

A REVIEW OF HATE CRIMES LEGISLATION IN THE UNITED STATES AND IMPLICATIONS FOR OTHER PARTS OF THE WORLD

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I. Overview: Discussion Framework.

Being victimized for simply being different is as ancient as humanity itself. Folklore and official archives of world history document wars between civilizations and tribes motivated by hate. Even today, in almost every part of the world, including the United States, challenges associated with race, gender, religion and other human rights violations and genocide persist. More pointedly, in parts of Eastern Europe, the Middle East, Asia and Africa, there have been numerous eruptions of armed mass conflicts based on racial cleansing, religious bias and the status of women and children.

The primary focus of the discussion that follows will be on (1) a fairly detailed summary of efforts underway in America and (2) a less detailed discussion on hate crimes and implications for the international arena.

II. Background

A quick review of the literature reveals that America has been one of the first countries to systematically collect data about hate crimes, and to offer a broad grouping of protections to potential victims. Many other countries have adopted strategies and policies. Even so, efforts to enact legislation to impose penalties for crimes motivated by hate are relatively new in a number of countries.

Forces that help to define the issue differ widely across nation states. In America, the roots of government approved sanctions and protections can be traced directly to the Civil Rights movement, and validated in part by Constitutional provisions related to equal protection, due process and the management of interstate commerce.

In other nations, other concerns and histories prevail e.g., the treatment of indigenous, immigrant, outcast and religious minority populations. Let us take a moment to recall the experience of the Jews of Eastern Europe, the untouchables of India, the indigenous people of New Zealand and Australia, and those in Bosnia, Darfur, and Rwanda, and ethnic minorities in France, Afghanistan and in numerous communities covering the globe.

There is no universal international definition of “who” should belong to the “hate crimes protected class(es) of persons.” Many countries have laws adding penalties for crimes

motivated by acts against ethnic or religious minorities; however, it appears that most countries do not have special penalties for crimes based on gender or sexual preference, or even acts of violence against poor and other disenfranchised groups.

III. Definition

Hate crimes, also known as “bias crimes,” are generally defined in U.S. law as crimes which include any crime against either person or property, in which the offender intentionally selects the victim because of the victim’s actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation.¹ The original federal hate crime law was enacted in 1969 ([18 U.S.C. § 245\(b\)\(2\)](#)) and applied only to crimes motivated by actual or perceived race, color, religion or national origin, and only while the victim was engaged in a federally protected activity. Under the former and newest definitions, such crimes typically are connected to an animus not towards the victim as an individual, but due to the victim’s membership in a particular group.² Prior to recent Federal action, a number of states’ hate crime statutes went further: for example, fully thirty-two states include sexual orientation as a group membership within the scope of hate

On October 28, 2009, President Obama signed into law a rider to the National Defense Authorization Act for 2010 (H.R. 2647) known as the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act (Matthew Shepard Act or HCPA) which greatly expanded the scope of activities covered under federal law as hate crimes. Under the HCPA’s definition, crimes are considered hate crimes if based upon a victim’s “actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity or disability.”³

In 2009, the Matthew Shepard Act or HCPA added “gender, gender identity, sexual orientation and disability to the federal definition, and removed the requirement that the victim be engaged in a federally-protected activity..

Outside of Federal law, 45 states and the District of Columbia have statutes criminalizing various types of hate crimes. Thirty-one states and the District of Columbia have statutes creating civil causes of action in addition to the criminal penalty for similar acts. Twenty-seven states and the District of Columbia have statutes requiring the state to collect hate crime statistics

IV. Scope and Application of the HCPA

As amended to the National Defense -*Authorization Act for Fiscal Year 2010, the most recent iteration of U.S. policy related to hate crimes set forths six congressional findings supporting federal action—

¹ William J. Krouse, “Hate Crime Legislation,” Congressional Research Service, October 16, 2009, RL33403

² 18 U.S.C. §245.

³ S.Amdt. 1511 to S. 1390, (2009).

- The incidence of violence motivated by the actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, or disability of the victim poses a serious national problem.
- Such violence disrupts the tranquility and safety of communities and is deeply divisive.
- State and local authorities are now and will continue to be responsible for prosecuting the overwhelming majority of violent crimes in the United States, including violent crimes motivated by bias. These authorities can carry out their responsibilities more effectively with greater Federal assistance.
- Existing Federal law is inadequate to address this problem
- A prominent characteristic of a violent crime motivated by bias is that it devastates not just the actual victim and the family and friends of the victim, but frequently savages the community sharing the traits that caused the victim to be selected.
- Such violence substantially affects interstate commerce in many ways.

On the very day the bill was signed into law by President Obama, under the direction of Attorney General Eric Holder, the Assistant Attorney General of Civil Rights, Thomas Perez sent an advisory to all United States Attorneys. He stated in part:

Today President Obama signed into law landmark legislation that builds upon an already strong foundation: The Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act of 2009. The Matthew Shepard and James Byrd Hate Crimes Prevention Act is the first significant expansion of federal criminal civil rights laws in more than a decade, the last being passage of the Church-Arson statute in the mid-1990s. The Act creates a new criminal code provision, 18 U.S.C. § 249, which criminalizes willfully causing bodily injury (or attempting to do so with fire, firearm, or other dangerous weapon) when (1) the crime was committed because of the actual or perceived race, color, religion, national origin of any person or (2) the crime was committed because of the actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability of any person and the crime affected interstate or foreign commerce or occurred within federal special maritime and territorial jurisdiction. The new law also provides funding and technical assistance to state, local and tribal jurisdictions to help them to more effectively investigate, prosecute and prevent hate crimes.

Other key provisions of the legislation include the establishment of a grant program to assist law enforcement officials and others in the prosecution of crimes covered under the Act. Also, it allows the Attorney General to prosecute offenses in certain instances that must be certified; extends protections to military personnel, and allows prosecutors to seek the death penalty. Legal action must be brought within seven years after the date the offense was committed, unless the violence resulted in death.

V. Examples of Hate Crimes in the USA

The two most famous examples of hate crimes are the murders of James Byrd, Jr., and Matthew Shepard, for whom the current federal hate crimes legislation is named. James Byrd, Jr. was an African-American man living in Jasper, Texas, who was chained to the back of a pickup truck and dragged to his death by three strangers in June 1998. The kidnapping and murder was both random and apparently fueled by his race: two of his three assailants had racist tattoos, and white supremacist literature was found in their homes.⁴ Four months later, an openly gay University of Wyoming student, Matthew Shepard, was tied to a fence post and repeatedly pistol-whipped with a .357 magnum handgun. He was found, nearly lifeless, eighteen hours later, still tied to the fencepost in freezing weather, and died in a coma six days later.⁵ The two men who beat him and left him for dead were strangers, and were apparently fueled by his sexual orientation, and two women who helped them dispose of their bloody clothes after the attack told police that they had made “anti-gay remarks.”⁶ Of course, these were simply two of the most extreme cases, with the FBI reporting thousands of hate crimes each year.⁷

VI. Chronological Review of Recent Hate Crime Legislation

Although already passed as a stand-alone bill by the House of Representatives on May 3, 2007, and passed by the Senate as part of the FY 2008 Defense Authorization bill (H.R. 1585) on September 27, 2007, the fate of a federal hate crimes legislative proposal during the 110th Congress ended when the contentious provisions were dropped in pre-conference negotiations.

In the 111th Congress, Chairman of the House Judiciary Committee John Conyers, introduced the Local Law Enforcement Hate Crimes Prevention Act (H.R. 1913). The Committee he chairs reported out the bill on April 23, 2009. The House passed it on April 29, 2009.

In the the other chamber of Congress, Senator Reid, introduced the Matthew Shepard Hate Crimes Prevention Act (S. 909) on April 28, 2009. Provisions from S. 909 were used to amend the National Defense Authorization Act (S. 1390), which passed the Senate on July 23, 2009.

Having passed the House and the Senate, the hate crimes language was included in the conference report on the FY 2010 Defense Authorization bill (H.R. 2647; H.Rept. 111-288), which the House passed on October 7, 2009, and the Senate on October 22, 2009. Six days later, on October 28, 2009, President Obama signed into law the Hate Crimes Prevention Act of 2009.

VII.

⁴ “3 Indicted in Texas Killing,” *New York Times*, p. A 12 (July 7, 1998).

⁵ “Murdered for Who He Was,” *New York Times*, p. A 18 (October 13, 1998).

⁶ James Brooke, “Gay Man Beaten and Left for Dead; 2 Are Charged,” *New York Times*, p. A 9 (October 10, 1998).

⁷ Federal Bureau of Investigation, *Hate Crime Statistics*, available at <http://www.fbi.gov/ucr/ucr.htm>

VIII. Statistical Data

The FBI began collecting hate crimes statistics relatively recently, 1990, and the data gathering system continues to evolve.⁸ Under the Hate Crimes Statistics Act (1990) the U.S. Attorney General is authorized to collect data from state and law enforcement agencies, although participation is voluntary. According to the most current FBI statistics, testimony presented by Attorney General Holder to Congress, and information published by the U.S. Department of Justice advising all U.S. Attorneys of the enactment of the HCPA -- more than 77,000 hate crime incidents were reported by the FBI between 1998 and 2007. In 2007 there were 7,621 hate crime incidents reported motivated by a single, discernable animus. Translation: There was at least one hate crime incident every hour of every day in our country last year, but the number of actual crimes is likely higher because a number of jurisdictions report incomplete statistics or none at all. Of those incidents that were reported, over half were motivated by racial bias; 18% were motivated by religious bias; 16% were motivated by a sexual-orientation bias; and 13% were motivated by national-origin bias. From 2003-2007, the number of reported hate crimes against Hispanics increased nearly 40%. And, the number of reported hate crimes against individuals because of their sexual orientation increased to the highest level in five years - amounting to 1,265 incidents.

Just a few weeks after these numbers were published, a more alarming update from the Department of Justice was released. On November 23, almost a week ago, the Federal Bureau of Investigation released a report for the year 2008 showing the highest number of hate crimes against blacks, Jews, and gay men and lesbians since 2001. Overall, the report documents a slight increase in the incidence of all hate crimes reported throughout the nation last year.

The overall number of reported hate crime incidents in the United States increased by just over 2 percent, rising from 7,624 reported incidents in 2007 to 7,783 in 2008. However, anti-black incidents jumped more than 8 percent, from 2,658 incidents in 2007 to 2,876 in 2008. Anti-Semitic incidents rose by 4.5 percent and incidents motivated by sexual orientation were up 2.5 percent. Hate crimes targeting Hispanics, which have risen by more than 30 percent since 2003, dropped in 2008, down from 595 to 561. As in 2007, the highest number of murders (5 out of 7 total) were motivated by bias based on sexual orientation.

Despite the progress made with the adoption of broader Federal policies with more teeth, many challenges remain. The biggest problem is that many cases still go unrecorded by law enforcement. For instance, according to Human Rights First, despite an increase in the number of agencies that participate in the hate crime data collection program (13,690, up 3.4 percent from 13,241 in 2007), far fewer agencies (2,145, up nearly 6 percent from 2,025 in 2007), actually reported any hate crimes in their jurisdiction. Some 4,000 police jurisdictions still do not participate in the voluntary program.

⁸ Bantley, 71 Alb. L. at 559.

IX. Case Law

In *Wisconsin v. Mitchell*, the Supreme Court considered the constitutionality of hate crimes legislation.⁹ In that case, a group of African-Americans incensed at the white racism portrayed in *Mississippi Burning* assaulted a white 14-year old, leaving him comatose.¹⁰ Mitchell, the alleged ringleader, was found guilty of assault in the Circuit Court for Kenosha County, Wisconsin, with a heavier sentence given because of the state's hate crimes legislation.¹¹ The Wisconsin Supreme Court eventually overturned the sentence, arguing that it criminalized "what the legislature has deemed to be offensive thought."¹² The United States Supreme Court, however, unanimously rejected that argument and reversed and remanded.¹³ In its opinion, Justice Rehnquist, writing for a unanimous court, acknowledged that the Wisconsin Legislature validly passed this law, not to regulate thoughts, but biased-based conduct; and that this conduct was in thought "to inflict greater individual and societal harm."¹⁴ After *Mitchell*, the constitutionality of generic hate crimes legislation can be considered affirmed.

X. International Trends

Hate crimes are not unique to the U.S. They touch every corner, nook and cranny of the world. A quick online check of *Wikipedia* suggests that more than 30 countries have enacted hate crimes. Also, a report funded in part by the U.S. Department of Justice and published by Margaret Shaw, on behalf of the International Centre for the Prevention of Crime, entitled "Preventing Hate Crimes: International Strategies and Practice," April 2002, provides a fairly comprehensive discussion of issues of international relevance. For instance, Shaw notes: "An attack on Moroccan farm laborers in Spain in 1999, the vandalizing of Jewish cemeteries in France, the explosion of three mail bombs targeting Black, Asian and gay people in England in 1999, and assault on three homosexual men in Delaware in 1994, a series of 94 arson of African American churches between 1995-6 and attacks on Turkish immigrants in Germany, are all manifestations of crimes motivated by hate and intolerance against others."

Shaw also notes that in recent years, there has been increased incidents of hate crime across Europe. The U.S. is one of the first countries to systematically collect data. Even so other model efforts are underway in other parts of the world. The adoption of human rights policies, civil legislation, criminal laws, education and outreach has critical roles to play. The ultimate challenge is the same: How can we reduce/end individual acts of violence based on the lack of reason and prejudice? Quite simply, we have to start somewhere and keep going, in such a way that not only penalizes reprehensible and imprudent behavior but which promotes tolerance.

⁹ 508 U.S. 476 (1993)

¹⁰ *Id.* at 480.

¹¹ *Id.*

¹² *Id.* at 482, quoting 169 Wis.2d 153, 163, 485 N.W.2d 807, 811 (1992).

¹³ *Id.* at 490.

¹⁴ *Id.* at 488.

XI. Summary Statement

Hate crimes are unique in that they are not “only attacks on random victims, but also attacks on racial, religious, or ethnic communities.”¹⁵ Unlike other crimes, there is little a victim can do to be protected. Often, they do not know their assailant, and since the attacks are frequently based upon immutable characteristics which cannot be disguised. By targeting individuals based upon their group membership, it is a declaration of hostilities against every member of that racial, ethnic or religious group. Preventing such violence is deemed a national priority in the United States and increasingly is of relevance to the global community in which we live.

¹⁵ Jason A. Abel, *Americans Under Attack: The Need for Federal Hate Crime Legislation in Light of Post-September 11 Attacks on Arab Americans and Muslims*, 12 Asian L.J. 41, 56-57 (2005).