

Fear and Hatred:
An Analysis of Hate Crime Arguments

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Introduction

President Barack Obama recently signed into law the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, expanding the 1969 United States federal hate crime law to include crimes motivated by the victim's sexual orientation, gender identity, gender, or disability. Much of the debate in Congress surrounding the passage of this act focused on whether or not individuals' sexual orientation should qualify them for inclusion under federal hate crimes law. The act's progression through Congress renewed much of the controversy surrounding hate crimes law, in particular the eligibility of certain groups to be included.

In general, hate crime laws offer increased penalties to perpetrators who commit crimes because of or motivated by the perpetrator's bias against a certain group and the victim's membership in the particular group, i.e., race, ethnicity, religion, gender, sexual orientation, etc. Hate crime laws provide prosecutors with other options for charging defendants and/or provide harsher sentencing guidelines. These laws regard crimes committed because of prejudice to be more serious than ordinary crimes. These new laws are becoming increasingly popular at the local, state, and national levels with much of the debate focusing on the extension of coverage to various groups. Several arguments exist, however, that question the efficacy of hate crime law.

This paper will examine the necessity of this relatively new type of law. First, arguments for and against the establishment of hate crime law will be explored, followed by a discussion of each argument to determine its validity of each. Then, the relations of the various arguments will be examined and possible refutations will be offered. Finally, this paper will reach a conclusion concerning the usefulness of hate crime legislation and argue whether or not hate crime laws should be codified.

Literature Review*Arguments in favor of hate crime law*

The majority of arguments in favor of hate crime law approach the issue from a utilitarian perspective, saying, in effect, that the harm caused by hate crime is greater than the harm caused by other types of crime (Kahan 2000). One argument states that hate crimes are more harmful because they claim vicarious victims; an attack on one member of a targeted group affects all members of that group (Goldman 2003). For example, Bill assaults George, an African-American man, because Bill believes that blacks are worthless and do not deserve to live. Bill's crime sends a message to all members of the black community that they are despised, vulnerable, and targeted solely because of their race (Wellman 2006). Because hate crimes claim as victims more individuals than the specific target of the attack, they demand a harsher punishment from the legal system (Adams 2005).

A related argument states that hate crimes are more degrading for the victim than ordinary crimes. Proponents maintain that bias motivated violence dehumanizes its subjects and emphasizes their inferiority (Adams 2005). Victims of hate crimes more often report being very upset than victims of comparison crimes (McPhail 2000). Hate crimes create more psychological distress and dehumanization than generic crimes and therefore command the application of more stringent penalties (Wellman 2006).

Additionally, supporters of hate crime legislation argue that the protected groups are more vulnerable to attack. Members of these groups are targeted not because of choices they make, but because of personal characteristics that they cannot change (Baehr 2003). Members of target groups are unable to make potential criminals discriminate less against them, therefore they cannot make choices to protect themselves from hate crimes (Baehr 2003). Historic discrimination has led to a perception that police officers are less likely to vigorously pursue

charges against members of historically discriminated groups and less willing to conduct full investigations (Adams 2005). This perception facilitates the creation of criminals who are less likely to be deterred by generic criminal law (Adams 2005). According to this argument, the combination of immutable characteristics of the victims and less deterred criminals calls for increased protection under the law.

Because hate-criminals are less deterred by ordinary criminal law, they are more likely to offend and repeat offend, therefore they are more dangerous (Goldman 2003). Prejudice is a greater and more undesirable motivation than other possible incentives for crime (Wellman 2006). For example, Alice murders someone for monetary gain, while Bill murders a Jewish woman because he despises Jews. Bill's crime exemplifies more depravity and therefore deserves harsher punishment (Wellman 2006). Additionally, bias-motivated criminals are likely to exhibit more brutality in their commission of the crime, due to their focused hatred of the victim (Adams 2005). Proponents of this argument suggest that hate-criminals should be subject to harsher punishments in an effort to increase deterrence.

The increased harm caused by hate crimes as well as the increased culpability of the offenders creates a class of crimes that are more destabilizing to society (Wellman 2006). Defenders of hate crime legislation argue that such crimes are more likely to provoke retaliatory crimes and incite unrest among target groups (Kahan 2001). Hate crime legislation offers increased stability by providing more recourse for victims and by sending a message that such crimes are unacceptable (Wellman 2006). In this way, such laws fulfill a symbolic purpose by declaring that equality is highly valued and that prejudice and discrimination against specific groups will not be tolerated (Adams 2005). Hate crime legislation mitigates the socially destabilizing effects of bias-motivated crime by reminding members of targeted groups that they

are fully protected under the law and that society is working to level an uneven playing field (McPhail 2000).

Arguments against hate crime legislation

The primary arguments against hate crime law focus on undermining the justifications provided by defenders of the legislation. Opponents of hate crime legislation hold that hate crimes are no more harmful than ordinary crime: it is nearly impossible to prove that a man assaulted because he is black is harmed any more or less than a man assaulted because he appears wealthy (Jacobs and Potter 1997). They argue that the actions committed by hate-criminals are already prohibited by ordinary criminal law and that aggravating factors such as motivation and intent are already taken into account during sentencing (Jacobs and Potter 1997). In addition, opponents of hate crime legislation maintain that hate crimes are no more destabilizing to society than ordinary crime. After all, gang violence and black-on-black violence have devastated inner city life for decades, while ordinary street crime, drug related crime, and organized crime have been equally widespread and destabilizing for society (Jacobs and Potter 1997).

Critics of hate crime legislation further argue that such laws punish thoughts and beliefs (Baehr 2003). For example, Bill assaults Fred because Fred smiled at Bill's wife, while Kyle assaults Carl because Kyle is prejudiced against homosexuals. Both Fred and Carl are equally injured, yet Bill receives the minimum sentence for simple assault, while George receives a much harsher punishment for hate-motivated assault. Opponents of hate crime law argue that George's harsher sentence unfairly takes into account his homophobia when only the act should be judged (Jacobs and Potter 1997).

Other critics argue that hate crime law unjustly labels specific character traits as deserving of increased punishment (Hurd 2001). They argue that hatred and bias represent traits

similar to greed, jealousy, sadism, or cowardliness, that cannot easily be changed by the holder (Hurd 2001). Hate crime law attempts to rank prejudice as more deserving of punishment than these other dispositions when it is impossible to accurately rank motives by their degree of culpability (Hurd 2001). Motivations are distinctly fact-based and situational so it is difficult to argue that some motivations are categorically worse than others (Hurd 2001). According to opponents of hate crime law, such arbitrary distinctions undermine the credibility of the legislation.

Another argument against hate crime law expresses concern over the politicization of the legal system. Groups are selected for inclusion into hate crime codes after civil rights groups lobby on their behalf (Jenness 1999). Some potential target groups are included under some laws, while different groups are protected under other laws, and some groups are left out altogether as the law declares which groups do and do not qualify as victims (McPhail 2000). Interest group strength and societal acceptance of the group's cause play the largest role in determining hate crime policy (Jacobs and Potter 1997). The obvious solution would be to prohibit crimes committed based on all potential motivating characteristics of the victim, but inclusion of all groups would simply be the equivalent of generic criminal law (McPhail 2000).

Finally, a related argument suggests that hate crime legislation leads to an increase in identity politics. If the current system continues, individuals will increasingly relate to one another as members of competing groups based on specific identifying characteristics (McPhail 2000). Groups have an interest in being recognized as disadvantaged and victimized as that gives them a greater moral claim on society (McPhail 2000). Labeling or failing to label specific crimes as hate crimes has led to the mobilization and polarization of target groups, while charging crimes as hate crimes potentially polarizes communities along identity lines, by signaling that specific characteristics define each case (Jacobs and Potter 1997). Hate crime

legislation runs the risk increasing and exacerbating existing societal divisions by providing protection to politically selected groups (Jacobs and Potter 1997).

Discussion

The argument that hate crimes cause greater harm than other types of crime appears to be well supported by proponent's claims that bias motivated crimes claim vicarious victims and are more degrading to the selected victim than other types of crime. If a black man is attacked, other black people may feel more vulnerable to attack as a result. This is that same as saying: If a house is robbed, other homeowners may feel more vulnerable to robbery as a result. Yet, supporters of hate crime legislation say the fears of the black community should be recognized by the legal system as being more deserving of increased legal protection.

The need for increased legal protection of minority groups is often attributed to historic discrimination and heightened vulnerability of these groups. Criminals motivated by prejudice against these groups are said to be more likely to target other members of the group. But criminals motivated by greed are more likely to target other people who appear wealthy, and criminals motivated by sadism are more likely to target other people who appear vulnerable to humiliation. Again, proponents of hate crime law suggest that members of minority groups should be valued higher than members of other groups. There is, however, little basis for this value judgment. As critics of hate crime law have argued, it is impossible to rank motivating characteristics on their ability to cause increased harm to potential victims. Such a ranking is also unnecessary when existing criminal laws already prohibit criminals from targeting each and every individual.

Proponents of hate crime legislation counter by arguing that bias-motivated criminals may not be deterred by ordinary criminal laws. This argument, however, is no easier to prove than an argument that greed-motivated criminals are unlikely to be deterred by normal statutes.

Supporters of hate crime laws appear to be operating from the viewpoint that prejudice is a stronger and more dangerous motivating factor than any other. The arguments in favor of hate crime legislation that suggest that bias-motivated criminals are more dangerous, less able to be deterred, and more depraved than other criminals fail to take into account the myriad subtleties that determine the basis of a criminals actions. It is much simpler to prove whether or not the criminal intended to harm his victim, the degree of premeditation involved, and the extent of damage caused. Such factors already affect sentencing under ordinary criminal law. There is no need to decide which motivations are particularly egregious as this adds unnecessary complicating factors to criminal cases.

The argument in favor of hate crimes laws that carries the most weight is the suggestion that the symbolic function of the laws works to level an uneven playing field. Similarly to laws prohibiting discrimination in the workplace and in education, hate crime laws make a statement that prejudicial judgments on the basis of unchangeable characteristics are unacceptable. The symbolic function, however, is considerably weakened when groups are arbitrarily included and excluded from hate crime laws. By extending coverage to specific groups, hate crime laws inherently discriminate against the groups that are excluded. Again, it is much simpler to leave prohibition of criminal conduct to ordinary criminal law and to work to ensure that all crimes are fully investigated by the proper authorities.

Of the arguments against hate crime legislation, the weakest is that punishing criminals for prejudicial motivation is equivalent to punishing them for their thoughts. Motivations are taken into account in ordinary legal processes. Motivations are used to determine intent, which in turn affects the outcome of the trial or sentencing process. A basic tenet of our legal system is that *mens rea*, a guilty mind, must be combined with *actus reus*, a guilty act, in order for a crime

to occur. Criminals choose to act on their thoughts, making their thoughts of relevance to the legal system.

The politicization of the legal system is potentially a valid argument against hate crime law. The legal system itself, however, is inherently political as legislatures at each level of government codify criminal statutes. Politicians justify the creation of criminal statutes based on the views of their constituents as well as their own moral codes. Vocal interest groups play a major role, influencing policy on all issues. They are not unique to the development of hate crime law. The political process, however, undermines the effectiveness of hate crime laws as statutes that profess to reduce prejudice discriminatorily select groups for inclusion.

Finally, the claim that hate crime legislation will exacerbate identity politics expresses an important concern. Societal divisions become more pronounced as various advocacy groups form in an effort to have the identities they represent included in hate crime laws. Civil rights groups, women's rights groups, gay rights groups, and disability rights groups, among others, have already had some success in influencing hate crime policy. When will we see smoker's rights groups, obesity rights groups, wealthy rights groups, intellectual rights groups, and others, forming in an effort to reduce discrimination against the members of their identity groups? Instead of reducing societal divisions and prejudice, hate crime legislation risks inflaming tensions between various identities as people strive to ensure that they are fully protected by criminal codes. Ordinary criminal laws protect people regardless of their identity and any efforts to reduce discrimination in the legal system should focus on the caretakers of the system—the police, lawyers, judges, and juries that make the system work—rather than the criminals that choose their victims for a variety of discriminatory reasons.

Summary

The purpose of this paper was to examine the multitude of arguments in favor of and against hate crime legislation. First several arguments in favor of such legislation were offered, followed by arguments against. The arguments were discussed and a conclusion was reached. It is impossible to decide which criminal motivations are worse than others, thus cases should be judged individually, not categorically. Hate crime laws are unnecessary because ordinary criminal laws already provide legal protection to individuals on a non-discriminatory basis. The arbitrary selection of protected groups is a major concern, as is the potential for division along lines of identity. Discrimination in the legal system should be combated from the top down, rather than the bottom up.

It should be noted that I am potentially biased in that I am a heterosexual, white male and as such, not a member of any group that has been identified by the government as being historically discriminated against. I have tried to provide a fair portrayal of the hate crime debate. This paper made no attempt to judge the feasibility of eliminating hate crime law and provided only a brief overview of the debate concerning hate crime legislation. Ultimately, the debate over hate crime laws will continue and will flare up whenever a new or controversial group attempts to gain inclusion into hate crime statutes.

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