

Are Hate Crime Enhancements Warranted in American Law?

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ABSTRACT

Hate crimes are crimes that have an unusual bias upon a certain group due to their specific identity. In the American legal system, it has been a long-time controversy surrounding whether a hate crime enhancement is warranted for those classified as such. This paper first seeks to examine the rationality of hate crime enhancements, using established hate crime legislature to analyze its purpose. Then it will apply such a framework to evaluate whether the legislature abides with legal philosophy and constitutional rights through the lens of moral culpability, past landmark cases, and implementation observances. The paper will explain that legal philosophy deems it impossible to assess motive, a key component of hate crimes. It will also challenge the current supreme court and landmark rulings upon hate crime legislature and points out an unconstitutional logical loophole. Flaws of implementation on demographics and due process are also pointed out as limitations. Through the three-prong analysis, although a justification for current hate crime enhancements is present due to the potential physical and mental damages, it is concluded that they are unconstitutional, unwarranted, and must be limited to ensure the justice of the American legal system.

Introduction

Albeit coinage ubiquitously recognized only until the 1980s, the concept of hate crime and its embodiment, when put into retrospect, marks clear accounts of perpetrations throughout history. Recent preposterous incidents, from Tangshan beatings targeting women to the Buffalo shooter claiming motive as 'for the...white race,'¹ have reinvigorated debates on whether enhancements are appropriate for the punishment of crimes with particular biases.

Hate crime, categorized as a prejudice-motivated crime targeting victims due to their identity associated with a certain race, religion, disability, sexual orientation, ethnicity, gender, or gender identity,² is often deemed “worse” than the crime without bias; perpetrators are subsequently charged with more severe enhancements. This paper will argue that although hate crimes may cause enhanced harm to individuals and society, enhanced punishments are not warranted for three reasons: 1) hate motive and culpability violate egalitarian judicial principles, 2) enhancements are unconstitutional due to a legal paradox,³ and 3) practical legislation damages due process. This will conclusively appraise that there’s no necessity for hate crime enhancement [hereinafter HCE].

¹ Andone, Dakin. “Buffalo Shooting Suspect Said He Committed Massacre 'for the Future of the White Race' in Note Apologizing to His Family, Affidavit Says.” *CNN*, Cable News Network, 16 June 2022, edition.cnn.com/2022/06/16/us/buffalo-shooting-suspect-federal-court/index.html.

² “Learn about Hate Crimes.” *The United States Department of Justice*, 16 June 2022, www.justice.gov/hate-crimes/learn-about-hate-crimes.

³ This paper mainly analyzes hate crimes through an American-centric view of the law. The constitution mentioned always refers to the U.S Constitution.

A Justification to Present Hate Crime Enhancement - More Harm?

Before considering whether HCEs are legally sound, a preambular justification for their presumptive rationality is warranted. It is indisputable that a hate crime often causes more significant harm to individuals and communities, validating the theory for their heavier punishments — the central assertion this paper seeks to analyze.

Regarding the personal sphere, studies comparing hate crimes to other crimes show that the former are “four times more likely to involve assault...two times as likely to cause injury...and four times as likely to necessitate hospitalization.”⁴ Furthermore, the emotional damages accompanying physical trauma are often severe. Victims of hate crimes report significantly higher levels of “depression, traumatic stress, anxiety, and anger” than victims of non-hate crimes after five years.⁵ Other than a strong correlation suggesting that hate crime incidents generally cause more physical harm, a more notable difference lies in the public sphere impacts. Specially targeted groups in bias-motivated crimes tend to interpret an attack on one community member as an attack upon the whole. A burglar committing an ordinary mugging merely incites distrust of the security in a residential complex, but his targeting of a transgender man to mug while yelling derogatory slurs implies that the thief is attacking not only the victim but the entire LGBTQ+ community.⁶ Statements of such nature cause community unrest and *in terrorem*, as was seen with George Floyd's death leading to the BLM movement or even mass societal panic from fear of a breakdown in civility and community order as observed after the 9/11 terrorist attacks.⁷

Using the framework of retributivism arguing that under “just deserts,”⁸ enhanced penalties must follow enhanced damages, there's sufficient empirical and theoretical evidence to approve this premise and bring HCE under further scrutiny. Substantiating hate crime's unusual severity fits such an *ex-post* perspective and, while not concluding the righteousness of HCEs, certainly establishes the groundwork for subsequent analysis.

Evaluating Motive and Moral Culpability

Considering that the only constant presence in all hate crimes is identified bias and that one cannot conclusively prove *actus reus* that all hate crimes yield more harm, *ex-ante* analysis of preemptive motive and culpability is crucial. However, this traditional wrongfulness-culpability framework⁹ is flawed and only weakens the argument for pro-enhancement as it fails to encompass the principle of legal egalitarianism.

⁴ Steven Bennett Weisburd & Brian Levin, “On the Basis of Sex”: Recognizing Gender-Based Bias Crimes, 5 STAN. L. & POL'Y REV. 21, 23 (1994).

⁵ Megan Sullaway, *The Psychology of Hate Crime Law, Victims, and Offenders*, in CRITICAL RACE REALISM: INTERSECTIONS OF PSYCHOLOGY, RACE, AND LAW 238 (Gregory S. Parks et al. eds., 2008).

⁶ See Christopher Heath Wellman, *A Defense of Stiffer Penalties for Hate Crimes*, 21 HYPATIA 62, 64 (2006).

⁷ See Weisburd & Levin, *supra* note 3, at 26–27.

⁸ The punishment that one deserves

⁹ For an elaborate breakdown of such framework, refer to Harel, Alon and Parchomovsky, Gideon, *On Hate and Equality* (1999). Faculty Scholarship at Penn Law. 1373.

In legal philosophy, culpability is arguably more critical than actual wrongfulness established in the previous section. This moral “blameworthiness,” according to Herbert Wechsler, “govern[s] what is done or may be done with the offender.”¹⁰ However, a key element of culpability — motive, has a burden of proof to establish *why* someone committed an offense under the “beyond a reasonable doubt” criminal standard. Unlike the conventional fact-finding of intent in criminal responsibility that *mens rea* requires, hate motive is nearly impossible to prove at any fair criminal trial. There are indeed exceptions where motive decides the proper degree of culpabilities, such as considering good motives to reduce sentencing or the premeditation doctrine. Per contra, both circumstances cannot establish legal precedent as the former exception does not apply to malicious motive out of bias, and the latter finds motive significantly helpful but not required to determine initial thought. As the criminal system legally cannot prove the thought of prejudicial biases connected to why the perpetrator committed the crime, hate motives should not be considered differently from regular counterparts.¹¹

Even when *ex hypothesi*, when the hate motive was validated through the particular ad hoc nature of exceptional mental states, the culpability framework itself is flawed.¹² As hate crime researchers posit, “Is there any reason to think that racism, sexism, and homophobia can be more readily purged by the criminal law than can, say, greed, sadism, or jealousy?”¹³ Too many nuances challenge stigmatized taxonomic classifications to claim that some motives are more culpable than others. The commonly argued concept that such bias can be corrected through “educational deterrence,”¹⁴ thus justifying ranking culpability, is incorrect. There is no factual support as the experience of incarceration tends to exacerbate recidivism or lower recidivism rates due to more probable causes such as aging or simply institutionalization.¹⁵

Disregarding its validity, the premise of enhanced culpability granting legitimacy to enhanced punishment violates egalitarian distributive justice. These current enhanced legislation punishments, which imply that certain groups deserve more legal protection than others, inadvertently create adversarial tension between protected and unprotected communities.¹⁶ How reasonable is it to incorporate targeting athletes, a specific group suffering hate motivations in the Columbine school shooting, or physicians who work in abortion clinics targeted for their cause into the hate crime definition? On the contrary, how reasonable is it to include hair color or height in the same book if a crime was based on such bias?¹⁷ Under legal egalitarianism, all such targeting of these groups, no matter how arbitrary, must be legislated, creating a significant burden on the criminal system’s resources and time.

¹⁰ Herbert Wechsler, *A Thoughtful Code of Substantive Law*, 45 J. CRIM. L. & CRIMINOLOGY & POLICE Sci. 524, 525 (1955).

¹¹ Schweppe, Jennifer and Walters, Mark Austin, *Hate Crimes: Legislating to Enhance Punishment*, Oxford Handbooks Online, Criminology and Criminal Justice (2015).

¹² See Janine Young Kim, *Hate Crime Law and the Limits of Inculcation*, 84 Neb. L. Rev. (2005).

¹³ Heidi M. Hurd & Michael S. Moore, *Punishing Hatred and Prejudice*, 56 STAN. L. REV. 1081 (2004).

¹⁴ Jean Hampton, *The Moral Education Theory of Punishment*, in PUNISHMENT 112, 117 (A. John Simmons et al. eds., 1995).

¹⁵ *Five Things About Deterrence*, Nat’l Inst. Just. (June 5, 2016), <https://nij.ojp.gov/topics/articles/five-things-about-deterrence>. See also Robert J. Sampson & John H. Laub, *Life-Course Desisters? Trajectories of Crime Among Delinquent Boys Followed to Age 70*, 41 Criminology 301, 330 (2003) (concluding from a data set of 500 men analyzed from age 7 to 70 that, “[a]lthough peak ages of offending vary by crime type, we found that all offenses decline systematically in the middle adult years for groups identified prospectively according to extant theory and early risk factors.”).

¹⁶ Briana Alongi, *The Negative Ramifications of Hate Crime Legislation: It’s Time to Reevaluate Whether Hate Crime Laws are Beneficial to Society*, 37 Pace L. Rev. 326 (2017).

¹⁷ For more rhetoric with such a train of thought, see Shively, Michael. *Study of Literature and Legislation on Hate Crime In America*. U.S. Department of Justice, (2005).

This framework not only denies the enhanced culpability argument presenting no optimal option between unfair prioritization and wasteful legislation, but also discredits HCE wholly with its inevitable contradiction of equality which the entire legal system depends upon.

HCE - A Violation of the Constitution

Affirming the impropriety of considering hate motives or increased culpability in HCEs requires a more constructive stance to re-evaluate whether current hate crime legislation is constitutional. Dissenting with real-world rulings by U.S state/federal courts, I argue that there is a legal paradox that bars the coexistence between first amendment constitutionality and HCEs.

Conventionally, two landmark cases set a precedent arguing that HCEs do not breach the first amendment. The first case, *R.A.V. v. St. Paul*,¹⁸ deemed an ordinance stating “burning a cross...arous[ing] anger, alarm, resentment in others [based on] race, color, creed, religion, or gender...shall be guilty”¹⁹ unconstitutional on the grounds of “prohibit[ing] otherwise permitted speech solely [based on] the subjects.”²⁰ Based on the wrongful expression to selectively chose tolerated situations, this ruling is correct, unlike the more commonly cited *Wisconsin v. Mitchell*.²¹

Subject to a sentencing enhancement due to verbal instigation of assault upon a white boy, the court found Wisconsin’s statutory enhancement of Todd Mitchell’s sentence constitutional as it punishes “conduct” instead of the “expression” in *St. Paul*.²² The nuances of these precedents are often used to draw a line between protection of hate speech and punishment of hate crime, benchmarking that biased conduct is not protected by the first amendment. However, *Mitchell* misapplies protected “expression,” in this case motive, in considering “conduct.” As the only difference between an original 2-year sentence and the enhanced 7-year sentence²³ in *Mitchell* was a rare hate motive identified by condemning testimonial evidence of verbal instigation, the expression of hateful opinions was the sole ground for sentencing enhancement for felonious conduct. This establishes two facts: 1) HCEs require culpability and subsequent hate motive, and 2) hate motive is protected expression under the First Amendment as affirmed by *St. Paul*. This renders the supreme court’s ruling unconstitutional as the upheld law in *Mitchell*’s enhancement is based on hate motive only, but that mandatory element in warranting HCE is protected and cannot be used against a defendant.

Mitchell’s argument also stands out from other prominent cases such as *Texas v. Johnson*²⁴, which found the statute prohibiting flag burning under the charge of “desecrating venerated object[s]” a violation of the First Amendment as “the government...may not proscribe particular conduct *because* it has expressive elements.”²⁵ Disregarding such precedent, *Mitchell* unconstitutionally withheld the defendant’s rights of protection from his ideals because the court saw the latter as a distasteful viewpoint. Such ruling is dangerous as it implies that the “legislative majority can punish virtually any viewpoint which it deems politically undesirable,”²⁶ undermining *Mitchell*’s status as the precedent of HCE justification.

¹⁸ 505 U.S. 377 (1992).

¹⁹ *Id.* at 407.

²⁰ *Id.* at 381.

²¹ 508 U.S. 476 (1993).

²² *Id.* at 477.

²³ See Wis. Stat. §§ 940.19(1m), 939.50(3)(e), and § 939.645(1)(b).1

²⁴ 491 U.S. 397 (1989).

²⁵ *Id.* at 406.

²⁶ 64 Ohio St. 3d 566 (Ohio 1992).

A correct approach to hate crimes can be seen in *Virginia v. Black*,²⁷ presenting a similar scenario as seen in *St. Paul* of Virginia law punishing “[anyone] with *intent* of intimidating any person or group... to burn...a cross”²⁸ yet upheld by the Supreme Court reasoning that the First Amendment protects not “cross burning a particularly virulent form of intimidation [with intent].”²⁹ The most significant difference is that proving intent is a mandatory process for any criminal trial (adhered by *Black*), while proving hate motive (which *Mitchell* requires for enhanced sentencing) is unconstitutional. Thus, *Black*’s trialing of intent and not enhancing punishments was correctly upheld but *Mitchell*’s trialing of motive and expression to apply HCEs was unjust.

Implementation Difficulties: Double Jeopardy and Damaging Due Process

In addition to HCEs weakness in legal philosophy and constitutionality, current implementations of enhancements are problematic on both enforcement and judicial levels.

One of the most prominent hate crime legislation was the Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act, passed in 2009.³⁰ The act’s language explicitly encourages a loophole in the double jeopardy restriction, allowing prosecutors to trial a defendant again with the same charge after a not-guilty verdict.³¹ The act grants permission for hate-crime prosecution when “the verdict...obtained ...left...the Federal interest unvindicated in eradicating bias-motivated violence.”³² To put a defendant declared not guilty by a jury on the stand again simply on alleged evidence of “hate” violates the fifth amendment’s ban on double jeopardy and the fourteenth amendment’s due process and equal protection of the laws.

The inconsistent mechanisms of classifying hate crimes for enhancements also discredit themselves. The first concern lies in the HCE’s enforcement. The preliminary decision of how and what to report as a hate crime is entirely up to local enforcement’s discretion, but police officers often act on their own accord based on personal beliefs and values. A conservative officer may choose to disregard the homophobic aspect of a harassment case, making judgments often personal yet political.³³ Even in court, the difference in state standards creates complications. Some states require an additional “maliciousness condition,”³⁴ while others only need “evidence[d] prejudice.”³⁵ The same crime can quickly be ruled oppositely in different states, and the vagueness in legislation language without a clear standard can mislead juror judgments.³⁶

Such a double jeopardy loophole and a two-pronged shortcoming in the criminal system severely undermine the present HCE laws as they threaten to challenge the constitution and due process - the foundations of all legal proceedings.

²⁷ 538 U.S. 343 (2003).

²⁸ Va. Code Ann. § 18.2-423.

²⁹ *supra*. note 27 at 363.

³⁰ Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009, 18 U.S.C. § 249.

³¹ Freddoso, David. “Hate Crimes, Thought Crimes, Double Jeopardy.” National Review. National Review, June 3, 2010. <https://www.nationalreview.com/corner/hate-crimes-thought-crimes-double-jeopardy-david-freddoso/>.

³² *supra* note 28, at §§ (b)(1c).

³³ Jeannine Bell, *Policing Hatred: Law Enforcement, Civil Rights, and Hate Crime* 4 (2002).

³⁴ IDAHO CODE ANN. §§ 18-7901, 7902.

³⁵ FLA. STAT. § 775.085.

³⁶ Juries have struggled to understand what some of these mental state descriptions mean.

James Morsch, Comment, *The Problem of Motive in Hate Crimes: The Argument Against Presumptions of Racial Motivation*, 82 J. Crim. L. & Criminology 659, 664-69 (1991).

Conclusion

Even with hate crime's enhanced harm to society, supporting either present or future HCE laws is fundamentally unjust. To justify all three elements: 1) the rationale for particular culpability of hate, 2) the constitutionality of incorporating hate motive, and 3) the disregarded procedural justice of implementing laws is impossible.

To uphold a society of order, moral sentiments that urge us to punish those who do more harm must come after the approval of legal doctrines and, in this case, be suppressed altogether. Legalist egalitarian principles and the sacred nature of the U.S Constitution, including the rights of free speech, fair trial, and due process, cannot and shall not be faltered.

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