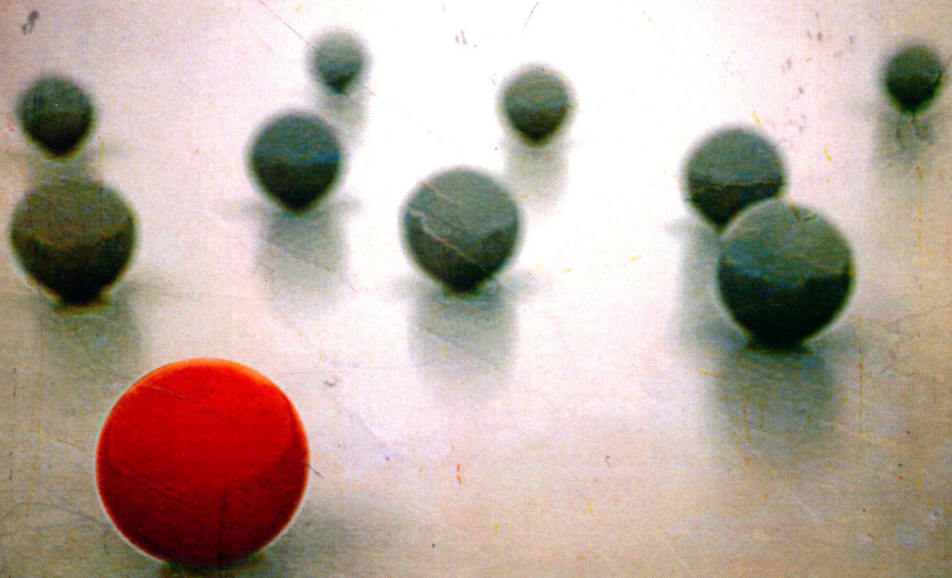


Law, Crime and Law Enforcement

# HATE CRIME PREVENTION



*Sophie A. Madrigal*  
*Editor*

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LAW, CRIME, AND LAW ENFORCEMENT

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SOPHIE A. MADRIGAL  
EDITOR



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**LAW, CRIME, AND LAW ENFORCEMENT**

# **HATE CRIME PREVENTION**

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## PREFACE

This new book provides an overview of the hate crime debate, with background on current law and hate crime statistics, and a legislative history of hate crime prevention bills in recent Congresses.

Chapter 1- On October 28, 2009, President Barack Obama signed the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act into law, as Division E of the National Defense Authorization Act for Fiscal Year 2010 (P.L. 111-84; H.R. 2647). This law broadens federal jurisdiction over hate crimes by authorizing the Attorney General to provide assistance, when requested by a state, local, or tribal official, for crimes that (1) would constitute a violent crime under federal law or a felony under state or tribal law, and (2) are motivated by the victim's actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, or disability. In other words, hate crimes are traditional crimes during which the offender is motivated by one or more biases considered to be particularly reprehensible and damaging to society as a whole. Prior to enactment, however, hate crimes *were not* separate and distinct offenses under federal law. Furthermore, federal jurisdiction over hate crime was limited to certain civil rights offenses.

Chapter 2- Concerns about hate crimes have become increasingly prominent among policymakers at all levels of government in recent years. The Violent Crime Control and Law Enforcement Act of 1994 (P.L. 103-322, Title XXVIII §280003a) defines a "hate crime" as one in "which the defendant intentionally selects a victim, or in the case of property crime, the property that is the object of the crime" motivated by prejudice based on the "race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation" of



the victim. Current federal law permits prosecution of hate crimes committed on the basis of the victim's race, color, religion, or national origin while the victim was engaged in a federally protected activity such as voting or attending school. On October 28, 2009, the President signed the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act (P.L. 111-84, codified at 18 U.S.C. § 249). This law expands the scope of hate crime victims to include gender identity and disability. In addition, the law broadens the circumstances under which the federal government may assert jurisdiction to prosecute such crimes. For hate crimes prosecuted federally under these provisions, the law requires that the Attorney General certify that pertinent state or local officials (1) were unable or unwilling to prosecute, (2) favored federal prosecution, or (3) prosecuted, but the investigation's or trial's results failed to satisfy the federal interest to combat hate crimes.

Chapter 3- Federal and state legislators recognize the special concerns and effects of hate crimes. Although there is some federal legislation in place, many states have enacted some form of ethnic intimidation law or bias-motivated sentence-enhancement factors in attempts to curtail hate crimes. Several United States Supreme Court cases provide the framework in which states must legislate to ensure the constitutionality of hate crime legislation. After these landmark cases, the real questions for states involve identifying permissible ways to curtail hate crimes without infringing on any constitutionally protected rights. On the federal level, in light of U.S. Supreme Court cases, the question remains as to what extent Congress can broaden the classes of individuals subject to hate crime legislation. This report discusses constitutional considerations facing both individual states and Congress in enacting hate crime legislation. It will be updated as events warrant.

Chapter 4- Almost half of the states outlaw cross burning with the intent to threaten as such. A few of these statutes cover the display of hangman's nooses and other symbols of intimidation as well. Moreover, the same misconduct also frequently falls under more general state prohibitions on coercion, terroristic threats, harassment, or hate crimes. Some of these laws feature a hate crime element without which conviction is not possible; others do not. In either case, there are obvious first amendment implications.

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## ***Chapter 1***

# **HATE CRIME LEGISLATION**

***William J. Krouse***

## **SUMMARY**

On October 28, 2009, President Barack Obama signed the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act into law, as Division E of the National Defense Authorization Act for Fiscal Year 2010 (P.L. 111-84; H.R. 2647). This law broadens federal jurisdiction over hate crimes by authorizing the Attorney General to provide assistance, when requested by a state, local, or tribal official, for crimes that (1) would constitute a violent crime under federal law or a felony under state or tribal law, and (2) are motivated by the victim's actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, or disability. In other words, hate crimes are traditional crimes during which the offender is motivated by one or more biases considered to be particularly reprehensible and damaging to society as a whole. Prior to enactment, however, hate crimes *were not* separate and distinct offenses under federal law. Furthermore, federal jurisdiction over hate crime was limited to certain civil rights offenses.

Although there is a consensus that hate crime is deplorable, determining the definitive federal role in addressing hate crime has proved contentious, as reflected in the legislative history and congressional debate. Legislation to widen federal jurisdiction over hate crime was passed by the Senate in the 106<sup>th</sup> and 108<sup>th</sup> Congresses, by the House in the 109<sup>th</sup> Congress, and by both

chambers in the 110<sup>th</sup> Congress. Opponents of hate crime legislation view separate federal offenses for hate crime as redundant and largely symbolic, arguing that separate hate crime offenses would be in addition to the legal prohibitions for traditional crime that already exist under either federal or state law. They also contend that in most cases the federal nexus is tenuous, and that such offenses are best handled at the state and local level. Proponents for creating a separate and distinct federal offense for hate crime maintain that there is a fundamental difference between ordinary crime and hate crime. They believe that hate crimes are often perpetrated to send a message of threat and intimidation to a wider group, and that the effects of hate crime extend beyond the particular victim and reflect more pervasive patterns of discrimination on the basis of race, color, religion, national origin, and other characteristics.

In the 111<sup>th</sup> Congress, the House Judiciary Committee amended and ordered reported a hate crimes bill (H.R. 1913; H.Rept. 111-86) on April 23, 2009. The House passed H.R. 1913 on April 29, 2009. Senator Reid, for Senator Kennedy, introduced the Matthew Shepard Hate Crimes Prevention Act (S. 909) on April 28, 2009. Senator Leahy successfully amended the National Defense Authorization Act (S. 1390) with language that is similar to S. 909 on July 16, 2009. The Senate passed S. 1390, amended, on July 23, 2009. The hate crime provisions were included in the conference report on the National Defense Authorization Act for Fiscal Year 2010 (H.R. 2647; H.Rept. 111-288). The House passed the conference report on H.R. 2647 on October 7, 2009; the Senate passed it on October 22, 2009.

In addition, Representative Sheila Jackson-Lee has introduced three hate crime-related bills (H.R. 70, H.R. 256, and H.R. 262), and Representative Maloney has introduced a hate crime statistics act (H.R. 823). At issue for Congress is whether the prevalence and harmfulness of hate crimes warrant greater federal intervention to ensure that such crimes are systematically addressed at all levels of government. Another related issue is the completeness and comprehensiveness of national hate crime data. Senator Benjamin Cardin has introduced a bill (S. 1765) that would amend the Hate Crime Statistics Act to require data collection on crimes committed against homeless persons. The Senate Judiciary Committee is scheduled to mark up this bill on January 21, 2010.

## **MOST RECENT DEVELOPMENTS**

On October 28, 2009, President Barack Obama signed the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act into law, as Division E of the National Defense Authorization Act for Fiscal Year 2010 (P.L. 111-84; H.R. 2647). This law broadens federal jurisdiction over hate crimes by authorizing the Attorney General to provide assistance, when requested by a state, local, or tribal official, for crimes that (1) would constitute a violent crime under federal law or a felony under state or tribal law, and (2) are motivated by the victim's actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, or disability.

On January 21, 2010, the Senate Judiciary Committee is scheduled to mark up a bill (S. 1765) that would amend the Hate Crimes Statistics Act to require data collection on hate crimes committed against homeless persons.

## **INTRODUCTION**

Prior to enactment of P.L. 111-84, federal jurisdiction over hate crimes was limited to investigating and prosecuting certain civil rights offenses considered "hate crimes," when it was determined that the offender was motivated by a bias against race, color, religion, national origin, or, in limited instances, disability.<sup>1</sup> Those civil rights violations were and continue to be considered "hate crimes" when it is determined that the offender is motivated by a bias against race, color, religion, national origin, or, in limited instances, disability.<sup>2</sup> For bias-motivated offenses, there were and continue to be enhanced penalties potentially available under federal law.

With the passage of P.L. 111-84, Congress has expanded federal coverage over hate crimes under two additional scenarios.<sup>3</sup> First, under any circumstance, it prohibits willfully inflicting bodily injury to any person, attempted or otherwise, through the use of fire, a firearm, an explosive, or an incendiary device if such conduct is motivated on the basis of the victim's actual or perceived race, color, religion, or national origin. Second, it prohibits the same conduct if such conduct is motivated on the basis of the victim's religion, national origin, gender, sexual orientation, gender identity, or disability. The reach of the second offense, however, extends to specific jurisdictional ties to the interstate Commerce Clause of the U.S. Constitution.

This report provides an overview of the hate crime debate, with background on current law and hate crime statistics, and a legislative history of hate crime prevention bills in recent Congresses. This report does not analyze the constitutional or other legal issues that often arise as part of the hate crime debate.<sup>4</sup>

## **Overview of the Hate Crime Debate**

Proponents of creating a separate and distinct federal offense for hate crime have maintained that there is a fundamental difference between ordinary crime and hate crime. They contend that hate crime is often perpetrated to send a message of threat and intimidation to a wider group. Furthermore, they argue that the effects of hate crime extend beyond the particular victim and reflect more pervasive patterns of discrimination on the basis of race, color, religion, national origin, and other characteristics. In addition, proponents argue that those characteristics, whether real or perceived, identify an individual as belonging to a group that has been marked for persecution and discrimination in the past, and that to tolerate any further persecution and discrimination on such counts, as manifested in either crimes against persons or property, is no longer acceptable.

Opponents of creating a separate and distinct federal offense for hate crime have often countered that the victim of any crime suffers regardless of the offender's motive. They claim that the perpetrator of an assault in the course of an armed robbery should be punished no less vigorously, no matter what his motivation might have been. They also maintain that the public interest would be better served if law enforcement efforts were to address crime across-the-board, rather than focusing on an offender's motives. In addition, opponents view a separate federal offense for hate crime as redundant and largely symbolic, asserting that a separate hate crime offense would be in addition to the legal prohibitions for traditional crime that already exist under either federal or state law. Moreover, they argue that the federal nexus is tenuous, and that such offenses should be handled at the state and local level.

## **HISTORICAL EVOLUTION OF HATE CRIME POLICY AND LEGISLATION<sup>5</sup>**

Social scientists view modern hate crime policy in the United States as having evolved, in part, out of the civil rights movement that began in the mid-1950s.<sup>6</sup> Although the initial focus of the civil rights movement was on promoting the legal, social, and economic status of African Americans, it soon expanded to include other racial and ethnic minorities in the 1960s.<sup>7</sup> Through nonviolent protest and other forms of political activism, these “rights-based movements” coalesced to expand civil rights and reduce violence directed at minorities.<sup>8</sup>

By the 1970s, the contemporary women’s rights movement and the gay and lesbian rights movement constituted what some experts have termed the “second-wave civil rights movements.”<sup>9</sup> In addition, the crime victims’ movement emerged as part of the women’s rights movement.<sup>10</sup> According to social scientists, by the 1980s, support from both the wider civil rights movement and the crime victims’ movement provided the broad constituent base that proved critical to the formation of the early anti-hate crime movement.<sup>11</sup> Even within the anti-hate crime movement, however, defining what constituted a hate crime and who would be protected against such crimes proved a matter of controversy.<sup>12</sup>

### **Early Civil Rights Movement**

In the not so distant past, some types of bias-motivated violence were in whole or part sanctioned by governments. Federal and state statutes that once legalized slavery loom large as examples of state-sanctioned violence in the United States. Under these laws, Africans and their descendants were subject to acts that resulted in millions of deaths and abuses, including beatings, rape, torture, branding, forced separation of families, trafficking in human beings, and exploitation.<sup>13</sup> Although slavery was ended, following Reconstruction, southern states adopted comprehensive segregation laws known as “Jim Crow” laws. These laws, which were upheld by the Supreme Court, effectively institutionalized post-slavery forms of violence and hate against African Americans from the 1870s to the 1960s.<sup>14</sup>

With the civil rights movement in the 1950s and 1960s, the struggle to address Jim Crow laws and other forms of discrimination was pioneered by the

National Association for the Advancement of Colored People (NAACP) and Southern Christian Leadership Conference (SCLC).<sup>15</sup> Under the leadership of Dr. Martin Luther King Jr. and others, the United States made great strides in addressing social injustices associated with the residual effects of slavery and other forms of institutionalized discrimination that were contrary to the principle of “equal justice for all” as set out in the U.S. Constitution.<sup>16</sup> Other disadvantaged groups were influenced by the early civil rights movement, particularly the success of the NAACP and SCLC.<sup>17</sup> Based on those models, in part, and the principle of nonviolent protest, minority groups mobilized by organizing themselves into nongovernmental organizations and advocacy groups.<sup>18</sup>

## **Second Wave of Civil Rights Movements**

As part of the “second wave of civil rights movements,” the women’s rights movement and the gay and lesbian rights movement emerged in the 1970s out of the wider civil rights movement.<sup>19</sup> Particularly in the women’s rights movement, the issue of the rights of victims of violent crime became an important issue, as crime victims and their advocates voiced concern about the “secondary victimization” of victims of rape and domestic abuse.<sup>20</sup> Secondary victimization is a term used to refer to the psychological trauma suffered by crime victims at the hands of the criminal justice system.<sup>21</sup> In particular, the crime victims’ movement was critical of the Warren Supreme Court for expanding defendants’ rights in criminal cases.<sup>22</sup> Advocates for greater crime victims’ rights asserted that in many cases the perpetrators of crime were inadequately punished and victims were inadequately protected.<sup>23</sup> According to social scientists who have studied the hate crime movement, the crime victims’ rights movement lent impetus and considerable support to the anti-hate crime movement.<sup>24</sup>

## **Anti-Hate Crime Movement**

The convergence of the civil rights movement, the women’s movement, the gay and lesbian movements, and the crime victims’ movement created an environment that was open to a wider public discourse about how violence manifests itself as discrimination brought on by deep-seated social biases.<sup>25</sup>

Out of this wider public discourse, the anti-hate crime movement emerged, calling attention to “hate crime” as a societal problem, which—in the view of the movement—warranted greater legislative intervention at either the state or federal level, or both.<sup>26</sup>

### ***ADL Model Legislation***

By 1981, the Anti-Defamation League of B’nai B’rith (ADL) had developed proposed model hate crime legislation, and advocates for tougher laws targeting “hate crime” began lobbying state and federal legislators.<sup>27</sup> This model legislation consisted of five proposals that addressed vandalism directed at religious institutions, intimidation, a civil action for both types of crime, data collection, and police training.<sup>28</sup> Based on one or more elements of this model legislation, more than half the states had enacted hate crime legislation by 1994.<sup>29</sup>

### ***Establishing Baseline Hate Crime Statistics***

Since 1981, civil rights advocacy groups, including the Southern Poverty Law Center (SPLC), the ADL, the Coalition on Hate Crimes Prevention, and the Klanwatch Project, called for the collection of national hate crime statistics.<sup>30</sup> At that time, there was no national source or mechanism for collecting hate crime data. Although some states collected such data, characterizing hate crimes accurately, or determining the extent of hate crimes nationally, was difficult, if not impossible. Nonetheless, civil rights advocates maintained that such data would (1) provide an empirical basis from which to shape public policy, (2) raise the consciousness of reporting law enforcement agencies, and (3) stimulate local prevention strategies, more effective responses, and greater sensitivity to the specific needs of hate crime victims.<sup>31</sup> Although hate crime proposals initially included categories of protected classes that were limited to race, religion, and ethnicity, the scope of those provisions were later expanded to include sexual orientation and gender.

### ***Gender***

Within the ranks of hate crime legislation supporters, the inclusion of gender under the hate crime statistics legislation proved contentious. For example, anti-gender bias-motivated crime was not included as a hate crime by the Coalition on Hate Crimes Prevention, one of the leading advocacy groups.<sup>32</sup> The coalition noted that statistics on domestic violence and rape were already being collected.<sup>33</sup> In many of these crimes, they pointed out the offenders were acquaintances of the victims.<sup>34</sup> They maintained that hate



crime involved attacks on victims because of their membership in a group, not because of their individual identities.<sup>35</sup> Women's advocates countered that many crimes against women are committed by persons other than acquaintances, and that such crimes are often motivated by the offender's irrational fear and hatred of women.<sup>36</sup> And, even if the offender was an acquaintance, violent crimes against women often involve an element of misogyny.<sup>37</sup>

Some observers have noted that the coalition's opposition to inclusion of anti-gender bias under the definition of "hate crime" was likely based on the notion that, if it were included, other types of hate crime would be washed out by the prevalence and sheer volume of anti-gender bias motivated crime (misogynistic violence) against women.<sup>38</sup>

### ***Sexual Orientation and Gender Identity***

Legislative proposals have also included "sexual orientation" and "gender identity" as characteristics, for which certain violent crimes would be considered a "hate crime" if it could be shown that the perpetrators were motivated by an animus for their victims for reasons related to those characteristics. Issues related to sexual orientation and gender identity often overlap, but the characteristics are conceptually distinct. While sexual orientation speaks to an individual's sexual desire, gender identity speaks to an individual's gender expression.<sup>39</sup> "Gender identity" has been defined as a person's internal, deeply felt sense of being male or female, which is not always congruous with their biological sex.<sup>40</sup> Nevertheless, gender identity was largely subsumed under the debate over sexual orientation and hate crime during the 1980s.<sup>41</sup>

The inclusion of sexual orientation as a characteristic under proposed legislation generated considerable debate during the 1980s in congressional hearings on anti-gay and -lesbian violence and during legislative debates leading to the Hate Crime Statistics Act.<sup>42</sup> Those debates often focused on the question of whether sexual orientation should be considered an ascribed and immutable characteristic like race or ethnicity, or a matter of individual choice. In some cases, those favoring the inclusion of sexual orientation as a category for which hate crime statistics should be gathered held the former view, whereas those opposing such proposals often held the latter view.

It has been argued that "transgender" persons—those who do not meet gender-based expectations or engage in gender variant behavior—are inordinately victimized by violent criminals for their nonconformity.<sup>43</sup> As described below, Congress passed hate crime statistics legislation in 1990 and

an amendment thereto in 1994. While sexual orientation was included as a category/characteristic for which federal hate crime data would be gathered, gender identity was not. In addition, neither characteristic is currently included as a protected category under federal civil rights statutes. Federal authorities, consequently, have no jurisdiction over bias-motivated crimes directed toward individuals because of their sexual orientation or gender identity.

## **HATE CRIME AND FEDERAL LAW PRIOR TO P.L. 111-84**

The term “hate crime” became prevalent during the 1980s, when there appeared to be an upward trend in violent crimes committed against persons for reasons related to their race, religion, sexual orientation, ethnicity, and other characteristics.<sup>44</sup> Hate crime statistics, however, were not collected nationally. Consequently, it was unknown whether hate crime was increasing, remaining the same, or decreasing. Nevertheless, the perception that bias crime was on the rise was reflected in the effectiveness of the anti-hate crime movement,<sup>45</sup> and many states were prompted to enact legislation against hate crimes.<sup>46</sup>

Congress responded by considering several proposals that addressed hate crime, and it passed legislation that (1) required the Attorney General to capture hate crime statistics annually; (2) increased penalties for certain civil rights offenses that were determined to be bias-motivated; and (3) expanded federal jurisdiction over the arson, destruction, or vandalism of religious property, as well as violent interference with an individual’s right to exercise religious freedom. Also, Congress attached hate crime-related provisions to other pieces of legislation, such as the FY1997 Defense Authorization Act and the No Child Left Behind Act of 2001. Furthermore, Congress appropriated funding for anti-hate crime training.

### **Federal Civil Rights Statutes and Hate Crime**

Enacted as part of the Civil Rights Act of 1968, section 245 of Title 18 of the United States Code (U.S.C.) prohibits interference with certain “federally protected activities.” Specifically, it prohibits the use of force, or threat of force, to injure, intimidate, or interfere with any person for reasons related to