

# Hate Crime Series

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## Legislation and Prosecution of Hate Crime

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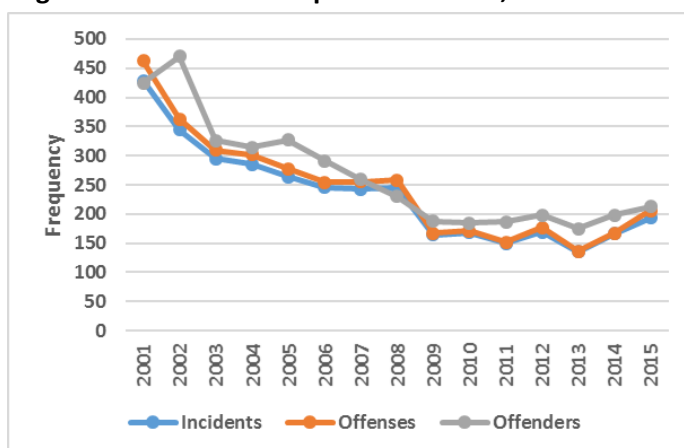
Hate crime involves animus toward a person or group of people because of some intrinsic characteristic the victim possesses. This type of crime can produce significant harm and pose prosecutorial issues. A few notable, tragic hate crimes have garnered substantial attention that ultimately produced nationwide changes to hate crime statutes. The brutal murders in 1998 of Matthew Shepard in Laramie, Wyoming, and James Byrd, Jr., in Jasper, Texas sparked widespread attention to the consequences that befall hate crime victims, those closest to the victim, and the community in which the victim belongs. While some states passed legislation soon after these events, almost a decade later, President Barack Obama enacted the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act in 2009 (HCPA; 18 U.S.C. § 249). This federal legislation expanded the set of biases that comprise hate crimes to also include those motivated by the victim's real or perceived gender, disability, sexual orientation, and gender identity.

In addition to federal efforts to address hate crime, state legislators have also attempted to proactively address hate crime. State legislation varies significantly in terms of what constitutes a hate crime. The reporting of hate crime also presents challenges in understanding of the nature of hate crime and prosecuting these incidents. There are numerous reasons why crime victims choose to not report crime, particularly victims of hate crime (e.g., apathy from law enforcement, further victimization, societal isolation/backlash; Perry, 2012; Sandholtz, Langton & Planty, 2011). For victims, there are also potential trepidations associated with a case progressing through the criminal justice system. These include secondary victimization (victim-blaming behaviors and practices that cause additional trauma to victims) from various criminal justice actors (Orth, 2002; Parsons & Bergin, 2010), trauma from facing their assailant (Rothbaum et al., 1992), and having to recount their experiences in court (Koss, 2000). For these reasons, victims of hate crime may be reluctant to report or unwilling to participate in cases against their assailants.

Debate exists concerning prosecution as cases charged as a hate crime may come with sentencing enhancements. Critics of hate crime legislation state that individuals should not be prosecuted for or receive enhanced sentences due to their own prejudices/thoughts. In addition, the disparity between reported hate crime and the number of people charged with hate crime is substantial. Texas prosecutors, it appears, are somewhat reluctant to charge

individuals with hate crime offenses. According to data maintained by the Texas Judicial Branch, as of October 1, 2017 prosecutors in Texas have requested a hate crime finding in court 26 times since September 2001 (when Texas established the James Byrd, Jr. Hate Crime Act), 23 of those produced an affirmative finding (Texas Judicial Branch, 2017). This is in stark contrast to the number of hate crimes reported in the state since 2001 (see Figure 1; Texas Department of Public Safety, 2017).

**Figure 1. Hate Crimes Reported in Texas, 2001-2015**



Lack of charging for a hate crime does not equate to leniency for offenders (they may be charged with other crimes, such as assault or murder). It does mean that the statute may be underused in Texas. The present issue in the Hate Crime Series addresses hate crime legislation and the prosecution of hate crime, particularly in Texas.

### Federal Hate Crime Legislation

One of the biggest proponents for hate crime legislation in the United States has been the Anti-Defamation League (ADL). The ADL developed two models of hate crime legislation in the early 1980s and 1990s. The goal of these models was to provide a framework for state and federal legislatures to draft their own statutes (Gillis, 2013). While there is no uniform acceptance of any particular statute model, 43 states have

enacted statutes based on or similar to the work the ADL has completed (Anti-Defamation League, 2012a).

In 1990, President George H. Bush introduced and enacted the Hate Crimes Statistics Act (HCSA)—the first federal legislation that was specifically designated for hate crime (28 U.S.C § 534). The act requires the Attorney General to gather crime data related to incidents committed due to the victim’s religion, ethnicity, race, disability, and/or sexual orientation. The FBI publishes annual reports that include national hate crime statistics. In 1994, the passage of the Hate Crimes Sentencing Enhancement Act (HCSEA) made committing a hate crime a federal offense (28 U.S.C. § 994). The HCSEA increased penalties for hate crime committed because of a victim’s actual religion, national origin, ethnicity, race, or gender; or the offender’s perception of these characteristics. This enhancement augmented the initial punishment already outlined for crimes that were committed (e.g., vandalism, assault, murder).

The Matthew Shepard and James Byrd, Jr. HCPA, passed in 2009 by President Barack Obama, in addition to expanding the characteristics, also magnified the circumstances where the federal government can assert their jurisdiction in the prosecution of hate crime (Smith & Foley, 2010). Three situations were established which would allow the Attorney General and federal government to assert jurisdiction and intervene in prosecution. The first is if a state was either unwilling or unable to prosecute a hate crime. The second situation included if state officials were in favor of federal prosecution for a crime. The final provision included if a state indeed prosecuted for a hate crime, but the result of the investigation or trial did not satisfy the country’s interest in combatting hate crime (Smith & Foley, 2010).

## State-Level Hate Crime Legislation

According to Smith and Foley (2010), hate crime statutes in the United States can generally be divided into four categories. The first is institutional vandalism, which is the destruction of a particular organization’s property (e.g., places of worship, cemeteries, schools, and community centers; Anti-Defamation League, 2012b). Second are sentence enhancements. If bias/prejudice is demonstrated as the motivation for the offense, additional incarceration time may be added to the sentence or prosecutors may increase the severity of the charging offense. The third category is substantive offenses, which involves the re-criminalization of existing lower-level offenses as new crimes if they are motivated by bias/prejudice. The final category Smith and Foley (2010) developed was data collection, which involved a mandate for an agency (e.g., a state’s Department of Public Safety and/or local law enforcement) to collect hate crime offense statistics.

Oregon became the first state in the country to introduce and pass a hate crime statute in 1981 (Stacey, 2015). Today, almost every state and the District of Columbia have established anti-bias/hate crime statutes (Alongi, 2016). The language in these statutes ranges in comprehensiveness. For example, California and Rhode Island have legislation that addresses numerous protected groups (i.e., gender, sexual orientation, race, religion, and ethnicity), mandates data collection, and provides training for law enforcement personnel. Hawaii and Kansas, however,

only have legislation that covers institutional vandalism. Currently, Arkansas, Georgia, South Carolina, and Wyoming have not enacted hate crime statutes. Indiana struck their hate crime legislation down since the publishing of the *Hate Crime: An Overview* report in this series.

## Texas Hate Crime Legislation

A year after President George H. Bush’s enactment of the HCSA in 1990, the state of Texas passed the Texas Hate Crimes Act (THCA), found within Chapter 411.046 of the Texas Government Code. The THCA describes a hate crime as any crime, “motivated by prejudice, hatred, or advocacy of violence” (Texas Department of Public Safety, 2015). A crime then, is considered a hate crime if it includes any incidents that reside in the categories of statistics compiled under Public Law 101-275 (the Federal Hate Crimes Statistics Act): race, sexual orientation, religion, ethnicity, and disability (which was added in 1997).

On September 1, 2001, Governor Rick Perry signed into law the James Byrd, Jr. Hate Crimes Act, which increased the penalties for criminal offenses motivated by a victim’s religion, color, race, sex, sexual orientation, disability, national origin, or age. Texas’ hate crime laws fall into both the sentence enhancement and institutional vandalism categories that Smith and Foley (2010) denoted in their research. Texas also requires data collection, but this only compels law enforcement agencies to report hate crime statistics for an annual report published by the state (Gillis, 2013). The Texas Government Code requires the Texas Department of Public Safety to establish and maintain a repository for collecting and analyzing information related to crimes motivated by prejudice, hatred, and/or advocacy of violence (McPhail & Jenness, 2010).

## Prosecuting Hate Crimes

Prosecuting hate crimes presents a number of obstacles. First, prosecutors must prove the offender was driven by their own bias/prejudice toward the victim to commit the crime. Without definitive evidence of such bias/prejudice, a prosecutor may be challenged and/or unable to demonstrate that the bias both existed and caused the crime to occur with circumstantial evidence (Alongi, 2016; Gillis, 2013). Some offenders do have more readily apparent evidence of prejudice. For example, an offender may have tattoos that are associated with hate groups. Others will leave hate speech, such as anti-Muslim vulgarities spray-painted on a mosque or swastikas on Jewish synagogues.

Prosecutors may not pursue hate crime charges if the evidence pointing toward bias/prejudice is weak. Furthermore, some criminal incidents are difficult to carry through the formal criminal justice system. For example, if anti-Semitic graffiti is applied at night, it may be challenging to identify the culprits. In addition, the vast majority of all criminal cases end in plea agreements, which may involve lesser charges than those originally brought against the defendant. This further decreases the odds that an offender will be charged and convicted of a hate crime.

Hate crime legislation that focuses on general animus (the offender acted based on their prejudice/hatred for the victim and their inclusion in a particular group, such as race or gender identity) presents more challenges for prosecutors. Time and

financial resource investment for a hate crime charge is arguably a significant deterrent for prosecutors. The underlying offense may also have a substantial enough sentence length for the offender to receive a long sentence before considering the sentencing enhancement for hate crimes. This affects the cost-benefit analysis of pursuing hate crime charges, since the enhancement from such a conviction may not be worthwhile from the prosecutor's perspective (Boram, 2015).

Laws that are focused more on what is known as 'discriminatory selection,' (the punishment of an offender if they selected their victim based upon the victim's affiliation with a group within the population) include smaller obstacles for prosecuting hate crimes (Gillis, 2013). The motivation for committing the offense is not the focus, but rather that the victim was chosen because of some characteristic they possess. This type of model is problematic because the offender may select their victim not out of prejudice or hate toward a particular group, but due to other reasons, such as the victim being an easier target (Gillis, 2013).

Ultimately, prosecutors hold a significant amount of discretion when determining how/if to charge an individual with an offense, and they are not mandated to charge individuals with anything particular, including hate crimes (McPhail & Jenness, 2010). This leaves the utility of hate crime legislation in the hands of prosecutors, and their interpretation of the statutes.

## Ideological Challenges

Various arguments have been made in opposition to hate crime legislation. One argument is that hate crime laws illegally interfere with a person's right to free expression (Alongi, 2016; Boram, 2015; Gillis, 2013). According to critics, criminalizing a person's thoughts may be constitutionally problematic. It is important to mention, however, that this is neither new nor unique to hate crime legislation (Boram, 2015). Pre-meditation is the lynchpin for 'upgrading' a second-degree murder charge to a first-degree murder charge. Motivation is a key factor for several different forms of crime in terms of differentiating between their seriousness.

The Supreme Court of the United States (SCOTUS) has provided commentary on these arguments in *Wisconsin v. Mitchell* (1993), where they ruled that Wisconsin's hate crime statute did not violate the defendant's free speech right since it punished actions that caused special harm to both the victim and the community itself (Oyez, 2018). According to *Wisconsin v. Mitchell*, the statute was designed to address this maltreatment and did not aim to punish the defendant because of their beliefs. This decision ultimately legitimized federal hate crime statutes.

As Brax (2016, p. 230) stated, hate crime laws add enhanced punishments not because the offender has certain motives/thoughts, but to address the decision to use a "patently bad reason (such as racism)" as the reason for committing a crime. When viewing hate crime legislation through this lens, punishing hate crime does not equate to legally disciplining thought, but instead penalizes an offender's motivation for committing a crime.

## Implications for Texas

The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009 does not appear to be the last addition to

the list of protected groups under hate crime legislation. Numerous instances of crime committed against homeless individuals have led several states to incorporate this group of people under the protection of hate crime statutes (Al-Hakim, 2015; Goldberg, 2014). The state of Texas joined Louisiana in September 2017 as the only states currently to include law enforcement in their list of protected groups, considered by some to be a controversial move since status as law enforcement is a career choice, compared to other protected groups whose characteristics are intrinsic and/or innate (Kutner, 2017).

Despite some of the challenges levied on hate crime laws, there is still broad adoption of them among states and federal government. Hate crimes pose unique problems for their victims, affecting them and their communities in substantial and meaningful ways. These statutes too give prosecutors additional factors they must consider when it is likely an individual has committed a crime motivated by hate/bias. Currently, it appears that hate crime laws are underused when comparing the number of hate crime incidents to the number of times a sentence enhancement was requested. This conclusion holds true for the state of Texas, with 0.5% of reported offenders being charged with a hate crime, and 0.48% of all reported hate crime offenders being convicted of a hate crime since 2001. The disparity is likely due to a number of factors, some of which are uncontrollable (e.g., identifying the culprit if no one witnessed them vandalizing a place of worship).

The Texas Commission on Law Enforcement (TCOLE) offers an optional training course covering hate and bias crime. The site that offers the purchasable course, OSS Academy, describes hate crimes as on the rise, and the importance of law enforcement training and multidisciplinary cooperation between justice system actors, the community, and media to address hate crime and ensure the safety and welfare of victims. The hate and bias crime training discusses the definitions of hate crime from multiple perspectives and provide a general overview of the crimes and types of victims (i.e., protected groups; OSS Academy, 2018). In addition, the course discusses various justifications used by offenders when they commit hate crimes. Last, the TCOLE course provides general investigative guidelines and profile information of offenders (OSS Academy, 2018). If law enforcement is better equipped to recognize and investigate hate crime, prosecutors may be more inclined to pursue hate crime charges, since they may be working with higher quality evidence. These enhanced punishments would work toward setting a precedent that hate crime is not tolerated by society and that the justice system takes hate-motivated offenses seriously. If hate crime charges are brought more successfully, victims may be more likely to report their experiences and believe that doing so is worthwhile. Hate crime, unfortunately, remains a contemporary and multi-faceted problem. These are constant reminders that we have not fully addressed the problems that underlie why these crimes continue to occur.

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