

Hate Crime Laws and the Reversion to Medieval Society

By Morgan Reynolds

Director of the Criminal Justice Center for the
Dallas-based National Center for Policy Analysis and
Professor of Economics at Texas A&M University

"All animals are equal, but some animals are more equal than others."
--George Orwell, *Animal Farm* (1945)

Forty-three Americans are murdered on an average day. We don't hear about many of them.

But the brutal and well-publicized killings of Matthew Shepard, a University of Wyoming student beaten to death by two white assailants, and James Byrd, Jr., of Jasper Texas, a 49-year-old black man dragged to his death behind a pickup truck, ignited emotional outpourings. Law enforcement reacted quickly and the killers were convicted of murder in each case, but few in the media remarked upon how well both criminal justice systems fulfilled their duties. In Texas, two of Byrd's slayers await execution in Huntsville, while the third serves his life sentence.

"Insufficient" was the cry. We need **more laws, special**

laws. President Clinton urged expansion of Federal hate-crime laws – which now cover offenses perpetrated because of racial, religious and ethnic status – to include victims purportedly attacked on account of their sexual orientation. Some Wyoming legislators have tried for years to pass so-called antibias laws, only to be defeated by those concerned that such a law would confer privileges on favored minorities. All but seven states (AR,

HI, IN, KS, NM, SC, WY) have hate-crime laws, although only 22 state statutes single out sexual orientation as a bias or prejudice.

During the presidential campaign, The National Voter Fund, an arm of the NAACP, ran a searing TV ad in which one of Byrd's daughters equated the absence of a more aggressive hate-crime law with contributing to her father's murder. The daughter "all but blamed Bush for her father's death at the hands of white racists" (Matthew Rees, "Look Who's Race-Baiting Now," *Weekly Standard*, Nov. 27, 2000, p. 14), sharply elevating the visibility of such legislation.

Texas State Sen. Rodney Ellis, D-Houston, has reintroduced the James Byrd, Jr., Hate Crimes Act (SB 275) to enlarge the state's current hate-crimes law, passed in 1993. Texas State Rep. Senfronia Thompson, D-Houston, introduced the same bill (HB 587) in the Texas House. Current law [Section 1.01, Sec. 1.02, Art.42.014] provides that at a trial's punishment phase the same criminal conduct can be more heavily punished if the victim was selected "primarily because of the defendant's bias

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or prejudice against a group.” The statute leaves the exact biases or prejudices unnamed.

Sen. Ellis’ new bill seeks to “strengthen the existing hate-crimes law, assign a hate-crimes prosecutor at the attorney general’s office, assist counties in prosecuting hate murders, provide civil remedies for victims and require training to help officers identify hate-crimes evidence,” according to an Associated Press account. Virtually the same bill passed the Democrat-controlled Texas House in 1999 but died in the GOP-controlled Senate during the last days of the session. Senate Republicans “objected to singling out specific groups for protection—primarily homosexuals,” according to the *Dallas Morning News* (November 14, 2000). Ellis’ bill specifies “race, color, disability, religion, national origin or ancestry, or sexual orientation” as the exact **six characteristics** – no more, no less – for enhanced protection.

FOR HATE-CRIME LEGISLATION

The core argument is that the criminal law must recognize the additional harm done to crime victims and society when people are attacked because of race or other group characteristics. It’s a special problem that calls for special measures. “Nearly every day in Texas a hate crime occurs,” says Sen. Ellis. “The legislature must act once and for all to strengthen our hate-crimes statute, punish crimes of hate and protect our communities from the terror of hatred and bigotry. This legislation will lead to a safer, more tolerant society.”

Enhanced punishments cannot be dismissed out of hand as remedies for particularly heinous crimes. Obviously not all crimes, criminals and victims are alike. For example, only seven types of murder qualify as capital crimes in Texas, including the murder of a child under 6 years old, serial murder and murder during the commission of specified felonies like robbery.

These differences in legal treatment imply that not all murder victims and their surviving families are treated alike. Yet there are compelling arguments for these differences, particularly that these laws serve obvious utilitarian ends and therefore serve the cause of justice. Additional punishment must be available to deter additional social harm. Robbers, for example, must be encouraged to leave victims and witnesses alive and murderers encouraged to stop at one life snuffed (no “free” murders after the first one). Antibias legislation would require equally compelling arguments in order to depart from equal treatment under the law.

AGAINST HATE-CRIME LEGISLATION

Hate crimes are rare and declining.

Texas has a low rate of bias-motivated crimes. Texas has 7.2 percent of the nation’s population and 8.1 percent of its overall FBI Index crime, while the state’s 267 bias crime incidents in 1999 constituted only 3.4 percent of the nation’s 7,876 hate-crime incidents.

Serious violent crime based on bias also is extremely rare in the state. There were no murders or rapes in 1999 classified as hate crimes in Texas and only four robberies and 43 aggravated assaults. [The state, however, suffered three bias murders in 1998.] The data imply that only one in 7,300 Texas robberies and one in 1,700 aggravated assaults were bias motivated. Further, Texas hate crimes declined from 331 incidents in 1997 to 267 in 1999, nearly a 20 percent decline in two years. The low Texas rate can be partially credited to Texas’ respect for the right of self-defense, as reflected in the right-to-carry concealed handgun law. California, by contrast, has a bias crime rate four-times higher than Texas, with 12 percent of the U.S. population but an outsized 25 percent of its

reported hate crimes. California has a “restricted issue” or “discretionary issue” concealed carry law, and in many counties it is alleged to be nearly impossible to get a license to carry a handgun.

Claims that hate crimes are on the rise are false, as shown by James Jacobs and Kimberly Potter in their book, “Hate Crimes: Criminal Law and Identity Politics”(New York, NY: Oxford University Press, 1998, 208 pp., ISBN 0195114485). Nationally, the FBI reported 17 bias-motivated murders in 1999, or one out of every 914 murders. Only six forcible rapes (one in every 14,850) were classified as bias-motivated, 129 robberies (one in every 3,175) and 1,268 aggravated assaults (one of every 720).

These figures suggest that bias victims are a tiny share of all crime victims, not a disproportionate and growing share in a nation of intolerant bigots, as portrayed by activists. The crime data simply do not support claims like “Gay bashing is common.” One aim of bias law is to make the public aware that the group is vulnerable, yet the data suggest no such vulnerability, so the publicity intent is undermined. We may not have known this fact but for politicians insisting that we look hard at bias crimes.

Texas is already tough on crime.

Texas is not soft on criminals, which weakens the case for special measures against crime and criminals. After an appalling increase in crime during the 1980s, Texas recovered its reputation for being tough on crime during the 1990s. One of every three executions in the United States

occurs in Texas. Texas has the second highest incarceration rate in the nation. Texas has more criminals under state supervision each day—in prison, state jail or on probation or parole—than any other state. One of every 98 adult Texans is

locked up in a state prison or jail. The parole board releases only one in five eligible applicants. The state’s juvenile justice code has been toughened and more youths detained in Texas Youth Commission facilities, bringing down the juvenile crime rate. If we take into account both the probability of going to prison for a crime and the likely time incarcerated, Texas doubles and triples national punishment norms. [For more, see www.ncpa.org for “Crime and Punishment in

Texas in the 1990s.”] To serve justice, of course, punishments should be proportional to the gravity of the offense and the record of the criminal.

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Equal Justice is Subverted

The blindfold and scales of Justitia symbolize the highest standards of the law: impartiality, generality and uniformity. In our diverse state and nation, we must be loath to allow Justitia to lift her blindfold and say, “Oh, you’re gay or black, then this law applies, but you’re straight or white so this other rule applies.” This is the most serious objection to hate-crime bills.

Prejudice and group hatred certainly are lamentable, but hate-crime legislation is almost guaranteed to do more harm than good. Counterproductive, in other words. Race-, class- and gender-conscious remedies are more likely to divide than unite. If true, this implies an especially heavy burden of proof on the proponents of enlarged hate-crime legislation to demonstrate the efficacy of bias law.

As far back as ancient Greece, Thucydides admirably stated, "Our laws secure equal justice for all." Our Declaration of Independence declares, "All Men are created equal," while its author, Thomas Jefferson, wrote further of "equal and exact justice to all men, of whatever state or persuasion." If we depart from this principle "in moments of error or alarm, let us hasten to retrace our steps and to regain the road which alone leads to peace, liberty, and safety."

Our seventh president, Andrew Jackson, properly observed that when the laws undertake to add "artificial distinctions...the humble members of society...have a right to complain of the injustice of their government."

The Fourteenth Amendment to our Constitution insists on "the equal protection of the laws," [Amendment XIV, Section 1. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.]

Justice John Marshall Harlan emphatically wrote in 1896, "In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful."

President Bill Clinton effectively joined these endorsements by saying, "All persons should be treated the same under the law – no matter what their race, color, religion, sex, national origin, sexual orientation, or disability." The puzzle is how the president can reconcile his statement with his strong endorsement of antibias legislation.

More importantly, the Texas Constitution celebrates equality before the law. Article 1 – Bill of Rights, Section 3 – Equal Rights, states, "All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate emoluments, or privileges, but in consideration of public services." Section 3a – Equality under the Law, states, "Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin. This amendment is self-operative. (Added Nov. 7, 1972.)" A rational interpretation of the Texas Constitution would seem to disallow sentence enhancements for bias crimes. In *Wisconsin v. Mitchell*, by contrast, the U.S. Supreme Court found the Wisconsin bias enhancement statute constitutional.

There's no question among people of good will that crimes motivated by hate are terrible. But all predatory crimes are terrible, and all crime victims suffer, regardless of race, color, creed or sexual orientation.

Ambitious opponents of hate-crime legislation may want to draft new language for the Texas Constitution's Section 30 – Rights of Crime Victims, banning special treatment for victims of bias crimes and/or enhanced punishments for defendants guilty of bias motivation.

Equality before the law is an essential principle of a free and human society, so only the most compelling arguments and evidence could overcome a presumption on behalf of equal standing. Are hate crimes particularly heinous, compared to identical crimes not motivated by bias? The case is unproven. Absent such data and argument, the law should remain impartial between persons.

Hate-crime legislation departs from this enlightened ideal, adopting the divisiveness of identity or group politics: All men are equal, but some are more equal than others. Down this

road, of course, ultimately lies disaster, especially for a multiethnic society. The Balkanization of American life ignores the harsh lessons of the Balkans, where identity politics proceeded through four stages: ethnic awareness, separatism, mysticism, and cleansing. Hate-crime legislation contributes to the first three stages – awareness, cultural and legal separatism and mysticism. In the legal limit, the logic of bias laws (separate and unequal treatment) leads to separate justice systems.

Legislation in our modern polity has proceeded cavalierly down this disastrous path. Anti-discrimination laws, for example, morph into affirmative action laws. One-time champions of non-discrimination become champions of discrimination. “The intellectual confusion of our times is indeed so remarkable that these measures are thought to be not merely consistent with equality before the law,” English barrister Arthur Shenfield wrote, “but necessary to make it a reality.” Rather than cling fiercely to equality before the law, legal inequality has been justified to redress historical advantages and disadvantages in pursuit of substantive equality. This is legal sophistry.

Divisive Politics Promoted

A realistic account of any legislation must acknowledge the role that politics and special interests play. Hate-crime legislation has remarkable political properties. Stirring up racial feelings of injustice, of course, is a staple of our politics. Hate crime is “the perfect crime,” as *Forbes* columnist Daniel Seligman points out, perfect for politicians who want to be loved and seen as high-minded, manning the barricades against rising bigotry. Minority votes remain crucial for many office-seekers and additional groups stand ready to politicize for new protections, recognition and influence. Whether new legislation passes or not, bias legislation remains a wedge issue ripe for hard feelings, agitation and minority votes. It’s veto-bait, feel-

good legislation, and economical with taxpayer money, all at the same time.

A Danger to Free Speech and Thought?

Hate-crimes laws run the risk of criminalizing thought and speech rather than evil conduct, as many have pointed out. Will the law be interpreted to restrict hate speech? Isn’t speech protected by the First Amendment? Yes and no. The protection does not apply if public officials believe that inflammatory speech puts the public safety at risk, as reflected in the court’s “clear and present danger” test of Oliver Wendell Holmes. The most common hate crime is verbal intimidation, so we have the risk that hate crimes and bias motivation will be broadly construed to include politically unpopular speech.

Sen. Ellis’ bill provides for regulation of speech if that speech involves threat of violence, reasonable fear by victims and an ability to carry out the threat. While we are reassured that prosecutors and courts will respect “the constitutional rights of the defendant,” the real proof will lie in the execution of such law for cases without actual violent or property crime.

Prosecution of Minority Offenders

Be careful what you wish for, goes the proverb. Media coverage of bias crimes leaves the impression that it’s all about restraining white supremacists and anti-gay bigots. That’s far from the truth, as Colin Ferguson, the Long Island Railroad commuter train killer and many other cases like *Mitchell v. Wisconsin* (racially motivated black youths beating a white youth unconscious) demonstrate. Of cross-racial violent acts, nine of 10 involve a black perpetrator and a white victim. Does this mean “blacks are more racist than whites?” We need not say, but blacks are two to three times as likely to commit crimes of racial bias as whites, setting up the criminal justice system for more allegations of racist administration. Do we want more black offenders

spending even longer sentences behind bars? Maybe not, judging by the controversy over “racial profiling” and other biases purportedly displayed by the criminal justice system. These enforcement problems remind us once again why the statue of justice wears a blindfold.

Hate Crimes: What Nonsense

Why, exactly, do we need hate crime legislation? Can't individuals decide for themselves what they think, whom they want to like and dislike, whom they want to “loath; detest; dislike; wish to shun,” all subject to the open debate, persuasion and public safety of a free society? Or are these matters to be dictated from above by the ennobled and superior people of government, empowered by the inevitable mission creep embedded in all legislation?

Lee Elder, the KABC Los Angeles radio talk show host, skewers hate crime legislation in his new book, “The Ten Things You Can't Say in America” (New York, NY: St. Martin's Press, 2000) in the following way:

Isn't it racist to place one victim ahead of another, based on ethnicity, religion, gender, sexual orientation, or disability? Aren't all crimes really hate crimes in the sense that the bad guy wanted to do harm to the innocent? [Indeed, where are the 'love crimes?'] Hate-crime legislation forces us to place greater value on some victims because of race. By all means, we should prosecute bad conduct. But if I'm standing at an ATM machine and a Ku Klux Klansman hits me in the back of the head with a brick, the operative word is not “Klansman.” It is “brick.”

Hate-crime legislation is part of a reversion to medieval society, which was based upon status, caste and privilege. In the event of homicide, for example, the lives of nobles were valued at 300 gold pieces (about 150 cattle) payable by the killer and/or his clan, the two classes of free men below

the rank of noble were valued at 150-200 gold pieces and slaves were valued at a lower price payable to the slave's master.

There's no question among people of good will that crimes motivated by hate are terrible. But all predatory crimes are terrible, and all crime victims suffer, regardless of race, color, creed or sexual orientation.

In 1963 President Kennedy said, “Race has no place in American life or law.” Today we are farther than ever from that ideal. We are a divided society. The bigotry-is-everywhere crowd preaches more government and more group-identity laws to protect minorities. Minority resentment grows and resisters to special privilege are smeared as racists and homophobes. It's a sad and destructive game that moves us ever farther from an *e pluribus unum* color-blind society.

Morgan Reynolds, Ph.D. is the Director of the Criminal Justice Center at the National Center for Policy Analysis (www.ncpa.org) and a Professor of Economics at Texas A & M University. He has published more than 50 articles in academic journals and has authored five books. His opinion pieces and ideas have been published in The Wall Street Journal, The Washington Times, The Washington Post, The New York Times, National Journal, Investor's Business Daily, the Dallas Morning News and other papers across the country. He has appeared on NBC Nightly News, FOX News Channel and C-SPAN.