

League of Women Voters of Utah

Hate Crime Study

September 2006

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Purpose

To inform the League of Women Voters of the history and controversy surrounding hate crime legislation (bias-motivated offense) in Utah. This study will define hate crime, summarize Utah's history with hate crime legislation, discuss the arguments for and against the passage of hate crimes legislation into law and discuss the legal concerns surrounding the legislation.

Definitions

Currently, there are crimes and sentencing enhancements for the crimes. Behaviors of vandalism, assault and murder are already crimes. When victims are chosen because of their race, color, national origin, religion, gender, sexual orientation or disability, a hate crime is committed.

In the State of Utah, the Bureau of Criminal Investigation defines a hate crime as a "criminal offense against a person or property which is motivated in whole or in part, by the offender's bias against a race, religion, ethnic/national origin group, or sexual orientation group."¹

In the year 2006, the Utah State Legislators passed a bill that allows judges and the Board of Pardons to take bias against the victim and the possibility of community unrest into consideration as an "aggravating factor."

Hate speech legislation is often confused with hate crimes legislation. Hate speech legislation involves the regulation or censoring of lectures, discussions, posters and 'symbolic speech' such as cross burning. In the United States, hate speech legislation has been ruled unconstitutional by the higher courts, including the US Supreme Court.²

Utah Attorney General Mark Shurtleff states, "Never have we allowed people to commit crime and keep free speech. Your free speech stops where my nose begins."

Utah History of Hate Crime Legislation (Bias-Motivated Offense)

There has been a hate crime statute in Utah for 12 years. Representative Frank Pignanelli was the first to introduce this legislation. This law was not used by prosecutors in Utah, because it was known in the legal community that any conviction would be struck down in the appellate courts as it does not include the commonly listed protected classes. According to the ACLU, "In a court challenge, the Utah Court of Appeals said the law lacked clear legislative intent and noted it was not a true hate crimes law but should be titled the 'Exercise of Rights' statute because of its lack of classifications."³

The late Representative Pete Suazo said, "A hate crime goes beyond just the individual victimization or injury involved with that victim. It is intended, often times, to terrorize a community." For nine years, legislators have worked to get the language correct and address the concerns of legal scholars. For several years, Representative Suazo attempted to pass legislation, which included a list. After his untimely death in 2001, Representative David Litvack has continued introducing such legislation with a list of protected classes included. Attempts to pass hate crimes legislation failed each time and many legislators and the political community

1 www.bci.utah.gov

2 www.paulsjusticepage.com

3 www.acluutah.org, "Hate Crimes Legislation"

believed that this form of hate crimes legislation would have passed quickly if it were not for the inclusion of “sexual orientation” on the list.⁴

The 2006 Utah State Legislators passed a bill that allows bias to be considered in the sentencing phase of a trial. There is no list, but community unrest can be used to determine aggravating factors. The bill passed the Senate unanimously and with a near unanimous vote in the House. (65-2)

Controversial Issues

Some legal scholars have concerns about hate crimes law. These concerns focus on the First Amendment issue of freedom of speech and expression, and the Fourteenth Amendment issue of equal protection under the law.

In the early 1990's, statutes were passed which, according to the United States Supreme Court, did punish speech (*R.A.V. v St Paul*) and these were found unconstitutional. Crafting legislative language to punish only conduct, not speech, has emerged from the challenges to these types of legislation.

The work to bring the legal issues in line with the Fourteenth Amendment has evolved into a list that includes everyone but makes clear what groups are protected. Many who oppose hate crimes legislation use the following type of example to make their case:

A grandmother walking down the street should have at least as much protection under the law as a homosexual who is leaving a “gay” bar. But under “hate crimes” laws that include “sexual orientation,” the same crime would be punished with greater penalties if the victim were a homosexual.⁵

The need to provide civil and criminal protection for certain classes of individuals has pressed legislators to broaden legislation to include the scope of racial, religious, and sexual minorities that experience victimization at high rates. In the above example, if it was proven that the grandmother was beaten because of her age, and that the offender intended to send a message of intimidation to all old people, the offender would receive a harsher, longer sentence, if age was on the list of protected classes.

Some critics of legislation for hate or bias motivated crimes have claimed that we already have laws covering assault, murder and property damage; therefore, we do not need additional laws. Supporters reply that hate crimes legislation only continues an existing differentiation in our laws and penalties.

They claim we should compare the situation with existing laws in which there are differentiations of penalties, based on motivation of the crime, such as: ‘accidental’, or ‘pre-meditation’.

Serious scholars of the law speak of the need for a balance between two, sometimes conflicting necessities of United States jurisprudence:

Hate crimes legislation reflects the collision of two longstanding American traditions. The first is that of bigotry, which is defined as the systematic subjugation of certain minority groups. This bigotry breeds hate and could lead to a bias-motivated crime. As a heterogeneous society, a need has been recently identified to provide special civil and criminal protection for certain classes of individuals from the onslaught of hate that these individuals frequently endure. The second tradition is our philosophical attachment to the freedom of speech. As a free society, the protection of words and opinions from undue

4 Representative Patricia Jones, spoken in a speech at Utah LWV Legislative Wrap-up, 2005
[5www.cwfa.org](http://www.cwfa.org), “Hate Crime Laws: An Assault On Equal Protection”

interference and censure is highly prized in American culture. Hate crimes legislation is an attempt to reconcile these two longstanding traditions.⁶

Attorney General Mark Shurtleff explains it this way, “I can stand up here and call you any horrible name I want, based on your gender or your race or your sexual orientation. I have a right to do that...when I commit a crime against you based on that motivation...they have said that the crime, the criminal motivation, the actual conduct against somebody is not protected speech.” (Appendix 4)

For more legal discussion, the famous *Wisconsin v Mitchell* case, heard before the US Supreme Court, is found in Appendix 5 in this document.

Opposition to Hate Crimes Legislation

The Eagle Forum, a conservative lobbying group, has published “Hate Crimes Talking Points” that sum up the issues for individuals who stand in opposition to hate crimes law. This information comes from an unofficial spokesperson because there is no national or local position printed on the Eagle Forum website.

- Hate crimes law increases the penalty assessed to those who commit a crime for reasons of “bias or prejudice” against certain “politically correct” groups. Under hate crimes law, a homosexual male would receive greater protection from assault than a white eight year old girl.
- Hate crimes law does nothing to criminalize behavior, but instead criminalizes the thought and motivation behind criminal acts.
- Protecting Sexual Orientation Under Law Serves to Further the Gay Agenda. By codifying sexual orientation as a protected attribute under hate crimes law, gay activists will be able to more effectively press their case for recognition of same-sex “marriage” and domestic partner benefits.

The Sutherland Institute, an independent, non-profit, public policy group, states in their opposition:

Enhancing penalties based only on the victim’s participation in certain sexual behavior or membership in a social class is merely a symbolic gesture designed to show favor or sympathy for the behavior or class, unconnected to the purpose of law enforcement. In fact, there is reason to believe that specifying a new legal class such as “sexual orientation” in hate crimes law could create a legal precedent for recognition of such a class in other areas of the law such as non-discrimination or family law. This sends a statement that sexual behavior is analogous to non-behavioral and benign classifications such as race or ancestry.⁷

Support for Hate Crimes Legislation

Many religious, ethnic and minority groups are some of the better known groups who support hate crimes legislation. The ACLU is cautious in its support of hate crimes legislation because of concern for “prosecutorial overreaching....Any proposed legislation should specifically provide

⁶www.paulsjusticepage.com, “Hate Crimes and Hate Speech”

⁷ www.sutherlandinstitute.org/issuesguide/hatecrimesbody

that the requisite discriminatory intent cannot be established merely upon evidence of speech or organizational membership that is unrelated to the crime.”⁸

Utah State Attorney General Mark Shurtleff who has been strongly supportive of hate crimes legislation, states, “When someone commits a hate crime, that crime is against everybody...everybody of that race, everybody of that religion, everybody of that gender.” (Appendix 4)

Equality Utah, a Gay, Lesbian, Bisexual, Transgender political advocacy, non-profit organization says,

Crimes motivated by hatred, against any group, hurt individuals, divide our community, and create a hostile environment.⁹ The state of Utah needs a hate crimes statute that is enforceable, regardless of its form. The best form of Hate Crimes Legislation is one that contains a list of specific groups, including sexual orientation. This approach provides the law enforcement community with the most effective, court-tested approach to enforcing penalties for hate crimes. The legislation that was introduced in the 2006 legislative session, House Bill 90, is a positive step in the right direction that will help Utah’s communities. Once this legislation passes, working towards a legally sound hate crimes statute can continue, using House Bill 90 as the platform to secure its stability.

Equality Utah has a list of 72 organizations that support hate crime legislation found in Appendix 6.¹⁰

Utah Opinion Polls Regarding Hate Crimes:

- A Deseret News poll, conducted in 2005, showed that 64% of Utahns are in favor of hate crimes legislation.¹¹
- According to an Alliance for Unity press release in 2004, polls suggest that as many as 76% of residents want the legislature to pass an effective Hate Crimes Law.¹²

Utah Newspaper Articles (1998 – 2005) Which Reference Hate Crime Legislation:

A tally of newspaper articles in the Deseret News and the Salt Lake Tribune referencing hate crimes from 1998 to 2005 falls into four general categories with the following distribution:

1. First Amendment Concerns: There were twenty direct interview quotes expressing concern that hate crime legislation violates constitutional rights to freedom of expression.
2. Social Message and Law Enforcement Tool: Forty statements showed strong support for legislation that would enhance penalties for hate crimes and send a strong message that we do not want “this kind” of behavior in our communities. In general these statements of support were in the form of “moral outrage” that did little to address the constitutionality of the kinds of behavior that the speaker sought to deter.
3. Punishing Thought: Seventeen individuals spoke directly to their concerns that hate crimes legislation punishes thought.

8 www.acluutah.org, “Hate Crime Legislation”

9 www.equalityutah.org

10 <http://deseretnews.com/dn/view/0,1249,635186461,00.html>

11 <http://slmetro.com/2005/4/local03.shtml>

12 www.equalityutah.org

4. Groups: Assertions about “group inclusion and exclusion” were equally divided. Fifteen statements supported legislation, which listed groups. Fourteen statements expressed concern for group inclusion.

Issue	Support	Concern
First Amendment Constitutionality of Hate Crime Legislation	0	29
Social Message and Law Enforcement Tool	40	0
Listing of “Groups” in Legislation	15	14
Hate Crime Legislation Punishes Thought	0	17
Totals	55	59

Appendix 2 provides the text and lists the articles used for this tally.

National Hate Crimes Statistics

In 1990, the FBI was mandated by the United States Congress to start collecting records of crimes that were committed on the basis of bias. The reporting, however, is voluntary, so hate crimes are probably under-reported. Nevertheless, these statistics are staggering:

- 3,844 (51%) racial incidents and 4,574 (52%) racial offenses
- 1,343 (17%) religious incidents and 1,426 (16%) religious offenses
- 1026 (13%) ethnicity/national origin incidents and 1426 (14%) ethnicity/national origin offenses
- 1,239 (16%) sexual orientation incidents and 1,430 (16%) sexual orientation offenses
- 33 (.04%) disability incidents and 40 (.04%) disability offenses (Appendix 3)

At the same time, the Anti-Defamation League and the National Gay and Lesbian Task Force began collecting their own data regarding bias motivated crimes. While there is a lack of uniformity relating to the definition of a crime and incident, the data gives community leaders and legislators some indication of the presence of a problem.

Utah Hate Crimes Statistics (see also Appendix 3)

2004 Utah Offenders:

1. White: 45%
2. Unknown: 41%
3. American Indian or Native Alaskan: 2%
4. Asian/Pacific Islander: 5%
5. Multi-racial: 7%

2004 Utah Victims:

1. Racial: 41%
2. Ethnic/National Origin: 35%
3. Religious: 16%
4. Sexual Orientation: 8%

3 Basic Legislative Approaches States Have Used

The U.S Department of Justice published *A Policymaker’s Guide to Hate Crimes* in 1997. It outlines 3 basic legislative approaches that states have used to deal with hate crimes in their communities:

- Prohibiting specific intimidating actions

- Prohibiting general behavior motivated by bias
- Enhancing penalties for criminal acts motivated by bias.

A number of states have passed laws prohibiting specific activity only at specific places, while other jurisdictions have passed legislation which would punish any behavior that is motivated by bias. These statutes punish motive and criminal conduct as the same offense. Other jurisdictions have passed statutes creating enhanced penalties when the motivation for an otherwise criminal act is bias.¹³

For a chart of states' hate crime legislation, go to www.adl.org.¹⁴

Conclusion

The hate crime (bias-motivated offenses) study has focused on the issues of free speech, equal protection and public opinion in the state of Utah. In the opinion of the committee, many legislators and attorneys have studied the legal issues and have carefully worded legislation which protects free speech and equal protection under the law. (See Appendix 5)

Utah's public opinion polls have shown that the majority of Utah citizens favor legislation that enhances the penalty of a crime if bias was the motivation or part of the motivation for the crime.

13 U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Assistance

14 http://www.adl.org/learn/hate_crimes_laws/State_Hate_Crime_Statutory_Provision_chart.pdf

Appendix 1

*Hate Crimes: Common Arguments

Oppose Hate Crimes Legislation	Support Hate Crimes Legislation
The legislation is simply not needed. Every crime that they cover is already illegal under existing state and local laws.	Legislation is needed. Crime victims are frequently targeted by strangers because of their gender, perceived sexual orientation, race, religion, etc. Legislation needs to be expanded to take this into consideration.
They are unfair... They grant special consideration to victims of “politically incorrect” crimes. Legislating hate crimes would deny equal protection under the law.	They are fair. The crime is not directed against one person; it is intended to target the victim’s whole group. These are “message crimes:” violence intended to terrorize a group within a community.
Legislation is a political vehicle for homosexual activists. It will advance the claim that homosexuality is normal and natural.	All groups that are targeted by hate crimes are in need of protection. In earlier decades, civil rights legislation had a devastating effect on racial bigotry. Including sexual orientation will probably have a devastating effect on homophobia within the country.
Hate crimes legislation would infringe on free speech. The government has no business creating a special class of crime victims. If gay-bashing becomes a hate crime we will lose freedom of religion for those who see homosexuality as a moral issue. Beliefs, thoughts and speech would be criminalized.	Hate crimes legislation would not limit freedom of speech. In order for hate crime legislation to be applied in a specific case, a criminal act must first be committed. This legislation does not prosecute hateful thoughts—it allows hateful acts to be punished. Inflicting harm or injury based on hate is not protected speech.
Such legislation should only apply to personal characteristics that are beyond the individuals’ control, like gender, race, national origin, color, and disability. Homosexuality is a chosen and changeable preference.	Denying sexual orientation as a protected class because it is perceived as chosen behavior cannot be supported because: <ul style="list-style-type: none"> ▪ There is growing evidence that sexual orientation is not chosen; ▪ Religion is already a protected class and is clearly chosen and changeable.

*Adapted from www.religioustolerance.org

Appendix 2

Quotes from Archived Utah Newspaper Articles Regarding Hate Crimes Legislation

Hate crimes are a political label that seeks strategic political or legal advantage through conferral of victimized or disadvantaged status. The truth is that all victims of violent crime deserve compassion and protection, none more than another.

Desert News Editorial, 1998

The law includes sufficient categories of felonies and misdemeanors to weigh the seriousness of offenses to mete out appropriate punishment.

(Ibid)

There is no worthy motive. Legal punishment in all cases should be based on overt actions and evidence without having to split hairs regarding motivation for the act.

(Ibid)

Our habit of judging sin and making it a government crime is against the very nature of our cherished values as home of the free. It appears to me that the only ones who object to hate crime legislation are haters or are uninformed about these people.

Christian Bear, SLC 1998

Bullies have always picked on the small and weak; such "tough" cowards attack the weak the crippled, the elderly and the defenseless. One could argue that all crimes are hate crimes.

Steve Barrowes, SLC 1998

If it is considered a hate crime to hurt gay people or to make disparaging remarks about the value of their lives, what do you call efforts to persecute other non-traditionalists, such as polygamists, home schoolers, gun carriers, selective dietarians and religionists? If the answer is motive, what do you fear and why? Is it justifiable to imprison or disrupt the life of someone just because you don't agree with his beliefs? When had this happened historically? Are the people in general willing to accept these ever-encroaching restrictions on what they can and can't do? If so, where is our freedom? It is my hope that everyone will consider these questions and answer them for yourselves.

Lory J. Whicker, Manti 1998

Most people (in Utah) are still buying into the notion that we're asking for special rights or special protection. We're not, we're asking for equal protection.

David Thometz, State Democrat Chair, Utah 1998

Salt Lake and Utah, I am pleading with you to wake up and see the signs of the destruction before it is too late. There is a plague going on, and we must stop it before it spreads further. We must all come together for the good of our state.

Jeanetta Williams

We have to face realities. There are hate groups out there targeting people for their ethnic background, color or lifestyle. We need to face that fact... We can't duck that.

Sen. Pete Suazo, 1999

Why are we even considering something like this? All people deserve to be protected equally... Utah law should not protect illegal or immoral behavior (sexual orientation).

Gayle Ruzika, 1999

It's a great step backward. Let's not single out members of particular groups for treatment different than any other person. I believe that it sands us down a path I don't think we will want to go

Terry Spencer, 1999

There is no such thing as a hate crime if it's not in contrast to any other crime. All crimes represent some level of hate. If not, we should specify the "love crimes" as well. The effort to define and redefine hate crimes will ultimately be futile. Instead of going down this endless path, we should focus on having consistent punishment to fit the crime. To tout the phrase "hate crime" is politically correct, I realize, but why does "correct" need an adjective?

Clark Richardson, Kaysville, 2000

Let's don't select some groups to receive extra protection and leave the rest us out of it.

Gayle Ruzika, 2000

I have a real problem wit the bill. It seems like we are trying to enhance a penalty because I (or any individual) think one-way or another.

Sen. Al Mansell, 2000

What if it looks like it was hate but it wasn't. That's the concern I have... We're doing this because of what someone thought. I don't think that we can always show what someone's thought is.

Sen. Parelly Hellewell, 2000

We need this bill to combat an influx of hate crimes in the past decade. Some groups are now targeting Utah because they know we don't have a workable law.

Sen. Ron Allen, 2000

I don't think that we should punish people for the crime of thinking.

Gayle Ruzika, 2000

There is a difference in motive. For example, those who torture and kill victims could be sentenced to death instead of just life in sentence for murder.

Rep. Patrice Arent, 2000

There is precious little evidence showing that there is a widespread problem with state and local police and prosecutors refusing to enforce law when the victim is black, or a woman, or gay or disabled.

Sen. Orrin Hatch, 2000

It doesn't matter what group a person is perceived to belong to our actually belongs to. I f a person slugged a reporter because he didn't like the press, for example, the punishment would be enhanced.

Sen. Pete Suazo, 2000

If the note (around the rock) says "We don't want your kind living in our neighborhood," it changes the whole nature of the offense.

Sen. Pete Suazo, 2001

We are beginning to inquire into how a person believes and feels, and I don't believe that should be the extent of the criminal law.

Sen. David Gladwell, 2001

I've never met a love crime. The entire criminal code is an anti-hate code.

(Ibid)

I understand that there are racist people out there. There are already laws out there to cover all that... I believe that we are putting a layer of legislation over an already existing layer that is adequate.

Sen. Chris Butters, 2001

Our inaction today can be a signal to those purveyors of hate and violence that we just don't care.

Sen. Pete Suazo, 2001

I'm somewhat insulted in saying that those who vote no don't care... We don't change beliefs and we don't change attitudes because of what we do here.

Sen. Leonard Blackham

I still have concerns. We should be drawing people together rather than drawing them apart.

Sen. Michael Waddoups

My problem with the bill is not with the punishment, it's that we are breaking society into certain groups.

House Speaker, Marty Stephens 2001

Equality under the law—all men are created equal—this concept will be diminished rather than enhanced should the courts become entangled in judging and punishing motive in addition to the actual crime...Rather than embracing a uniform application of the law, such legislation will further separate and give permanent status to different applications of the law based on race. This is not a cure for racism: it is a fuel to guarantee its permanent continuance...Hate crimes legislation would create more problems than it would solve, and it runs contrary to the concept of equality and uniform application of law.

F.T. Gardiner, Provo 2001

There are thoughts so repugnant that even having them is a crime. Once that precedent is set, it is a short hop for the government to begin outlawing and punishing any thought it doesn't like. There are other solutions to the problems of hate that creating thought crimes. Legislators who are willing to vote for law that is wrong in principle are either evil or mislead. If they will not change or cannot be taught, they must be replaced...

H. Richard Bennion, South Jordan 2001

Utah's general legislative session is over. Regarding SB37 I am reminded of Sir Thomas Mores warning to his future son-in-law, Roper, in "A Man for All Season" More's family was anxious for More to arrest Richard Rich, not because he had broken a law but because he was "bad." More disagreed:

More: And go he should if he were the Devil himself until he broke the law.

Roper: So now, you would give the devil the benefit of law?

More: Yes. What would you do? Cut a great road through the law to get after the devil?

Roper: I would cut down every tree in England to do that.

More: Oh? And when the last law was down and the Devil turned around on you, where would you hide..."I do not support SB37, however well intentioned, because it compromises important protections. It cuts a road through the law to get at the devil of hate... Perhaps even more important, it strikes at the heart of First Amendment protections. SB37's sponsor argues that throwing a rock through a window with a note, "We don't want your kind," affects not only the victim but the larger group to which he belongs and should therefore be punished more severely than just throwing the rock through the window.

However, we should remember that the same statement said in protest on a street corner or printed in a newspaper or written on a banner or distributed in flier or acted out on TV or communicated in a hundred other ways would be protected speech. Yet doing all of these things would dramatically affect the target group...If throwing a rock through a window is punishable by 10 days in jail and throwing a rock with the note, "We don't want your kind," by 15 days, what is the extra five days punishing—the act or the thought? Our legal traditions have always protected

one's right to believe as he chooses. Our law should not punish beliefs, not even to get at the Devil.

Greg Hawkins, Salt Lake Attorney 2001

I am so embarrassed to find out that I am living in a state that has not yet bothered to pass a hate crime bill. Its necessity is unfortunate, but the time is here. Please think about it. We are all minorities in one way or another, and none of us want to be persecuted for who and what we are! Please call your legislators and insist on compassion in the world.

Kathleen Arvold, Salt Lake City 2001

Unless a law imposes strict liability, all crimes must be predicated upon a "state of mind" essential to form the necessary intent to satisfy an element of the offense. Thus, all crimes are, to a degree, predicated upon thought. The hate crime bill is no different. Without an overt act accompanied by the requisite intent, there is no crime. Why the opponents of this bill continue to propagate the false notion that we are punishing only "thought" or impinging on the First Amendment is a mystery to me and other criminal lawyers.

John T. Nielson, SLC 2001

The problem is that hate crime legislation goes beyond punishing an already criminal act and punishes an opinion associated with that act as well. We must have total freedom of opinion and expression thereof in a free society, and only when the opinion leads to an egregious harm can a person be punished, and then only for the act, not for the opinion itself.

Spencer Morgan

People should for no small reason be scared of the double standard. Hate crime legislation moves our society backward to the day when people were treated differently based on their race or political beliefs. Laws should be equally harsh on all villains.

Craig Russell

By trying to make everything politically correct you usually make everything incorrect. The minority groups that are making issues of minority issues have become divisive anyway.

Rep. Oda

Aren't all crimes committed out of hate? Anyone who commits murder, abuse, rape, etc. should be viewed as n equal among their peers in idiocy, not who is more stupid than the other. Our politicians should spend their time and our money coming up with laws punishing killers, not racists.

Tiffany Kaye Whitney, 2002

No amount of lobbying will sway legislative leaders to take on hate crimes this year. They can bring all the attention to it that they want. I think that people view this as un-American... This isn't the kind of thing that people are going to support.

Senate Majority Leader Steve Poulton

I personally think it creates a bigger divide.

Sen. Paul Ray

Laws against crimes (that are committed against groups), to me, are always going to fail.

Senator John Valentine

Its not going away because the problem in the community is not going away.

Representative David Litvack

The hate crimes of today are systemic. It is the refusal to adequately fund education for minority communities. It is lack of health care for immigrant and bilingual children. It is the refusal to acknowledge the community, even in the face of census data. It is the legislative gerrymandering that inhibits the minority community from political cohesion. These are the hate crimes of this decade. Hate crimes of today are aimed at groups not individuals. These acts of systemic

omission impact our minority communities more than the overt physical crime by individual racists. Worse yet, these acts are socially acceptable and are perpetuated by officials who pass laws and regulations and under fund services. The minority community of today must combat today's racism with new ideas, not 60's rhetoric and failed solutions.

Mike Martinez

It's been heard for years... What hasn't been studied...? I hate this subject because I always end up getting criticized for it.

Sen. Chris Butters

We're not talking about special protections and special rights, we are talking about equal protection and equal rights.

Rep. David Litvack

Does the hate crimes legislation so vehemently pushed by liberals include all Americans are just those that fall under a morally deficient politically popular group? I cannot understand the hypocrisy the ACLU so blatantly shows. They discriminate against conservatives and religious groups while they tout a title that claims to defend civil liberties. This is proof again that liberalism is not an ideology of progress but an exclusionary philosophy of moral digression.

Nikki Richards

This is about accountability for those who commit crimes solely out of hatred.

Rep. David Litvack

When someone commits a hate crime, that crime is against everybody... everybody of that race, everybody of that religion, everybody of that gender.

Attorney General Mark Shurtleff

My heart breaks and my heart aches, but I do not believe this bill does what it was intended to do... the question is whether the people of Utah want to make this their standard.

Rep. LaVar Christensen

It terrorizes, it traumatizes, it chills an entire community...I have come to understand that there is very little difference between hate crimes and terrorism. I think that it is an accurate and correction principle that we enhance the penalty.

Rep. Jim Ferrin

This is the most dangerous piece of legislation this year.

Gayle Ruzika

Passing the bill is the right message to send.

Marco Diaz

I don't understand why we have all felt so threatened by this legislation. Why do we think that we cannot support the constitution and this bill?...We have put it in a form that we can all feel good about.. but I personally think that it was a cop-out and a sham. We have not served our constituents.

Rep. Susan Lawrence

I am against the current bill being considered in the Legislature because it violates the constitutional principle that all men are created equal. I don't think it is more wrong to hit one kind of a person than another. It is wrong to hit people, period. When the law raises some groups above others, in the penalties attached for hitting them, I think it creates inequalities that will lead to the same confusion and contentions that has resulted from the affirmative-action program.

James Lee

The hate crimes bill being debated by the Utah State Legislature has some serious flaws.

First, it is arbitrary in that it covers crimes that intimidate certain “politically correct” groups.

Second, by using the term “sexual orientation,” the law promotes the normalization of homosexuality by implying that it is a natural and unchanging characteristic. A more correct term would be “same-sex addiction.”

The law could be rewritten to protect those with physical or mental disabilities and could specifically include same-sex addiction in the category. While this would upset militants it would be accepted by those who genuinely want to stop hate-motivated violence.

David Anderson

Tell me a crime that is not a hate crime. In reality, any crime is a crime against humanity. I am very dismayed and disappointed and disheartened that this legislation is even before us.

Rep. Margaret Dayton

Only the person committing a crime knows what the reason is for doing it. If penalties need to be increased, then increase them for everyone, not just for those who commit a crime against a certain group...Every crime is a hate crime, so a hate crime bill should never be considered.

Joseph K. Lawson

The root cause is never going to be taken care of by simple punishment. We need to get beyond punishment to change those kinds of attitudes. Sadly though... I'll take whatever I can get in my arsenal.

Theresa Martinez

Law enforcement never met an enhancement it didn't like. I think that the very group that will feel this penalty enhancement is the very group that the law is seeking to protect.

Stephen Clark

It is a bad law. Any bill or law that carries different punishments for certain categories of people should be opposed because it set a bad precedent. We want justice to be blind, but hate crime law based on categories seems the reverse of that.

Rep. Chad Bennion

Hate crime laws are a form of discrimination. As a racial minority, should a crime against me be more despicable than a crime against my wife who is not? The thought offends me. If you want to punish criminals for violence or intimidation, by all means do so. I have no problem with stiffer punishment for violent crimes. To single out a crime because it had a different motive adds nothing to the fact that it is still a crime.

Rodger Pitts, Orem

...at the time of Christ's improper midnight trial and subsequent crucifixion, there were Jewish laws on the books making public incitement to riot and blasphemy illegal. But something else was at play here among those who opposed what Christ taught and stood for: Hate. Hate provided the incentive to ignore existing law, focus on the man himself and what he was, and extract a bigot's fearful revenge. Seems like a pretty good argument for the need of hate crime legislation them as well as now.

David E. hardy, Park City

What the Illinois people did to LDS men, women and children in 1844 wasn't considered a hate crime since they didn't have laws on the books. In that day, as in this sate now, you are only charged or convicted for a crime, without more severe penalties if hate was a motivation. Our Legislature seems to have forgotten what happened to their ancestors and what can and does happen today.

Mark Swanson

I can't see a belief in the mind can be prosecuted unless you take action.

Merrill Cook

I applaud the Utah State Legislature for continuing to resist the growing pressures urging for enactment of hate crime legislation. By their very nature, such laws are discriminatory—the very thing that proponents of such laws are trying to abolish. The laws fly in the face of constitutional justice. By its specific language, the 14th amendment grants no special privileges or redress to any individual or group of individuals. If we are going to have equal protection under the law, we must also accept the premise of equal punishment.

Joseph H. Evans

I find it ironic that in its desperation to be less “conservative” the Desert Morning News has embraced the most stereotypically right-wing of left-wing goals: punishing thoughts. The more “entrenched” the News becomes in advocating hate crime legislation, the more suspicious I become of the potential for abuse. The implication that anyone who opposes hate crime legislation is racist/sexist/anti-Semite/homophobic is a politically correct method of bullying people into silence.

Doug Dansie

I favor hate crime legislation that punishes crimes motivated by bias or prejudice against a victim’s race, color, gender, disability, age, nationality, ancestry, sexual orientation or religion.

Scott Matheson

I have major concerns with any hate crime legislation. The first and 14th amendments are essential to our way of life. Do hate crimes punish actions or the thoughts behind the actions? We should not attempt to be thought police. In regard to the 14th amendment, it guarantees “equal protection” under the law. With hate crimes legislation are we creating second-class victims? Is it more egregious for someone to be robbed because of his race rather than he wears a nice coat? We need to be very careful in any discussion about hate crimes that we do not trample the very constitutional rights our country depends upon to deliver justice to our society.

Jon Huntsman

I would not have a problem with hate crime legislation if it covered everyone—it doesn’t. It circles the wagons particularly around gays.

Sen. Chris Butters

It’s insane—we’re not even considering laws that are equal. They talk about discrimination, but hate crimes are laws that discriminate against certain people... who are penalized based on the things they are thinking while committing a crime.

Gayle Ruzicka

I would urge Utah legislators to consider carefully the hate crimes bill before making it a law in Utah. Is it possible that the Utah hate-crime legislation could send religious leaders to prison for teaching against same-sex unions and in favor of traditional marriage?

Marcia Ogden

Could this big push really be aimed at taking away my rights as a Christian? I have recently read about incidents of pastors being arrested for preaching that homosexuality is a sin. I should have the right to put a voice to my belief without fear of being arrested because someone else thinks I am teaching hate. Their right to sin and my right to call it a sin are both protected if we don’t have hate crime laws.

Betty Rowsell

Our state legislature has the opportunity to combat terrorism by approving HB 50, also known as the “hate crimes” bill. Just as those behind the atrocities of 9/11 intended to terrorize and victimize all American/Westerners, “hate crimes” perpetrators do not intend to harm only their immediate victims but all persons possessing the hated attribute. The intent and effect is widespread terrorism.

Carina Kuesterman Dillion

We all have the potential for becoming targets. I hope people will see that.

Sen. Karen Hale

I am sponsoring this bill on gut instinct for something that I feel is right.

Sen. Karen Hale

I would hate for my son to suffer the same kind of treatment because he was hated, and not have the same protection under the law because he was hated for the wrong reason... I am fundamentally opposed to giving certain people special protection under the law.

Sen. Mark Madsen

We in law enforcement support this bill. We believe we need this tool in order to adequately defend and protect everyone in this state.

Attorney General Mark Shurtleff

A crime is a crime is a crime. Let's let the courts do their job. Let's enforce the existing laws.

Rep. Oda

I give credence to what my constituents say. On this issue my constituents were heavily opposed to it.

Rep. Wayne Harper

We never treat a crime as a crime.

Rep. David Litvack

Once again our lawmakers had the chance to speak loudly against hate and bigotry and the crimes committed because of them. Once again they choose not to. Perhaps, indeed, "a crime is a crime is a crime."

Julene E. Fisher

I don't know what legislators who are opposing it are so afraid of. I really don't know.

Jeanetta Williams

The will of the people was not done today. When a strong majority of Utahns say they want an enforceable hate crime statute with named groups and when the law enforcement community is pushing hard for such a measure, it says loud and clear that law makers have no respect for the opinions or the well being of the people who elected them. Apparently hypocrisy isn't a moral value that they care about too much. If they are looking to tell our children its alright to discriminate and hate, they're doing darn good job. If they are looking to businesses that are looking to relocate here that their employees wont be welcome here, they are doing an even better job.

Michael Mitchell

Appendix 3 Hate Crimes Statistics

In Utah in 2004, there were a total of 56 reported offenses that fell into the category of hate crime as defined as “a criminal offense against a person or property which is motivated, in whole or in part, by the offender’s bias against a race, religion, ethnic/national origin group or sexual orientation group.”

2004 Utah Offenders:

45% of the offenders were white.
The race of another 41% is unknown.
2% of the offenders were American Indian or Native Alaskan.
5% of the offenders were Asian/Pacific Islander.
7% of the offenders were multi-racial.

2004 Utah Victims:

Racial: 41%
Ethnic/National Origin: 35%
Religious: 16%
Sexual Orientation: 8%

National Statistics:

The FBI compiles a **Uniform Crime Reports** document every year. The 2003 document reported:

3,844 (51%) racial incidents and 4,574 (52%) racial offenses
1,343 (17%) religious incidents and 1,426 (16%) religious offenses
1026 (13%) ethnicity/national origin incidents and 1426 (14%) ethnicity/national origin offenses
1,239 (16%) sexual orientation incidents and 1430 (16%) sexual orientation offenses (Of that number, 14 were anti-heterosexual incidents and 15 anti-heterosexual offenses).
33 (.04%) disability incidents and 40 (.04%) disability offenses
4 (.005%) multiple bias incidents and 9 (.01%) multiple bias offenses

(Source: www.print.infoplease.com, Society and Culture --- Law Enforcement and Crime --- Crime Data)

Appendix 4
League of Women Voters Hate Crimes Study
Interview with Mark Shurtleff, Utah Attorney General
July 6, 2005
Summary of Meeting Transcript

Those present:

(MS)	Mark Shurtleff
(BF)	Bonnie Fernandez
(JS)	Joycelynn Straight
(MF)	Marie Fulmer
(ML)	Missy Larsen
(P)	Pat Klentzman

Question # 1 (BF) --- Will new legislation have a “list” of groups or not? What is the current thinking and rationale?

MS --- The final decision has not been made yet. They had a summit with about 12 people participating, including former Chief Justice Zimmerman, a U of U law professor, legislators, etc. They took a look at 4 possible bills. The first one was go back with the same proposal and just keep plugging away. They kind of settled on “Proposal C”. M.S. can't give them to us right now, because ultimately it will be the sponsor's decision whether to go with M.S.'s proposal, which gets away from the group listing, or just go back and fight the fight every year.

We all know that the legislation that has been proposed every year (that has lists and sexual orientation) is the only true, fair hate crimes bill. And it is the one that has been upheld by the U.S. Supreme Court in a unanimous decision. *(He distributed copies to those present).*

What the current thinking and rationale is on the current proposal....M.S. looked at the Georgia option. They have the same problem (their legislature won't pass a bill with sexual orientation). So they passed a bill with a one-step penalty enhancement if you commit a crime based on bias or prejudice, period. Utah legislator (Sen. James Evans), two sessions ago was looking at the same option, and we told him then that it was going to be ruled unconstitutionally vague. And sure enough, the Georgia Supreme Court said that it's too vague....bias or prejudice against whom? They said you have to go to look at more specifics, as ruled by the Supreme Court in Wisconsin vs. Mitchell.

M.S. came up with going back to the Pete Suazo bill, which says “bias or prejudice against the group to which the victim belongs” (that is a little more specific than the Georgia law, because it has to be against a “group to which the victim belongs”). It's still probably not enough, so M.S. went back to Wisconsin vs. Mitchell *(see page 2201)*...because it's not just that particular victim that feels harmed, it's the whole community.

Paul Boyden, over the statewide association of public attorneys, is good at drafting legislation and he took a stab at it. What M.S. ended up with is “the one- step penalty enhancement will apply if the jury or the judge finds beyond a reasonable doubt that the defendant at the time of committing the offense intentionally selected the victim because of a perceived or actual attributes of a group to which the victim belongs”. This “Perceived or actual attributes of a group” is much more specific than Georgia; it's not as good as we'd like in listing categories, but to try to bring in the category concept.

Now, as a prosecutor, how am I going to prove this particular thing? Now, if I have this pass, I am going to go to the judge and in the law we have something called judicial notice. Courts can

take 'judicial notice' of another courts ruling. And it's really easy to take judicial notice of a Supreme Court decision or finding. Take judicial notice of the Supreme Court that this type of crime that I have before you today is one that is one of these things because it is bias motivated. I meet that burden.

So, what M.S. is doing now is shopping it with several law professors. We're trying to get a couple of B.Y.U. professors; we've got the U of U professor and he's going to get a couple more U professors (constitutional lawyers), and they have colleagues at B.Y.U. who they believe will agree to look at this and give their take on it...make maybe some suggested changes to this concept to make it more likely to succeed a constitutional challenge. That's where we're at right now. We're working on that.

BF --- So this is one proposal. Is it Litvack that's going to carry it again?

MS --- There is some talk about letting the Republicans do it, or at the very least have Litvack and get Ferrin to co-sponsor. That was the year we got it passed the House...because that conservative Republican from Utah County as a co-sponsor. So we'll have at least that. And Ferrin's actually said, and so has Karen Hale, if it is going to take having a Republican bill, for political reasons, then we don't care; we just want to get it passed.

BF --- But you have determined that with a list in there, no matter how we structure it (unless we take out sexual orientation) that it will not pass?

MS --- That was the consensus of the group.

BF --- Which is why you want to take a different approach?

MS --- Ultimately, it comes down to: if it doesn't do what we want it to do, then we just keep battling and maybe it will take 3 or 4 more years, and a change in the legislature to get this passed. But there is some thought that if we can pass this different bill, it would take 2 or 3 years, but it will be challenged by somebody. The first time I charge somebody, they are going to challenge it as unconstitutionally vague, and it may be 3 years and we get a Supreme Court decision saying "not good enough". Then we come back and say "see, we've tried everything we can. The only possible way we can pass one is if we have the categories listed." And you start over and maybe things have changed by then. At least it gives it to us. At least you give me, a prosecutor, a law that I can then use to prosecute somebody...charge them with the enhanced penalty if I believe I can prove it was based on bias or prejudice.

BF --- Do you believe something like this will have enough teeth in it?

MS --- Yes, I do. Is it the best? No. The best is the categories because prosecutors like it [to be] very clear before we charge somebody....

The other option is to do this now, and start looking into a referendum. Take it to the people; take the list to the people. The polls show that the majority of Utahns will support a list even if it includes sexual orientation. So the legislators apparently aren't listening to those polls. That's a very difficult process, and the only way you do it anymore these days is to spend a lot of money, and you've got to pay people to collect signatures.

Question # 2: (BF) ---- List or no list, does this legislation violate the Constitution, either way?

MS ----Absolutely not.

BF ---- Either way

No way shape or form. Well, it's a stretch, but the Georgia Supreme Court said it was "unconstitutionally vague." In effect over the years in criminal jurisprudence, the courts have held, that in fairness to somebody you want to charge with a crime, [that person] needs to know what conduct constitutes a crime. When you pass laws that criminalize conduct or even puts an enhanced penalty on conduct (by the way, again, we need to make this clear, this is not a new crime it is simply an enhanced penalty for a crime because the impact is more serious because of those categories, those things I mentioned). So, the only way possible way that doing a bill that doesn't have a list could be ruled unconstitutional could be if it is too vague."

BF --- Okay, but where does free speech cross that line?

MS --- All the criticisms of the bill get to it being unconstitutional, or that it violates free speech/thought. They also say it violates the equal protection clause, only giving protection to certain select groups. Those are the arguments you're gonna have.

BF --- What's the answer?

MS --- The answer is...first of all it does not violate free speech...it is not a violation of free speech, according to the Supreme Court decision, 9-0, [Wisconsin v Mitchell], written by Chief Justice Rehnquist, one of the conservatives on the bench. He made it very clear that we are not punishing thought, we are not punishing speech. I can stand up here and call you any horrible name I want, based on your gender or your race or your sexual orientation. I have a right to do that...when I commit a crime against you based on that motivation,... they have said that the crime, the criminal motivation, the actual conduct against somebody is not protected speech.

BF --- The assault, vandalism...

MS --- Right. You have committed a crime. Never have we allowed people to commit crime and keep free speech. Your free speech stops where my nose begins.

BF --- Right, but there is this distinction there. You're assaulting somebody or you're committing a crime against their property in conjunction with what you're saying. Where does what you're saying cross the line into a hate crime that deserves the enhanced penalty. It's not just what you are thinking, you are saying something but maybe the manner in which you are saying it does not necessarily constitute that leap into hate crime.

MS --- That's why we say we are not creating a new crime. You have to commit a crime that's already a crime. I have to prove, not what you said, although what you said is evidence of what your motive is. I have to prove your motive. Here's another objection: how do you prove motive? We do it everyday in the law. We prove motive. It fact motive is often and has been for hundreds of years a reason to enhance the penalty. What was motivating you? Were you motivated out of passion at the moment because you found your wife in bed with another man? It's a less punishment than if you are motivated by greed...you killed this person to obtain financial benefit...you are going to be punished differently for the same crime, murder. So, we always have to try and prove motive which goes into their mind. Again, they say, "Well you are going to read people's thoughts." No, no prosecutor is gonna read somebody's thoughts. We have to have physical manifestation, verbally, something in writing at the time to prove that they were motivated because of their bias or prejudice against that group.

BF --- If you say something such as, "I hate you and your kind", that's a little vague.

MS --- If I am punching you in the nose while I'm saying "I hate you and your kind," it makes it more difficult for me to prosecute or prove, but I think I would take that case.

BF ---- It could be any number of things he is referring to.

MS --- That's true. I'm going to have to have something that's going to help me with that if I'm going to get the enhanced penalty...Prosecutors don't like to lose. I can't believe how many times I have sat around this table and argue with my prosecutors. "We don't know if we can prove the case beyond a reasonable doubt." Sometimes you take a risk. The only cases you're going to have prosecutors bring are the ones: "You S.O.B. n..." That's when you say, "Okay, I've got enough there."

BF --- Okay, that's what I was getting at: some kind of distinguishing factor there that separates what you say or whatever the evidence is that makes it a hate crime that deserves the enhanced penalty.

MF --- That would be up to the court and the jury to decide. The sticking point for me though is the law. I just want to be sure I understand what you said: when you commit a crime, free speech is suspended. Is that right?

MS --- Free speech. Yes. That's right. Again, the way the court said it, they use that metaphor: Your free speech ends where my nose begins. You can sit there and scream in my face, but if you commit a crime you are not protected by the constitution.

MF --- Okay, good. This is what I need to be able to say to people.

MS --- Absolutely. It's probably been mislabeled "hate crime." People [ask], "Is it a crime to hate?" No, we're not saying that. You'll notice we don't use hate; it's bias or hatred against that person's traits because of the group they belong. It's even perceived traits. So, if someone beats somebody up because they think they are gay and we can prove they are doing it because they are gay even if they are not gay, it's not a defense. It's what they were attempting to do. Because the victim, even though he's not gay, gay people are gonna be saying, "Hey! There's a person out here who is gay-bashing or is going to beat somebody up, I may be victimized! I have been victimized! Even though you haven't thrown a punch at me."

BF --- None of us have liked the hate crime moniker.

MS --- We haven't called it hate crimes forever.

BF --- That's what everyone knows it as.

ML --- We agreed to go with bias motivated offense.

MS --- The press is going to use hate crimes and that is what they are going to use. Every chance I get, I say we are not talking about hate crimes, we're not creating a new category of crime; this is an enhancement based on your bias or prejudice.

Does that answer the free speech issue?

MF --- I know all I need to know. You commit a crime, you have no protected speech. That's what I need to say to people.

MS --- Let me get to one other constitutional issue, equal protection, because you will hear this too. They'll say, "With categories you are...treating certain people that you have decided to list, you are treating them differently than everybody else. You shouldn't have categories and just protect those categories." The Supreme Court's response to that came in the Wisconsin case. Everybody has a gender...everybody has a race, everybody has a national origin, everybody has a sexual orientation. It applies to everybody...then they say, "Why don't we include coaches, politicians. Why don't we include all these additional groups?" One reason for going to the group designation is that it takes away that argument. It does include everyone.

These enhancements came about because it is certain that certain groups were being targeted because of bias or prejudice, certain groups were being victimized. The issue in those days was

race and it still is, by far. Second is religion. Third is ...sexual orientation...it's growing. It is clearly the fastest growing hate crime. It is a group of people that is clearly being targeted and victimized because of bias or prejudice against that group.

MF --- We have the statistics to prove it because we have Uniform Crime Reporting.

MS --- Right. The federal government has been doing that for 10 or 15 years.

Question #3: (BF) --- What is the distinguishing bright line between hate crimes and other crimes?

MS --- That's good because people don't understand and they will say...a crime is a crime. Or every crime is a hate crime. Show me a love crime. Most crimes are not committed because of hate. It is financial, greed...There are all kinds of motives for people committing crimes...Blackstone was cited by the founding fathers. And the Supreme Court decided to go back to Blackstone at the bottom of that paragraph [we read]. Blackstone said long ago, "It is but reasonable that crimes of a different nature be more severely punished which are the most destructive a public safety and happiness." It is in the same paragraph where the Court is saying a crime based on bias or prejudice is more serious. If I can prove a crime based on bias or prejudiced based on who they are, suddenly the victims extend way beyond you. I use September 11. I didn't know any of those individuals. Did I feel victimized? Did America? Did we all feel like, "Hey!" My kids were scared. We all went through, "Do they hate us?" We all wanted revenge...even though we weren't personally targeted. That's the point. If you commit a crime against someone and it is proven it's because they are black or gay or female, [others of the same group] feel victimized even though [they] live miles away or in another part of the state. So, it is more serious, it is more destructive of public safety and happiness, therefore it is appropriate to enhance the penalty. We have accepted in this country that because of motive, or intent, same crime, same victim, you have a higher penalty, you need to be locked up longer. I want to lock up that person longer.

ML --- There you're talking about the different degrees: first, second, third.

MS --- Yes. If I can show this: that you committed assault that's a third degree felony, this makes it a second degree...we do it all the time. If I kill somebody because I'm drunk driving down the road, and I run over your child, they're still dead, but the time that I serve is going to be a lot different than that s.o.b. who murdered that family and that boy. He's probably going to get the death penalty compared to a misdemeanor offense.

Question #4: (BF) --- Hate crimes, gang related crimes.

MS --- We have gang enhancements.

BF --- We do? I didn't know that.

MS --- If we can prove that you commit a crime against somebody because you were a gang member and it was against another gang member then there is an enhanced penalty. The reason we do that is that gang members beat up on gang members. It's hopefully a deterrent. If you're going to do something because you belong to a gang, I want you locked up longer. It depends. You know, if you have a Hispanic gang who hates blacks and you can prove it wasn't just a gang-on-gang, but it was bias and prejudice against the black person, because of their race, then you may even have two enhancements: one for the gang crime and one for the hate crime.

BF --- Okay. You could have two enhancements?

MS --- What the judge would probably do is give one or the other. You would not go from a third to a first degree, usually.

BF --- But, gang related crimes in general, why are they not hate crimes?

MS --- Usually, gang crimes are motivated by financial reasons. It could be territorial. Not all gangs are based on race. Currently, there are some gangs that are clearly based on race. Most of the violence that occurs between gangs are the same race. You have different types of Hispanic gangs that are each fighting each other...It's more about friendship and teamwork...loyalty, usually to an area. Again, there are some gangs that are clearly racist gangs. White Aryan Nation gang...will attack someone because of the color of their skin. In those cases, you would probably do the hate crime enhancement...if you could.

Question # 5: (BF) --- Because it is subjective whether or not a hate crime exists, how can you assure that the law is applied fairly and uniformly?

MS --- That's why you have the standards I talked about, that's why you have to have some evidence at the time the crime was committed...and I can prove beyond a reasonable doubt certain factors. It got to the point where we are saying that it's not enough to prove that you belong to the Aryan Nation. You have to prove that it was that reason and that motive. You have to have verbal or written...or some other type of evidence that I can prove it.

BF --- Will there be something in the legislation that will give structure to how the various local jurisdictions apply the evidence collected?

MS --- No more so than any other criminal law. We can't write our laws so specific. You are always going to have to rely on prosecutorial discretion, law enforcement discretion. It is something we deal with in every single case that we have. One prosecutor will choose not to prosecute a case and another will say, "I'm gonna do it." I face that all the time because when a DA or County Attorney says, "I don't want to prosecute this" for whatever reason, people come to us and I have to decide whether to go ahead and do it and I can. I can exercise my discretion to charge a crime. It's what we have in our system and what we live with every day.

BF --- If a crime is committed and the defense comes before the court and says, "My client did the same thing that happened over here and they didn't prosecute this person..."

MS --- No more than they do every day of the week.

ML --- It's very common practice.

MS --- It's common practice; we live with that. With every type of crime there are some who will take the case and some who won't. It may be one of the flaws in an imperfect system, but it's the system we have.

PK --- So uneven application is a known fact and that's just it.

MS --- That's it. You may not like it.

BF --- It makes you uncomfortable because you want even application.

MS --- The argument would be, "Hey. Ultimately, you have a state Supreme Court. All these cases get appealed up. If there are two cases and they are tried, maybe there is some equalization that happens by the Supreme Court. It is not going to be based on, "Hey, you did it here and you didn't do it there." It's going to be based on the facts and how it was applied.

JS --- Some arguments of those states that have the list of categories, it would mean that someone on that list might never be prosecuted because of prosecutorial discretion. For example, that prosecutor may always go after someone who attacks a meat factory or someone who attacks someone because of their country of origin, but they may never do one against a gay or against women.

MS --- That's why our constitution requires that your chief prosecutors be elected. Ultimately, people take that back...We have judges who don't sentence sufficiently...really disparities. One crime and he's out free and the same crime before a different judge in the same district court and you get five years. You say, "It's not fair!" With judges, you can't do a lot about it. It's just inherent in the system.

BF --- Okay, that leads us into our next question:

Question # 6: (BF) --- How does hate crime legislation provide law enforcement with more tools to collect evidence?

MS --- It doesn't give us tools to collect more evidence. It gives, cops, prosecutors and everybody more tools to protect more people. When I talk about equal protection, I make the same argument the opponents do: they say, "This is about unequal protection." I say, "No, this guarantees equal protection." The whole concept of justice is equal application of the law. I can't protect a certain group of our population from a crime being committed against them and the only reason it is being committed against them is because of bias or prejudice. I can't protect them...this legislation gives me the ability to keep all the public safe. That's why we have prisons. We convict somebody and people talk about prisons for rehabilitation...If I can demonstrate that someone has committed a crime against a whole group in society and because of that there is the possibility of retaliation and there will be a whole bunch of victims, I want them locked up longer. It's a more serious offense. It gives me a tool to keep people across the board, safe, more safe.

One other thing it does is this. We have federal law; we have a federal hate crimes law. Right now in the state of Utah, the feds decide. If a hate crime is committed in Utah, the only way it is going to be prosecuted is by the feds. Now, I am a state's rights kind of guy. I don't like the way the federal government is criminalizing everything. They want to come in and put federal crimes on everything. We ought to have control of our own system here in Utah and decide if we are going to prosecute this in state court, under state rules and courts. So, the "Curry in a Hurry" fire had to be prosecuted federally. They had no control over it.

PK --- They have a list.

MS --- They do, but it doesn't go to sexual orientation. When it was argued to put it in there, we had people like Senator Hatch say, "Well, that should be a state decision." I think the feds will probably get there. They put sexual orientation as one of the categories you have to keep...statistics. They just haven't changed the hate crime traditional categories.

MF --- Could the federal statutes be repealed?

MS --- There's always talk about enlarging the list, not repealing. So, as we talk here today, if a crime is committed against a gay or lesbian and it is for bias or prejudice, they will not have the enhanced penalty. Because the feds statute can't do it and the state won't do it. What kind of message is that sending?

BF --- The legislation that you're talking about, will it or won't it provide more tools for collecting evidence? Mostly, you don't interfere with how local jurisdictions do their job?

MS --- We pass laws all the time the go to giving more tools to collect evidence. The Patriot Act was supposedly that where we are going to give you better chances to get information the...library...doctor. That was an evidence-gathering kind of a bill. We do those here. We pass a law dealing with confessions or Miranda...this is a punishment, a sentencing law.

Question # 7: (BF) --- Is any Utah hate crime legislation largely a symbolic gesture for the kind of society that we want to have?

MS --- To me, it's a law enforcement tool. Do we want to send a message? Yeah! I don't want hate groups to look at Utah and say..."In Utah, we commit a crime there and...not get a higher penalty." They know it. The National Alliance, the billboards and the year we passed Pete Suazo's bill, delivered to our homes, every legislator and the Attorney General, a little note and a copy of their CD with all their rantings on it, basically saying we know where you live...they celebrate the fact. So, in that sense, it's a message bill.

More importantly, it is a law enforcement tool. We get up there and we say, "We're not trying to send a message; this is not some kind of a militant homosexual agenda. This is a law enforcement tool." That's why we have every law enforcement agency in the state: Sentencing Commission, Juvenile Justice, the Board of Pardons, CCJJ, Statewide Association of Prosecutors, and Utah Prosecution Council. It goes on and on. We need this for law enforcement purposes.

Question # 8: (BF) --- What do you think is the main reason effective legislation has not yet passed in Utah?

MS --- The gay and lesbian issue. Sexual orientation. It's been told time and time again to me.

BF --- Is there any way to get over that? What is a rational way to counter those arguments?

MS --- One thing we talked about and we always address it and Pete Suazo addressed it: Take it out.

BF --- Okay. That's not a rational way.

PK --- That says to me, "It's fine for you to do whatever you want to this group, but the other people we are going to protect."

MS --- It's the worst thing you can do and I agree. The worst thing you could do is send that message. The approach in this state is to convince people, for the purpose of this bill, we don't have to decide the big issue: Is it a choice? Is it nature? Is it a sin? Debate that all you want in church; debate it in the academic institutions. We don't have to decide that issue.

What we do have to decide is...you should never be allowed to commit a crime against somebody. It seems like reasonable people would agree to that. I think that was what the LDS Church was trying to say, "We do not oppose the bill as written, including sexual orientation. We teach tolerance and love." Because it was "we don't oppose," the opponents often say, "Well, they don't oppose any bill. That doesn't really mean anything..."get the LDS Church to come out and say, "We support passage of hate crimes statute that includes sexual orientation."

JS --- If you were to strategize, would it be better for a prosecutor to have a case in this state including the sexual orientation issue in the bill, if the person was not sexually oriented the way the attacker thought they were to convince the public. Because, first of all, the family would be mad that their child was killed on the thought that they were. They might be willing to defend and make it a bigger public issue. Or would it be better to have the person be oriented the way the attacker thought.

MS --- You're right in line with what we were thinking.

PK --- It's not so good to go looking for a candidate to be killed, huh?

MS --- Well, what we did was, we did have a victim. Bangerter family, big name in Utah. Actually, the son of a former Senator Bangerter, was beaten and lost the sight in one eye, permanently impaired. He was an artist. He can no longer paint because someone thought he was gay. He wasn't; he's not gay. But this guy met him in a bar, thought he was and beat him up. Really hurt him. So we brought him down, Paul I think was his name, to say look, "It could be you; it could be anybody." We tried it.

We said, "Okay, let's get away from this concern, this is part of the militant homosexual movement to obtain all the rights." We really backed off with that, got all the church groups involved, worked hard to get the business community, PTA and all these other groups and it didn't matter. It's so frustrating because you have chief law enforcement of the state, and all these other law enforcement officials sit down before a committee...and analyze this from constitutional, legal and law enforcement [perspectives, and] answer all the questions. And all you have to do is have this crazy woman lady stand up and say, "If you pass this bill today then tomorrow you will have to teach *Heather Has Two Mommies* in our public schools."

Oh! Really!

ML --- That's exactly what happens.

PK --- In other words, going straight for the emotional. That's it.

MS --- One guy brought in with Amendment Three... these signs that someone had wrote on it against our Amendment Three. We should have brought in all the signs that said, "Die Fag" and stuff like that which were ten times more numerous, than the defaced "Vote for Amendment Three" signs. They were all saying, "Ooo, that's big!"

Question # 9: (BF) --- In Utah what is the difference between hate crimes committed, hate crimes reported and hate crimes prosecuted? What we are trying to get at: are there any stats that are available that we could use. How do those three areas relate?

MS --- Well, we don't prosecute any hate crimes in Utah because there is no prosecuting under state law. Hate crimes committed and reported: it's not a perfect system. We have agencies voluntarily reporting to the federal government what they would classify as hate crimes. We have 60 or 70 on average a year. And we can get you those statistics or you can go to the internet and get them by state, category, etc.

ML --- What you have to realize is that those statistics are what law enforcement is voluntarily keeping...The Wasatch Front is fairly good about it, but you get into those rural areas...

JS --- Every time the LDS Church reports that one of their churches has been vandalized, are they pointing that out for a particular reason? Are they asking that it be looked at as a hate crime?

MS --- Only where it has been specifically has "Mormons suck" or something like that. If they just do graffiti on it or there is a fire, there is no evidence to charge them with, but they will submit it

JS --- Do they report the graffiti?

MS --- They do, but they report it as just a crime.

JS --- Will the Church help with prosecution?

MS --- They will if there is evidence.

PK --- So, has there been such a prosecution in Utah?

MS --- Not in the last five years. I would have to check the federal stats...Of all the people who could understand hate crimes, you would think it would be Mormons...I have never heard such a passionate and rational speech as given by Karen Hale before the Senate Committee. I don't know how anybody could fail to be moved by her argument. It was emotional, it was logical. It didn't make a difference.

Question # 10: (BF) --- Are there other avenues that already exist to accomplish the same or better desired outcomes?

MS --- The only avenue would be to go federal hate crime statute. Or, Greg Curtis brought this up several years ago, "Why not just try under the federal Civil Rights statutes?" The one famous case was where they charged a murderer with violating someone's Civil Rights by killing them.

PK --- Could they get the higher penalty?

MS --- No, it's not as high a penalty. Sometimes they will be charged with the crime of murder and be acquitted and then charged with Civil Rights. That's what happened with the Rodney King beating. In our indiscriminate sentencing laws, the judge only has a couple of choices: jail or no jail. If I'm convicted of a third degree felony, he has to decide whether I go to jail. If I do go to jail, that's zero to five years. Usually, that's based on elements of if they are dangerous or not.

The argument I use with conservatives is, "If I'm charging you, wouldn't you want a jury of your peers determining your sentence instead of some judge you didn't elect?" That usually plays into their... belief in their right that a jury trial is fundamental to our system of justice. So, why don't you want to be judged by a jury of your peers? Let them determine whether to give you more time in prison. You want to hand it to the judge? It doesn't make sense for them to argue that, but they do. They throw it out because it is some other way they can try to get away from this. They say let's just pass a law that say the Board of Pardons "shall consider this factor in determining sentencing.: Well, again, do you want a jury to decide that? Or do you want a Board that is again further removed, a governor appointed position, that you have no say in...the judge can already give you more time if he wants. No, he can't give you more time; he can decide whether you serve time or not.

BF --- Doing things such as education or taking an approach like they have done with DORA. Does that fit in with hate crime legislation anywhere?

MS --- Yeah, you know, we can just say, "Can't we just all get along?" Oh, certainly, all that we have done to try to change society, we have made tremendous progress. But there is still a heck of a lot of hatred. It's evident; it's right under the surface. People are biased...It was mostly brought to me after 9/11 and the case involving the three Arab Americans when they weren't allowed to fly on the plane and I stood up for them and said, "Hey! You can't do that. I don't care how afraid we are, we can't violate people's Civil Rights because of how they look after they have been cleared and conclusively not terrorist."

"We don't care! They look scary."

When I came out, the hateful, horrible, nasty letters I got! A woman from an institute of higher learning in the state said, "Every Muslim is a rapist, a child abuser; they are evil. We should ship them all out, but before you do, we should castrate them first so they can't propagate." This is Utah in the 21st Century and there is still a lot of hatred. So, everything we can do to get people

to say we love each other and get along and be tolerant and so forth is good. This would be a really good way to demonstrate that we really believe that.

BF --- Essentially, it's fair to say that good, strong, effective legislation is the best way to deal with it.

MS --- Yes.

PK --- Given that you say yes to that, I have a question. Have you any statistics that it is any deterrent for this kind of acting out. It doesn't control true prejudice in the mind, so does it deter this kind of acting out in states that have this kind of legislation?

MS --- I'm not aware of any studies of that nature. There are two kinds of deterrents: general and specific. Without a doubt, it will deter the person, specific deterrents because they are going to be locked up longer. Whether it sends a general message, I don't know if we have hard facts. All I know is the hate groups celebrate and announce the fact that Utah and a couple of other states don't have these statutes.

PK --- We won't be on that list any more if we were to pass it.

MS --- Right.

ML --- They have these web-sites...

MS --- Let me say that I think the League of Women Voters taking this on is unbelievable. Whether we go with the list or whatever, education is the key. And then, motivating more people to contact their legislators.

BF --- That's what we want the study to be: a source of information, a resource, not pointing them in a certain direction, but letting them make up their own minds. Just sound information.

MS --- Beautiful.

PK --- Do you have some kind of way for us to publicize our study? League members are going to see it. Outside the League membership, do you have a place to send it?

MS --- We should distribute it as widely as possible.

PK --- Do you have a suggestion? Can you get us invited to a caucus? Can you get us on TV?

MS --- Yeah! The thing is, we have every newspaper, editorial board already. It's not like we have to convince them. The more mainstream organizations out there getting information, the better. We could sit down with the First Presidency.

BF --- We will go anywhere!

MS --- God bless you for that!

PK --- Yes. I would like the challenge. As one church member to another, I'm not of your church, but I'm a member of another church and I cannot imagine why they are against this. I can't imagine how they can sit there and say it's fine for my daughter who is gay to be killed, or anybody else to be killed just because they belong to a group. I can't even believe that.

BF --- Anymore questions?

ML --- Could we start using bias motivated offense instead of hate crime. As a social worker, I want to remove the negativity of the verbiage "hate."

PK --- Going on the verbiage idea, it might allow some of those people to open up their heads for a minute because they have already turned it off when they hear "hate crime."

MS --- Branding and marketing, it's gotta change. It's always been labeled penalty enhancement.

ML --- When we're talking to the media we need another term.

BF --- We looked at "bias motivated crime" and felt it fits a lot better.

PK --- You have all the editorial boards of all the newspapers, tell them to change the name. Why can't they affect a change in the words they use?

MS --- You're right! A good thing to start!

PK --- The media places where you have pull. That's where the repetition hits the general public, the mass media. If you get them to change the words, you will have done a lot more than us doing anything.

JS --- If both papers are really on the same side, they could come together and make one phrase, one framing.

MS --- You know you're right. We need to go back to the editorial boards with this and make that point. You guys have taken a public position to support it; help us. Don't use the word "hate." And get your reporters not to use it either.

Appendix 5
Wisconsin v. Mitchell (92-515), 508 U.S. 47 (1993)

SUPREME COURT OF THE UNITED STATES

No. 92-515

WISCONSIN, PETITIONER v. TODD MITCHELL

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

[June 11, 1993]

Chief Justice Rehnquist delivered the opinion of the Court.

Respondent Todd Mitchell's sentence for aggravated battery was enhanced because he intentionally selected his victim on account of the victim's race. The question presented in this case is whether this penalty enhancement is prohibited by the First and [Fourteenth Amendments](#). We hold that it is not.

On the evening of October 7, 1989, a group of young black men and boys, including Mitchell, gathered at an apartment complex in Kenosha, Wisconsin. Several members of the group discussed a scene from the motion picture "Mississippi Burning," in which a white man beat a young black boy who was praying. The group moved outside and Mitchell asked them: " `Do you all feel hyped up to move on some white people?' " Brief for Petitioner 4. Shortly thereafter, a young white boy approached the group on the opposite side of the street where they were standing. As the boy walked by, Mitchell said: " `You all want to fuck somebody up? There goes a white boy; go get him.' " *Id.*, at 4-5. Mitchell counted to three and pointed in the boy's direction. The group ran towards the boy, beat him severely, and stole his tennis shoes. The boy was rendered unconscious and remained in a coma for four days.

After a jury trial in the Circuit Court for Kenosha County, Mitchell was convicted of aggravated battery. Wis. Stat. §§ 939.05 and 940.19(1m) (1989-1990). That offense ordinarily carries a maximum sentence of two years' imprisonment. §§ 940.19(1m) and 939.50(3)(e). But because the jury found that Mitchell had intentionally selected his victim because of the boy's race, the maximum sentence for Mitchell's offense was increased to seven years under § 939.645. That provision enhances the maximum

penalty for an offense whenever the defendant "[i]ntentionally selects the person against whom the crime . . . is committed . . . because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person" § 939.645(1)(b). [fn.11](#) The Circuit Court sentenced Mitchell to four years' imprisonment for the aggravated battery.

Mitchell unsuccessfully sought postconviction relief in the Circuit Court. Then he appealed his conviction and sentence, challenging the constitutionality of Wisconsin's penalty enhancement provision on [First Amendment](#) grounds. [fn.21](#) The Wisconsin Court of Appeals rejected Mitchell's challenge, 163 Wis. 2d 652, 473 N. W. 2d 1 (1991), but the Wisconsin Supreme Court reversed. The Supreme Court held that the statute "violates the First Amendment directly by punishing what the legislature has deemed to be offensive thought." 169 Wis. 2d 153, 485 N. W. 2d 807, 811 (1992). It rejected the State's contention "that the statute punishes only the 'conduct' of intentional selection of a victim." *Id.*, at 164, 485 N. W. 2d, at 812. According to the court, "[t]he statute punishes the 'because of' aspect of the defendant's selection, the *reason* the defendant selected the victim, the *motive* behind the selection." *Ibid.* (emphasis in original). And under *R. A. V. v. St. Paul*, 505 U. S. ---- (1992), "the Wisconsin legislature cannot criminalize bigoted thought with which it disagrees." 169 Wis. 2d, at 171, 485 N. W. 2d, at 815.

The Supreme Court also held that the penalty enhancement statute was unconstitutionally overbroad. It reasoned that, in order to prove that a defendant intentionally selected his victim because of the victim's protected status, the State would often have to introduce evidence of the defendant's prior speech, such as racial epithets he may have uttered before the commission of the offense. This evidentiary use of protected speech, the court thought, would have a "chilling effect" on those who feared the possibility of prosecution for offenses subject to penalty enhancement. See *id.*, at 174, 485 N. W. 2d, at 816. Finally, the court distinguished antidiscrimination laws, which have long been held constitutional, on the ground that the Wisconsin statute punishes the "subjective mental process" of selecting a victim because of his protected status, whereas antidiscrimination laws prohibit "objective acts of discrimination." *Id.*, at 176, 485 N. W. 2d, at 817. [fn.31](#)

We granted certiorari because of the importance of the question presented and the existence of a conflict of authority among state high courts on the constitutionality of statutes similar to Wisconsin's penalty enhancement provision, [fn.41](#) 506 U. S. ---- (1992). We reverse.

Mitchell argues that we are bound by the Wisconsin Supreme Court's conclusion that the statute punishes bigoted thought and not conduct. There is no doubt that we are bound by a state court's construction of a state statute. *R. A. V.*, *supra*, at ---- (slip op., at 2-3); *New York v. Ferber*, [458 U.S. 747](#), 769, n. 24 (1982); *Terminiello v. Chicago*, [337 U.S. 1](#), 4 (1949). In *Terminiello*, for

example, the Illinois courts had defined the term " `breach of the peace,'" in a city ordinance prohibiting disorderly conduct, to include " `stirs the public to anger . . . or creates a disturbance.'" *Id.*, at 4. We held this construction to be binding on us. But here the Wisconsin Supreme Court did not, strictly speaking, construe the Wisconsin statute in the sense of defining the meaning of a particular statutory word or phrase. Rather, it merely characterized the "practical effect" of the statute for [First Amendment](#) purposes. See 169 Wis. 2d, at 166-167, 485 N. W. 2d, at 813 ("Merely because the statute refers in a literal sense to the intentional `conduct' of selecting, does not mean the court must turn a blind eye to the intent and practical effect of the law--punishment of motive or thought"). This assessment does not bind us. Once any ambiguities as to the meaning of the statute are resolved, we may form our own judgment as to its operative effect.

The State argues that the statute does not punish bigoted thought, as the Supreme Court of Wisconsin said, but instead punishes only conduct. While this argument is literally correct, it does not dispose of Mitchell's First Amendment challenge. To be sure, our cases reject the "view that an apparently limitless variety of conduct can be labeled `speech' whenever the person engaging in the conduct intends thereby to express an idea." *United States v. O'Brien*, [391 U.S. 367](#), 376 (1968); accord, *R. A. V.*, 505 U. S., at ---- (slip op., at 7); *Spence v. Washington*, [418 U.S. 405](#), 409 (1974) (*per curiam*); *Cox v. Louisiana*, [379 U.S. 536](#), 555 (1965). Thus, a physical assault is not by any stretch of the imagination expressive conduct protected by the [First Amendment](#). See *Roberts v. United States Jaycees*, [468 U.S. 609](#), 628 (1984) ("[V]iolence or other types of potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection"); *NAACP v. Claiborne Hardware Co.*, [458 U.S. 886](#), 916 (1982) ("The [First Amendment](#) does not protect violence").

But the fact remains that under the Wisconsin statute the same criminal conduct may be more heavily punished if the victim is selected because of his race or other protected status than if no such motive obtained. Thus, although the statute punishes criminal conduct, it enhances the maximum penalty for conduct motivated by a discriminatory point of view more severely than the same conduct engaged in for some other reason or for no reason at all. Because the only reason for the enhancement is the defendant's discriminatory motive for selecting his victim, Mitchell argues (and the Wisconsin Supreme Court held) that the statute violates the [First Amendment](#) by

punishing offenders' bigoted beliefs.

Traditionally, sentencing judges have considered a wide variety of factors in addition to evidence bearing on guilt in determining what *zTennessee*, 501 U. S. ----, ---- (1991) (slip op., at 10); *United States v. Tucker*, [404 U.S. 443](#), 446 (1972); *Williams v. New York*, [337 U.S. 241](#), 246 (1949). The defendant's motive for committing the offense

is one important factor. See 1 W. LeFave & A. Scott, *Substantive Criminal Law* § 3.6(b), p. 324 (1986) ("Motives are most relevant when the trial judge sets the defendant's sentence, and it is not uncommon for a defendant to receive a minimum sentence because he was acting with good motives, or a rather high sentence because of his bad motives"); cf. *Tison v. Arizona*, [481 U.S. 137](#), 156 (1987) ("Deeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished"). Thus, in many States the commission of a murder, or other capital offense, for pecuniary gain is a separate aggravating circumstance under the capital sentencing statute. See, e. g., *Ariz. Rev. Stat. Ann.* § 13-703(F)(5) (1989); *Fla. Stat.* § 921.1415(f) (Supp. 1992); *Miss. Code Ann.* § 99-19-101(5)(f) (Supp. 1992); *N. C. Gen. Stat.* § 15A-2000(e)(6) (1992); *Wyo. Stat.* § 6-2-102(h)(vi) (Supp. 1992).

But it is equally true that a defendant's abstract beliefs, however obnoxious to most people, may not be taken into consideration by a sentencing judge. *Dawson v. Delaware*, 503 U. S. ---- (1992). In *Dawson*, the State introduced evidence at a capital sentencing hearing that the defendant was a member of a white supremacist prison gang. Because "the evidence proved nothing more than [the defendant's] abstract beliefs," we held that its admission violated the defendant's [First Amendment](#) rights. *Id.*, at ---- (slip op., at 7). In so holding, however, we emphasized that "the Constitution does not erect a *per se* barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the [First Amendment](#)." *Id.*, at ---- (slip op., at 5). Thus, in *Barclay v. Florida*, [463 U.S. 939](#) (1983) (plurality opinion), we allowed the sentencing judge to take into account the defendant's racial animus towards his victim. The evidence in that case showed that the defendant's membership in the Black Liberation Army and desire to provoke a "race war" were related to the murder of a white man for which he was convicted. See *id.*, at 942-944. Because "the elements of racial hatred in [the] murder" were relevant to several aggravating factors, we held that the trial judge permissibly took this evidence into account in sentencing the defendant to death. *Id.*, at 949, and n. 7.

Mitchell suggests that *Dawson* and *Barclay* are inapposite because they did not involve application of a penalty enhancement provision. But in *Barclay* we held that it was permissible for the sentencing court to consider the defendant's racial animus in determining whether he should be sentenced to death, surely the most severe "enhancement" of all. And the fact that the Wisconsin Legislature has decided, as a general matter, that bias motivated offenses warrant greater maximum penalties across the board does not alter the result here. For the primary responsibility for fixing criminal penalties lies with the legislature. *Rummel v. Estelle*, [445 U.S. 263](#), 274 (1980); *Gore v. United States*, [357 U.S. 386](#), 393 (1958).

Mitchell argues that the Wisconsin penalty enhancement statute is invalid because it punishes the defendant's discriminatory motive, or reason, for acting. But motive plays the same role under the

Wisconsin statute as it does under federal and state antidiscrimination laws, which we have previously upheld against constitutional challenge. See *Roberts v. Jaycees*, 468 U. S., at 628; *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984); *Runyon v. McCrary*, 427 U.S. 160, 176 (1976). Title VII, for example, makes it unlawful for an employer to discriminate against an employee "because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e 2(a)(1) (emphasis added). In *Hishon*, we rejected the argument that Title VII infringed employers' [First Amendment](#) rights. And more recently, in *R. A. V. v. St. Paul*, 505 U. S., at ---- (slip op., at 11), we cited Title VII (as well as [18 U.S.C. § 242](#) and [42 U.S.C. §§ 1981](#) and 1982) as an example of a permissible content neutral regulation of conduct.

Nothing in our decision last Term in *R. A. V.* compels a different result here. That case involved a First Amendment challenge to a municipal ordinance prohibiting the use of " `fighting words' that insult, or provoke violence, `on the basis of race, color, creed, religion or gender.'" 505 U. S., at ---- (slip op., at 13) (quoting St. Paul Bias Motivated Crime Ordinance, St. Paul, Minn., Legis. Code §292.02 (1990)). Because the ordinance only proscribed a class of "fighting words" deemed particularly offensive by the city--*i.e.*, those "that contain . . . messages of `bias motivated' hatred," 505 U. S., at ---- (slip op., at 13)--we held that it violated the rule against content based discrimination. See *id.*, at ---- (slip op., at 13-14). But whereas the ordinance struck down in *R. A. V.* was explicitly directed at expression (*i.e.*, "speech" or "messages," *id.*, at ---- (slip op., at 13), the statute in this case is aimed at conduct unprotected by the First Amendment.

Moreover, the Wisconsin statute singles out for enhancement bias inspired conduct because this conduct is thought to inflict greater individual and societal harm. For example, according to the State and its *amici*, bias motivated crimes are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest. See, *e. g.*, Brief for Petitioner 24-27; Brief for United States as *Amicus Curiae* 13-15; Brief for Lawyers' Committee for Civil Rights Under Law as *Amicus Curiae* 18-22; Brief for the American Civil Liberties Union as *Amicus Curiae* 17-19; Brief for the Anti Defamation League et al. as *Amici Curiae* 9-10; Brief for Congressman Charles E. Schumer et al. as *Amici Curiae* 8-9. The State's desire to redress these perceived harms provides an adequate explanation for its penalty enhancement provision over and above mere disagreement with offenders' beliefs or biases. As Blackstone said long ago, "it is but reasonable that among crimes of different natures those should be most severely punished, which are the most destructive of the public safety and happiness." 4 W. Blackstone, Commentaries *16.

Finally, there remains to be considered Mitchell's argument that the Wisconsin statute is unconstitutionally overbroad because of its "chilling effect" on free speech. Mitchell argues (and the Wisconsin Supreme Court agreed) that the statute is "overbroad" because evidence of the defendant's prior speech or associations may be used to prove that the defendant intentionally selected his victim

on account of the victim's protected status. Consequently, the argument goes, the statute impermissibly chills free expression with respect to such matters by those concerned about the possibility of enhanced sentences if they should in the future commit a criminal offense covered by the statute. We find no merit in this contention.

The sort of chill envisioned here is far more attenuated and unlikely than that contemplated in traditional "overbreadth" cases. We must conjure up a vision of a Wisconsin citizen suppressing his unpopular bigoted opinions for fear that if he later commits an offense covered by the statute, these opinions will be offered at trial to establish that he selected his victim on account of the victim's protected status, thus qualifying him for penalty enhancement. To stay within the realm of rationality, we must surely put to one side minor misdemeanor offenses covered by the statute, such as negligent operation of a motorvehicle (Wis. Stat. § 941.01 (1989-1990)); for it is difficult, if not impossible, to conceive of a situation where such offenses would be racially motivated. We are left, then, with the prospect of a citizen suppressing his bigoted beliefs for fear that evidence of such beliefs will be introduced against him at trial if he commits a more serious offense against person or property. This is simply too speculative a hypothesis to support Mitchell's overbreadth claim.

The [First Amendment](#), moreover, does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent. Evidence of a defendant's previous declarations or statements is commonly admitted in criminal trials subject to evidentiary rules dealing with relevancy, reliability, and the like. Nearly half a century ago, in *Haupt v. United States*, [330 U.S. 631](#) (1947), we rejected a contention similar to that advanced by Mitchell here. Haupt was tried for the offense of treason, which, as defined by the Constitution (Art. III, § 3), may depend very much on proof of motive. To prove that the acts in question were committed out of "adherence to the enemy" rather than "parental solicitude," *id.*, at 641, the Government introduced evidence of conversations that had taken place long prior to the indictment, some of which consisted of statements showing Haupt's sympathy with Germany and Hitler and hostility towards the United States. We rejected Haupt's argument that this evidence was improperly admitted. While "[s]uch testimony is to be scrutinized with care to be certain the statements are not expressions of mere lawful and permissible difference of opinion with our own government or quite proper appreciation of the land of birth," we held that "these statements . . . clearly were admissible on the question of intent and adherence to the enemy." *Id.*, at 642. See also *Price Waterhouse v. Hopkins*, [490 U.S. 228](#), 251-252 (1989) (plurality opinion) (allowing evidentiary use of defendant's speech in evaluating Title VII discrimination claim); *Street v. New York*, [394 U.S. 576](#), 594 (1969).

For the foregoing reasons, we hold that Mitchell's First Amendment rights were not violated by the application of the Wisconsin penalty enhancement provision in sentencing him. The judgment of the Supreme Court of Wisconsin is therefore reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Notes

¹ At the time of Mitchell's trial, the Wisconsin penalty enhancement statute provided:

"(1) If a person does all of the following, the penalties for the underlying crime are increased as provided in sub. (2):

"(a) Commits a crime under chs. 939 to 948.

"(b) Intentionally selects the person against whom the crime under par. (a) is committed or selects the property which is damaged or otherwise affected by the crime under par. (a) because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property.

"(2)(a) If the crime committed under sub. (1) is ordinarily a misdemeanor other than a Class A misdemeanor, the revised maximum fine is \$10,000 and the revised maximum period of imprisonment is one year in the county jail.

"(b) If the crime committed under sub. (1) is ordinarily a Class A misdemeanor, the penalty increase under this section changes the status of the crime to a felony and the revised maximum fine is \$10,000 and the revised maximum period of imprisonment is 2 years.

"(c) If the crime committed under sub. (1) is a felony, the maximum fine prescribed by law for the crime may be increased by not more than \$5,000 and the maximum period of imprisonment prescribed by law for the crime may be increased by not more than 5 years.

"(3) This section provides for the enhancement of the penalties applicable for the underlying crime. The court shall direct that the trier of fact find a special verdict as to all of the issues specified in sub. (1).

"(4) This section does not apply to any crime if proof of race, religion, color, disability, sexual orientation, national origin or ancestry is required for a conviction for that crime." Wis. Stat. § 939.645 (1989-1990). The statute was amended in 1992, but the amendments are not at issue in this case.

² Mitchell also challenged the statute on [Fourteenth Amendment](#) equal protection and vagueness grounds. The Wisconsin Court of Appeals held that Mitchell waived his equal protection claim and rejected his vagueness challenge outright. 163 Wis. 2d 652, 473 N. W. 2d 1 (1991). The Wisconsin Supreme Court declined to address both claims. 169 Wis. 2d 153, 158, n. 2, 485 N. W. 2d 807, 809, n. 2

(1992). Mitchell renews his [Fourteenth Amendment](#) claims in this Court. But since they were not developed below and plainly fall outside of the question on which we granted certiorari, we do not reach them either.

³ Two justices dissented. They concluded that the statute punished discriminatory acts, and not beliefs, and therefore would have upheld it. See 169 Wis. 2d, at 181, 485 N. W. 2d, at 819 (Abrahamson, J.); *id.*, at 187-195, 485 N. W. 2d, at 821-825 (Bablitch, J.).

⁴ Several States have enacted penalty enhancement provisions similar to the Wisconsin statute at issue in this case. See, e. g., Cal. Penal Code Ann. § 422.7 (West 1988 and Supp. 1993); Fla. Stat. § 775.085 (1991); Mont. Code Ann. § 45-5-222 (1992); Vt. Stat. Ann., Tit. 13, § 1455 (Supp. 1992). Proposed federal legislation to the same effect passed the House of Representatives in 1992, H. R. 4797, 102d Cong., 2d Sess. (1992), but failed to pass the Senate, S. 2522, 102d Cong., 2d Sess. (1992). The state high courts are divided over the constitutionality of penalty enhancement statutes and analogous statutes covering bias motivated offenses. Compare, e. g., *State v. Plowman*, 314 Ore. 157, 838 P. 2d 558 (1992) (upholding Oregon statute), with *State v. Wyant*, 64 Ohio St. 3d 566, 597 N. E. 2d 450 (1992) (striking down Ohio statute); 169 Wis. 2d 153, 485 N. W. 2d 807 (1992) (striking down Wisconsin statute). According to *amici*, bias motivated violence is on the rise throughout the United States. See, e. g., Brief for the National Asian Pacific American Legal Consortium et al. as *Amici Curiae* 5-11; Brief for the Anti Defamation League et al. as *Amici Curiae* 4-7; Brief for Atlanta et al. as *Amici Curiae* 3-12. In 1990, Congress enacted the Hate Crimes Statistics Act, Pub. L. 101-275, § 1(b)(1), 104 Stat. 140, codified at [28 U.S.C. § 534](#) (note) (1988 ed., Supp. III), directing the Attorney General to compile data "about crimes that manifest evidence of prejudice based on race, religion, sexual orientation, or ethnicity." Pursuant to the Act, the Federal Bureau of Investigation reported in January 1993, that 4,558 bias motivated offenses were committed in 1991, including 1,614 incidents of intimidation, 1,301 incidents of vandalism, 796 simple assaults, 773 aggravated assaults, and 12 murders. See Brief for the Crown Heights Coalition et al. as *Amici*

Appendix 6
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Briefing Paper
Facts Regarding Utah's Hate Crimes Legislation
House Bill 90

Section 3: Organizations that Support Hate Crimes Legislation xix

- All Saint's Episcopal Church
- ARC of Utah
- Brigham City Community Presbyterian Church
- Church of Jesus Christ of Latter Day Saints
- Christ United Methodist Church
- Christian Center of Park City
- Coalition of Religious Communities
- Commission on Criminal and Juvenile Justice
- Crossroads Urban Center
- Davis School District
- Delta Community Presbyterian Church
- Disability Law Center
- Ecclesia Gnostica
- Episcopal Community Services
- Episcopal Peace Fellowship of Utah
- Equality Utah
- GLBT Police Public Safety Committee
- Governor's Hispanic Advisory Council
- Granger Christian Church
- Hispanic Democratic Caucus
- Holy Cross Welcome Center
- Interfaith Roundtable
- The Islamic Society of Greater Salt Lake
- Jewish Family Services
- Kingsbury Community Church
- Law Enforcement Legislative Committee
- Legislative Coalition for People with Disabilities
- Log Cabin Republicans
- Mental Health Association of Utah
- Midvale City Police Department
- Montessori School of Salt Lake
- Mount Benedict Monastery
- Mount Tabor Lutheran Church
- Murray Baptist Church
- NAACP
- National Conference for Community & Justice

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- National Council of Jewish Women
- Ogden's Japanese Buddhist Temple
- Ogden United Church of Christ
- PFLAG, Utah Chapter
- REM

- Sacred Light of Christ Metropolitan Community Church
- Salt Lake City Minority Affairs
- Salt Lake City Prosecutor's Office
- Salt Lake City Police Department
- Salt Lake Community Action Program
- Salt Lake County Commission on Youth
- Salt Lake Japanese-American Citizens League
- South Valley Unitarian Universalist Society
- Sri Lankan Buddhist Faith Community
- St. James Episcopal Church
- St. Mark's Episcopal Cathedral
- Tibetan Buddhist Tradition
- TMA Corporation
- Trinity A.M.E. Church
- United Methodist Church
- University of Utah
- University of Utah School of Medicine
- Urygen Samten Ling Meditation Center
- Utah Association of Community Services
- Utah Board of Juvenile Justice
- Utah Council on Victims of Crime
- Utah Education Association
- Utah Hispanic Republican Assembly
- Utah Progressive Network
- Utah Sentencing Commission
- Utah Substance Abuse and Anti-Violence Coordinating Council
- Utah State University
- Utah Stonewall Democrats
- Utah Tibetan Association
- Utah Valley State College
- Ute Indian Tribe
- Wat Chammagunaram Buddhist Temple
- Wasatch Front Unitarian Fellowship
- Wasatch Presbyterian Church
- Weber State University
- Westminster College

Equality Utah: Hate Crimes Talking Points House Bill 90: Criminal Penalty Amendments

Crimes motivated by hatred, against any group, hurt individuals, divide our community, and create a hostile environment. Utah needs an enforceable, workable hate crimes law, regardless of its form.

While Equality Utah still firmly believes that a Hate Crimes bill with a list of specific groups, including sexual orientation, is the most effective, court-tested approach, Equality Utah firmly believes that this new legislation is a good step in the right direction.

Equality Utah enthusiastically supports House Bill 90 as a reasonable compromise that can move us forward with a law that will protect all Utahns.