

THE AMERICAN PERSPECTIVE ON HATE CRIMES AND FREEDOM OF SPEECH

Presented by John Suthers, Colorado Attorney General
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Thank you for the invitation to join you. I consider it an honor to address a distinguished group of Russian jurists.

While I've travelled extensively, this is my first visit to Russia and St. Petersburg and I am looking forward to seeing some of your beautiful city during my brief stay.

As I understand my mission, it is to talk to you about the American perspective on hate crime, with particular attention to the interplay between hate crime laws and the protection afforded to freedom of expression under the First Amendment to the United States Constitution.

As you are well aware, crimes motivated by bias appear to be as old as civilization itself. A few notable examples in recorded history include the Roman persecution of Christians, the Ottoman genocide of Armenians and Assyrians, and the Nazi extermination of Jews. In the United States the shameful history of hate crimes include lynching of African-Americans and more recently, assaults on gay and lesbian people.

While the first hate crime laws in the United States were enacted after the Civil War, it was not until after World War II that serious attention was given in the U.S. Congress to the need for hate crime legislation. On the federal level, the civil rights movement and the passage of the Civil Rights Act of 1964 led to the enactment in 1968 of a statute which made it illegal to use force or threat of force to injure or intimidate anyone engaged in federally protected activities such as voting, attending school or engaging in interstate commerce because of their race, color, religion or national origin. In 2009 Congress added gender, sexual orientation and disability to the categories of people that were subject to federal hate crime protection.

The first state to pass a hate crime law was California in 1978. That statute simply provided for enhancement of a sentence where a murder was motivated by prejudice based on race, religion, color or national origin. In 1988 my state of Colorado passed a hate crime law providing for a more serious punishment for the crimes of assault and destruction of property if the conduct is motivated by the victim's race, color, religion, national origin, physical or mental disability or sexual orientation.

Today, 45 of our 50 states have statutes criminalizing various types of hate crimes and 31 states have laws creating a civil cause of action for wrongful conduct motivated by bias. Twenty-seven states and the federal

government have statutes requiring the collection by government of hate crime statistics. On the national level, the U.S. Department of Justice is required to collect statistics on the reporting of hate crimes.

Those statistics indicate that for the past two decades an average of approximately 10,000 people per year **report** being a victim of hate crimes in the United States. Fifty-five percent of victims report racial bias was the motivation, 17% cite religious bias, 14% sexual orientation, 14% ethnicity, and 1% disability. About 20% of the allegations involving racial bias are whites alleging they were victims of hate crimes perpetrated by racial minorities. It's important to point out that these numbers reflect **reports** by victims that they were the subject of hate crime. A smaller number of such reports are corroborated by the police and successfully prosecuted as hate crimes. I'll discuss that more later.

From the American perspective, hate crimes have two essential aspects. First they are motivated by the victim's actual or perceived membership in a particular social group. Secondly, they are actions that are already criminalized, but their characterization as a hate crime increases the possible penalty. So in the United States a hate crime is when a perpetrator commits a crime such as vandalism, assault, murder, rape, robbery, burglary or larceny and the victim was targeted because of his race, religion, ethnicity, gender, sexual orientation or political affiliation. American hate crime laws are intended to deter bias motivated violence or property damage. Because of the First Amendment and our free speech traditions, they cannot be intended to deter hateful speech. You can only be subject to punishment for what you **do** because of your bias, not on the basis of what you think or say on account of your bias. In this regard, we view the selection of a victim on the basis of a particular characteristic as behavior, not speech. I believe the United States is somewhat unique among developed countries in that we do not have hate speech laws that provide criminal penalties for bias motivated speech or expression that does not involve violent or destructive actions. More about that in a minute.

Hate crime laws in America generally fall into one of four categories:

1. Laws defining a crime that make bias motivation an element of proof in addition to the underlying criminal act and provide for a greater possible penalty than the act alone would have;
2. Laws allowing for a sentencing enhancement if bias is found to be the motivation for a criminal act the defendant has been convicted of;
3. Laws creating civil penalties for hate crimes; and
4. Laws requiring administrative or law enforcement agencies to collect hate crime statistics.

The difference between hate crimes where bias is an element of proof of the crime and where it is a possible sentence enhancer has been made largely irrelevant by two U.S. Supreme Court cases, *Apprendi v. New Jersey* (530 U.S. 466) in 2000, and *Blakely v. Washington*(542 U.S. 29) in 2004.

The *Apprendi* case involved a hate crime where the white defendant shot several bullets into the house of an African-American family. Under New Jersey state law the sentence for the crime of attempted murder or assault could be extended an additional 10-20 years if the trial judge found at a sentencing hearing that a bias motive was involved. The United States Supreme Court held that the constitutional right to a jury trial requires that any fact that could add to a sentence for a crime must be found by a jury. Therefore, if a defendant asks for a jury trial, any statutory sentence enhancer must be proven to a jury and a judge cannot make a finding of bias motivation for purposes of sentencing enhancement. In *Blakely v. Washington*, the Supreme Court held that even where a bias motive didn't add years to a possible sentencing range, but mandated a certain sentence within the possible range for the underlying crime, the bias motive must still be proven to a jury. So after 2004 prosecutors in the U.S. must plead any sentence enhancer, including bias motivation, and a jury must determine that bias motivation was proven beyond a reasonable doubt, just like every other element of the crime.

Now many non-Americans may be surprised or perhaps skeptical at the notion that we don't punish people for hate speech in America. All I can say is that we take the Bill of Rights very seriously, particularly the First Amendment protection of Free Speech, and that a number of Supreme Court cases have helped clarify the sometimes complex relationship between hate crimes and the First Amendment. And I'd like to briefly walk you through some of the important cases that clarify and define this relationship.

The first thing to be cognizant of is the scope of free speech in America. The First Amendment says simply, "Congress shall make no law...abridging the freedom of speech..." In the 1950's the Supreme Court held the Amendment was applicable to local and state governments as well as the federal government. While the First Amendment refers to the word "speech," a long line of U.S. Supreme Court cases clarify that all sorts of expressive conduct is constitutionally protected by the Amendment, including the written word, and symbolic speech where symbols are used as acts of protest. As you may know, we even protect all but the most hard core pornographic materials as protected speech. So in the United States today, students at all grade levels can wear t-shirts to public schools protesting the wars in Iraq and Afghanistan, making fun of President Obama,

and containing distasteful verbiage. Fringe groups can display swastikas and the Ku Klux Klan still gets parade permits to flaunt their racism. The U.S. Supreme Court has repeatedly held that government cannot punish inflammatory speech regardless of how hateful it is, unless it is likely to incite imminent lawless action. So a protestor can stand a block away from a police officer and shout obscenities at him, but he may not do it an inch from his face while he's trying to do his job. As you may know, in the United States you can even burn an American flag in protest without legal consequence, because burning a flag in protest is protected speech. Any restrictions on such protest activity must be what we call "content neutral." That means the purpose of the law cannot be to suppress expression because of its content. In other words, a city can have a law preventing the starting of fires in public places and enforce it against someone who burns a flag in a town square, but it cannot have a law banning the burning of an American flag in public. The Supreme Court has said that in deciding whether conduct possesses sufficient expressive or communicative elements to be protected by the First Amendment, courts should determine whether there was an intent to convey a particularized message and there was a likelihood those who viewed the conduct would understand the message. If so, the expressive conduct is protected.

So let's turn to some important cases that discuss the First Amendment in the context of hate crimes and see if that will help clarify this somewhat complex interplay.

In a case called *Wisconsin v. Mitchell* (508 U.S. 476, 1993) in the early 1990's, the U.S. Supreme Court held it was not a violation of the First Amendment for a state to provide for a greater penalty for a crime if the crime was committed due to an intended victim's status in a protected class.

The defendant Mitchell was drinking with several other African-Americans and discussing a movie about racial prejudice in the American South in the 1960's, called "Mississippi Burning." Afterwards he and his friends decided to assault a white person. The first person they encountered was a 14-year-old boy walking down the street. Ten of them surrounded the boy and kicked, punched and stomped on him for over five minutes. He was in a coma for four days.

At a jury trial in Wisconsin State Court, Mitchell was convicted of aggravated assault. Under a Wisconsin hate crime statute the maximum penalty was raised to seven years if the defendant intentionally selected the victim of assault because of race, religion, color, ethnicity, disability or sexual orientation.

Mitchell took an appeal to the Wisconsin Court of Appeals and Wisconsin Supreme Court challenging the constitutionality of the hate crime law. The Wisconsin Supreme Court reversed the conviction holding the sentence enhancement for hate crimes violated the First Amendment because it essentially punished what the legislature deemed to be offensive thought. But on appeal by the State of Wisconsin to the U.S. Supreme Court, the Court ruled 9-0 that the law was constitutional because it was targeted at violent conduct, not simply expressive conduct. The Court ruled the state could offer a sentence enhancement for the violent conduct if it was shown the defendant selected the victim due to bias, because the state had a compelling interest in preventing the serious negative effects of such crimes. Those effects include intimidation of the victim and members of the victim's social group, and causing them to feel vulnerable and unprotected by the law. The court also found that the pernicious psychological impact of such crimes can exacerbate racial, religious and ethnic tensions and increase the likelihood of retaliation. It held that the conduct in choosing a victim on account of bias was not protected expressive conduct. The prevention of these secondary effects of hate crimes were adequate reason to increase penalties if the law was not explicitly targeting specific beliefs or statements. The Court pointed out it was commonplace for the government to prove motivation for a crime and for that motivation to be considered in sentencing the defendant.

But that case is to be contrasted with a case called *R.A.V. v. City of St. Paul, Minnesota* (505 U.S. 377, 1992) which also reached the U.S. Supreme Court in the early 90's. R.A.V. is the initials of a juvenile who, with several friends, taped together broken chair legs to crudely make a cross and burned it in the front yard of an African-American family. He was charged with two crimes, one of which was a violation of the St. Paul Bias-Motivated Crime Ordinance. The ordinance provided:

“Whoever places on public or private property a symbol, object, characterization or graffiti including but not limited to a burning cross or Nazi swastika, which one knows or has reason to know arouses anger or alarm in others on the basis of race, color, creed, religion or gender commits disorderly conduct and is guilty of a misdemeanor.”

The juvenile defendant moved to dismiss the charge under the Bias-Motivated Crime Ordinance alleging it was impermissibly content-based in its restriction on expression and therefore facially invalid under the First

Amendment. The trial court agreed and dismissed the charge, but the Minnesota Supreme Court reversed saying the ordinance could be construed to be limited to conduct that was the equivalent of fighting words and not constitutionally protected.

The U.S. Supreme Court ruled that the ordinance violated the First Amendment because it was overly content-based and essentially prohibited hate speech or expression. It pointed out that the ordinance did not prohibit all abusive or invective displays, only those addressed to certain disfavored topics. The First Amendment does not permit government to impose special content-based restrictions on those who express views on disfavored subjects. The Court made clear that the conduct could be prohibited and prosecuted under Minnesota laws that prohibited trespass on private property, vandalism and unauthorized fires. Justice Scalia, in his majority opinion for the Court concluded by saying, “Let there be no mistake about our belief that burning a cross in someone’s yard is reprehensible. But the City of St. Paul has sufficient means at its disposal to prevent such behavior without throwing the First Amendment on the fire.”

Many cases decided in state and federal courts since the *Wisconsin* and *St. Paul* cases confirm that a hate crime law does not violate the First Amendment so long as it does not punish an individual for thinking or expressing bigoted or hateful thought, but rather punished the offender’s conduct in choosing a victim based on their beliefs or hatred and then committing a criminal act against them.

While hate crimes that increase punishment for violent or destructive acts are lawful in the United States, they still have their critics. Those critics contend that hate crime statutes exacerbate conflict between social groups by emphasizing the crime as being committed against a segment of society rather than society as a whole. They argue this causes groups to feel persecuted and can incite retaliation that leads to more crime. The critics contend all violent crimes are hate crimes and treating some defendants more harshly because of the identity of their victims is a violation of equal protection and comes dangerously close to criminalization of speech and thought. Despite such criticism, it’s clear that hate crimes will be part of the legal landscape in America for the foreseeable future.

A bigger issue from my perspective is the practical realities of prosecuting hate crimes in the United States. As you know, the burden of proof in a criminal case in the United States is very high. Every element of a crime, including a bias motive in the case of a hate crime, must be proven to a jury of citizens beyond a reasonable doubt. I have been a prosecutor most of my 34-year legal career and I know that prosecutors in America are very

practical people. If they have clear evidence the defendant intentionally committed an assault or intentionally destroyed property, but it's not as clear that their motive was bias, they are not going to charge the defendant with a bias motive and add a complicating element of proof to their case. If careful analysis of the evidence shows a strong possibility of another motive in addition to possible bias, the prosecutor may also not charge a hate crime. For example, if two intoxicated people of different ethnic backgrounds are arguing in a bar because they support different sides in a football game they are watching on television and they get into a physical fight and when one is punching the other he mutters a racial or ethnic slur, is his motive for the assault racism or ethnic bias or the fact the guy supports the other team? In such a situation a prosecutor will probably not pursue a hate crime case. But if they have clear evidence of premeditation, by writings or statements of the defendant, which shows clearly that his motive was racist, religious, ethnic or gender prejudice, they are more likely to charge a hate crime.

The other reality is that punishments for violent crime in America are typically sufficiently severe that prosecutors may not feel compelled to add a difficult element of proof just to get a chance at a greater sentence. Most sentences for violent crimes have a wide range of possible consequences. For example, in my state of Colorado, an assault with a weapon that results in serious bodily injury carries a possible sentence of 10 - 32 years in prison. Prosecutors know that if a defendant is convicted of an assault and the judge believes that racial prejudice was the motivation, the judge will view the crime harshly and it's likely the sentence will be near the top or at the top of the range, even if the case was not charged as a hate crime. As a consequence, American prosecutors will charge hate crimes only when the evidence of a bias is very clear and there is also reason to believe doing so will bring about a greater sentence than would otherwise be achieved and the prosecutor believes it's important to send a clear message to the community about the unacceptability of the conduct.

I hope my remarks have helped clarify for you the American perspective about hate crime and its complex relationship to the First Amendment's freedom of expression.

I look forward to trying to answer any questions you might have.