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2018

Hate Crimes Against LGBTQ Communities and Persons

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Recommended Citation

Rebecca A. Mattson, *Hate Crimes Against LGBTQ Communities and Persons*, in *Sexual Orientation, Gender Identities, and the Law: A Research Bibliography, 2006-2016* (Dana Neacsu and David Brian Hold, eds., 2018).

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Sexual Orientation, Gender Identities, and the Law: A Research Bibliography, 2006–2016

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AALL PUBLICATIONS SERIES NO. 81

Sponsored by the



American Association of
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Published by
William S. Hein & Co., Inc.
Getzville, New York
2018

Hate Crimes Against LGBTQ Communities and Persons

Rebecca Mattson*

This section focuses on scholarship surrounding hate crimes—in particular hate crimes relating to LGBTQ communities. The scholarship spans the last decade, a decade that has seen significant progress. As such, early articles discuss marriage equality and suggest that hate crimes would significantly decrease if marriage equality passed at a federal level. Other articles focus on the Hate Crimes Statistics Act, Pub. L. No. 101-275, 28 U.S.C. § 534, and suggest that Congress should enact more, better anti-hate crime legislation that includes sexual orientation and gender identity as protected classes. After the passage of the Hate Crimes Prevention Act, Pub. L. No. 111-84, 18 U.S.C. § 249, 1389; 42 U.S.C. § 3716, 3716a, scholars focus on the Act’s deficiencies and the need for consistent and strong state laws prohibiting hate crimes. Still other scholars discuss the intersection of communities of color and LGBTQ communities in common oppression and as victims of hate crimes. As evidenced by the Pulse nightclub massacre in 2016, Latinx and LGBTQ communities intersected as victims of a common attack. At least one article discusses the complexities of such an intersection and why the threads of oppression cannot be untangled.

To search for scholarship in this area using free databases such as Google Scholar or Fastcase, you may start by using key terms such as *LGBT hate crimes*. Further research should include use of associated relevant broadening key terms such as *queer*, *sexual orientation*, *lesbian*, *gay*, or *trans*.¹

Other key research terms include:

Harass

Harassment

Crime

If you are using LegalTrac, the following subject headings may be helpful:

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¹ For annotations regarding bullying or cyberbullying hate crimes, see “LGBT Youth/Students.”

Bisexuality--Laws, regulations, and rules
Gays--Crimes against
Gays--Laws, regulations, and rules
Hate Crimes
Hate Crimes Statistics Act of 1990
Homosexuality--Laws, regulations, and rules
Lesbians--Crimes against
Lesbians--Laws, regulations, and rules
Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act
Sexual minorities--Crimes against
Sexual minorities--Laws, regulations, and rules
Sexual orientation--Laws, regulations, and rules
Transgender people--Crimes against
Trnsgender people--Laws, regulations, and rules

Ahuja, Harbani, *The Vicious Cycle of Hate: Systemic Flaws in Hate Crime Documentation in the United States and the Impact on Minority Communities*, 37 CARDOZO L. REV. 1867–1906 (2016).

Ahuja addresses the underreporting of hate crimes which affects the ability to protect vulnerable groups from hate crimes. Ahuja notes that improper reporting and documentation leads to decreased resources. The author states that one reason behind the underreporting is a gap in law enforcement and suggests that hate crime task forces be created to address the gap in training and specialization.

Alongi, Briana, *The Negative Ramifications of Hate Crime Legislation: It's Time to Reevaluate Whether Hate Crime Laws are Beneficial to Society*, 37 PACE L. REV. 326–51 (2016).

Alongi argues that hate crime legislation is harmful because it encourages members of society to view themselves in particular classifications instead of as one community. She states that hate crime legislation does not work as intended and is not cost-effective. Instead, she recommends that the money used to support hate crime legislation be spent on educating citizens and eliminating social problems that cause hate crimes. Specifically, she argues that families, communities, schools and law enforcement should work to better appreciate diversity, develop conflict resolution and critical thinking skills, and practice empathy.

Bantley, Kathleen A., *Judicial Activism and Progressive Legislation: A Step Towards Decreasing Hate Attacks*, 71 ALB. L. REV. 545–64 (2008).

Bantley examines how judicial decisions, such as *Goodrich v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003), which held that the Massachusetts Constitution provided for same-sex marriage, have shaped the landscape for hate crime legislation. At the time of this article, some states did the opposite of Massachusetts and amended their constitutions to specifically exclude LGBT couples. This disparity made it impossible for LGBTQ persons to be on equal ground with heterosexuals. Bantley argues that governmental actions have negatively impacted LGBTQ persons and that the only way to decrease hate attacks is to eliminate heterosexist policies.

Boram, Meredith, *The Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act: A Criminal Law Perspective*, 45 U. BALT. L. REV. 343–68 (2016).

Boram examines the language of the Shepard-Byrd Hate Crimes Prevention Act, which makes it a crime to cause bodily injury to another person “because of ... sexual orientation [or] gender identity.” In examining the legislative history of the act, Boram notes supporters of the Act clearly intended that animus motivation for conduct enhance punishment. Boram argues that courts have misinterpreted this “because of” language to mean but-for causation where it should actually require proof beyond a reasonable doubt.

Bui, Joseph, *Recycled Hate: Tyler Clementi, Dharun Ravi, and Those in the Crossfire*, 21 ASIAN AM. L.J. 145–76 (2014).

Bui discusses hate crimes at an intersection with immigrant communities and communities of color. He argues that using the criminal justice system to aggressively punish perpetrators of hate crimes may actually make communities of color and the LGBT community more vulnerable to hate-related crime and bias, in particular LGBT immigrants and LGBT persons of color. Bui asserts that pursuits for civil rights are connected throughout marginalized communities, not attached to singular communities, and actions against one community in the name of the rights of another affect those who are facing oppression on both fronts.

Charles, Casey, *Panic in the Project: Critical Queer Studies and the Matthew Shepard Murder*, 18 L. & LITERATURE 225–48 (2006).

In 2004, ABC television's show 20/20 revisited the Matthew Shepard murder. In this episode, the reporter, disregarding a gag order, interviewed one of the perpetrators of the murder who claimed it was simply a drug-fueled robbery, not a hate crime. The author examines this narrative in light of *The Laramie Project*, a play about the murder of Matthew Shepard designed to encourage dialogue about public perceptions of homosexuality and violence against sexual minorities. The author concludes that discussing tragic events is occasionally dangerous as it allows for heteronormative ideals to defuse the discussion and prevent change, rather than inspire change and prevention.

Cramer, Robert J., et al., *An Examination of Sexual Orientation—and Transgender-Based Hate Crimes in the Post-Matthew Shepard Era*, 19 PSYCHOL. PUB. POL'Y & L. 355–68 (2013).

In this article, the authors address two issues: whether perpetrators of hate crimes should be subject to penalty enhancements and if hate crime protection should be extended to sexual and transgender minorities. The authors conducted a two-part study in which jury-eligible community members provided sentencing and blame attribution ratings in three hate crime scenarios, one anti-African American, one anti-gay, and one anti-transgender, and also ranked agreement with penalty enhancement. The authors found that mock jurors tended to follow the penalty enhancement laws but also placed blame on the victim differently by victim category, which indicates that they did not remain completely objective in complying with the statute.

Duimovich, Samuel, *A Critique of the Hate Crimes Prevention Act Regarding Its Protection of Gays and Lesbians (And How a Private Right Could Fix It)*, 23 S. CAL. REV. L. & SOC. JUST. 295–327 (2014).

Duimovich examines the failure of the Hate Crimes Prevention Act to adequately protect against crimes directed at sexual minorities, even after sexual orientation was added as a protected class. He argues that the Act is not effective due to prosecutorial discretion in charging hate crimes, the high burden of proof required, and potential jury bias. Duimovich suggests that a private right of action would help alleviate this failure, as the burden of proof would be lowered and there would be a compensatory remedy.

Gillis, Ben, *Understanding Hate Crimes Statutes and Building Towards a Better System in Texas*, 40 AM. J. CRIM. L. 197–226 (2013).

Gillis notes that, although Texas has had a hate crime statute on the books since 1993, prosecutors are often reluctant to charge defendants with hate crimes. He examines hate crime statutes in other states to provide suggestions on how to improve the current scheme in Texas. He suggests that Texas should fully use the laws that are currently in place, prosecutors should be required to submit data on how many defendants are charged and convicted of hate crimes each year, and Texas should provide additional training for law enforcement as well as state oversight.

JIMENEZ, STEPHEN, *THE BOOK OF MATT: HIDDEN TRUTHS ABOUT THE MURDER OF MATTHEW SHEPARD* (2013).

To write this book, the author traveled to Wyoming and conducted an investigation over the course of thirteen years. Jimenez presents, in this book, an alternative narrative of Matthew Shepard's murder. He asserts that his investigation revealed a drug scene with deep ties to trafficking and that Matthew Shepard was actually murdered because of his ties to the drug scene.

Kim, Lisa Kye Young, *The Matthew Shepard and James Byrd, Jr. Hate Crimes Act: The Interplay of the Judiciary and Congress in Suspect Classification Analysis*, 12 LOY. J. PUB. INT'L L. 495–529 (2011).

The Hate Crimes Prevention Act was the first federal statute that includes sexual orientation as a protected class; however, the Supreme Court has not ruled that sexual orientation or gender identity is a suspect class that would trigger a strict scrutiny analysis. The author compares the current movement regarding LGBT rights with the civil rights movement. She argues that since the legislature has already concluded that sexual orientation has some "suspectness," the Supreme Court should grant quasi-suspect class status to sexual orientation for Equal Protection purposes.

Koons, Judith E., *Pulse: Finding Meaning in a Massacre through Gay Latinx Intersectional Justice*, 19 SCHOLAR: ST. MARY'S L. REV. & SOC. JUST. 1–56 (2017).

Koons examines the intersection of forms of oppression as well as the intersection of forms of justice. The author illustrates the intersection of oppression of the Latinx community and the oppression of the LGBTQ community using the Pulse nightclub massacre as an example. She argues that socially constructed systems of oppression of both these communities made the Pulse shooting inevitable. Koons states that all communities must join together in discourse and political action to free communities of color and LGBT communities from oppression, and that no one is ever free from oppression if anyone remains oppressed.

LEWIS, CLARA S., *TOUGH ON HATE? THE CULTURAL POLITICS OF HATE CRIMES* (2014).

The author challenges readers to understand why hate crimes have not declined even though there has been an increase in anti-hate crime legislation. She examines the cultural politics of society to show the societal willingness to accept violence against minority groups.

Loewen, Kim Diane, *Reframing Hate Crimes: Identifying and Combating the Systems of Violent Oppression that Converge Upon Queer Black Women*, 36 *WOMEN'S RTS. L. REP.* 137–63 (2015).

Loewen discusses the intersection of different communities that face oppression, such as race and sexual orientation. The author states that there is a common misconception that one single animus can be blamed for any hate crime; instead, she states, multiple systems of oppression are intertwined and inseparable. She argues that traditionally divergent groups, such as white feminists and Black women, must unite and stand against Euro-centric, heteropatriarchal oppression.

Meli, Laura, *Hate Crime and Punishment: Why Typical Punishment Does Not Fit the Crime*, 2014 *U. ILL. L. REV.* 921–66 (2014).

Meli discusses and examines hate crime laws and the theories behind them. She argues that such laws and the enhanced penalties they carry are justified because hate crimes cause more harm than traditional crimes. She concludes that hate crime laws should not be repealed, but rather that longer sentences should be abolished and offenders should be required to complete community service in the targeted community.

Newman, Rebecca J., *Two Sheriffs, One Town: The Problem of Prosecuting Transgender Hate Crimes in the District of Columbia*, 17 GEO. J. GENDER & L. 495–519 (2016).

Newman addresses the unique problem of prosecuting hate crimes in the District of Columbia. The author notes that, although crime rates have decreased, hate crimes, in particular crimes against transgender persons, have increased. The District has devoted resources into combating these hate crimes, but, unfortunately, the federal interest doctrine leaves the decision to prosecute with the U.S. Attorney General. The author argues that vesting authority completely in local DC prosecutors would be inadequate for the federal government, but a hybrid prosecution would allow federal and local prosecutors to share discretion.

Rankin, Sara K., *Invidious Deliberation: The Problem of Congressional Bias in Federal Hate Crime Legislation*, 66 RUTGERS L. REV. 563–628 (2014).

Rankin focuses on the delicate issue of congressional bias in the passage of federal hate crime statutes. She notes that adding LGBTQ as a protected category was met with greater resistance than other covered categories such as race and gender. She states that this resistance was an expression of unrecognized bias against LGBTQ persons. Rankin concludes by suggesting that Congress use a more transparent method of determining category inclusion in hate crime legislation in order to mitigate unrecognized bias.

SHEPARD, JUDY, *THE MEANING OF MATT: MY SON'S MURDER IN LARAMIE, AND A WORLD TRANSFORMED* (2009).

This book, written by Matthew Shepard's mother, tells the story of Matthew Shepard's life, death, and the affect his death had on the country. Written from the point of view of Matthew Shepard, this powerful book examines the true impact of hatred in the United States.

Simmons, Kami Chavis, *Subverting Symbolism: The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act and Cooperative Federalism*, 49 AM. CRIM. L. REV. 1863–1912 (2012).

This article addresses the very real problem with the Hate Crimes Prevention Act: federalism. The author argues that hate crimes can, in fact,

be prosecuted under this Act without violating principles of federalism by using a federal-state regime of prosecution. The collaboration would also maximize resources for prosecutions while not usurping the state's traditional power to prosecute crimes.

SPINKLE, STEPHEN V., *UNFINISHED LIVES* (2011).

This book tells the story of fourteen victims of anti-LGBTQ hate crimes. This powerful account of fourteen lives cut short heightens public discourse surrounding persons targeted for violence simply because of their sexual orientation and/or identification. The stories in this book help put faces to anti-gay and anti-trans violence.

TOMSEN, STEPHEN, *VIOLENCE, PREJUDICE AND SEXUALITY* (2009).

This is a book about the politics of masculinity and its intersection with violence. In this book, the author discusses why men attack sexual minorities and illustrates how being of a sexual orientation outside the binary classification of heterosexuality can be dangerous and fatal. He examines why society accepts such violence.

Trout, Matthew, *Federalizing Hate: Constitutional and Practical Limitations to the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009*, 52 AM. CRIM. L. REV. 131–54 (2014).

Trout uses the case *United States v. Jenkins* as an illustration of the difficulties in prosecuting a hate crime under the federal Hate Crimes Act. In this case, although the defendants were convicted of the underlying crimes of kidnapping and assault, they were acquitted of the hate crime component charge, even after co-perpetrators who pleaded guilty testified that the victim was targeted because of his sexual orientation. The Hate Crimes Prevention Act is limited significantly because of its reliance on the Commerce Clause and the Thirteenth Amendment. Trout argue that states need to enact their own hate crime laws to combat hate crimes at the local level.

Woods, Jordan Blair, *Taking the "Hate" Out of Hate Crimes: Applying Unfair Advantage Theory to Justify the Enhanced Punishment of Opportunistic Bias Crimes*, 56 UCLA L. REV. 489–541 (2008).

Woods examines bias crimes committed, not because of hatred for the group, but because the perpetrator believes that the victim is more

vulnerable; thus the crime is opportunistic. Woods questions whether these types of crimes should be considered hate crimes and punished as such when the perpetrator is not motivated by animus. Woods concludes that perpetrators should in fact be subjected to enhanced punishments based on unfair advantage theory, which justifies enhanced punishment based on the unfair advantage that criminals gain over community members who follow the law, and that opportunistic bias crimes perpetuate the idea that certain groups are more vulnerable and easier targets.

Primary Sources

Goodridge v. Department of Public Health, 440 Mass. 309, 798 N.E.2d 941 (2003)

Hate Crime Statistics Act, Pub. L. No. 101-275, 104 Stat. 140 (1990), 28 U.S.C § 534

Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84 Division E, 123 Stat. 2835 (2009), 18 U.S.C. § 249, 1389; 42 U.S.C. § 3716, 3716a