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Why the ACLU of Utah is wary of legislation that includes enhanced penalties for hate crimes

Our nuanced stance on hate crimes touches on more than crime and punishment.

By John Mejia & Jason Stevenson

It might surprise you that the ACLU of Utah doesn't instinctively support hate crimes legislation that involves enhanced penalties for certain offenses. But when you consider our opposition to policies that promote mass incarceration and our constant fight to end the racism embedded in the criminal justice system, our stance shouldn't be surprising. As the Utah Legislature considers changes to the state's hate crimes laws again this year, we want to offer our perspective on the hidden perils of enhancing punishments for certain crimes.

The ACLU of Utah believes that racism and other forms of discrimination are real and systemic problems in our society. We condemn crimes where the victim is selected because of that person's race, color, national origin, religion, gender, sexual orientation, gender identity, or disability. Crimes motivated by hate strike at the sense of security and equality of all members of the targeted group and beyond. Therefore, we do see value in certain law enforcement efforts related to hate crimes, such as clearly identifying and tracking hate-based crimes. These kinds of efforts can help us to address the systemic issues that lead to hate crimes.

But even as we recognize the harm done by hate crimes and the role for some government efforts to confront them, our unvarnished view of the criminal justice system cautions us against supporting lengthier prison or jail sentences to punish hate crimes.

To better explain our position, here are five concerns we have with stronger hate crimes legislation.

First, the ACLU is currently engaged in a sustained campaign to end our nation's fixation on mass incarceration and to reduce the number of people in prisons and jails by half nationwide. We want to decrease our reliance on more and longer incarceration as an answer to crime. We are also seeking alternative solutions to address all crimes focused on root causes and restorative justice, and to correct the racial bias embedded in the criminal justice system. These efforts are why we do not support increased sentences for any crime.

Second, minority groups are most often the targets of hate crimes. Our experience with hate crimes cases in other jurisdictions, however, has shown that prosecutors do not limit their cases to crimes against minorities. Most people think of neo-Nazis and skinheads as the perpetrators of hate crimes, but the reality of how these crimes are prosecuted can be much more complex. Many defendants in

hate crimes prosecutions have been people of color, including African-Americans, with white victims. This fuels a concern that prosecutors will, through conscious or unconscious bias, be more inclined to identify and pursue hate crimes against people from minority groups or people with disabilities.

Third, the process of pursuing hate crime charges might ultimately damage free speech and associational rights. While direct links between someone's speech or association and their hateful actions might exist, we foresee cases where the links are unclear or even exaggerated. It is not hard to imagine, for example, that a prosecutor might argue that membership in Black Lives Matter should be used as evidence of bias, even though that is not true. Whether the prosecutor won that argument or not, even making it would send a chilling message to members of that or similar groups and to people considering joining them.

Fourth, we believe that mandating harsher punishments for hateful individuals does not fully address the root problems of hate and bias in our society. These cases may even create instances in which the intended result might be counterproductive to the larger cause. Consider Dylann Roof, a white man convicted of murdering nine African-American churchgoers in Charleston, South Carolina in a devastating hate crime. In an essay for *Time* magazine considering whether he supported the death penalty for Roof, Jeffrey Robinson, Deputy Legal Director for the ACLU, wrote that a high-profile trial and execution of Roof might provide false legitimacy to the idea that the death penalty "is meted out fairly in America." His concern was that this single instance would obscure the fact that capital punishment "unfairly and disproportionately continues to kill black and brown people," potentially hindering efforts to end it.

Fifth, whether the law is changed or not this year, victims of hate crimes should always feel that law enforcement treats them with the same dignity and respect that others receive. How can you have an effective hate crimes statute if the victims are more afraid of the police than their attackers? All law enforcement agencies should adopt policies under which people can report crime without worrying that doing so could put them in jeopardy of detention or deportation. Any barrier to reporting crimes will always make people more vulnerable to mistreatment.

It is because of these major concerns that the ACLU of Utah is not able to support hate crimes legislation focused on enhancing criminal penalties. However, we will not oppose hate crimes legislation that carefully addresses the key issues raised above, including free speech protections and proper oversight to ensure its unbiased application by prosecutors.

Finally, we believe there are effective and positive approaches to condemning and healing from hateful acts beyond enhanced criminal punishments. For example, following the Pulse nightclub shooting in June 2016, hundreds of people gathering in downtown Salt Lake City heard a heart-felt speech from Lt. Gov. Spencer Cox about his journey to acceptance and love for LGBTQ people. That event, and the hundreds of thousands of people who later viewed the viral video of Cox's speech, likely helped to change hearts and minds about acceptance of LGBTQ individuals, without regard for how the crime was punished.

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