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Resist this assault on freedom of thought

America's new Matthew Shepard Act will punish criminals for their thoughts as well as their acts. But we should defend the freedom to hate.

Wendy Kaminer

I mean no disregard for the sufferings of crime victims when I say we should be wary of laws named after them. However well-intentioned, penal laws that memorialise victims deter reasoned debate about the rights of the accused. They rely on emotional blackmail: oppose a law named for a murdered child, and you seem to insult her memory and exacerbate her parents' grief.

The US Matthew Shepard Local Law Enforcement Hate Crimes Prevention Act is no exception to this rule. By invoking memories of the brutal slaying of the gay University of Wyoming student Matthew Shepard in 1998, it makes a sentimental bid for expanded federal hate crime legislation covering violent crimes motivated by a victim's sexual orientation or 'gender identity', as well as race, sex, religion, ethnicity or disability. Passage of this bill was blocked last year by the threat of a presidential veto, but with a promise of support from the new president, the Matthew Shepard Act has passed the House and is pending in the Senate. Its prospects are excellent.

Hate crime legislation can still stir up controversy (opponents typically point out that it is redundant, at best), but in the past two decades it has been normalised. Almost all states in the US have laws targeting hate crimes, typically imposing stricter sentences in cases involving bias-motivated violence. Race, religion and sex are the most common protected categories, but a majority of state hate crime laws include sexual orientation in what seems like an ever-expanding list of protected classes: Maryland recently amended its hate crime statute to include crimes against homeless people. Soon crime victims who were not targeted on account of their demographic status may complain of unequal treatment by laws that don't impose enhanced sentences on their attackers.

US federal law already imposes harsher penalties on hate crimes that fall within traditional areas of federal jurisdiction, like crimes committed on federal property. In 1993, the Supreme Court upheld the use of enhanced sentencing in bias-motivated crimes, and Congress quickly included an enhanced sentencing provision in a massive omnibus crime bill, the Violent Crime Control and Law Enforcement Act of 1994. But the Matthew Shepard Act could greatly expand federal jurisdiction to a wide range of bias crimes committed anywhere, under virtually any circumstances, at the discretion of the US attorney general.

By what authority would federal prosecutors intervene in what have traditionally been state criminal cases? Congress rests its assertion of jurisdiction over hate crimes on federal, constitutional power to regulate interstate commerce, which was the basis for the landmark 1964 Civil Rights Act, prohibiting discrimination in employment and public accommodations. Recently, however, the right-leaning Supreme Court has limited federal civil rights jurisdiction under the commerce clause; in a controversial case in 2000, it struck down provisions of the 1994 crime bill that defined acts of violence against women as violations of federally protected civil rights. Once enacted, the Matthew Shepard Act could conceivably be challenged as an unconstitutional appropriation of federal power.

The battle over this bill, and the extension of power it represents, has been predictably partisan; generally, liberals like it and conservatives don't. In the House, the bill passed with the support of 231 Democrats and 18 Republicans, over the opposition of 17 Democrats and 158 Republicans. Naturally, the Matthew Shepard Act enjoys the enthusiastic support of civil-rights groups, including

the historic defender of free speech, the American Civil Liberties Union. The ACLU has withheld support from federal hate crime legislation in the past but has wholeheartedly embraced this bill, which applies only to acts of violence and has been carefully drafted to avoid criminalising pure speech: it provides that evidence of a defendant's hateful speech or associations are only admissible at trial if they 'specifically relate' to the offence charged. In other words, speech could be offered as evidence that a violent act was motivated by bias, but it would not be a crime in itself.

Still, distinguishing hateful bias crimes from other hateful acts of violence punishes ideas and expression, no matter how scrupulously the legislation is crafted. When someone convicted of assaulting one woman is subject to an enhanced prison sentence or a more vigorous prosecution because his assault was motivated by a hateful belief in the inherent inferiority of all women, then he is being punished for his thoughts as well as his conduct.

Some regard this as merely a small step rather than a great leap for criminal law. First-year law students learn that motive, willfulness and intent are routinely considered in determining criminal liability. But ideology is not routinely invoked in assessing the seriousness of an alleged crime. Hate crime legislation does not address the defendant's intent to commit a violent act, as penal laws generally do; it is expressly designed to punish particular thoughts and ideas.

Its advocates argue that hate crimes demand differential treatment because they are crimes against communities, not just individuals. Hate crimes 'are more serious than a normal assault because they target not just an individual, but an entire group of people', New York congressman Jerrold Nadler has asserted. Or, as the Human Rights Campaign explains, 'While a random act of violence against any individual is always a tragic event, violent crimes based on prejudice have a much stronger impact because the motive behind the crime is to terrorise an entire community, and sometimes the nation'. So, without directly criminalising speech, the Matthew Shepard Act (like other hate crime laws) would effectively and intentionally criminalise bias, when bias is shown to bear a direct relationship to a violent crime.

It's not surprising that civil-rights advocates concerned with what they view as epidemics of unaddressed violence against particular, presumptively vulnerable groups support the criminalisation of bias. Civil libertarians, however, ought to be more sensitive to the creation of thought crimes - even when 'bad' thoughts are only punished in the course of punishing bad acts. Free-speech advocates who believe that misogynist pornography should be legal, for example, should question whether evidence of a defendant's porn collection should be introduced at a sexual-assault trial in order to convict him of a hate crime. It is sophistry to suggest that in such a case the defendant would suffer punishment only for his conduct, and not his beliefs.

But freedom of thought is not the only liberty at stake in this debate. The Matthew Shepard Act would also subject defendants to double jeopardy for a single offence. The bill expressly states that defendants prosecuted in state court may be prosecuted for the same crime in federal court, if federal officials determine that 'the verdict or sentence obtained pursuant to state charges left demonstrably un-vindicated the federal interest in eradicating bias-motivated violence'.

The constitutionality of this provision is not in question. The Supreme Court has long allowed state and federal authorities to conduct separate trials for the same offence, and reasonable people will differ as to the justice of this, especially when the state has demonstrated an inability or unwillingness to prosecute fairly a horrendous crime.

Civil rights-era cases offer the best argument for dual prosecutions by dual sovereigns. In 1965, federal prosecutors convicted Klan member Collie LeRoy Wilkins of a civil-rights crime in the killing of activist Viola Liuzzo after his acquittal in Alabama state court. More recently, in a controversial 1993 case, federal prosecutors convicted two police officers of beating Los Angeles motorist Rodney King (and violating his civil rights) after their acquittal by the state of California.

Still, exceptions to double jeopardy remain controversial for civil libertarians: the ACLU officially opposes dual prosecutions, stating: 'There should be no exception to double jeopardy principles simply because the same offence may be prosecuted by two different sovereigns… even important federal interests do not justify balancing away a defendant's rights under the double jeopardy clause.' This policy was briefly suspended by the ACLU board in 1992, in response to the Rodney King case, but it was reinstated in 1993 after an impassioned debate. The ACLU's unequivocal endorsement of the Matthew Shepard Act violates its own stated, civil-liberties principles.

Is it necessary or fair to expand federal criminal jurisdiction to allow for dual federal and state prosecutions of alleged hate crimes? Arguably - if strong empirical evidence demonstrates that states are generally unwilling or unable to prosecute these crimes. Otherwise federal hate crime legislation addresses an illusory threat to civil rights, while it exacerbates an actual crisis for civil liberty.

The continuing expansion of federal criminal jurisdiction has given federal law enforcement officials unprecedented power over each of us. As Gene Healy of the Cato Institute has observed, the federal criminal code is so vast and comprehensive that it enables prosecutors to 'pick targets they think they should get rather than offences that need to be prosecuted'. Healy estimates that about 4,000 crimes are 'scattered throughout the tens of thousands of pages of the United States code', stressing that the exact increase in federal crimes has been difficult to track. One frequently cited 1999 study by the American Bar Association noted that 40 per cent of all federal criminal laws enacted after the Civil War dated back only to 1970.

While libertarians have mounted consistent, principled resistance to this expansion of federal criminal jurisdiction (and Cato has offered thoughtful testimony against the federal hate crime bill), generally both liberals and conservatives have adopted result-oriented approaches to federalising crime: liberals who favour decriminalising marijuana possession oppose federal laws prohibiting it, which conservative anti-drug warriors support. Liberal gay rights advocates support the federalisation of bias crimes against gay people, which conservatives wary of expanding gay rights oppose.

This may look like pragmatism, but it's more like shortsightedness. Expansions of federal criminal jurisdiction are often responses to concerns of the moment - from carjacking and cockfighting to child abuse and juvenile crime - that can be addressed adequately by the states (especially with federal incentives). The necessity of many federal penal laws is more often presumed than demonstrated, and outweighed by the cumulative threat that this growing body of law poses to liberty.

Matthew Shepard's killers were convicted of homicide and kidnapping by the state of Wyoming and are serving consecutive life sentences. His torture and murder remain awful to contemplate, but civil libertarians ought not be squeamish about questioning the consequences of the law that would bear his name.

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