



H.118

Vermont Office of the Defender General

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What is a hate crime enhancement?

- It is not constitutional to prohibit people from thinking hateful thoughts, from saying hateful things, or from expressing hateful ideas. Hate is protected by the First Amendment.
- Because hate is protected by the first amendment, courts have to be very careful about how they use the content of people's speech, thoughts, motivations, and expressions.
- Where there is a hate crime enhancement, it is not hateful speech or thought that is the crime, but the hateful speech or thought leads to a higher penalty for the crime.
- For example – if someone spray paints on the side of a neighbor's house because they do not like their neighbor's political beliefs, that's probably unlawful mischief, punishable by up to 6 months in prison.
- But if someone spray paints the side of a neighbor's house because they do not like their neighbor's religious beliefs, that's unlawful mischief with a hate crime enhancement and is punishable by up to *two and a half years* in prison.

Hate crime enhancement must be connected to victimization.

- Courts *can't* impose an enhanced sentence because of a person's *abstract* beliefs, statements, thoughts, or motives.
- In *Dawson v. Delaware*, 503 U.S. 159 (1992) the US Supreme Court overturned a murder sentencing because the judge had based the sentence, in part, on the fact that the defendant was a white supremacist. The Supreme Court held that was not permissible because Dawson's white supremacist beliefs were not related to his selection of a victim in his murder.
- But in *Barclay v. Florida*, 463 U.S. 939 (1993), the US Supreme Court upheld a sentencing of a Black Liberation Army adherent who killed a white man, even though the judge had imposed the sentence in part because of the defendant's racism. IN that case, it was permissible because the defendant's racism was the basis for the selection of the victim in the offense.

Hate crime enhancements must be facially neutral.

- There are categories of *unprotected* speech which the First Amendment does not recognize as speech at all and allows governments to restrict that speech: Child pornography, incitement to imminent violence, true threats, speech integral to criminal conduct, fighting words, etc.
- But even within those categories, the government cannot elect one viewpoint over another.
- In *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), The US Supreme Court considered a city ordinance prohibiting the use of “fighting words” (unprotected speech) if that speech or symbolism was motivated by bias and intended to “arouse[] anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.”
- The US Supreme Court struck down the ordinance because the City could not single out fighting words related to “race, color, creed, religion, or gender” as the only categories of fighting words that would be prohibited – that is not viewpoint neutral. If the statute had prohibited all fighting words, that would have been constitutional.

Hate crime enhancements *are* constitutional when they are narrowly tailored.

- In *Wisconsin v. Mitchell*, 508 U.S. 476 (1993), the US Supreme Court upheld a hate crime sentencing enhancement in Wisconsin.
- The Court distinguished *Mitchell* from *R.A.V.* by noting that the statute in *R.A.V.* was struck because it contained viewpoint discrimination, where the statute in *Mitchell* was upheld because “the only reason for the enhancement is the defendant’s *discriminatory motive for selecting his victim.*”
- Because the Wisconsin statute in *Mitchell* was focused on the *conduct* of selecting a victim on the basis of race or ethnicity, not the racist motive for the underlying offense, that statute was upheld while the statute in *R.A.V.* was struck down.

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- H.118 proposes to amend 13 V.S.A. § 1455 to make it less like the constitutional hate motivated crime statute in *Mitchell* and more like the unconstitutional hate motivated crime statute in *R.A.V.*
- Specifically, H.118 *removes* the provision explicitly endorsed by the Supreme Court in *Mitchell* connecting the enhanced penalty with the discriminatory or biased selection of a victim.
- Instead, H.118 would enhance penalties for offenses based not on whether the victim was targeted based on their race, color, religion, etc. but on whether the offense was motivated by hatred of *any person or group* whether they are the victim or not.
- This crosses the line into punishing people for their biased and discriminatory thoughts, whether or not those thoughts had a connection to the victim of the offense. That conflicts with the *Mitchell* decision and the principle that we punish intent and action but not motive.

While we're on the subject of § 1455

- The penalties in this section should be adjusted, particularly at the lower end.
- It doesn't make sense that damaging your neighbor's property because you disapprove of their political identity is a six month misdemeanor but damaging the same neighbor's property because you disapprove of their religious beliefs is a two year and six month felony – it is disproportionate to have such disparate sentences for such similar offenses made different only by the nature of the motive.
- Making misdemeanors into felonies because of what someone was thinking when they committed the offense is disproportionate.
- Subsection (a)(1) should be modified to read “If the maximum penalty for the underlying crime is one year or less, the penalty for a violation of this section shall be imprisonment for not more than ~~two years~~ six months or a fine of not more than \$2000, or both.”
- Subsection (a)(2) should be modified to read “If the maximum penalty for the underlying crime is more than one year but less than five years, the penalty for a violation of this section shall be imprisonment for not more than ~~five~~ three years and in no event for more than 50% of the sentence imposed for the underlying crime or a fine of not more than \$10,000 or both.

Other jurisdictions

- Connecticut: 5 different hate crime sentencing enhancements, all explicitly focusing on targeting a particular victim based on their protected status.
- Maine: No hate crime sentencing enhancement, but a statute noting that courts may take bias-motivation into account at sentencing, but it does not enhance the sentence.
- Massachusetts: 2 hate crime enhancements, one focusing on property damage motivated by the protected characteristic of the victim, the other focused on assaults or threats motivated by the protected characteristic of the victim
- New Hampshire: Hate crime sentencing enhancement if the defendant was “substantially motivated to commit the crime *because of hostility to toward the victim’s protected characteristic.*”
- New York: Hate crime sentencing enhancement for “*intentionally select[ing] the victim at least substantially because of a belief or perception regarding a protected characteristic.*”
- Rhode Island: Hate crime sentencing enhancement when a defendant is convicted of a crime “in which *they intentionally selected the person* against whom the offense is committed or selected property that is damaged or affected *because f the defendant’s hatred or animus toward the protected characteristic of the victim.*”