

Statement of:

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Thank you for the invitation to share my views with you at today's hearing.

I have been studying and writing about hate crime for twenty years. In 1998, Oxford University Press published my book, *HATE CRIME: CRIMINAL: LAW AND IDENTITY POLITICS*. The book is, in effect, an extended argument against the need for and the desirability of hate crime laws. I argue that there is no problem for which hate crime laws are the solution. Certainly, the maximum sentences for criminal offenses, are long enough to serve all the needs of criminal punishment. If anything, we are reaching a societal consensus that we have too much punishment, not too little.

I hasten to add that I deplore discrimination and bias and, of course, violent crime motivated by bias. All violent crime, no matter the motivation, is deplorable and therefore rightly carries significant maximum punishment. I do not think it is justifiable, desirable or useful to create a hierarchy of crimes and victims based on the racial, religious, gender, sexual orientation identity of the perpetrator and/or victim.

The labeling of offenses as hate crimes or bias crimes is hopelessly subjective and generates unnecessary and divisive controversy. The early efforts by hate crime proponents to resist including gender-motivated-violence as a hate crime was regarded as insensitive at best and indicative of blatant bias at worse. The subsequent effort by some to resist including anti-gay motivation as a bias crime trigger was similarly regarded as blatantly discriminatory and

intolerant. Even now, there continues to be debate about what biased motivations should warrant extra punishment.

Determining what is a bias crime is fraught with difficulty, thus frustrating the aim of the federal Hate Crime Statistics Act and many prosecutions. Sometime offenders are not caught. When they are caught, it is usually difficult to determine offenders' motivations. And, even if prosecutors believe that they can determine motivation, it is often very difficult to prove.

One need only recall the controversy over whether Dharun Ravi's effort to photograph his roommate, Tyler Clementi's, homosexual encounter ought to be charged as a bias crime. While all Americans could agree that invading a roommate's privacy is wrong, there was great division over whether the punishment should be doubled if the roommate is gay. The whole fight was so unnecessary since "simple" invasion of privacy was punishable in New Jersey by a five year maximum sentence. The politics of hate crime laws divide rather than unite us.

In the 1980s, when the term hate crime was invented, its proponents said they meant for the laws to be used to punish murderous plots by members of neo-Nazi and similar hard-core hate groups. The reality is that bias crime prosecutions are far more likely to be directed against the Archie Bunkers than the (white supremacist) Tom Metzgers. Indeed, most hate crime prosecutions involve young defendants, frequently mixed-up teenagers, who commit low-level offenses such as criminal mischief and simple assault, typically escalating from spontaneous altercations at a party, in a parking lot or at a school event. Many cases that initially are called hate crimes, upon closer inspection, involve serious mental illness rather than ideological commitment. It is worth pondering that the federal hate crime statute, passed in 2009 to bring federal law enforcement resources to bear on hard core murderous hate groups, is this week

being used to prosecute a breakaway Amish cleric in Ohio for religiously degrading Amish men who did not follow his lead by ordering their beards to be cut.

As crime control policy, bias crime laws are unnecessary. Failure to provide for maximum punishments adequate to satisfactorily punish criminal offenders is not an American problem. We probably have the longest sentence maxima in the free world. For the most serious crimes, we have life imprisonment without parole or capital punishment. No more can be added. Ironically, some states, in the name of creating a more tolerant society have made bias motivation an aggravating factor that makes a murder eligible for capital punishment. Another irony is the use of prison to punish bias crimes. Prisons, as we know, are the number one spawning grounds for hate groups.

Hate crime laws are counterproductive. They politicize crime and spawn charges of hypocrisy and double standards. Those who are prosecuted call themselves victims of political correctness and martyrs to the First Amendment.

The hate crime laws conflict with their proponent opposition to over-use of criminal law and especially to over-incarceration. Sending more people to prison for longer is hardly likely to contribute to a more tolerant society.