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BEYOND UNCOMPROMISING POSITIONS: HATE CRIMES LEGISLATION AND THE COMMON GROUND BETWEEN CONSERVATIVE REPUBLICANS AND GAY RIGHTS ADVOCATES

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I. Introduction

We live in an age of political rhetoric and posturing that is needlessly rigid and quite harmful. Disagreements more apparent than real too often are manufactured by overstatement, overdefensiveness, and uncompromising wish lists for a perfect world. In a society beset by conflict, there may be nothing more tragically destructive than a failure to acknowledge common ground.

New York State has suffered the effects of extremist political posturing and rhetoric, as State Senate Republicans long have blocked efforts to enact a bill that would create the new offense of bias-motivated crime.¹ At the same time, gay and lesbian advocates, through our own posturing, have undermined the prospect that conservatives would support laws having anything to do with gay rights. Yet, there is common ground for conservatives and gay rights advocates, and that common ground is the proposed bias-crimes legislation.

The proposed legislation would make a person guilty of a bias-motivated crime when a jury determines beyond a reasonable doubt that a robbery, assault, or murder was perpetrated because of the victim's race, religion, national origin, gender, disability, age,

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1. N.Y.S.B. 4842, 215th Gen. Ass. (1993), introduced in the New York State Senate by Senator Roy Goodman on May 3, 1993, which "amend(s) the criminal procedure law, the penal law and the civil rights law, in relation to strengthening civil rights protections and to make bias related violence or intimidation a criminal offense." S. 4842 defines "Bias related violence in the first degree as follows:

A person is guilty of bias related violence or intimidation in the first degree when, with the intent to deprive an individual or group of individuals of the exercise of civil rights because of the individual's or group of individual's race, creed, color, national origin, sex, disability, age, or sexual orientation, such person intentionally, knowingly, or recklessly causes the death of another individual.

or sexual orientation.² Recent incidents of violence motivated by racism, anti-semitism, and homophobia underscore that the problem of bias-motivated violence is quite real.³ It should not be news to anyone that the bonds linking us in a common social enterprise are strained; that historic hate and prejudice are being inflamed by political change and hard times;⁴ that some young males, insecure in their own identities and immature in their sense of social responsibility, are increasingly venting their inherited bigotries through games of stalking and assaulting human prey.⁵ Indeed, all of us are increasingly vulnerable to bias-motivated attack, whether on Christopher Street, the Brooklyn Bridge, Howard Beach, Staten Island, Long Island, or Main Street in Poughkeepsie, Albany, or Buffalo.

Despite the prevalence of bias-motivated violence, and despite the State Assembly's passage of the proposed legislation during its 1994 session, conservative Republicans in the State Senate blocked the bias-crimes bill yet again. This conservative opposition seems odd, however, because Republicans long have claimed to be the party of law and order. Indeed, Richard Nixon declared in 1968 that freedom from violent crime is "the *first* civil right of every American."⁶ Furthermore, crime is once again a first-priority issue, as it was a generation ago.⁷

The core Republican objection to the bias-crimes bill has focused on the inclusion of crimes motivated by anti-gay bias.⁸ To provide special criminalization for crime motivated by anti-gay bias, they fear, would be to step down a slippery slope leading to virtually unlimited civil rights for gay men and lesbians.⁹ As Republican

2. See, *supra* note 1.

3. Curtis L. Taylor, *Slaying Prompts Gays to Organize; New Groups in Queens Battle Homophobia*, NEWSDAY, Nov. 6, 1991, at 21. Rose Marie Arce and Anthony M. DeStefano, *Fear and Distrust Greet Racial Attack*, NEWSDAY, Jan. 14, 1992, at 4.

4. See generally GARY S. BECKER, *THE ECONOMICS OF DISCRIMINATION* 19-27 (2d ed. 1971).

5. Joseph A. Gambardello, *White Trio Beats Latino Boys*, NEWSDAY, Jan. 14, 1992, at 5; Scott Winokur and Carla Marinucci, *Gangs: Byproducts of Diversity, Despair*, SAN FRANCISCO EXAMINER, July 10, 1994, A-8. See generally James C. McKinley Jr., *Gang Kills Homeless Man in Halloween Rampage*, N.Y. TIMES, Nov. 2, 1990, A-1.

6. *Transcripts of Acceptance Speeches by Nixon and Agnew to the G.O.P. Convention*, N.Y. TIMES, Aug. 9, 1968, at A20 (emphasis added).

7. Rich Jaroslovsky, *Americans Agenda for 1994 is Crime, Welfare and Healthcare*, THE WALL STREET JOURNAL, Jan. 21, 1994 at A1.

8. Ralph J. Marino, *Q. & A.: Where Republicans Stand On Hate-Crime Legislation*, N.Y. TIMES, Jan. 26, 1992, § 4, at 7; M.P. McQueen, *State Bias Law Pressed; Cuomo Calls on Senate to Pass Bill*, NEWSDAY, May 15, 1990, at 2.

9. Some have raised the flag of the First Amendment in opposing hate-crimes legislation. But, as the Supreme Court recently held, providing special criminalization

Senator Guy Velella declared, "It opens up a Pandora's Box. Our concern is opening up a whole area of gay rights in teaching. Teachers would have rights to be homosexual and advocate that that is an acceptable way of life."¹⁰

These concerns are misplaced. One can be committed to securing for gay men and lesbians "the *first* civil right of *every* American,"¹¹ without being committed to *every* civil right for gay men and lesbians.

Section II of this Essay suggests four reasons why conservative Republicans should enthusiastically support the very hate-crimes legislation they have been blocking, despite its inclusion of crimes motivated by anti-gay bias. Section III argues that the confrontational rhetoric of many gay rights advocates has undermined prospects for political progress, and suggests that open dialogue between gay rights advocates and conservatives is preferable to the now-prevalent rigid posturing. This Essay concludes that hate-crimes legislation can be embraced by both conservatives and gay rights advocates without advancing or inhibiting either group's broader political agenda.

II. Hate-Crimes Legislation and Conservative Values

Legislation that imposes a special penalty when a defendant is found beyond a reasonable doubt to have selected his crime victim because of the victim's race, creed, color, national origin, sex, disability, age, or sexual orientation, serves the values of conservatives in the following four ways:

A. Enforcing Ordered Liberty through the Rule of Law

Those who commit hate-crimes directly challenge the fundamental conservative idea that the state has a monopoly right to vindicate social norms through the use of force. Perhaps unlike other criminals, hate-motivated criminals believe that their acts of assault actually serve the community's morality, or even some higher mo-

for crimes motivated by the race, religion, gender or sexual orientation of the victim does not impinge on the First Amendment's protected speech. *Wisconsin v. Mitchell*, 113 S. Ct. 2194 (1993). For a discussion of hate-crimes legislation and the First Amendment, see David Chang, *Lynching and Terrorism, Speech and R.A.V.: The Constitutionality of Wisconsin's Hate Crimes Statute*, 10 N.Y.L.S. J. HUM. RTS. 455 (1993).

10. Paul Schwartzman, *Gov: City's Racial Hatred is as Bad as it Can Get*, N.Y. Post, Jan. 17, 1992.

11. *Transcripts of Acceptance Speeches by Nixon and Agnew to the G.O.P. Convention*, *supra* note 6.

rality.¹² Whether the motivation is hatred of gays or blacks or Jews, a common bond among hate-motivated criminals is a sense of doing battle for good over evil. Put another way, these criminals are vigilantes in pursuit of justice as they see it.¹³ From their perspective, the crucial point is their belief that they are doing justice. From a conservative's perspective, the crucial point should be that they are vigilantes.

Rejecting vigilante justice does not require condemning the values underlying the vigilante's decision to act. One can be anti-gay, yet still support the criminalization of those who advocate anti-gay values through the vigilantism of hate-motivated assault. Indeed, conservative Republicans can support hate-crimes legislation as a pointed affirmation of the basic conservative principle that ours is a society of *ordered liberty* governed by the *rule of law*.

Liberty is not ordered unless the state alone uses force to vindicate society's norms. The rule of law requires the enforcement of society's norms through regular and orderly procedures to ensure that only those who actually have violated the laws are punished. Thus, if homosexuals are to be regulated—a goal shared by hate-motivated criminals and many conservative Republicans—it must be through orderly public procedures, not through flailing ambushes committed by private individuals on the public's streets.¹⁴

B. Securing Commerce and Productive Enterprise

Conservatives should support hate-crimes legislation because hate-motivated crime disrupts the social peace and security that allow commerce and productive enterprise to flourish. People must feel free to venture from their homes into the streets, to participate in economic production and consumption, and simply to enjoy the variety of society's characteristics and creations. Ordinary street

12. See, e.g., GARY DAVID COMSTOCK, VIOLENCE AGAINST LESBIANS AND GAY MEN 19 (1991) (quoting former gay-basher as believing that he was "waging . . . a kind of holy war . . . [and] doing the world a favor," and that "aggression against [the homosexual] was viewed as a virtue" because the homosexual is "so universally despised"). Comstock also cited a youth center counselor who said about the murderers of gay men, "[u]nlike other residents who had committed their crimes as a means of rebelling against society, the slayers of Charlie Howard [a gay man] committed theirs as a way of being accepted by it." *Id.* at 92. In addition, a police inspector reported that four young men who beat a gay man to death "seem to regard the beating-up of whomever they consider sex deviates as a civic duty." *Id.* at 183, n. 54.

13. Cf. Edward I. Koch, "Law, Order, and Justice," 18 CONG. REC. H14, 020 (daily ed. April 24, 1972)(statement of Rep. Koch).

14. Studies suggest that lesbians and gay men suffer violent attacks at three to four times the rate at which the general population does. COMSTOCK, *supra* note 12, at 55.

crime destroys a sense of security in society and, therefore, hinders this productive social activity. Hate-motivated crime compounds the fears of victimization and the pressures to avoid danger. Potential targets must fear not only the ordinary assault, but also the hate-motivated assault against a human bull's eye.

Hate-motivated crime broadly distributes these anti-social effects. Not only gay people are potential targets of anti-gay crime. People who might be wrongly perceived as homosexual also are vulnerable as potential victims, and subject to a climate of fear. In short, hate-motivated crime broadly discourages travel, commerce, and the ordinary enjoyment of the streets—the fundamental benefits of society that conservatives view as government's central legitimate concern.

Enactment of the federal Civil Rights Act of 1964¹⁵ was facilitated by a similar perspective. Certain southern conservatives acceded to the Civil Rights Act of 1964 not on the ground that racism is morally wrong, but because racial discrimination undermines economic productivity. Similarly, conservatives can support hate-crimes legislation not on the ground that homophobia is morally wrong, but to secure the commerce and productive enterprise that are the fruits of ordered liberty from which society broadly benefits.

C. Detering Hate-Crimes Effectively

Conservatives should support hate-crimes legislation because of the prospects for successful deterrence. People motivated by prejudice and hate are particularly amenable to signals from higher authority, according to social scientists.¹⁶ These "authoritarian personalities" seek rules with which to comply, and feel most comfortable when confronted with rules backed by authority.¹⁷

Many hate-motivated criminals are young, middle-class, white males,¹⁸ most of whom might well be self-avowed law-enforce-

15. 42 U.S.C. § 2000(d)-2000(h)(6).

16. See COMSTOCK, *supra* note 12, at 116 (Adolescents committing anti-gay crime "are essentially conformist, and superficially rebellious.")

17. See T.W. ADORNO, ELSE FRENKEL-BRUNSWIK, DANIEL J. LEVINSON, R. NEVITT SANFORD, *THE AUTHORITARIAN PERSONALITY* (1950); GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* (1958). See also JOHN P. DECECCO, ED., *HOMOPHOBIA IN AMERICAN SOCIETY* 70 (1984).

18. According to Gary Comstock, "[p]erpetrators are not only predominantly male and white, but just as likely, or even more likely, to be middle-class; good in their classes; involved in school and community activities, organizations, and athletics; popular friendly, and sociable; enrolled in college preparatory courses in high school or enrolled in college; and/or in the military." COMSTOCK, *supra* note 12, at 106.

ment-minded conservatives. This profile suggests a cognitive breach between the hate-motivated criminals' perception of their acts and their understanding of crime.¹⁹ To a significant extent, the threat of punishment under ordinary assault legislation might not deter their acts of vigilante justice, because they do not think of their acts as crime warranting punishment.

Deterrence is not simply a matter of threatening stringent penalties for committing a prohibited act. Although the severity of threatened punishment is an important element for achieving deterrence, another significant variable is the degree of certainty that the threatened punishment will be imposed, as is the extent to which potential criminals have knowledge and understanding of the threatened punishment for prohibited acts.²⁰

The New York State Senate Republicans have argued that the best way to deter hate-motivated crime is to increase the penalties for all assaults.²¹ This might be correct. One might doubt, however, that existing law has failed to deter many hate-motivated criminals because these felons view the present threat of three to fifteen years in prison as a good trade for the choice to bash a gay person's head.²² Rather, hate-motivated vigilantes may commit their acts of violence because they fail to *understand* that their acts are, indeed, criminal. Thus, simply increasing the penalties for all assaults will do nothing to promote an understanding that vigilante "justice" is indeed criminal assault. The vigilantes' failure of understanding is rooted in confusing their views about right and wrong with the right to enforce their views through assault.

Thus, the state is unlikely to succeed in deterring its potential vigilantes unless its message of deterrence is forcefully and clearly stated. That clarity of message is lacking when the state refuses to condemn the vigilante's actions because of sympathy—or perceived sympathy—with the vigilante's motives. Conservative opposition to a hate crimes law that rests on a fear of opening the "Pandora's Box"²³ of gay rights sends the message that there is no adequate distinction between a gay person's right to teach and a

19. See COMSTOCK, *supra* note 12, at 91-2. Comstock also writes, "[A]ssailants do not exhibit what are customarily thought of as criminal attitudes and behaviors. Many conform to or are models of middle-class respectability." *Id.* at 231-32.

20. See, e.g., SUE T. REID, *CRIME AND CRIMINOLOGY*, at 485-89 (3d ed. 1982).

21. Hugh Murray, *What's in a Name?*, *NEWSDAY*, Oct. 24, 1988, at 52.

22. Assault in the first degree is a class C felony in New York. See N.Y.PENAL L. § 120.10 (McKinney 1987), which is subject to a sentence of imprisonment from three to fifteen years. See N.Y.PENAL L. § 70.00(2)(c)(McKinney 1987).

23. See *supra* note 10 and accompanying text.

gay person's right not to be assaulted. It sends the message that the goal of condemning homosexuality justifies the means of vigilantism.

Even more than a state that seeks to protect a broad range of civil rights for gay people, a state that seeks to reinforce anti-gay values must condemn the anti-gay vigilante's means, or risk sacrificing its commitment to ordered liberty through the rule of law.²⁴ To ensure that vigilantism is deterred, the state must announce clearly and without reservation that those who commit assaults motivated by hate—in other words, those who assault in pursuit of vigilante justice—have committed a crime and are subject to stringent criminal penalties. A state can send an unambiguous message of deterrence by singling out these bias-motivated crimes for special punishment through hate-crimes legislation.²⁵

D. Protecting People About Whom Conservatives Care — Both Potential Victims and Perpetrators

Once hate-crimes legislation is enacted and achieves an increment of deterrence, conservatives may benefit personally. The potential victims spared a painful assault might be their own children. Perhaps more to the point, the potential perpetrators spared a criminal record and punishment might be their own children.²⁶ Surely it is better for the sons and daughters of middle-class conservatism to be deterred by an unambiguous threat of greater punishment, and thereby to avoid a criminal record and punishment altogether, than, to commit a hate-crime subject to punishment only as ordinary assault. Thus, concern about potential hate-motivated criminals can supplement concern for their potential victims. Both concerns can lead one to conclude that New York's youth should be inculcated with the message that hate-motivated crime

24. Gary Comstock lists four factors underlying anti-gay violence as disproportionately committed by young males. The fourth factor refers to society's "institutionalized permission" for violent behavior against gay men and lesbians. See COMSTOCK, *supra* note 12, at 118-19. It is important to break down the nature of this "institutionalized permission" into its two components of values and methods. It is important for both anti-gay conservatives and for gay rights advocates to recognize that one can be anti-gay in the context of public policy, yet still believe that it is criminal to pursue anti-gay values through vigilantism.

25. Hate-criminals have been encouraged by a sense that their act would not be prosecuted because the "friendly cop" would overlook it. See COMSTOCK, *supra* note 12, at 19-20.

26. For many, hate-motivated attacks are their only involvement in criminal activity. See COMSTOCK, *supra* note 12, at 92.

is, indeed, *crime*; that *all* have a right to walk the streets safely; and that *all* benefit from ordered liberty through the rule of law.

III. Toward Dialogue: Why Gay Rights Advocates Should Moderate Our Rhetoric

With all these conservative reasons for hate-crimes legislation, why the persistent resistance? Although homophobia is surely one reason, people like Guy Vellella might fear opening a "Pandora's Box"²⁷ in part because of the manner in which much of the gay community handles political opposition. It sometimes seems that unless a politician is one hundred percent pure for gay and lesbian civil rights, he or she is deemed a mortal enemy who must be one hundred percent opposed and denounced.²⁸ When gay rights are portrayed in such all or nothing terms, one should not be surprised that conservative Republicans might fear sliding to the bottom of a slippery slope if they recognize that gay people, like everyone else, have a right to personal security on the public's streets.

Too many lesbian and gay activists may be unwilling to take the first step away from our pure, ideal world, even though doing so could facilitate the first step from a too imperfect reality toward something better. We perhaps preach too much to the converted, while alienating those who need conversion. Although this might make us feel better in the short run, it is not otherwise productive. Advocates of civil rights for gay men and lesbians should cultivate support from those who do not fully embrace our cause—and from those who largely reject our cause—by opening dialogue with them.

Opening dialogue requires understanding the range of our opponents' values. It requires asking how we can demonstrate that the policies we seek actually serve conservative values as well as ours. Opening dialogue requires moving from reflexive condemnations of our opponents' errors toward positions and rhetoric that are

27. See *supra* note 10 and accompanying text.

28. Carl Siciliano, *Uncivil Religion*, *NEWSDAY*, May 10, 1994, at 31. If a police commissioner or a mayoral candidate walks in the St. Patrick's Day Parade, he is deemed anti-gay. A President who bows to political reality, despite expending precious political capital on gays in the military, and despite being an unprecedented presidential voice for a homosexual's place in the American community, is demonized as a weak, lying traitor. A politician who opposes a particular "Rainbow Curriculum" might be condemned as a lost cause, despite being open to a tolerance curriculum that better fits certain parental sensibilities.

more measured and textured.²⁹ However unpleasant these steps might be, and however much patience they would require, they are necessary for communication. And communication is necessary for persuasion. And persuasion is necessary for progress.

IV. Conclusion

This Essay has presented four arguments for hate-crimes legislation that gay and lesbian advocates can make without compromising our integrity, and that conservatives can embrace without compromising theirs. A hate-crimes law predicated on these arguments neither advances nor inhibits a broader civil rights agenda. Rather than debate the hate-crimes law as a gay rights measure, conservatives and gay rights advocates can declare a truce, serve the interests of the entire community, and enact the bill based on the consensus principles of ordered liberty through the rule of law. This is not unprincipled compromise. It is, rather, intelligent politics that, in working with the world as it is, seeks to make it better.

29. For example, opening dialogue might require a decision not to condemn as necessarily beyond redemption those who support the Ancient Order of Hibernians, or those who oppose the Rainbow Curriculum.

