

THE CASE FOR THE INCREASED USE OF HATE CRIME LAWS TO PROSECUTE VIOLENCE AGAINST WOMEN

BY JESSICA MITTEN*

The recent trend of amending hate crime laws to include gender presents a new opportunity for prosecutors to bring additional charges against offenders who commit violence against women. Hate crimes are crimes motivated in part or whole by the offender's bias against a protected trait,¹ but which traits are protected differs by jurisdiction. The most commonly protected traits are race, religion, and ethnicity, but there has been a growing movement in the past few decades to expand the definition of protected traits to include characteristics such as gender,² sexual orientation, and disability.³ The federal government's definition of hate crime first included gender as a motivation in 2009.⁴ Thirty-five states currently include gender in their hate crime laws⁵—an increase from only ten in 1990.⁶

Despite the trend of including gender in the official definition, gender motivated hate crime laws are vastly underutilized in practice, and violence against women is rarely considered a hate crime by law enforcement and prosecutors. Hate crimes are unique because a hate crime is not a single offense with particular elements. Instead, a hate crime is a separate offense such as murder or assault that is motivated by bias. As such, use of hate crime laws depends on conceptions of bias and motivation by decision-makers—law enforcement and prosecutors. These decision-makers are much less likely than survivors to view violence against women as a hate crime. For example, in 2019, only eighty hate crimes motivated by gender were reported to the FBI by local law enforcement agencies, or a mere 1% of the total hate crimes reported.⁷ This is wildly out of proportion with the number of hate crimes against women reported by victims. Between 2013 and 2017, victims

* © 2021, Jessica Mitten.

¹ *Learn About Hate Crimes*, DEPT. OF JUST., <https://www.justice.gov/hatecrimes/learn-about-hate-crimes/chart> (last visited Dec. 30, 2020); see also Elizabeth A. Pendo, *Recognizing Violence Against Women: Gender and the Hate Crimes Statistics Act*, 17 HARV. WOMEN'S L.J. 157, 158-62 (1994); see generally Troy A. Scotting, *Hate Crimes and the Need for Stronger Federal Legislation*, 34 AKRON L. REV. 853, 853-66 (2001).

² Although most jurisdictions use the term gender, sex is a more accurate term. For example, the federal government classifies gender-based hate crimes as either anti-female or anti-male. See *Hate Crime Statistics*, FED. BUREAU OF INVESTIGATIONS, <https://www.fbi.gov/services/cjis/ucr/hate-crime> (last visited Dec. 30, 2020).

³ See e.g., #50StatesAgainstHate: *An Initiative for Stronger Hate Crime Laws*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/50statesagainsthate> (last visited Jan. 5, 2021).

⁴ See *The Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act of 2009*, DEPT. OF JUST., <https://www.justice.gov/crt/matthew-shepard-and-james-byrd-jr-hate-crimes-prevention-act-2009-0> (last updated Oct. 18, 2018).

⁵ *ADL Hate Crime Map*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/adl-hate-crime-map> (last visited Dec. 30, 2020).

⁶ See Pendo *supra* note 1, at 163.

⁷ *2019 Hate Crime Statistics: Incidents and Offences*, FED. BUREAU OF INVESTIGATIONS, <https://ucr.fbi.gov/hate-crime/2019/topic-pages/incidents-and-offenses> (last visited Dec. 30, 2020).

reported as part of the Bureau of Justice Statistics' National Crime Victimization Survey (NCVS)⁸ that 27.2% of hate crimes were motivated by gender.⁹

So, why is the recognition of gender-based hate crimes by law enforcement so rare? One explanation is that women are more likely to be victims of certain types of crime that law enforcement does not immediately recognize as hate crimes, even when those crimes are motivated by hatred of the female sex. For example, female victims of crimes like murder and rape are likely to have a personal relationship with the offender. Nearly half of all female murder victims are killed by a current or former male intimate partner.¹⁰ 80-90% of rape victims are female,¹¹ and the vast majority of rape is perpetrated by someone the victim knows.¹² Law enforcement and prosecutors tend to view violence against women committed by someone known to them as primarily personal rather than motivated by bias.¹³ This perception is not necessarily accurate. Because hate crimes may be motivated in whole or in part by bias, a personal connection does not preclude a hate crime. Additionally, it is easy to conceive of a hate crime where the victim and offender have a preexisting relationship in other circumstances. For example, an assault by a white man on his Black neighbor because he is Black is still clearly a hate crime despite the relationship.¹⁴ Regardless of law enforcement's conceptions about personal relationships between victims and offenders, they are entirely consistent with the definition of a hate crime.

Rape in particular—a crime mostly committed against women—is exceedingly unlikely to be reported as a hate crime by law enforcement. In 2019, although more than 8,000 hate crimes were reported to the FBI, only thirty were rape.¹⁵ One study investigating prosecutorial perspectives on gender-based hate crimes found that some prosecutors believed rape was motivated by power and control, and therefore inconsistent with a motivation of bias.¹⁶ This conception is too rigid, as the motivations behind rape are complicated and widely debated. Some feminist scholars instead argue that rape is inherently gendered. Catherine MacKinnon, for example, argues that women are targeted for crimes like rape “because they are

⁸ The NCVS is a federal survey based on a nationally representative sample of 240,000 interviews. *Data Collection: National Crime Victimization Survey (NCVS)*, OFF. OF JUST. PROGRAMS, <https://www.bjs.gov/index.cfm?ty=dcdetail&iid=245>.

⁹ See Barbara Ouderkerk, *Hate Crime Statistics: Briefing prepared for the Virginia Advisory Committee, U.S. Commission on Civil Rights*, BUREAU OF JUST. STATISTICS, <https://www.bjs.gov/content/pub/pdf/hcs1317pp.pdf> (2019).

¹⁰ See Emiko Petrosky, et al., *Racial and Ethnic Differences in Homicides of Adult Women and the Role of Intimate Partner Violence in – United States, 2003-2014*, 66 MORBIDITY AND MORTALITY WKLY REPORT 741, 743 (2017).

¹¹ *Victims of Sexual Violence: Statistics*, RAPE, ABUSE & INCEST NAT'L NETWORK, <https://www.rainn.org/statistics/victims-sexual-violence> (last visited Dec. 30, 2020).

¹² *Perpetrators of Sexual Violence: Statistics*, RAPE, ABUSE & INCEST NAT'L NETWORK, <https://www.rainn.org/statistics/perpetrators-sexual-violence> (last visited Dec. 30, 2020).

¹³ See Pendo, *supra* note 1, at 167. See generally Beverly A. McPhail & Diana M. DiNitto, *Prosecutorial Perspectives on Gender-Bias Hate Crimes*, 11 VIOLENCE AGAINST WOMEN 1162 (2005).

¹⁴ See Pendo, *supra* note 1, 168.

¹⁵ *2019 Hate Crime Statistics: Incidents and Offences*, *supra* note 7.

¹⁶ See McPhail & DiNitto, *supra* note 13, at 1172.

women: not individually or at random, but on the basis of sex.”¹⁷ With this understanding it becomes easier to see that rape is perfectly consistent with the definition of hate crime.

Many incidents of violence against women are also consistent with the rationales for hate crime laws. According to the Department of Justice, hate crimes are distinct from other types of crimes not only in their motivation but in their effect, because victims include not only the direct target but others like them and communities as a whole.¹⁸ Violence against women has adverse effects on the community at large, as recognized by groups such as the U.S. Department of Health and Human Services¹⁹ and the World Health Organization.²⁰ Violence against women also victimizes all women in the community. Despite generally being less likely than men to be a victim of crime, women are more afraid of crime than men.²¹ Carole Sheffield’s theory of sexual terrorism explains that the cause of this difference is the ever-present fear women have of sexual assault in particular.²² This theory argues that the widespread occurrences of sexual assault send a clear message to women that they are all potential victims.²³ Sexual assault against one woman victimizes all women in the community.

In most jurisdictions, gender-motivated hate crime laws are already on the books²⁴—the trouble is enforcement. Scholars Beverly A. McPhail and Diana M. DiNitto make a number of recommendations to increase the use of hate crime laws in prosecuting violence against women focusing on education and training of prosecutors.²⁵ They also argue that hate crime laws are currently more symbolic than effective, and resources are better spent increasing use of existing laws rather than advocating for the passage of new ones.²⁶

Increased use of hate crime laws alone, however, will not solve the epidemic of violence against women. For example, it will not increase the number of cases brought by prosecutors in the first place, which is a major problem, particularly in cases of sexual assault.²⁷ Nevertheless, the use of hate crime laws in cases of violence against women does have several benefits. Many hate crime laws carry

¹⁷ See Pendo, *supra* note 1, at 116 (quoting Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1301 (1991)).

¹⁸ *Learn About Hate Crimes*, *supra* note 1.

¹⁹ *Effects of violence against women*, OFF. OF WOMEN’S HEALTH, <https://www.womenshealth.gov/relationships-and-safety/effects-violence-against-women> (last visited Dec. 30, 2020) (citing harm to children, loss of work, and homelessness as effects of violence against women).

²⁰ *Violence against Women: Health Consequences*, WORLD HEALTH ORG. (1997), <https://www.who.int/gender/violence/v8.pdf> (citing loss of productivity and increased healthcare costs as effects of violence against women).

²¹ See Laurel B. Watson et al., *Understanding the Relationships Among White and African American Women’s Sexual Objectification Experiences, Physical Safety, Anxiety, and Psychological Distress*, 72 SEX ROLES 91, 92 (2015).

²² *Id.*

²³ *Id.*

²⁴ *ADL Hate Crime Map*, *supra* note 5.

²⁵ McPhail & DiNitto, *supra* note 13, at 1182.

²⁶ *Id.*

²⁷ *Id.* at 1178.

penalty enhancements, which allow for longer sentences.²⁸ There is also a symbolic significance—treating violence against women as a hate crime forces the public to confront its attitudes towards women and redefines violence against women as political rather than private, shifting the focus and blame to the offender.²⁹ More prosecutors and law enforcement should recognize these benefits and take advantage of existing laws to fight violence against women.

²⁸ *Id.*

²⁹ *Id.*