

Arkansas' Lack of Hate Crime Legislation
Fails to Provide Inclusive Fundamental Rights

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Abstract

This paper examines the reasons, ramifications, and solutions for Arkansas' lack of hate crime legislation. Currently, local law enforcement officers must forward potential hate crime cases to the Federal Bureau of Investigation (FBI) since the state has no statute regarding hate crimes. The problem is gaining new public awareness after Arkansas Governor Asa Hutchinson recently encouraged lawmakers to consider such legislation in the wake of public mass shootings. The Anti-Defamation League (ADL) and the Human Rights Campaign (HRC) are also entering the picture to educate Arkansans on tolerance. The Department of Justice (DOJ) and Bureau of Justice (BOJ) are both collecting statistical data and working to handle hate crimes at the federal level, but that is not enough. Arkansas should join the other 46 states that already have hate crime legislation in place in order to be progressive and competitive because all crime affects the state's residents socially and economically; hate crime adds negative psychological impact as well.

Keywords: hate crime, Arkansas hate crime, hate crime laws

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Despite federal hate crime legislation, Arkansas' lack of state-level laws regarding crimes against victims of a perceived race, color, religion, national origin, gender or gender identity, sexual orientation, or disability is a weakness that keeps the state tied to its Jim Crow past. This weakness is an obvious affront to civil rights, yet continues to go unaddressed in Arkansas. It has been more than 60 years since the state's controversial role in desegregation of Little Rock's Central High School that drew negative attention worldwide. Continuing to let hate crimes slide by without special legislation forever dangles our state in that era indefinitely, prohibiting progress in the way of equal law enforcement protection for all; it perpetuates white privilege just like the Jim Crow laws.

The laws, named for a character created by a white minstrel actor who dressed in black face and performed his comedic skits as a bumbling African American, Jim Crow laws legalized racial segregation from the post-Civil War Reconstruction era and ended when schools finally integrated (*Jim Crow Laws*). For some, that was when the Civil Rights Act of 1964 passed; but for the majority of communities in Arkansas, it was the end of that decade or into the early 1970s before the Jim Crow laws were broken.

Arkansas is already fifty-one years behind the federal government in terms of hate crime legislation. The Civil Rights Act of 1968 was the first legislation to define crimes against a person because of race, color, religion, or national origin (Department of Justice). This initial hate crime statute was specifically established to address physical harm, either actual or threatened, based on race, color, religion, or national

origin. The potential victim, according to this statute, is protected when participating in “a federally protected activity,” such as attending school, going to work, serving jury duty, traveling, or recreating in public places, or helping another person to do any of these (Department of Justice). Basically, the Civil Rights Act of 1968 is trying to specifically identify aspects that are Constitutionally- protected as “life, liberty, and the pursuit of happiness” (*The Preamble of the U.S. Constitution*).

As social mores changed, the federal government realized the need to extend that basic hate crime law from 1968 to include new concerns about gender, sexual orientation, and disability. The gender-based and disability considerations were added in 2009 in the Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act, demonstrating the federal government’s willingness to protect Constitutional rights for all (Legal Information Institute). Both Shephard and Byrd were victims of heinous hate crimes that resulted in their deaths. Byrd, who was targeted for his race, was chained to the back of a pickup truck and dragged to his death. Shepard, targeted for his sexual orientation, was beaten, tied to a fence, and left to die (Deitle).

Still, Arkansas has not addressed the issue and is one of four states to opt out of hate crime legislation at the state level. Georgia, South Carolina, and Wyoming are the other three (Hutzler, 2019). Jake Hyman, a spokesman for the Anti-Defamation League, supposed the biggest hold up with these states not coming on board with hate crime legislation is the addition of the gender identity and sexual orientation aspects (Hutzler, 2019).

To address LGBTQ concerns, the Human Rights Campaign has established a permanent campaign in Arkansas (Human Rights Campaign). The permanent

campaign, called Project One America, was established to promote equality and protections for the LGBTQ communities across the south (Human Rights Campaign). In addition to Arkansas, the organization has established also permanent campaigns in Alabama and Mississippi (Human Rights Campaign).

If the gender and sexual orientation aspects of the federal hate crime were really the reason Arkansas had not passed hate crime legislation, the state would have supported hate crime legislation long ago, prior to 2009 when the federal hate crime statute was expanded to include sexual orientation and gender identity. Even Mississippi, Arkansas' sister in lagging behind the rest of the country in all things related to social justice and equality, adopted hate crime legislation in alignment with the first federal civil rights hate statute (*Mississippi Annotated Code 99-19-301*). Attempts to add gender identity and sexual orientation to the Mississippi version have failed, though (Morrow). Race is the biggest issue for Arkansas.

Further evidence that race is the primary factor in Arkansas' unwillingness to pass state hate crime legislation rests in the number of hate organizations that exist in the state, more than a dozen as recently as 2018 (Hutzler). Even the Ku Klux Klan, one of the oldest hate groups in the nation, has an Arkansas mailing address for its national headquarters (Hutzler, 2019).

Not having state hate crime legislation is a problem for a number of reasons. First of all, hate crimes are happening and victims deserve the protection promised in the Constitution. In 2017 alone, 59.6 percent of hate crimes were committed based on race, ethnicity, or ancestry bias (Uniform Crime Report, 2018). Those percentages fell to 20.6 for crimes based on religious bias and 15.8 based on sexual orientation/gender

identity (Uniform Crime Report, 2018). It is important to note that these figures were established from 16,149 law enforcement agencies across the United States who reported voluntarily (Uniform Crime Report, 2018).

The second reason Arkansas needs a hate crime statute is based on Arkansas' current investigation procedures of potential hate crimes. In the current procedure, local and state law enforcement officers who suspect a hate crime has occurred call in the Federal Bureau of Investigation, or FBI, to investigate. Without a statute to address these incidents as criminal, local and state officers have no jurisdiction to investigate, nor do prosecutors have jurisdiction to prosecute. This makes every suspected hate crime in the state of Arkansas a federal investigation and a federal prosecution, an unnecessary situation that could easily be avoided by adopting simple legislation. Because all potential hate crime referrals are forwarded to the feds for investigation, not having a state hate crime statute also creates a potential backlog for the FBI. These instances are clearly cases that could be investigated by local and state agencies, allowing federal officers to concentrate on inter-state criminal activity.

Upon receiving a complaint about a suspected hate crime, the FBI sends an agent to investigate. The primary tool used is the Bias Crime Assessment Tool, or BCAT, a worksheet that serves as a worksheet and checklist for the investigating officer (Bias Crime Assessment Tool, 2018). The two-part worksheet records both quick interview questions and more in-depth statements from the victim and any witnesses to the incident (Bias Crime Assessment Tool, 2018). The BCAT explains the conflict of making the decision about whether a crime fits the hate crime model and it explains the difference between hate incidents and hate crimes (Bias Crime Assessment Tool,

2018). For instance, there is nothing criminal about shouting racial slurs, which would instead classify such activity as a hate incident (Bias Crime Assessment Tool, 2018). While it is not a crime in and of itself, hate incident reports can establish an environment conducive to such crimes that can be crucial in later investigations (Bias Crime Assessment Tool, 2018).

Interestingly, the BCAT also reminds officers to respond to the incident “in a manner that promotes human dignity and justice,” and to treat victims seriously and with respect (Bias Crime Assessment Tool, 2018). Without a state hate crime law, Arkansans who are victims of hate crime may feel as though they are getting brushed aside during their initial response from state-funded officers, for whom their tax dollars pay and who are first in line to respond to such incidents, simply because they must forward the case to a federal investigation.

Part One of the BCAT records information about the report-taker and the person reporting the incident and serves as a basic incident report. In addition to this basic information, it notes special identity markers, indicators of bias that are reported by the victim (Bias Crime Assessment Tool, 2018). Identity markers for the federal law include race/color, religion, ethnicity, gender/gender identity, national origin, religion, or sexual orientation (Bias Crime Assessment Tool, 2018). Even with this much basic information collected, the officer can still not conclude the presence of bias in the crime until interviewing the victim.

The BCAT instructions remind the officer taking the report that rapport between the officer and victim is crucial (Bias Crime Assessment Tool, 2018). Some may have had negative experience when previously reporting potential hate incidents. Knowing

that approximately 54 percent of hate crimes went unreported in the period of time between 2011 and 2015, it is important for officers to build that rapport to encourage future reporting (Masucci, 2017).

Unreported hate crimes do not just go away. The Bureau of Justice, or BOJ, report explains that 43.5 percent of hate crime victims chose to handle their incident themselves, which creates a circle of building aggression (Masucci, 2017). Only 37.4 percent of victims of non-hate crimes said they chose not to report and to handle the matter themselves (Masucci, 2017).

The BOJ report also reflects three additional reasons people did not report hate crimes for the period between 2011 and 2015. A total of 5.1 percent said they believed the police *could* not do anything to help, and sadly thanks to the state's lack of legislation, they are correct in Arkansas. Another 17.5 percent said they believed the police *would* not help (Masucci, 2017). The worst reason people used for not reporting their hate crimes, however, was that they just didn't feel like it was important enough (Masucci, 2017). The state's refusal to protect all its citizens will have a psychological impact on hate crime victims, increasing the very inferiority upon which bias is built. Since Arkansas does not have a hate crime law, these numbers would technically be correct, or even higher, for victims in the state. There is nothing a law enforcement officer can do without having a law to enforce. Calling in the FBI to investigate only builds bureaucratic red tape that frustrates victims and frees those who victimize to do whatever they want.

Another problem with the state not having a hate crime law is that law enforcement officers are left to their own devices to determine whether or not an

incident fits the federal hate crime statute. The term “hate crime” itself can be confusing for officers who have not been trained to deal with it; and without a state statute to enforce, few are trained for it. The cycle is endless without a state law.

In terms of the federal law, “hate” refers to a bias, not to the rage, disdain, or anger that one would typically use to define the word (Department of Justice, 2019). The Department of Justice formulizes “hate crime” by explaining that a crime plus a motivation for committing that crime based on a bias equals a hate crime.

Hate crimes victimize families, communities, or even the entire nation when not kept at bay (Department of Justice, 2019). That is why the federal government addresses hate crime specifically. The problems of not having hate crime legislation at the state level are many. At the foundation is the denial of basic human rights, the rights of life, liberty and pursuit of happiness as granted in the United States Constitution (*The Preamble of the U.S. Constitution*).

The bigger problem socially with this is that lack of hate crime legislation paints a picture of Arkansas as unwelcoming and unaccepting. At a time when Arkansas needs tax revenue and jobs, can the state afford to exclude potential residents?

This perception also impacts business for the same reason. When looking to establish or grow a new or existing business or industry, companies look for specifics related to their needs, such as availability of natural resources and ease in transportation of raw materials and finished products (Aliyu, 2018). But they also need something else – a skilled, educated labor force (Aliyu, 2018). The shadow created by the state’s looming racism, as evidenced by the legislature’s unwillingness to enact hate crime statutes, reeks of an uneducated populous. Whether the job is manual labor or

skilled technology labor, businesses need an educated workforce. This is taken to mean the ability to read, write, and follow the directions associated with specific job duties. But advanced jobs now require critical thinking skills (Bray, 2018). Bray outlines the top four critical thinking skills needed in today's workforce: problem-solving, communication, emotional intelligence, and creativity.

Each of these soft skills take a hard hit in Arkansas simply because we have no state hate crime legislation. Problem-solving is a prime example. Employers are looking to hire people who can identify a problem, analyze, and then solve it (Bray, 2018). With legislators who choose not to identify hate crime as a problem in Arkansas, the state appears tolerant of hate. Because the public knows hate crimes do occur in Arkansas, this failure to legislate is the equivalent of turning a cold shoulder to victims, and thus turning a back to people who need help most.

The lack of hate crime legislation also impacts communication between the state and businesses considering locating in Arkansas. By not addressing the issue, the state government is, in effect, communicating to potential businesses that Arkansas values the rights of one group of people over others. In this case, the group preferred is white, which reflects the state's 77.31 percent Caucasian population (Arkansas Population 2019). Refusing to address the state's lack of hate crime law is promotion of white privilege. Ironically, white Americans are less aware of privilege, mainly because it does not negatively affect them (Hartman, et al). For this reason, white privilege becomes systemic, as it has in Arkansas.

Lack of hate crime legislation may negatively impact the state's workforce in terms of emotional intelligence as well. Emotional intelligence, defined as the ability to

know, understand, and manage one's emotions, may be perceived as weaker among the workforce in a state without hate crime law reinforcement (Bray, 2018). Lack of legislation at the state level implies that cultural tolerance, and safety for cultures that are not like the majority, is not a priority. Potential businesses or industries find themselves dealing with a workforce that may or may not be able to work with a variety of different people. For this reason, too, the soft skill of creativity is impacted. By not fostering a state sensitivity to cultural acceptance and protection, the state likewise hinders creative thinking.

But the lack of hate crime legislation in the state of Arkansas affects more than just business and potential growth. It is already impacting communities because of the state's blatant disregard for protecting basic human rights. The numbers are not big, but remember, the state is not even equipped to recognize hate crimes at the state level; so they simply go unreported.

In 2017, Arkansas reported only five hate crimes based on race, ethnicity, or ancestry (Uniform Crime Report, 2018). One incident was reported each for the categories of sexual orientation and for disability (Uniform Crime Report, 2018). The statistics are not staggering, but the trend they show is.

Eighty percent of the hate crime events reported to the FBI in Arkansas in 2017 were concentrated in areas known to be white supremacy hot spots in Northwest Arkansas. One of the racial bias incidents was reported in Benton, Arkansas, but the other four were in Fort Smith (Uniform Crime Report, 2018). The Southern Poverty Law Center has developed a list of hate groups with a presence in Arkansas. Harrison is home to a handful and Mountain View is home to Shield Wall Network, a white

nationalist group (Arkansas, 2019). Statewide groups include Neo-Nazi, White Nationalist, and Black Nationalist groups (Arkansas, 2019). In total, Arkansas is recorded with having 14 hate groups in the state, which provides a welcoming environment to them with the absence of a state hate crime law (Arkansas, 2019).

Even small hate groups like the Shield Wall Network can have mighty intimidation tactics. Despite locating in the sparsely populated Ozark Mountain range, the members of this white supremacy group make their presence known by organizing white supremacy rallies and conferences (Anti-Defamation League). The Anti-Defamation League, or ADL, reports that the group is only rallying a dozen or so members at this time, however organizing events gives them a chance to network with other white nationalists in the region (Anti-Defamation League). Members of the group train, which indicates they are looking for a fight of some kind, wearing camouflage or black pants and boots with their standard black button-up shirt to complete their "uniform" (Anti-Defamation League). On a frightening note, this group plans to build a "new America" in a community they want to call Ozarkia, planning to secede from the nation with 40 counties between Arkansas and Missouri that are already at least 95 percent white in population (Anti-Defamation League). Some may simply dismiss this radical mindset as ludicrous, but daily newscasts are full of reports of violence that are ludicrous. This dangerous mindset of white superiority currently has no state law to control or contain it, much less to evacuate it. At this point, Arkansas' minority population and anyone else who does not fit the racial/sexual/ethnic ideology of the Shield Wall Network is a potential hate crime victim, just another statistic.

The problem with relying on statistics for hate crimes and hate group activity is that they often go unreported. At least half of hate crimes never get reported (Vera Institute of Justice, 2018). Also, only offenses for which an arrest is made are included in the hate crime data collected (Vera Institute of Justice, 2018). Most important, an evidentiary standard must be met in order for an incident to be labeled a hate crime (Vera Institute of Justice, 2018). Without a statute to identify what those evidentiary standards are, the state of Arkansas is not fully protecting all of its citizens.

Equally as challenging to hate crime statistic collection is the fact that not all states with hate crime laws require statistical reporting. So, in addition to the four states that do not have hate crime laws, these states that do have hate crime legislation do not require statistical reporting: Alabama, Alaska, Colorado, Delaware, Kansas, Mississippi, Missouri, Montana, New Hampshire, North Carolina, North Dakota, Ohio, South Dakota, Tennessee, Vermont, West Virginia, and Wisconsin (Department of Justice, 2019). Given this fact, once Arkansas passes much needed hate crime legislation, the state must also require statistical reporting. Only with accurate data can law enforcement officials be certain they are serving all those they have vowed to protect and serve.

The solution to this problem is easy. The state legislature simply must do the right thing by passing an inclusive statute congruent to the most recent federal law to address hate crime. The state attempted to pass a hate crime bill in 2001. It failed, according to State Senator Joyce Elliott, because of the bill's reference to sexual orientation (Turnure, 2017). Again, if race were not the real issue, the state would have adopted hate crime legislation a long time ago.

In 2017, Elliott joined forces with fellow Democrat, State Representative Greg Leding, to create a hate crime bill that would also call for enhanced punishment for those found guilty; but it did not make it out of committee (Turnure, 2017). But now, even with the bipartisan support of Arkansas' Republican governor, the state still has no hate crime law.

The topic is still floating around the state government, though. In August 2019, Arkansas Governor Asa Hutchinson expressed the need for harsher punishment for perpetrators who commit crimes against others based on their race, ethnicity, or religion (Demillo, 2019). The governor failed to mention the issues of gender identity and sexual orientation in his call for the law, but later clarified that he supported that as part of the law as well, adding that no one should be targeted for simply being who they are (Demillo, 2019). Hutchinson sees the problem as a mindset that must be changed in the legislature. He said he wanted to work to build support for the measure before asking the legislature to address it (DeMillo, 2019). Hate crime legislation is currently not scheduled to be part of the upcoming state legislative agenda, which will address budget issues instead.

In the meantime, the state has failed to protect all of its citizens effectively, an unconscionable situation for the state and its law enforcement agencies. To address this situation, law enforcement agencies at the city, county, and state levels throughout Arkansas should offer professional development around the hate crime topic and teach officers how to effectively use the BCAT since they are the first point of contact for victims who do choose to report hate crimes that have occurred against them. Having the BCAT report completed upon turning the incident over to the FBI could make the

transition a little smoother and save the federal agency from backlog. It would go a long way in building the necessary rapport to comfort victims as well as aiding the FBI reporting process.

While starting the BCAT report for the federal investigating agency can help move the incident investigation along, it should not be the state's only course of action. Arkansas legislators must address the state's lack of hate crime law for a number of reasons. Not having a hate crime law affects the state socially and economically; if law makers are not concerned about the social ramifications, surely they can get behind the economical ones.

In the bigger picture, Arkansans need to hold their state legislators accountable. Many voters simply do not know there is no hate crime law in the state. Armed with that knowledge, they can persuade their representatives to seek such legislation. While everyone may not feel comfortable speaking out on an issue, everyone 18 and older who meets state voter guidelines can have a silent say in the matter. If state legislators continue to refuse the Constitution's fundamental rights to Arkansans, those Arkansans need to speak with their votes and replace those legislators with people who really do care about the people of Arkansas.

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