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Law and Violence*

Dan Danielsen**

I have been asked to comment upon Professor Terry Kogan's paper *Legislative Violence Against Lesbians and Gay Men*,¹ in which he analyzes the legislative process surrounding the passage of hate crimes legislation in Utah. Through an analysis of the gay bashing that took place within the legislative debate, Professor Kogan argues that the Utah legislature's removal of all references to gays and lesbians in the legislation was significant both because it reinforced stereotypical and negative perceptions of gays and lesbians, and because it suggested that violence against gays and lesbians was, at best, not of concern to, and at worst, actively encouraged by, the state. While Professor Kogan's paper raises a number of interesting issues, I would like to focus on some of the broader themes concerning law and violence raised by the many ways we might interpret hate crimes statutes in the context of violence against gays and lesbians.

The political struggle over the passage of hate crimes legislation in Utah, and the central role of the gay and lesbian community in that struggle, are by no means unique. Similar struggles have been or are being fought in various jurisdictions across the country and, in many cases, it is the gay and lesbian communities that are leading the fights.² As a result, much like the battle over gays in the military, political struggles over the passage of hate crimes legislation have become important sites of contention over the meaning of violence against gays and lesbians, over the place of gays and lesbians in the broader social scene, and over the legal and

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1. Terry S. Kogan, *Legislative Violence Against Lesbians and Gay Men*, 1994 UTAH L. REV. 209.

2. See Nick Charles, *A Struggle for Dignity: Cleveland's Gay Community Joins an Emerging Fight for Rights*, PLAIN DEALER (Cleveland), Nov. 29, 1992, at 1G; Leslie Earnest, *Gays Beginning to Fight Back*, L.A. TIMES, Jan. 17, 1993, at B1; Timothy Egan, *Violent Backdrop for Anti-Gay Measure*, N.Y. TIMES, Nov. 1, 1992, at A40; Jonathan Rauch, *Beyond Oppression: Homosexuals and Victimology*, NEW REPUBLIC, May 10, 1993, at 18; Don Terry, *The Supreme Court: The States and the Law*, N.Y. TIMES, June 12, 1993, at A8.

political significance of gay and lesbian visibility.

As an initial matter, it would seem important to spend some time contemplating why hate crimes legislation has come to play so important a role in gay and lesbian activism. Why have the victories seemed so sweet and the defeats, like the one in Utah, so bitter, so painful? From the standpoint of protection against homophobic violence, the adoption of hate crimes legislation seems to add very little. Under existing criminal laws of assault and murder, there is, in principle, protection from violence for all persons.³ An act of violence against a random victim might be treated by the law as an assault on the undifferentiated body politic. From this perspective, gays and lesbians have the same protection as everybody else. The interesting point is that, as a cultural matter, it is precisely this anonymous submersion into the body politic that is challenged, not simply by the gay and lesbian communities which promote visibility or "outness," but by both hate crimes statutes and, perhaps ironically, gay bashing.

This nexus between gay and lesbian visibility, violence, and hate crimes legislation poses a number of perplexing dilemmas. For example, challengers to the hate crimes concept challenge it precisely for its recognition of the specificity of gay- and lesbian-directed violence. In this view, violence against any individual is violence against society as a whole. To single out violence against gays and lesbians in hate crimes laws seems a claim to "special rights." Ironically, the argument suggests, through the blunt imprecision of the general criminal law, violence becomes a great "equalizer"—whatever the status of gays and lesbians before violence, once beaten, tortured, maimed, or murdered, gays and lesbians become "citizens," members of the undifferentiated body politic, entitled to the law's full retributive force and protection. This claim is more than a challenge or response to the gay and lesbian politics of visibility—it is an assertion that invisibility is equality.

In contrast, hate crimes statutes approach gay and lesbian citizenship through a politics of recognition and visibility. For example, hate crimes statutes seem to recognize and assert that gay

3. Of course, one could argue that enforcement of the existing laws may be done in a discriminatory manner. In other words, homophobic police or district attorneys may be refusing to investigate seriously or prosecute violent attacks against gays and lesbians. Assuming this is true, and assuming it is the same police and district attorneys that are charged with the enforcement of hate crimes legislation, my cynical self cannot help but wonder how additional legislation will make much difference. District attorneys will still retain discretion in whether to charge offenders with the additional "hate" motivation, and police will still have the job of interpreting the violence in their reports as "hate" violence or mere "normal" violence.

bashing is not "random" violence, but homophobic violence. In seeking to create the crime of homophobic violence (or in the case of hate crimes statistics statutes, to record incidences of the same), hate crimes statutes recognize the existence of the gay or lesbian body—a body marked by its "gayness" or "lesbianness." This gay or lesbian body is both part of the body politic through its recognition in law, and a subset of it, perhaps worthy of particular attention or protection.

On the one hand, there seems to be a price for this recognition: the violence punished by the statutes is not violence against society generally, it is an attack on gays and lesbians identified as such. On the other hand, hate crimes statutes, unlike general criminal statutes, seek to address violence on a symbolic and a physical level. In other words, homophobic violence is both the violence of recognizing or marking a person as gay or lesbian, and the physical enactment of that violence. The once unidentified body becomes, in a sense, the "gay" body literally marked as "gay" by the gay basher's blows. The violence of this marking creates the identity of the victim: whatever the victim's conscious identity, the victim of homophobic violence becomes a "gay" body. In the hate-filled eyes of the gay basher, the victims "gay" body is recognized and abused.

Seen this way, the significance of hate crimes statutes in situating gays and lesbians and the violence against them in a broader social context is quite complex. At one level, hate crimes statutes single out gays and lesbians for recognition by and protection from society at large. In so doing, the existence of gays and lesbians and the particular violence against them is recognized in law. Through this legal recognition, gays and lesbians are simultaneously affirmed as visible participants in society, and separated from society because the violence against gays and lesbians is not violence against society generally.

The simultaneous recognition and affirmation of the gay or lesbian body made manifest throughout hate crimes statutes is, in a sense, the opposite of the recognition and annihilation that takes place through acts of homophobic violence. By recognizing homophobic violence in the specificity of particular incidences of it, hate crimes statutes permit the simultaneous recognition of specific gay and lesbian bodies and the symbolic injury of such violence—the crime proscribed is injury to the gay or lesbian body as such. By contrast, through homophobic violence, the gay or lesbian body is recognized and destroyed.

From this perspective, the exclusion of gays and lesbians from the Utah hate crimes statutes takes on a particular poignancy. As Professor Kogan suggests, exclusion of gays and lesbians from the

scope of such statutes could be understood as the banishment of gays and lesbians from society—an explicit refusal to recognize that violence against gays and lesbians is violence against society as a whole. At the same time, exclusion seems to signal a refusal to recognize the symbolic aspect of homophobic violence—that the desire it manifests is not to kill generally but to kill “gays and lesbians.” Thus, the exclusion of gays and lesbians from hate crimes statutes takes on a symbolic power of its own. Gays and lesbians are quite literally “outlaws” or outside the law’s protective purview, not merely invisible as in the general criminal law, but visible and excluded. One might say, as Professor Kogan’s provocative title suggests, the “legislative violence” of exclusion from the hate crimes statutes in Utah was a symbolic reenactment of a homophobic assault. The legislature recognized gays and lesbians and the brutal violence against them, and then annihilated them by writing them out of the law.

But this story seems too neat. It might have been, after all, the “outlaw” status of gays and lesbians that gave rise to their desire to gain legal recognition—in part through hate crimes statutes—in the first place. Putting aside the other forms of social prohibition of homosexuality, in many states (including Utah) the prohibition takes the quite explicit form of criminal sodomy statutes. Thus, the violence perpetrated by the Utah legislature could not solely be a failure or refusal to recognize gays and lesbians legally. The law recognizes gays and lesbians in a variety of ways, not the least of which being through criminal sodomy statutes.

From this perspective, the status of gays and lesbians as outlaws in Utah may seem only tangentially related to their exclusion from the hate crimes statutes. To the extent one understands homosexuality to be manifested by the commission of acts of sodomy, gays and lesbians are outlaws in their very existence. In this sense, to be actively gay or lesbian is to be an outlaw—in Utah, a criminal. If by “actively gay or lesbian” we also mean making one’s self visible, then gays and lesbians might be the victims of violence precisely because they make themselves visible. If one understands the gay man to have “asked for” criminal sanction by acting on his orientation, might it not seem reasonable to treat the gay man as having asked to be bashed or raped through his visibility? If one’s existence is criminal, then to be visible is to be vulnerable, to be subject to legal censure and perhaps worse: violence.

Through this analysis, one can see that hate crimes statutes and criminal sodomy statutes might be at cross-purposes. If hate crimes statutes are about recognition and visibility of the symbolic element in crimes of hate against gays and lesbians as such, crimi-

nal sodomy statutes seem to punish gay and lesbian visibility—or at least homosexuality manifested through the commission of sodomy.⁴ Yet the behavior criminalized by sodomy statutes is rarely witnessed directly by the statute's enforcers. Those committing the "crime" must be identified in other ways. In the context of hate crimes statutes, ironically, one way gays and lesbians are identified and made visible is through homophobic violence; that is, unless the violence is *not* recognized as homophobic violence, and the victim is not recognized as gay.

Expanding on the work of Kendall Thomas, Professor Kogan seeks to draw a connection between the legislative exclusion of gays and lesbians from the Utah hate crimes statutes, the criminalization of sodomy, and violence against gays and lesbians. Put directly, Professor Kogan argues that the mere existence of criminal sodomy statutes legitimizes homophobic violence. His argument is based in part upon the notion described earlier that the criminal prohibition of sodomy effectively constructs gays and lesbians as criminals—as outlaws. This construction, so the argument goes, provides both the moral theory and the justification for homophobic violence. As Professor Kogan, quoting Thomas, puts it: "Broadly speaking, homosexual sodomy statutes express the official 'theory' of homophobia; private acts of violence against gay men and lesbians 'translate' that theory into brutal 'practice.' In other words, private homophobic violence punishes what homosexual sodomy statutes prohibit."⁵ Stated another way, homophobic violence, to the extent it expresses the public/state (legal) condemnation of homosexuality through private (violent) means, is in a sense legal violence—or at least it takes place in a legal context, has law's imprimatur.

This conclusion might seem untroubling to those who feel that since gays and lesbians are criminals—flouters of moral law, religious law, social law, and criminal law—they are not entitled to the law's protection. For gays and lesbians to invoke the law's special notice in the form of hate crimes statutes might seem a travesty—a particularly inappropriate case of a minority group's demand for "special rights." This focus also performs transformative magic on the gay basher. Rather than being a violent vigilante out of control, the gay basher could be understood as a fed-up Bernard Goetz figure who simply cannot take the gay and lesbian assault any longer.

4. See generally Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915 (1989).

5. Kogan, *supra* note 1, at 213 (quoting Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1485–86 (1992)).

To this person, the creation of special statutory protection for gays and lesbians might seem the last straw.

At the same time, however, most people would agree that the violent abusers of gays and lesbians also are outlaws. While gay bashers might in some sense be understood as the enforcers of legal justice, they act "extralegally" to the extent they take the law into their own hands. If force is to be levied against gays and lesbians to bring them to justice, that force must be at the hands of the state.

And it is humbly to the state that gays and lesbians go with hopes of legal protection from hate crimes. The legal strategy for gay and lesbian activists seems to be built on the sense that a gay and lesbian presence in law (sodomy statutes) or their absence from law (hate crimes statutes) can affect the level of violence directed against gays and lesbians. On the one hand, it seems that it is the law which justifies state and private violence against gays and lesbians. Through representations of gays and lesbians as outlaws in criminal sodomy laws, the law enables state violence against gays and lesbians and rationalizes or legitimizes the homophobic violence of private actors. On the other hand, exclusion from law through exclusion from the Utah hate crimes statutes may also legitimate private and public violence against gays and lesbians. Professor Kogan argues that the Utah legislature's exclusion of gays and lesbians from the hate crimes statutes may legitimize violence against gays and lesbians by suggesting that, along with sodomy statutes, gays and lesbians are criminals deserving of punishment. Further, he suggests that these enabling or legitimating connections between law and violence should be seen as a kind of legal or legislative violence.

I share much of Professor Kogan's outrage at the reticence to include violence against gay and lesbian people in hate crimes legislation, and I found his analysis of the cultural consequences of this reticence helpful in articulating my own unease. Indeed, it is precisely by looking at the troubling relationship between the apparent direct consequences of legislation and its broader symbolic or cultural importance that I feel we might better come to understand the puzzles presented by legal battles such as the one Professor Kogan describes. It is perhaps no accident that the relationship between legal and cultural meanings seems particularly relevant in thinking about gay and lesbian people—people for whom issues of explicit and implicit identity, of cultural recognition and visibility, however ambiguous and perplexing, are so central to their struggle over equality. Nevertheless, for all my enthusiasm for Professor Kogan's exploration of this difficult terrain, I am left with two hesitations, or cautions, about his approach.

To my mind, it is particularly important when analyzing the cultural and the seemingly factual elements of law that we not lose sight of the ambivalent, shifting, and uncertain character of law's cultural face. For this reason, I think it is difficult to draw more than tentative conclusions about the cultural consequences of the inclusion of gays and lesbians in, or their exclusion from, particular legal regimes. Similarly, it is also difficult to be certain about what programmatic or strategic consequences flow from this form of legal analysis.

For example, it seems correct as a matter of cultural interpretation that there is a strong connection between the violence of gay bashing and that of exclusion from hate crimes statutes. But can we conclude that exclusion will, as a result of this cultural mechanism, lead to more violence? Is this conclusion necessary for the insight to be a significant one? It seems likely, as a factual matter, that the results will be far more haphazard and unpredictable. We can imagine potential bashers losing interest once a hate crimes statute is passed without mention of gays or lesbians, or being incensed to violence should such a statute be passed that includes gays and lesbians.

Similarly, even if we see some cultural significance in the state's recognition of gay and lesbian visibility in the hate crimes context, it is not at all clear that the recognition would be, as Professor Kogan hopes, a positive one. After all, the ability to get such legislation passed would seem to be a function of the extreme levels of hatred and violence that exist in the broader society toward gays and lesbians. Further, as we saw in the case of sodomy statutes, to assess the cultural significance of the legal recognition of gays and lesbians, we must explore the multiple and perhaps contradictory representations of sexual identities in law.

In sum, although I am much in favor of a cultural approach to the analysis of legal matters such as this, I hesitate when we try to demonstrate the method's mettle by translating its insights back into the realm of cause and effect. In my view, the strength and import of a cultural analysis such as Professor Kogan's is in its explanation of the particular ways in which the enactment and enforcement of legal rules become ongoing sites of struggle over the meanings and consequences of, in this case, sexual identities. Further, independent of its claims vis a vis the tangible effects of exclusion from the Utah hate crimes statutes, Professor Kogan's analysis has done transformative magic on the statutory scheme by documenting the cultural presence of gays and lesbians in the Utah hate crimes statutes ironically made manifest by their exclusion.

My second hesitation or caution arises from Professor Kogan's

equation of the classificatory work done by sodomy and hate crimes laws, which divide society between general members and gays and lesbians, with the work done by the gay basher. My hesitation arose when I tried to relate these sorts of on/off classifications to the very complex efforts by gay and lesbian people to draw exactly these sorts of lines about themselves. Indeed, the issues of recognition and assimilation raised by hate crimes statutes—issues of both visibility and solidarity—are issues which are greatly disputed among gays and lesbians. When, how, and should gay and lesbian people make themselves known? Is gay or lesbian identity our choice, or is identity ascribed? Is there a distinct gay and lesbian culture? Who has made a mistake when a “straight” person is bashed for being “gay”?

At a minimum, these sorts of ambiguities make it difficult to feel confident that being included in hate crimes statutes would be the end of this battle for legal recognition. Surely including gay- and lesbian-directed crimes in the statute would require courts and other legal actors to adjudicate the specificity of gay and lesbian existence with each application of the law. Further, our identities would be constructed in the context of, and in relation to, our status as victims of violence. How do we distinguish homophobic violence from mere garden variety brutality? How do we know the crime was “because of” homophobia? What actions of the victim signaled that she was a lesbian? Did the violence arise because the perpetrator was the object of an unwanted pass, and should this serve as a justification? If the victim of the violence turned out to be straight, should a defendant be able to raise the victim’s “straightness” as a defense? As courts, police, and prosecutors sought to define the terms “hate,” “gay,” and “lesbian” with the specificity of legal certainty, they and we would surely encounter the deep ambivalences of gays and lesbians, as of the broader community, regarding these issues. We can imagine, for example, assimilative or closeted gays and lesbians who might secretly feel reassured when a flamboyant gay or lesbian is bashed, or queer culture producers who would laugh at an effort by the state to cabin or identify a gay sensibility. Just as it is difficult for us to be clear or confident when we distinguish gay and lesbian culture from society as a whole, we should also recognize the ambivalent cultural messages which may attend efforts by gay bashers and legislatures to recognize and define gay and lesbian identities.