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Chapter 98: Deterring Hate Crimes and Enforcing State and Federally Secured Constitutional Rights

Christian Herrmann

Code Sections Affected

Civil Code §§ 51.7, 52, 52.1 (amended).
AB 2719 (Wesson); 2000 STAT. Ch. 98

I. INTRODUCTION

While walking along a beach in California, a man was beaten and left near death with permanent brain damage because a group of youths believed he was gay.¹ In Wyoming, twenty-two-year-old Mathew Shepard, was beaten, pistol-whipped, burned, tied to a fence, and left to eventually die simply because of his sexual orientation.² In Arlington, Texas, Donald Thomas was shot at close range in a drive-by shooting, by white supremacists who targeted him because he was African-American.³ A Minnesota college dormitory kitchen, known to supply kosher food for Jewish students, was vandalized by “Skinheads”⁴ who left Anti-Semitic markings and “excrement on a cooking utensil.”⁵

These examples detail, in part, the brutality which some Americans encounter on a continuing basis.⁶ Hate crimes—crimes that target individuals because of their membership in a particular social group⁷—carry a significant sting, as they have a “more debilitating effect on the victim.”⁸ The pain of a hate crime is particularly detrimental to the victim because it is often committed against her on the basis of her “immutable characteristics”—those personal characteristics of which the victim has no control.⁹ Indeed, the effects of a crime motivated by hate are not limited to

1. David G. Braithwaite, Note, *Combatting Hate Crimes: The Use of Civil Alternatives to Criminal Prosecutions*, 6 B.U. PUB. INT. L.J. 243, 243 (1996).

2. See Craig L. Uhrich, Comment, *Hate Crimes Legislation: A Policy Analysis*, 36 HOUS. L. REV. 1467, 1468 (1999) (chronicling the death of Mathew Shepard as a hate-based crime motivated by his sexuality).

3. See *id.* (detailing the shooting and killing of Donald Thomas by White Supremacists because of his race).

4. See The Staff of the Syracuse Journal of Legislation and Policy, Project, *Crimes Motivated by Hatred: The Constitutionality and Impact of Crime Legislation in the United States*, 1 SYRACUSE J. LEGIS. & POL’Y 29, 33 (1995) (noting that “Skinheads,” a White Supremacist group known for violence against minorities, are also referred to as “Neo-Nazis”).

5. See *id.* (citing recent examples of hate crimes).

6. *Id.*

7. See Uhrich, *supra* note 2, at 1469 (defining a hate crime).

8. *In re Joshua H.*, 13 Cal. App. 4th 1734, 1748, 17 Cal. Rptr. 2d 291, 300 (1993).

9. *Id.* Some critics argue that the term “immutable characteristics” does not include groups whose classification is based on, for example, religion, political beliefs or even sexual orientation. See generally John Hans Thomas, Comment, *Seeing Through a Glass, Darkly: The Social Context of “Particular Social Groups”* in Lwin

the victim.¹⁰ Because such attacks often target individuals on the basis of specific characteristics, the community to which the victims belong also experiences the effects, as they are left to wonder who among them will become the next victim.¹¹

The California Legislature has responded to this inhumanity by enacting laws aimed at curbing the occurrence of hate crimes.¹² Chapter 98 seeks to further protect hate crime victims, and deter hate crimes in general, by allowing an action for civil damages to be brought on a victim's behalf.¹³ In addition to protecting individuals against hate crimes, prior law has sought to protect the victim's constitutional rights, found in both the California and United States Constitutions.¹⁴ However, recent case law has undermined the ability of courts to protect these more general constitutional rights under existing law.¹⁵ Instead of extending the ability to bring an action for a

v. INS, 1999 B.Y.U.L. REV. 799, 804-07 (1999) (noting criticism for use of the term "immutable characteristics" for particular social groups whose identity is based on characteristics such as religion or political affiliation); Katrina C. Rose, Comment, *The Transsexual and the Damage Done: The Fourth Court of Appeals Opens PanDOMA's Box By Closing the Door on Transsexuals' Right to Marry*, 9 LAW & SEX. 1, 8-26 (1999/2000) (noting that one's sexual orientation and/or sexual identity is a debated issue with respect to it being an immutable characteristic). One might argue that such characteristics are actually "voluntary" choices, while, for example, race and nationality are more appropriately identified as characteristics which cannot be changed, and are, therefore, "truly immutable." See Thomas, *supra*, at 804. However, Thomas argues for a broader definition of immutable characteristics including not only those characteristics which "cannot be changed, but also those that a person should not have to change." See *id.* at 804 (arguing for a more extensive definition of immutable characteristics including members of a particular social group who share "a characteristic that either is beyond the power of the individual members of the group to change or is so fundamental to their identities or consciences that it ought not be required to be changed"). With respect to one's sexual orientation or sexual identity, Rose argues that "the concept of sex" is determined by chromosomal and hormonal fetal development. Rose, *supra*, at 11-12. Accordingly, this view of sexual identity is consistent with it being an "immutable characteristic." *Id.* Furthermore, Rose posits that "male" and "female" should not be the only sex classifications, rather sexuality occurs on a continuum, as a result of immutable chromosomal and hormonal characteristics. *Id.* at 8-12. In short, Rose suggests that one's sexual identity should not be limited to a doctor's identification of an individual as either male or female at birth based "on the presence or absence of a penis." *Id.* at 9.

10. See The Staff of the Syracuse Journal of Legislation and Policy, *supra* note 4, at 29 (identifying the far-reaching effects of hate based crimes by stating the effects of a crime motivated by hate extend beyond the victim and "cast a shadow of fear and terror throughout entire communities").

11. Howard P. Berkowitz, Q: *Are Hate-Crime Laws in Keeping With a Free Society? Yes: Such Laws Send a Powerful Message to Racists Everywhere*, INSIGHT MAGAZINE, Sept. 20, 1999, at 40, available in 1999 WL 27691807.

12. See, e.g., Tom Bane Civil Rights Act, 1987 Cal. Stat. ch. 1277, sec. 2, at 4544 (identifying its aim to protect minorities from discrimination).

13. See CAL. CIV. CODE § 52(b)(2) (amended by Chapter 98) (indicating that a \$25,000 civil penalty may be awarded to an aggrieved individual whether brought by the individual herself, or by the Attorney General and any district or city attorney).

14. See CAL. CIV. CODE § 52.1 (amended by Chapter 98) (providing for the ability of an individual to institute a civil action for a violation of state or federal constitutional rights "in order to protect the peaceable exercise or enjoyment of the right or rights secured").

15. See *Boccatto v. City of Hermosa Beach*, 29 Cal. App. 4th 1797, 1809, 35 Cal. Rptr. 2d 282, 290 (1994) (requiring that an action brought under Civil Code section 52.1 must allege that the plaintiff who claims interference of his or her rights also allege that this interference was due to his or her "race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age, disability, or position in a labor dispute, as set forth in Civil Code Section 51.7." "The failure to so allege constitutes a failure to state a cause of action under [section 52.1]"). *Id.* In short, the *Boccatto* court held that Civil Code sections 51.7 and 52.1 must be read together, and therefore,

violation of such rights to *all* individuals, recent case law holds that only an individual who can demonstrate that the violation was motivated by her membership in a protected minority class may bring such an action.¹⁶ Chapter 98 rectifies this misinterpretation and effectively supersedes the holding of these cases; thus, an individual who is not a member of an enumerated minority class is allowed to bring an action for a violation of his constitutional rights.¹⁷

II. LEGAL BACKGROUND

A. Limiting the Efficacy of Hate Crime Legislation

Civil Code section 51.7 established that “[a]ll persons . . . [in] this state have the right to be free from any violence . . . because of their” membership in specifically enumerated minority classes.¹⁸ Civil Code section 52 provided that civil damages would be awarded to individuals deprived of such a right under Civil Code section 51.7.¹⁹ One possible interpretation of these provisions would allow only the person whose rights had been violated to bring an action.²⁰ The danger of such a finding was that if a victim failed to bring a lawsuit, it was not possible for another person, such as the Attorney General, to bring an action on the victim’s behalf.²¹ Due to this restriction, the ability of the provisions to reach their full potential of deterrence to hate crimes was diminished.²²

B. A Limit on Constitutional Rights

Additionally, in October of 1994, the California Second District Court of Appeal delivered a decision in *Boccatto v. City of Hermosa Beach*²³ which

unless an individual was a member of an enumerated minority class, he could not bring an action under Civil Code section 52.1 for a violation of one of his constitutional rights. *Id.*; see also *Nelson v. City of Irvine*, 143 F.3d 1196, 1206-07 (9th Cir. 1998) (following the decision in *Boccatto*; thus, requiring Civil Code sections 52.1 and 51.7 to be read together); *Cabesuela v. Browning-Ferris Industries of California*, 68 Cal. App. 4th 101, 110-11, 80 Cal. Rptr. 2d 60, 64-65 (1998) (same).

16. *Supra* note 15.

17. See CAL. CIV. CODE § 52.1(g) (amended by Chapter 98) (stating that “[a]n action brought pursuant to this section is independent of any other action, remedy, or procedure that may be available to an aggrieved individual under any other provision of law, including, but not limited to, an action, remedy, or procedure brought pursuant to section 51.7”).

18. CAL. CIV. CODE § 51.7(a) (West 1982 & Supp. 2001).

19. *Id.* § 52(b)(2) (amended by Chapter 98).

20. See *id.* (lacking the language necessary to indicate that a person other than the victim of rights enumerated in Civil Code section 51.7 could bring the action on the individual’s behalf).

21. *Id.*

22. See Letter from Bill Lockyer, Attorney General of California, to California Governor Gray Davis at 2 (July 6, 2000) [hereinafter Lockyer-Davis Letter] (on file with the *McGeorge Law Review*) (indicating that Chapter 98 will serve as a deterrent to hate crimes “regardless of whether the action is brought by a public official or the person whose rights were violated”).

23. 29 Cal. App. 4th 1797, 35 Cal. Rptr. 2d 282 (1994).

interpreted the Civil Code to require that these provisions be read in connection with one another.²⁴ Section 52.1 of the California Civil Code provided a cause of action for violations of rights “secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of [California].”²⁵ This section provided for an extension of these rights to “[a]ny individual” and did not enumerate any further requirement.²⁶

However, the court in *Boccatto* interpreted the law as requiring an individual bringing an action under Civil Code section 52.1 to demonstrate that the alleged violation of her rights was motivated by her membership in a protected class enumerated in Civil Code section 51.7.²⁷ Consequently, under *Boccatto* and the cases which have followed its holding,²⁸ an individual claiming, for example, a violation of his right to vote under Civil Code section 52.1 would be denied recovery unless he could demonstrate that the violation was motivated by his membership in a protected class enumerated in Civil Code section 51.7.²⁹

The court’s conclusion in *Boccatto* was surprising given the language of Civil Code section 52.1(g), which specifically states that “[a]ctions under this section shall be independent of any other remedies or procedures that may be available to an aggrieved person under any other provision of law.”³⁰ Nevertheless, the *Boccatto* court reasoned that the Bane Act,³¹ which enacted Civil Code section 52.1, was a response to an increase in the number of hate crimes being committed against minority victims.³² The court argued that the California Legislature enacted Civil Code section 52.1 to protect the minority classes outlined in Civil Code section 51.7.³³ Therefore, the court concluded that Civil Code section 52.1 must be read in connection with the class of minorities contained in Civil Code section 51.7.³⁴ As a result, only an individual who was a member of a class enumerated in Civil Code section 51.7 could bring an action under Civil Code section 52.1.³⁵ While the drafters of Civil Code section 52.1 may have been interested in protecting minorities against hate crimes, the language of the statute provides for the protection of the

24. *Id.* at 1809, 35 Cal. Rptr. 2d 282, 290 (requiring that, Civil Code section 52.1 be read in connection with Civil Code section 51.7; thus, forcing an individual making a claim for a violation of her constitutional rights to also allege that the violation was motivated by her membership in a minority class).

25. CAL. CIV. CODE § 52.1(a) (amended by Chapter 98).

26. *Id.* § 52.1 (amended by Chapter 98). *But see id.* (requiring that an allegation of a constitutional right violation be made in order to bring an action).

27. *Id.* § 51.7 (West Supp. 2001); 29 Cal. App. 4th 1797, 1809, Cal. Rptr. 2d 282, 290 (1994).

28. *Supra* note 15.

29. CAL. CIV. CODE § 52.1 (amended by Chapter 98); *Id.* § 51.7 (West 1982 & Supp. 2000).

30. *Id.* § 52.1(g) (amended by Chapter 98).

31. *Supra* note 12.

32. *Boccatto*, 29 Cal. App. 4th at 1808, 35 Cal. Rptr. 2d at 290 (1994).

33. *Id.*, 35 Cal. Rptr. at 290 (noting that the protected classes found in Civil Code section 51.7 include “race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age, disability, or position in a labor dispute”).

34. *Id.* at 1809, 35 Cal. Rptr. at 290.

35. *Id.*

State and federal constitutional rights of *any* individual, not just those among the classes enumerated in Civil Code section 51.7.³⁶

III. CHAPTER 98

Chapter 98 accomplishes two major goals. First, it strengthens the intention of the Ralph Act³⁷ “to give law enforcement a strong tool to deter crimes against minorities.”³⁸ It does this by clarifying that an action for a civil penalty may be brought on a victim’s behalf by the Attorney General, or by a district or city attorney.³⁹ The Attorney General of California, the sponsor of Chapter 98, suggests that providing for the recovery of a civil penalty in this way should serve to discourage further hate crimes against minorities.⁴⁰

Secondly, Chapter 98 clarifies Civil Code section 52.1, thus clarifying the intent of the law and nullifying the *Boccatto* decision.⁴¹ Chapter 98 corrects any confusion contained in the language of Civil Code section 52.1(g) by amending it to specifically state that “[a]n action brought pursuant to this section is independent of any other action including, . . . an action . . . brought pursuant to [Civil Code] section 51.7.”⁴² As a result of this clarification, a victim of a constitutional rights violation does not have to meet the additional burden of demonstrating that the violation was motivated by her membership in a minority class.⁴³

IV. ANALYSIS OF CHAPTER 98

Due to the destructive effects of hate crimes,⁴⁴ limiting their continual occurrence is a crucial social goal.⁴⁵ One response is to enact laws providing for civil suits.⁴⁶ This sends a strong message of deterrence to those who would engage in such conduct, and seeks to punish the perpetrator of the crime while compensating

36. CAL. CIV. CODE § 51.7 (West 1982 & 2001 Supp.)

37. Ralph Civil Rights Act of 1976, 1976 Cal. Stat. ch. 1293, sec. 2, at 5778 (amended by Chapter 98) (enacting Civil Code section 51.7).

38. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 2719, at 7 (June 6, 2000).

39. CAL. CIV. CODE § 52(b)(2) (amended by Chapter 98).

40. *Supra* note 22.

41. See CAL. CIV. CODE § 52.1(g) (amended by Chapter 98) (providing that “[a]n action brought pursuant to this section is independent of any other action, remedy, or procedure that may be available to an aggrieved individual under any other provision of law, including, but not limited to, an action, remedy, or procedure brought pursuant to section 51.7”).

42. *Id.*

43. *Id.*

44. *Supra* Part I.

45. See Berkowitz, *supra* note 11, at 40 (stating that “[e]veryone agrees that something, legislative or otherwise, must be done to stem the tide of hate”).

46. See Braithwaite, *supra* note 1, at 254 (arguing that when combined with a criminal prosecution, civil suits serve as effective deterrents to hate crime as they can provide “actual damages, emotional distress, . . . forfeiture” and “[p]erhaps more importantly, . . . punitive damages”).

the victim.⁴⁷ By providing that a person other than a victim can bring an action for a hate crime, Chapter 98 expands the scope of the law and thereby comes closer to realizing the aforementioned goals.⁴⁸

Additionally, for a number of reasons, including a desire by cities to project a safe image, hate crimes often go unreported.⁴⁹ By expanding the scope of individuals able to bring such actions, Chapter 98 assists in rectifying the problem of unreported hate crimes, while serving as a deterrent for crimes yet to be committed.⁵⁰

Generally, critics attack hate crime legislation, notably at the federal level, for targeting beliefs and attitudes—essentially arguing that such measures are inconsistent with the First Amendment’s protections of free speech.⁵¹ The danger in enacting hate crime legislation, according to one commentator, is that in doing so, “we lay the groundwork for truly breathtaking chills on free speech.”⁵² While the laws may target “genuinely dangerous” speech, there is a risk that it will extend to “speech that is merely offensive, unfashionable, careless, or at odds with the reigning egalitarian orthodoxies of the day.”⁵³

In response to this challenge, proponents argue that hate crime legislation is not focused on speech, but rather only addresses the conduct of the crime.⁵⁴ In this way individuals are free to express their beliefs about suspect classes,⁵⁵ but if they act upon these views in violent or unlawfully harmful ways, hate crime statutes will be triggered.⁵⁶ Agreeing with this position, the Supreme Court has stated that “[t]he First Amendment does not protect violence.”⁵⁷ The Court reasons that offensive

47. See *id.* at 252-54 (asserting that “anti-bias statutes [have] proved highly productive in vindicating the rights of individuals who had faced unjust discrimination”).

48. CAL. CIV. CODE § 52 (amended by Chapter 98).

49. Peter Y. Hong, *Panel Seeks to Raise Awareness of Hate Crimes Violence: State Commission Urges Victims as well as Police to Report Incidents*, L.A. TIMES, Mar. 16, 2000, at B1, available in 2000 WL 2221083; see also *id.* (urging, that hate crimes are unreported because “[p]olice departments may also focus on crimes such as assaults without pursuing the possibility that such offenses might be hate crimes” . . . can keep a community from learning of tensions among residents.” Some hate crimes are not reported because the individual may “fear deportation,” “may not want their sexual orientation to be revealed,” and may not trust police, because police are sometimes the perpetrators of hate crimes, or some “may fear retaliation from their attackers”).

50. *Id.* But see *id.* (noting that legislation funding “training programs that would teach police and local officials how to properly identify, report and respond to hate crimes” may be needed to correct the problem of unreported hate crimes).

51. E.g., Michael S. Greve, *Hate Crimes and Hypocrisy*, 1992/1993 ANN. SURV. AM. L. 563, 563-64 (1993).

52. *Id.* at 568.

53. *Id.*

54. See Berkowitz, *supra* note 11, at 42 (stating that “[t]hese critics erroneously contend that such statutes punish individuals for their beliefs and their speech”). *Id.* (noting that “the critics demonstrate a fundamental misunderstanding of hate-crimes legislation as well as the First Amendment,” as “hate-crimes legislation does not in any way target or punish speech; such statutes punish conduct only”).

55. *Id.* In the context of the First Amendment, references to suspect classes remain largely the same as those protected by hate crimes laws. See *id.* (exemplifying “race, religion, sexuality” as classes about which individuals may express their beliefs freely via the First Amendment).

56. *Id.*

57. *Wisconsin v. Mitchell*, 508 U.S. 476, 484 (1993).

speech is not being punished;⁵⁸ rather, when a message extends to violent conduct, “special harms” are produced which are distinct from their “communicative impact.”⁵⁹ The Court has concluded that this type of “special harm” is not covered by free speech, and because it is distinct from the underlying view that a perpetrator may have about a targeted suspect class, it is therefore, punishable.⁶⁰

Critics of hate crime legislation also argue that existing law sufficiently addresses violent crime, thereby, making such legislation superfluous.⁶¹ Those adhering to this position would argue, for example, that a battery is a battery, regardless of the perpetrator’s motive.⁶² In making this argument, the opposition to hate crime legislation fails to recognize that a perpetrator of a hate crime may not only be interested in harming the victim, but also intends to send a threatening message to the victim’s community.⁶³ Hence, hate crime legislation addresses the larger societal impact of a hate crime, as well as the injury to the individual victim.⁶⁴

V. CONCLUSION

Chapter 98 is an ostensibly simple bill which makes minor yet significant changes to the California Civil Code. With regard to Chapter 98’s expansion of constitutional rights, the American Civil Liberties Union has noted that constitutional rights violations can occur even where the person is not a member of minority class.⁶⁵ Furthermore, the Attorney General believes that the purpose of Chapter 98 is to expand the interpretation of civil rights statutes as broadly as possible.⁶⁶ In so doing, enforcement of the laws will result in greater protection of rights and a more significant deterrent value.⁶⁷

58. *Id.* at 481-82.

59. *Id.* at 484.

60. *Id.*

61. See Marc Sandalow, *House Backs Expanded Hate-Crime Legislation/Broader Definition Includes Gays, Disabled*, S.F. CHRON., Sept. 14, 2000, at A1, available at 2000 WL 6491475 (observing that pending federal hate crimes legislation was opposed by Republican leaders who “argued that violent crimes should be universally prosecuted without regard to the motives of the assailant or the background of the victim”).

62. *Id.*

63. See Uhrich, *supra* note 2, at 1497 (arguing that a hate crime is characterized by its “extreme viciousness” which derives, “in part, [from] the perpetrator’s desire to send a message to the victim and those like the victim”).

64. See Berkowitz, *supra* note 11, at 42 (stating that “[b]y making minority communities fearful, angry and suspicious of other groups—and of the legal structure that is supposed to protect them—these incidents can damage the fabric of our society and fragment communities”); *id.* (noting that hate crimes “laws protect all Americans, allowing them to walk the streets safe in the knowledge that their community will not tolerate violent bigotry”).

65. See Letter from Francisco Lobaco, Legislative Director, and Valerie Small Navarro, Legislative Advocate, American Civil Liberties Union, to Assembly Member Herb Wesson (Apr. 18, 2000) (on file with the *McGeorge Law Review*) (asserting that “[v]iolations of constitutional rights attach regardless of the person’s race, sex or other protected status”).

66. See Lockyer-Davis Letter, *supra* note 22 (urging Gray Davis to support AB 2719 because of the civil and constitutional rights protections it affords).

67. *Id.*

While Chapter 98 lacks any known documented opposition, similar legislation at the federal level is evidently controversial.⁶⁸ However, when the community impacts of hate crimes are identified, the opposition's arguments are less effective and the need for legislation becomes clearer.⁶⁹ As President Bill Clinton recently stated in support of federal hate crime legislation, "[w]e may not ever fully conquer the disease that afflict human hearts everywhere, the compelling need to define ourselves up by defining someone else down . . . [b]ut at least we can do more to make sure that no one in our country is violated simply because of who they are."⁷⁰

68. *Supra* Part IV.

69. *Id.*

70. Susan Milligan, *Hate-Crimes Law Expansion Ok'd*, THE BOSTON GLOBE, Sept. 14, 2000, at A25, available in 2000 WL 3342229.