

As part of the City of Boulder's efforts to ensure that Boulder is a welcoming and inclusive community, the city is working to update Boulder Revised Code (BRC) language pertaining to bias motivated crime sentence enhancements.

The amendments to the Boulder Revised Code regarding sentence enhancements for bias-motivated crimes include:

- Expanding the underlying offenses that are subject to an enhanced sentence,
- Adding offenses related to religious expression into the category of bias motivated crimes,
- Adding language to more clearly authorize an enhanced sentence even if the offender had mixed motives when the crime was committed,
- Cross-referencing the definitions of gender, gender identity and gender expression with Boulder's Human Rights Ordinance which is also being amended, and
- Increasing the potential jail sentence for bias-motivated crimes from 90 days to 364 days.

Please see below for final City Attorney's Office ordinance language and a February 2019 memo to City Council.

First reading by City Council is scheduled for August 6, 2019.

1 ORDINANCE _____

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3 AN ORDINANCE AMENDING SECTION 5-1-1,
4 "DEFINITIONS," AND SECTION 5-2-4, "GENERAL
5 PENALTIES," B.R.C. 1981 AND SETTING FORTH RELATED
6 DETAILS.

7 FINDINGS:

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1. Bias-motivated conduct inflicts greater individual and societal harm and is especially harmful because it is motivated by bias or hatred toward a protected group.
 2. It has been widely documented that victims of bias-motivated crimes suffer harmful psychological effects, and these crimes are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims and incite community unrest.
 3. In light of the greater degree of harm suffered by minority groups that have been systematically victimized, these groups deserve special protection from the municipal code, even where the offender merely perceives that the victim was a member of that group.
 4. Because an offender chooses a victim by reason of bigoted beliefs or hatred, bias-motivated offenses warrant greater maximum penalties.
 5. Council desires to redress these individual and societal harms by enhancing the sentences for criminal conduct on account of the offender's motives of bias or hatred toward a protected group.
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14 BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF BOULDER,

15 COLORADO:

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17 Section 1. Section 5-1-1, "Definitions," B.R.C. 1981, is amended as follows:

18 *Bias motivated crime* shall mean the commission of any of the underlying offenses
19 specified below if the offense is committed by reason of the actual or perceived race,
20 color, religion, religious expression, national origin, age, disability, sex, sexual
21 orientation, gender, gender identity or gender variance-expression of another individual
22 or group of individuals, regardless of the existence of any other motivating factor or
23 factors. The underlying offenses are sections 5-3-1, "Assault in the Third Degree," 5-3-
24 2, "Brawling," 5-3-3, "Physical Harassment," 5-3-4, "Threatening Bodily Injury," 5-3-
25 6, "Use of Fighting Words," 5-3-9, "Brandishing a Weapon," ~~or~~ 5-4-1, "Damaging
Property of Another," 5-4-14, "Graffiti Prohibited," 5-4-15, "Posting Signs on Property
of Another Prohibited," 5-8-6, "Aiming Weapon at Another," or 5-8-7, "Flourishing
Deadly Weapon in Alarming Manner," B.R.C. 1981. No "bias motivated crime" finding
shall occur unless the allegation of bias motivation has been specifically charged and
sustained by an in-court admission of a defendant, or by a specific finding established
beyond a reasonable doubt by a judge or jury in a contested trial.

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2 Gender shall have the same meaning as the term "sex" defined in section 12-1-1,
3 "Definitions," B.R.C. 1981.

4 Gender identity and gender expression shall have the meanings defined in section 12-1-1,
5 "Definitions," B.R.C. 1981.

6 Section 2. Section 5-2-4, "General Penalties," B.R.C. 1981, is amended as follows:

7 **5-2-4. - General Penalties.**

- 8 (a) The penalty for violation of any provision of this code or any ordinance is a fine of not more
9 than \$1,000 per violation, or incarceration for not more than ninety days in jail or by both such
10 fine and incarceration, except as follows:
- 11 (1) Where any different provision is made elsewhere in this code or any ordinance;
 - 12 (2) Where the defendant's criminal culpability is vicarious, jail may not be imposed as a
13 penalty;
 - 14 (3) Where a non-traffic violation is involved, in order to impose a jail sentence, the court
15 must be satisfied from the evidence and other material available to it for sentencing that
16 the defendant acted intentionally, knowingly or recklessly with respect to the material
17 elements of the violation. Where traffic offenses are concerned, ordinary negligence is
18 sufficient to permit the imposition of jail;
 - 19 (4) Where a defendant is a child under the age of ten years, in which case the child may not
20 be held accountable in municipal court for any violation; or
 - 21 (5) Where the defendant is a child of ten years through and including seventeen years of age,
22 the child may not be sentenced to jail except upon conviction of a moving traffic violation
23 for which penalty points are assessed against the driving privilege under the laws of this
24 state. ^[4]
- 25 (b) Nothing in Subsection (a) of this section is intended to:
- (1) Remove or limit the discretion or authority of any public official to charge a child in a
court other than the municipal court; or
 - (2) Limit the power of the municipal court to incarcerate a defendant for nonpayment of a
fine or for contempt.
- (c) The penalty for violation of any rule or regulations promulgated under authority delegated by
the charter, this code, or any ordinance of the city is a fine of not more than \$1,000 per
violation, except as provided in Paragraph (a)(4) of this section and in Section 5-5-20,
"Unlawful Conduct on Public Property," B.R.C. 1981.
- (d) The maximum penalty for violation of Sections 5-3-1, "Assault in the Third Degree," 5-3-2,
"Brawling," 5-3-3, "Physical Harassment," 5-3-4, "Threatening Bodily Injury," 5-3-6, "Use of
Fighting Words," 5-3-9, "Brandishing a Weapon," ~~and~~ 5-4-1, "Damaging Property of

1 Another," 5-4-14, "Graffiti Prohibited," 5-4-15, "Posting Signs on Property of Another
2 Prohibited," 5-8-6, "Aiming Weapon at Another," and 5-8-7, "Flourishing Deadly Weapon
3 in Alarming Manner," B.R.C. 1981, when the offense is found to be a bias motivated crime,
4 shall be a fine of not more than \$2,000 per violation, or incarceration for not more than ~~ninety~~
5 ~~days-364 days~~ in jail, or both such fine and incarceration. The court shall not be required to
6 make the findings required by Paragraph (a)(3) of this section in order to impose a sentence
7 including incarceration. This ordinance shall not be applied in a manner that suppresses
8 abstract thought or protected speech.

9 Section 3. This ordinance is necessary to protect the public health, safety, and welfare of
10 the residents of the city, and covers matters of local concern.

11 Section 4. The city council deems it appropriate that this ordinance be published by title
12 only and orders that copies of this ordinance be made available in the office of the city clerk for
13 public inspection and acquisition.

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15 INTRODUCED, READ ON FIRST READING, AND ORDERED PUBLISHED BY
16 TITLE ONLY this 6th day of August 2019.

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Suzanne Jones
Mayor

Attest:

Lynnette Beck
City Clerk

1 READ ON SECOND READING, PASSED AND ADOPTED this 27th day of August
2 2019.

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5 _____
Suzanne Jones
Mayor

6 Attest:

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Lynnette Beck
9 City Clerk

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Mayor
Suzanne Jones



City Manager
Jane Brautigam

Council Members
Aaron Brockett
Cindy Carlisle
Lisa Morzel
Mirabai Nagle
Sam Weaver
Bob Yates
Mary Young

City Attorney
Thomas A. Carr

City Clerk
Lynnette Beck

Council Chambers
1777 Broadway
Boulder, CO 80302
February 26, 2019
6:00 PM

STUDY SESSION BOULDER CITY COUNCIL

Manufactured Housing Strategy (120 minutes)

Human Relations Commission Recommendations (90 minutes)

1. Vote16/Voting Rights to Non-citizens
2. Hate Crime Sentence Enhancements
3. Gender Inclusive Language

Updated on 2/26/2019 at 10:43 am Executive Summary to Hate Crimes Sentence Enhancement Section Amended

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CITY COUNCIL AGENDA ITEM COVER SHEET

MEETING DATE:

February 26, 2019

AGENDA TITLE

Human Relations Commission Recommendations (90 minutes)

1. Vote 16/Voting Rights to Non-citizens
2. Hate Crime Sentence Enhancements
3. Gender Inclusive Language

PRIMARY STAFF CONTACT

Clay Fong, Manager, Community Relations & Office of Human Rights

ATTACHMENTS:

Description

- ▣ **Memo and attachments**

them to war or conflicts. Noncitizens also can't vote even though they are parents and legal representatives to millions of U.S. citizens.

Joshua A. Douglas is a law professor at the University of Kentucky and co-editor of Election Law Stories (<https://catalog.princeton.edu/catalog/10396554>). He argues that noncitizen voting is not radical or far-fetched and that it can help provide a voice to people with a vested stake in their communities as well as a sense of belonging. While he maintains that efforts to expand the electorate can be constructive and are consistent with melting-pot perspectives, he also says that the questions of whether and how to do so are for each community to make for itself.

Historically, according to Douglas, noncitizen voting was the norm in many states until laws beginning in the 1920s began to eliminate voting rights. New York City allowed noncitizens to vote in school board elections until 2002 when the city dissolved the elected school board.

In addition, noncitizens contribute to the local economic and cultural vibrancy of the community.

The HRC is interested in supporting either a citizen-led or council-led initiative in 2019. It listed extending voting rights to noncitizens and 16-year-olds in its Dec. 26, 2017, Responses to Council Questions 2018 Goals as measures to be considered in the effort to foster a welcoming and inclusive community.

COMMUNITY ENGAGEMENT SUMMARY

Given the charge pertaining to a citizen-led aspect of this proposed change, staff and HRC have not conducted any community engagement related to this initiative. If council wishes to move this forward, a public engagement strategy will be developed as needed.

NEXT STEPS

Council will need to decide whether to place this initiative on the 2019 municipal ballot. Note that neither city money or staff can be drawn upon to move non-citizen voting forward without council direction to explore this as a council initiative. Also, if the council does make non-citizen voting a council initiative, city staff and other resources, including money, cannot be used once the matter is placed on the ballot, usually the second business meeting in August. At no time can city money be used for advocacy.

III. HATE CRIME SENTENCE ENHANCEMENTS

EXECUTIVE SUMMARY

On May 22, 2018, City Council requested that staff review the Sentence Enhancement ordinance (Section 5-2-4(d), "General Penalties," B.R.C. 1981) for recommended updates since its passage in 2006 and bring back analysis and recommendations.

Since May 22nd, staff, in collaboration with members of the HRC, most notably Chair Nikhil Mankekar, conducted additional research regarding the rise of hate crime incidents, both nationally and locally, and identified areas of the Boulder ordinance that present opportunities for updating.

Specific options for updates to the ordinance include language that addresses mixed motive offenses where bias is not the sole driver of the offense. In some jurisdictions, the lack of specific mixed motive language has prevented prosecutors from utilizing hate crimes sentence enhancement provisions in some cases.

Second, a rise in hate incidents pertaining to religious expression, both nationally and locally, indicate a need for language that protects individuals from harassment in a house of worship or while engaged in personal religious expression such as prayer that may occur outside of a house of worship.

Lastly, staff have drafted recommendations that respond to the research and input to inform ordinance changes, including broadening the definition of protected classes under the Human Rights Ordinance and implementing restorative justice with respect to hate crime offenses.

At its January 28th, 2019 meeting, the HRC voted unanimously to forward these suggested changes to City Council for consideration.

QUESTIONS FOR COUNCIL

1. Does City Council choose to direct staff to analyze and propose amendments to Section 5-2-4, "General Penalties," B.R.C. 1981, to include mixed motive and religious expression language to the enhanced sentencing authority?
2. Which of the related policy recommendations does City Council wish to pursue?

BACKGROUND

There are compelling reasons at the national, state and local levels for Boulder to revisit its approach to hate crimes.

Across the country, hate crimes motivated by religious bias accounted for 1,679 reported offenses in 2017 according to FBI statistics. Of these incidents, some 58.1 percent were anti-Jewish and 18.7 percent were anti-Islamic, which accounted for the top two categories of offenses. There was a 37 percent increase in anti-Jewish hate crimes, and overall there was a 23 percent increase in religious bias hate crimes.

Locally, there has been strong expression of the need for urgency and demand for real action from the city to combat issues of bias and hate crimes they are experiencing in our community. A multi-year long, robust process of public engagement took place to assess community needs

and wants around diversity and inclusivity in Boulder from 2016-2018. This feedback was captured in the Community Perceptions Assessment study (CPA) and CPA Open House event in 2017. Furthermore, HRC's January 2018 Public Hearing on Racial Bias and Hate Incidents – The Community Speak Out – resulted in even more feedback from people of color and others regarding a significant rise in bias and hate incidents, including harassment and assaults they have experienced in Boulder in the past two years.

There has also been a significant amount of input on hate crimes received as part of public comment during HRC meetings from community members relating their own experiences with hate crimes in Boulder and asking the city to address their issues. Feedback from the community to the HRC has included mentions of Islamic community members who have had their head coverings torn off while receiving racial insults in the wake of the 2016 Presidential election. This type of harassment has also been an issue for Sikhs facing similar harassment for religious expression, including wearing articles of faith, turbans, beards etc. There were also local reports of children of immigrants being harassed while playing in schoolyards, multiple incidents of black residents having garbage thrown on them from passing vehicles while having racial epithets shouted at them and many more bias and hate incidents reported to the HRC during the past three years.

According to the Federal Bureau of Investigation's annual report on hate crimes, Boulder experienced three hate crime incidents in 2017, the most recent year for which data is available. There were four reported incidents in 2016 and one in 2015. It is also worth noting that a 2017 U.S. Department of Justice report on "Hate Crime Victimization: 2004-2015" noted that an estimated 54 percent of hate crimes go unreported.

Through the 2018 Boulder Community Survey, participants who designated themselves as Hispanic or another race gave a lower percentage of positive marks than white respondents concerning "openness and acceptance of the community toward people of diverse backgrounds" (48 percent vs. 57 percent).

Nikhil Mankekar, Chair of the City of Boulder Human Relations Commission, writes, "We have a need to take action at the city level to combat the rise of hate nationally, and to make our city safe for all people where state and national hate crime policies are not strong and progressive enough.

These laws and the proposed changes are an expression of our community's values. The protections we grant within them play a significant role in keeping targeted populations safe and helping victims and these communities heal. Hate crimes don't just impact the victim but the entire minority group they come from especially. In addition, they impact the safety and well-being of everyone in our community.

By increasing protections through hate crime laws, the City of Boulder will encourage victims to come forward and report hate incidents. Through our laws, they know that what they have experienced is recognized, taken seriously, and they are protected under the law. This makes all the difference in people coming forward and these incidents not being underreported. Through

strengthening and improving our bias-motivated hate crimes law, we bring justice to victims and re-affirm our values as a community."

Current Ordinance Language

The definition of "bias motivated crime" is found in Section 5-1-1, Definitions, B.R.C., 1981: "Bias motivated crime shall mean the commission of any of the underlying offenses specified below, if the offense is committed by reason of the actual or perceived race, color, religion, national origin, age, disability, sexual orientation, gender, gender identity or gender variance of another individual or group of individuals. The underlying offenses are Sections 5-3-1, "Assault in the Third Degree," 5-3-2, "Brawling," 5-3-3, "Physical Harassment," 5-3-4, "Threatening Bodily Injury," 5-3-6, "Use of Fighting Words," or 5-4-1, "Damaging Property of Another," B.R.C. 1981. No "bias motivated crime" finding shall occur unless the allegation of bias motivation has been specifically charged and sustained by an in-court admission of a defendant, or by a specific finding established beyond a reasonable doubt by a judge or jury in a contested trial."

ANALYSIS

Real world observations of bias motivated crimes ordinance enforcement have illustrated a need for updated language that addresses gaps in current statutory construction. Specifically, language that can allow for prosecution of crimes with a mixed motive and afford greater protection against interference with religious worship and expression can constructively address hate incidents.

Mixed Motive Hate Crimes

Current Boulder statutory language pertaining to bias-motivated crime does not address instances where an offender has mixed motives. An example of a mixed motive crime may occur when a car accident escalates into an assault during which an offender hurls racial epithets at a victim.

Some jurisdictions have sought to add specific language to clarify that mixed-motive incidents can still be prosecuted as a hate crime. As recently as last year, the state of Florida attempted to update its hate crimes laws with specific language allowing for prosecution in mixed-motive instances. Without such specific language, mixed motive crimes become much harder to prosecute as bias motivated incidents.

Illinois has met with more success in addressing mixed motive crimes, having updated its law in 2003 to take into account mixed motive hate-crimes by adding the phrase: "regardless of the existence of any other motivating factor or factors." Illinois has also provided some clarity with respect to hate crimes via the 1996 People vs. Davis case, which held that the fact that the victim engaged in mocking behavior towards the offender did not provide a bar to successful prosecution.

Boulder could improve its hate crimes law by adding language mirroring that of Illinois, namely to allow for bias motivated prosecution "regardless of the existence of any other motivating factor or factors." The HRC suggests that the inclusion of a mixed motive clause into the current

ordinance will be a significant step in making Boulder safer for minorities and other marginalized groups.

Protection for Religious Worship and Expression

The HRC is concerned about potential attacks on both houses of worship as well as individuals practicing their religious beliefs, whether or not this occurs in a house of worship. It's worth noting that Colorado state statutes do not criminalize interference with religious worship, although many states, including California and Florida do. This may also be an issue that the city may wish to put on its legislative agenda so as to advocate for relevant changes at the state level.

The Federal Damage to Religious Property, Church Arson Prevention Act, 18 U.S.C. § 247, provides guidance on statutory approaches to religious hate crimes. According to the U.S. Department of Justice summary, "This statute prohibits the intentional defacement, damage, or destruction of religious real property because of the religious nature of the property, where the crime affects interstate or foreign commerce, or because of the race, color, or ethnic characteristics of the people associated with the property. The statute also criminalizes the intentional obstruction by force, or threat of force of any person in the enjoyment of that person's free exercise of religious beliefs."

If council decides to move forward on expressly criminalizing religious bias crimes at the local level, the HRC believes that the abovementioned federal statute can serve as one example for drafting appropriate municipal ordinance language.

Some state hate crime statutes cover religion-related offenses in a similar fashion. However, it's worth noting that there are differing approaches at the state level. Boulder County District Attorney Michael Dougherty suggested that New York state may provide some examples of religious protections and language in their hate crimes laws that could be further reviewed in developing this piece of our municipal ordinance. New York's misdemeanor language criminalizes criminal interference with religious worship as follows:

"1. A person is guilty of criminal interference with ... religious worship in the second degree when:

... (c) by force or threat of force or by physical obstruction, he or she intentionally injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with, another person because such person was or is seeking to exercise the right of religious freedom at a place of religious worship; or

(d) ... or intentionally damages the property of a place of religious worship."

As noted above, religious protection is an issue of potential local significance as it pertains to both practice and expression. For example, Muslim students who pray five times a day and sometimes must do so publicly can be at risk, and vandalism of such institutions as the Boulder Jewish Community Center also indicated a need for enhanced legal protection.

Given this local history, HRC recommends that the City of Boulder examine federal and selected state statutory language to create similar protections at a municipal level related to religious practice and expression.

Other Policy Recommendations

The following are additional points to consider from the HRC when revisiting the language of Boulder's current bias-motivated crime offenses:

1. Adding additional protected groups to create consistency with Human Rights Ordinance.

Protected classes from the City of Boulder's Human Rights Ordinance that are not mentioned in the bias-motivated crimes ordinance are creed, sex, genetic characteristics, marital status, ancestry, pregnancy, parenthood, custody of a minor child, source of income and immigration status. Adding these protected classes to the definition of a bias-motivated crime would create consistency in the protections available to residents.

With respect to genetic characteristics, it's worth noting that The U.S. Equal Employment Opportunity Commission now has protections for genetic and medical testing. These protections can guard against companies providing health plans from discriminating against people with a genetic predisposition to an illness. A data collection related statute would ensure that Boulder would be on the leading edge by keeping up with changing technologies and to protect people in medical care facilities, and addressing related concerns pertaining to such issues as insurance coverage.

2. Developing a legal mandate of police training on hate crimes and investigation.

Many other states have this as part of their hate crimes statutes. Boulder has fallen behind the national state laws mandating such training, and as a progressive city we should be leading across the board on these issues.

3. Housing Status – add "homeless" or "housing status" to protected groups.

Other jurisdictions have considered adding these categories to their list of protected classes. In 2018, the Los Angeles City Council considered these protections, and Florida attempted to pass an update to their state hate crimes ordinance that included protections for the homeless. This would protect a particularly vulnerable population that has experienced disempowered and abuse.

4. Restorative Justice

As a matter of policy and not ordinance, council may wish to look at restorative justice as a means of address hate-related offenses. Currently, the Boulder Municipal Court does offer restorative justice on a case-by-case basis. The goal of restorative justice is for an offender to repair the harm that they have caused. In some cases, the direct victim may be present, in others, they may not, although they may have a written statement read on their behalf or a surrogate victim take their place. Another key component of restorative justice

is that it can afford an opportunity for meaningful dialogue with victims and/or community members (not necessarily direct victims) about the impacts of hate crimes.

COMMUNITY ENGAGEMENT SUMMARY

Community engagement related to these proposed ordinance changes can draw upon past public feedback including community surveys, the Community Perceptions Assessment, and public comment before City Council and the Human Relations Commission.

A multi-year long, robust process of public engagement took place to assess community needs and wants around diversity and inclusivity in Boulder from 2016-2018. This feedback was captured in the Community Perceptions Assessment study (CPA) and the CPA Open House event in 2017. Furthermore, HRC's January 2018 Public Hearing on Racial Bias and Hate Incidents – The Community Speak Out. There has also been a significant amount of input received at public comment during HRC meetings from community members relating their own experiences with hate crimes in Boulder and asking the city to address their issues. This input has been summarized in the background session above.

Moving forward, community engagement will be of a consultative nature, allowing opportunities for the public to share concerns and provide feedback on proposed language. In addition to developing mechanisms for the public to share feedback online, the HRC plans on holding a public hearing in March. Staff is currently in the process of developing a contact list consisting of community organizations that have been funded by or collaborated with the HRC in the past as well as those that are likely to have an interest in revised language. Emphasis will be placed on outreach to community members of diverse backgrounds as well as concerned community members. These contacts will be invited to share their feedback at the public hearing or via other channels.

NEXT STEPS

The following timeline defines next steps regarding hate crimes sentence enhancement code revisions:

- February to March: City Attorney's Office reviews and revises proposed language.
- March 25: Public Hearing at Human Rights Commission Meeting (there may be other public engagement events as needed).
- April: City Attorney's Office reviews proposed language.
- TBD: City Council discussion and potential adoption of an ordinance.