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Extending Hate Crime Legislation to Include Gender: Explicating an
Analogical Method of Advocacy

Abstract

This paper examines expert testimony advocating the inclusion, in proposed hate-crime legislation, of crimes motivated by gender bias. The design and rhetoric of such testimony evidences formal properties. Precisely because these properties are formal properties, not limited to specific cases or issues, their explication will contribute not only to the understanding of hate crimes discourse, but to social problems research and theory more broadly. Arguments for the expansion of rights to previously unprotected categories (1) can be designed with an emphasis on generic or formal principles, which allow for the inclusion of previously unprotected groups whose victimization constitutes additional social problems not yet institutionally recognized. Such arguments (2) can emphasize parallelism between protected categories and unprotected categories, and between recognized social problems and as-yet-unrecognized social problems, making similar institutional treatment seem rational, and making disparate treatment seem unjustifiable or insensitive. And such arguments (3) can propose limits to the desired expansion of rights, as a means of pre-empting “floodgate” arguments against expanding the scope of existing protections. More generally, membership categorization analysis is employed to study social identity and inter-group relations as these are constituted in social problems discourse. Special reference is made in this case to “hate crimes” and how they might be addressed by membership categorization analysis in the context of constructionist social problems analysis and qualitative socio-legal studies.

Keywords

Hate crime, bias crime, gender, testimony, advocacy, analogy, ethnomethodology, membership categorization analysis, social problems, language in law

Introduction

A regular feature of rights discourse is the attempt to expand the coverage of existing rights or protections by suggesting that certain groups or categories of people who do not yet enjoy these rights or protections are similar in relevant respects to groups or categories of people who already do. The emphasis on similarities across groups, rather than differences, is a highly significant but understudied aspect of the pragmatic design and the cultural logic of social problems claims-making and civil rights advocacy. This emphasis is achieved partly through the use of common designations for the social problems afflicting various groups, including “discrimination” and “hate crime.”

Particular social struggles and social problems effecting minority groups are progressively being understood in the context of larger, historical and political processes of social change, as particular social movements locate themselves in a broader dialogue of civil rights advocacy. In this pluralist dialogue of civil rights and social problems, each subsequent social movement can learn from the struggles of previous movements, and invoke their achievements as standards or precedents in policy debates. These practices of learning and leveraging across social movements become most clear in the United States from the nineteen-sixties on, as the methods and successes of the African American Civil Rights movement became lessons for Hispanics, Native Americans, and others, and the methods and successes of the feminist movement, itself informed by neo-Marxist critiques of class relations, in turn informed the nascent gay/lesbian/bisexual/transgender movement. All have relied more and more upon legal strategies of legislation and litigation, in which the social problems of diverse constituencies have been expressed similarly, for example in terms of discrimination or lack of equal opportunity, and all have asked for federal government recognition of and remedy for various types of inequality and victimization.

The remarkably common elements of such arguments for the expansion of rights and the recognition of neglected social problems is technically best understood by means of methods which can elucidate both the formal elements of claims-making on the part of as-yet unrepresented or unprotected categories of people suffering from as-yet unrecognized social problems, and the context-sensitivity of these formal elements in practice and in particular cases. The socio-linguistic logic and the situated practical reasoning of such claims-making can be understood by drawing upon classical principles of ethnomethodology and conversation analysis. Where the pivotal issue is the inclusion of additional categories of people, the subfield of membership categorization analysis, rooted in early ethnomethodology and early Sacksian conversation analysis, is indispensable. These overlapping traditions of inquiry provide alternative windows on the social organization of social problems, in this case by elucidating a small constellation of cultural (or ethno) methods which provide for the visibility of a specific trouble, portray the trouble as a social problem, and label it in a manner conducive to official recognition and action, “all dependent on participants’ systematic use and deployment of various conversational and discourse procedures” (Maynard, 1988: 320). In this case the trouble and social problem addressed is hate crimes against women, but the methods of advocacy observable in the congressional testimony discussed below are relevant well beyond the confines of hate crimes discourse and politics.

Attending to the methodic and logical properties of legal and political arguments takes the study of hate crimes in a direction which few have attempted, but which is nicely prefigured in the work of Jenness and Grattet in their authoritative book *Making Hate a Crime* (2001). Jenness and Grattet express interest in “understanding the definitional processes that result in the assignment of victim status to some individuals and groups but not to others” (Jenness and Grattet, *ibidem*: 9). They argue for a focus:

[...] on processes of recognition, categorization, and institutionalization through which some types of people get social recognition as victims and some types of events are deemed hate crimes. This approach to understanding victimization departs radically from conventional formulations of the victimization process insofar as it allows us to reconceptualize victimization in terms of interactional, discourse, and institutional practices. (p. 10)

Most importantly, Jenness and Grattet draw our attention to the “microlevel processes of categorization work” (Jenness and Grattet, *ibidem*: 71). Their work, however, offers a broad summary of such political processes and rhetorical categorization, rather than elucidating the pragmatic methods of categorization observable within the language of specific contributions to hate crimes discourse.

Membership categorization analysis stands to complement existing “macro” analyses of hate crimes politicking and policymaking by means of attending to just these “microlevel processes of categorization work,” evident in texts such as congressional testimony. The “macro” question of how hate crimes discourse works politically can be illuminated at the “micro” level by asking how hate crime discourse works rhetorically. Ultimately the distinction between the macro and the micro, the political and the rhetorical, collapses, as it becomes clear how political questions of inclusion and exclusion are at the same time pragmatic questions of socio-linguistic categorization.

Membership categorization analysis therefore affects a “respecification” of hate crimes, illuminating the structure of hate crime politics by elucidating the structure of hate crimes discourse. Hate crimes discourse can be shown to display a variety of structural properties which membership categorization analysis is especially suited to identify, including but not limited to: (1) the pragmatic logic by which interactions between individuals can be understood as instances of group relations such as race relations and gender relations, and social problems such as racial violence and the victimization of women; (2) the cultural methods by which social problems can be decoupled from their stereotypical victims and expanded to include new categories of victims; and (3) the sequential nature of arguments for group entitlements, in which similarities across groups and differences between groups can each be invoked, in turn, to argue for expanding legal protections or remedies and to argue for limiting such expansion.

Topic & Method: Hate Crimes and Membership Categorization Analysis

Membership categorization analysis studies the naturally occurring details and social logic of social identity in practice. The analytic focus is on membership categories, such as men and women; whites and blacks; Protestants, Catholics and

Jews. More specifically, the focus is on the logic and the practice of membership categorization, speaking to how particular identities are made relevant and heard to be relevant in talk and text, by means of cultural methods of practical reasoning and practical action, or ethnomethods. These methods are observable in different ways in different contexts, but cannot be understood as unique to specific contexts; the cultural nature of these methods suggests that in addition to being contextually sensitive, they are also context-free or context-transcendent in nature, and therefore in an important sense formal (c.f. Garfinkel and Sacks, 1990; Sacks, Schegloff and Jefferson, 1978).

At the analytic core of membership categorization analysis is the observation that membership categories are conventionally and socio-logically grouped into what Harvey Sacks called membership category “devices.” Thus “women” and “men” are two membership categories collected together in the membership category device “sex,” or “gender” (as it is usually referenced in hate crime legislation). “Black” and “White” are two membership categories collected together in the membership category device “race.” “Protestant,” “Catholic,” “Jew” and “Muslim” are membership categories from the device “religion.” Clearly, individuals are members or incumbents of multiple categories; for example we can speak of one person as being a Black Muslim man, another as a White Protestant woman, etcetera, hence the “multiple category incumbency” of persons. These are perhaps merely novel analytic terms for expressing cultural truisms, but membership categorization analysis has pursued the study of membership categorization practices well beyond the obvious, resulting in a variety of sociological analysis which is singularly effective at explicating the cultural logic of social identity and group relations. Membership categorization analysis therefore has great promise for inquiries into social problems which implicate social identities and group relations, including hate crimes.

The term “hate crime” refers to crimes motivated by bias or hatred of a group, or characterized by discriminatory selection of victims. For legal purposes, a potential victim, in order to be protected or recognized under hate crime legislation, must be a member of a membership category (such as “African American”) which belongs to a membership category device (such as “race”) which is protected by law. Generally, all membership categories within a membership category device will be protected under law; such that, for example, whites and Blacks are both protected against crimes motivated by racial hatred, and Christians are protected against religious bias along with Jews and Muslims (c.f. Jenness, 2002/2003: 92). The prominence of membership category devices within membership categorization analysis (MCA) makes MCA especially relevant for the study of formal rights, where formalism suggests the applicability of a law or policy beyond specific cases or categories of victims involving, for example, African Americans, Jews, and immigrants, the groups Jenness calls the “core” groups in the history of hate crime legislation (Jenness, *ibidem*). This formal nature of hate crime legislation is captured well by Terry Diggs; responding to the argument that some laws passed to protect minorities had also been used against them, Diggs replies “The idea should be that no one gets to go hunting” (1999).

Importantly, hate crime legislation does not protect victims of crime just by virtue of the two criteria that one has been victimized by a crime and one is a member of a group from a membership category device protected by hate crime legislation. The hateful or biased motive, or the discriminatory selection of the victim, is an essential criterion for identifying a hate-crime. There is therefore something of an “intent standard” in hate crime law, as in much discrimination law (Jenness, 2002/2003: 78). A crime victim who is Black is not necessarily the victim of a racial

hate crime, nor is a crime victim who is a woman necessarily the victim of a gender hate crime.

Given the multiple category incumbency of victims and offenders, and the consequent choice available in selecting from between multiple correct descriptions of social identity, it is an open question which social identity, if any, is relevant in any particular case for understanding the motive for an offense. The question of relevant identity is seen within ethnomethodological conversation analysis and membership categorization analysis as a practical interactional issue or problem for members, which members answer for themselves. The analyst's role is understood as explicating members' methods and orientations, rather than criticizing or politicizing them.

Issues of motive, action and identity are often mutually implicative and mutually constitutive, in that each can inform our understanding of the others, but in the case of hate crimes, these questions are tied together *extremely* closely. A hate crime, as a particular type of *action*, involves a hateful *motive*, where hate is understood in terms of a limited number of social *identities*. These social identities are technically best understood as membership categories drawn from the same membership category devices (co-categories), such as white/black, male/female, Christian/Muslim, etcetera.

As Watson suggests in his work on membership categorization practices relevant to victims and offenders (1976, 1983), pairings of co-categories such as white/black and straight/gay are culturally available for *mapping* onto another relational pair of co-categories: *offender/victim* (of discrimination, hate crime, etc.), providing for the intelligibility of some crimes as motivated by, for example, racism or homophobia. One method for displaying the motive of an offense, which suggests an understanding of victims and offenders in terms of alternate membership categories in this way, works through the victim's identity as *this is formulated by the offender*. Watson notes that when offenders identify their victims by such hateful terms as "faggot" or "nigger," this can be adequate in and of itself to provide for the motive as one of sexual or racial hatred (Watson, 1983: 33-34). Alternatively, the nature and motive of an offense can be displayed or achieved partly through describing the offender's identity by means of a category (such as "white"), where the victim's incumbency in a co-category (such as "black") from the same device (such as "race") is also an accountable (observable, reportable) feature of the setting.

Whether the motive is displayed through a description of the victim or the offender, or in another manner, the identities of both are relevant, and descriptions of either one can be partly constitutive of the relevant identity of the other. Either the offender's or the victim's incumbency in a co-category from a device such as race can become relevant even if it is not explicitly declared, along the logic elucidated by Sacks in his "consistency rule," by which a description of one person in terms of a membership category such as "white" can make relevant an understanding of co-present others by means of co-categories from the same category device, such as "black" (Sacks, 1972).

Similar observations have been made about the relational nature of action descriptions and identities; Watson notes that because certain activity descriptions are related to certain membership categories ("category-bound activities"), describing an activity in a certain way can supply the relevant identity of the persons involved (Watson, 1983: 40). For example, describing an activity as a hate crime against a Black invites inferences as to the racial identity of the offender as White, just as describing an activity as "gay-bashing" provides for the categorization of the offender as heterosexual. Thus descriptions of actions, motives, and identities are mutually implicative and mutually constitutive. This is true to the extent that, even in the

absence of explicit formulations of certain identities, actions or motives, they may still be provided for by the logic of membership categorization practices, with reference to such phenomena as the consistency rule, which allows the categorization of one person to provide for the relevance of understanding others by means of categories from the same category device, and with reference to actions which imply the relevance of certain categories (category-tied actions) and motives which imply the relevance of certain categories (category-tied motives).

In law also, the presence or absence of a discriminatory motive is an essential consideration in deciding whether certain social identities (such as race, religion, sexual orientation) are legally relevant to a case, and whether an action counts as an instance of “discrimination,” or a “hate crime.” If the perpetrator is not demonstrably oriented to a membership category covered by hate crime statutes, then a crime is difficult to make accountable (observable, reportable) by law as a hate crime. Similarly, if the perpetrator’s motive is hatred of a group which is not protected by hate crime legislation, we cannot speak of a hate crime in any technical sense, although such crimes are easily formulated as hate crimes in a less formal sense, leading to the present topic.

In the United States, neither women nor gender were included in the initial Federal legislation on hate crimes, the Hate Crimes Statistics Act of 1990, which recognizes crimes “based on race, religion, sexual orientation, or ethnicity” and was later supplemented to include disability status (Streissguth, 2003: 47-48). The Federal Hate Crimes Sentencing Enhancement Act of 1994 also mentions race, religion, sexual orientation, ethnicity and disability status, and mentions as well color, national origin, and gender, but this law only addresses gender-motivated crimes on federal property (Jenness and Grattet, 2001: 44-45). The Violence Against Women Act of 1994 recognized gender-motivated hate crimes under its Title III, but this law only provided a civil remedy for gender-motivated hate crimes (not enhanced criminal sanctions), and Title III was declared unconstitutional by the courts in 1999 (Jenness and Grattet, *ibidem*: 44). General coverage and protection at the federal level for gender-motivated hate crimes, as well as a variety of more paradigmatic hate crimes, is waiting for the contested and delayed passage of the Hate Crimes Prevention Act, and it is in this context in 1999 that Professor Frederick Lawrence, a professor of law and former civil rights attorney, offered the testimony to be analyzed below, arguing for the inclusion of gender in the proposed legislation before the Committee on the Judiciary, of the U.S. House of Representatives. This Act, in its most recent form, would specifically recognize, as a national problem, “violence motivated by the actual or perceived race, color, religion, national origin, gender, sexual orientation or disability of the victim” (U.S. Congress, 2004).

This testimony was chosen for analysis not because it is demonstrably representative in any statistical sense of all arguments for including gender among protected categories, nor because it is distinctive from other such arguments. It is a rather sustained discussion explicitly addressed to the topic of expanding hate crime legislation, but this also does not make it a unique resource for analysis. For purposes of membership categorization analysis, or ethnomethodology, or conversation analysis, almost any naturally occurring data (not hypothetical, experimental, contrived, manipulated, scripted, etc.) should prove fertile ground for analysis, if the analyst is able and willing to attend closely to what the participants are doing (whatever it might be) and how they are doing it. Almost any data will serve, because one is working backwards from speech or text to the cultural (ethno) methods of practical action and practical reasoning which inform its production and reception. Indeed, the testimony analyzed below was not even chosen because it deals with arguments for expanding hate crime legislation to include women. Rather,

the data were selected for a different research project having nothing to do with hate crime legislation or social problems advocacy, but it quickly became clear that the data were organized in such a way as to answer a question which had not been asked of the data: how does one advocate the expansion of legislation to protect an additional category of victims? Although this question had been addressed in the hate crimes literature, and could be addressed in a theoretical fashion, the approach taken here was to allow the data to generate the question as well as the answer; the hate crimes literature is discussed at times to add additional intellectual context to the data analysis, and at times as data itself, but not as the primary framework or standard for the analysis. The analytic method and goal is therefore to work with instances of speech or text, and “to tear them apart in such a way as to find rules, techniques, procedures, methods, maxims... that can be used to generate the orderly features we find” in the data. These rules “will handle those singular features, and also, necessarily, handle lots of other events” (Sacks, 1984: 411, quoted in ten Have, 1999: 135). These rules, methods, etcetera, can therefore be characterized as formal and context-transcendent.

Not only are the cultural methods analyzed here context-transcendent, but in an important sense the discourse addressed here is also context-transcendent, and this has a bearing on the selection of data and how the data is reported below. The specific context of writing testimony or offering testimony before a particular committee at a particular time was not addressed, because the interest here is rather broader. Texts and textual analysis are legitimate objects and methods for analysis in their own right, even without reference to their initial production and reception. Texts are massively relevant for understanding many social and especially institutional phenomena, and they are by their nature more context-transcendent than talk-in-interaction. The early work of both Harold Garfinkel and Sacks includes considerations of texts as well as speech and social interaction. Several subsequent works have argued for or illustrated the ability of ethnomethodology and conversation analysis to contribute to the social sciences through the analysis of textual data (see e.g. Smith, 1990; Green, 1983; McHoul, 1982; Silverman, 1998). Eglin and Hester analyze the Montreal Massacre, to be discussed below, almost exclusively through textual analysis of news reportage and news commentary (see esp. 2003: 8), and with great success.

In light of the importance of texts such as prepared testimony, and given the specific topic addressed here, argument concerning the inclusion of women in hate-crime legislation, the most relevant context is not any particular setting, but is a legal/political debate which spans many places and times, and is carried out largely by textual argumentation and testimony. Moreover, this debate necessarily overlaps with American civil rights discourse and American discrimination law, in which many experts and authors on hate crimes are also participants. It is the mutual participation in this context-transcendent debate which allows us to understand the remarkable similarities across the many arguments for including women and gender in hate crime legislation, offered by different people, before different committees or appearing in different media, over a period spanning more than two decades now. Ethnomethodologists and conversation analysts can take it upon themselves to test to what extent their methods and insights will explicate the structures of such context-transcendent discourses, as Nekvapil and Leudar have started to do with respect to “dialogical networks” in media coverage of immigration issues (see, e.g., 2002).

Even though the analysis to be offered here is less tied to the local and sequential production of particular turns-at-talk than much work found in membership categorization analysis, ethnomethodology and conversation analysis, the traditional concern with the sequential and contextual nature of talk is not ignored, but informs

the analysis of data at a different level. Therefore the data chosen for analysis is not so much entire transcripts understood with reference to the local context of production, but contributions constituting moves in a policy discourse transcending all local contexts in which it may be engaged. One can understand, for example, arguments for including gender among protected categories in hate crime legislation much better if one considers that arguments for including gender open up an opportunity space (c.f. Coulter, 1990), or make conditionally relevant, counterarguments for excluding gender. Such counterarguments, and even the possibility of counter-argument, can inform the design of an argument, whether the counterarguments follow immediately in context, or whether they follow somewhere else at some other time, or even if they don't follow. Advocates of including gender are often quite aware of a number of counterarguments, and their arguments for including gender can often be understood as designed to pre-empt predictable counterarguments, as will be illustrated below. In terms of explicating the logic of the policy discourse, these discursive moves can be identified and analyzed without reference to much of what else is said and done in particular contexts, and without reference to much of what goes on between relevant speeches or publications, or even between relevant passages within particular dialogue or texts. Data are therefore selected for their relevance to discourse on a particular issue, and analyzed in terms of what they contribute to the relevant dialogue and how.

As the analysis below suggests, the ambition is to identify elements of logic relevant to understanding hate crimes discourse, without raising or needing to raise questions such as the statistical frequency or correlates of particular arguments (see, for example, Benson and Hughes, 1991: 131; Psathas, 1995: 3). The selected data are treated not as typical of what most advocates say and how they say it, but as exemplary of some of the methods and logic which can inform such advocacy (compare ten Have, 1999: 43). Data are used not primarily as materials for inductive analysis, but to identify, illustrate and explicate the practical logic of speech and interaction in different domains of practice and discourse. This methodological orientation is informed by Wittgensteinian as well as ethnomethodological and conversation-analytic sensibilities, and draws particularly on previous work by scholars including Coulter (e.g. 1991; 1990; 1983) and Jayyusi (e.g. 1984) (see also ten Have, 1999: 40).

Despite the emphasis below on one particular piece of testimony, the discussion will go beyond what could be called a single case or extended case analysis, at times referring to other talk and texts on hate crimes which suggest that the design and logic of several key elements in this testimony are observable elsewhere as well. These other instances are in a sense selected for their topical relevance to issues raised in the analysis of the testimony, perhaps constituting a variety of theoretical sampling (c.f. ten Have, 1999: 40, 132-33). Once it is appreciated how multiple examples illustrate similar methods and logics, despite differences in wording and context, readers should be able to find many additional examples, not only in hate crimes discourse, but in many discourses featuring advocacy for expanding rights or protections to include previously unprotected categories of persons.

Analysis of Arguments for Extending Hate Crime Legislation

Defining Hate Crimes by Means of Formal Principles

One of the central questions which Professor Lawrence addresses in his testimony simply involves defining hate crimes, or bias crimes. He repeatedly emphasizes that bias or prejudice is the essential element in a bias crime: "A bias crime is a crime committed as an act of prejudice," and "Bias crimes are distinguished from "parallel crimes" (similar crimes lacking bias motivation) by the bias motivation of the perpetrator" (Lawrence, 1999a). This may seem to go without saying, but two observations can be noted. First, Lawrence need not have offered any sort of definition at all. Second, note that bias crimes are not defined ostensibly, by giving specific, uncontroversial examples of bias crimes, or by listing the specific biases or the specific groups currently recognized in bias-crime law. Ostensive definition by example or by enumeration of protected categories would seem to preclude the expansion of the protected categories, because no general rule for generating or justifying additional categories would be available. Instead, bias crimes are defined in generic terms, leaving it open what variety of bias is involved, and thus formulating hate-crimes as an open-ended category, capable of expansion consistent with formal features identified in a definition. It is rather easy to multiply examples from different speakers/authors, and different contexts. Wolfe and Copeland (1994), for example, in their characterization of violence against women as bias-motivated hate crime, define hate crimes by different terms, but in a similarly formal fashion, as:

[...] acts of terrorism directed not only at the individual victims but at their entire community. It is violence directed toward groups of people who generally are not valued by the majority of society, who suffer discrimination in other areas... (p. 201)

Another feature of bias crimes is simply that the paradigmatic or stereo-typical victim is a member of a group which is conventionally understood as liable to victimization. Lawrence (1999a) argues:

The chief factor in bias crimes is that the victim is attacked because he/[she] possesses the group characteristic. From this chief factor, two things follow: (i) victims are interchangeable, so long as they share the same characteristic; and (ii) victims generally have little or no pre-existing relationship with the perpetrator that might give rise to some motive for the crime other than bias toward the group.

Both (i) the interchangeability of victims, and (ii) the anonymity of the offender-victim-relationship, suggest that the victim is victimized for impersonal reasons such as incumbency in a membership category. The interchangeability of victims illustrates this by suggesting that all other characteristics of the victim are contingent as far as the motive for the crime is concerned. The anonymity of the relation between offender and victim illustrates this by reminding us that in hate crimes, generally speaking, many more conventional motives for crimes are lacking, especially the more conventional motives for expressive crimes of violence, because perpetrators of bias crimes typically do not have the social relationships with their victims which would more likely lead to personal animosity or violent reactions in the course of ongoing social interaction.

As with the discussion of the bias motive above, the emphasis on the interchangeability of victims and the anonymity of the offender-victim relationship both suggest formal or generic principles for defining bias crimes, independent of the social identity of the offender and independent of bias against particular groups and independent of the victimization of certain groups. These formal or generic principles

allow for subsequent extension of hate crime legislation to cover crimes of this general nature against members of categories or groups which have not previously been recognized and protected. Such extension is referred to in the hate crime literature as the “domain expansion” of the hate crime construct (Jenness and Grattet, 2001; Phillips and Grattet, 2000). But it is a special type of expansion, which can be formulated as a “clarification” of the ideal scope of the original rule (Jenness and Grattet, 2001), rather than a political attempt to alter the rule, as is suggested by Jacobs’ and Potter’s emphasis on the role of identity politics in hate crime legislation (1998).

Expanding the Number of Protected Categories by Means of Analogical Reasoning

Jenness and Grattet note that initially, federal hate crime measures protected groups based on race, ethnicity, and religion, and that these protections provided a foundation for later expansion (2001), especially to sexual orientation and gender categories (c.f. Sunstein 1993), and also disability. Jenness distinguishes between “core groups,” namely Blacks, Jews and immigrants, and groups which inspired a “second wave” of civil rights activism, especially the gay/lesbian movement, women’s movement, and disability movement (Jenness, 2002/2003: 84).

Jenness and Grattet also note that social movement representatives “rendered the meaning of sexual orientation, as a protected status, similar to the meanings already attached to race, religion, and ethnicity” (Jenness and Grattet, 2001: 160). Such testimony accomplishes an “equivalence” between different targeted groups and between motives for targeting different groups (c.f. McPhail, 2002: 128). This equivalence is further accomplished in arguments that many different minorities are liable to be targeted by the same type of hate criminal (cf. Jenness and Grattet, 2001), often understood as young working or lower class white Christian males experiencing economic or status insecurity.

The formulation of hate crimes by means of an open-ended class of motives therefore allows subsequent elaboration of hate crime legislation to protect additional groups. This possibility for domain expansion provides the foothold for one variety of argument, in particular, namely advocacy by *analogical reasoning*. An analogical method of advocacy is understood here as one of the topics of analysis, as one of the members’ methods of practical action and practical reasoning observable in hate crimes discourse, rather than as a resource or method for carrying out the analysis. Analogical reasoning has received some attention in legal theory, but to date very little attention in sociology. The legal theorist Cass Sunstein offers a very topical treatment of the variety of analogical reasoning which we can note as being involved in the elaboration of the hate crime category. Sunstein (1993) suggests:

[...] we can get a sense of the characteristic form of analogical thought in law. The process appears to work in four simple steps: (1) Some fact pattern A has a certain characteristic X, or characteristics X, Y, and Z; (2) Fact pattern B differs from A in some respects, but shares characteristics X or characteristics X, Y, and Z; (3) The law treats A in a certain way; (4) Because B shares certain characteristics with A, the law should treat B the same way.” (p. 745)

Edward Levi in a classic treatise on legal reasoning argues that “[a] working legal system must therefore be willing to pick out key similarities and to reason from them to the justice of applying a common classification. The existence of some facts in common brings into play the general rule” (1949: 3). This process of determining similarity and difference is done in the course of arguing the applicability and scope

of a rule. Attempts to expand the scope of an existing rule frequently identify similarities between cases clearly covered and cases at the margins or “penumbra” (Hart) of the category in question.

It might be especially clear, given Sunstein’s and Levi’s formal treatments of the logic of analogical reasoning (c.f. Brewer, 1996; MacCormick, 1978), that analogical reasoning in the service of political-legal argumentation can be analyzed as one of many “formal structures of practical action” (Garfinkel and Sacks, 1990).

Lawrence suggests a variety of similarities between crimes motivated by gender hatred and more widely recognized hate crimes motivated by racial, ethnic, or religious hatred. References to hate crimes against African Americans and Jews are interwoven throughout his testimony, providing an implicit but recurring and essential point of comparison. Some of the similarities are suggested when Lawrence argues, “Gender and sexual orientation ought to be included in a federal bias crime law... The violence involved in each case arises from a social context of animus... Sex is generally an immutable characteristic, and no one seriously argues that women are not victimized as a result of their gender” (Lawrence, 1999a). Some of these criteria, such as the social context of animus and the fact that women share an immutable characteristic, are mentioned only briefly. But also included among the similarities are the three criteria of hate crimes mentioned by Lawrence in his general descriptions; the criteria of the bias motive, the interchangeability of victims (c.f. Jacobs and Potter 1998), and the anonymity of the offender-victim relationship. Such parallelism across categories of victims allows Lawrence to argue, for example, that “Gender-motivated violence and crimes targeting victims on the basis of sexual orientation are as much bias crimes as racially- and ethnically-motivated crimes” (Lawrence, 1999a). More generally, we can also speak of the category “women” as a protected category in American discrimination law and civil rights discourse (c.f. Jenness and Grattet 2001), and as a category which has received protection in many states’ hate crime legislation (see e.g. Pendo 1994; Shaw, 2001; Jenness, 2002/2003).

If we were interested in mapping Lawrence’s arguments onto the formal model of analogical reasoning supplied by Sunstein, we would simply replace the formal place-holders in Sunstein’s model with the substantive concerns of Lawrence’s testimony, resulting in something like the following: (1) Bias crimes against, for example, racial minorities are characterized by the offender’s bias against a group represented by the victim(s), by the interchangeability of victims, and by the anonymity of the offender-victim relationship. (2) Some crimes against women are also characterized by the offender’s bias against a group represented by the victim(s), by the interchangeability of victims, and by the anonymity of the offender-victim relationship. (3) Legislation recognizes and protects victims of race-motivated bias crimes. (4) Because some crimes against women share essential characteristics with race-motivated bias crimes, legislation should also recognize such crimes against women. The point here is not to remove or remedy the substantive and informal properties of legal and political argument by means of formalization, but to suggest the presence of a formal logic at work in substantive, contextually-embedded discourse.

Given the similarities between crimes motivated by gender discrimination or bias, and paradigmatic hate crimes targeting race, ethnicity, and religion, and also given the inclusion of gender in much discrimination law and indeed in many hate crime statutes at the state level and weaker hate crime legislation at the federal level, the refusal to include gender in broader federal legislation can be formulated as a failure of the legal system to recognize hate crimes against women. This is true even though technically it is only the legislature which has the authority to criminalize such offenses, and thus constitute them as hate crimes in any official sense.

In this vein, Jacobs and Potter suggest that groups not protected by hate crime legislation face a “selective depreciation of their victimization” (Jacobs and Potter, 1998: 8; cf. p. 133). Jenness objects that gender is “a second class citizen in larger legal efforts to respond to bias-motivated violence” (Jenness, 2002/2003: 86). Pendo employs a number of relevant arguments; she suggests that resistance to the inclusion of gender reflects the institutionalized nature of gender inequality (Pendo, 1994: 158). She also argues that the lack of coverage for certain groups constitutes a “gap” in the law (Pendo, *ibidem*: 163). These objections are illustrated very well in Pendo’s criticism of the Hate Crimes Statistics Act (HCSA); she writes, “Under the HCSA... if a man is beaten or killed *because* he is black, that counts as a hate crime; but if a woman is beaten, raped or killed *because* she is a woman, that doesn’t count as a hate crime (Pendo, *ibidem*: 163). Wolfe and Copeland argue that “acts of violence based on gender – like acts of violence based on race, ethnicity, national origin, religion, and sexual identity – are not random, isolated crimes against persons who happen to be female” (Pendo, *ibidem*: 200). The logic of the arguments is clear – women can be victimized by hate crimes just as incumbents of racial, ethnic and religious categories are victimized, so the law should include women in hate crime legislation. As Wolfe and Copeland suggest, these crimes “are not necessarily identical but – as bias-motivated hate crimes – they share certain essential characteristics in common” (Pendo, *ibidem*: 206).

Illustrative Case: The Montreal Massacre

No one should doubt the potential importance in social problems discourse of illustrative cases, used to exemplify the clearest cases, the worst cases, and also the cases chosen by advocates for expanding the domain of the social problem. The dragging death of James Byrd in Texas 1998 reminded the United States as a nation of the ugliness of hate crimes against African Americans and fueled the nascent interest in hate crime legislation. The murder of Mathew Shepard in Wyoming because of his sexual orientation was widely invoked by advocates for including sexual orientation in hate crime legislation as a protected category; indeed, the Shepard murder has been a “poster case” for lobbyists (see, for example, Dunn, 2000). Before Byrd and Shepard, forming the first of a trio of contemporary “poster cases,” there was the Montreal Massacre, targeting women. It is this case which Professor Lawrence (1999a) invokes in his testimony.

Gender-motivated violence... should be included in bias crime statutes. This is not to say that all crimes where the perpetrator is a man and the victim is a woman are bias crimes. But where the violence is motivated by gender, this is a classic bias crime... The case of Marc Lepine makes the point powerfully. Lepine was a 25-year old unemployed Canadian man who killed fourteen women with a semi-automatic hunting rifle at the engineering school of the University of Montreal on December 7, 1989... The killings were clearly gender-motivated. Lepine killed six women in a crowded classroom after separating the men and sending them out into the corridor. Before shooting, he told the women students ‘you’re all a bunch of feminists.’ He left behind a three page statement in which he blamed feminists for spoiling his life. He listed the names of fifteen publicly-known women as the apparent objects of his anger. Lepine’s crime plainly fits the model of classic bias crimes: his victims were shot solely because they were women and, from his point of view, could well have been a different group of individuals, so long as they were women...

This excerpt is of interest for a variety of reasons, as it employs a number of membership categorization practices in the course of developing the argument-by-example. The general purpose of the speaker's argument is to provide an illustration of gender-motivated violence that supports the contention that bias crime law should encompass such violence. It is therefore fair to expect that the example might be selected and designed so as to display the formal, generic properties of a *bias* crime economically and persuasively. How can this example be elucidated as selected and designed¹ for achieving this purpose?

First, the speaker chooses for his example a case in which the perpetrator has control over a group, the membership of which is over-inclusive with respect to his selection criterion. That is to say, the perpetrator has control over a number of potential victims, and *overtly* specifies which people could go and which people had to stay. This case therefore avoids all kinds of questions as to whether all or some of the victims were chosen randomly. In this case there is every reason to believe that the perpetrator was acting on some sort of selection criterion, and that this criterion was absent in all those he let go and present in all those he retained.

Second, those who are let go are characterized by the category "men," and those who are kept are described by the membership category "women." Notice that both categories fall within the membership category device "sex" (or "gender"), providing us with the characterization of "gender-motivated" crime. Gender is accomplished through the description of the murders as the relevant, operative criterion in the selection of the victims. It is important that we do not hear the use of gender categories as merely correct predicates of the persons involved, but as *relevantly correct* predicates; that is, we hear the speaker to be saying that the perpetrator sent the men out *because they were men*, and kept the women *because they were women*, providing for an understanding of the offender's *motive* as one of gender bias.

Third, the speaker identifies the offender as male: "Lepine was a 25-year old unemployed *man*..." (emphasis added), and employs the male pronouns "he" and "his." The relevance of the offender's identity as male is also implied in a number of ways; the speaker's description of the victims by means of the alternate gender category "women," the description of the victims by the offender as "feminists" (an ideological/political category which is tied to "women" as a gender category), the description of the action by the speaker as "gender-motivated," all of this indirectly provides for the relevance of the offender's incumbency in the category "male," and provides for the accountability (observability, reportability) of the crime as a crime of gender bias.

Fourth, note that the speaker does not provide the listener with any reason to believe that the perpetrator and the victims had any prior acquaintance (e.g. he does not describe any as the perpetrator's ex-girlfriend, former teacher, step-sister, etc.) and note also that in this case, the number of victims is fairly large (six women from the discussed classroom, fourteen women total). Both features of the case are designed such as to undercut alternative characterizations of the crime, in that both the (implied) anonymity and the large number of female victims and the absence of any mention of male victims speak against the possibility that the victims were random (chosen without any selection criterion whatsoever), or chosen by means of a selection criterion other than that of gender. The fact that the perpetrator is described as having listed only women, and many women, as the "apparent objects of his anger" in his note further establishes that it was the victims' incumbencies in the category "women" that was the basis for their selection as victims.

In this illustration, then, the motive is presented as one of bias, the victims are presented as interchangeable, and the victim-offender relationship is presented as anonymous, in the sense suggested by the prior formal criteria of hate crimes, which Lawrence refers to collectively as comprising a “model” of hate crimes, in a clear indication of the formal logic at work.

The Montreal Massacre committed by Lepine has actually been used with some regularity in arguments to expand hate crime coverage to include women or gender, and it is instructive that this illustration is designed in much the same way by different speakers or authors, for different audiences. The “facts” of the case clearly allow for such illustrations, but it is the illustrations which select and speak for the “facts,” and display their relevance to political and legal discourse. Eglin and Hester, who have used membership categorization analysis to great effect in a study of the Montreal Massacre, note, for example, that “the emergent phenomena constituting the Montreal Massacre, notably the “problem of violence against women,” were dependent on the categories and category predicates used by parties to the event to describe who was involved, what they were doing, and why they were doing it” (Eglin, Hester, 2003: 4). Given the problem of multiple correct descriptions of persons, one can ask, as Eglin and Hester do, “Who then is he killing?” (Eglin, Hester, *ibidem*: 54). Reporters, commentators and scholars answer this question partly by referring to how Lepine himself answered this question for them, preemptively, by testifying to his motive in writing, and also in front of witnesses who were spared in his massacre.

Pendo, writing in the *Harvard Women’s Law Journal*, offers a very similar formulation of the incident, referencing the gender of the perpetrator, the fact that the perpetrator separated the women out from the men, the fact that he cursed them as feminists, the number of women killed, and the note blaming women for the problems in his life (Pendo, 1994). McPhail, writing in the journal of *Trauma, Violence and Abuse*, introduces the details of this killing by quoting previous authors, who also mention the gender of the perpetrator, the purposeful separation of women from men, the perpetrator’s denunciation of the victims as feminists, the number of women killed, and the note scapegoating women for his problems.ⁱⁱ McPhail then observes, “This horrific crime is almost unanimously agreed to be a hate crime and opened the door for viewing other violence against women as gender-bias hate crime” (McPhail, 2002: 135). Wolfe and Copeland (1994) discuss the Montreal Massacre as one of two events motivating their analysis of violence against women as a bias-motivated hate crime, and their description similarly includes Lepine’s gender (through mention of his first name), the gender of his victims, and Lepine’s denunciation of the victims as feminists (1994). These examples, like those from Congressional testimony, constitute data revealing how an action or situation can be formulated as an instance of a social problem such as a hate crime. Although many of the participants in hate crime discourse are scholars who can and do offer their own insightful analysis, in this context they figure primarily as members rather than analysts, using cultural methods of practical reasoning and practical action to contribute to social problems discourse and advocate for particular policies, more than explicating the methods and logic used to do so.

It may seem curious that Lawrence seems to be concerned to emphasize that not all crimes against women would be covered under the proposed expansion of hate-crime legislation, and therefore seems to be concerned to limit as well as expand the protection offered. Specifically, he says “Bias crimes should include only gender-motivated violence... not all crimes that happen to have female victims” (Lawrence 1999a). This is in addition to the beginning of the excerpt above, stating “This is not to say that all crimes where the perpetrator is a man and the victim is a woman are bias crimes” (Lawrence, *ibidem*). This may seem to show the speaker

working at cross-purposes, but viewed another way this concern to delimit the social problem and delimit the expansion of rights may be seen as part of the design of the argument for a limited expansion of legislation, in that it pre-empts a potentially powerful objection known as the “floodgate argument.”

Opening the Dam without Creating a Flood

The floodgate argument, as a generic policy objection, suggests that no addition or exception should be made to existing law or policy, because the same principle which justifies one addition or exception could be used as a precedent to press for further additions or exceptions, until the system is flooded by types and numbers of claims it has no intention or ability to consider. The floodgate argument can be difficult to counter, because it allows objectors to seem sensitive to the concerns of the immediate group(s) seeking expanded coverage, but to prevent any innovation by invoking principles of realism and responsibility within existing institutional arrangements, inevitably marked by limited resources (personnel, infrastructure, funding, etc.). Jenness and Grattet, in their discussion of the resistance to the inclusion of gender in federal hate crime legislation, begin their discussion by noting this concern: “Some suggested that the inclusion of gender in hate crime legislation would open the door to demands for provisions based on age, disability, position in a labor dispute, party affiliation, and membership in the armed forces” (Jenness, Grattet, 2001: 66). The sheer number of women victimized by crime has also been raised as an objection to including gender among protected categories (Jenness, Grattet, *ibidem*). McPhail notes that this type of floodgate argument was voiced within minority social movements (2002), not just by social conservatives.

Professor Lawrence in his testimony, by specifically mentioning that the inclusion of women would not include all women victimized by crimes, but only women victimized by crimes driven by gender-hatred, is proposing a delimitation which goes a good way towards undercutting the relevance of the floodgate argument, as a possible and expectable sequential response to his arguments. The analytic observation here does *not* concern what the speaker was knowingly and purposefully doing in his testimony (was that the aim, the interview format would have been used). Rather, and regardless of whether the speaker was *intending* to preempt floodgate arguments or not, the argument offered *does* pre-empt floodgate arguments as a feature of its design, and the potential relevance and potential consequentiality of such pre-emption is provided for by a minimal contextual understanding of the speaker’s testimony as involving advocacy for the inclusion of categories towards which there has been significant skepticism or resistance. In addition, it is a category-tied responsibility of members of the Committee on the Judiciary to evaluate congressional testimony as to the feasibility of legislation proposed or supported in expert testimony, and it is a category-bound interest of an expert providing such testimony that powerful, predictable objections be pre-empted. This is especially true given considerations such as the expert’s inability to guarantee himself a chance to answer objections *after* delivering testimony, and the fact that any elaborations or defenses offered subsequent to the delivery of prepared testimony would not be seen by subsequent parties looking only at prepared testimony.

Taking a broader view, it is relevant to consider that Lawrence himself, as well as many others in favor of including women or gender in federal hate crime legislation, do at times demonstrate knowledge of the objections they face. In Lawrence’s book

Punishing Hate (1999b), which prefigures much of his congressional testimony, he writes:

First, the arguments against including gender in bias crimes share a common proposition: that bias crimes should include only gender-motivated violence and not all crimes that happen to have female victims... some crimes against women are bias crimes and some are not. A prime example of the subset that are bias crimes is random violence clearly motivated by hatred of women, such as the Lepine shootings in Montreal. None of the arguments against including gender as a protected category applies to this sort of crime. (p. 17)

It would seem, then, that Lawrence knows his limited focus on gender-*motivated* violence will avoid or answer what he presents as the first, common argument against the inclusion of gender. The use of the Montreal Massacre as an illustration of a gender-motivated hate crime seems *also* to have been selected in light of pragmatic considerations such as anticipating and pre-empting objections to including women.

Many contributors to the political discourse on hate crimes can be heard or read to address this issue, even using specific phrases such as “opening the floodgate” or “opening the door” (see for example Wolfe and Copeland, 1994: 205). Laurence Tribe, a constitutional law expert, can be heard as pre-empting the floodgate argument in his congressional testimony in 1992, arguing “Nothing in the U.S. Constitution prevents the Government from penalizing with added severity those crimes directed against people or their property because of their race, color, religion, national origin, ethnicity, gender or sexual orientation, and *nothing in the Constitution requires that this list be infinitely expanded* [emphasis added].”ⁱⁱⁱ Similarly, the attorney Millicent Shaw devotes the final section of her article in the *Domestic Violence Report* to noting the overlap between proposed gender-bias crimes and existing crimes, observing that such an overlap means that prosecutors would not need to pursue many crimes against women as hate crimes in order to convict, even if the crimes qualify under expanded hate crime legislation (Shaw, 2001). She concludes her article on the note that “the majority of rape, domestic violence, and stalking cases will not fall within the parameters of a hate crime statute,” but noting also that “having the statute available for certain gender-bias cases will aide prosecutors in making appropriate charging decisions” (Shaw, *ibidem*: 80). Her closing argument, then, can be read/heard as undercutting the floodgate argument, and suggesting that instead of creating a flood, the inclusion of gender in hate crime statutes would be an institutional resource for prosecutors that they could draw upon selectively, rather than an institutional burden. Again, these illustrations are not invoked as corroborative *analysis*, but as *data* displaying a particular type of discursive “move,” in this case defensive or pre-emptive, in the advocacy of expanding the domain of a social problem.

The necessity to preempt floodgate arguments was recently illustrated well by the Supreme Court of Georgia, which unanimously struck down state hate crime legislation as unconstitutionally vague, arguing that the statute “leaves open... the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against” (*Botts v. The State / Pisciotta v. The State*, 2004, p. 6, quoting *United States v. L. Cohen Grocery Co.*^{iv}). Consistent with the discussion of formal definitions above, Georgia’s hate crime statute covered crimes motivated by bias or prejudice, without specifying which particular groups would be protected. With respect to the categories covered by the law, it was indeed vague, and in such a manner as made the legislation potentially

very *inclusive*. Congressional records, media coverage, and the hate crimes literature all suggest widespread disagreement about who should and should not be covered by hate crime statutes, consistent with the concerns of the court. If the Georgia Supreme Court has struck upon a seminal judicial response to the question of the scope of hate crime statutes, then there may be no alternative for legislative bodies but to delimit the scopes of their hate crime statutes by specifically mentioning all protected categories. And it is precisely the question of *which* categories should be included in legislation, and why or why not, which is the practical question addressed in the discourse discussed above. The analytic question addressed has concerned, not *why* certain groups should be included or excluded from the scope of hate crime legislation, but *how* the arguments are often structured.

Conclusion

What seems to be involved in the advocacy analyzed above is a variety of analogical reasoning, involving argumentation on the basis of similarities and differences between different groups and different crimes. The similarities between recognized hate crimes and some crimes against women are used to justify the expansion of hate crime legislation to include women, but the victimization of women by hate crimes is also suggested to be different from many other types of victimization, including many crimes against women which would not fall under the scope of expanded hate crime legislation. Advocacy for expanded rights can therefore be seen to involve a “rule of relevance” (c.f. Schauer, 1993: 184), or “analogy warranting rules” (Sherwin, 1999: 1195), according to which limited expansion is portrayed as the moral evolution of existing law (c.f. Sunstein 1993), but which also precludes a flood of new cases, and preserves the symbolic meaning of granting legal recognition only to special categories of victims.

To summarize, the following pragmatic features are illustrated in this case, as formal, logical features of the design of an argument to expand legislation to include additional membership categories, or to maintain the inclusive properties of pending legislation.

(1) The foundation or spirit of the current law is characterized by formal, generic principles or rules, rather than delimiting a specific scope by enumerating the groups covered by hate crime statutes. This *generic* characterization of the law subsequently facilitates a second feature of the design evident in this testimony.

(2) Unprotected categories can be compared to protected categories, and categories whose inclusion is controversial can be portrayed as similar in relevant respects to more paradigmatic, less controversial or uncontroversial categories. By means of analogical reasoning, a parallelism or equivalence is achieved between recognized, paradigmatic categories and unrecognized or controversial categories, which make different coverage, seem arbitrary or insensitive. Inclusion of controversial groups or expanding coverage can then be advocated as required or appropriate in order to respect and preserve the *coherence* of the domain of law in question (cf. MacCormack 1978). Parallelism can also be established between the motives involved in currently covered offenses and the motives involved in the offenses which would be covered under proposed extension of the law, and parallelism can be established between the offenders stereotypically associated with covered crimes and the offenders stereotypically associated with the violations or crimes which would be covered under the proposed expansion of the law. The

proposed expansion then makes sequentially relevant assurances that the proposed expansion can be limited and workable.

(3) The testimony analyzed here also illustrates a pre-emption of floodgate arguments. A distinction is made between those complaints which would be covered under an expanded law and other complaints which would not be covered under the expanded law. Whether intentionally or not, this implies an evidentiary burden which many victims can't meet, in this case distinguishing within the large set of female victims of crime a special subset of females victimized by hate-crimes (against women), the latter of which will be afforded a new variety of protection or redress not available to the rest.

These three elements are discussed here as constituting an *analogical* method of advocacy because the first and third elements here function *in combination with* analogical reasoning, although each of the three elements can also function independently. The first element, a formal definition, *sets up* an analogy by allowing the extension of an existing rule to new cases and categories which share some arguably essential feature(s). *After* one has suggested expanding an existing rule, for example by means of analogical reasoning, it then becomes relevant to pre-empt counter-arguments such as floodgate arguments, by means which can include suggesting limits on further advocacy by analogy. Of the three elements, analogical reasoning is not only the locus of the advocacy, but also links the other two elements together sequentially and logically.

Not only the one instance of testimony analyzed here, but many arguments in favor of expanding hate crime legislation to include women or gender, have such features as observable elements in their pragmatic design, as do arguments in other policy domains. Indeed, it even seems promising to understand the *restriction* of rights by means of an *inverse* formal logic, one similarly emphasizing generic principles (such as national security), drawing analogies between groups with more rights to groups with less (such as likening Japanese Americans to resident Japanese aliens, to Japanese in Japan; likening Muslim Americans to resident Muslim aliens, to Muslims abroad), and reassuring that restrictions won't extend so far as to inconvenience the general public.

The rhetorical emphasis observed above on the *similarities* of hate-crimes across types of victim would be difficult to capture by conventional social-scientific approaches to minority groups. Conventional social science and especially social theory on inequalities and group relations has largely been shaped by the identity politics which Jacobs and Potter, among many others, criticize in their study of hate crimes. There is often an emphasis on the uniqueness of each minority group and the uniqueness of the historical and social relations between particular minority groups and their respective, alternate dominant or majority groups. Membership categorization analysis is different in that it does not see empirical research as a means of identity politics, and is concerned not only with analyzing case-specific or group-specific details, but also with explicating formal structures of practical action and context-transcendent methods of practical reasoning which can be illustrated *through* the discussion of particular groups and specific issues. It is these formal properties of membership category devices and practices, along with a variety of other ethno methods of practical action and practical reasoning, which provide for the cultural and legal intelligibility of including women in a category device of protected categories including African Americans, Hispanics, Jews, Muslims, immigrants and refugees, homosexuals, amputees, and the blind. The domain expansion of a social problem to include a new category of victims can therefore be illuminated by analyzing arguments not only on their merits, but also on their methods, including methods of membership categorization and analogical reasoning.

Endnotes

- i In conversation analysis, the “design” of an utterance is not necessarily purposefully or strategically chosen; utterance design often evidences *tacit* socio-linguistic competence.
- ii J. Caputi and D.E.H. Russell. 1992. “Femicide: Sexist Terrorism against Women.” In J. Radford and D.E.H. Russell (ed.), *Femicide: The Politics of Women Killing*, pp. 13-21. New York: Twayne, p. 13, quoted in McPhail (2002: 135).
- iii Quoted by Jenness and Grattet (2001: 43), from “Hate Crimes Sentencing Enhancement Act of 1992” Washington: U.S. Government Printing Office, 1992, p. 7.
- iv 255 U.S. 81, 89 (41 SC 298, 65 LE2d 516) (1921).

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