

HATE CRIMES AND THE NEED FOR STRONGER FEDERAL LEGISLATION

*Hate crimes . . . leave deep scars not only on the victims, but on our larger community. They weaken the sense that we are one people with common values and a common future. They tear us apart when we should be moving closer together. They are acts of violence against America itself.*¹

I. INTRODUCTION

In response to what most experts agree was an increase in hate crimes during the 1980s and early 1990s,² hate crime legislation became the hot topic of debate and resulted in most states passing some form of legislation to attack hate crimes.³ Tragic, intolerable stories such as those of Jim Byrd Jr.,⁴ Matthew Shepard,⁵ and Marc Lepine⁶ helped nationalize the hate crime issue and strengthen the

¹ William J. Clinton, *Radio Address on Hate Crime* (radio broadcast, June 7, 1997), quoted in Kristine Olson, *The Government and the Community: A Coordinated Response to Hate Crime in America*, 45 OCT. FED. LAW 47, 47 (1998).

² *Hate Crimes Prevention Act of 1999: Testimony on H.R. 1082 before the House Comm. on the Judiciary*, 106th Cong. (1999) [hereinafter *House Testimony on H.R. 1082*] (statement of Frederick M. Lawrence, Professor of Law, Boston University), also available in 1999 WL 20011041, at 7-8. See also David Todd Smith, *Enhanced Punishment Under the Texas Hate Crimes Act: Politics, Panacea, or Pathway to Hell?*, 26 ST. MARY'S L.J. 259, 265 (1994) (noting that data has shown that throughout the country the incidence of hate crimes has increased significantly).

³ Terry A. Maroney, *The Struggle Against Hate Crime: Movement at a Crossroads*, 73 N.Y.U. L. REV. 564, 567 (1998) (stating that commissions were appointed to study the problem by state and local government; bias policies and procedures were developed by police departments and prosecutors; and that hate crime laws were debated and passed by both the state and federal governments). See also *infra* notes 76-89 and accompanying text (detailing current state legislation).

⁴ See Lee Hancock & Bruce Tomaso, *3 Held in Dragging Death of Black Man*, DALLAS MORNING NEWS, June 10, 1998, at 1A, also available in 1998 WL 13079861. James Byrd, Jr., a black man, was picked up in Jasper, Texas, by three white men in a pickup truck. *Id.* They drove Byrd to a rural dirt road and severely beat him after one announced that he wanted to scare "this nigger." *Id.* After the beating, Byrd was chained by the ankles to the rear bumper and then dragged. *Id.* Police discovered Byrd's torso on a road, and then traced a trail of blood upon the road for a mile where the head and arm of Byrd were found in a ditch. *Id.* See also Sue Ann Pressley, *3 White Men Held in Death of Black Man; Victim Chained to Pickup Truck – Then Dragged*, SUN-SENTINEL, June 10, 1998, at 1A, also available in 1998 WL 12815428 (detailing the death of James Byrd, Jr.).

⁵ See E.N. Smith, *Gay Student in Wyoming Attacked, Left to Die*, COLUMBIAN, Oct. 9, 1998, at A3, also available in 1998 WL 17200531. Matthew Shepard, a 22-year-old openly gay student, was lured from a campus bar by two men who told Shepard that they were gay. *Id.* The three drove off in a truck, and then the two men started beating

push for legislation.

Congress has also attempted to attack the problem by passing legislation during the 1990s.⁷ However, deficiencies currently exist in federal legislation. The main federal hate crimes statute, 18 U.S.C. § 245 (Section 245), was enacted as part of the Civil Rights Act of 1968 in an attempt to deal with racial violence against civil rights workers,⁸ and has been referred to as “outdated.”⁹ It prohibits the use of force, or threat of force, to injure, intimidate, or interfere with (or attempt to injure, intimidate, or interfere with) a person because of that person’s race, color, religion, or national origin, and because of that person’s participation in any one of six enumerated federally protected activities.¹⁰ The statute is

Shepard, continuing to do so after tying him to a fence outside Laramie, Wyoming. *Id.* Shepard was found the next day still tied to the fence, bloody and unconscious, his skull having been smashed with a blunt object. *Id.* During the attack, the two men made anti-gay statements. *Id.* See also Coleman Cornelius et al., *3 Arrested in Attack on Gay Man – Victim Left on Wyoming Fence to Die*, DENVER POST, Oct 9, 1998, at A01, also available in 1998 WL 18527125 (detailing the death of Matthew Shepard).

⁶ See JACK LEVIN & JACK MCDEVITT, *HATE CRIMES: THE RISING TIDE OF BIGOTRY AND BLOODSHED* 90 (1993). In 1989, Lepine entered the University of Montreal with a semiautomatic rifle and a hundred rounds of bullets. *Id.* After walking into a classroom, Lepine ordered the women to move to one side of the room and the men to leave, shouting “I want the women . . . I hate feminists.” *Id.* In all, Lepine killed fourteen women, and eventually committed suicide. *Id.* at 91. A suicide note was found on his body that stated “[f]eminists have always ruined my life.” *Id.*

⁷ During the 1990s, Congress passed the following legislation: Hate Crimes Statistics Act of 1990, 28 U.S.C. § 534 (1994), see *infra* notes 105-112 and accompanying text; Hate Crimes Sentencing Enhancement Act, enacted as part of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, § 280003 (1993) (codified in part at 28 U.S.C. § 994 (1994)), see *infra* notes 113-17 and accompanying text; Violence Against Women Act, 42 U.S.C. § 13981 (1994) (later held unconstitutional). See also 18 U.S.C. § 247 (Supp. 1999) (making it a federal offense to damage religious property or obstruct the free exercise of religious beliefs).

⁸ See Jeannine Bell, *Policing Hatred: Police Bias Units and the Construction of Hate Crime*, 2 MICH. J. RACE & L. 421, 428 (1997).

⁹ Andrew M. Gilbert & Eric D. Marchand, *Splitting the Atom or Splitting Hairs – The Hate Crimes Prevention Act of 1999*, 30 ST. MARY’S L.J. 931, 937 (1999).

¹⁰ See 18 U.S.C. § 245 (1994). Generally, the six federally protected activities are: (1) enrolling or attending public school; (2) participating in a service or facility provided by a state; (3) employment by any private or state employer; (4) service as a juror; (5) traveling in or using a facility of interstate commerce; and (6) enjoying the services of certain public establishments. *Id.* See also *infra* notes 118-24 and accompanying text (discussing statute and requirements for a prosecution under the statute).

deficient on two grounds: (1) no federal jurisdiction exists unless the victim engaged in one of the enumerated federally protected activities,¹¹ and a nexus exists between the crime and the federally protected activity;¹² and (2) there is no federal protection for hate crimes committed because of bias based on gender, sexual orientation, or disability.¹³

These deficiencies have limited federal investigation and prosecution of brutal hate crimes, and have even led to acquittals in several cases.¹⁴ In 1999, Congress attempted to pass the Hate Crimes Prevention Act of 1999 (HCPA),¹⁵ but failed to do so.¹⁶ The HCPA would have helped to correct the deficiencies. Supporters of the bill, however, have vowed to resume their efforts for federal legislation.¹⁷

¹¹ See *Hate Crimes Prevention Act of 1999: Testimony on S. 622 Before the Senate Comm. on the Judiciary*, 106th Cong. (1999) [hereinafter *Senate Testimony on S. 622*] (statement of Eric H. Holder, Jr., Deputy Att’y Gen.), available in 1999 WL 16947487, at 15. (stating that the federally protected activity requirement has limited federal officials in the investigation and prosecution of hate crimes); Section 245 (limiting federal jurisdiction to cases where the victim was engaged in one of the enumerated activities). See also *infra* notes 118-24, 128-32 and accompanying text (discussing the statute and federally protected activity requirement).

¹² See Gilbert & Marchand, *supra* note 9, at 937-38 (discussing the nexus requirement between the crime and the federally protected activity); Section 245 (requiring that the individual injure, intimidate, or interfere with (or attempt to injure, intimidate, or interfere with) another person because of the person’s race, color, religion, or national origin and because the person was engaging in a federally protected activity). See also *infra* notes 118-24; 128-32 and accompanying text (discussing the statute and the nexus requirement between the crime and the federally protected activity).

¹³ Gilbert & Marchand, *supra* note 9, at 937; Section 245 (providing protection only to victims of hate crimes based on race, color, national origin, or religion).

¹⁴ See *Senate Testimony on S. 622*, *supra* note 11 (statement of Eric H. Holder, Jr.). See also *infra* notes 128-32 and accompanying text (discussing deficiencies of the statute).

¹⁵ See Hate Crimes Prevention Act of 1999, H.R. 1082, 106th Cong. (1999); Hate Crimes Prevention Act of 1999, S. 622, 106th Cong. (1999).

¹⁶ See *What Happened to the Hate-Crimes Bill?*, 31 NAT’L J. 3616, 3616 (1990) (stating that the hate crimes provisions were removed from an appropriations bill).

¹⁷ *Id.*

This Comment focuses on the HCPA, concluding that such legislation is necessary to help combat the onslaught of hate crimes in America. Part II focuses on the problem of hate crimes, including the incidence of hate crimes,¹⁸ the characteristics of hate crimes,¹⁹ and the effects of hate crimes on the individual and the community.²⁰ Part III examines state legislation concerning hate crimes, including the rise of hate crimes legislation,²¹ and treatment by the Supreme Court.²² In Parts IV and V, this Comment examines current federal legislation²³ and the recently proposed HCPA.²⁴ Part VI looks at the proposed extension of federal legislation to crimes motivated by bias against gender, disability, and sexual orientation.²⁵

II. THE PROBLEM OF HATE CRIMES

A. *Hate Crimes Defined*

Crimes of hate transcend their immediate victims and cast a shadow of fear and terror throughout entire communities . . . [w]e are not talking about the obvious physical damage inflicted during a hate motivated attack. We are referring to the fear, the terror, that one experiences when faced with a passionate rejection because of what one is. An absolute stranger looks at you and hates you.²⁶

¹⁸ See *infra* notes 30-37 and accompanying text.

¹⁹ See *infra* notes 38-52 and accompanying text.

²⁰ See *infra* notes 53-75 and accompanying text.

²¹ See *infra* notes 76-89 and accompanying text.

²² See *infra* notes 90-102 and accompanying text.

²³ See *infra* notes 103-24 and accompanying text.

²⁴ See *infra* notes 125-39 and accompanying text.

²⁵ See *infra* notes 140-82 and accompanying text.

²⁶ 139 CONG. REC. H6792-01 (1993), *quoted in* Staff of the Syracuse Journal of Legislation and Policy, *Crimes Motivated by Hatred: The Constitutionality and Impact of Hate Crime Legislation in the United States*, 1 SYRACUSE

Hate crimes, referred to by some as “bias crimes,”²⁷ are generally defined as crimes that are “committed not out of animosity toward the victim as an individual, but out of hostility toward the group to which the victim belongs.”²⁸ Looking at a more specific definition, a hate crime is defined as “a crime in which the defendant intentionally selects a victim, or in the case of a property crime, the property that is the object of the crime, because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person.”²⁹

B. Incidence of Hate Crimes

According to the most recent statistics reported by the FBI, there were 7,755 hate crimes committed in 1998,³⁰ with racial hate crimes being the most prevalent.³¹ Although this number is down

J. LEGIS. & POL’Y 29, 29 (1995).

²⁷ See FREDERICK M. LAWRENCE, PUNISHING HATE 9 (1999). Lawrence maintains that there is a misconception by the use of the term “hate crime” in that not every crime that is motivated out of hatred for the victim is a bias crime. *Id.* Lawrence uses the term “bias crime” rather than “hate crime” to emphasize that the key factor in a bias crime is not necessarily hatred towards the victim, but rather bias or prejudice toward that victim. *Id.* For purposes of this Comment, these terms are used interchangeably.

²⁸ Elizabeth A. Pendo, *Recognizing Violence Against Women: Gender and the Hate Crimes Statistics Act*, 17 HARV. WOMEN’S L.J. 157, 159 (1994). See also Lori A. Spillane, *Hate Crimes: Violent Intolerance*, 29-AUG PROSC 20, 20 (1995) (“Hate crimes are directed against members of a specific group merely because of their membership in that group. The basis for the attack may be the victim’s age, race, gender, sexual persuasion, religion, or ethnicity.”).

²⁹ Violent Crime Control And Law Enforcement Act of 1994, Pub. L. 103-322, 108 Stat. 1796, § 280003 (1994) (codified in part at 28 U.S.C. § 994 (1994)).

³⁰ *Most Hate Crimes Racial, FBI Reports*, JET, Dec. 6, 1999, at 12, also available in 1999 WL 9748230. Note that FBI statistics are conducted pursuant to the Hate Crimes Statistics Act, 28 U.S.C. § 534 (1994). See *infra* notes 105-12 and accompanying text (discussing the Hate Crimes Statistics Act).

³¹ *Most Hate Crimes Racial, supra* note 30, at 12 (stating that roughly 57 percent of the hate crimes reported in 1998 were motivated by racial bias, roughly 18 percent of the crimes were motivated by religious bias, roughly 16 percent were motivated by sexual orientation bias, approximately nine percent were motivated by ethnic or national origin bias, and less than one percent were motivated by disability bias).

from the 8,049 reported in 1997, there were nearly 500 fewer agencies reporting in 1998.³² Looking at the statistics reported by the FBI throughout the 1990s, it appears that the number of hate crimes increased early, but has decreased in recent years.³³

Although many commentators argue over whether the hate crime problem has or has not worsened, the statistics remain inconsistent and incomplete. According to commentators, the statistics remain inconsistent and incomplete, and thus, may support both conclusions that the hate crime problem has or has not worsened.³⁴ One major problem is that the number of hate crimes reported by the FBI is simply an accumulation of numbers reported by state and local law enforcement agencies, the participation of which is voluntary.³⁵ Additionally, a large number of hate crime victims simply do not

³² Elena Grigera, *Hate Crimes: State and Federal Responses to Bias-Motivated Violence*, CORRECTIONS TODAY, Aug. 1, 1999, at 68, also available in 1999 WL 4218878; *Most Hate Crimes Racial*, supra note 30, at 12.

³³ Number of reported hate crime incidents collected by the FBI under the Hate Crimes Statistics Act of 1990 for years 1991 to 1998:

1991 B 4,558
1992 B 7,442
1993 B 7,684
1994 B 7,498
1995 B 7,947
1996 B 8,759
1997 B 8,049
1998 B 7,755

House Testimony H.R. 1082, supra note 2 (statement of Frederick M. Lawrence) (citing Federal Bureau of Investigation, United States Department of Justice, Uniform Crime Reports, Hate Crimes Statistics 1991-1997); *Most Hate Crimes Racial*, supra note 30, at 12.

³⁴ See, e.g., LAWRENCE, supra note 27, at 20. Lawrence notes that the statistics that have been gathered to this point reflect not only an increase in the number of hate crimes, but also a growth in the response to the problem. *Id.* Arguably, there is a relationship between the problem, the perception of the problem, and the response to the problem. *Id.* at 23. A perceived increase in hate crimes leads to increased concern, which leads to increased response and increased reporting, thus a perception results that the hate crime problem is worsening. *Id.*

³⁵ *Id.* This requires faithful participation by all law enforcement jurisdictions in not only identifying hate crimes but also reporting them to the FBI, which has not yet occurred. See Greg Barrett, *When Does Hate Count? You Can Make a Federal Case Out of the Statistics*, GANNETT NEWS SERV., July 14, 1999, also available in 1999 WL 6971530 (discussing problems with reporting system and noting that of the 11,211 agencies reporting to the FBI in 1997, 85 percent recorded no hate crimes); Mark Fritz, *Hate Crimes Hard to Track as Some Areas Report None*, L.A. TIMES,

report the incident to police.³⁶ Overall, one can conclude that the hate crime problem is much more serious than even the statistics report as a result of drastic underreporting by both law enforcement agencies and victims themselves.³⁷

C. Characteristics of Hate Crimes

The typical perpetrator of a hate crime is a young male between the ages of 14 and 24.³⁸

Unlike other violent crimes that are usually committed by one person, most hate crimes are committed by multiple offenders³⁹ against a complete stranger.⁴⁰ Moreover, victims often have been subjected to

Aug. 23, 1999, at A1 (noting that only six out of every ten agencies report hate crimes to the FBI, and that four out of the five that do report say they do not have any hate crimes. The author was also puzzled by the fact that in 1997 the southern states of Alabama, Arkansas, and Mississippi reported a total of zero hate crimes). *See also* Bell, *supra* note 8, at 421 (discussing the problems inherent in police discretion in classifying hate crimes); Gilbert & Marchand, *supra* note 9, at 946 (identifying one of the problems as being that police officers may not recognize signs of a hate crime and will thus report the crime as an ordinary assault).

³⁶ Steven Bennett Weisburd & Brian Levin, “*On the Basis of Sex*”: *Recognizing Gender-Based Bias Crimes*, 5 STAN. L. & POL’Y REV. 21, 26 (1994) (citing as reasons for failing to report as including shame, fear, distrust, embarrassment, belief that authorities are unsympathetic, and fear of “secondary trauma” from the legal system). *See also* Anthony S. Winer, *Hate Crimes, Homosexuals, and the Constitution*, 29 HARV. C.R.-C.L. L. REV. 387, 413-14 (1994) (citing as one reason why homosexuals are reluctant to report the exposure of their sexual orientation and the resulting stigma and treatment by others that would result); LAWRENCE, *supra* note 27, at 23 (noting that many victims fail to report hate crimes “due to factors such as [the victim’s entrenched] distrust of the police, language barriers, the fear of retaliation by the offender, and the fear of courting exposure,” quoting Joseph Fernandez, *Police Beat: Fear, Intimidation Cloud True Statistics on Hate-Bias Crimes*, NASHVILLE BANNER, Jan. 9, 1996. Lawrence also notes that the number of reported hate crimes are significantly underreported because intimidation is the most frequent hate crime, and some victims do not report these crimes because the victim sees them as too minor to report).

³⁷ *See* LAWRENCE, *supra* note 27, at 23-24

³⁸ Katherine Chen, *Including Gender in Bias Crime Statutes: Feminist and Evolutionary Perspectives*, 3 WM. & MARY J. WOMEN & L. 277, 281 (1997) (citing Jack O’Malley, A PROSECUTOR’S GUIDE TO HATE CRIMES § VIII-12-13 (1994)). One commentator also notes that the typical perpetrator has low self-esteem, is resentful of his or her situation, tends to dislike entire classes of people, and feels threatened by the stereotyped group. *See* LEVIN & MCDEVITT, *supra* note 6, at 60-61.

³⁹ *See* LEVIN & MCDEVITT, *supra* note 6, at 16 (noting that 25 percent of all violent crimes are committed by two or more offenders compared to 64 percent of hate crimes committed by two or more offenders). This may be attributed to a few reasons: (1) there is safety in numbers – “most are basically cowards”; (2) it gives the offender a degree of anonymity; and (3) it gives the offender psychological support for his actions – violence escalates among members of the group as each tries to prove himself. *Id.* at 17-18.

repeated incidents of hate crimes.⁴¹

Hate crime offenders, “frequently motivated by a belief that the victim deserves punishment,”⁴² select their victim “as a means of pouring out their anger against the class as a whole.”⁴³ The offender has a stereotyped view of the victim’s class,⁴⁴ and the hate crime may be a result of such causes as resentment,⁴⁵ current events,⁴⁶ desire to achieve “power and domination” over the other group,⁴⁷ and insecurities of the offender.⁴⁸

⁴⁰ Weisburd & Levin, *supra* note 36, at 25. See also LEVIN & MCDEVITT, *supra* note 6, at 11-13 (describing a Boston study of 452 hate crimes in which 85 percent of the crimes involved offenders who were unknown to the victim). Although most hate crimes are committed in groups, they are not usually committed by organized hate groups such as the Ku Klux Klan as most people may believe. Kristin L. Taylor, *Treating Male Violence Against Women as a Bias Crime*, 76 B.U. L. REV. 575, 581 (1996).

⁴¹ Joan C. Weiss, *Working with Victims of Ethnoviolence*, in GROUP WORK WITH POPULATIONS AT RISK 121 (Geoffrey L. Grief & Paul H. Ephross eds., 1997). See also Taylor, *supra* note 40, at 584 (noting that one study found that two-thirds of victims have experienced repeated attacks).

⁴² Taylor, *supra* note 40, at 578.

⁴³ *Id.* at 579.

⁴⁴ *Id.* at 578.

⁴⁵ David R. Fine, *Beware That False First Step*, 82 KY. L.J. 731, 737-38 (1994). Fine argues that the individual sees himself separated from society and no longer in control of his destiny. *Id.* at 738. This causes resentment in the individual and a loss of self-esteem. See *id.* at 737-38. To rebuild his self-esteem, the individual attacks another “whom he perceives as inferior.” *Id.* at 738. One example is economic resentment, where many workers are being required to accept lower-paying jobs, which causes resentment, and ultimately violence. *Id.*

⁴⁶ *Id.* at 738-39. Fine cites as examples the Persian Gulf War of 1991 and the aftermath of the Rodney King trial. *Id.* at 739. Each resulted in a flurry of hate crimes. Fine, *supra* note 45, at 739. See also LEVIN & MCDEVITT, *supra* note 6, at 56 (noting that in the wake of the Persian Gulf War, Arab-Americans received death threats and harassing phone calls, and were the victims of beatings, bombing attempts, and property damage).

⁴⁷ Chen, *supra* note 38, at 281. Equating power with domination and control, Chen argues that men commit hate crimes against women for the same reason that whites perpetrate hate crimes against minorities – “to achieve and maintain power” over them. *Id.* at 290. See also Taylor, *supra* note 40, at 594-95 (arguing that males use violence to punish women for deviation from gender roles, seeking “to punish the victim in order to further subordinate the victim=s group based on negative views of them”).

⁴⁸ Lisa Gelhaus, *Gay-Bashing Victims Overcome Prejudice to Win Civil Settlements*, 35-FEB TRIAL 14, 17 (1999) (discussing hate crimes based on sexual orientation and noting that “[b]y beating a homosexual or someone they

Hate crimes are typically more violent than regular offenses.⁴⁹ A Boston study found that one of every two hate crimes was an assault, as compared to only seven percent of all crimes being assaults nationally.⁵⁰ Overall, the victim of a hate crime assault is four times more likely to require hospital treatment than the victim of a parallel assault.⁵¹ As one commentator noted, hate crime victims are “not merely beaten, but are also severely tortured . . . [t]he extreme cruelty and severe depravity . . . commonly evidenced by multiple stab wounds, skull fractures, mutilations, and dismemberments.”⁵²

D. Effects of Hate Crimes

Hate crimes may be distinguished from parallel crimes based on their effects on the individual, the target community, and society as a whole.⁵³ The effects on the victim have often been equated with

perceive as a homosexual, they are trying to deal with their sexual insecurity.” (statement of Brian Levin, a hate crime expert at Richard Stockton College)). *See also* Robert J. Kelly et al., *Hate Crimes: Victimized the Stigmatized*, in *BIAS CRIME: AMERICAN LAW ENFORCEMENT AND LEGAL RESPONSES* 36 (Robert J. Kelly ed., 2d ed. 1993) (citing as factors rapid demographic changes for racial and ethnic groups, housing and job market deficiencies, international events, and affirmative action policies).

⁴⁹ *See, e.g.*, LEVIN & MCDEVITT, *supra* note 6, at 11 (discussing a study of 452 hate crimes in the Boston area); Weisburd & Levin, *supra* note 36, at 23 (describing the “heightened violence” that is characteristic of hate crimes). *But see* JAMES B. JACOBS & KIMBERLY POTTER, *HATE CRIMES: CRIMINAL LAW & IDENTITY POLITICS* 82 (1998) (criticizing the Levin & McDevitt study by arguing that in order for the study to support the claim that hate crimes are more brutal, a study must be conducted that compares hate motivated assaults against all assaults).

⁵⁰ LEVIN & MCDEVITT, *supra* note 6, at 11. The study also found that roughly 75 percent of hate crime assaults resulted in at least some personal injury to the victim, and 30 percent of those assault victims required hospital treatment. *Id.* The study compared these figures with national figures of 29 percent of regular assault victims receiving physical injury and only seven percent requiring hospital treatment. *Id.*

⁵¹ *Id.* (noting that 30 percent of hate crime assault victims required hospital treatment as compared to seven percent of non-hate crime assault victims).

⁵² Weisburd & Levin, *supra* note 36, at 23. *See also* Hancock & Tomaso, *supra* note 4 (describing brutal death of James Byrd Jr.); Smith, *supra* note 5 (describing brutal death of Matthew Shepard).

⁵³ *See* Frederick M. Lawrence, *The Punishment of Hate: Toward a Normative Theory of Bias-Motivated Crimes*, 93 MICH. L. REV. 320, 323 (1994) (noting that hate crimes and parallel crimes differ as to the harm inflicted on the victim and mental state of the perpetrator as well as to the harm inflicted on the target community and society – hate crimes inflict harm and parallel crimes generally do not). *See also* 139 CONG. REC. H6792-01 (1993). In distinguishing hate crimes from parallel crimes, Congress noted that:

the effects felt by a rape victim.⁵⁴ In a typical non-hate crime, a victim generally is attacked for a random, impersonal reason.⁵⁵ But in a hate crime, the victim is selected based on a specific, personal reason,⁵⁶ such as the victim's race, gender, or sexual orientation. As a result, the hate crime victim suffers greater emotional and psychological damage.⁵⁷ It is not unusual for a hate crime victim to experience withdrawal, higher levels of depression, anxiety, feelings of helplessness, sleep disorders, loss of confidence, and a sense of isolation.⁵⁸ Additionally, because the victim is attacked based on an immutable characteristic, he or she will have a heightened sense of vulnerability.⁵⁹ Consequently, victims

[A] rock through somebody's window at home as an act of wanton vandalism is troubling enough. It is a crime, it causes costs, it causes irritation, and it causes injury to the owners of that house. But a rock through a window with a note tied to it that says, "we don't want your kind of people living in this neighborhood," changes the whole character of that offense, even though physically speaking it is the same offense. But to indicate that the motivation for such an attack is the result of hate and bigotry creates an additional sense of apprehension upon the victims and additional damage to the entire community.

Id. But see JACOBS & POTTER, *supra* note 49, at 79-91 (reviewing the literature advocating that hate crimes cause greater harms and concluding that "[t]hese assertions depend upon empirical assumptions that seem dubious and have not been substantiated").

⁵⁴ See, e.g., Joan C. Weiss, *Ethnoviolence: Impact Upon and Response of Victims and the Community*, in *BIAS CRIME*, *supra* note 48.

⁵⁵ See LAWRENCE, *supra* note 27, at 40. For example, a person who is simply at a public place when a shooting spree occurs or a person walking down the street who is subsequently mugged for money are both random victims of crime. *Id.* For the most part, the victim is simply in the wrong place at the wrong time.

⁵⁶ *House Testimony on H.R. 1082*, *supra* note 2 (statement of Frederick M. Lawrence). See also Taylor, *supra* note 40, at 583 ("[A]t the core of the bias crime is an unleashing of extreme violence against the individual for immutable qualities that link him to the targeted group.").

⁵⁷ See LAWRENCE, *supra* note 27, at 40. See also Weisburd & Levin, *supra* note 36, at 25-26 ("Because victims have been targeted due to their very identity, they tend to experience more dramatic and damaging self blame. Unlike those who can cope with their victimization by attributing it to behavior, bias crime victims realize that they were victimized due to elements of character related to status."); Taylor, *supra* note 40, at 583 (discussing the impact on the victim of a hate crime, and noting that the psychological harm caused in a hate crime is much greater than the harm suffered by victims of parallel crimes). See generally Lu-in Wang, *The Transforming Power of "Hate": Social Cognition Theory and the Harms of Bias-Related Crime*, 71 S. CAL. L. REV. 47 (1997) (discussing hate crimes and thoroughly comparing the effects of a crime on hate and non-hate crime victims).

⁵⁸ Weiss, *supra* note 54, at 182-83.

⁵⁹ LAWRENCE, *supra* note 27, at 40 (noting that the victim will experience greater vulnerability than the victim of a

may drastically alter their attitudes and lifestyle in order to avoid future attacks.⁶⁰

Hate crimes also have a more harmful effect on the target community⁶¹ than do parallel crimes.⁶²

In this sense, hate crimes are seen as “message crimes,” in effect, sending “a message that members of a certain group[] are not wanted in a particular neighborhood, community, workplace, or college campus.”⁶³ When the victim is attacked because of an immutable characteristic, members of the target

normal crime because the victim of a hate crime cannot reduce the risk of future attacks because the reason the victim was attacked cannot be changed). *See also Hate Crimes Prevention Act of 1998: Testimony on H.R. 3081 Before the House Comm. on the Judiciary*, 105th Cong. (1998) [hereinafter *House Testimony on H.R. 3081*] (testimony of Jack McDevitt, Professor, Northeastern University), available in 1998 WL 465698 (discussing how a typical victim may change their lifestyle to avoid future victimization, but the victim of a hate crime suffers greater vulnerability because they cannot change their immutable characteristic to avoid future victimization); LEVIN & MCDEVITT, *supra* note 6, at 13. In discussing the effects of a hate crime on the victim, Levin and McDevitt note that:

[A] potential victim cannot rationalize his or her future safety . . . [r]ather, for all members of a group under attack, the mere decision to leave home automatically puts them at risk of being victimized. This threat infuses all daily activities, both inside and outside of an individual’s home, and is extremely difficult to eliminate . . . [w]herever they go, they carry the reason for their victimization with them.

Id.

⁶⁰ Weisburd & Levin, *supra* note 36, at 24 (noting that victims typically experience dramatic changes, and citing a study which found that victims changed how they reacted to strangers, answered the phone, how suspicious they were of coworkers, and where they walked (citing NATIONAL INSTITUTE AGAINST PREJUDICE AND VIOLENCE, THE ETHNOVIOLENCE PROJECT PILOT STUDY 7 (1986)). *See also* Weiss, *supra* note 41, at 125 (discussing a study conducted by the National Institute Against Prejudice and Violence, and noting that victims took such actions as “[m]oving, reducing social interactions, taking security measures, and purchasing guns. . . .”); Taylor, *supra* note 40, at 583-84 (noting that the hate crime victim cannot rationalize the hate crime and subsequently alters their conduct in an attempt to deal with the fear of future attacks. Although the victim may change their behavior, the fear stays with the victim because the reason for the attack – the immutable characteristic – cannot be changed).

⁶¹ *See, e.g.*, Weisburd & Levin, *supra* note 36, at 24; LAWRENCE, *supra* note 27, at 41-43. The target community consists of those individuals who share the immutable characteristic with the victim – i.e., race, gender, and sexual orientation. LAWRENCE, *supra* note 27, at 41.

⁶² *See, e.g.*, LAWRENCE, *supra* note 27, at 41-42. In discussing the effects of a hate crime on the target community, Lawrence asserts that:

Members of the target community of a bias crime experience that crime in a manner that has no equivalent in the public response to a parallel crime. The reaction of the target Community not only goes beyond mere sympathy with the immediate bias crime victim, but exceeds empathy as well.

Id. *See also* Wang, *supra* note 57, at 120 (noting that hate crimes have a strong impact on the target group because the target group shares the characteristic that motivated the offender to commit the crime against the individual, and will thus perceive themselves as vulnerable because of the shared characteristic).

⁶³ *House Testimony on H.R. 3081*, *supra* note 59 (testimony of Jack McDevitt).

community who share the characteristic perceive it “as an attack on themselves directly and individually.”⁶⁴ This creates a feeling among target community members that any one of them could be a victim of similar violence.⁶⁵

On a societal level, hate crimes cause distrust and inter-group tension among members of different groups that may result in a “violent cycle of retaliatory violence.”⁶⁶ Hate crimes also have an isolation effect on society.⁶⁷ Not only will the victim and members of the target community isolate themselves to prevent future victimization, but also members of the community will avoid socializing with the victims.⁶⁸

Because hate crimes cause greater harm to the victim, the target community, and society as a whole, it is easy to see why these crimes merit higher punishment than do parallel crimes.⁶⁹ Punishing

⁶⁴ LAWRENCE, *supra* note 27, at 42.

⁶⁵ Lawrence, *supra* note 53, at 367-68 (discussing the similarities between the psychological injury suffered by individual victims and target community members, and concluding that the target community will feel their physical safety threatened). *See also* Wang, *supra* note 57, at 121.

⁶⁶ Weisburd & Levin, *supra* note 36, at 26. *See also* LAWRENCE, *supra* note 27, at 42-43 (noting that the target community may direct their response to the hate crime toward the group with which the offender is identified, which may result in anger towards the offender’s identified group and “intense and long-standing intercommunity tensions”); 139 CONG. REC. H6792-01 (1993) (“Certainly the rioting in the aftermath of the acquittals in the trial of the officers accused of beating Rodney King indicate that there is a socially incendiary or nitroglycerine quality that is generated by crimes that are motivated by bigotry.”); Kelly et al., *supra* note 48, at 26 (noting that hate crimes may “mobilize segments of communities into protest demonstrations and marches that may increase tensions and retaliatory violence . . . [seeking] justice”).

⁶⁷ *See* LAWRENCE, *supra* note 27, at 43.

⁶⁸ *Id.* at 43.

⁶⁹ It is also argued that greater punishment is warranted because of the culpability of the hate crime offender. *Id.* at 60. In noting that the difference between a parallel crime and a hate crime is the reason why the offender committed the crime, Lawrence maintains that culpability is a factor in crime seriousness. *Id.* Just as an intentional murderer should receive a harsher sentence than the negligent killer because of the difference in culpability, the hate crime offender should receive a harsher sentence because of the increased culpability. *Id.*

these heinous incidents as hate crimes has other important implications.⁷⁰ As Lori A. Spillane notes, a major implication is that punishing hate crimes will serve to deter future offenses.⁷¹ In addition, prosecution of hate crimes also helps the victim heal in the aftermath of a hate crime.⁷² Failure to punish offenders of hate crimes actually encourages the commission of more hate crimes,⁷³ sends a message to the communities of the victim that their protection is not of primary importance,⁷⁴ and fails to punish offenders for the actual harm they have caused.⁷⁵

III. STATE LEGISLATION

A. *The Rise of Hate Crime Legislation*

⁷⁰ See Spillane, *supra* note 28, at 25.

⁷¹ *Id.* at 25 (“First, stiffer penalties serve to discourage potential hate crime perpetrators . . . [s]econd, the legislation provides an impetus for law enforcement to be more vigilant in the context of hate crimes.”). See also 139 CONG. REC. H6792-01 (1993) (noting that because hate crimes are premeditated, the Hate Crime Sentencing Enhancement Act would deter offenders from committing hate crimes); Karl M. Hamner, *Gay-Bashing: A Social Identity Analysis of Violence Against Lesbians and Gay Men*, in HATE CRIMES: CONFRONTING VIOLENCE AGAINST LESBIANS AND GAY MEN 187 (Gregory M. Herek & Kevin T. Berrill eds., 1992) (arguing that increasing the punishment for a hate crime will deter the offender because it shows the offender that the crime will be taken seriously and that the offender would be prosecuted. The offender will then see that the potential costs outweigh any benefits of committing the crime).

⁷² *House Testimony on H.R. 3081*, *supra* note 59 (testimony of Jack McDevitt) (noting that prosecution sends a message to the victim that he/she is a valuable member of society and that treatment of the crime by police and prosecutors plays a vital role in the healing process). See also Eric Rothschild, *Recognizing Another Face of Hate Crimes: Rape as a Gender-Bias Crime*, 4 MD. J. CONTEMP. LEGAL ISSUES 231, 283-84 (1993) (stating that one important reason for the sentence enhancement is the creation and affirmation of norms to guide societal behavior. Rothschild also argues that the labeling of the incident as a hate crime “serves to validate the experience of the victim” and recognizes the greater harm imposed on the victim).

⁷³ Marc Lieberman et al., *The Case for Hate Crime Legislation*, 32-MAR-ARIZ. ATT’Y 14, 17 (1996). See also Weisburd & Levin, *supra* note 36, at 24 (arguing that failure to respond to hate crimes through legislation “lends a type of silent, implicit support to bias offenders, leading them to believe that their crimes are tolerable and, at least to a certain degree, socially acceptable”).

⁷⁴ Lieberman et al., *supra* note 73, at 18. See also LAWRENCE, *supra* note 27, at 168 (“If bias crimes are not expressly punished in a criminal justice system . . . a message is expressed by the legislation, a message that racial harmony and equality are not among the highest values held by the community.”).

⁷⁵ Lieberman et al., *supra* note 73, at 17 (arguing that because the perpetrator is only punished for the parallel crime

Prior to 1980, only five states had enacted hate crime laws,⁷⁶ and some states had statutes prohibiting vandalism of religious institutions and interference with religious worship.⁷⁷ According to one commentator, hate crimes historically “have been actively encouraged, passively condoned, or simply ignored by systems of governance, especially the criminal justice system.”⁷⁸ However, hate crime legislation increased after the Anti-Defamation League (ADL) released a model hate crime statute in 1981,⁷⁹ and today almost every state has some form of legislation to address hate crimes.⁸⁰

Even though most states model their statutes after the ADL, there is substantial variation from jurisdiction to jurisdiction.⁸¹ Most states use sentence enhancement statutes, which increase the penalty

and not the hate crime, he escapes punishment for the greater injurious effects a hate crime has on the community).

⁷⁶ Spillane, *supra* note 28, at 21.

⁷⁷ Maroney, *supra* note 3, at 589.

⁷⁸ *Id.* at 565. Maroney cites as examples the lynching of blacks and the inability of police to investigate hate crimes, as well as the police abusing victims. *Id.* at 565-66. If the crime were to make it past the police, prosecutors either refused to charge, undercharged, or promoted leniency. *Id.* at 566-67. Even judges and juries were not immune from failing to give the problem the correct attention. *Id.* at 567. *See also* Kevin T. Berrill, *Anti-Gay Violence and Victimization in the United States: An Overview*, in *HATE CRIMES*, *supra* note 71, at 31-32. (noting that police have tended to view such crimes as pranks or an acceptable form of behavior, and that police have themselves perpetrated hate crimes).

⁷⁹ *See* Maroney, *supra* note 3, at 589.

⁸⁰ *See* Anti-Defamation League, *Hate Crimes* <http://www.adl.org/frames/front_99hatecrime.html>. As of 1999, every state except Wyoming has at least one statute that is targeted towards hate crimes, though only 43 states target bias-motivated violence and intimidation. *See id.* The following states have not enacted bias-motivated or intimidation statutes: Arizona, Hawaii, Indiana, Kansas, New Mexico, South Carolina, and Wyoming. *Id.*

⁸¹ Maroney, *supra* note 3, at 590. *See also* JACOBS & POTTER, *supra* note 49, at 29-44 (discussing both federal and state hate crime statutes); Lawrence, *supra* note 53, at 320. Lawrence discusses a distinction between statutes that is not discussed in this article. Lawrence maintains that most hate crime statutes are based on one of two models, a discriminatory selection model and the group animus model. *Id.* at 326-42. The discriminatory selection model punishes the defendant for the act of selecting the victim based on a statutorily impermissible reason such as race. *Id.* The group animus model punishes the defendant’s animus toward a statutorily protected group if that animus was the central motivation of the crime. *Id.* These different models of hate crimes statutes help result in variations among state statutes. *See id.* For an in-depth discussion of these two models, see Wang, *supra* note 57, at 67-79; LAWRENCE, *supra* note 27, at 29-39.

for a crime when the offender's motivation is a bias prohibited under the statute.⁸² Among states that have enhancement statutes, states differ as to the size of the penalty enhancement,⁸³ the types of biases that are enumerated under the statute,⁸⁴ and the predicate offenses that may qualify as hate crimes.⁸⁵

In contrast to sentence enhancements, some state statutes may define new substantive offenses that “redefine conduct that is already criminal as a new crime or as an aggravated form of an existing crime.”⁸⁶ Other state laws range from mandating collection of statistics, creating civil causes of action

⁸² JACOBS & POTTER, *supra* note 49, at 29. A typical enhancement statute would provide:

45-5-222. Sentence enhancement –

(1) A person who has pleaded guilty or nolo contendere to or who has been found guilty of any offense, except malicious intimidation or harassment, that was committed because of the victim's race, creed, religion, color, national origin, or involvement in civil rights or human rights activities or that involved damage, destruction, or attempted destruction of a building regularly used for religious worship, in addition to the punishment provided for commission of the offense, may be sentenced to a term of imprisonment of not less than 2 years or more than 10 years, except as provided in 46-18-222.

MONT. CODE ANN. § 45-5-222 (West Supp. 1999).

⁸³ See JACOBS & POTTER, *supra* note 49, at 30 (noting that Alabama provides a mandatory minimum sentence of 15 years; in Vermont, the defendant is subject to double the maximum prison term; and in Florida, the maximum possible prison sentence is tripled).

⁸⁴ *Id.* at 30-31. Jacobs and Potter note that while “all hate crime laws are designed to punish criminals motivated by prejudice based on race, color, religion, and national origin, . . . all uniformity ends there.” *Id.* at 30. The authors also note that only some states include sexual orientation and/or gender, while other states include hate crimes against right to life and pro-choice groups, immigrants, Native Americans, the disabled, union members, non-union members, age, family responsibility, personal appearance, political affiliation, marital status, and matriculation. *Id.* at 30-31.

⁸⁵ *Id.* at 31. Note that the predicate offense is the offense that must be committed in order to trigger the hate crime enhancement. Consequently, if a state only lists assault as a predicate offense, an assault motivated by racial bias would be a hate crime, whereas a burglary motivated by racial bias would not be a hate crime. Jacobs and Potter note that many states only cover harassment and intimidation; some states limit hate crimes to certain lower level offenses that vary from state to state (for example, New Jersey covers simple and aggravated assault, harassment, and vandalism, while New York only covers aggravated harassment); and other states allow for any offense to be a hate crime. *Id.*

⁸⁶ *Id.* at 33. Many states have adopted statutes modeled after ADL model statutes, which provide for new substantive offenses of intimidation and institutional vandalism. *Id.* For example, when a crime is committed and is motivated by a bias that is listed in the statute, the individual would be charged with the offense of intimidation, rather than the underlying crime. See *id.* at 33-36. The pertinent section of the current ADL statute provides:

A. A person commits a Bias-Motivated Crime if, by reason of the actual or perceived race, color, religion, national origin, sexual orientation or gender of another individual or group of individuals, he violates

for hate crime victims, criminalizing interference with religious worship and vandalism of religious institutions, to providing and/or mandating training for law enforcement personnel.⁸⁷

While the progress in implementing hate crime statutes on the state level has been commendable, gaps still exist. While almost all statutes criminalize hate crimes motivated by bias based on race, color, religion, and national origin,⁸⁸ many leave out hate crimes motivated by bias based on gender, sexual orientation, and disability.⁸⁹

B. Supreme Court Treatment

The first hate crime case to reach the Supreme Court was *R.A.V. v. City of St. Paul*.⁹⁰ The Court invalidated a city hate crime ordinance that criminalized the placing of a burning cross or swastika on private or public property,⁹¹ even though the statute was limited to expressions constituting “fighting

Section _____ of the Penal code (insert code provisions for criminal trespass, criminal mischief, harassment, menacing, intimidation, assault, battery and or other appropriate statutorily proscribed criminal conduct).
B. A Bias-Motivated Crime under this code provision is a _____ misdemeanor/felony (the degree of criminal liability should be at least one degree more serious than that imposed for commission of the underlying offense).

Anti-Defamation League, *Hate Crimes* <http://www.adl.org/frames/front_99hatecrime.html>. The ADL also has model statutes for institutional vandalism, civil actions for institutional vandalism and bias-motivated crimes, and bias crime reporting and training. *Id.*

⁸⁷ *See id.* *See also* Maroney, *supra* note 3, at 590-91 (discussing different statutes enacted by states).

⁸⁸ JACOBS & POTTER, *supra* note 49, at 30-31.

⁸⁹ *Id.* *See also* Anti-Defamation League, *Hate Crimes* <http://www.adl.org/frames/front_99hatecrime.html> (listing states that have statutes for hate crimes motivated by bias based on gender, sexual orientation, and disability). As of 1999, only 21 states had statutes covering sexual orientation; 19 states had statutes covering gender; and 22 states had statutes covering disability. *Id.*

⁹⁰ *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). The case involved a group of teenagers who assembled a cross out of broken chair legs. *Id.* at 379. The teenagers then burned the makeshift cross on the yard of a black family living across the street from one of the teenagers. *Id.* One of the teenagers was prosecuted under a city hate crime ordinance. *Id.* at 380-81.

⁹¹ The ordinance provided:

Whoever places on public or private property a symbol, object, appellation, characterization or graffiti,

words.”⁹² Although it recognized that restrictions may be placed on speech,⁹³ the Court concluded that the ordinance constituted impermissible content discrimination,⁹⁴ and thus violated the First Amendment.

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The constitutionality of hate crimes came under attack again during 1993 in the case of *Wisconsin v. Mitchell*.⁹⁶ In upholding the constitutionality of a sentence enhancement statute, the Court

including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor. *Id.* at 380 n.1 (citing ST. PAUL, MINN., CODE ' 292.02 (1990)).

⁹² *Id.* at 381 (the Court accepted the construction of the statute given by the Minnesota Supreme Court that the ordinance only reached expressions constituting “fighting words” within the meaning of *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)).

⁹³ *Id.* at 382-85. The Court noted that the First Amendment generally proscribes government prohibition of speech or expressive conduct because of disagreement with the ideas expressed. *Id.* at 382. However, restrictions have been permitted in areas that have been determined are not constitutionally protected because they are of slight social value. *Id.* at 382-83. This includes areas such as obscenity, defamation, and “fighting words.” *Id.* The Constitution is not oblivious to these areas of speech, however. *Id.* at 383. As the Court noted: “not that they are categories of speech entirely invisible to the Constitution . . . [T]he government may proscribe libel; but it may not make the further content discrimination of proscribing only libel critical of the government.” *Id.* at 383-84.

⁹⁴ *R.A.V.*, 505 U.S. at 391. The Court noted that although the statute had been limited to “fighting words,” it stated that the “remaining, unmodified terms [of the statute] make clear that the ordinance applies only to ‘fighting words’ that insult, or provoke violence, ‘on the basis of race, color, creed, religion, or gender.’ [Yard] [d]isplays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics.” *Id.* In other words, the content discrimination was in the fact that “fighting words” that invoked something other than the protected topics of the statute were not criminalized, only prohibited were “fighting words” that expressed “views on disfavored subjects.” *Id.*

⁹⁵ *Id.* at 396. As stated by the Court: “the only interest distinctively served by the content limitation is that of displaying the council’s special hostility towards the particular biases thus singled out. That is precisely what the First Amendment forbids.” *Id.* at 396. The First Amendment provides: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. CONST. amend. I.

⁹⁶ See *Wisconsin v. Mitchell*, 508 U.S. 476 (1993). Todd Mitchell was convicted for aggravated battery and, under a Wisconsin statute, his sentence was enhanced for intentionally selecting his victim because of the victim’s race. *Id.* at 479. Mitchell was with a group of black youths when Mitchell asked the others “Do you all feel hyped up to move on some white people?” *Id.* After seeing a white boy, Mitchell stated, “You all want to fuck somebody up? There goes a white boy; go get him.” *Id.* at 480. The group then proceeded to beat the boy, rendering him unconscious and in a coma for four days. *Id.* Mitchell’s offense ordinarily carried a maximum of two years imprisonment, but

rejected the argument that the statute violated the First Amendment, stating that a “physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment.”⁹⁷ While it noted that a defendant’s abstract beliefs could not be taken into consideration,⁹⁸ the Court stated that sentencing judges may take into account the defendant’s racial animus towards the victim.⁹⁹ In concluding that the statute was constitutional, the Court emphasized that the statute singled out conduct that inflicts greater individual and societal harm.¹⁰⁰ The decision has created considerable debate by commentators, both criticizing¹⁰¹ and praising¹⁰² the decision.

under the enhancement statute, the maximum was increased to seven years, and Mitchell was ultimately sentenced to four years. *Id.*

⁹⁷ *Mitchell*, 508 U.S. at 484.

⁹⁸ *Id.* The Court cited *Dawson v. Delaware*, 503 U.S. 159 (1992). In *Dawson*, the state introduced evidence that the defendant was a member of a white supremacist prison gang. *Dawson*, 503 U.S. at 161-62. The Court in *Dawson* held that admission of the evidence violated the defendant’s First Amendment rights because it proved nothing more than abstract beliefs of the defendant. *Id.* at 166. The *Dawson* Court stated, however, that “the Constitution does not erect a per se barrier to the admission of evidence concerning one’s beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment.” *Id.* at 165.

⁹⁹ *Mitchell*, 508 U.S. at 484. The Court reasoned that sentencing judges have traditionally considered a variety of factors in determining what sentence to impose on a convicted defendant, including motive. *Id.* at 485. The Court cited *Barclay v. Florida*, 463 U.S. 939 (1983), for the proposition that racial animus could be used to impose a sentence enhancement on an offender. *See id.* at 486. In *Barclay*, the Court looked at a judge’s use of aggravating factors in determining what sentence to impose. The *Barclay* Court determined that it was not a Constitutional violation for a sentencing judge to use racial hatred as an aggravating circumstance. *Barclay*, 463 U.S. at 948-51.

¹⁰⁰ *Mitchell*, 508 U.S. at 488 (“The state’s desire to redress these perceived harms provides an adequate explanation for its penalty-enhancement provision over and above mere disagreement with offenders’ beliefs or biases.”). The Court also analogized enhancement statutes to anti-discrimination laws, which also punish an individual’s motive. *Id.* at 487. The Court stated that “motive plays the same role under the Wisconsin statute as it does under federal and state anti-discrimination laws, which we have previously upheld against constitutional challenge.” *Id.*

¹⁰¹ *See, e.g.*, Lynn Adelman & Pamela Moorshead, *Bad Laws Make Hard Cases: Hate Crime Laws and The Supreme Court’s Opinion in Wisconsin v. Mitchell*, 30 GONZ. L. REV. 1 (1994) (concluding that the opinion by the Court neglected and misused precedent. The Court also ultimately failed to realize that *Mitchell* was a hard case, and the opinion does not do justice to the importance and complexity of the issues presented.); James Weinstein, *Hate Crime and Punishment: A Comment on Wisconsin v. Mitchell*, 73 OR. L. REV. 345 (1994) (concluding that although the statute is valid on its face, the Court failed by not giving states more guidance on how to apply hate crime statutes without infringing on the First Amendment); Marc Fleisher, *Down the Passage Which We Should Not Take: The Folly of Hate Crime Legislation*, 2 J.L. & POL’Y 1 (1994) (questioning the ability to prove that a defendant selected a

IV. FEDERAL LEGISLATION

The commendable enactment of hate crime legislation at the state level has not been equaled at the federal level.¹⁰³ In response to what most viewed as an increase in hate crimes during the 1980s and early 1990s,¹⁰⁴ the federal government passed various legislation to first assess, and then attack the problem of hate crimes. The sections that follow provide a brief overview of current federal legislation.

victim because of bias and concluding that the state can more effectively attack hate crimes by vigorous enforcement of criminal statutes); Thomas D. Brooks, *First Amendment – Penalty Enhancement for Hate Crimes: Content Regulation, Questionable State Interests and Non-Traditional Sentencing*, 84 J. CRIM. L. & CRIMINOLOGY 703 (1994) (concluding that the statute punishes speech and expressive conduct in contravention of the First Amendment and also distinguishing the precedent relied on by the Supreme Court in concluding that a defendant’s expression may be used in determining severity of sentence); Lisa M. Stozek, *Wisconsin v. Mitchell: The End of Hate Crimes or Just the End of the First Amendment?*, 14 N. ILL. U. L. REV. 861 (1995) (concluding that hate crime statutes encroach upon the First Amendment by punishing thought, speech, and motive); William J. Burnett, *Wisconsin v. Mitchell: First Amendment Fast-Food Style*, 4 TEMP. POL. & CIV. RTS. L. REV. 379, 401 (1995) (concluding that the Court overlooked the First Amendment, and that the decision will permit legislatures to indiscriminately apply its views to areas such as “crimes motivated by disfavor of political incumbents or color of a victim’s hair”).

¹⁰² See, e.g., Stephen Russell Martin II, *Establishing the Constitutional use of Bias-Inspired Beliefs and Expressions in Penalty Enhancement for Hate Crimes: Wisconsin v. Mitchell*, 27 CREIGHTON L. REV. 503 (1994) (analyzing the *Mitchell* opinion and the issues surrounding hate crimes legislation and concluding that although society has an interest in stopping hate crimes, the statutes must be designed so as not to impinge on First Amendment freedoms); William A. Nicolozakes, *Wisconsin v. Mitchell: Criminal Discrimination Under the First Amendment*, 23 CAP. U. L. REV. 767 (1994) (analyzing criminal discrimination and its importance to hate crime legislation, also examining the state interests involved in suppressing hate crimes and the flaws in the arguments in *Mitchell*); Robert V. Ward, Jr., *Hate Crimes*, 32 GONZ. L. REV. 511 (1997) (concluding that crimes which support such a finding should be labeled as hate crimes because of the impact that they have on the individual, the community, and society); Staff of the Syracuse Journal, *supra* note 26 (analyzing the constitutionality under the First Amendment and Equal Protection Clause); Andrew E. Taslitz, *Condemning the Racist Personality: Why the Critics of Hate Crimes Legislation are Wrong*, 40 B.C. L. REV. 739, 741 (1999) (assessing the arguments against hate crimes by arguing that the criminal law plays an important role in “condemning evil character and accommodating the tensions between individualized and group justice”).

¹⁰³ Maroney, *supra* note 3, at 593 (noting that most of the main federal statutes are criminal civil rights statutes passed during Reconstruction and that these statutes have a limited scope, and are further limited because they may only be brought by the Department of Justice).

¹⁰⁴ *House Testimony on H.R. 1082*, *supra* note 2 (statement of Frederick M. Lawrence). See also Smith, *supra* note 2, at 265 (noting that data has shown that throughout the country the incidence of hate crimes has increased significantly). But see JACOBS & POTTER *supra* note 49, at 45-64 (discussing claims that hate crimes are on the rise, and concluding that “in contemporary American society there is less prejudice-motivated violence against minority groups than in many earlier periods of American history. Clearly, violence motivated by racism, xenophobia, anti-Semitism, and other biases is not new and is not ‘on the rise.’ ”).

A. *Hate Crimes Statistics Act*

The first federal initiative came in 1990, when Congress passed the Hate Crimes Statistics Act (HCSA).¹⁰⁵ The purpose of the HCSA was to “let Congress and law enforcement officials know whether Hate Crimes are in fact on the rise” and help in the innovation of “effective strategies to combat bigotry and racism.”¹⁰⁶ By enacting the HCSA, Congress recognized the “unique emotional and psychological impact on the victim and the community” that are the result of hate crimes.¹⁰⁷

The HCSA mandates federal compilation and reporting of statistics and publication of an annual report concerning hate crimes,¹⁰⁸ requiring the Attorney General to collect data on enumerated crimes¹⁰⁹ that “manifest evidence of prejudice based on race, religion, sexual orientation, or ethnicity.”¹¹⁰ Disability was added to the list in 1994.¹¹¹ Although passage of the HCSA was certainly a step in the

¹⁰⁵ Hate Crimes Statistics Act, 28 U.S.C. § 534 (1994).

¹⁰⁶ 135 CONG. REC. S2378-01 (1989) (statement of Senator Simon). The HCSA should also help Congress assess the effectiveness of current legislation and increase public awareness of hate crimes. *See* Joseph M. Fernandez, *Recent Development, Bringing Hate Crime into Focus – The Hate Crime Statistics Act of 1990*, *Pub. L. No. 101-275*, 26 HARV. C.R.-C.L. L. REV. 261, 263 (1991).

¹⁰⁷ *See* 135 CONG. REC. S2378-01 (1989).

¹⁰⁸ JACOBS & POTTER, *supra* note 49, at 39; § 534.

¹⁰⁹ The Act enumerated the following offenses: destruction, damage, or vandalism of property; murder; forcible rape; non-negligent manslaughter; simple assault; aggravated assault; intimidation; and arson. Hate Crimes Statistics Act, *Pub. L. No. 101-275*, 104 Stat. 140 (1990) (codified in part at 28 U.S.C. § 534 (1994)). The list was later supplemented with burglary, robbery, and motor vehicle theft. JACOBS & POTTER *supra* note 49, at 40.

¹¹⁰ Hate Crimes Statistics Act, *Pub. L. No. 101-275*, 104 Stat. 140 (1990) (codified in part at 28 U.S.C. § 534 (1994)). The Act also instructed the Attorney General to establish guidelines for data collection and to determine the necessary evidence and criteria for a finding of manifest evidence. JACOBS & POTTER, *supra* note 49, at 39. The Attorney General delegated authority to the FBI, which subsequently passed the assignment on to its Uniform Crime Reports Section. *Id.*

¹¹¹ *See* Violent Crime Control and Law Enforcement Act of 1994, *Pub. L. No. 103-322*, 108 Stat. 1796, § 320926 (1994)

right direction, the Act has not been impervious to attacks from critics.¹¹²

B. Hate Crimes Sentencing Enhancement Act

The Hate Crimes Sentencing Enhancement Act (HCSEA) was passed in 1994 as part of the Violent Crime Control and Law Enforcement Act.¹¹³ The HCSEA mandated a revision of the United States Sentencing Guidelines to provide sentencing enhancements of at least three offense levels for offenses that are hate crimes.¹¹⁴ The Act includes as hate crimes those crimes motivated by “the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person.”¹¹⁵ The sentence enhancement, however, only applies to cases tried in federal courts in which

(codified in 28 U.S.C. § 534 (1994)).

¹¹² See Gilbert & Marchand, *supra* note 9, at 955-57. One attack leveled against the HCSA is that it is purely administrative in form. *Id.* at 955-56 (noting that the act concerns collection of data, it plays a limited role in deterrence of hate crimes, and does not create enhancement penalties for hate crimes); JACOBS & POTTER, *supra* note 49, at 39-44. Critics also argue that the HCSA is inadequate because of the problems with reporting requirements under the statute. Gilbert & Marchand, *supra* note 9, at 955-57. See also *supra* notes 34-37 and accompanying text (discussing problems inherent in the data collection system under the HCSA and concluding that as a result hate crimes are underreported). Finally, critics also contend that the HCSA is inadequate because of the ambiguity of the definition of “hate crimes.” See Gilbert & Marchand, *supra* note 9, at 957 (noting that the definition of hate crime differs under the HCSA and Section 245, creating a paradox “whereby the government considers certain attacks to be hate crimes but then restricts federal prosecutors’ authority to prosecute them as such.”); JACOBS & POTTER, *supra* note 49, at 41 (noting that state reporting statutes differ widely from the HCSA in what crimes and biases are to be counted, forcing some states to count twice, “once to see if they qualify as hate crimes, and once to see if they qualify as federal hate crimes”).

¹¹³ Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, § 280003 (1994) (codified in part at 28 U.S.C. § 994 (1994)).

¹¹⁴ See *id.* The Sentencing Commission implemented a three-level increase in 1995. Gilbert & Marchand, *supra* note 9, at 958. See also UNITED STATES SENTENCING GUIDELINES MANUAL § 3A1.1(a) (1998). The pertinent provision states:

(a) If the finder of fact at trial or, in the case of a plea of guilty or nolo contendere, the court at sentencing determines beyond a reasonable doubt that the defendant intentionally selected any victim or any property as the object of the offense of conviction because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person, increase by three levels.

Id.

¹¹⁵ See Violent Crime Control and Law Enforcement Act ' 280003. A hate crime is defined by the Sentencing

there is federal jurisdiction.¹¹⁶ Moreover, although the enhancement applies to cases involving bias based on gender, disability, and sexual orientation, Section 245 does not give federal jurisdiction for these types of cases.¹¹⁷

C. 18 U.S.C. § 245: “Federally Protected Activities”

Originally passed as part of the Civil Rights Act of 1968 in an attempt to deal with racial violence against civil rights workers,¹¹⁸ Section 245 may be considered a precursor to the modern hate crime laws.¹¹⁹ It prohibits the use of force – or the threat of force – to injure, intimidate, or interfere with (or attempt to injure, intimidate, or interfere with) a person because of that person’s race, color, religion, or national origin, and because of that person’s participation in any one of six enumerated federally protected activities.¹²⁰

Commission as “a crime in which the defendant intentionally selects a victim, or in the case of a property crime, the property that is the object of the crime, because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person. . . .” 60 Fed. Reg. 25,082 (1995).

¹¹⁶ Gilbert & Marchand, *supra* note 9, at 958.

¹¹⁷ Compare Violent Crime Control and Law Enforcement Act § 280003, with 18 U.S.C. § 245 (1994). See also Gilbert & Marchand, *supra* note 9, at 958 (noting that although the Sentencing Enhancement Act could enhance punishment for hate crimes based on sexual orientation, gender, and disability, Section 245 does not provide federal prosecutors with jurisdiction to bring charges, thus to use the sentence enhancement provisions, the prosecutor must find jurisdiction in another manner).

¹¹⁸ See Bell, *supra* note 8, at 428 (discussing Section 245 and its enactment).

¹¹⁹ JACOBS & POTTER, *supra* note 49, at 38.

¹²⁰ See 18 U.S.C. § 245 (1994). The relevant portion of the statute provides:

(b) Whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with—

* * *

(2) any person because of his race, color, religion or national origin and because he is or has been—

(A) enrolling in or attending any public school or public college;

(B) participating in or enjoying any benefit, service, privilege, program, facility or activity provided or administered by any State or subdivision thereof;

(C) applying in or enjoying employment, or any perquisite thereof, by any private employer or any agency of

In order to establish a violation, the prosecution must prove that the defendant committed the crime: (1) because of one of the enumerated biases; and (2) because – not simply while – the victim was engaged in one of the enumerated federally protected activities.¹²¹ Because of the obvious problems in establishing these two elements, the statute is rarely used.¹²² From 1992 to 1997, the Department of Justice brought only 33 prosecutions under the statute.¹²³ Moreover, despite the Hate Crimes Sentencing Enhancement Act’s mandate to enhance sentences for crimes motivated by gender, disability, and sexual orientation, Section 245 does not give federal jurisdiction to prosecute these crimes.¹²⁴

any State or subdivision thereof, or joining or using the services or advantages of any labor organization, hiring hall, or employment agency;
(D) serving, or attending upon any court of any State in connection with possible service, as a grand or petit juror;
(E) traveling in or using any facility of interstate commerce, or using any vehicle, terminal, or facility of any common carrier by motor, rail, water, or air;
(F) enjoying the goods, services, facilities, privileges, advantages, or accommodations of any inn, hotel, motel, or other establishment which provides lodging to transient guests, or of any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility which serves the public and which is principally engaged in selling food or beverages for consumption on the premises, or of any gasoline station, or of any motion picture house, theater, concert hall, sports arena, stadium, or any other place of exhibition or entertainment which serves the public, or of any other establishment which serves the public and (i) which is located within the premises of any of the aforesaid establishments or within the premises of which is physically located any of the aforesaid establishments, and (ii) which holds itself out as serving patrons of such establishments. . . .

Id.

¹²¹ *See id.* *See also* Gilbert & Marchand, *supra* note 9, at 953-54.

¹²² *See Hate Crimes Prevention Act of 1998: Testimony on S. 1529 Before the Senate Comm. on the Judiciary*, 105th Cong. (1998) [hereinafter *Senate Testimony on S. 1529*] (statement of Eric H. Holder, Jr., Deputy Att’y Gen.), available in 1998 WL 385267, at 4-5. *See also* LEVIN & MCDEVITT, *supra* note 6, at 182-83 (noting that federal prosecutions are rare because the remedies are “extremely limited,” that people are rarely engaged in a protected activity when they are attacked, and that the statute is limited as to the groups it protects).

¹²³ *Senate Testimony on S. 1529*, *supra* note 122, at 7 (statement of Eric H. Holder, Jr.).

¹²⁴ *Compare* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, § 280003 (1994) with Section 245. *See also* Gilbert & Marchand, *supra* note 9, at 958 (noting that although the Sentencing Enhancement Act could enhance punishment for hate crimes based on sexual orientation, gender, and disability,

V. PROPOSED HATE CRIMES PREVENTION ACT

Congress recently renewed the debate over hate crimes by introducing federal legislation in both the House and the Senate that would amend Section 245.¹²⁵ This legislation would be the most important federal criminal civil rights legislation in 30 years.¹²⁶ When it considered the legislation, Congress found that the incidence of hate crimes “poses a serious national problem” and that “existing Federal law is inadequate to address this problem.”¹²⁷

Section 245 is currently deficient on two grounds: (1) no federal jurisdiction exists unless the victim was engaged in one of the enumerated federally protected activities;¹²⁸ and (2) the fact that there must be some nexus between the crime and this federally protected activity.¹²⁹ This latter requirement has led to acquittals in several federal cases where the state and local prosecutors declined to bring

Section 245 does not provide federal prosecutors with jurisdiction to bring charges. Thus, to use the sentence enhancement provisions, the prosecutor must find jurisdiction in another manner).

¹²⁵ See Hate Crimes Prevention Act of 1999, H.R. 1082, 106th Cong. (1999); Hate Crimes Prevention Act of 1999, S. 622, 106th Cong. (1999). Congress introduced similar versions during the 1998 session. See Hate Crimes Prevention Act of 1998, S. 1529, 105th Cong. (1998); Hate Crimes Prevention Act of 1998, H.R. 3081, 105th Cong. (1998).

¹²⁶ Frederick M. Lawrence, *The Case for a Federal Bias Crime Law*, 16 NAT’L BLACK L.J. 144, 144 (1999).

¹²⁷ See H.R. 1082, 106th Cong. (1999); S. 622, 106th Cong. (1999).

¹²⁸ See *Senate Testimony on S. 622*, *supra* note 11, at 15 (statement of Eric H. Holder, Jr.) (stating that the federally protected activity requirement has limited federal officials in the investigation and prosecution of hate crimes); Gilbert & Marchand, *supra* note 9, at 937-38 (noting that the strict requirements of Section 245 have made prosecution of hate crimes under the Act almost impossible). See also Section 245.

¹²⁹ See Gilbert & Marchand, *supra* note 9, at 937-38 (discussing the nexus requirement under Section 245). See also *House Testimony on H.R. 3081*, *supra* note 59 (statement of Bill Lann Lee, acting Assistant Attorney General, Civil Rights Division), available in 1998 WL 514008, at 8-9 (stating that “[f]ederal jurisdiction exists under 18 U.S.C. § 245 only if a crime motivated by racial, ethnic, or religious hatred has been committed with the intent to interfere with the victim’s participation in one or more of the six federally protected activities.”).

prosecutions, or where the prosecutions were unsuccessful.¹³⁰ The requirement also leads to absurd results. For example, federal jurisdiction over a hate crime that occurs in front of a convenience store may depend on whether the convenience store has a video game inside or not.¹³¹ Second, there is no federal protection for hate crimes committed because of bias based on gender, sexual orientation, or disability.¹³²

The HCPA would amend Section 245 by addressing both of these deficiencies. First, it would remove the “federally protected activities” requirement for hate crimes based on race, color, religion, or national-origin biases.¹³³ Second, the Act would extend federal protection to victims of hate crimes

¹³⁰ *Senate Testimony on S. 1529, supra* note 122 (statement of Eric H. Holder, Jr.). One example that Holder cites: an African-American civil rights leader was shot in 1980 as the leader walked from a car toward his hotel room. *Id.* at 12. The defendant was prosecuted under Section 245, but was found not guilty. *Id.* Jurors later told the press that, although they believed that the defendant committed the shooting because of the victim’s race, they were not persuaded that he did so because of the victim’s use of the motel. *Id.*

Another case involved three white supremacists who were acquitted of assaulting African-Americans. *Id.* at 11. The individuals knocked unconscious a victim who was waiting near a bus stop. *Id.* After the acquittal, the jury stated that the assault was motivated by racial bias, but that the defendants did not have the required intent to deprive the victim of the right to engage in one of the enumerated federally protected activities. *Senate Testimony on S. 1529, supra* note 122 (statement of Eric H. Holder, Jr.).

¹³¹ *House Testimony on H.R. 3081, supra* note 59, at 17-18 (statement of Bill Lann Lee). Lee notes that the presence of a video game in the store would likely qualify the store as a “place of . . . entertainment” within the meaning of Section 245. *Id.* On a similar note, Lee states that if a hate crime occurs on a public sidewalk, there is most likely federal jurisdiction, but if the same event were to happen in a private parking lot across the street, there would be no federal jurisdiction under Section 245. *Id.* The requirements under the Act have, in recent years, forced federal prosecutors to resort to arguing that hate crimes occurred on public streets or sidewalks in order to satisfy the federally-protected-activity requirement. *Id.* at 15-16. As the argument goes, by using sidewalks, the victims were using “facilities” provided by a state or local government. *Id.* See also Section 245 (stating that the federally-protected-activity requirement is fulfilled when the victim is “participating in or enjoying any benefit, service, privilege, program, facility or activity provided or administered by any State or subdivision thereof”).

¹³² Gilbert & Marchand, *supra* note 9, at 937 (noting that Section 245 does not provide coverage for the ever-increasing number of hate crimes motivated by gender, sexual orientation, and disability). See also Section 245 (granting protection only to victims of hate crimes motivated by race, color, religion, and national origin).

¹³³ See 18 U.S.C. § 245 (setting forth the federally-protected-activity requirement). The relevant HCPA statutory section provides:

Whoever, whether or not acting under color of law, willfully causes bodily injury to any person or, through the use of fire, a firearm, or an explosive device, attempts to cause bodily injury to any person, because of

based on the victim’s sexual orientation, gender, or disability.¹³⁴ In hate crime cases involving bias based on the victim’s sexual orientation, gender, or disability, the Bill would criminalize the “intentional infliction of bodily injury whenever the incident involved or affected interstate commerce.”¹³⁵

Besides allowing federal prosecutors to prosecute cases that the state or local prosecutor has decided not to prosecute, the HCPA would also allow the federal government to share its resources, forensic expertise, and civil rights experience with state and local prosecutors.¹³⁶ By working together, federal and state law enforcement officials stand the best chance of bringing hate crime offenders to justice.¹³⁷

the actual or perceived race, color, religion, or national origin of any person.
Hate Crimes Prevention Act of 1999, H.R. 1082, 106th Cong. (1999); Hate Crimes Prevention Act of 1999, S. 622, 106th Cong. (1999). *See also Senate Testimony on S. 622, supra* note 11 (statement of Eric. H. Holder, Jr.); Gilbert & Marchand, *supra* note 9, at 938.

¹³⁴ H.R. 1082. (providing protection to victims of hate crimes based on the “actual or perceived race, color, religion, or national origin . . . gender, sexual orientation, or disability”). The HCPA would also direct the United States Sentencing Commission to study the issue of adult recruitment of juveniles to commit hate crimes, and amend the sentencing guidelines by providing sentence enhancements for recruitment, if appropriate. *Id.* The Act also authorizes grants to “[s]tate and local programs designed to combat hate crimes committed by juveniles, including programs to train local law enforcement officers in investigating, prosecuting, and preventing hate crimes.” *Id.* *See also S. 622.*

¹³⁵ *Senate Testimony on S. 622, supra* note 11, at 16 (statement of Eric H. Holder, Jr.). The relevant statutory provision under the HCPA provides:

(2)(A)Whoever, whether or not acting under color of law, in any circumstances described in subparagraph (B), willfully causes bodily injury to any person or, through the use of fire, a firearm, or an explosive device, attempts to cause bodily injury to any person, because of the actual or perceived religion, gender, sexual orientation, or disability of any person.

(B) For purposes of subparagraph (A), the circumstances described in this subparagraph are that (i) in connection with the offense, the defendant or the victim travels in interstate or foreign commerce, uses a facility or instrumentality of interstate or foreign commerce, or engages in any activity affecting interstate or foreign commerce; or (ii) the offense is in or affects interstate or foreign commerce.

H.R. 1082; S. 622.

¹³⁶ *Senate Testimony on S. 622, supra* note 11, at 9 (statement of Eric H. Holder, Jr.).

¹³⁷ *Id.* at 9-10. Holder analogizes the hate crimes situation to the Church Arson Prevention Act of 1996. The Church Arson Prevention Act allows federal and state officials to work together on arson cases. *Id.* at 11-12. The cooperation under that statute has led to a 34-percent arrest rate for all investigations, as compared to a 16-percent

Moreover, issues of federalism¹³⁸ and concerns as to whether Congress has the power to enact the HCPA¹³⁹ should not present an obstacle to federal legislation in this area. Section 245 is currently deficient because it prevents federal prosecutors from gaining jurisdiction in many cases and from helping local prosecutors in many other cases. In an era when hate crimes are prevalent – and the need for prosecution strong – the power necessary to combat these hate crimes should not be denied. Although the HCPA is not the complete answer, it is a necessary tool in the fight against hate crimes.

arrest rate for all arson cases nationwide. *Id.*

¹³⁸ See *Senate Testimony on S. 1529*, *supra* note 122, at 21 (statement of Eric H. Holder, Jr.) (stating that the Act would not result in a significant increase in federal prosecutions, nor would it drain federal law enforcement resources. The language of the Act and the interpretations of the language by the Department of Justice would limit investigations and prosecutions to crimes implicating “the greatest federal interest”); Gilbert & Marchand, *supra* note 9, at 981-84 (arguing that some federal involvement is necessary and beneficial because some crimes are more appropriately handled by the federal government); H.R. 1082; S. 622 (stating that state and local authorities would continue to prosecute the majority of hate crimes). *But see House Testimony on H.R. 3081*, *supra* note 59 (testimony of Kimberly A. Potter, Center for Research in Crime & Justice). Potter argues that the HCPA would have drastic implications because it would “greatly expand federal jurisdiction.” *Id.* at 3. Because, for some hate crimes, there would no longer be a nexus or federally-protected -activity requirement, “[i]t is only a short step away to federalizing all violent crime. . . .” *Id.* at 4. Potter also maintains that, because of constant political pressure, federal officials would be unable to limit the number of federal prosecutions, and the Act would result in a depletion of resources for other federal crimes. *Id.* at 4-5.

¹³⁹ See H.R. 1082; S. 622 (basing Congressional power on the Commerce Clause and the Thirteenth Amendment); Lawrence, *supra* note 126, at 161-63 (discussing congressional power to enact the HCPA and concluding that both the Thirteenth Amendment and the Commerce Clause provide constitutional support for the Act); *Hate Crimes Prevention Act of 1999: Testimony on S. 622 Before the Senate Comm. on the Judiciary*, 106th Cong. (1999) (testimony of Burt Neuborne, Professor at New York University School of Law). Neuborne argued that the first section of the HCPA (giving federal jurisdiction for hate crimes based on race, color, religion, or national origin) is constitutional pursuant to congressional power under the Commerce Clause because these hate crimes have a substantial effect on interstate commerce. *Id.* As for the second section, which grants federal jurisdiction for hate crimes based on sexual orientation, gender, and disability, Congress has power to enact this section because federal prosecution is limited – it requires proof of a nexus between the crime and interstate commerce. *Id.* *But see Hate Crimes Prevention Act of 1998: Testimony on S. 1529 Before the Senate Comm. on the Judiciary*, 105th Cong. (1998) (testimony of Larry Alexander, Professor of Law at the University of San Diego) (arguing that Congress does not have power either under the Commerce Clause or under the Thirteenth Amendment); *House Testimony on H.R. 3081*, *supra* note 59 (statement of John C. Harrison, Associate Professor of Law at the University of Virginia) (arguing that under the Supreme Court’s decision in *United States v. Lopez*, 514 U.S. 549 (1995), the constitutionality of the HCPA is doubtful because the crimes have a limited effect on interstate commerce. Much like the argument set forth in the *Lopez* case, if Congress could pass the HCPA under the Commerce Clause power, “there is no stopping place if such conduct can be regulated”).

VI. EXTENDING SECTION 245 TO GENDER, SEXUAL ORIENTATION, AND DISABILITY

A. Gender

Under the proposed HCPA, federal protection would be extended to victims of hate crimes based on gender.¹⁴⁰ Since 1990, the trend has been to recognize gender-motivated crimes as hate crimes.¹⁴¹ However, protection is limited, as only 19 states currently have statutes that criminalize hate crimes based on gender.¹⁴² The time has come for Congress to seize the initiative and enact legislation

¹⁴⁰ H.R. 1082; S. 622.

¹⁴¹ See Anti-Defamation League, *Hate Crimes* <http://www.adl.org/frames/front_99hatecrime.html> (noting that, as of 1990, only seven states included gender in their hate crime statutes; however, today there are 19 states that include gender in their hate crime statutes). The ADL also decided to include gender in its model legislation after concluding that “gender-based hate crimes could not be easily distinguished from other forms of hate motivated violence.” *Id.* Congress has also recognized that crimes against women may be hate crimes. In enacting the Hate Crimes Sentencing Enhancement Act of 1994, gender was included as a hate crime that could receive an enhanced sentence under the Act. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, 108 Stat. 1796, § 280003 (1994). Also, in enacting the Violence Against Women Act, Congress stated that:

Whether the attack is motivated by racial bias, ethnic bias, or gender bias, the results are often the same.

The victims of such violence are reduced to symbols of hatred, they are chosen not because of who they are as individuals but because of their class status. The violence not only wounds physically, it degrades and terrorizes, instilling fear and inhibiting the lives of all those similarly situated.

S. REP. NO. 103-138, at 49 (1993).

The Violence Against Women Act was passed in 1994, and it recognized that “crimes motivated by the victim’s gender constitute bias crimes in violation of the victim’s right to be free from discrimination on the basis of gender.” *Id.* at 44. See also W.H. Hallock, *The Violence Against Women Act: Civil Rights for Sexual Assault Victims*, 68 IND. L.J. 577, 589 (1993) (discussing the provisions of the Act, and noting the Act recognizes “that women are the primary victims of sexual violence and that they are targeted for violence because of their sex”). The Violence Against Women Act defined a “crime of violence motivated by gender” as “a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim’s gender.” Violence Against Women Act, 42 U.S.C. § 13981 (1994). The Act allowed the victim of a crime of violence motivated by gender to sue the attacker in federal court and recover compensatory and punitive damages, as well as obtain injunctive and declaratory relief. See *id.* The Act also allowed for limited criminal prosecutions. See 18 U.S.C. §§ 2261, 2262 (1994). Generally, Section 2261 made it a federal offense if the offender crossed a state line and committed domestic violence; Section 2262 made it a federal offense if the offender crossed a state line with the intention to violate a protective order. *Id.* Unfortunately, the United States Supreme Court declared the Violence Against Women Act unconstitutional, thus depriving women of some of the little protection that they did have. See *United States v. Morrison*, 529 U.S. 598 (2000).

¹⁴² See Anti-Defamation League, *Hate Crimes* <http://www.adl.org/frames/front_99hatecrime.html>. The following states have enacted statutes criminalizing hate crimes motivated by gender: Alaska, Arizona, California, Illinois, Iowa, Louisiana, Maine, Michigan, Minnesota, Mississippi, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Rhode Island, Vermont, Washington, and West Virginia. *Id.*

that would give victims of gender-biased crime the protection they need and deserve.

As one commentator has recognized, “women are daily targeted for violent assault merely because of their gender, and are subjected to the same discriminatory patterns of violence which plague other historically subordinated groups.”¹⁴³ Studies reveal that the leading cause of injury to women is male violence,¹⁴⁴ with one woman beaten every 18 seconds, and up to 4,000 dying each year.¹⁴⁵

Moreover, the characteristics of hate crimes based on gender and the effects on the victim are strikingly similar to those of other hate crimes.¹⁴⁶ As one commentator noted, some gender cases “are extremely

¹⁴³ George P. Choudas, *Neither Equal Nor Protected: The Invisible Law of Equal Protection, The Legal Invisibility of its Gender-Based Victims*, 44 EMORY L.J. 1069, 1071 (1995). See also Rothschild, *supra* note 72, at 261 (“[Failing to include gender as a protected category] demeans the historical experience of women as a subjugated group, and confirms acts of discrimination and violence specifically directed at women as being more acceptable and ingrained in our society than the same treatment of other groups.”); S. REP. 103-138, at 41 (1993) (“The legacy of societal acceptance of family violence endures even today . . . a comparable assault by a stranger on the street would lead to a lengthy jail [sentence], a similar assault by a spouse will result neither in arrest nor in prosecution.”).

¹⁴⁴ Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice*, 67 N.Y.U. L. REV. 520, 523 (1992).

¹⁴⁵ *Id.* at 523. Other commentators have noted the disturbing trend of violence against women. See Weisburd & Levin, *supra* note 36, at 29 (citing an FBI estimate that a woman is forcibly raped every five minutes); Taylor, *supra* note 40, at 588 (citing FBI statistics that 2,880 married women are beaten every day); Choudas, *supra* note 143, at 1086 (noting that one-third of the women entering emergency rooms are there because of beatings by their spouses and that battering is the number one cause of injuries to women and citing *Women and Violence: Hearings on Legislation to Reduce the Growing Problem of Violent Crime Against Women Before the Senate Comm. on the Judiciary*, 101st Cong. 84, 93 (1990); S. REP. NO. 103-138, at 38 (stating that, for women between the ages of 15 and 44, violence is the leading cause of injuries – more common than accidents, muggings, and cancer deaths combined. The Senate also noted that more than two thousand women are raped per week, and that three out of four women will be the victims of a violent crime at some point during their life).

¹⁴⁶ See Weisburd & Levin, *supra* note 36, at 34 (noting that much like other hate crime defendants, gender bias offenders “tend to define their victims as legitimate targets of aggression or domination on the basis of group status.” The author also notes that the gender offender is usually a habitual offender, that these crimes instill terror in the target community causing target community members to change their behavior, and that victims experience psychological trauma); Chen, *supra* note 38, at 290-91 (arguing that men commit hate crimes against women for the same reason whites commit hate crimes against minorities – to achieve and maintain power, and power is seen as male dominance and female subordination); Rothschild, *supra* note 72, at 268 (discussing similarities between gender biased crimes and other crimes, and noting that “violence against each woman terrorizes and intimidates the entire class – all women. The threat of violence permeates every aspect of women’s lives. It alters where women live, work, and study, as they try to be safe by staying within certain prescribed bounds.”); Choudas, *supra* note 143, at 1089-90 (arguing that women have been forced to rearrange their lives because of a fear of attack, and noting that this fear

violent, often serial in nature, and usually the random act of a stranger, instilling terror and apprehension in a targeted community.”¹⁴⁷

One argument against inclusion of gender as a hate crime is that the offender does not view the victim as interchangeable with other members of the target group.¹⁴⁸ Because the victim usually knows and has a prior relationship with the offender, critics argue that the crime is individualized, and that the victim is not “interchangeable” with other persons of the same gender.¹⁴⁹ However, this argument fails to take into account that other hate crimes may also occur between acquaintances.¹⁵⁰ No one would doubt that a hate crime has occurred when a white male burns a cross in the yard of his neighbor, a black man next to whom the offender has lived, and whom the offender has known for a considerable length of time.¹⁵¹ Indeed, one study found that approximately 85 percent of hate crimes were

of attack substantially restricts women’s social lives and also restricts employment opportunities).

¹⁴⁷ Weisburd & Levin, *supra* note 36, at 35.

¹⁴⁸ Lawrence, *supra* note 126, at 158 (discussing arguments of critics to including gender as a hate crime). *See also* LEVIN & MCDEVITT, *supra* note 6, at 15-16 (arguing that date or acquaintance rape and domestic violence incidents, “no matter how despicable, would be excluded from consideration as hate offenses”) The authors argue that hate crimes based on gender should only include those instances where the offender is looking for any woman. *Id.* at 15. Where the victim and offender are acquainted, the victim “may have been chosen because of her particular characteristics . . . [h]e might not have chosen just any woman for his sexual offense.” *Id.* at 14. Prior to 1996, the ADL also took this view, stating that:

While a hate crime against a black sends a message to all blacks, that same logic does not follow in many sexual assaults. Victims are not necessarily interchangeable in the same way . . . the relationship between individual perpetrators and victim is the salient fact, whether the defendant is a woman-hater is irrelevant. Pendo, *supra* note 28, at 168 (citing ANTI-DEFAMATION LEAGUE OF B’NAI B’RITH, HATE CRIMES STATUTES: INCLUDING WOMEN AS VICTIMS 12 (1990)).

¹⁴⁹ *See* LEVIN & MCDEVITT, *supra* note 6, at 14-16.

¹⁵⁰ *See, e.g.*, Weisburd & Levin, *supra* note 36, at 37; Pendo, *supra* note 28, at 168.

¹⁵¹ *See* Julie Goldscheid, *Gender-Motivated Violence: Developing a Meaningful Paradigm for Civil Rights Enforcement*, 22 HARV. WOMEN’S L.J. 123, 156-57 (1999). *See also* Chen, *supra* note 38, at 299 (arguing that just like a hate crime offender would attack any black family who moves into the neighborhood or any man that is believed to be a homosexual, a male batterer will assault any woman he is associated with. This is confirmed by the fact that male

committed against strangers, thus indicating that the other 15 percent were committed against victims who knew their attackers.¹⁵² In addition, studies have shown that, much like victims of other hate crimes, victims of rape and domestic violence are interchangeable.¹⁵³

Another argument posited by critics of gender bias crimes is that it would be difficult to prove motive, especially in cases of domestic assault and acquaintance rape.¹⁵⁴ However, this argument overlooks the fact that motive is difficult to prove for any hate crime,¹⁵⁵ and that the same facts that prove motive in other hate crimes may be used for gender-biased crimes.¹⁵⁶ At the same time, it must be recognized that not all crimes committed against women are hate crimes; only those where the

batterers batter women in consecutive relationships.); Taylor, *supra* note 40, at 599-600 (stating that, for one to argue that women are not interchangeable, is to ignore the fact that men who abuse the women in their lives are abusive to women in each of the man's relationships, thus supporting the argument that the man would abuse any woman with whom he was in a relationship).

¹⁵² LEVIN & MCDEVITT, *supra* note 6, at 13.

¹⁵³ Marguerite Angelari, *Hate Crimes Statutes: A Promising Tool for Fighting Violence Against Women*, 2 AM. U. J. GENDER & L. 63, 65-66 (1994). *See also* Goldscheid, *supra* note 151, at 157.

¹⁵⁴ *See, e.g.*, Rothschild, *supra* note 72, at 273 (recognizing the argument that motive is difficult in rape cases because the offender may be motivated by his desire to have sexual intercourse). Other critics argued that:

[P]roblems of proof in criminal cases, which are already enormous, will become impossible. The focus of prosecutions will shift from proving facts to delving into emotions and motivations. We will start requiring juries to determine what motivated the defendant's conduct instead of focusing on the factual issue of whether particular conduct was committed.

139 CONG. REC. H6792-01 (1993). *See also* Angelari, *supra* note 153, at 98-100; Goldscheid, *supra* note 151, at 151-54; Taylor, *supra* note 40, at 594-604. *See generally* Adam Candeub, *Motive Crimes and Other Minds*, 142 U. PA. L. REV. 2071 (1994) (arguing that motive is extremely difficult to ascertain and by necessity involves a court imposing their own personal views to determine what a defendant's motive was).

¹⁵⁵ *See, e.g.*, Angelari, *supra* note 153, at 98-99.

¹⁵⁶ Lawrence, *supra* note 126, at 159 (citing as factors: "a pattern of assaulting women, bias language or epithets accompanying the assault, extreme brutality or sexual violence, mutilation, or an otherwise seemingly motiveless cruelty"). *See also* Chen, *supra* note 38, at 322-23 (citing as factors: lack of provocation, the defendant's previous history of committing hate crimes, severity of the harm inflicted, whether the individuals are of different sexes, whether the occurrence of the offense may be linked to an important day or event for the group, if the incident occurred in a setting where the victim was a minority, awareness of the offender to the victim's membership in a targeted group, and language used before, during, and after an attack).

offender is motivated by a gender bias should be prosecuted as hate crimes.¹⁵⁷

Because many crimes are motivated by gender and possess the same characteristics as other hate crimes, they must be labeled hate crimes. Because gender is a much too frequent motivator for crimes, greater protection and punishment is necessary. Congress must take the initiative, because the states have failed to adequately address the problem.

B. Sexual Orientation

The HCPA would also extend necessary protection to victims of hate crimes based on sexual orientation.¹⁵⁸ Despite gay men and lesbians being among the most targeted victims of hate crimes,¹⁵⁹ only 20 states have enacted legislation criminalizing sexual-orientation hate crimes.¹⁶⁰ A significant number of hate crimes motivated by sexual orientation are committed each year,¹⁶¹ and constituted

¹⁵⁷ See, e.g., *House Testimony on H.R. 3081*, *supra* note 59 (statement of Bill Lann Lee); S. REP. No. 103-138, at 49 (noting that not all crimes against women are gender motivated, and proof would be required on a case-by-case basis that the offender was motivated by gender bias).

¹⁵⁸ See Hate Crimes Prevention Act of 1999, H.R. 1082, 106th Cong. (1999); Hate Crimes Prevention Act of 1999, S. 622, 106th Cong. (1999).

¹⁵⁹ Winer, *supra* note 36, at 402.

¹⁶⁰ See Anti-Defamation League, *Hate Crimes* <http://www.adl.org/frames/front_99hatecrime.html>. The following states have enacted statutes criminalizing hate crimes motivated by sexual orientation: Arizona, California, Connecticut, Delaware, Florida, Illinois, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, Oregon, Rhode Island, Vermont, Washington, and Wisconsin. *Id.*

¹⁶¹ *House Testimony on H.R. 1082*, *supra* note 2 (statement of Frederick M. Lawrence). See also *Most Hate Crimes Racial*, *supra* note 30, at 12 (stating that 1,260 hate crimes motivated by sexual orientation were reported to the FBI in 1998); Grigera, *supra* note 32, at 68 (stating that 1,102 hate crimes motivated by sexual orientation were reported to the FBI in 1997). These numbers do not appear too large, but there is a question as to just how accurate the numbers actually are. Much like other hate crime victims, lesbians and gay men tend to underreport vastly the incidents of hate crimes. *Senate Testimony on S. 622*, *supra* note 11 (statement of Eric H. Holder, Jr.). Lesbians or gay men may not report these incidents because they fear that their sexual orientation will be made public, or that they would be physically abused or receive other mistreatment. *Id.* Indeed, according to a 1997 National Coalition of Anti-Violence Programs survey, 45 percent of gay males and lesbians reporting hate crimes to police “labeled their treatment by police as ‘indifferent to hostile.’” *Id.* See also *supra* note 36 (discussing the failure of hate crime victims to report

roughly 16 percent of all hate crimes reported to the FBI in 1998.¹⁶² Surveys have even indicated that over half of all homosexuals have been victims of hate crimes.¹⁶³ Moreover, lesbians and gay men, in ways similar to women and African-Americans, are perpetual victims of discrimination,¹⁶⁴ including discrimination by police and the courts.¹⁶⁵ Indeed, lesbians and gay men are routinely excluded from hate crime statutes because of “societal antipathy.”¹⁶⁶

As commentators have noted, it is difficult to make a convincing argument that sexual-orientation hate crimes should not be included in hate crime statutes.¹⁶⁷ They contain the same

the incident).

¹⁶² *Most Hate Crimes Racial*, *supra* note 30, at 12 (noting that 1,260 of the 7,755 total hate crimes reported to the FBI in 1998 were based on sexual orientation).

¹⁶³ GARY DAVID COMSTOCK, *VIOLENCE AGAINST LESBIANS AND GAY MEN* 36 (Richard D. Mohr ed., 1991).

¹⁶⁴ Credence Fogo, *Cabining Freedom: A Comparative Study of Lesbian and Gay Rights in the United States and Canada*, 6 *CARDOZO J. INT’L & COMP. L.* 425, 449 (1998) (noting that discrimination has taken such forms as jailing, institutionalization, job loss, and loss of child custody rights). *See also* Lucy H. Halatyn, *Political Asylum and Equal Protection: Hypocrisy of United States Protection of Gay Men and Lesbians*, 22 *SUFFOLK TRANSNAT’L L. REV.* 133, 150 (1998) (“Although the United States now deems the gay and lesbian community eligible for political asylum due to persecution based upon their sexual orientation, these asylees will nonetheless experience persecution upon arrival and continued residence in the United States.”); Berrill, *supra* note 78, at 1. Berrill notes that violence against lesbians and gay men historically represented state policy, and included punishments such as mutilation, castration, and death. *Id.* The violence also took the form of action by private citizens, including those closely associated with the victim, while police ignored the violence. *Id.*

¹⁶⁵ *See* Fernandez, *supra* note 106, at 262 (discussing an incident where two gay men were pulled over by a police officer and one was subsequently beaten while being called anti-gay names); Dan M. Kahan, *The Anatomy of Disgust in Criminal Law*, 96 *MICH. L. REV.* 1621, 1622 (1998) (discussing a case where a man was convicted of killing two gay men and the judge rejected a recommendation of a life sentence. The judge instead imposed a sentence in line with voluntary manslaughter. The judge analogized gay men to prostitutes, and stated that he could not give somebody a life sentence for killing a prostitute.); Berrill, *supra* note 78, at 31-32 (noting that 20 percent of lesbians and gay men reported abuse by police); *Senate Testimony on S. 1529*, *supra* note 122 (statement of Eric H. Holder, Jr.) (noting that a recent survey found that 12 percent of victims stated that the response by police officers was “verbally or physically abusive” after the victims had reported hate crimes motivated by sexual orientation).

¹⁶⁶ Winer, *supra* note 36, at 388. *See also* Halatyn, *supra* note 164, at 156 (noting that many members of Congress and other government officials invalidate the lesbian and gay male community simply because of their sexual orientation).

¹⁶⁷ *House Testimony on H.R. 1082*, *supra* note 2 (statement of Frederick M. Lawrence). Lawrence notes that sexual-orientation hate crimes do not face the same difficulties of victim interchangeability and relationship with the offender

characteristics of other hate crimes that are criminalized under current statutes.¹⁶⁸ For instance, offenders typically seek out their victims, often traveling lengthy distances.¹⁶⁹ Thus, it is not surprising that most incidents occur where lesbians and gay men reside and socialize.¹⁷⁰ Also, as compared to regular crimes, crimes against lesbians and gay men tend to be much more violent.¹⁷¹ One hospital employee stated that “attacks against gay men were the most heinous and brutal I encountered. They frequently involved torture, cutting, mutilation, and beating, and showed the absolute intent to rub out the

that are present in gender hate crimes. *Id.* Lawrence also argues that sexual orientation should be included because one purpose of hate crime statutes is to protect overly victimized groups. *Id.* See also LAWRENCE, *supra* note 27, at 18. Lawrence notes that some of the debate around inclusion of lesbians and gay men is whether homosexuality is an immutable characteristic like race or sex. *Id.* However, this argument fails to notice that there is evidence that sexual orientation is an immutable characteristic. *Id.* Also, even if it were not an immutable characteristic, this has not stopped any legislature from extending protection to religion, which is certainly not an immutable characteristic. *Id.* at 18-19. Another argument frequently cited is based on value grounds. As stated by Representative Woody Burton of Indiana, inclusion of homosexuals would be “opening the door toward . . . teaching that kind of lifestyle to our children,” and could lead to gay marriages being legalized, *quoted in* Mary Dieter, *General Assembly; House Rejects Bid to Deny Gays Protection Under Hate-Crimes Law*, COURIER JOURNAL, Feb. 2, 1994, also available in 1994 WL 5202880. See also David Chang, *Beyond Uncompromising Positions: Hate Crimes Legislation and the Common Ground Between Conservative Republicans and Gay Rights Advocates*, 21 FORDHAM URB. L.J. 1097, 1098 (1994) (noting that one argument against inclusion of sexual orientation as a hate crime category is that many believe it “would be a step down a slippery slope leading to virtually unlimited civil rights for gay men and lesbians”).

¹⁶⁸ See, e.g., Winer, *supra* note 36, at 410-18; *House Testimony on H.R. 1082*, *supra* note 2 (statement of Frederick M. Lawrence); Lu-in Wang, *The Complexities of “Hate,”* 60 OHIO ST. L.J. 799, 867-71 (1999).

¹⁶⁹ Winer, *supra* note 36, at 415-16.

¹⁷⁰ Wang, *supra* note 168, at 870.

¹⁷¹ See, e.g., Berrill, *supra* note 78, at 25; Winer, *supra* note 36, at 410-13 (stating that attacks “tend to be motivated by such extreme hatred that these incidents are unusually bloody or gruesome.” The author notes that although other crimes involve gruesome brutality, hate crimes against lesbian and gay men are characterized by this kind of brutality.); Gilbert & Marchand *supra* note 9, at 965-66 (noting that hate crimes against lesbians and gay men are the most violent hate crime. In one incident, a seaman was attacked and killed after word spread that he was a homosexual. The victim was kicked in the groin, punched in the face, and had his head and chest stomped. The victim was so disfigured that his mother could only identify him by looking at the tattoos on his arm). This violent trend appears to be getting worse, with a 108 percent increase in sexual orientation hate crimes that resulted in hospitalization in 1998. *Clinton Endorses Extending Hate Crime Laws*, MILWAUKEE J. & SENTINEL, April 7, 1999, at 11, also available in 1999 WL 7672974.

human being because of his [sexual] preference.”¹⁷² As with other hate crimes, the psychological effects on the victim may be devastating, as one commentator noted:

When people are attacked because they are perceived to be gay, the consequences . . . create a unique set of challenges for the survivor. Perhaps most important is that the victim’s homosexuality becomes directly linked to the heightened sense of vulnerability that normally follows victimization. One’s homosexual orientation consequently may be experienced as a source of pain and punishment rather than of intimacy, love, and community.¹⁷³

Crimes motivated by sexual orientation possess the same characteristics as do the other hate crimes that are currently protected by federal legislation. The significant number and the extreme brutality often shown in these crimes demand greater protection for lesbians and gay men, and greater punishment for offenders. Much like hate crimes motivated by gender, the states have failed to adequately address the problem, thus federal legislation is necessary.

C. Disability

The HCPA would also extend federal protection to victims of hate crimes motivated by the victim’s disability.¹⁷⁴ Although this issue is not frequently commented on and is rarely mentioned in the

¹⁷² Berrill, *supra* note 78, at 25 (quoting Melissa Mertz, Director of Victim Services at Bellevue Hospital in New York)). See also Gelhaus, *supra* note 48, at 17 (“Attackers try to physically remove the victim’s sexual orientation. ‘It is an aggressive onslaught with your hands to physically beat out what you perceive in this person you don’t like.’” (quoting Carle Locke of the New York City Gay and Lesbian Anti-Violence Project)).

¹⁷³ Linda Garnets et al., *Violence and Victimization of Lesbians and Gay Men: Mental Health Consequences*, in HATE CRIMES, *supra* note 71, at 211-12. See also Julie Brienza, *Hate Crimes Against Gays Hurt Body and Soul*, 34-JAN TRIAL 95, 95 (1998) (discussing a recent study which found that “levels of psychological stress were higher and lasted longer for gay and lesbian hate-crime victims compared with those victimized by other types of crimes.” Symptoms such as stress, depression, and anger may last up to five years for victims of sexual orientation hate crimes, while gay and lesbian victims of other crimes see these symptoms substantially drop within three to five years after the incident).

¹⁷⁴ See Hate Crimes Prevention Act of 1999, H.R. 1082, 106th Cong. (1999); Hate Crimes Prevention Act of 1999, S. 622, 106th Cong. (1999).

mainstream press, hate crimes against the disabled also occur too frequently. Much like gender and sexual orientation, states have failed to adequately protect the disabled.¹⁷⁵ For example, police failed to investigate as a possible hate crime an incident where a paraplegic died after being forced into a trash can upside down.¹⁷⁶ Hate crimes against people with disabilities may take such forms as beatings, torture, rape, and even murder.¹⁷⁷ Such crimes typically take the form of neglect and institutional abuse.¹⁷⁸

Congress has already shown a commitment to protecting the disabled when it enacted the Americans with Disabilities Act,¹⁷⁹ amendments to the Hate Crimes Statistics Act in 1994,¹⁸⁰ and the Fair Housing Act in 1988.¹⁸¹ By including disability under the Hate Crimes Statistics Act, Congress

¹⁷⁵ *Senate Testimony on S. 622, supra* note 11 (statement of Eric H. Holder, Jr.). *See also* Anti-Defamation League, *Hate Crimes* <http://www.adl.org/frames/front_99hatecrime.html>. Only 21 states have enacted statutes to criminalize hate crimes motivated by disability: Alabama, Alaska, Arizona, California, Delaware, Illinois, Iowa, Louisiana, Maine, Massachusetts, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, New York, Oklahoma, Rhode Island, Vermont, Washington, and Wisconsin. *Id.*

¹⁷⁶ *Senate Testimony on S. 622, supra* note 11 (statement of Eric H. Holder, Jr.).

¹⁷⁷ Nancy Starnes, *Roll Back the Clock?*, PARAPLEGIA NEWS, November 1, 1999, at 44; *also available in* 1999 WL 24955955.

¹⁷⁸ *Id.*

¹⁷⁹ Americans With Disabilities Act, 42 U.S.C. §§ 12101-12213 (1994). *See also* Gilbert & Marchand, *supra* note 9, at 970-71.

¹⁸⁰ *See* Violent Crime Control And Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, § 320926 (1994) (codified in part at 28 U.S.C. § 534 (1994)) (adding disability to the list of hate crimes that are to be collected under the Act). *See also* Gilbert & Marchand, *supra* note 9, at 970-71. In 1998, there were only 25 hate crimes reported to the FBI that were motivated by disability bias. *Most Hate Crimes Racial, supra* note 30, at 12. However, because statistics on hate crimes motivated by disability have only begun to be collected, it is too early to draw any concrete conclusions about the problem. It can be concluded, however, that state and local officials have not handled satisfactorily many of the hate crimes motivated by disability. *Senate Testimony on S. 622, supra* note 11, (statement of Eric H. Holder, Jr.).

¹⁸¹ 42 U.S.C. §§ 3601-31 (1994). *See also* Gilbert & Marchand, *supra* note 9, at 970-71.

explicitly recognized that some crimes against the disabled are properly recognized as hate crimes.¹⁸²

VII. CONCLUSION

Hate crimes have become an all-to-often occurrence in our society; they are a problem that cannot be ignored, and that must be addressed. All hate crimes should be recognized and dealt with accordingly, whether they are committed with bias based on race, gender, sexual orientation, or disability. Because of the increased damage inflicted on the individual, the targeted community, and society as a whole, hate crimes require greater punishment. Although some states have recognized the importance of criminalizing all hate crimes, other states have failed to do so. Because the states have failed to address the problem adequately, Congress must take the initiative by providing federal protection. Although the Hate Crimes Prevention Act would not remove all of the prejudices prevalent in society, it is an important step in the attempt to do so.

Troy A. Scotting

¹⁸² See Violent Crime Control and Law Enforcement Act § 320926 (amending the HCSA to include disability as a hate crime). See also *Senate Testimony on S. 1529, supra* note 122 (statement of Eric H. Holder, Jr.).