



1-1-1999

Splitting the Atom or Splitting Hairs - The Hate Crimes Prevention Act of 1999 Note.

Andrew M. Gilbert

Eric D. Marchand

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Recommended Citation

Andrew M. Gilbert & Eric D. Marchand, *Splitting the Atom or Splitting Hairs - The Hate Crimes Prevention Act of 1999 Note.*, 30 ST. MARY'S L.J. (1999).

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NOTE

SPLITTING THE ATOM OR SPLITTING HAIRS—THE HATE CRIMES PREVENTION ACT OF 1999

ANDREW M. GILBERT
ERIC D. MARCHAND

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I. INTRODUCTION

On Wednesday, October 7, 1998, a bicyclist found Matthew Shepard tied to a fence, beaten, burned, and unconscious.¹ Because of the way that Shepard was tied to the fence, the bicyclist thought at first that Shepard was a scarecrow.² Preliminary investigation by police, however, revealed that Shepard was likely the victim of a "hate crime."³

According to police, Shepard had met two men at the Fireside Lounge, a bar in Laramie, Wyoming.⁴ Telling Shepard that they were gay, the two

1. See E.N. Smith, *Gay Man Beaten in 'Cowboy' Wyo.*, ARIZ. REPUBLIC, Oct. 10, 1998, at A1 (detailing the Shepard incident), available in 1998 WL 7802418.

2. See *id.*

3. See *id.* Generally, a hate crime is defined as an act of violence motivated by prejudice or bias against certain groups. See, e.g., 28 U.S.C. § 994 note (1994) (defining a hate crime 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"); Terry A. Maroney, Note, *The Struggle Against Hate Crime: Movement at a Crossroads*, 73 N.Y.U. L. REV. 564, 564 (1998) (defining hate crimes "as acts of violence motivated by animus against persons and groups because of race, ethnicity, religion, national origin or immigration status, gender, sexual orientation, disability (including, for example, HIV status), and age").

4. See Steve Lopez, *To Be Young and Gay in Wyoming*, TIME, Oct. 26, 1998, at 38 (reporting the events leading up to Shepard's death, as well as the consequences the death has had on the nation), available in 1998 WL 21377561.

men persuaded Shepard to leave with them.⁵ Upon entering their vehicle, police said, Shepard “was pistol-whipped until his skull collapsed.”⁶ The rest is tragic history: Shepard was tied to the bottom of a rickety wooden fence in thirty-degree weather and left to die.⁷ However, perhaps even more tragic is the fact that the Wyoming legislature has refused to enact hate crime legislation in response to this horrific event.⁸

Recent statistical surveys conducted by the Federal Bureau of Investigation (“FBI”) indicate that the number of hate crimes has generally increased over the past few years.⁹ In 1996, for example, over 11,000 individuals were the victims of hate crimes, five percent more than reported the previous year.¹⁰ Yet, these figures alone do not reveal the dangerous impact of hate-based violence. Hate crimes are not only injurious to the individual victim,¹¹ but they also fracture a

5. See *id.* (describing the deception leading to Shepard’s death).

6. See Howard Fineman, *Echoes of a Murder in Wyoming*, NEWSWEEK, Oct. 26, 1998, at 42 (describing police allegations concerning the Shepard incident).

7. See E.N. Smith, *Gay Man Beaten in ‘Cowboy’ Wyo.*, ARIZ. REPUBLIC, Oct. 10, 1998, at A1 (detailing the facts surrounding Shepard’s murder), available in 1998 WL 7802418.

8. See *Gay Student Found Beaten, Tied to Fence: Wyoming Victim in Critical Condition, Four Suspects Arrested*, DALLAS MORNING NEWS, Oct. 10, 1998, at 3A (indicating that the Wyoming “legislature has repeatedly voted down [hate crime] legislation, saying it would give gays and lesbians special rights”), available in 1998 WL 13109150.

9. See CRIMINAL JUSTICE INFO. SERVS. DIV., FBI, HATE CRIME STATISTICS 1997, at 7 (1998) (reporting that 8,049 bias-motivated incidents occurred in 1997, an increase over the number of incidents reported in 1995); CRIMINAL JUSTICE INFO. SERVS. DIV., FBI HATE CRIME STATISTICS 1996, at 7 (1997) (reporting that 8,759 bias-motivated incidents occurred in 1996); Criminal Justice Info. Servs. Div., FBI, *Uniform Crime Reports: Hate Crime—1995* (visited Mar. 30, 1999) <<http://www.fbi.gov/ucr/hateem.htm>> (reporting that 7,947 bias-motivated incidents occurred in 1995); Vince Horiuchi, *Report of Hate Crimes Being on Decline Is Deceiving, Say Police*, SALT LAKE TRIB., Nov. 16, 1997, at B1 (relating the nationwide increase in hate crimes), available in 1997 WL 15236496; Marc Lieberman et al., *The Case for Hate Crime Legislation*, ARIZ. ATT’Y, Mar. 1996, at 15-16 (indicating the increase in hate crimes within the past five years); see also *infra* note 42 (presenting the FBI statistics in tabular format).

10. See *infra* note 42. Although the 1997 statistics reflect a slight decline in hate crimes in comparison to 1996, the 1997 figures evidence a 1.3% increase in total number of incidents in comparison with 1995. See *id.*

11. See *Hate Crimes Prevention Act of 1998: Hearings on S. 1529 Before the Senate Comm. on the Judiciary*, 105th Cong. (1998) (testimony of Jack McDevitt, Professor at Northeastern University, College of Criminal Justice) (indicating the tremendous impact of hate crime on victims and discussing statistical studies that support the view of the harmful nature of hate crimes), available in 1998 WL 12763004; see also H.R. 188, 105th Cong. (1997) (finding that “bias crimes are far more lethal than other kinds of attacks, with hospitalization of victims occurring four times more often than for other assaults”); Robert V. Ward, Jr., *Hate Crimes*, 32 GONZ. L. REV. 511, 514 (1997) (relating the violent nature of hate crimes). Victims of hate crimes are also subjected to tremendous psychological effects. See Aklilu Dunlap, *The Bellows of Dying Elephants: Gay-, Lesbian-, and Bisexual-*

surrounding community, creating a pervasive disharmony among citizens.¹²

As a result, many states implemented enhancement-legislation in the mid-1980s designed to deter hate-motivated crimes.¹³ These enhance-

Protective Hate Crime Statutes After R.A.V. v. City of St. Paul, 12 LAW & INEQ. J. 205, 211 (1993) (recognizing that hate crimes subject victims to more than physical injury); Theresa Suozzi et al., Project, *Crimes Motivated by Hatred: The Constitutionality and Impact of Hate Crime Legislation in the United States*, 1 SYRACUSE J. LEGIS. & POL'Y 29, 32 (1995) (indicating that "Hate Crimes have been documented to cause emotional and physiological problems, high blood pressure, sleep disorders, post-traumatic stress, hypertension, and psychosis"); Lu-in Wang, *The Transforming Power of "Hate": Social Cognition Theory and the Harms of Bias-Related Crime*, 71 S. CAL. L. REV. 47, 47 (1997) (analyzing extensively the psychological impacts of hate crimes on victims); see also 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, 262 (1991) (linking hate crimes to acute psychological trauma); *The White House Conference on Hate Crimes*, M2 PRESS-WIRE, Nov. 11, 1997 (relating preliminary results of the National Institute of Mental Health indicating that the psychological effects on hate crime victims are more severe than non-bias-motivated offenses), available in 1997 WL 15143326.

12. See Marc Lieberman et al., *The Case for Hate Crime Legislation*, ARIZ. ATT'Y, Mar. 1996, at 16 (recognizing that "the intention to terrorize an entire community is often the motivating factor for hate crimes"), available in WESTLAW, AZATT Database; David Todd Smith, Comment, *Enhanced Punishment Under the Texas Hate Crimes Act: Politics, Panacea, or Pathway to Hell?*, 26 ST. MARY'S L.J. 259, 266-67 (1994) (noting that hate crimes cause trauma to the community); U.S. Attorney General Janet Reno, Address to the Governor's Conference on Racial Reconciliation 10 (Oct. 27, 1997) (transcript on file with the *St. Mary's Law Journal*) (indicating specifically that hate crimes "represent an attack not just on an individual victim, but also on the victim's community, and their impact is broader because they send a message of hate intended to create fear"); see also *State v. Plowman*, 838 P.2d 558, 564 (Or. 1992) (relating the consequences of hate crimes on members of the victim's perceived group); Samuel R. Cacas, *Hate Crime Sentences Can Now Be Enhanced Under a New Federal Law*, 22 HUM. RTS. 32, 33 (1995) (illustrating that hate crimes constitute attacks against an entire group of people); Susan Gellman, *Sticks and Stones Can Put You in Jail, but Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, 39 UCLA L. REV. 333, 340-42 (1991) (noting that the effects of hate crimes extend beyond the targeted victim); Eric Rothschild, *Recognizing Another Face of Hate Crimes: Rape As a Gender-Bias Crime*, 4 MD. J. CONTEMP. LEGAL ISSUES 231, 268 (1993) (indicating the impact of hate crimes on entire minority groups); Tanya Kateri Hernandez, Note, *Bias Crimes: Unconscious Racism in the Prosecution of "Racially Motivated Violence"*, 99 YALE L.J. 845, 848 (1990) (stating that hate crimes hurt the entire victimized group).

13. See ANTI-DEFAMATION LEAGUE, HATE CRIME STATUTES: A 1991 STATUS REPORT 2-5 (1991) (describing model hate crime legislation and noting that over half of all state hate crime legislation is based on or similar to the model statute); Terry A. Maroney, Note, *The Struggle Against Hate Crime: Movement at a Crossroads*, 73 N.Y.U. L. REV. 564, 567-68, 589-90 (1998) (detailing the development of a "hate crimes jurisprudence" and noting the development of model statutes). Subsequently, in 1992 and 1993, the United States Supreme Court considered the permissible bounds of hate crime statutes in two separate cases: *Wisconsin v. Mitchell*, 508 U.S. 476 (1993), and *R.A.V. v. City of St. Paul*,

ment statutes have provided heightened punishment for a defendant who selected a victim based upon the victim's perceived race, religion, or national origin.¹⁴ In addition, a few states have permitted punishment to be heightened when a defendant selected a victim based upon gender, sexual orientation, or disability.¹⁵ Unfortunately, other states continue to over-

505 U.S. 377 (1992). In *R.A.V.*, the Court invalidated a Wisconsin ordinance that proscribed certain "fighting words" designed to "arouse anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 377, 391 (1992). The Supreme Court declared the ordinance unconstitutional because it impermissibly discriminated upon viewpoint in violation of the First Amendment. *See id.* In *Mitchell*, the Court upheld a sentencing enhancement statute similar to the ADL model against a First Amendment challenge, holding that the statute did not implicate speech. *See Wisconsin v. Mitchell*, 508 U.S. 476, 488-90 (1993).

14. *See* Eric Rothschild, *Recognizing Another Face of Hate Crimes: Rape As a Gender-Bias Crime*, 4 MD. J. CONTEMP. LEGAL ISSUES 231, 238-39 (1993) (describing the adoption by many states of model legislation, which was drafted by the Anti-Defamation League, that includes penalty enforcement provisions); Terry A. Maroney, Note, *The Struggle Against Hate Crime: Movement at a Crossroads*, 73 N.Y.U. L. REV. 564, 589-90 (1998) (defining enhancement statutes). In *Mitchell*, the Court unanimously upheld Wisconsin's hate crime statute that provided similarly for enhancement of a defendant's sentence whenever the accused "[i]ntentionally selects the person against whom the crime . . . is committed . . . because of the race, religion, color, disability, sexual orientation, national origin, or ancestry of that person." *See Mitchell*, 508 U.S. at 480. Although it was argued that the hate crime statute punished "abstract thought" and beliefs, the Court noted that "the Wisconsin statute singles out for enhancement bias-inspired conduct," discarding the defendant's free speech contention. *Id.* at 487 (emphasis added). Because a defendant's motivation must be sufficiently connected to a physical act, the Court rejected the notion that enhancement statutes would chill bigoted speech. *See id.* at 488; *see also* Shirley S. Abrahamson et al., *Words and Sentences: Penalty Enhancement for Hate Crimes*, 16 U. ARK. LITTLE ROCK L.J. 515, 526-27 (1994) (proclaiming that the Wisconsin penalty enhancement statute punishes "acts," not thoughts, and that "[t]he statute does nothing more than assign consequences to invidiously discriminatory acts"); Richard Cordray, *Free Speech and the Thought We Hate*, 21 OHIO N.U. L. REV. 871, 873 (1995) (distinguishing crimes from hate speech laws and recognizing that hate crime laws target the "act" of intentional selection, which is the root of all hate crime). *But see* Frederick M. Lawrence, *Resolving the Hate Crime/Hate Speech Paradox: Punishing Bias Crimes and Protecting Racist Speech*, 68 NOTRE DAME L. REV. 673, 711 (1993) (claiming that "[r]acially targeted behavior that vents the actor's racism is racial speech that is protected by the First Amendment"). The Court further noted in *Mitchell* that sentencing judges consider a wide variety of factors in determining the ultimate punishment of a convicted offender, and the Court analogized the statute to federal and state anti-discrimination laws, which also take into account prejudicial or discriminatory motive. *See Mitchell*, 508 U.S. at 485-87.

15. *See* Anti-Defamation League, *1999 Hate Crimes Laws* (visited Mar. 29, 1999) <<http://www.adl.org/99hatecrime/provisions.html>> (illustrating states that enhance penalties for sexual orientation and gender motivated hate crimes). Currently, Arizona, California, the District of Columbia, Illinois, Iowa, Louisiana, Maine, Minnesota, Nebraska, New Hampshire, New Jersey, Rhode Island, Vermont, and Washington enhance penalties for both sexual orientation and gender-motivated hate crimes. *See id.*

look the gravity of hate crime offenses, consistently refusing to implement any remedial legislation.¹⁶

Recognizing that hate crimes divide our nation, rend the national fabric, and stigmatize our communities,¹⁷ the United States Congress has taken steps to address the potential hate crime epidemic, enacting several legislative measures. One such measure includes the Hate Crime Statistics Act of 1990, which was enacted in order to determine the extent of hate-related offenses more thoroughly.¹⁸ The Statistics Act requires the Attorney General of the United States to collect data from local agencies regarding the frequency of hate crime offenses.¹⁹ Another piece of federal legislation includes the Hate Crimes Sentencing Enhancement Act

16. See Howard Chua-Eoan, *That's Not a Scarecrow: A Brutal Assault in Wyoming and a Rise in Gay Bashing Fuel the Debate Over Sexual Orientation*, TIME, Oct. 19, 1998, at 72 (stating that although "Wyoming had been the site of many archconservative victories," the state legislature has continuously crushed bills to outlaw discrimination against gays and lesbians), available in 1998 WL 21377421. State representative for Wyoming, Mike Massie, has co-sponsored the anti-bias hate crime bills. See Steve Lopez, *To Be Young and Gay in Wyoming*, TIME, Oct. 26, 1998, at 38 (noting that the Wyoming legislature has denied hate crime bills four times this decade), available in 1998 WL 21377561. "There's no problem with enhanced penalties for crimes against race, religion or ethnicity, he's been told, but if he doesn't drop sexual orientation from the list, there's not a chance. . . ." *Id.* Currently, Arkansas, Georgia, Hawaii, Indiana, Kansas, Kentucky, New Mexico, New York, South Carolina, and Wyoming have limited or no penalty-enhancement hate crimes laws. See Anti-Defamation League, *1999 Hate Crimes Laws* (visited Mar. 29, 1999) <http://www.adl.org/99hatecrime/map_statutes.html>.

17. See H.R. 3081, 105th Cong. (1997) (finding that incidents of violence motivated by prejudice disrupt "the tranquility and safety of communities and is deeply divisive"); David Todd Smith, Comment, *Enhanced Punishment Under the Texas Hate Crimes Act: Politics, Panacea, or Pathway to Hell?*, 26 ST. MARY'S L.J. 259, 267-68 (1994) (noting that hate crimes cause a variety of societal harms); Bill Lann Lee, Statement of Bill Lann Lee, Acting Assistant Attorney General, Civil Rights Division, United States Department of Justice, Before the United States Attorneys' Conference on Hate Crimes, The Willard Hotel Washington, D.C. 2 (Feb. 18, 1998) (on file with the *St. Mary's Law Journal*) (explaining that hate crimes "divide our communities and rend the national fabric").

18. See Hate Crime Statistics Act, Pub. L. No. 101-275, 104 Stat. 140 (codified at 28 U.S.C. § 534 note (1994)) (providing for the acquisition of data concerning "crimes that manifest evidence of prejudice based on race, religion, disability, sexual orientation, or ethnicity"); see also 135 CONG. REC. S2,378-01 (daily ed. Mar. 8, 1989) (stating that the Hate Crime Statistics Act facilitates the collection of "crimes motivated by prejudice based on race, religion, sexual orientation, or ethnicity").

19. See 28 U.S.C. § 534 note (1994) (charging the Attorney General with the task of collecting hate crime data); see also Terry A. Maroney, Note, *The Struggle Against Hate Crime: Movement at a Crossroads*, 73 N.Y.U. L. REV. 564, 594 (1998) (noting that the Hate Crime Statistics Act of 1990 empowered the Attorney General to collect data on hate crimes); 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, 268 (1991) (describing the Hate Crime Statistics Act of 1990).

that Congress passed in 1994.²⁰ Like enhancement statutes found at the state level, the Sentencing Enhancement Act provides sentencing enhancements for defendants who commit certain hate-motivated crimes.²¹ The Sentencing Enhancement Act works simultaneously with the federal government's principal hate crime statute, Section 245(b)(2) of Title 18 of the United States Code.²² Initially enacted in 1968,²³ Section 245 prohibits interference with an individual based upon his race, color, religion, or national origin and establishes a minimum sentence for violations of the Act.²⁴

Although Section 245 provides some deterrence against hate crimes, its application is not flawless. To begin, Section 245 was enacted as part of the Civil Rights Act of 1968 at a time when Congress was concerned primarily with racial divisiveness.²⁵ As such, the statute has become outdated. Even though it condemns race-based crimes, it ignores the increasing numbers of crimes committed on the basis of gender, disability, or sexual orientation.²⁶ In addition, the statute imposes a strict jurisdictional requirement that forces prosecutors to prove two critical elements at trial: (1) that the victim was engaged in one of the statute's "federally protected activities" at the time of the crime, and (2) that a

20. Pub. L. No. 103-322, 108 Stat. 1796 (codified in part at 28 U.S.C. § 994 note (1994)). The Hate Crimes Sentencing Enhancement Act is part of the Violent Crime Control and Law Enforcement Act of 1994 and hereinafter will be referred to as the Sentencing Enhancement Act. *See* 28 U.S.C. § 994 note (1994); *see also* H.R. 1152, 103d Cong. (1993) (introducing the Hate Crimes Sentencing Enhancement Act of 1993).

21. *See* 28 U.S.C. § 994 note (1994) (enhancing punishment at least three offense levels for defendants committing hate-based crimes); *see also* Marguerite Angelari, *Hate Crime Statutes: A Promising Tool for Fighting Violence Against Women*, 26 AM. U. J. GENDER & L. 63, 72 (1994) (discussing the proposed Sentencing Enhancement Act of 1993); Terry A. Maroney, Note, *The Struggle Against Hate Crime: Movement at a Crossroads*, 73 N.Y.U. L. REV. 564, 594-95 (1998) (discussing federal hate crime legislation and the Hate Crimes Sentencing Enhancement Act).

22. 18 U.S.C. § 245 (b)(2) (1994); *see* 28 U.S.C. § 994 note (1994) (mandating enhanced punishments for federal crimes).

23. Pub. L. No. 90-284, 82 Stat. 73 (1968) (codified in part as 18 U.S.C. § 245 (1994)).

24. *See generally* 18 U.S.C. § 245 (1994).

25. *See* Jeannine Bell, Note, *Policing Hatred: Police Bias Units and the Construction of Hate Crime*, 2 MICH. J. RACE & L. 421, 426-28 (1997) (discussing the context for the enactment of 28 U.S.C. § 245).

26. *See infra* note 42 (providing FBI statistics on bias-motivated crimes); *see also infra* Part III.B. (discussing the increase in hate crimes committed on the basis of sexual orientation, gender, and disability). *Compare* 18 U.S.C. § 245(b)(1) (1994) (limiting the prohibition against violence to violence that is motivated by race, color, religion or national origin), *with* 28 U.S.C. § 994 note (1994) (protecting against crimes based upon gender, disability, and sexual orientation in addition to the categories protected by Section 245).

nexus exists between the crime and that activity.²⁷ Because these elements are difficult to establish and place severe limits on the number of crimes falling under the statute, the jurisdictional requirement has made the prosecution of hate crimes almost impossible.²⁸ As a result of this prosecutorial limitation and the limited coverage of Section 245, the efficacy of the Sentencing Enhancement Act in providing heightened punishment for the growing number of hate-based crimes is questionable.²⁹

Hoping to fill in the gaps left by Section 245 and the Sentencing Enhancement Act, Congress has been considering the Hate Crimes Prevention Act of 1999 (HCPA).³⁰ This proposed legislation is designed to eliminate the "federally protected activity requirement" from Section 245, which will facilitate the federal prosecution of hate crimes by removing the statute's unnecessary jurisdictional hurdle.³¹ In addition, the

27. See 18 U.S.C. § 245(b)(2) (1994) (giving protection only when a victim of a race-, color-, national origin-, or religion-based crime was engaged in a protected activity).

28. See *Hate Crimes Prevention Act of 1998: Hearings on S. 1529 Before the Senate Comm. on the Judiciary*, 105th Cong. (1998) (statement of Eric H. Holder, Jr., Deputy Attorney General) (identifying one of the deficiencies of Section 245 as being its jurisdictional requirement, as evidenced by the number of violent incidents federal prosecutors have been precluded from pursuing); *Morning Edition* (NPR radio Broadcast, July 9, 1998) (stating that "[c]urrent laws are so restrictive that federal prosecutors have had to decline prosecution in many cases"), available in 1998 WL 3307969.

29. See *infra* Part II.C.2. & Part III. Compare 18 U.S.C. § 245(b)(2) (1994) (requiring that the crime be based on a person's race, color, national origin, or religion), with 28 U.S.C. § 994 note (1994) (providing a penalty enhancement for crimes based on "race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation").

30. See S. 622, 106th Cong. (1999); H.R. 1082, 106th Cong. (1999); see also Melissa Robinson, *Interest Renewed in Hate Crimes Law*, SAN ANTONIO EXPRESS-NEWS, Mar. 13, 1999, at 8A (discussing recent debate over the Hate Crimes Act of 1999). The predecessor to the 1999 proposed act was introduced originally as the Hate Crimes Prevention Act of 1998. See S. 1529, 105th Cong. (1997); H.R. 3081, 105th Cong. (1997). Senate Bill 1529, the Hate Crimes Prevention Act of 1998, was first introduced on November 10, 1997 by Senators Edward Kennedy (D-Mass.) and Arlen Specter (R-Pa.). See Nancy Mathis, *Clinton Pushes Civil Rights Choice: Plan Would Extend Hate-Crime Protection to Women, Gays, Disabled*, Hous. CHRON., Nov. 11, 1997, at 2 (detailing the introduction of S. 1529), available in 1997 WL 13070749. A companion bill, H.R. 3081, was introduced by Representative Schumer of New York. See H.R. 3081, 105th Cong. (1997). Both bills died in committee at the end of the 1998 session. Search of Westlaw, BILL-TRK database (Mar. 23, 1999).

31. See S. 622, 106th Cong. (1999); H.R. 1082, 106th Cong. (1999); see also *Hate Crimes Prevention Act of 1998: Hearings on S. 1529 Before the Senate Comm. on the Judiciary*, 105th Cong. (1998) (statement of Eric H. Holder, Jr., Deputy Attorney General) (arguing that the Hate Crimes Prevention Act will facilitate federal prosecution of hate crimes), available in 1998 WL 12762065; Human Rights Campaign, *A Legislative Briefing from the Human Rights Campaign* (visited Sept. 10, 1998) <<http://www.hrc.org/issues/leg/hcpa/index.html>> (praising the Hate Crimes Prevention Act and explaining that the Act will facilitate prosecution of hate crimes).

HCPA seeks to reaffirm Congress' commitment to ensuring the equal protection of laws by eliminating inconsistencies in the existing federal legislation.³² Moreover, if enacted, the HCPA will enable the federal government to continue prosecuting egregious hate crime offenders in the absence of state legislation.³³

This Note recognizes the dramatic effect of hate crimes on American society and recommends that Congress enact the Hate Crimes Prevention Act of 1999. In this regard, Part II presents the statistical surveys conducted by the FBI and details state and federal legislation that address the hate crime problem. Part III then questions the effectiveness of the present federal statutory provisions and explores two prominent deficiencies: (1) the federally protected activity requirement, and (2) the omission of certain groups. Next, Part IV examines the HCPA and discusses Congress' power to enact such legislation under the Commerce Clause as well as the Thirteenth and Fourteenth Amendments. In addition, Part IV considers whether Congress, in enacting the Hate Crimes Prevention Act, will violate principles of federalism by legislating in an area traditionally left to the individual states. Finally, this Note lauds the efforts of legislators for attempting to eradicate the bigotry and prejudice that threatens the peaceful co-existence of all Americans.

II. AN AREA OF CONCERN: FACTUAL AND LEGISLATIVE BACKGROUND

“[W]hen prejudice results in criminal conduct, it is the duty of society to punish that conduct more severely than it would otherwise . . . to do anything else would be to sanction what is essentially a growing epidemic of domestic terrorism.”³⁴

32. Compare 18 U.S.C. § 245(b)(1) (1994) (limiting the prohibition against violence to violence that is motivated by race, color, religion or national origin), with 28 U.S.C. § 994 note (1994) (protecting against crimes based upon gender, disability, and sexual orientation in addition to the categories protected by Section 245). Previous hate crime legislation has included victims of gender, sexual orientation, and disability-motivated violence. See generally 28 U.S.C. § 994 note (1994) (mandating increased sentences for perpetrators of, among others, gender, sexual orientation, and disability-based hate crimes).

33. See Human Rights Campaign, *A Legislative Briefing from the Human Rights Campaign* (visited Sept. 10, 1998) <<http://www.hrc.org/issues/leg/hcpa/index.html>> (commending the Hate Crimes Prevention Act and relating that the Act will facilitate the prosecution of hate crimes); see also Howard Fineman, *Echoes of a Murder in Wyoming*, NEWSWEEK, Oct. 26, 1998, at 43 (indicating that “Wyoming is one of 10 states with no hate-crimes law at all”); cf. S. 622, 106th Cong. (1999); H.R. 1082, 106th Cong. (1999) (finding that federal assistance is warranted in the prosecution of hate crimes).

34. Marc Lieberman et al., *The Case for Hate Crime Legislation*, ARIZ. ATT'Y, Mar. 1996, at 16, available in WESTLAW, AZATT Database.

A. *Rise in Hate Crime Activity*

Although the social construction of the term "hate crime" is of recent origin,³⁵ bias-motivated violence in the United States can be identified as early as the 1800s with the lynching of African Americans.³⁶ However, despite the formal abolition of racial segregation and the passage of civil rights laws that have promoted formal equal opportunity,³⁷ individual discrimination still poses a grave problem today.³⁸ Moreover, the patent danger of hate violence has not been limited exclusively to racial persecution; perpetrators of hate crimes today also select their victims based upon the victim's actual or perceived religion, national origin, sexual orientation, gender, or disability.³⁹ To describe the escalating number of hate crimes, some commentators have used terms such as "crisis" and "epidemic;" other commentators, however, criticize these characterizations as sensational.⁴⁰ Regardless, the national trend is self-evident⁴¹ and

35. See JAMES B. JACOBS & KIMBERLY POTTER, *HATE CRIMES: CRIMINAL LAW & IDENTITY POLITICS* 4 (1998) (explaining the recent origins of the term "hate crime"). Jacobs and Potter argue that the hate crime "epidemic" has been "socially constructed" in many ways. See *id.*

36. See David Deitchman, Comment, *Limits on the Right to Hate: A Look at the Texas Hate Crime Act*, 46 BAYLOR L. REV. 399, 399 (1994) (observing, for example, that "[a] glance at American history reveals harassment and lynching of blacks at least as far back as the late 1800s").

37. See, e.g., U.S. CONST. amend. XIII, § 1 (stating, in part, that "[n]either slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction"); Voting Rights Act of 1965, 42 U.S.C. § 1971 (1998) (stating that race shall not affect the right to vote); 42 U.S.C. § 1983 (1998) (providing the primary method to enforce violations of civil rights committed by state and local governments and employees); Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-2000h (1998) (implementing civil rights laws aimed at affording equal opportunity in education, employment, and all public accommodations).

38. See 143 CONG. REC. S12,576-02 (daily ed. Nov. 13, 1997) (statement of Sen. Kennedy) (elaborating on the rising incidents of "violent bigotry"); Marc Lieberman et al., *The Case For Hate Crime Legislation*, ARIZ. ATT'Y, Mar. 1996, at 14 (depicting a "hate crime crisis"), available in WESTLAW, AZATT Database; U.S. Attorney General Janet Reno, Address to the Governor's Conference on Racial Reconciliation 6 (Oct. 27, 1997) (transcript on file with the *St. Mary's Law Journal*) (declaring that "our national journey has taken us from starkly segregated classrooms to more integrated ones; from Jim Crow laws to civil rights laws . . . but 40 years [later] . . . reports of violent hate crimes against racial and ethnic minorities, Jews and Muslims, and gays and lesbians, are disturbingly high"); see also *infra* note 42 (indicating a nationwide increase in hate crimes from 1995-1997).

39. See *infra* note 42 (detailing the rate of incidents committed against various groups); see also S. 622, 106th Cong. (1999); H.R. 1082, 106th Cong. (1999) (finding that "the incidence of violence motivated by the actual or perceived race, color, national origin, religion, sexual orientation, gender, or disability of the victim poses a serious national problem").

40. Compare JACK LEVIN & JACK McDEVITT, *HATE CRIMES: THE RISING TIDE OF BIGOTRY AND BLOODSHED* 33-34 (1993) (acknowledging that hate crimes continue to rise),

is reflected in the FBI Hate Crime Statistics, which indicate that hate crimes are escalating across the nation.⁴² In fact, the FBI Hate Crime

and Marc Lieberman et al., *The Case for Hate Crime Legislation*, ARIZ. ATT'Y, Mar. 1996, at 14 (describing a "hate crime crises"), available in WESTLAW, AZATT Database, with James B. Jacobs & Jessica S. Henry, *The Social Construction of a Hate Crime Epidemic*, 86 J. CRIM. L. & CRIMINOLOGY 366, 367, 372 (1996) (arguing that the hate crime "epidemic" is exaggerated and that "advocacy groups have used the metaphor to dramatize their groups' plight" while recognizing that a hate crime epidemic has been acknowledged by an "overwhelming majority" of authors).

41. See Vince Horiuchi, *Report of Hate Crimes Being on Decline Is Deceiving, Say Police*, SALT LAKE TRIB., Nov. 16, 1997, at B1 (noting that "[n]ationwide, 8,759 hate crimes were reported last year, compared to 7,947 for the previous year"), available in 1997 WL 15236496.

42. Specifically, the Federal Bureau of Investigation's data indicates that 8059 bias-motivated incidents were reported in 1997, 8759 bias-motivated incidents were reported in 1996 and 7,947 incidents were reported in 1995; the statistics compiled by the FBI identify the nationwide trend of an increase in hate crimes:

TABLE 1 — NUMBER OF INCIDENTS, OFFENSES, VICTIMS, AND OFFENDERS BY BIAS MOTIVATION, 1997

Bias-Motivation	Number of			
	Incidents	Offenses	Victims	Known Offenders
Total	8,049	9,861	10,255	8,474
Single-Bias Incidents				
Race:	4,710	5,898	6,084	5,444
Anti-White	993	1,267	1,293	1,520
Anti-Black	3,120	3,838	3,951	3,301
Anti-American Indian/Alaskan Native	36	44	46	45
Anti-Asian/Pacific Islander	347	437	466	351
Anti-Multi-Racial Group	214	312	328	227
Religion:	1,385	1,483	1,586	792
Anti-Jewish	1,087	1,159	1,247	598
Anti-Catholic	31	32	32	16
Anti-Protestant	53	59	61	19
Anti-Islamic	28	31	32	22
Anti-Other Religious Group	159	173	184	120
Anti-Multi-Religious Group	24	26	27	11
Anti-Atheism/Agnosticism/etc.	3	3	3	6
Sexual Orientation:	1,102	1,375	1,401	1,315
Anti-Male Homosexual	760	912	927	1,032
Anti-Female Homosexual	188	229	236	158
Anti-Homosexual	133	210	214	103
Anti-Heterosexual	12	14	14	14
Anti-Bisexual	9	10	10	8
Ethnicity/National Origin:	836	1,083	1,132	906
Anti-Hispanic	491	636	649	614
Anti-Other Ethnicity/National Origin	345	447	483	292
Disability:	12	12	12	14
Anti-Physical	9	9	9	11
Anti-Mental	3	3	3	3
Multiple-Bias Incidents	4	10	40	3

SOURCE: CRIMINAL JUSTICE INFO. SERVS. DIV., FBI, HATE CRIME STATISTICS 1997, at 7 (1998).

TABLE 2 — NUMBER OF INCIDENTS, OFFENSES, VICTIMS, AND OFFENDERS BY BIAS MOTIVATION, 1996

	Number of			
	Incidents	Offenses	Victims	Known Offenders
Total	8,759	10,706	11,039	8,935
Single-Bias Incidents				
Race:	5,396	6,767	6,994	6,122
Anti-White	1,106	1,384	1,445	1,783
Anti-Black	3,674	4,469	4,600	3,701
Anti-American Indian/Alaskan Native	51	69	71	56
Anti-Asian/Pacific Islander	355	527	544	374
Anti-Multi-Racial Group	210	318	334	208
Ethnicity/National Origin:	940	1,163	1,207	1,095
Anti-Hispanic	564	710	728	734
Anti-Other Ethnicity/National Origin	376	453	479	361
Religion:	1,401	1,500	1,535	523
Anti-Jewish	1,109	1,182	1,209	371
Anti-Catholic	35	37	38	17
Anti-Protestant	75	80	81	44
Anti-Islamic	27	33	33	16
Anti-Other Religious Group	129	139	145	64
Anti-Multi-Religious Group	24	27	27	11
Anti-Atheism/Agnosticism/etc.	2	2	2	0
Sexual Orientation:	1,016	1,256	1,281	1,180
Anti-Male Homosexual	757	927	940	925
Anti-Female Homosexual	150	185	192	150
Anti-Homosexual	84	94	99	93
Anti-Heterosexual	15	38	38	4
Anti-Bisexual	10	12	12	8
Multiple-Bias Incidents	6	20	22	15

SOURCE: CRIMINAL JUSTICE INFO. SERVS. DIV., FBI, HATE CRIME STATISTICS 1996, at 7 (1997).

TABLE 3 — NUMBER OF INCIDENTS, OFFENSES, VICTIMS, AND OFFENDERS BY BIAS MOTIVATION, 1995

Bias Motivation	Number of			
	Incidents	Offenses	Victims	Known Offenders
Total	7,947	9,895	10,469	8,433
Race:	4,831	6,170	6,438	5,751
Anti-White	1,226	1,511	1,554	2,032
Anti-Black	2,988	3,805	3,945	3,099
Anti-American Indian/Alaskan Native	41	59	59	38
Anti-Asian/Pacific Islander	355	484	496	380
Anti-Multi-Racial Group	221	311	384	202
Ethnicity/National Origin:	814	1,022	1,044	958
Anti-Hispanic	516	680	698	685
Anti-Other Ethnicity/National Origin	298	342	346	273
Religion:	1,277	1,414	1,617	437
Anti-Jewish	1,058	1,145	1,236	350
Anti-Catholic	31	35	53	8
Anti-Protestant	36	47	65	12
Anti-Islamic	29	39	41	26
Anti-Other Religious Group	102	122	196	36
Anti-Multi-Religious Group	20	25	25	4
Anti-Atheism/Agnosticism/etc.	1	1	1	1
Sexual Orientation:	1,019	1,266	1,347	1,273
Anti-Male Homosexual	735	915	937	1,031
Anti-Female Homosexual	146	189	191	131
Anti-Homosexual	103	125	182	80
Anti-Heterosexual	17	19	19	13
Anti-Bisexual	18	18	18	18
Multiple Bias Incidents:	6	23	23	14

SOURCE: Criminal Justice Info. Servs. Div., FBI, *Uniform Crime Reports: Hate Crime—1995* (visited March 30, 1999) <<http://www.fbi.gov/ucr/hatecm.htm>>.

Other sources relate the increase in hate crimes as well. See Vince Horiuchi, *Report of Hate Crimes Being on Decline Is Deceiving, Say Police*, SALT LAKE TRIB., Nov. 16, 1997, at B1 (relating the nationwide increase in hate crimes), available in 1997 WL 15236496; Marc Lieberman et al., *The Case for Hate Crime Legislation*, ARIZ. ATT'Y, Mar. 1996, at 14-16 (indicating that hate crimes have increased within the past five years), available in WESTLAW, AZATT Database.

In addition, the 1997 Hate Crime Statistics indicate two significant results: (1) even considering the negligible decrease in hate crimes for 1997, the total number of incidents still present cause for concern and, (2) the number of sexual orientation-related incidents exceeded previously reported levels by over 8 percent, whereas race, religion, and national origin-related incidents decreased slightly. See CRIMINAL JUSTICE INFO. SERVS. DIV., FBI, HATE CRIME STATISTICS: 1997, at 8 (1998); see also *Report Cites Internet, Music Lyrics As Causes of More Hate Groups*, FT. WORTH STAR-TELEGRAM, Mar. 4, 1998, at 6 (finding that "a separate report by two gay advocacy groups yesterday said anti-gay violence and harassment increased nationwide by 2 percent [in 1997] in 14 areas across the country" in contrast with the 1996 FBI Hate Crime Statistics Report indicating a slight decrease in the number of sexual-orientation related offenses over 1995), available in 1998 WL 3280379.

Statistics reveal that the overall number of hate crime incidents increased by over ten percent between 1995 and 1996.⁴³ Disturbingly, the national crime rate decreased during that same time period, making the reported number of hate crimes even more alarming.⁴⁴

Precipitating the rise in hate crimes on a state and national level, experts have also documented an all-time high number of hate groups in 1997 and a twenty-percent increase over those reported in 1996.⁴⁵ Some commentators attribute the growth of such groups to novel means of communication such as the Internet.⁴⁶ A study by the Southern Poverty Law Center indicated that, at the time of the study, 163 racist hate groups published websites on the Internet; three years ago, only one such website existed.⁴⁷ Whether the recruitment occurs on-line or in person, ex-

43. See *supra* note 42.

44. See *ADL Reports Anti-Semitic Incidents Down in 1997*, U.S. NEWSWIRE, Mar. 11, 1998 (observing that “[n]ational crime statistics . . . demonstrate a drop in the overall crime rate over the last few years”), available in 1998 WL 5683688; FBI National Press Office, *Crime in the United States, 1997* (visited Apr. 3, 1999) <<http://www.fbi.gov/pressrel/ucr-press.htm>> (discussing generally the declining rate of crime for 1997 according to FBI crime reports).

45. See *Number of Hate Groups Grew Last Year, Report Says*, DALLAS MORNING NEWS, Mar. 4, 1998, at 6A (citing study by Southern Poverty Law Center that has determined 474 hate groups exist nationwide), available in 1998 WL 2517192; Richard A. Serrano, *Hate Groups Rise As 2000 Nears: Internet Magnifies Reach of Racists and Doomsayers, Study Says*, HOUS. CHRON., Mar. 4, 1998, at 6 (discussing reports by Klanwatch and the Militia Task Force and noting that “[m]ainstream America is being targeted in a way that this country hasn’t seen in decades”), available in 1998 WL 3563862.

46. See *ADL Reports Anti-Semitic Incidents Down in 1997*, U.S. NEWSWIRE, Mar. 11, 1998 (detailing the increasing trend of “Anti-Semitism on the Internet”), available in 1998 WL 5683688; *Number of Hate Groups Grew Last Year, Report Says*, DALLAS MORNING NEWS, Mar. 4, 1998, at 6A (discussing a study by the Southern Poverty Law Center that observed an increase in the number hate groups on the Internet), available in 1998 WL 2517192; Richard A. Serrano, *Hate Groups Rise As 2000 Nears: Internet Magnifies Reach of Racists and Doomsayers, Study Says*, HOUS. CHRON., Mar. 4, 1998, at 6 (attributing the Internet and other novel means of communication to the rise in hate crime activity), available in 1998 WL 3563862. The Internet is becoming a more pervasive medium for communication. In 1997, an estimated 56 million people used the Internet; the figure will likely rise in 1998 to 75 million. See *ADL Reports Anti-Semitic Incidents Down in 1997*, U.S. NEWSWIRE, Mar. 11, 1998, available in 1998 WL 5683688.

47. See Naftali Bendavid, *U.S. Seeks to Widen Fight on Hate Crimes: Justice Officials Cite Underreporting*, CHI. TRIB., Jan. 9, 1998, at 4 (citing an ADL report that indicated the Internet “hate sites” doubled last year), available in 1998 WL 2812631; *Number of Hate Groups Grew Last Year, Report Says*, DALLAS MORNING NEWS, Mar. 4, 1998, at 6A (attributing the increase in hate groups to the increase of communication mediums that tout white superiority, such as the Internet and rock music), available in 1998 WL 2517192.

perts claim that “[t]he growth of such groups could trigger a wave of bombings and other domestic violence as this century comes to a close.”⁴⁸

Although this rise in hate crimes and hate groups has stunned the entire nation, hate violence in the southern states evokes images of the not-too-distant Jim Crow era, and history reminds us that incidents of such hate violence can divide the nation unlike any other crime.⁴⁹ Just recall the recent death of James Byrd, Jr., who was beaten, chained to the back of a pickup, and dragged for more than two miles in Jasper, Texas.⁵⁰ Byrd was simply walking home from his niece’s bridal shower when he accepted a ride from three white men.⁵¹ After driving to a remote location, these three men instigated a savage beating.⁵² Thereafter, the men chained Byrd to the back of their pickup truck and dragged him for almost two miles where he was later found decapitated and dismembered.⁵³ Lamentably, this unforgettable and tragic story of James Byrd, Jr. is not an isolated event; the FBI reported nearly 1,000 bias-motivated crimes to have occurred from 1995 to 1997 in Texas alone.⁵⁴ In fact, this event is just a gruesome reminder of how hate crimes have continued to invade the peaceful living of many Americans.

In evaluating hate crimes today, legislators must also bear in mind that the number of hate crimes reported rarely provides an accurate account

48. Richard A. Serrano, *Hate Groups Rise As 2000 Nears: Internet Magnifies Reach of Racists and Doomsayers, Study Says*, Hous. Chron., Mar. 4, 1998, at 6, available in 1998 WL 3563862; cf. JACK LEVIN & JACK McDEVITT, *HATE CRIMES: THE RISING TIDE OF BIGOTRY AND BLOODSHED* 235-36 (1993) (indicating an expected negative trend with regard to race relations in the next decade).

49. See JAMES B. JACOBS & KIMBERLY POTTER, *HATE CRIMES: CRIMINAL LAW & IDENTITY POLITICS* 59-63 (Michael Tonry & Norval Morris eds., 1998) (recognizing America’s history of racial violence and divisiveness); Jeannine Bell, Note, *Policing Hatred: Police Bias Units and the Construction of Hate Crime*, 2 MICH. J. RACE & L. 421, 425-28 (1997) (discussing the legal climate in which hate crime legislation was initially considered).

50. See Erin Kelly, *Victim’s Daughter Pleads for Stronger Hate-Crime Laws*, USA TODAY, July 9, 1998, at 6A (recounting the James Byrd, Jr. incident and quoting Frances Renee Mullins, the eldest child of James Byrd, Jr.), available in 1998 WL 5729903.

51. See *id.*

52. See *id.*

53. See *id.*; Michael Graczyk, ‘Unfortunately, the Murder is Going to Give Jasper a Bad Look for a Long Time’, FORT WORTH STAR-TELEGRAM, June 11, 1998, at 1.

54. See CRIMINAL JUSTICE INFO. SERVS. DIV., FBI, *HATE CRIME STATISTICS 1997*, at 69-73 (1998) (indicating 298 incidents of bias-motivated violence in Texas in 1997); CRIMINAL JUSTICE INFO. SERVS. DIV., FBI, *HATE CRIME STATISTICS 1996*, at 67-71 (1997) (reporting 322 incidents in Texas in 1996); Criminal Justice Info. Servs. Div., FBI, *Uniform Crime Reports: Hate Crime—1995* (visited Mar. 30, 1999) <<http://www.fbi.gov/ucr/hatecm.htm>> (noting 326 incidents in Texas during 1995).

of the actual number of incidents.⁵⁵ Notably, the FBI Hate Crime Statistics Report itself has been criticized as underestimating the actual number of hate crimes that occur.⁵⁶ At its most fundamental level, the underestimation can be attributed to an ineffective identification of hate crimes by field officers.⁵⁷ For instance, a police officer may not recognize certain tell-tale signs of a “gender-based bias crime” and instead reports the crime as a simple assault. Consequently, incidents of “gay bashing” or “gender violence” are often pooled together with ordinary assaults. In addition, victims themselves may choose not to report offenses in order to

55. See 143 CONG. REC. S12,576-02 (daily ed. Nov. 13, 1997) (statement of Sen. Kennedy) (explaining that “[t]he Federal Bureau of Investigation documented 8,000 hate crimes in 1995, a 33-percent increase over 1994”). Senator Kennedy also stated, “The 8,000 documented hate crimes actually understate the true number of hate crimes, because reporting is voluntary and not all law enforcement agencies report such crimes.” *Id.*; see CRIMINAL JUSTICE INFO. SERVS. DIV., FBI, HATE CRIMES STATISTICS 1996, at 2 (1997) (explaining the miscalculation of actual hate crimes); Jeannine Bell, Note, *Policing Hatred: Police Bias Units and the Construction of Hate Crime*, 2 MICH. J. RACE & L. 421, 453-55 (1997) (discussing the problem that police officers often do not recognize the tell-tale signs of hate crimes); *Morning Edition* (NPR radio broadcast, July 9, 1998) (mentioning that many states still fail to report hate crimes), available in 1998 WL 3307969.

56. See Jeannine Bell, Note, *Policing Hatred: Police Bias Units and the Construction of Hate Crime*, 2 MICH. J. RACE & L. 421, 453-55 (1997) (noting problems in the reporting of hate crimes); 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, 291 (1991) (concluding that the Hate Crime Statistics Act does not accurately reflect the extent of hate crimes in America); Theresa Suozzi et al., Project, *Crimes Motivated by Hatred: The Constitutionality and Impact of Hate Crime Legislation in the United States*, 1 SYRACUSE J. LEGIS. & POL’Y 29, 34 (1995) (establishing the problems in reporting hate crimes).

57. See H.R. 188, 105th Cong. (1997) (finding that “Federal, State, and local law enforcement officials have indicated that training in the area of bias crimes is inconsistent and officials repeatedly cite the need for uniform training of officers in the investigation and prevention of bias crime”); B. Kay Shafer, *Hate Crimes and Other Practical Battles*, 5 S. CAL. REV. L. & WOMEN’S STUD. 131, 133 (1995) (noting that problems with reporting can be attributed to patrol officers); Jeannine Bell, Note, *Policing Hatred: Police Bias Units and the Construction of Hate Crime*, 2 MICH. J. RACE & L. 421, 453-55 (1997) (indicating that police officers have a great amount of discretion in reporting crimes and may choose not to classify an incident as a hate crime even though signs of bias motivation are present); Naftali Bendavid, *U.S. Seeks to Widen Fight on Hate Crimes: Justice Officials Cite Underreporting*, CHI. TRIB., Jan. 9, 1998, at 4 (explaining that some “police are reluctant to report hate crimes because they dislike trying to determine whether a crime was motivated by bigotry or some other factor”), available in 1998 WL 2812631; Maro Robbins, *Hate Crimes in San Antonio Appear Uncommon*, SAN ANTONIO EXPRESS-NEWS, Oct. 20, 1998, at 13A (indicating that local authorities may fail to identify hate crimes effectively). According to U.S. Attorney William Blagg, “It’s a lot easier to carry them as an assault than to look further.” *Id.*

avoid the stigmatizing effect of public disclosure.⁵⁸ The inability to recognize hate offenses is also further magnified by the deficiency of police agencies in reporting hate crimes, with thirty percent not reporting hate crime data at all.⁵⁹

Because of these reporting problems, statistics alone cannot purport to demonstrate the gravity of the hate crime “epidemic.” As Abraham H. Foxman, the National Director for the Anti-Defamation League, warns, “[A]ll people should be aware of the ignorance and hatred that lurk” behind incidents motivated by bias.⁶⁰ Thus, heightened awareness and aggressive legislation are needed to prevent any future growth of hate violence.⁶¹

B. Intimidation: Divisiveness, Fear, and Violence Among Victims and the Community

In examining the need for supplemental legislation, critics often consider hate crimes in isolation, and by doing so, give little weight to the

58. See B. Kay Shafer, *Hate Crimes and Other Practical Battles*, 5 S. CAL. REV. L. & WOMEN'S STUD. 131, 132 (1995) (identifying the fear the gay or lesbian community has of being shunned if they report a hate crime and noting “[t]he environment of most law enforcement agencies is incredibly homophobic, not unlike the military”); Anthony S. Winer, *Hate Crimes, Homosexuals, and the Constitution*, 29 HARV. C.R.-C.L. L. REV. 387, 413 (1994) (describing various reasons that hate crimes against homosexuals are underreported, including fear, exposure, rejection, social stigmatization, loss of employment, and child custody); see also Vince Horiuchi, *Report of Hate Crimes Being on Decline Is Deceiving, Say Police*, SALT LAKE TRIB., Nov. 16, 1997, at B1 (noting the disgust and humiliation associated with a crime motivated by bias), available in 1997 WL 15236496. Further, some statistics reveal a significantly lower number of hate crimes because law enforcement officers have difficulty recognizing these types of attacks. See *id.*

59. See CRIMINAL JUSTICE INFO. SERVS. DIV., FBI, HATE CRIME STATISTICS 1996, at 2 (1997) (explaining that the FBI's 1996 hate crime statistics contain figures from only 11,354 of the more than 17,000 reporting agencies); see also *Morning Edition* (NPR radio broadcast, July 9, 1998) (indicating that many states do not report hate crimes), available in 1998 WL 3307969; H.R. 188, 105th Cong. (1997) (noting that in 1994 “only 7,356 of the more than 16,000 law enforcement agencies furnished hate crime data to the Federal Bureau of Investigation”).

60. *ADL Reports Anti-Semitic Incidents Down in 1997*, U.S. NEWswire, Mar. 11, 1998, available in 1998 WL 5683688.

61. See *Hate Crimes Prevention Act of 1998: Hearings on S. 1529 Before the Senate Comm. on the Judiciary*, 105th Cong. (1998) (testimony of Jack McDevitt, Professor at Northeastern University) (indicating that the Hate Crimes Prevention Act of 1998 is “one of the most important pieces of legislation proposed over [the last ten years]”), available in 1998 WL 12763004; *Reno Presses Case for Expanding Hate Crime Laws to Include Gays*, DALLAS MORNING NEWS, Oct. 19, 1998, at 3A (discussing Reno's contention that the federal government “must take a stronger stand” to combat hate crimes), available in 1998 WL 13111514; Office of the Press Secretary, *Remarks By the President at White House Conference on Hate Crimes* (Nov. 10, 1997) <<http://www.whitehouse.gov/Initiatives/OneAmerica/19971110-2429.html>> (urging Congress to pass hate crime legislation).

suffocating effects of hate crimes upon the victim and the community.⁶² One study in Boston revealed that hate crimes are three times as likely to require hospitalization than ordinary assaults.⁶³ A second study in California further showed that victims of hate crimes experience longer lasting trauma than any other victims.⁶⁴ Moreover, random hate crimes stigmatize unwary victims in such a way that cause horrifying injuries, lasting psychological trauma,⁶⁵ and continuous wonderment over why they were attacked due to a characteristic they could not control.⁶⁶

62. See Theresa Suozzi et al., Project, *Crimes Motivated by Hatred: The Constitutionality and Impact of Hate Crime Legislation in the United States*, 1 SYRACUSE J. LEGIS. & POL'Y 29, 32 (1995) (proclaiming that hate crimes extend past the immediate victims and cause fear and terror throughout an entire community); David Todd Smith, Comment, *Enhanced Punishment Under the Texas Hate Crimes Act: Politics, Panacea, or Pathway to Hell?*, 26 ST. MARY'S L.J. 259, 267-68 (1994) (noting the "particularly pervasive impact" of hate crimes because they perpetuate fear and tear at our nation's fabric); see also *Hate Crimes Prevention Act of 1998: Hearings on S. 1529 Before the Senate Comm. on the Judiciary*, 105th Cong. (1998) (testimony of Jack McDevitt, Professor at Northeastern University) (distinguishing hate crimes from ordinary offenses by their impact on communities), available in 1998 WL 12763004.

63. See *Hate Crimes Prevention Act of 1998: Hearings on S. 1529 Before the Senate Comm. on the Judiciary*, 105th Cong. (1998) (testimony of Jack McDevitt, Professor at Northeastern University) (indicating impact of hate crime on victims and discussing statistical studies), available in 1998 WL 12763004; see also H.R. 188, 105th Cong. (1997) (finding that "bias crimes are far more lethal than other kinds of attacks, with hospitalization of victims occurring four times more often than for other assaults"); Robert V. Ward, Jr., *Hate Crimes*, 32 GONZ. L. REV. 511, 514 (1997) (relating the violent nature of hate crimes).

64. See *Hate Crimes Prevention Act of 1998: Hearings on S. 1529 Before the Senate Comm. on the Judiciary*, 105th Congress (1998) (testimony of Jack McDevitt, Professor at Northeastern University) (commenting that a California study found victims of hate motivated crimes experience more post-attack trauma than victims of non-bias motivated crime), available in 1998 WL 12763004.

65. See Aklilu Dunlap, *The Bellows of Dying Elephants: Gay-, Lesbian-, and Bisexual-Protective Hate Crime Statutes After R.A.V. v. City of St. Paul*, 12 LAW & INEQ. J. 205, 211 (1993) (recognizing that hate crimes subject victims to more than physical injury); Theresa Suozzi et al., Project, *Crimes Motivated by Hatred: The Constitutionality and Impact of Hate Crime Legislation in the United States*, 1 SYRACUSE J. LEGIS. & POL'Y 29, 32 (1995) (indicating that hate crimes "have been documented to cause emotional and physiological problems, high blood pressure, sleep disorders, post-traumatic stress, hypertension, and psychosis"); 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, 262 (1991) (linking hate crimes to acute psychological trauma); *The White House Conference on Hate Crimes*, M2 PRESSWIRE, Nov. 11, 1997 (relating preliminary results of the National Institute of Mental Health indicating that the psychological effects on hate crime victims are more severe than non-bias-motivated offenses), available in 1997 WL 15143326.

66. See Lori A. Spillane, *Hate Crimes: Violent Intolerance*, PROSECUTOR, Aug. 1995, at 23 (explaining that the impact of hate crimes is more devastating because of the randomness of the attack), available in WESTLAW, Prosc Database; see also *Hate Crimes Preven-*

These tragic ramifications, however, do not cease with the victim. On the contrary, a hate crime's effect often migrates throughout an entire surrounding community, as most notably evidenced by the numerous church arsons committed within the past year that have propagated widespread apprehension among many southern congregations.⁶⁷ The occurrence of such prejudicial crimes often leads many members of a community to dissociate from one another.⁶⁸ Whereas some community members may decide to migrate from an area because of a hate crime, others are left wondering if many of their neighbors share the same views as the attacker.⁶⁹ In this way, hate crimes can com-

tion Act of 1998: Hearings on S. 1529 Before the Senate Comm. on the Judiciary, 105th Cong. (1998) (testimony of Jack McDevitt, Professor at Northeastern University) (recognizing that victims feel incredibly vulnerable "because they carry with them the cause of their victimization"), available in 1998 WL 12763004. Professor McDevitt notes that as a criminologist he is usually able to help victims of *non-bias* crimes change their lifestyle to help "reduce the likelihood that a similar victimization will occur in the future." *Id.* For example, Professor McDevitt may recommend that victims change their route to work or obtain additional security for their home. *See id.* However, a victim who is attacked because of a personal characteristic cannot easily reduce the likelihood that a similar incident will occur. *See id.*; see also 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, 262-63 (1991) (illustrating that targeted individuals feel vulnerable and helpless with respect to preventing future attacks); Elizabeth A. Pendo, Recent Development, *Recognizing Violence Against Women: Gender and the Hate Crimes Statistics Act*, 17 HARV. WOMEN'S L.J. 157, 160 (1994) (explaining that a sense of vulnerability and fear accompanies hate crimes because victims feel future attacks can not be prevented).

67. See Robert M. Press, *Church Arsons Continue—Concern Oddly Low*, CHRISTIAN SCI. MONITOR, Jan. 26, 1999, at 11 (noting that the National Church Arson Task Force investigated 114 church arsons through September of 1998), available in 1999 WL 5376576; see also Carolyn S. Carter, *Church Burning in African American Communities: Implications for Empowerment Practice*, SOC. WORK, Jan. 1, 1999, at 62 (discussing the increase of African-American churches burned during 1995-96), available in 1999 WL 11336938; Jim McKinnon, *Arson Wrecks a Fifth Church: First Baptist in Elizabeth Township Takes \$100,000 Hit*, PITT. POST-GAZETTE, Feb. 26, 1998, at A1 (listing churches which were fire bombed during January and February of 1998), available in 1998 WL 5235541.

68. See Lu-in Wang, *The Transforming Power of "Hate": Social Cognition Theory and the Harms of Bias-Related Crime*, 71 S. CAL. L. REV. 47, 82 (1997) (noting that a victim's social environment changes in an unfavorable direction because of the way others treat and view them after an attack).

69. *See id.* (indicating that hate crime victims lose trust in society); see also *Hate Crimes Prevention Act of 1998: Hearings on S. 1529 Before the Senate Comm. on the Judiciary*, 105th Cong. (1998) (testimony of Jack McDevitt, Professor at Northeastern University) (explaining that "[v]ictims wonder if others in the community share the offenders' bigotry and also want the victim to leave"), available in 1998 WL 12763004; Lori A. Spillane, *Hate Crimes: Violent Intolerance*, PROSECUTOR, Aug. 1995, at 23-24 (relating that community members often wonder how widespread the hatred and bigotry is and how many of their neighbors want them to leave), available in WESTLAW, Prosc Database.

pel minority groups to self-associate, thereby reversing the process of integration.⁷⁰

Along the same line, criminologists have interpreted hate crimes as “message crimes,” or crimes intended to “send a message that members of a certain [group] are not wanted.”⁷¹ Oftentimes, hate-motivated attackers travel outside of their own communities in a cold, calculating manner⁷² as part of a plan to find and intimidate victims.⁷³ One example of such a message crime concerns the tragic incident where a white man murdered a single African-American mother without any provocation.⁷⁴ That man had carried in his wallet his message, a mock license that read, “License To Hunt Or Kill Niggers, With Or Without Dogs.”⁷⁵ Message crimes like this one have an impact on a surrounding community by spreading feelings of vulnerability and fear throughout.⁷⁶ As Marguerite Angelari points out, the statement “I’m going to get you bitch” scrawled

70. See S. 1529, 105th Cong. (1997) (finding that hate violence affects interstate commerce “by . . . forcing [members of targeted groups] to move across State lines to escape the incidence or risk of [hate] violence”); 135 CONG. REC. S2,378-01 (daily ed. Mar. 8, 1989) (statement of Sen. Simon) (explaining that hate crimes “[make] members of targeted communities fearful, angry and suspicious of other groups—and of the power structure that is supposed to protect them,” which in turn “can damage the fabric of our society and fragment communities” (quoting Jess N. Hordes & Michael Lieberman, *Time to Target Hate Crimes*, WASH. JEWISH WEEK, Mar. 2, 1989)).

71. *Hate Crimes Prevention Act of 1998: Hearings on S. 1529 Before the Senate Comm. on the Judiciary*, 105th Cong. (1998) (testimony of Jack McDevitt, Professor at Northeastern University), available in 1998 WL 12763004.

72. See *id.*; see also Marc Lieberman et al., *The Case for Hate Crime Legislation*, ARIZ. ATT’Y, Mar. 1996, at 14 (condemning the murder of Lorna Adcock, who was attacked and murdered without provocation by a white man), available in WESTLAW, AZATT Database. Lieberman also tells of other incidents of unprovoked hate crimes. See *id.* (describing incidence where, for example, the attackers “acted out of the perverted belief that people of color are subhuman garbage that must be cleansed from the Earth”).

73. See S. 622, 106th Cong. § 2(5) (1999); H.R. 1082, 106th Cong. § 2(5) (1999) (finding that perpetrators cross state lines in the commission of offenses); 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) (acknowledging that perpetrators follow and stalk unwary victims); see also GARY DAVID COMSTOCK, *VIOLENCE AGAINST LESBIANS AND GAY MEN* 219 n.29 (1991) (quoting a gay and lesbian community liaison working with a San Francisco Police Department, who said that attackers of homosexuals “are most often out-of-town toughs who come to the city expressly to hunt homosexuals, or city residents resentful of homosexuals sharing their neighborhoods and public transportation”).

74. See Marc Lieberman et al., *The Case for Hate Crime Legislation*, ARIZ. ATT’Y, Mar. 1996, at 14 (noting that the man shouted racial slurs and then shot the African-American woman twice in the chest as she walked by his doorway with her son), available in WESTLAW, AZATT Database.

75. *Id.* (emphasis omitted).

76. See *id.* (indicating that hate crimes usually injure the whole community).

on the door of a woman's home stigmatizes not only the targeted victim, but also every woman in the community.⁷⁷

The sickening nature of hate crimes, which in truth amounts to nothing more than hunting for humans,⁷⁸ has led both the federal and state governments to act.⁷⁹ The legislation enacted, however, has been criticized as not going far enough to punish malicious offenders severely and to prevent the lasting effects of hate crimes left on both victims and their communities.

C. Existing Legislation

1. General Categories of Hate Crime Legislation

Generally, hate crime legislation can be divided into two categories: bias-motivated violence statutes and penalty enhancement provisions.⁸⁰

77. See Marguerite Angelari, *Hate Crime Statutes: A Promising Tool for Fighting Violence Against Women*, 2 AM. U. J. GENDER & L. 63, 86 (1994) (analogizing the term "bitch" to the term "nigger" to argue that "bitch," like "nigger," demonstrates aggression against not only the victim but also a group of the population). However, an opposing argument is that the existence of a prior relationship between the victim and the attacker, which is common in cases of gender bias, removes any impact on the community at large. See *id.* at 85 (noting the refusal of some commentators to recognize the interchangeability argument when a prior relationship exists between the woman and her attacker (citing CENTER FOR WOMEN POLICY STUDIES, *VIOLENCE AGAINST WOMEN AS BIAS MOTIVATED HATE CRIME: DEFINING THE ISSUES* 12-13 (1991))). Angelari counters that argument by explaining that "bitch . . . is a derogatory term that applies to a sub-group of the population" much like other offensive terms. *Id.* at 86.

78. See 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) (identifying hate crimes as crimes involving "human prey").

79. See, e.g., 18 U.S.C. § 245 (1994) (criminalizing certain offenses committed because of the victim's race, religion, color, or national origin); 28 U.S.C. § 994 note (1994) (providing a penalty enhancement for crimes committed because of the victims "race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation"); FLA. STAT. ANN. § 775.085 (West Supp. 1998) (enhancing criminal liability if the offense was committed based on a person's "race, color, ancestry, ethnicity, religion, sexual orientation, national origin, mental or physical disability, or advanced age"); 720 ILL. COMP. STAT. ANN. 5/12-7.1 (West 1993 & Supp. 1998) (providing criminal penalties for hate crimes based upon "race, color, creed, religion, ancestry, gender, sexual orientation, physical or mental disability, or national origin"); MISS. CODE ANN. § 99-19-301 (1994) (increasing the criminal penalty for an offense if it "was committed because of the actual or perceived race, color, ancestry, ethnicity, religion, national origin or gender of the victim"); S.D. CODIFIED LAWS § 22-19B-1 (Michie 1998) (penalizing certain crimes "because of that person's race, color, religion, ancestry, or national origin"). *But see* Howard Fineman, *Echoes of a Murder in Wyoming*, NEWSWEEK, Oct. 26, 1998, at 43 (indicating that "Wyoming is one of 10 states with no hate-crimes law at all").

80. See Jeannine Bell, Note, *Policing Hatred: Police Bias Units and the Construction of Hate Crime*, 2 MICH. J. RACE & L. 421, 431-32 (1997) (discussing bias-motivated vio-

A bias-motivated violence statute provision functions independently, meaning that it, in and of itself, prohibits and punishes crimes based upon certain types of prejudice.⁸¹ Specifically, a defendant charged under a bias-motivated violence statute is charged with a hate crime as well as with an underlying offense such as assault or battery.⁸² As a result, under the "bias-motivated" option, prejudicial intent must be proven beyond a reasonable doubt at the guilt-innocence stage of trial.

The second type of hate crime legislation, sentencing enhancement provisions, do not function independently. By contrast, they allow the judge to determine during the punishment phase whether a particular crime resulted from a prejudicial motivation, and if so, whether an enhanced punishment is warranted.⁸³ The Anti-Defamation League ("ADL") model statute illustrates such a penalty enhancement law, as it "bumps up" a penalty to at least one degree higher than the underlying offense.⁸⁴

lence and intimidation statutes); Terry A. Maroney, Note, *The Struggle Against Hate Crime: Movement at a Crossroads*, 73 N.Y.U. L. REV. 564, 590 (1998) (examining bias-motivated violence and enhancement statutes).

81. See Eric Rothschild, *Recognizing Another Face of Hate Crimes: Rape As a Gender-Bias Crime*, 4 MD. J. CONTEMP. LEGAL ISSUES 231, 239 (1993) (defining the procedural aspects of hate crime laws such as "penalty bump-ups" and "separate crimes").

82. See *id.*

83. See Jeannine Bell, Note, *Policing Hatred: Police Bias Units and the Construction of Hate Crime*, 2 MICH. J. RACE & L. 421, 431-32 (1997) (discussing bias-motivated violence and intimidation statutes); Terry A. Maroney, Note, *The Struggle Against Hate Crime: Movement at a Crossroads*, 73 N.Y.U. L. REV. 564, 590-91 (1998) (defining bias-motivated violence and enhancement statutes); see also R.I. GEN. LAWS § 12-19-38 (1998) (requiring the judge to determine beyond a reasonable doubt whether the offense was a hate crime).

84. See Anti-Defamation League, *1999 Hate Crimes Law* (visited Mar. 29, 1999) <http://www.adorg/99hatecrime/text_legis.htm1>. The model legislation also includes other provisions dealing with institutional vandalism, civil actions for institutional vandalism, and bias-motivated crimes, as well as bias crime reporting and training. See *id.* (outlining the various provisions included in the ADL's model hate crimes legislation); see also Eric Rothschild, *Recognizing Another Face of Hate Crimes: Rape As a Gender-Bias Crime*, 4 MD. J. CONTEMP. LEGAL ISSUES 231, 239 (1993) (explaining that "bump-ups prescribe additional punishment for the underlying offense"). For example, if the underlying offense is a second-degree felony, the hate crime offender would be "bumped-up" to a first degree felony. Cf. TEX. PEN. CODE ANN. § 12.47 (Vernon Supp. 1999) (increasing the punishment of an offense if it is committed because of bias or prejudice "to the punishment prescribed for the next-highest category of offense").

2. Federal Legislation⁸⁵

Although the federal government has historically recognized the need to quash threats of racially motivated violence,⁸⁶ Congress first began to combat hate crimes in 1968 by enacting Section 245(b)(2) of Title 18 of the United States Code.⁸⁷ Subsequently, Congress took further steps toward deterring hate crimes by passing the Hate Crime Statistics Act of 1990⁸⁸ and the Hate Crimes Sentencing Enhancement Act of 1994.⁸⁹ Recently, Congress has considered additional remedial legislation, in particular the proposed Hate Crimes Prevention Act of 1999.⁹⁰ Overall, these four pieces of legislation seek to halt and remedy the dangers imposed by hate crimes.

a. The First Attack on Hate Crimes: 18 U.S.C. § 245

In its first attack on hate crimes, Congress enacted Section 245 of Title 18 of the United States Code as part of the Civil Rights Act of 1968.⁹¹ Section 245, as the United States' principal federal hate crime statute, prohibits interference by force or threat of force with any person "because of his race, color, religion or national origin and because he is or has been" participating in a federally protected right or benefit.⁹² Accordingly, in order to establish a violation of Section 245, a federal prosecutor must prove: (1) the perpetrator's racial animus during the commission of the offense,⁹³ and (2) the "jurisdictional requirement" of

85. The authors note that there are many types of hate crime laws, all of which have some interdependence and are designed to combat hate crimes. These laws come in the shape of civil rights laws, reporting statutes, enhancement laws, and separate hate crimes. However, this Note focuses primarily on the recent attempts by the United States Congress to combat hate crimes.

86. See Civil Rights Act of 1871 § 1, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983 (1994)) (providing a civil remedy for any deprivation of "rights, privileges, immunities secured by the Constitution and laws" by any person under color of state law); see also Todd E. Pettys, *The Intended Relationship Between Administrative Regulations and Section 1983's "Laws,"* 67 GEO. WASH. L. REV. 51, 51 (1998) (noting that the Civil Rights Act of 1871 has been popularly called the Klu Klux Klan Act and also the Antilynching Act).

87. 18 U.S.C. § 245 (1994).

88. 28 U.S.C. § 534 note (1994).

89. 8 U.S.C. § 994 note (1994).

90. See S. 622, 106th Cong. (1999); H.R. 1082, 106th Cong. (1999) (proposing changes to Section 245 that would expand the federal government's role in deterring hate crime).

91. Pub. L. No. 90-284, 82 Stat. 73 (1968) (codified in part at 18 U.S.C. § 245 (1994)); see Jeannine Bell, Note, *Policing Hatred: Police Bias Units and the Construction of Hate Crime*, 2 MICH. J. RACE & L. 421, 428 (1997) (noting that Congress introduced Section 245 in the Civil Rights Act in response to retaliation against civil rights workers).

92. 18 U.S.C. § 245(b)(2).

93. See *id.* (listing as prohibited offenses willfully injuring, intimidating, or interfering with, or attempts to injure, intimidate or interfere with any person).

the crime's relation to a federal right or benefit.⁹⁴ Section 245 enumerates six federally protected activities that will satisfy the jurisdictional requirement: (1) enrolling in or attending a public school or public college; (2) participating in or enjoying a benefit, service, privilege, program, facility or activity provided or administered by a state government; (3) applying for or enjoying employment; (4) serving as a grand or petit juror of any state; (5) traveling in or using any facility of interstate commerce; or (6) enjoying the goods or services of certain places of accommodation.⁹⁵ Thus, to prosecute a defendant under Section 245, the government must prove that the accused committed the crime not only because of the victim's race or religious beliefs, but also because, for example, the victim was attending a public school, or because the victim was eating at a certain restaurant.⁹⁶ Only once the prosecutor satisfies both elements does Section 245 confer the right to prosecute the accused.⁹⁷

Although Section 245 provides protection from hate crimes, it suffers from two flaws. First, the statute forces prosecutors to prove at trial a nexus between the hate crime and a specified federally protected activity, which not only is difficult but also limits the coverage that the statute can provide.⁹⁸ Secondly, the federal statute took no steps to penalize offenders who committed gender, disability, or sexual orientation-based hate

94. *See id.* (requiring the victim to be participating in a delineated list of activities before a basis for federal prosecution is provided).

95. *See id.*

96. *See id.* (prohibiting violence against any person "because of" his or her involvement with one of the enumerated activities); *Hate Crimes Prevention Act of 1998: Hearings on S. 1529 Before the Senate Comm. on the Judiciary*, 105th Cong. (1998) (testimony of Eric H. Holder, Jr., Deputy Attorney General) (explaining that 18 U.S.C. § 245(b)(2) prohibits certain conduct committed "because of" participation "in any of six federally 'protected activities'"), available in 1998 WL 12762065; Jeannine Bell, Note, *Policing Hatred: Police Bias Units and the Construction of Hate Crime*, 2 MICH. J. RACE & L. 421, 428 (1997) (recognizing that Section 245 allows the prosecution of those who retaliate against persons who exercise protected federal rights).

97. 18 U.S.C. § 245(b) (1994). This section states, in part, that:

[Violators] shall be fined under this title, or imprisoned *not more than one year*, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire shall be fined under this title, or imprisoned *not more than ten years*, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title or imprisoned *for any term of years or for life, or both, or may be sentenced to death.*

Id. (emphasis added).

98. *See id.* § 245(b)(2) (giving protection only where a protected activity accompanies the race- or religion-based crime).

crimes.⁹⁹ Thus, while at a distance Section 245 appears to be a solid response to the need to combat hate crimes, upon closer inspection, it forces the Justice Department to fight hate crimes “with one hand tied behind its back.”¹⁰⁰

b. Hate Crime Statistics Act of 1990

In an effort to determine the exact depth of hate violence in the United States, the 101st Congress passed the Hate Crime Statistics Act (“Statistics Act”) of 1990.¹⁰¹ The groundbreaking Statistics Act requires the Attorney General of the United States to collect data on crimes “that manifest evidence of prejudice based on race, religion, sexual orientation or ethnicity.”¹⁰² The purpose of the Statistics Act is to “[l]et Congress and law enforcement officials know whether Hate Crimes are in fact on the rise” and to allow policymakers to innovate “effective strategies to combat bigotry and racism.”¹⁰³ In this regard, the Statistics Act provides Congress access to an enormous compilation of data. Not only does this enable Congress to assess the effectiveness of existing hate crime legislation, but the reports generated from the Statistics Act have also been useful in sparking public awareness of the frequency and nature of bias-motivated crimes.¹⁰⁴

Nevertheless, the Statistics Act plays a very limited role in the substantive deterrence against hate crimes. For one, the Statistics Act is purely administrative and, because it concerns itself only with the collection of

99. *See id.* (limiting the prohibition against violence to violence that is motivated by race, color, religion or national origin).

100. 143 CONG. REC. S12,576-02 (daily ed. Nov. 13, 1997) (statement of Sen. Kennedy). Senator Kennedy noted that 18 U.S.C. § 245 is inadequate and hinders the prosecution of violence because it contains “anachronistic and onerous” jurisdictional requirements and fails to provide protection from violence based on such things as gender and disability. *See id.*; *see also Morning Edition* (NPR radio broadcast, July 9, 1998) (explaining that because of the “federally protected right” language of Section 245, the Justice Department, in order to fully prosecute hate crimes, has had to argue that simply walking down a public street is a protected activity), *available in* 1998 WL 3307969.

101. Pub. L. No. 101-275, 104 Stat. 140 (codified at 28 U.S.C. § 534 note (1994)).

102. 135 CONG. REC. S2,378-01 (daily ed. Mar. 8, 1989) (quoting Jess N. Hordes & Michael Lieberman, *Time to Target Hate Crimes*, WASH. JEWISH WEEK, Mar. 2, 1989). Subsequent to the enactment of the Statistics Act in 1990, the Attorney General delegated the responsibility of collecting data to the Uniform Crime Reports division of the FBI. *See CRIMINAL JUSTICE INFO. SERVS. DIV., FBI, HATE CRIME STATISTICS 1996*, at 1 (1997).

103. 135 CONG. REC. S2,378-01 (daily ed. Mar. 8, 1989) (statement of Sen. Simon).

104. *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) (recognizing the Statistics Act’s ability to raise public awareness as to the extent of hate crimes).

data, it does not create enhancement penalties for hate crimes.¹⁰⁵ Secondly, the Statistics Act suffers from two deficiencies that dilute its effectiveness as a reporting tool: (1) the lack of reporting requirements, and (2) the ambiguity of the definition of "hate crime."

Because the Attorney General does not require local law enforcement agencies to report hate crimes, such incidents are vastly underreported.¹⁰⁶ Although all law enforcement agencies report general crime data to the FBI, only sixty-seven percent of them actually collect and report hate crime data.¹⁰⁷ In addition, problems with the reporting process itself, such as the lack of further investigation to determine if a general assault was hate-motivated,¹⁰⁸ impact the accuracy of hate crime statistics.¹⁰⁹ The deficiencies in the reporting process are further magnified because victims often do not report hate crimes,¹¹⁰ fearing retaliation or embar-

105. See 28 U.S.C. § 534 note (1994) (providing only for the collection of data).

106. See CRIMINAL JUSTICE INFO. SERVS. DIV., FBI, HATE CRIME STATISTICS 1996, at 1 (1997) (indicating that agency reporting of hate crimes is voluntary); Vince Horiuchi, *Report of Hate Crimes Being on Decline Is Deceiving, Say Police*, SALT LAKE TRIB., Nov. 16, 1997, at B1 (discounting the accuracy of hate crime data and noting that statistics show a significantly lower number of hate crimes because law enforcement officers have difficulty recognizing these types of attacks), available in 1997 WL 15236496.

107. See CRIMINAL JUSTICE INFO. SERVS. DIV., FBI, HATE CRIME STATISTICS 1996, at 1-2 (1997) (explaining that the FBI's 1996 statistics on hate crimes contain figures from only 11,354 of the more than 17,000 reporting agencies).

108. See H.R. 188, 105th Cong. (1997) (explaining that, at the state, federal, and local levels, law enforcement officials report inconsistent, non-uniform training and investigation of bias-motivated crimes); Naftali Bendavid, *U.S. Seeks to Widen Fight on Hate Crimes: Justice Officials Cite Underreporting*, CHI. TRIB., Jan. 9, 1998, at 4 (explaining that some police are reluctant to report hate crimes because they dislike trying to determine whether a crime was motivated by bigotry or some other factor), available in 1998 WL 2812631; Maro Robbins, *Hate Crimes in San Antonio Appear Uncommon*, SAN ANTONIO EXPRESS-NEWS, Oct. 20, 1998, at 13A (indicating that local authorities may fail to effectively identify hate crimes); see also Jeannine Bell, Note, *Policing Hatred: Police Bias Units and the Construction of Hate Crime*, 2 MICH. J. RACE & L. 421, 453 (1997) (illustrating how police discretion can effectively nullify hate crime laws through non-enforcement).

109. See B. Kay Shafer, *Hate Crimes and Other Practical Battles*, 5 S. CAL. REV. L. & WOMEN'S STUD. 131, 133 (1995) (noting that problems with reporting can be attributed to patrol officers); Jeannine Bell, Note, *Policing Hatred: Police Bias Units and the Construction of Hate Crime*, 2 MICH. J. RACE & L. 421, 453-55 (1997) (indicating that police officers have a great deal of discretion in reporting crimes and may choose not to classify an incident as a hate crime even though signs of bias motivation are present).

110. See Vince Horiuchi, *Report of Hate Crimes Being on Decline Is Deceiving, Say Police*, SALT LAKE TRIB., Nov. 16, 1997, at B1 (noting the disgust and humiliation associated with a bias motivated crime), available in 1997 WL 15236496. Horiuchi further notes that statistics show a significantly lower number of hate crimes because law enforcement officers have difficulty recognizing these types of attacks. See *id.*; see also B. Kay Shafer, *Hate Crimes and Other Practical Battles*, 5 S. CAL. REV. L. & WOMEN'S STUD. 131, 132 (1995) (identifying the fear the gay or lesbian community has of being shunned if they

rassment.¹¹¹ According to one expert, many homosexual victims “fear that disclosing one’s sexual orientation would become public information and jeopardize” relations with one’s family, friends or business associates.¹¹²

A second shortcoming to the Statistics Act is that the definition of “hate crime” is somewhat misleading. Within the definition of “hate crime,” the Statistics Act includes not only race, but also religion, ethnicity, sexual orientation, and disability.¹¹³ However, under Section 245, federal prosecutors currently cannot charge defendants who commit crimes based upon sexual orientation or disability.¹¹⁴ An interesting paradox therefore occurs, whereby the government considers certain attacks to be hate crimes but then restricts federal prosecutors’ authority to prosecute them as such.¹¹⁵

c. Hate Crimes Sentencing Enhancement Act

In 1994, following the enactment of the Statistics Act, Congress passed the Hate Crimes Sentencing Enhancement Act.¹¹⁶ The purpose of this Act was to require the United States Sentencing Commission to promulgate “guidelines to provide sentencing enhancements of not less than 3

report a hate crime and noting “[t]he environment of most law enforcement agencies is incredibly homophobic, not unlike the military”); Anthony S. Winer, *Hate Crimes, Homosexuals, and the Constitution*, 29 HARV. C.R.-C.L. L. REV. 387, 413 (1994) (describing various reasons that hate crimes against homosexuals are underreported including: fear, exposure, rejection, social stigmatization, loss of employment, and child custody).

111. See B. Kay Shafer, *Hate Crimes and Other Practical Battles*, 5 S. CAL. REV. L. & WOMEN’S STUD. 131, 132 (1995) (pointing out the fear that gays or lesbians have of being shunned if they report a hate crime); Anthony S. Winer, *Hate Crimes, Homosexuals, and the Constitution*, 29 HARV. C.R.-C.L. L. REV. 387, 413 (1994) (suggesting various reasons why hate crimes against homosexuals are underreported, including fear and loss of employment); Vince Horiuchi, *Report of Hate Crimes Being on Decline Is Deceiving, Say Police*, SALT LAKE TRIB., Nov. 16, 1997, at B1 (noting the disgust and humiliation associated with a bias-motivated crime), available in 1997 WL 15236496.

112. Mimi Ko Cruz, *Countywide Panel Urges Lesbians to Report Hate Crimes*, L.A. TIMES, Aug. 15, 1997, at B3 (quoting Rusty Kennedy, Executive Director of the Orange County Human Relations Commission), available in 1997 WL 2238306.

113. See 28 U.S.C. § 534 note (1994) (requiring the Attorney General to acquire data “about crimes that manifest evidence of prejudice based on race, religion, disability, sexual orientation, or ethnicity” (emphasis added)).

114. See 18 U.S.C. § 245(b)(2) (1994) (limiting protection to offenses based on race, color, religion or national origin).

115. Compare 18 U.S.C. § 245(b)(2) (1994) (criminalizing bias-motivated violence based on race, color, religion, or national origin), with 28 U.S.C. § 534 note (1994) (gathering statistics of crimes based on race, religion, and national origin, as well as disability and sexual orientation).

116. Pub. L. No. 103-322, 108 Stat. 1796 (codified in part at 28 U.S.C. § 994 note (1994)).

offense levels for . . . hate crimes."¹¹⁷ In 1995, the Sentencing Commission complied with Congress' directive, implementing a three-level offense increase for hate crimes.¹¹⁸

Notably, the Sentencing Enhancement Act also broadly defines the term "hate crime" as a crime in which the defendant intentionally selects a victim because of the victim's actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation.¹¹⁹ However, the Sentencing Enhancement Act, like all federal sentencing guidelines, applies only to cases tried in federal court. Consequently, unless the federal government exercises jurisdiction over the offense, the Sentencing Enhancement Act does not apply.

If prosecutors obtain jurisdiction over hate crimes through the principal federal hate crime statute, Section 245, they are subject to the statute's burdensome jurisdictional requirement.¹²⁰ In addition to the jurisdictional requirement, Section 245 also limits the types of crimes that are protected.¹²¹ Specifically, Section 245 does not provide for prosecution of hate crimes based on the victim's sexual orientation, gender, or disability.¹²² As a result, the Sentencing Enhancement Act could enhance punishment for crimes premised upon sexual orientation, but because Section 245 does not provide federal prosecutors with the initial jurisdiction to bring charges, the enhancement protections cannot be used unless prosecutors obtain federal jurisdiction in another manner.¹²³

117. 28 U.S.C. § 994 note (1994).

118. See U.S. SENTENCING GUIDELINES MANUAL § 3A1.1(a) (1998). This provision became effective November 1, 1987. See *id.* The provision states:

3A1.1. HATE CRIME MOTIVATION OR VULNERABLE VICTIM

- (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 3 levels.

Id. (emphasis omitted).

119. See 28 U.S.C. § 994 note (1994).

120. See 18 U.S.C. § 245(b)(2) (1994) (requiring the victim to have been engaged in certain delineated federally protected activities before prosecution can be sought under Section 245).

121. See *id.*; see also *supra* note 95 and accompanying text.

122. See 18 U.S.C. § 245(b)(2) (1994) (providing only for prosecution of crimes based on a person's race, color, national origin, or religion).

123. Compare *id.* (requiring that the crime be based on a person's race, color, national origin, or religion), with 28 U.S.C. § 994 note (1994) (providing a penalty enhancement for crimes based on "race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation").

Regardless of the deficiencies and inconsistencies, Section 245, the Statistics Act, and the Sentencing Enhancement Act have been steps in the right direction. Each piece of legislation has sought to eradicate, in some form, the existence of hate crime offenses. Although not uniform, state legislation has also been instrumental in ensuring that this laudable goal can be achieved in reality.¹²⁴

3. State Legislation

Despite the pervasive impact of violence motivated by hate, only five states had passed legislation dealing with hate crimes before 1980.¹²⁵ However, due to increased awareness and the development of model statutes,¹²⁶ a majority of states now employ sentencing enhancement legislation, and almost every state uses some form of legislation to redress bias-motivated offenses.¹²⁷

124. See, e.g., FLA. STAT. ANN. § 775.085 (West Supp. 1998) (enhancing criminal liability if the offense was committed based on a person's "race, color, ancestry, ethnicity, religion, sexual orientation, national origin, mental or physical disability, or advanced age"); 720 ILL. COMP. STAT. ANN. 5/12-7.1 (West 1993 & Supp. 1998) (providing criminal penalties for hate crimes based upon "race, color, creed, religion, ancestry, gender, sexual orientation, physical or mental disability, or national origin"); MISS. CODE ANN. § 99-19-301 (1994) (increasing the criminal penalty for an offense if it "was committed because of the actual or perceived race, color, ancestry, ethnicity, religion, national origin or gender of the victim"); S.D. CODIFIED LAWS § 22-19B-1 (Michie 1998) (penalizing certain crimes based on the victim's "race, color, religion, ancestry, or national origin"); see also Anti-Defamation League, *1999 Hate Crimes Laws* (visited Mar. 29, 1999) <http://www.adl.org/frames/front_99hatecrime.html> (reflecting the varied approaches of states to hate crimes).

125. See Lori A. Spillane, *Hate Crimes: Violent Intolerance*, PROSECUTOR, Aug. 1995, at 20, 21 (recognizing that although only five states had any type of bias-crime legislation in 1980, at least thirty-one states possessed such legislation by 1995), available in WESTLAW, Prosc Database.

126. See ANTI-DEFAMATION LEAGUE, HATE CRIME STATUTES: A 1991 STATUS REPORT 2-5 (1991) (describing model hate crime legislation and noting that over half of all state crime legislation is based on or similar to the model statute); Terry A. Maroney, Note, *The Struggle Against Hate Crime: Movement at a Crossroads*, 73 N.Y.U. L. REV. 564, 589-93 (1998) (detailing the development of a "hate crimes jurisprudence" and noting the development of model statutes).

127. See Marguerite Angelari, *Hate Crime Statutes: A Promising Tool for Fighting Violence Against Women*, 2 AM. U. J. GENDER & L. 63, 68 (1994) (observing that most states have enacted hate crime statutes); Anti-Defamation League, *1999 Hate Crimes Laws* (visited Mar. 29, 1999) <http://www.adl.org/frames/front_99hatecrime.html> (showing that most states follow the ADL model legislation). But see Howard Fineman, *Echoes of a Murder in Wyoming*, NEWSWEEK, Oct. 26, 1998, at 42-43 (mentioning that ten states have no hate crime laws at all).

For example, since 1993, Texas has sought to “encourage tolerance in our increasingly diverse state and strengthen our trust in one another.”¹²⁸ Correspondingly, the Texas Penal Code and Code of Criminal Procedure provide for enhanced penalties for offenses “if the court determines that the defendant intentionally selected the victim primarily because of the defendant’s bias or prejudice *against a group*”¹²⁹ Notably, in crafting this legislation, conservative legislators wished to exclude hate crimes based upon sexual orientation *and* maintain the prohibition of deviant sexual conduct found in the Texas Penal Code.¹³⁰ To achieve both goals, the legislators opted for the generic language of “against” a group.¹³¹

The Texas enhancement segment is found in Section 12.47 of the Penal Code.¹³² It provides that “[i]f the judge or jury, whichever assesses punishment . . . , makes an affirmative finding under Article 42.014, Code of Criminal Procedure, in the punishment phase of the trial of an offense . . . the punishment for the offense is increased to the punishment prescribed for the next highest category of offense.”¹³³ The statute takes exception for first-degree felonies and Class A misdemeanors; in the case of Class A misdemeanors, the Code imposes a minimum term of confinement of 180 days.¹³⁴

In contrast to the Texas provision, the Delaware Criminal Code provides enhanced penalties when an individual intentionally “[s]elects the victim because of the victim’s race, religion, color, disability, sexual orientation, national origin or ancestry.”¹³⁵ Specifically, Delaware requires that any class A, B or C misdemeanor determined to be a hate crime be

128. David Deitchman, Comment, *Limits on the Right to Hate: A Look at the Texas Hate Crime Act*, 46 BAYLOR L. REV. 399, 401 (1994) (quoting Sen. Rodney Ellis, *Texas Must Not Let Hate Crime Go Unpunished*, 56 TEX. B.J. 1146, 1146 (1993)).

129. TEX. CODE CRIM. PROC. ANN. art. 42.014 (Vernon Supp. 1999).

130. See David Todd Smith, Comment, *Enhanced Punishment Under the Texas Hate Crimes Act: Politics, Panacea, or Pathway to Hell?*, 26 ST. MARY'S L.J. 259, 276 (1994) (recognizing the “Texas Legislature’s reluctance” to extend protection “to persons whose sexual orientations differ from the norm”).

131. See TEX. PEN. CODE ANN. (Vernon Supp. 1999) (permitting enhanced penalties for prejudice against a group); Lisa Teachey, *Lawyers, Lawmakers, Activists Debate State’s Hate-Crimes Law*, HOUS. CHRON., Oct. 16, 1993, at A40 (noting Senator Ellis’ statement that the statute uses broad language, “because [the statute] would not have passed if it referred to gender or sexual orientation”); available in 1993 WL 9627095; see also David Todd Smith, Comment, *Enhanced Punishment Under the Texas Hate Crimes Act: Politics, Panacea, or Pathway to Hell?*, 26 ST. MARY'S L.J. 259, 276 (1994) (indicating the reluctance of the Texas Legislature to remove provisions criminalizing deviate sexual behavior and to extend protection to homosexuals).

132. See TEX. PEN. CODE ANN. § 12.47 (Vernon Supp. 1999).

133. *Id.*

134. See *id.* The punishment range for first-degree felonies is not enhanced. Cf. *id.*

135. DEL. CODE ANN. tit. 11, § 1304(a)(2) (1995 & Supp. 1998).

upgraded to a class G felony.¹³⁶ In addition, class C to class G felonies are bumped up to “one grade higher than the underlying offense.”¹³⁷ Further, Delaware requires the minimum jail sentences be doubled in the case of class A and B felonies.¹³⁸ Although the Delaware provision is quite broad, enhancing penalties for crimes against gays and the disabled, it specifically excludes hate crimes perpetrated against an individual because of gender.¹³⁹

As the distinctions between the Texas and the Delaware statutes indicate, a lack of uniformity exists among state hate crime provisions. In fact, only twenty-one states have hate crime legislation that covers sexual orientation in some way.¹⁴⁰ Likewise, only twenty-two states include disability within their hate crime legislation.¹⁴¹ This lack of uniformity among states in terms of the groups protected is one reason that additional federal legislation is needed.¹⁴²

Another reason supporting the passage of additional federal legislation is the lack of enforcement at the state level.¹⁴³ For example, Smith County first used Texas’ hate crime law in 1998, despite the statute being enacted in 1993.¹⁴⁴ Problems of uniformity, along with the jurisdictional and substantive deficiencies of the current federal hate crime legislation,

136. *See id.* § 1304(b)(2) (1995).

137. *See id.* § 1304(b)(3) (1995).

138. *See id.* § 1304(b)(4) (1995).

139. *See id.* § 1304(a)(2) (1995 & Supp. 1998) (including gender).

140. *See* Anti-Defamation League, *1999 Hate Crimes Laws* (visited Mar. 29, 1999) <<http://www.adl.org/99hatecrime/provisions.html>>. These states addressing sexual orientation-motivated crimes include Arizona, California, Connecticut, the District of Columbia, Delaware, Florida, Illinois, Indiana, Louisiana, Maine, Massachusetts, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, Oregon, Rhode Island, Vermont, Washington, and Wisconsin. *See id.*

141. *See id.* The states covering disability-motivated crimes include Alabama, Alaska, Arizona, California, the District of Columbia, Delaware, Illinois, Indiana, Louisiana, Maine, Massachusetts, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, New York, Oklahoma, Rhode Island, Vermont, Washington, and Wisconsin. *See id.*

142. *Cf.* S. 622, 106th Cong. (1999); H.R. 1082, 106th Cong. (1999) (stating that “although many State and local authorities are now and will continue to be responsible for prosecuting the overwhelming majority of violent crimes . . . motivated by bias, Federal jurisdiction over certain violent crimes motivated by bias is necessary to supplement State and local jurisdiction and ensure that justice is achieved in each case”).

143. *Cf.* S. 622, 106th Cong. (1999); H.R. 1082, 106th Cong. (1999) (indicating that “the problem of hate crime is sufficiently serious, widespread, and interstate in nature as to warrant Federal assistance to States and local jurisdictions”).

144. *See Man Given 30-year Term Under ‘93 Hate-Crime Law*, HOUS. CHRON., Mar. 6, 1998, at 40 (indicating that the first use of the 1993 hate crime law in Smith County occurred in 1998), available in 1998 WL 3564443.

indicate that further steps must be taken by Congress in order to halt the current hate crime "epidemic."¹⁴⁵

III. THE NEED FOR ADDITIONAL FEDERAL LEGISLATION

A. Jurisdictional Deficiencies in Federal Hate Crime Legislation

Even though Congress has enacted Section 245 and the Sentencing Enhancement Act to fight hate crimes, concomitant jurisdictional requirements often obstruct the successful prosecution of hate crime offenders.¹⁴⁶ Section 245 provides the Justice Department with jurisdiction only when the hate crime interferes with a federally protected activity.¹⁴⁷ As such, in order for the Justice Department to prosecute a hate crime, the victim must be engaged in a federally protected activity at the time of the crime and the participation in the activity must be the reason for the crime.¹⁴⁸ For example, in 1993, the Justice Department was pre-

145. *But see, e.g.,* Steven G. Gey, *What if Wisconsin v. Mitchell Had Involved Martin Luther King, Jr.? The Constitutional Flaws of Hate Crime Enhancement Statutes*, 65 GEO. WASH. L. REV. 1014, 1014 (1997) (describing the *Mitchell* decision, which upheld a Wisconsin hate crime statute, as "deeply and irrevocably flawed"); James B. Jacobs & Jessica S. Henry, *The Social Construction of a Hate Crime Epidemic*, 86 J. CRIM. L. & CRIMINOLOGY 366, 366 (1996) (dismantling the perspective that additional hate crime legislation is needed); Thomas Sowell, *Backers of Hate-Crime Law Seeking Special Privileges*, SAN ANTONIO EXPRESS-NEWS, Oct. 27, 1998, at 7B (opining that hate crime "A" should not be treated differently than ordinary offense "B"); Daniel E. Troy, *Hate Crime Laws Make Some More Equal Than Others*, WALL ST. J., Oct. 19, 1998, at A27 (criticizing hate crime laws for criminalizing certain conduct more harshly than other conduct); George Will, *Current Laws Enough to Punish Hate Crimes*, SAN ANTONIO EXPRESS-NEWS, Oct. 19, 1998, at 13A (arguing that existing state laws are sufficient to combat hate crimes).

146. *See Hate Crimes Prevention Act of 1998: Hearings on S. 1529 Before the Senate Comm. on the Judiciary*, 105th Cong. (1998) (statement of Eric H. Holder, Jr., Deputy Attorney General) (noting that Section 245 is deficient because its narrowly defined protected activities often prevent the federal government from investigating and prosecuting hate crimes), available in 1998 WL 12762065; 143 CONG. REC. S12,576-02 (daily ed. Nov. 13, 1997) (testimony of Sen. Kennedy) (explaining the inadequacies of Section 245); *Morning Edition* (NPR radio broadcast, July 9, 1998) (stating that "[c]urrent laws are so restrictive that federal prosecutors have had to decline prosecution in many cases"), available in 1998 WL 3307969.

147. As discussed earlier, the statute enumerates six federally protected activities: (1) "enrolling in or attending any public school or public college," (2) "participating in or enjoying any benefit, service, privilege, program, facility or activity provided or administered by any State or subdivision thereof," (3) "applying for or enjoying employment . . .," (4) "serving or attending upon any court of any State in connection with possible service, as a grand or petit juror" (5) "traveling in or using any facility of interstate commerce," or (6) enjoying the goods or services of certain places of accommodation. 18 U.S.C. §§ 245(b)(2)(A)-(F) (1994).

148. *See* 18 U.S.C. § 245(b)(2) (establishing a jurisdictional requirement for the prosecution of hate crimes); *see also Hate Crimes Prevention Act of 1998: Hearings on S. 1529*

cluded from prosecuting two people who first robbed an African-American man and then set him on fire.¹⁴⁹ In that situation, there was no evidence that the victim was engaged in a federally protected activity at the time of the crime.¹⁵⁰ Similarly, in another case involving the murder of a minority victim, jurors who acquitted the defendant explained to the press that they had done so because they believed the victim had been shot only because he was a civil rights leader, not because he was using a motel, which is a federally protected activity.¹⁵¹

Thus, as one can see, by imposing this narrow jurisdictional requirement, Section 245's broad sweep is constrained, allowing numerous offenders to escape conviction under that provision.¹⁵² Moreover, the jurisdictional requirement altogether frustrates Congress' intent not only by preventing federal prosecutions, but also by giving rise to arbitrary and capricious results. For instance, prosecutors can meet the jurisdictional requirement if a violent hate-based rape occurs in a public school parking lot, but they will be unable to prosecute the same crime if it occurs across the street in a private lot.¹⁵³ Such an arbitrary result hardly serves as a deterrence against the commission of hate crimes, and in fact, suggests the need for additional legislation.

**B. *Substantive Deficiencies in Federal Hate Crime Legislation:
Lack of Coverage for Crimes Based on Sexual
Orientation, Gender, or Disability***

Although both the Statistics Act and the Sentencing Enhancement Act recognize more than race-based crimes,¹⁵⁴ Section 245 does not empower

Before the Senate Comm. on the Judiciary, 105th Cong. (1998) (statement of Eric H. Holder, Jr., Deputy Attorney General) (stating that prosecutors have been precluded from prosecuting many incidents of brutality and violence because they lacked jurisdiction under Section 245(b)(2)), available in 1998 WL 12762065.

149. *See Hate Crimes Prevention Act of 1998: Hearings on S. 1529 Before the Senate Comm. on the Judiciary*, 105th Cong. (1998) (statement of Eric H. Holder, Jr., Deputy Attorney General), available in 1998 WL 12762065.

150. *See id.*

151. *See id.*

152. *See id.* (concluding that the federally protected activity requirement often "either put[s] the case beyond the reach of federal prosecutors or ma[kes] federal prosecution extremely difficult").

153. *See id.* Similarly, although the federal government may prosecute a violent, racially-motivated hate crime that occurs in a grocery store in which video games are located, the federal government may not necessarily have jurisdiction if the crime occurs in a store lacking "amenities that would make the store a 'place . . . of entertainment.'" *Id.*

154. 28 U.S.C. § 534 note (1994) (including race, religion, disability, sexual orientation, and ethnicity); 28 U.S.C. § 994 note (1994) (explaining that the Act originally defined "hate crime" as "a crime in which the defendant intentionally selects a victim . . . because of the race, gender, disability, or sexual orientation of any person").

the Justice Department to prosecute crimes perpetrated because of an individual's gender, disability, or sexual orientation.¹⁵⁵ Citing a "slippery slope" argument, opponents condemn the idea of extending the current protections provided by Section 245 and its secondary statutes.¹⁵⁶ For instance, during oral argument in *Wisconsin v. Mitchell*,¹⁵⁷ Justice Antonin Scalia suggested that extending the protection of current hate crime legislation could result in the potential for any state to include persons who are attacked for their belief in a "hole in the ozone layer."¹⁵⁸ However, despite such criticism, the extension of coverage to other groups in need of protection would not lead Congress down a slippery slope, but rather would serve to address only those hate crimes already recognized by Congress in the Statistics Act and the Sentencing Enhancement Act.¹⁵⁹

Currently, the omission of certain groups from protection within the principal hate crime statute renders bizarre results. For example, "the perpetrator who hurls a brick at someone because he is Asian-American can be prosecuted under Federal law. The one who attacks gay men to

155. See 18 U.S.C. § 245(b)(2) (1994) (failing to extend protection to women, gays, or the disabled); H.R. 3081, 105th Cong. (1998) (finding that federal law is inadequate to combat gender, sexual orientation, and disability based violence); 143 CONG. REC. S12,576-02 (daily ed. Nov. 13, 1997) (statement of Sen. Kennedy) (introducing the Hate Crimes Prevention Act and explaining that the current hate crime law does not cover gay bashing, gender-motivated violence, or hate crimes against the disabled).

156. See, e.g., James B. Jacobs & Jessica S. Henry, *The Social Construction of a Hate Crime Epidemic*, 86 J. CRIM. L. & CRIMINOLOGY 366, 384-85 (1996) (suggesting that the "hate crime" label may be an inaccurate one because of the difficulty in determining a crime's true motivation and because of the subjective and political nature of labeling hate crimes); Daniel E. Troy, *Hate Crime Laws Make Some More Equal Than Others*, WALL ST. J., Oct. 19, 1998, at A27 (arguing that "hate crime legislation encourages groups to vie for protected status by emphasizing the degree of their victimization"); Nicole Tsong, *Hate Crime Laws Deemed Flawed*, SAN ANTONIO EXPRESS-NEWS, Aug. 19, 1998 (citing James Jacobs, New York University criminal law professor, who believes that hate crimes cause interest groups to fight as they each seek protection under hate crime laws); cf. United States Supreme Court Official Transcript, *Wisconsin v. Mitchell*, (No. 92-515), at *10-11 (noting in oral argument the potential for infinite expansion of hate crime laws), available in 1993 WL 751845.

157. 508 U.S. 476 (1993).

158. United States Supreme Court Official Transcript, *Wisconsin v. Mitchell* (No. 92-515) at *10, available in 1993 WL 751845. However, the inclusion of sexual orientation, gender, and disability by no means requires inclusion of pseudo-suspect classes such as "migratory bird lovers" or "ozone layer protectionists." See Anthony S. Winer, *Hate Crimes, Homosexuals, and the Constitution*, 29 HARV. C.R.-C.L. L. REV. 387, 432-33 (1994) (analyzing Justice Scalia's slippery slope argument and noting that homosexuals face persistent and widespread prejudice unlike those "who 'don't believe in the hole in the ozone layer' or who 'don't believe the earth revolves around the sun'").

159. 28 U.S.C. § 534 note (1994) (covering disability and sexual orientation); 28 U.S.C. § 994 note (1994) (covering gender, disability, and sexual orientation).

'teach them a lesson' cannot."¹⁶⁰ This type of sporadic prosecution sends a message to those groups who are excepted from Section 245: Although the government considers counting the number of times such an individual is victimized a compelling matter, the same government does not find prosecuting the offender necessary. Today, this disparaging message is sent to the ever-increasing number of victims who are targeted on the basis of their sexual orientation, gender, and disability-based hate crimes.

1. Sexual Orientation

Among the groups victimized by hate crimes, gays and lesbians have perhaps been the group that has been most susceptible to bias-motivated violence.¹⁶¹ Yet, this group falls prey to Section 245's lack of protection despite two factors that compel extending such protection: (1) sexual orientation-based attacks are the most violent of hate crimes, deserving enhanced punishment; and (2) once the attack has occurred, the lack of legislative coverage leaves room for prejudices within the judicial system to prevent proper punishment. The net effect of these two factors is a sharp increase in sexual orientation-based crimes.¹⁶²

The first factor illustrating a distinct need for protection against sexual orientation-based crimes is that, generally, "gay bashing" incidents are more violent than ordinary assaults.¹⁶³ An example of the savage brutality associated with hate crimes against homosexuals is the 1992 murder of Seaman Allen Schindler.¹⁶⁴ Schindler had revealed to his commander that he was gay and requested an administrative discharge.¹⁶⁵ Word of Schindler's homosexuality spread amongst the other personnel at the na-

160. 143 CONG. REC. S12,576-02 (daily ed. Nov. 13, 1997) (statement of Sen. Kennedy), available in 1997 WL 712518.

161. See generally Kevin T. Berrill, *Anti-Gay Violence and Victimization in the United States: An Overview*, (utilizing numerous empirical studies to illustrate gay and lesbian susceptibility to violence based on their sexual orientation) in HATE CRIMES: CONFRONTING VIOLENCE AGAINST LESBIANS AND GAY MEN 19, 19-46 (Gregory M. Herek & Kevin T. Berrill eds., 1992).

162. See Kevin T. Berrill, *Anti-Gay Violence and Victimization in the United States: An Overview* (explaining the increase of anti-gay violence) in HATE CRIMES: CONFRONTING VIOLENCE AGAINST LESBIANS AND GAY MEN 19, 36-38 (Gregory M. Herek & Kevin T. Berrill eds., 1992).

163. See Anthony S. Winer, *Hate Crimes, Homosexuals, and the Constitution*, 29 HARV. C.R.-C.L. L. REV. 387, 410-11 (1994) (explaining that because attacks against homosexuals are motivated by such extreme hatred, they often include severe beating, repeated stabbing, and gruesome mutilation).

164. See *id.* at 411-12 (describing the much-publicized account of Schindler's attack and murder).

165. See *id.*

val base.¹⁶⁶ On the day of the murder, Airman Terry Helvey and a friend had been drinking in a park near the base when they noticed Schindler approaching the park.¹⁶⁷ Helvey watched Schindler enter a bathroom and suggested to his companion that they follow him into the restroom and harass him.¹⁶⁸ Helvey then admitted to punching Schindler in the face, kneeling him in the groin, and stomping on his head and chest until Schindler was dead.¹⁶⁹ This murderous attack left Schindler so disfigured that only the tattoos on his arms enabled his mother to recognize him.¹⁷⁰ Subsequent to the autopsy, the physician said, “[i]f you took a tomato and slushed it all up without damaging its skin, that’s what it would be like.”¹⁷¹ Unfortunately, this gruesome hate crime is not unusual, and the rising number of such “bashing” incidents against homosexuals,¹⁷² like that suffered by Schindler, support extending protection and including sexual orientation within the federal hate crime statute, Section 245.

The second factor prompting a need for legislative protection against sexual orientation-based crimes is the prevalence of prejudice against gays and lesbians, particularly in light of the fact that such prejudice even pervades the judicial system.¹⁷³ The 1988 sentencing of Richard Lee Bednarski, who was convicted of viciously murdering two gay men, Lloyd Griffen and Tom Trimble, in cold blood, is one example of the prejudice that occurs within the judicial system.¹⁷⁴

166. *See id.*

167. *See id.*

168. *See id.*

169. *See id.*

170. *See id.*

171. *Id.* (citing James Sterngold, *Motive in Killing of Gay Sailor is Left Unclear in Penalty Hearing*, N.Y. TIMES, May 26, 1993, at A16).

172. *See* Brent Hunter Allen, Note, *The First Amendment and Homosexual Expression: The Need for an Expanded Interpretation*, 47 VAND. L. REV. 1073, 1087 n.69 (1994) (reporting on the alarming increase of attacks on gays and lesbians in the early 1990s); Bettina Boxall, *Long Arm of Hatred—Deadly Assault on Wyoming College Student Stunned People Across the Country, Reminding Many Southland Gays and Lesbians of Their Vulnerability to Attacks*, L.A. TIMES, Nov. 6, 1998, at B2 (reporting homosexual activists’ assertions of an increase in hate crimes that target homosexuals), available in 1998 WL 18890957.

173. *See* Anthony S. Winer, *Hate Crimes, Homosexuals, and the Constitution*, 29 HARV. C.R.-C.L. L. REV. 387, 414 (1994) (stating that “[a]t the very least, police, prosecutors, and judges may view violence against homosexuals as insignificant, or even justified”); Kevin T. Berrill & Gregory M. Herek, *Primary and Secondary Victimization and Anti-Gay Hate Crimes: Official Response and Public Policy*, (indicating examples where judges referred to gays as “queers,” “sick people,” “flaming queens,” and “volunteers for AIDS”), in HATE CRIMES: CONFRONTING VIOLENCE AGAINST LESBIANS AND GAY MEN 289, 294-95 (Gregory M. Herek & Kevin T. Berrill eds., 1992).

174. *See* Anthony S. Winer, *Hate Crimes, Homosexuals, and the Constitution*, 29 HARV. C.R.-C.L. L. REV. 387, 412 & n.161 (1994) (indicating the judge imposed a thirty-

On the night in question, Bednarski and some friends drove to a neighborhood in Dallas, Texas known to have a large homosexual population, intending to assault any gay man who showed an interest in them.¹⁷⁵ After Bednarski entered a car with two gay men, Trimble and Griffen, he demanded that the two undress.¹⁷⁶ When both refused, Bednarski wielded a gun, forced it into Trimble's mouth and pulled the trigger three times.¹⁷⁷ Griffen attempted to escape, but Bednarski stepped on him, firing the remaining bullets.¹⁷⁸ During the sentencing phase of Bednarski's trial, the presiding judge, Judge Hampton declined the prosecutor's request for life imprisonment; instead, he imposed a thirty-year sentence for the double murder.¹⁷⁹ In a subsequent interview published by the *Dallas Times Herald*, Judge Hampton revealed his underlying prejudice against gays, which no doubt impacted his decision not to sentence Bednarski for life. He stated, "These two guys that got killed wouldn't have been killed if they hadn't been cruising the streets picking up teenage boys."¹⁸⁰

The cases of Seaman Allen Schindler, Tom Trimble, and Lloyd Griffen are not simply sensationalized accounts of sexual orientation-based hate crimes; in fact, anti-gay violence accounts for a significant portion of the reported number of hate crimes.¹⁸¹ In 1997, the FBI observed that 1,102 bias motivated incidents based upon sexual orientation occurred,¹⁸² and the National Coalition of Anti-Violence Programs, a private organization dedicated to tracking hate crimes, reported 2,529 incidents of sexual ori-

year sentence instead of life imprisonment for two men (citing Lisa Belkin, *Texas Judge Eases Sentence for Killer of Two Homosexuals*, N.Y. TIMES, Dec. 17, 1988, at 8, and Kevin Gerrity, *On Life's Dark Underside, the Evil of Gay Bashing*, KAN. CITY TIMES, Aug. 3, 1989, at A1, A13)).

175. *See id.* (describing the attack and murder of Trimble and Griffen, two homosexual men).

176. *See id.*

177. *See id.*

178. *See id.*

179. *See id.*

180. *In re Hampton*, 775 S.W.2d 629, 630 (1989) (per curiam).

181. *See supra* note 42 (quantifying the amount of anti-gay violence in calendar years 1995-1997); *see also* Jantz v. Muci, 759 F. Supp. 1543, 1549 (1991) (recognizing that there exists "widespread violence against homosexuals" and that gays and lesbians "probably face victimization more frequently than any other minority group"), *rev'd*, 976 F.2d 623 (10th Cir. 1992); Aklilu Dunlap, *The Bellows of Dying Elephants: Gay-, Lesbian-, and Bisexual-Protective Hate Crime Statutes After R.A.V. v. City of St. Paul*, 12 LAW & INEQ. J. 205, 223 (1993) (concluding that despite the recent political gains of the gay rights movement, "gay people remain the most frequent targets of hate crimes or gay-bashing").

182. *See supra* note 42 (indicating the number of bias-motivated incidents committed against gays and lesbians in 1997).

entation motivated violence that same year.¹⁸³ The FBI Hate Crime Statistics report also indicated that in 1997 13.7% of all hate crimes were committed because of sexual orientation bias, in contrast to the 10% committed because of a victim's ethnicity or national origin.¹⁸⁴ In addition, violent crimes against victims because of their sexual orientation reportedly comprised over 40% of the total offenses against gays and lesbians.¹⁸⁵ That percentage is far greater than the reported number of violent crimes based on race (32%), ethnicity (33%), or religion (4%).¹⁸⁶

Ironically, even though more hate crimes are committed due to the victim's sexual orientation and those crimes tend to be more violent in comparison, crimes based on a victim's ethnicity or national origin are covered under Section 245, whereas sexual orientation-based crimes are not.¹⁸⁷ This lack of a federal deterrence, combined with the prejudices pervading the judicial system, prevent proper punishment of sexual orientation-based crimes, leaving the ever increasing numbers of offenders to continue growing without federal ramification.

2. Gender

In a manner similar to crimes predicated upon sexual orientation, crimes based upon gender are pervasive in America.¹⁸⁸ In fact, as more women "are exposed to terror, brutality, serious injury, and even death because of their gender," identifying this violence in the context of laws that "recognize it for what it is—a hate crime" is increasingly impor-

183. See *Hate Crimes Prevention Act of 1998: Hearings on S. 1529 Before the Senate Comm. on the Judiciary*, 105th Cong. (1998) (statement of Eric H. Holder, Jr., Deputy Attorney General), available in 1998 WL 12762065.

184. See *supra* note 42.

185. See CRIMINAL JUSTICE INFO SERVS. DIV., FBI, HATE CRIME STATISTICS 1997, at 7 (1998) (demonstrating that assault crimes account for more than 40% of hate crimes for gays and lesbians).

186. See *id.*

187. See 18 U.S.C. § 245(b)(2) (1994) (extending protection on the grounds of race, color, religion or national origin, but excluding sexual orientation).

188. See *Hate Crimes Prevention Act of 1998: Hearings on S. 1529 Before the Senate Comm. on the Judiciary*, 105th Cong. (1998) (statement of Eric H. Holder, Jr., Deputy Attorney General) (noting that a significant number of women are exposed to violence because of their gender), available in 1998 WL 12762065. Currently, the federal Hate Crime Statistics Act does not define hate crime to include gender; for this reason, the FBI does not compile statistics for gender motivated offenses. See 18 U.S.C. § 534 note (1994) (requiring the Attorney General to acquire data about hate crimes or "crimes that manifest evidence of prejudice based on race, religion, sexual orientation, or ethnicity"). For a commentary espousing the inclusion of gender in the Statistics Act, see generally Elizabeth A. Pendo, Recent Development, *Recognizing Violence Against Women: Gender and the Hate Crimes Statistics Act*, 17 HARV. WOMEN'S L.J. 157 (1994).

tant.¹⁸⁹ Congress has already responded in part, although not by including gender as one of the hate-based crimes covered by Section 245.¹⁹⁰

In 1994, Congress recognized that certain violent attacks against women constitute hate crimes and enacted the Violence Against Women Act (VAWA).¹⁹¹ Although VAWA provides a civil and criminal remedy, its criminal provisions offer only limited coverage.¹⁹² Moreover, “some violent assaults committed against women are bias crimes rather than mere ‘random’ attacks.”¹⁹³ As such, support exists for including gender within federal hate crime legislation.¹⁹⁴ Accordingly, the Anti-Defamation League has modified its model hate crime provision to include crimes based upon gender.¹⁹⁵ The ADL also made this modification “after coming to the determination that gender-based hate crimes could not be easily distinguished from other forms of hate motivated violence.”¹⁹⁶

189. *Hate Crimes Prevention Act of 1998: Hearings on S. 1529 Before the Senate Comm. on the Judiciary*, 105th Cong. (1998) (statement of Eric H. Holder, Jr., Deputy Attorney General) (quoting Burt Neuborne and Helen Neuborne), available in 1998 WL 12762065.

190. 18 U.S.C. § 245(b)(2) (1998) (limiting protection to offenses based on “race, color, religion or national origin”).

191. Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1941 (codified in part at 42 U.S.C. § 13981 (1994)); see Violence Against Women Act of 1994, 42 U.S.C. § 13981 (1994) (providing a cause of action against anyone “who commits a crime of violence motivated by gender”).

192. See 18 U.S.C. §§ 2261-62 (1994) (providing federal offenses if a person crosses a state line and commits domestic violence or does so with the intent to violate a protective order).

193. *Hate Crimes Prevention Act of 1998: Hearings on S. 1529 Before the Senate Comm. on the Judiciary*, 105th Cong. (1998) (statement of Eric H. Holder, Jr., Deputy Attorney General), available in 1998 WL 12762065.

194. See *id.*

195. See Anti-Defamation League, *Penalty Enhancement and the Inclusion of Gender* (visited Mar. 29, 1999) <http://www.adl.org/hatecrime98/ADL_model.html>.

196. *Id.* One difficulty that arises is determining which crimes are committed against women because of their gender. See Marguerite Angelari, *Hate Crime Statutes: A Promising Tool for Fighting Violence Against Women*, 2 AM. U.J. GENDER & L. 63, 99 (1994) (noting that some advocates of including violence against women in state hate crime laws have expressed a concern that there are “no guidelines for demonstrating that a particular act of violence against a woman was motivated by gender bias”). Angelari argues that the difficulty in proving motive becomes less significant considering that hate crime statutes offer the potential for new legal remedies currently unavailable to women and heightened public sensitivity to the problem of violence against women. See *id.* at 100-04; see also Elizabeth A. Pendo, Recent Development, *Recognizing Violence Against Women: Gender and the Hate Crimes Statistics Act*, 17 HARV. WOMEN’S L.J. 157, 165-66 (1994) (arguing that most violence against women occurs on the basis of gender). Pendo suggests that most violent attacks on women probably are crimes of hate and notes statistics that show that women consistently are targeted for violence, such as rape, because they are women. See *id.*

One example of a clear case of a gender-based hate crime occurred in 1989 on a college campus, where a brutal, gender-based multiple murder took place.¹⁹⁷ A man carrying a semi-automatic rifle marched into an engineering school classroom and separated the students by gender, shouting, "I want the women!"¹⁹⁸ As he yelled, "You're all a bunch of [expletive deleted] feminists!" and "I hate feminists!," he shot fourteen women at point blank range before taking his own life.¹⁹⁹ Subsequently, a note was discovered in the man's pocket in which he had written that women had destroyed his life.²⁰⁰ Thus, with gender-based hate crimes such as this one poisoning our communities in the same manner as other hate crimes, further federal legislation that properly addresses the unique dangers affecting women is needed, particularly in the form of expanding Section 245.²⁰¹

3. Disability

In addition to denying coverage for crimes based upon sexual orientation and gender, Section 245 also exempts crimes that are based upon disability.²⁰² Currently, legislative action at the state and federal level, such as the enactment of the Americans with Disabilities Act²⁰³ and the Fair Housing Act,²⁰⁴ and the 1994 amendment to the Hate Crime Statis-

197. See Elizabeth A. Pendo, Recent Development, *Recognizing Violence Against Women: Gender and the Hate Crimes Statistics Act*, 17 HARV. WOMEN'S L.J. 157, 163 (1994).

198. *Id.*

199. *Id.*

200. *See id.*

201. Presently, it remains unclear if the HCPA intends to include both women and men under the blanket term "gender." See S. 622, 106th Cong. (1999); H.R. 1082, 106th Cong. (1999). Hearings before the Senate Committee on HCPA's predecessor only give examples of hate crimes perpetrated against women, lending support to the argument that the intent of the HCPA is to provide protection solely for women. See *Hate Crimes Prevention Act of 1998: Hearings on S. 1529 Before the Senate Comm. on the Judiciary*, 105th Cong. (1998) (statement of Eric H. Holder, Jr., Deputy Attorney General), available in 1998 WL 12762065. Additionally, it is unclear whether rape would be considered a hate crime, however, whether or not rape constitutes a hate crime is beyond the scope of this Note. See Elizabeth A. Pendo, Recent Development, *Recognizing Violence Against Women: Gender and the Hate Crimes Statistics Act*, 17 HARV. WOMEN'S L.J. 157, *passim* (1994) (arguing that rape is a hate crime).

202. See 18 U.S.C. § 245(b)(2) (1994) (revealing a lack of protection against disability-based offenses); *Hate Crimes Prevention Act of 1998: Hearings on S. 1529 Before the Senate Comm. on the Judiciary*, 105th Cong. (1998) (statement of Eric H. Holder, Jr., Deputy Attorney General) (noting Congress' concern over disability-based hate crimes), available in 1998 WL 12762065.

203. 42 U.S.C. §§ 12101-213 (1994).

204. 42 U.S.C. §§ 3601-31 (1994).

tics Act,²⁰⁵ reflect an intent to recognize disabled persons as a specific group worthy of protection.²⁰⁶ However, the FBI has not yet produced any statistics that account for crimes based upon disability, despite a directive to do so.²⁰⁷ Consequently, the seriousness of crimes committed based on actual or perceived disability status remains unknown to some extent,²⁰⁸ but, according to Deputy Attorney General Eric H. Holder, Jr., “other available information indicates that hate crimes based on disability occur all too frequently.”²⁰⁹

One example of a disability-motivated hate crime surfaced in California when a neighbor began to harass a man because he suffered from AIDS.²¹⁰ The attacker killed more than one pet, shot at the family’s home, beat one family member, and assaulted another at gunpoint.²¹¹ In light of Congress’ commitment to extend civil rights protections to per-

205. 28 U.S.C. § 534 note (Supp. II 1996).

206. See *Hate Crimes Prevention Act of 1998: Hearings on S. 1529 Before the Senate Comm. on the Judiciary*, 105th Cong. (1998) (statement of Eric H. Holder, Jr., Deputy Attorney General) (describing Congress’ “consistent and durable commitment to the protection of persons with disabilities” and the subsequent enactment of amendments to the Fair Housing Act, as well as the enactment of the Americans with Disabilities Act of 1990), available in 1998 WL 12762065.

207. See *Hate Crimes Prevention Act of 1998: Hearings on S. 1529 Before the Senate Comm. on the Judiciary*, 105th Cong. (1998) (statement of Eric H. Holder, Jr., Deputy Attorney General) (elaborating that although the FBI has not reported any statistics generated under the amendment, other information illustrates that disability-based hate crimes occur all too frequently), available in 1998 WL 12762065.

208. See *The Disability Rights Activist—Your Input* (visited Mar. 29, 1999) <<http://www.disrights.org/dr-input.html>> (requesting reports of disability-motivated hate crimes, “[t]o assist Congress in building this record”); Maro Robbins, *Hate Crimes in San Antonio Appear Uncommon*, SAN ANTONIO EXPRESS-NEWS, Oct. 20, 1998, at 13A (noting that prosecutors charged a husband and two sisters with civil rights violations for “holding a deaf family as indentured servants”).

209. *Hate Crimes Prevention Act of 1998: Hearings on S. 1529 Before the Senate Comm. on the Judiciary*, 105th Cong. (1998) (statement of Eric H. Holder, Jr., Deputy Attorney General), available in 1998 WL 12762065.

210. See *id.* (relating this specific instance of disability discrimination). Presently, it is unclear what exactly would constitute a disability under the HCPA. See S. 622, 106th Cong. (1999); H.R. 1082, 106th Cong. (1999). However, the Supreme Court recently recognized AIDS as a disability under the Americans with Disabilities Act. See *Bragdon v. Abbott*, 118 S. Ct. 2196, 2201 (1998) (acknowledging that a person who is asymptomatic HIV positive is disabled within the meaning of the ADA). Yet, it is uncertain whether courts will utilize a definition such as the one found in the Americans with Disabilities Act. See 42 U.S.C. § 12101(2) (1994) (defining disability as “(a) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (b) a record of such impairment; or (c) being regarded as having such an impairment”).

211. See *Hate Crimes Prevention Act of 1998: Hearings on S. 1529 Before the Senate Comm. on the Judiciary*, 105th Cong. (1998) (statement of Eric H. Holder, Jr., Deputy Attorney General), available in 1998 WL 12762065.

sons with disabilities, expanding Section 245 to cover hate crimes committed against persons with disabilities, such as this one, would not be surprising and is arguably desirable.

IV. THE HATE CRIMES PREVENTION ACT OF 1999: MOVEMENT TOWARD A UNIFIED VISION

A. *Legislative Background*

Recently, lawmakers renewed their interest in expanding and unifying federal hate crime legislation by introducing bills in both houses of Congress.²¹² This legislation mirrors two previously proposed bills, S. 1529 and H.R. 3081, which lapsed as a result of the impeachment proceedings of 1998.²¹³ This proposed legislation, referred to as the Hate Crimes Prevention Act of 1999 ("HCPA"), would amend Section 245 in two critical ways: (1) it eliminates the unnecessary jurisdictional requirements for race, national origin, and religion, and (2) expands coverage to include sexual orientation, gender, and disability.²¹⁴ In addition, the HCPA requires the United States Sentencing Commission to study the issue of adult recruitment of juveniles to commit hate crimes.²¹⁵ The proposed legislation also grants approval for the Sentencing Commission to promulgate additional sentencing enhancements for adult defendants who recruit juveniles to assist in the commission of hate crimes.²¹⁶

As discussed earlier, Section 245 currently contains an onerous jurisdictional requirement, proscribing the intentional interference with an individual on the basis of the victim's race, color, religion, or national origin *only when the victim is engaged in a federally protected right or activity*.²¹⁷ If enacted, the HCPA would amend Section 245 to remove this jurisdictional requirement.²¹⁸ Instead, the HCPA would simply prohibit the infliction or attempted infliction of bodily injury "through the use of a fire, a firearm, or an explosive device . . . because of the actual or perceived race, color, religion, or national origin of any person."²¹⁹ Senator Ken-

212. See generally S. 622, 106th Cong. (1999); H.R. 1082, 106th Cong. (1999) (proposing changes that would "enhance Federal enforcement of hate crimes").

213. See *supra* note 30.

214. See S. 622, 106th Cong. § 4 (1999); H.R. 1082, 106th Cong. § 4 (1999).

215. See S. 622, 106th Cong. § 5 (1999); H.R. 1082, 106th Cong. § 5 (1999).

216. See S. 622, 106th Cong. § 6 (1999); H.R. 1082, 106th Cong. § 6 (1999).

217. See 18 U.S.C. § 245(b)(2) (1994) (affording federal protection to people who are interfered with on the basis of race, color, national origin or religion, to instances in which they are attending a college or school, enjoying the benefits of a state subdivision, enjoying or seeking employment, serving as a juror, travelling in interstate commerce, or enjoying the benefit of a place of public accommodation).

218. See S. 622, 106th Cong. § 4 (1999); H.R. 1082, 106th Cong. § 4 (1999).

219. S. 622, 106th Cong. § 4 (1999); H.R. 1082, 106th Cong. § 4 (1999).

nedly, a sponsor of the HCPA has praised the changes in the legislation because it “closes [the] gaps in existing law, and gives prosecutors the tools they need to fight bigots who seek to divide the nation through violence.”²²⁰

Secondly, the HCPA would amend Section 245 to cover hate crimes based upon gender, sexual orientation, and disability.²²¹ This amendment, thus, would address the second principal gap in existing federal legislation: the increasing number of crimes against women, homosexual, and disabled individuals. Specifically, the legislation would eliminate the existing double standard currently codified in Section 245 that punishes crimes motivated by one sort of bias while forgiving those motivated by other biases.²²² According to Senator Kennedy, “[g]ender motivated violence occurs at alarming rates” and “society is beginning to realize that many assaults against women [and the disabled] are not ‘random’ acts of violence but actually bias-related,” like crimes perpetrated against gays and lesbians, African-Americans, Jews, and Latinos.²²³ The HCPA responds to this realization by recognizing all acts of violent bigotry.

In addition to eliminating the jurisdictional requirement and protecting gays, women, and the disabled, the HCPA may also be lauded for its commitment to understanding the growing problem of juvenile involvement in hate crimes.²²⁴ During the floor debates of the legislative predecessors to the HCPA, an incident in Tennessee was discussed where a white supremacist organization known as the Aryan Faction recruited new members by going into local high schools and embarking “on a violent spree of firebombings and arsons before being apprehended.”²²⁵ As proposed, the HCPA is designed to study this growing problem of adults who recruit

220. 143 CONG. REC. S12,576-02 (daily ed. Nov. 13, 1997) (statement of Sen. Kennedy), available in 1997 WL 712518.

221. See S. 622, 106th Cong. § 4 (1999); H.R. 1082, 106th Cong. § 4 (1999). In addition, the HCPA contains a new jurisdictional requirement for these crimes. See S. 622, 106th Cong. § 4 (1999); H.R. 1082, 106th Cong. § 4 (1999).

222. Compare 18 U.S.C. § 245 (1994) (criminalizing only certain hate crime offenses), with S. 622, 106th Cong. § 4 (1999); H.R. 1082, 106th Cong. § 4 (1999) (extending protection to other groups).

223. 143 CONG. REC. S12,576-02 (daily ed. Nov. 13, 1997) (statement of Sen. Kennedy), available in 1997 WL 712518.

224. See *id.* (opining that the HCPA addresses the increasing problem of adults recruiting juveniles to commit hate crimes); see also Theresa Suozzi et al., Project, *Crimes Motivated by Hatred: The Constitutionality and Impact of Hate Crime Legislation in the United States*, 1 SYRACUSE J. LEGIS. & POL'Y 29, 36 (1995) (reporting that “the most frequent hate crime offenders are young white males between the ages of eleven and twenty”).

225. 143 CONG. REC. S12,576-02 (daily ed. Nov. 13, 1997) (statement of Sen. Kennedy), available in 1997 WL 712518.

juveniles to commit hate crimes.²²⁶ In particular, the legislation grants authority to the Justice Department to allocate additional resources to state and local agencies aimed at preventing the growing juvenile hate crime problem.²²⁷

The HCPA, thus, seeks to enhance the current federal hate crime legislation by removing the jurisdictional requirement, expanding the groups protected, and by acknowledging the ever-increasing role of juveniles in hate crime offenses.²²⁸ However, these changes to the HCPA raise questions as to the HCPA's ability to survive a constitutional attack. In particular, questions are raised regarding the HCPA's viability under the Commerce Clause as well as the Thirteenth and Fourteenth Amendments; the HCPA may also violate principles of federalism.

B. An Analysis of the Constitutionality of the HCPA: Congress' Power to Remove the Federally Protected Activity Requirement Currently in Section 245

1. Removing the Jurisdictional Requirement for Crimes Based on Race, National Origin, or Ethnicity

The jurisdictional requirement in the current Section 245 serves to ameliorate constitutional concerns arising from Congress' otherwise limited power to enact hate crime legislation.²²⁹ However, according to some legal scholars, the jurisdictional requirement is mere "excess baggage" on prosecutors.²³⁰ As a result, the HCPA is designed to no longer require a connection to a federally protected activity for crimes based on

226. See S. 622, 106th Cong. § 5 (1999); H.R. 1082, 106th Cong. § 5 (1999) (providing for a means to alter the federal sentencing guidelines for adults who employ juveniles to commit hate crimes).

227. See S. 622, 106th Cong. § 6 (1999); H.R. 1082, 106th Cong. § 6 (1999).

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

229. See *Hate Crimes Prevention Act of 1998: Hearings on S. 1529 Before the Senate Comm. on the Judiciary*, 105th Cong. (1998) (statement of Chai R. Feldblum, Professor of Law at Georgetown University Law Center) (explaining that "[e]xplicitly requiring a commerce clause jurisdictional nexus in the statutory description of the offense serves effectively to short-circuit a range of concerns that would otherwise have been raised by the Supreme Court's decision in *United States v. Lopez*"), available in 1998 WL 12762071; see also *infra* note 264 (discussing the federal government's traditionally limited role in criminal law enforcement).

230. See *Hate Crimes Prevention Act of 1998: Hearings on S. 1529 Before the Senate Comm. on the Judiciary*, 105th Cong. (1998) (statement of Chai R. Feldblum, Professor of Law at Georgetown University Law Center) (doubting the need for Congress to rely upon the Commerce Clause for constitutional authority to enact the HCPA), available in 1998 WL 12762071; see also *id.* (statement of Eric H. Holder, Jr., Deputy Attorney General) (urging Congress to remove the federally protected commerce element and pass the HCPA), available in 1998 WL 12762065.

race, national origin, and ethnicity.²³¹ Yet, this change raises various constitutional questions.

a. Proper Exercise of Commerce Power

The HCPA contains a legislative finding that race-based hate crimes necessarily affect commerce,²³² thereby invoking Congress' Commerce Clause power in order to justify passage of the HCPA.²³³ Because the HCPA does not contain an express jurisdictional requirement, opponents of the legislation could argue that it represents an unconstitutional exercise of congressional power.²³⁴ Yet, the HCPA closely resembles the Violence Against Women Act ("VAWA"), which was enacted pursuant to Congress' Commerce Clause power;²³⁵ like VAWA, the HCPA provides protection against actions that have an adverse effect on commerce.²³⁶ Despite constitutional challenges to VAWA, a number of federal courts have upheld it because of the impact of gender-related violence on commerce.²³⁷ Accordingly, due to the similarities between VAWA and the

231. See S. 622, 106th Cong. § 4 (1999); H.R. 1082, 106th Cong. § 4 (1999) (requiring only that the crime occur, not that it be against an individual who is engaged in a federally protected activity).

232. See S. 622, 106th Cong. § 2(4) (1999); H.R. 1082, 106th Cong. § 2(4) (1999) (stating that a hate crime "affects interstate commerce in many ways").

233. See *Hate Crimes Prevention Act of 1998: Hearings on S. 1529 Before the Senate Comm. on the Judiciary*, 105th Cong. (1998) (statement of Chai R. Feldblum, Professor of Law at Georgetown University Law Center) (positing that "[Congress] can choose, as it has done [in the proposed legislation], to enact a provision that is based primarily on its Commerce Clause power" or it can "exercise the full scope of its constitutional power" and omit the nexus requirement, relying instead on a combination of justifications), available in 1998 WL 12762071.

234. Cf. *id.* (defending the constitutionality of the HCPA).

235. Several district courts have upheld VAWA as a proper exercise of Congress' Commerce Clause power. See, e.g., *Crisonino v. New York Housing Auth.*, 985 F. Supp. 385 (S.D.N.Y. 1997); *Anisimov v. Lake*, 982 F. Supp. 531 (M.D. Ill. 1997); *Seaton v. Seaton*, 971 F. Supp. 1188 (E.D. Tenn. 1997).

236. See S. 622, 106th Cong. (1999); H.R. 1082, 106th Cong. (1999) (finding that hate crimes "affect[] interstate commerce in many ways"). Specifically, the HCPA finds that hate violence affects commerce "by impeding the movement of members of targeted groups and forcing such members to move across State lines to escape the incidence or risk of such violence" and "by preventing members of targeted groups from purchasing goods and services, obtaining or sustaining employment or participating in other commercial activity." S. 622, 106th Cong. (1999); H.R. 1082, 106th Cong. (1999).

237. See, e.g., *United States v. Page*, 167 F.3d 325, 334 (6th Cir. 1999) (Moore, J., concurring) (stating that the VAWA is a valid exercise of Congress's Commerce Clause power because the statute is triggered once a victim is moved across state lines); *United States v. Wright*, 128 F.3d 1274, 1275-76 (8th Cir. 1997) (stating that the VAWA was "validly enacted under Congress's commerce clause power" because the movement of victims across state lines is considered interstate commerce); *Anisimov*, 982 F. Supp. at 538 (acknowledging that VAWA is constitutional under the Commerce Clause because "Congress

HCPA, the HCPA would also likely withstand constitutional scrutiny on Commerce Clause grounds.

b. Reliance upon the Thirteenth Amendment

Removing the jurisdictional requirement for race-based crimes currently in Section 245 also raises an issue regarding whether Congress can rely upon the Thirteenth Amendment in its effort to curtail race-based hate crimes.²³⁸ Originally, the Thirteenth Amendment was enacted to abolish slavery and involuntary servitude.²³⁹ Section 2 of the Thirteenth Amendment permits Congress "to enforce this article by appropriate legislation."²⁴⁰ In *United States v. Bledsoe*,²⁴¹ the United States Court of Appeals for the Eighth Circuit upheld the current Section 245 as an appropriate exercise of Congress' power under the Thirteenth Amendment.²⁴² The court based its holding on the fact that "interfering with a person's use of a [public accommodation] because he is black is a badge of slavery."²⁴³ Likewise, the court held that Congress can reach and prohibit purely private action under the Thirteenth Amendment.²⁴⁴

The HCPA makes explicit findings of Congress' intent, stressing that "violence motivated by bias that is a relic of slavery can constitute badges and incidents of slavery."²⁴⁵ Especially in light of the fact that many

has meticulously articulated the connection" between violence against women and interstate commerce). *But see* *Brzonkala v. Virginia Polytechnic Inst. State Univ.*, Nos 96-2316, 96-1814, 1999 WL 111891, at *1, *2 (4th Cir. 1999) (holding unconstitutional VAWA's civil remedy on the grounds that it regulates a noncommercial activity not related to interstate commerce).

238. Georgetown Law Professor Chai Feldblum explains that in addition to the commerce power, "courts have consistently affirmed that the Thirteenth Amendment authorizes Congress to pass a wide range of laws that respond to race-based violence." *Hate Crimes Prevention Act of 1998: Hearings on S. 1529 Before the Senate Comm. on the Judiciary*, 105th Cong. (1998) (statement of Chai R. Feldblum, Professor of Law at Georgetown University Law Center), available in 1998 WL 12762071; see *Griffin v. Breckenridge*, 403 U.S. 88, 105 (1971) (concluding that Congress was within its powers under the Thirteenth Amendment in enacting the Ku Klux Klan Act, 42 U.S.C. § 1985(3), which outlaws "two or more persons . . . conspiri[ng] or go[ing] in disguise on the highway . . . for the purpose of depriving . . . any person . . . of the equal protection of the laws").

239. See U.S. CONST. amend. XIII, § 1 (stating that "[n]either slavery nor involuntary servitude . . . shall exist within the United States").

240. U.S. CONST. amend. XIII, § 2.

241. 728 F.2d 1094 (8th Cir. 1984).

242. See *United States v. Bledsoe*, 728 F.2d 1094, 1097 (8th Cir. 1984) (indicating that "in our opinion [18 U.S.C. § 245] is constitutional as applied under the thirteenth amendment").

243. *Id.*

244. See *id.* (stating that "it is abundantly clear that under this amendment Congress can reach purely private action").

245. S. 622, 106th Cong. § 2(8) (1999); H.R. 1082, 106th Cong. § 2(8) (1999).

states choose not to confront these “vestiges of slavery,” the federal government may employ its power under the Thirteenth Amendment to remedy the effects of private actors who commit hate-based crimes.²⁴⁶ The absence of a jurisdictional requirement, therefore, would not negate the direct manifestation of Congress’ intent to safeguard the national interest of a society free of hate-based crimes.²⁴⁷

c. The Fourteenth Amendment: A Basis for Remedial Legislation

The HCPA’s removal of the jurisdictional requirement additionally is permissible under the Fourteenth Amendment. Section 5 of the Fourteenth Amendment confers upon Congress the power to pass remedial legislation.²⁴⁸ Thus, where certain states fail to protect individuals from racial or hate-motivated violence, Congress is empowered to prevent an equal protection violation.²⁴⁹ Consequently, legal scholars believe that Congress possesses the power to eliminate the jurisdictional requirement

246. See *Griffin v. Breckenridge*, 403 U.S. 88, 105 (1971) (stating that “there has never been any doubt of the power of Congress to impose liability on private persons under § 2 of [the Thirteenth Amendment]”); *Clyatt v. United States*, 197 U.S. 207, 216 (1905) (stating that the Thirteenth Amendment prohibitions are not limited to state actions because the “amendment denounces [slavery or involuntary servitude] irrespective of the manner or authority by which the [slavery or involuntary servitude] is created”); *Civil Rights Cases*, 109 U.S. 3, 20 (1883) (expressing that the Thirteenth “[A]mendment is not a mere prohibition of state laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist”).

247. See *Hate Crimes Prevention Act of 1998: Hearings on S. 1529 Before the Senate Comm. on the Judiciary*, 105th Cong. (1998) (statement of Chai R. Feldblum, Professor of Law at Georgetown University Law Center) (indicating that the Thirteenth Amendment may be used by Congress to pass the HCPA), available in 1998 WL 12762071. In fact, as Mr. Feldblum notes, “the existing federal law . . . has been upheld as within Congress’ power not only by virtue of the Thirteenth Amendment, but by virtue of section 5 of the Fourteenth Amendment and the Commerce Clause as well.” *Id.* (citing *United States v. Lane*, 883 F.2d 1484 (10th Cir. 1989), and *United States v. Bledsoe*, 728 F.2d 1094 (8th Cir. 1984)).

248. See U.S. CONST. amend. XIV, § 5 (conferring upon Congress the power to enforce the provisions of the Fourteenth Amendment).

249. See *Hate Crimes Prevention Act of 1998: Hearings on S. 1529 Before the Senate Comm. on the Judiciary*, 105th Cong. (1998) (statement of Chai R. Feldblum, Professor of Law at Georgetown University Law Center) (explaining that jurisdictions failing “to respond appropriately to hate crimes based on the characteristics covered in S. 1529 constitutes an equal protection problem” (emphasis added)), available in 1998 WL 12762071. Currently, ten states do not have penalty-enhancement hate crime laws. See Howard Fineman, *Echoes of a Murder in Wyoming*, NEWSWEEK, Oct. 26, 1998, at 43 (indicating that “Wyoming is one of 10 states with no hate-crimes law at all”); cf. Anti-Defamation League, *Charts and Graphs, Map of State Statutes* (visited Mar. 29, 1999) <http://www.adl.org/99hatecrime/map_statutes.html> (indicating that forty states have penalty-enhancement hate crime laws). Among the states that penalize hate crimes, certain states penalize only

contained in Section 245, relying solely on enumerated powers.²⁵⁰ Notably, the *Bledsoe* court recognized that Section 245, which “protects the right to enjoy state provided benefits free from private harassment motivated by racial animus,” was within Congress’ power under the Fourteenth Amendment.²⁵¹

Thus, by combining Congress’ power arising under the Thirteenth and Fourteenth Amendments, along with the powers provided by the Commerce Clause, Congress is able to enact hate crime legislation despite the absence of a jurisdictional requirement. Although this requirement initially served to safeguard against possible constitutional challenges, recent case law has revealed that Section 245 is constitutional not “because of” the jurisdictional requirement, but rather “in spite of” the requirement.²⁵² As such, the deletion of the requirement by the HCPA should have no bearing on the constitutionality of the potentially newly amended Section 245.

2. The Jurisdictional Requirement for Crimes Based upon Religion, Sexual Orientation, Gender, and Disability

Although the HCPA puts one brave foot forward in removing the jurisdictional requirement for race-based crimes, it continues to hide behind a jurisdictional requirement for crimes based upon religion, sexual orienta-

crimes motivated by racial animus whereas other states include other groups. *See id.* (showing which states have specific hate crime provisions).

250. *See Hate Crimes Prevention Act of 1998: Hearings on S. 1529 Before the Senate Comm. on the Judiciary*, 105th Cong. (1998) (statement of Chai R. Feldblum, Professor of Law at Georgetown University Law Center) (discussing the potential sources of power from which Congress could enact the HCPA), available in 1998 WL 12762071. In addition, Feldblum argues that the Fourteenth Amendment can provide a basis for legislation that does not necessarily depend on the race of a defendant. *See id.* (indicating that the Fourteenth Amendment may serve as a basis for Congress to enact a broad-based hate crime provision protecting against discrimination based on gender, sexual orientation, and disability).

251. *Bledsoe*, 728 F.2d at 1097; *see Hate Crimes Prevention Act of 1998: Hearings on S. 1529 Before the Senate Comm. on the Judiciary*, 105th Cong. (1998) (statement of Chai R. Feldblum, Professor of Law at Georgetown University Law Center) (specifying that “the existing federal law that criminalizes hate crimes . . . has been upheld as within Congress’ power . . . by virtue of section 5 of the Fourteenth Amendment” (citing *United States v. Lane*, 883 F.2d 1484 (10th Cir. 1989), and *United States v. Bledsoe*, 728 F.2d 1094 (8th Cir. 1984)), available in 1998 WL 12762071.

252. *See Bledsoe*, 728 F.2d at 1097 (holding that Section 245(b) is constitutional both under the Thirteenth and Fourteenth Amendments). The Eighth Circuit indicates that regardless of a commerce nexus, needed to obtain jurisdiction under the Commerce Clause, the Constitution provides support for the passage of Section 245(b) under the Thirteenth and Fourteenth Amendments. *See id.*

tion, gender, and disability.²⁵³ As such, despite the fact that the HCPA extends coverage to groups other than race, federal prosecutors would still be forced to jump through jurisdictional hoops in order to prosecute these offenders.

Concerning the constitutionality of including hate-based crimes other than those based upon race, religion, and national origin, the HCPA relies upon a “commerce nexus”—explicitly stated in the proposed amendments to Section 245—as a means to respond to any constitutional challenge effectively.²⁵⁴

[W]hoever willfully causes bodily injury to any other person . . . because of the actual perceived religion, gender, sexual orientation, or disability of any person . . . shall be imprisoned *if 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.*²⁵⁵

253. See S. 622, 106th Cong. § 4 (1999); H.R. 1082, 106th Cong. § 4 (1999) (adding a commercial nexus requirement for hate crimes based on religion, gender, sexual orientation or disability).

254. See *Hate Crimes Prevention Act of 1998: Hearings on S. 1529 Before the Senate Comm. on the Judiciary*, 105th Cong. (1998) (statement of Chai R. Feldblum, Professor of Law at Georgetown University Law Center) (discussing the second tier of Senate Bill 1529, the predecessor to the 1999 version of the HCPA), available in 1998 WL 1276207; *id.* (statement of Eric H. Holder, Jr., Deputy Attorney General) (advocating for the enactment of the HCPA and describing the construction of the new amendments). Curiously, Congress included religious-based hate crimes in both tiers of the HCPA. See S. 622, 106th Cong. § 4 (1999); H.R. 1082, 106th Cong. § 4 (1999) (criminalizing certain hate offenses based on race, religion, national origin in the first tier and criminalizing other hate crimes based on religion, sexual orientation, gender, and disability in the second tier). Presumably, Congress has not yet decided if religious discrimination is covered under the Thirteenth and Fourteenth Amendments. *Cf. Hate Crimes Prevention Act of 1998: Hearings on S. 1529 Before the Senate Comm. on the Judiciary*, 105th Cong. (1998) (statement of Chai R. Feldblum, Professor of Law at Georgetown University Law Center) (asserting that Congress might have the power under the Thirteenth Amendment to include religion in a race-based discrimination provision of the Hate Crimes Prevention Act (citing *Saint Francis College v. Al-Khazraji*, 481 U.S. 604 (1987) and *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987))), available in 1998 WL 12762071. Compare 18 U.S.C. § 247(a), (b) (Supp. III 1997) (prohibiting religious-based offenses if those offenses are “in or affect [] interstate or foreign commerce”), with 18 U.S.C. § 247(c) (Supp. III 1997) (prohibiting racially based offenses irrespective of whether the offenses involve interstate or foreign commerce).

255. S. 622, 106th Cong. § 4 (1999); H.R. 1082, 106th Cong. § 4 (1999) (emphasis added). Congress modeled this Commerce Clause requirement after a similar provision found in the Church Arson Protection Act, passed by Congress in 1996. See *Church Arson Protection Act*, 18 U.S.C. § 247(b) (1994 & Supp. III 1997) (replacing the then-existing subsection (b) with a new subsection (b) in 1996 that refers to an “offense [that] affects

This new commerce requirement in the HCPA, like the federally protected activity nexus, “effectively compresses the required analysis of whether the standard for invoking commerce clause power enunciated in *Lopez* has been met.”²⁵⁶ In *United States v. Lopez*,²⁵⁷ the Supreme Court of the United States recognized three activities that Congress may regulate pursuant to its Commerce Clause power: (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce, persons or things in interstate commerce; and, (3) activities that have a substantial relation to interstate commerce.²⁵⁸ Thus, in order to be a proper exercise of power, the HCPA must fit within any one of these categories.²⁵⁹ In other words, when a prosecutor charges a defendant with a hate crime based upon religion, sexual orientation, gender or disability, as a prerequisite to bringing the prosecution, the prosecutor must prove that in connection with the crime, the defendant or the victim traveled in interstate commerce, used a facility or instrumentality of commerce, engaged in any activity affecting commerce, or that the offense was in, or affected, commerce.

Consequently, the inclusion of a commerce nexus is designed to protect federal prosecutors' ability to seek enhancements for crimes perpetrated on the basis of a victim's religion, sexual orientation, gender, or disability from constitutional attack.²⁶⁰ Notably, Congress has successfully protected other legislation against such challenges using provisions similar to

interstate or foreign commerce”). The Church Arson Protection Act also employed a “two-tiered approach,” whereby the first tier criminalized action that was based on the race of individuals associated with the particular religious property and the second tier, which required a commerce nexus, criminalized non-racially motivated offenses. *See id*; *see also Hate Crimes Prevention Act of 1998: Hearings on S. 1529 Before the Senate Comm. on the Judiciary*, 105th Cong. (1998) (statement of Chai R. Feldblum, Professor of Law at Georgetown University Law Center) (comparing the Church Arson Protection Act to the HCPA), *available in* 1998 WL 12762071.

256. *Hate Crimes Prevention Act of 1998: Hearings on S. 1529 Before the Senate Comm. on the Judiciary*, 105th Cong. (1998) (statement of Chai R. Feldblum, Professor of Law at Georgetown University Law Center), *available in* 1998 WL 12762071.

257. 514 U.S. 549 (1995).

258. *See United States v. Lopez*, 514 U.S. 549, 558-59 (1995) (delineating the three categories of activity that Congress is permitted to regulate).

259. *See S. 622*, 106th Cong. § 4 (1999); H.R. 1082, 106th Cong. § 4 (1999) (requiring “the defendant or victim [to] travel[] in interstate or foreign commerce, use[] a facility or instrumentality of foreign commerce, or engage[] in any activity affecting interstate or foreign commerce”).

260. *See Hate Crimes Prevention Act of 1998: Hearings on S. 1529 Before the Senate Comm. on the Judiciary*, 105th Cong. (1998) (statement of Chai R. Feldblum, Professor of Law at Georgetown University Law Center) (indicating that the jurisdictional element will insulate the legislation from constitutional attack), *available in* 1998 WL 12762071.

the commerce requirements in the HCPA.²⁶¹ Substituting the commerce requirement for the current jurisdictional requirement not only fortifies the HCPA against constitutional challenges, but lessens the burden on prosecutors to obtain a hate crime conviction based upon a “federally protected activity” as well.

C. “*Splitting the Atom*”—*Federalism and the Hate Crimes Prevention Act*²⁶²

“Hate crimes are the most visible sign that the promise of equality is not yet a reality. Hate crimes ruin the lives of some of our most vulnerable citizens, *divide* our communities, and *rend* the national fabric.”²⁶³

1. The Federalization of Criminal Law

Historically, federal courts have retained jurisdiction over relatively few criminal offenses.²⁶⁴ Correspondingly, jurisdiction over ordinary criminal conduct has traditionally remained within the purview of states’ judicial systems.²⁶⁵ However, in recent decades, the number of federal

261. *See id.* (discussing instances where Congress has properly safeguarded legislation against Commerce Clause violations). For example, the Third Circuit Court of Appeals upheld the Anti-Car Theft Act which used a substantially similar Commerce Clause nexus. *See United States v. Bishop*, 66 F.3d 569, 576 (3d Cir. 1995) (finding that “(1) Congress had a rational basis for believing that carjacking substantially affects interstate Commerce; and (2) [the Act] has, as an element of the offense, a requirement that there be a constitutionally adequate nexus with interstate commerce”).

262. In *U.S. Term Limits v. Thornton*, Justice Kennedy discussed how the Framers “split the atom of sovereignty.” *U.S. Term Limits v. Thornton*, 514 U.S. 779, 838 (1995). He explained, “It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other.” *Id.*

263. Bill Lann Lee, Civil Rights Division United States Department of Justice, Statement Before the United States Attorneys’ Conference on Hate Crimes, Washington, D.C., at 2 (Feb. 18, 1998) (transcript on file with the *St. Mary’s Law Journal*).

264. *See* Nora V. Demleitner, *The Federalization of Crime and Sentencing*, 11 FED. SENTENCING REP. 123, 123 (1998). The Constitution only enumerates a limited number of federal crimes including treason, counterfeiting, piracy on the high seas and offenses against the law of nations. *See* U.S. CONST. art. I, § 8 cl. 6 (stating that Congress has the power “[t]o provide for the Punishment of counterfeiting the Securities and current Coin of the United States”); U.S. CONST. art. I, § 8, cl. 10 (granting Congress the power “[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations”); U.S. CONST. art. III, § 3, cl. 2 (providing that “Congress shall have the Power to declare the Punishment of Treason”); *see also* Edwin Meese, III, *Big Brother on the Beat: The Expanding Federalization of Crime*, 1 TEX. REV. L. & POL. 1, 6 (1997) (noting that the Constitution only gives Congress jurisdiction over a limited number of crimes).

265. *See* Gerald G. Ashdown, *Federalism, Federalization, and the Politics of Crime*, 98 W. VA. L. REV. 789, 789 (1996); Nora V. Demleitner, *The Federalization of Crime and Sentencing*, 11 FED. SENTENCING REP. 123, 123 (1998).

crimes has skyrocketed.²⁶⁶ According to former Attorney General and Chair of the American Bar Association's Task Force on Federalization of Criminal Law, Edwin Meese, at least 3,000 federal crimes exist today.²⁶⁷ This stark increase has led to considerable criticism concerning the proper role of the federal government in the criminal justice arena.²⁶⁸

Critics denounce this recent trend for several reasons. First, at a foundational level, federalizing local crimes may violate states' sovereignty and constitute an exercise of congressional authority outside the scope of permissible constitutional bounds.²⁶⁹ As a result of federalizing traditionally local issues, the intricate balance between the state and federal governments upon which our democracy was founded is threatened to be destroyed.²⁷⁰ Second, federalization of crimes may overburden the federal judiciary, altering the character and structure of federal courts.²⁷¹ As

266. See generally James A. Strazzella, *The Federalization of Criminal Law*, 1998 A.B.A. SECT. CRIM. JUST. 5-13 (discussing the growth of federal crimes). The American Bar Association's Task Force released this "federalization report" which investigates and examines the "widespread concern about the number of new federal crimes being created annually by Congress." *Id.* at 1.

267. See Edwin Meese, III, *Big Brother on the Beat: The Expanding Federalization of Crime*, 1 TEX. REV. L. & POL. 1, 3 (1997); Deanell Reece Tacha, *Preserving Federalism in the Criminal Law: Can the Lines Be Drawn?*, 11 FED. SENTENCING REP. 129, 129 (1998).

268. See James A. Strazzella, *The Federalization of Criminal Law*, 1998 A.B.A. SECTION CRIM. JUST. 1, 5 (characterizing the federalization of crime as "troubling"); Gerald G. Ashdown, *Federalism, Federalization, and the Politics of Crime*, 98 W. VA. L. REV. 789, 812-13 (1996) (asserting that, when the federal government becomes involved in crime, the law enforcement becomes muddled); Nora V. Demleitner, *The Federalization of Crime and Sentencing*, 11 FED. SENTENCING REP. 123, 123-24 (1998) (explaining that the "growth of federal criminal jurisdiction raises" constitutional concerns as well as "unprecedented structural and financial burdens").

269. See Nora V. Demleitner, *The Federalization of Crime and Sentencing*, 11 FED. SENTENCING REP. 123, 124 (1998) (reporting that constitutional objections derive from disputes regarding whether Congress' exercise of power under the Commerce Clause was proper). Professor Demleitner is a Professor at St. Mary's University School of Law in San Antonio, Texas, as well as an editor of the Federal Sentencing Reporter. See *id.* at 122-23. Professor Demleitner delineates three primary objections to the recent federalization trend. See *id.* at 124-25. Generally, these objections are divided into constitutional, structural, and budgetary arguments. See *id.*

270. See James A. Strazzella, *The Federalization of Criminal Law*, 1998 A.B.A. SECTION CRIM. JUST. 27 (recognizing the "innate American distrust for the concentration of broad police power in a national police force"); Edwin Meese, III, *Big Brother on the Beat: The Expanding Federalization of Crime*, 1 TEX. REV. L. & POL'Y 1, 6 (1997) (indicating that "[t]he more crime is federalized, the more the potential exists for an oppressive and burdensome federal police state").

271. See Nora V. Demleitner, *The Federalization of Crime and Sentencing*, 11 FED. SENTENCING REP. 123, 124-25 (1998) (discussing the burden on the courts and the subsequent structural changes that have occurred to accommodate the growing caseload, such as increasing the number of prosecutors and investigators).

such, federalization may blur the “distinctive and complementary role” of federal courts, contemplated by the Framers, by forcing an increased number of judgeships or, alternatively, by taking unsatisfactory shortcuts in order to compensate for an increased demand.²⁷² Finally, legal scholars mount criticism over budgetary concerns and expending limited federal funds on additional judgeships, federal prisons, and law enforcement personnel.²⁷³

Despite the overarching sentiment against the federalization of criminal offenses, many commentators concede the necessity of some federal involvement.²⁷⁴ In fact, few authors today advocate repeal of federal criminal statutes, recognizing value in the notion of cooperative federalism.²⁷⁵ Moreover, involvement of the federal government in certain areas of criminal justice may prove beneficial. For example, not all crimes are inherently local in nature; as such, sophisticated crime that crosses state lines may be handled more effectively by federal law enforcement personnel.²⁷⁶ National hate groups, in particular, may be more effectively prosecuted by the federal government.²⁷⁷ Furthermore, scholars agree that “criminal cases raising highly sensitive local issues” may

272. See James A. Strazzella, *The Federalization of Criminal Law*, 1998 A.B.A. SEC. CRIM. JUST. 37 (lamenting the inevitable burden on the federal courts if federalization continues and asserting that this burden erodes the quality of justice administration).

273. See Nora V. Demleitner, *The Federalization of Crime and Sentencing*, 11 FED. SENTENCING REP. 123, 125 (1998).

274. See, e.g., Thomas M. Mengler, *The Sad Refrain of Tough on Crime: Some Thoughts on Saving the Federal Judiciary from the Federalization of State Crime*, 43 U. KAN. L. REV. 503, 515-16 (1995) (recognizing that “[a] single system of shared functions, without any sharply defined demarcations of responsibility, better represents the core of our federalism”); Deanell Reece Tacha, *Preserving Federalism in the Criminal Law: Can the Lines Be Drawn?* 11 FED. SENTENCING REP. 129, 131 (1998) (suggesting that pragmatic reasons support some federal involvement in the context of criminal law).

275. See Tom Stacy & Kim Dayton, *The Underfederalization of Crime*, 6 CORNELL J.L. & PUB. POL’Y 247, 249 (1997) (contending that “judicial and academic complaints about the overfederalization of crime largely have matters backwards”). A majority of scholars advance support for a plan adopted by the Judicial Conference of the United States that promotes limitations on the federalization of crimes and delineates five areas where federal criminal jurisdiction appears proper. See Nora V. Demleitner, *The Federalization of Crime and Sentencing*, 11 FED. SENTENCING REP. 123, 125 (1998) (highlighting the Judicial Conference Plan which proposes limits on the federalization of crime).

276. See Thomas M. Mengler, *The Sad Refrain of Tough on Crime: Some Thoughts on Saving the Federal Judiciary from the Federalization of State Crime*, 43 U. KAN. L. REV. 503, 517-18 (1995) (mentioning instances where federal involvement may effectively address crime control). Mengler asks: without federal involvement who would prosecute, which state would investigate and coordinate prosecution, how would turf battles be avoided? See *id.* at 517.

277. Cf. S. 622, 106th Cong. (1999); H.R. 1082, 106th Cong. (1999) (suggesting that federal prosecution is necessary to stop the hate crime “epidemic”).

warrant federal involvement.²⁷⁸ In this regard, certain crimes, such as the Rodney King incident, may be prosecuted more effectively by the national government when the conduct involves a highly volatile local situation.²⁷⁹

In this respect, prosecution at the national level of hate crimes may be justified, particularly since such crimes fracture communities and offend sensibilities.²⁸⁰ Additionally, an expansion of federal hate crime legislation would, at the very least, carry symbolic meaning and be consistent with the notion that the federal government should play a role in protecting civil liberties and the rights of minorities. The HCPA carries such a message—crimes motivated by an individual's disability, gender, or sexual orientation are equally opprobrious as crimes motivated by an individual's race, religion, or national origin.²⁸¹

2. The Limiting Provisions of the HCPA

To prevent impermissible intrusions on state sovereignty in the area of hate crime prevention, the HCPA contains several limiting provisions. First, the newly amended Section 245 would require a written certification by the Attorney General, the Deputy Attorney General, the Associate Attorney General, or a specially designated Assistant Attorney General, thus ensuring that prosecutions of hate crimes are limited to incidents that are appropriately within the national interest.²⁸² Also, the Department of Justice maintains a "backstop policy," which applies to all criminal civil rights investigations and defers first to the state prosecution of offenses.²⁸³ This policy, although not mandatory, permits the Depart-

278. See Nora V. Demleitner, *The Federalization of Crime and Sentencing*, 11 FED. SENTENCING REP. 123, 125 (1998).

279. See Thomas M. Mengler, *The Sad Refrain of Tough on Crime: Some Thoughts on Saving the Federal Judiciary from the Federalization of State Crime*, 43 U. KAN. L. REV. 503, 518 (1995) (indicating that "[s]ome civil rights actions, because of their potential for explosiveness in the community, may be more effectively handled by the national government").

280. Cf. *id.* (positing that some crimes may be more effectively prosecuted at the national level).

281. See generally S. 622, 106th Cong. (1999); H.R. 1082, 106th Cong. (1999) (covering race, religion, color, national origin, gender, sexual orientation, or disability).

282. See *Hate Crimes Prevention Act of 1998: Hearings on S. 1529 Before the Senate Comm. on the Judiciary*, 105th Cong. (1998) (statement of Eric H. Holder, Jr., Deputy Attorney General) (explaining the certification process), available in 1998 WL 12762065.

283. See *Hate Crimes Prevention Act of 1998: Hearings on S. 1529 Before the Senate Comm. on the Judiciary*, 105th Cong. (1998) (statement of Eric H. Holder, Jr., Deputy Attorney General) (indicating that the Department of Justice maintains a "backstop policy" that defers prosecution to local and state law enforcement officials "except in highly sensitive cases in which the federal interest in prompt federal investigation and prosecution outweighs the usual justifications of the backstop policy"), available in 1998 WL 12762065.

ment of Justice to determine if a state or local government is able to prosecute a hate crime effectively; the federal government may step in when a small county does not have the resources to handle the case.²⁸⁴ In addition to the required certification and the backstop policy, the HCPA also includes the commerce requirement in hate crimes based upon religion, sexual orientation, gender, and disability, ensuring that federal prosecutions are limited to instances where the federal government is constitutionally empowered to act.²⁸⁵

The HCPA, by deleting the jurisdictional requirement for race-based crimes and including a less burdensome jurisdictional requirement for crimes based upon sexual orientation, gender, and disability, would fill in the gaps left by current hate crime legislation. Anticipating possible constitutional challenges, Congress has supplemented the HCPA by guaranteeing that the provision falls within its powers under the Thirteenth and Fourteenth Amendments, along with its powers under the Commerce Clause. In addition, Congress has remedied possible federalism concerns by incorporating a required certification from the Attorney General and a backstop policy. As a result, the HCPA will likely survive a constitutional challenge, and as such, represents a large step in the direction of eradicating all hate-based crimes. Moreover, the HCPA makes practical sense, preventing the waste of prosecutorial efforts by removing unnecessary jurisdictional hurdles at a time when many scholars and federal judges are concerned with conserving federal resources.²⁸⁶

V. CONCLUSION

“Whether we like it or not, our futures are bound together, and it is time we acted like it.”

— William Jefferson Clinton²⁸⁷

Over thirty years ago, Dr. Martin Luther King, Jr. spoke of a society free from racial hatred. Today, problems of bias-motivated violence

284. *See id.* (statement of Chai R. Feldblum, Professor of Law at Georgetown University Law Center) (relating the Justice Department’s commitment to prosecute hate crimes when “state and local officials are either unable or unwilling to pursue cases that adequately address the federal interest in fighting bias crimes”).

285. *See* S. 622, 106th Cong. (1999); H.R. 1082, 106th Cong. (1999); *see also Hate Crimes Prevention Act of 1998: Hearings on S. 1529 Before the Senate Comm. on the Judiciary*, 105th Cong. (1998) (statement of Eric H. Holder, Jr., Deputy Attorney General) (detailing the commerce clause nexus requirement), *available in* 1998 WL 12762065.

286. *See* Nora V. Demleitner, *The Federalization of Crime and Sentencing*, 11 *FED. SENTENCING REP.* 123, 125 (1998) (detailing the concern over budgetary objections).

287. *Clinton Supports Expanding Definition of Hate Crimes*, *ASSOCIATED PRESS POL. SERV.*, Nov. 11, 1997, *available in* 1997 WL 2561807.

plague our nation and threaten to erase the progress made during the civil rights era. Because bigotry and prejudice lie at the core of all hate crimes, substantive legislation designed to halt the outbreak of bias-motivated violence is urgently needed.

The first step in achieving Dr. King's goal is to realize that hate crimes still pervade and threaten society. Only then will the legislature be able to create a uniform and effective method of reporting these crimes. As observed by President Clinton, "[i]f a crime is unreported, that gives people an excuse to ignore it."²⁸⁸ Because better reporting of hate crimes will increase the ability to enforce hate crime laws, politicians must take aggressive steps to repair the tearing fabric of American society by punishing all hate crimes more severely.

To this end, the Hate Crimes Prevention Act of 1999 represents a more effective means for securing heightened punishment of hate crimes. The HCPA provides further deterrence against hate crimes and reiterates Congress' desire to drive out hate-based violence that threatens to destroy America's communities. If enacted by Congress without delay, the HCPA would go a long way toward realizing Dr. King's dream.

288. *Id.*