Recent Legislation: Where Are We Going with Federal Hate Crimes Legislation? Congress and the Politics of Sexual Orientation

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I. INTRODUCTION

Throughout the 1990s, the concept of hate crime burgeoned in the American, as well as the global, imagination. Here in America, public interest and engagement of the problem of hate crime reached its zenith in the wake of the brutal and widely publicized 1998 murders of Matthew Shepard and James Byrd, Jr. Following the Byrd and Shepard

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1. Use of the expansive term "global" is to emphasize that hate crime is not a concept that is unique to the United States, but is a problem recognized to have an international character. Mark S. Hamm, Conceptualizing Hate Crime in a Global Context, in HATE CRIME: INTERNATIONAL PERSPECTIVES ON CAUSES AND CONTROL 173, 174 (Mark S. Hamm ed., 1994).

2. See generally Richard Lacayo, The New Gay Struggle, TIME, Oct. 26, 1998, at 32 (including several articles that discuss homosexuality, its impact on marriage, and hate crime legislation). See generally TIME, Oct. 26, 1998. The cover of this issue captured the deer fence on the Wyoming plains where Matthew Shepard was left for dead. Id. For many, including the author, the cover photo was a first and enduringly haunting image that has attached to the problem of hate violence against homosexuals in America. See Lacayo, supra, at 32. See also Carol Marie Cropper, Black Man Fatally Dragged in a Possible Racial Killing, N.Y. TIMES, June 10, 1998, at A16; James Brooke, Gay Man Beaten and Left for Dead; 2 are Charged, N.Y. TIMES, Oct. 10, 1998, at A9. It is of note here that the wide coverage of these two particular crimes is viewed by some in a somewhat dubious light. John S. Baker, Jr., United States v. Morrison and Other Arguments Against Federal "Hate Crime" Legislation, 80 B.U. L. Rev. 1191 (2000). Baker's article, as part of a symposium in the journal's winter issue, takes up many arguments against federal hate crime legislation that are discussed later in this Comment. One of these arguments is that sensational coverage by the media of the Byrd and Shepard murders presents political concussions. Baker says:

In the effort to enact federal "hate crime" legislation, the drum-beat, like that for federal gun control, has come from the march of the mass-media. The horrific nature of certain crimes, like the murders of James Byrd, Jr., Matthew Shepard, and the magnitude of the multiple murders at Columbine, has the power to transform a local crime into an event of national impact, generating demands for a federal criminal law response. Even when the state law response is adequate, the national attention drawn by these cases typically generates a corresponding call for a national response. As I found in testifying before the House Judiciary Committee, proponents of a federal "hate crime" statute use the headline cases to frame the debate as a test of opposition to or support for hate.
murders; a cognizance of the nature and degree of hate crimes in the United States has ballooned.³ Symbiotically, the problem of hate crime has become even more entrenched in the conscience of lawmakers in Congress, who as far back as the 1980s, have shown a commitment to forging legislation to address this problem.⁴

In its 106th term, the United States Congress gave significant attention to two competing hate crime bills: The Hate Crime Prevention Act of 1999 (HCPA), authored principally by Senator Edward Kennedy (D-Mass.), and a subsequently authored competing bill sponsored by Senator Orrin Hatch (R-Utah).⁵ Both bills proposed extending a line of modern federal hate crime legislation that began in 1990 when Congress passed the Hate Crime Statistics Act of 1990 (HCSA).⁶ Indeed, scholars

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Id. at 1194 (citations omitted). Cf. Rich Tafel, Hate as a Way of Winning, Log Cabin Republicans CR OP/ED, Nov. 2, 2000, available at http://www.lcr.org/press/20001102oped.htm (last visited Feb. 15, 2001) (examining the use of hate as an election strategy by Democrats). It is noteworthy that the article is found on the LCR—Log Cabin Republicans—website. The Log Cabin Republicans are perhaps the most prolific and powerful gay Republican group. The article's appearance in this forum suggests that the rhetoric in it must be qualified as being, necessarily, partisan. Tafel says:

In the past Democrats used Medicare, social security, and AIDS to make people think their lives would end without the Democrats, but such tactics don't work as well anymore. Because people within the Republican Party have succeeded in putting those issues front and center through hard work, [Democrats] have to get "imaginative" again.

The new fear tactic is hate. And it's not just hate as manifested by the heinous murders of Matthew Shepard and James Byrd, which outraged everyone and drew public condemnation from the chairmen of both the Democratic and Republican parties. It's hate toward any gay person who doesn't want to support the "imaginative" tactics Democrats are using in the closing days of this election.

Id. The significance of this rhetoric, though qualified as necessarily partisan, illustrates the degree to which the political debate over hate crime is charged.

3. See generally Cropper, supra note 2; Brooke, supra note 2.

4. As early as 1988, Senator John Kerry (D-Mass.) is quoted on the floor of the U.S. Congress as affirming that "there is a serious problem in America with hate crimes of all types," and that "[l]egislation is needed to address [this] serious problem." JAMES B. JACOBS & KIMBERLY POTTER, HATE CRIMES: CRIMINAL LAW AND IDENTITY POLITICS 52 (Michael Tonry & Norvel Morris eds., 1998).

5. Hate Crimes Prevention Act of 1999, S. 622, 106th Cong. (1999) [hereinafter HCPA]. Authored by Senator Edward Kennedy (D-Mass.), the HCPA was introduced on March 16, 1999. The bill had thirty-three original co-sponsors and added ten throughout the first and second sessions of the 106th Congress. Senator Orrin Hatch introduced an alternative to the HCPA on July 21, 1999, late in the first session of the 106th Congress. The "Hatch" bill differed significantly from Kennedy's HCPA and was introduced with no co-sponsors. To Combat Hate Crimes, S. 1406, 106th Cong. (1999).

and proponents of hate crime legislation have viewed the extension that is addressed by the proposed bills as the "logical culmination" of this line of federal hate crime legislation that had begun in 1990 with the HCSA.\(^7\) Opponents of the measures, on the other hand, have expressed many concerns with the kind of law proposed by these measures.\(^8\)

At the time lawmakers proposed the HCSA, the spearhead of what can be termed *modern federal hate crime legislation*, the identified purpose was to quantify "what was, at that point, an unquantified problem."\(^9\) The HCSA initiated modern hate crime legislation by giving the Department of Justice the charge of gathering and recording statistics of bias motivated crime.\(^10\) Having kept its charge over the past nine years, quantification of the problem is now one commodity the federal government has in surplus.\(^11\) What is to be done with this data

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\(^8\) See generally Baker, *supra* note 2; JACOBS & POTTER, *supra* note 4, at 27–28. See also Kalam, *supra* note 7, at 597 (quoting Senator Orrin Hatch (R–Utah) as saying, "[b]efore we take the step of making every criminal offense motivated by hatred a federal offense, we ought to equip states and localities with the resources necessary so that they can undertake these criminal investigations and prosecutions on their own."). Many constitutional and statutory reasons are proffered in opposition to federal hate crime legislation, including but not limited to the idea that such legislation encroaches unconstitutionally on the states' discretion in prosecuting criminal conduct. Id. at 597–98.

\(^9\) Kalam, *supra* note 7, at 596 (quoting then FBI director William Session's comments on the passage of the act: "Until now, we have been unable to ascertain the full scope of hate crimes in America," quoted in Jerry Seper, *FBI Chief Pledges to Make Hate-Crimes Data Priority*, WASH. TIMES, Apr. 5, 1991, at A6).


\(^11\) The use of statistical data has been a principal means by which we have given shape to this concept or problem. Likewise, statistical data has been a key component of the hate-crime legislation that has been passed throughout the past decade at both the federal and
and, consequently, where we are going with federal hate crime legislation is decidedly less settled.

Both of the competing hate crime measures introduced in the 106th state level in the United States. This is because we, in America, measure or quantify problems relating to the criminal law through the use of statistics. See FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS, HATE CRIME STATISTICS, DATA COLLECTION GUIDELINES (1999), available at http://www.fbi.gov/ucr/hatecrime.pdf (last visited Oct. 14, 2001) (explaining that hate crime statistics are available as part of a comprehensive system of federal criminal statistic collection known as the Uniform Crime Reports) [hereinafter FBI HATE CRIME STATISTICS]; see also STATE OF WISCONSIN OFFICE OF JUDICIAL ASSISTANCE, STATISTICAL ANALYSIS CENTER, UNIFORM CRIME REPORTS, 1998 CRIMES AND ARRESTS, APP. III—HATE CRIMES (1998), available at http://oja.state.wi.us/static/crimel998.htm (last visited Oct. 14, 2001) [hereinafter WIS. CRIME REPORTS]. The Office of Justice Assistance is in charge of collecting statistics on hate crime occurring within the state of Wisconsin. Thus, law enforcement at both the state and federal levels is informed, albeit in a reactionary sense, to this data. The one certain thing that can be said about this practice of criminal statistic keeping is that these statistics are, necessarily, backward looking. See, e.g., FBI HATE CRIME STATISTICS, supra (reporting statistics only through 1999); WI CRIME REPORTS, supra (reporting statistics only through 1999). In many ways, efforts to address the problem of hate crime in the United States, and in particular the practice of compiling statistics as an initial step, was derived from private advocacy groups. For example, the Southern Poverty Law Center, an organization that since its inception in 1971 has been focused on combating hate crime, buttressed its efforts by the production and circulation of a newsletter entitled Klanwatch that sought to document all instances of bias-motivated violence. SOUTHERN POVERTY LAW CENTER, available at http://www.splcenter.org/intelligenceproject/ip-index.html (last visited Feb. 15, 2001). Together with a subsequently created newsletter, the Militia Task Force, the two form the comprehensive Intelligence Report, which operates as one of the organization's principle weapons in their fight against hate activity. Id. The organization's founder, Morris Dees, created the newsletter (collectively the Intelligence Report), thinking that a problem cannot be addressed sufficiently until it is sufficiently quantified, or assessed. See SOUTHERN POVERTY LAW CENTER, available at http://www.splcenter.org/centerinfo/ct-index.html (last visited Feb. 15, 2001). However, much of the vast scholarship examining hate crime admonishes that such statistical data be carefully scrutinized. JACOBS & POTTER, supra note 4, at 55—59 (urging that the data regarding hate crime, whether from public or private sources should be carefully "construct[ed]"). This admonition is intuitive because the calculus of interpreting, or as Jacobs & Potter suggest—constructing, the statistical data on hate crimes involves many variables. Id. at 59. For instance, what exactly, for reporting purposes, is a hate crime? Who is compiling the data? How exactly do the numbers crunch? How many and what kind of reporting agencies are being polled and over what span of time? See generally id. at 55—59. The federalization of statistical compilation worked only marginally to normalize data collection focused on hate crime because this data is also susceptible of being misleading. See generally id. For instance, a steady increase in state and local participation in the process of collecting hate crime data has resulted in an increase in the number of hate crimes that are reported. Id. See also FEDERAL BUREAU OF INVESTIGATION, HATE CRIME STATISTICS, DATA COLLECTION GUIDELINES (1999), available at http://www.fbi.gov/ucr.htm (last visited Feb. 15, 2001) (seeking to specify all the above mentioned "variables" in an effort to offer clarity in their Uniform Crime Reports). For the many reasons listed in this footnote, this Comment will not address a performance of any variation of the statistical calculus described above. Rather, this piece will address the theoretical, moral, and ideological hurdles implicated by federal hate crime legislation.
Congress were tabled, and notwithstanding the serious attention given each, neither bill reached a final vote by the joint membership of the 106th Congress. To be sure, the bare fact that these two measures died in Senate committee is not, on its own, extraordinary. Indeed, hundreds of proposed bills met a similar fate in the 106th Congress. What is extraordinary is the way the debate, and ultimate failure, of these measures aptly informs the principal inquiry at hand: where are we going with federal hate crime legislation?

The fact that two hate crime measures were brought before both the House and the Senate in the 106th Congress is significant for two reasons. First, it shows that the passage of an additional federal hate crime law was a priority of most of the members of the 106th Congress. Second, the existence of a competing bill connotes not only a controversy as to how to effectuate this seemingly bi-partisan legislative priority, but also an attempt at compromise. The fact that both bills were tabled is also significant because it shows that the 106th Congress remained embroiled over a resolution to the issue at the end of its term, resolving only that this battle should be left to fight another day.

The differences in the two hate crime measures brought before the 106th Congress frame the principal controversy over where the federal government will go next with legislation preventing hate activity. These differences are subtle, and perhaps at first blush, even negligible. Yet, as it is often said—the devil is in the details. But what do the details show us here? Upon close examination of these two competing measures, the problematic distinction centers on the question of whether persons victimized because of their sexual orientation should be among those protected under a substantive federal hate crime law.

12. See generally CONGRESSIONAL QUARTERLY, HOW CONGRESS WORKS, 102–13 (3d ed. 1998) (discussing the various fates that befall congressional bills when differences are not, as the subsection suggests, resolved) [hereinafter HOW CONGRESS WORKS].


14. See id.

15. Both the HCSA and the VCCLEA include in their provisions a category for sexual orientation. In the former, statistics relating to violence against persons because of their real or perceived sexual orientation are gathered; and in the latter, the U.S. Sentencing Commission is authorized to provide sentence enhancements for these acts of violence. 28 U.S.C. § 534 note; 28 U.S.C. § 994 note. While this fact shows that Congress has considered the category of sexual orientation in its hate crime laws, both the HCSA and the VCCLEA do not provide the substantive protections for this category. The HCPA proposes to provide substantive protection to persons victimized because of their sexual orientation. This protection is absent from existing federal hate crime law. See HCPA, S. 622 § 4 (1999)
The HCPA unequivocally says that gay, lesbian, and bisexual men and women should be afforded such protection, and purports to amend the United States Code to include language clearly expressing such. The competing bill does not, but in terms that are decidedly less clear. The debate over hate crimes in the 106th Congress unquestionably shows that sexual orientation is the legislative quandary that has vexed Congress with respect to this area of law—an area of law that until now has had significant legislative momentum.

This Comment examines both the HCPA of 1999 and the "Hatch" bill, focusing primarily on the debate raging over the inclusion of sexual orientation as a category protected by this kind of legislation. Part II of this Comment offers a brief background of hate crime legislation and pays attention to the operation of these types of laws at both the state and federal levels. Part III examines where we have come with a stream of modern federal hate crime legislation, culminating with the two competing hate crime bills that were introduced in the 106th Congress. Finally, Part IV considers some of the immediate and future hurdles faced by proponents of hate crime legislation at the federal level and focuses on Congress's debate over sexual orientation. In sum, this Comment purports to answer the question: where are we going with federal hate crime legislation?

II. BACKGROUND

A. Hate Crimes, Generally

It is germane to a discussion of where we are going with federal hate crime legislation to discuss where we are with respect to this kind of legislation and what steps the federal government has taken to bring us to where we are. In order to answer to these questions, we must know exactly what it is we are talking about. Indeed, as James Jacobs and

(proposing to amend title 18, section 245 of the United States Code).

16. HCPA, S. 622 § 4. The bill chooses the definition of "hate crime" provided in the VCCLEA. Under this definition, a hate crime is "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." 28 U.S.C. § 994 note. Enactment of the bill would have effectively created new categories of persons who would be extended substantive hate crime protection under federal law. HCPA, S. 622 § 4. Currently, substantive hate crime protections under federal law only extend to persons victimized because of their race, color, religion, or national origin. 18 U.S.C. § 245 (1994).


18. See discussion supra note 13.
Kimberly Potter rightly assert in their 1998 treatise on hate crime, "We cannot talk about how much hate crime exists in the United States or what to do about it until we are clear about what a hate crime is." Definition, then, is central to any discussion of hate crime legislation.

This, to be sure, is the case with all legislation; however, in the context of federal hate crime legislation, defining precisely what kind of conduct and mental state a particular law will proscribe and against what kind of victim the law will apply has been both salt and fire to the bitter, ongoing debate over hate crimes. The argument always comes down to definition because it is through definition that these two core legislative questions are resolved.

It is best to begin by looking at hate crime in the way that scholars, legislators, and law enforcement officials have come to view the problem. Most of these groups have begun to discuss hate crime, generically, under the broad mantle of "bias-motivated crime." This concept, verily distilled, suggests that a hate crime is an act of prejudice. We can give this a little more shape, though, by adducing that hate crimes are committed against persons who are victimized.

19. JACOBS & POTTER, supra note 4, at 11.

[T]he concept of hate crime is loaded with ambiguity because of the difficulty in determining (1) what is meant by prejudice; (2) which prejudices qualify for inclusion under the hate crime umbrella; (3) which crimes, when attributable to prejudice, become hate crimes; and (4) how strong the causal link must be between the perpetrator's prejudice and the perpetrator's criminal conduct.

Id.

20. Id.

21. Kalam, supra note 7, at n.39 ("The Hate Crime Statistics Act of 1990, like the HCPA, confronted significant conservative resistance at its inception, in part because it included 'sexual orientation' as a class of hate crime victims. Senator Jesse Helms (R-N.C.) called the bill the 'flagship of the militant homosexual legislative agenda.'") (citation omitted).

22. FREDERICK M. LAWRENCE, PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW 9 (1999). Lawrence posits that bias crime is an act of prejudice, and thus different from the two broad categories that compose the "universe" of violent crimes. The first being "crimes committed without regard to any personal characteristics of the victim" like muggings and robberies where the victim is chosen by "the requirements of the crime," as in the case of a bank teller. Id. The second group contains all crimes committed against the victim because of who they are. These include crimes of passion, revenge crimes, or any cases where the victim could not be "interchanged with someone else." Id. Thus, Lawrence asserts that bias crimes are unlike the first category because "distinct identifying characteristics of the victim are critical to the perpetrator's choice of victim." Id. They are also unlike the second category because the "individual identity of the victim is irrelevant." Id.

23. Id.
because of their identification with a certain group or class. It is easy to see the numerous legislative concerns posed by laws of this sort, especially when considering these kinds of crimes in the federal forum. Not the least significant among these concerns is that we are talking about criminal law, which is an area of law that is traditionally within the purview of the several states. An equally significant concern is the problem of legislative classification—a concern that has been perhaps best described as a "perennial" one.

24. FBI, HATE CRIME STATISTICS, supra note 11. In keeping with the modern trend of federal hate crime legislation, the FBI, under the authority given to it by the Hate Crime Statistics Act of 1990, began their data gathering effort defining a hate crime as a "criminal offense committed against a person or property, which is motivated, in whole or part, by the offender's bias against a race, religion, ethnic/national origin group, or sexual orientation group." Id. (emphasis added). Cf. VCCLEA, 28 U.S.C. §§ 991-998 (1994) and discussion, supra note 10 (specifying that "'hate crime' means 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").

25. See Baker, supra note 2, at 1192:

Short of violating the First Amendment and other restraints of the Fourteenth Amendment, state legislatures are free to legislate broadly in this area if they so decide. Not satisfied with the response at the state level, some lobbyists want a federal "hate crime" statute. The Congress, however, must identify some particular constitutional power in order to enact any piece of criminal legislation. Although the states enjoy general police powers; the federal government does not.

Id. (citations omitted). See also Larry Wheeler, Rep. Deal Says Hate Crime Amendment Oversteps Bounds, GANNET NEWS SERVICE, June 22, 2000, available at 2000 WL 4401505. This explains Representative Deal's (R—Gainsville, FL) disagreement with a federal hate crimes amendment that the Senate attached to a defense authorization bill. The article states his belief that "expanding the hate crimes categories [as per the HCPA] is a further erosion of the U.S. Constitution that envisioned a federal government of limited powers." Deal is also quoted in the article as saying "[w]e don't need to go sticking our nose into things that are the jurisdiction of the states." Id.


[The] problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies... [o]r the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.

Id.
B. Hate Crime Laws Among the Several States

1. Generally

Anthony S. Winer posits that "[s]tate laws designed to address the hate crime phenomenon fall broadly into two categories: hate speech statutes and hate crime statutes." For many reasons, states have, by and large, focused their efforts on passing hate crime statutes. Since the passage of the HCSA, states have taken the initiative in passing their own hate crime statutes. Indeed, as of 1999, all fifty states had one or more of what may be fairly called hate crime statutes on the books. Yet, these statutes vary a great deal in terms of the kind of conduct they proscribe, as well as the class of persons they are designed to protect. Thus, all hate crimes statutes are not created equal, and close examination of the differences between the hate crime statutes enacted by the several states shows that such statutes are indeed cast in many forms.


Hate crime statutes, unlike hate speech statutes, are not by their terms directed at expressive statements. Instead, they increase the penalties applicable to those convicted of violent crimes... Hate speech statutes are designed to redress harm inflicted when a person makes a statement or engages in expressive conduct that derides or devalues the hearer because of the hearer's race, color, religion, sexual orientation, or other analogous characteristic. Id. at 419–21.

28. Id. at 422 ("Hate crime statutes in most cases stand on firmer constitutional footing than speech statutes, but hate crime statutes are not completely exempt from constitutional challenge."); see also R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (holding that laws intending to proscribe even "unprotected" speech must be content-neutral in order to eschew a presumption of invalidity under the First Amendment). Winer goes on to say that most of these hate crime statutes fall within three broad categories: 1) penalty enhancement statutes, which are to act as supplements or provide sentencing enhancements to already enacted sections of the state criminal code; 2) substantive or new crime statutes, which are themselves free-standing crimes that are described in their own terms and with their own elements; and 3) model civil rights statutes, which generically proscribe abridgement of a victim's civil rights, which are generally characterized as those rights guaranteed by federal and state constitutions and/or laws. See Winer, supra note 27, at 422–24.

29. See LAWRENCE, supra note 22, app. A.

30. Id.

31. Winer, supra note 27, at 422 (stating that "the various state hate crime statutes are drafted in distinct ways").

32. See LAWRENCE, supra note 22, app. A. Lawrence's appendix shows that the hate crime or bias crime statutes enacted by the several states vary in significant ways. These
It is essential to a discussion of federal hate crime legislation to undertake an inquiry into the way the several states have handled this legislative challenge. This is because the sufficiency of the several states' involvement in addressing this kind of crime is a disputed issue in the debate over the necessity of a federal hate crime statute. Moreover, an understanding of the way the several states have handled this kind of legislation is essential because state statutes have been reviewed by the courts. In reviewing states' hate crime statutes, courts have had the opportunity to articulate why such statutes, in their various forms, do or do not pass constitutional muster.

2. Wisconsin v. Mitchell and State Hate Crime Statutes

The saga that resulted in the United States Supreme Court's 1993

statutes range in form from penalty enhancement to pure bias crime statutes. The statutes also differ with respect to the requisite state of mind or mens rea. These differences range from racial animus to discriminatory selection of victim and "because of" scienters. Moreover, the statutes vary a great deal in terms of what categories of victims they protect. Among the categories protected by various state statutes are: race, color, ethnicity, national origin, religion, creed, ancestry, sexual orientation, sex/gender, age, disability, and political affiliation. Also fitting underneath the umbrella of state hate crime statutes are crimes that include institutional vandalism (including desecration of religious institutions), disturbing/obstructing religious worship, cross burning, and mask wearing. Id.

33. Id. at 155. Lawrence outlines that there are two sources of strong federal interest that warrant federal bias crime legislation. He explains:

The first arises out of the problem of state default in bias crime prosecution, the prime justification for the original creation of federal criminal civil rights legislation. During the nineteenth and the early twentieth century, state governments, particularly in the South, could not be relied upon to investigate and prosecute bias crimes within their jurisdiction. Even through the middle part of this century, state default has remained a critical factor warranting a federal role in bias crimes....

[The] crudest form of state default, present for a full century after the Civil War, is far less common today. Still, a less pernicious form of state default continues to exist in some circumstances, and calls for a federal role in these crimes. Id. According to Lawrence, the second source of federal interest warranting federal bias crime legislation applies even in the absence of state default, and involves the concept of dual prosecutions covered by a theory called the "Petite Policy," an internal policy of the U.S. Department of Justice that "restricts federal prosecution following a state trial to instances [where significant] reasons exist to prosecute." Id. at 159. Among such instances, Lawrence singles out the Rodney King case, "where such compelling reasons were deemed to exist." Id.


35. LAWRENCE, supra note 22, at 30-34 (discussing the constitutional holdings of the U.S. Supreme Court in R.A.V. and Mitchell). Lawrence explains that while the Court did not view the type of law enacted in R.A.V. favorably, Mitchell represents "the first case in which the Supreme Court expressly sustained a modern bias crime law." Id. at 30.

36. 508 U.S. 476.
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decision in *Wisconsin v. Mitchell* is among the most prominent instances where the Court has interpreted a state hate crime statute. At issue in this case was the constitutionality of the statute. The *Mitchell* case was the first case to test Wisconsin's newly enacted bias-crime penalty enhancement statute.

The defendant in the case, Todd Mitchell, was an African-American male who was convicted in the Circuit Court for Kenosha County of aggravated battery for his part in the severe beating of Gregory Riddick,

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37. *Id.*


Penalty; crimes committed against certain people or property. (1) If a person does all of the following, the penalties for the underlying crime are increased as provided in sub. (2): (a) Commits a crime under chs. 939 to 948.

(b) Intentionally selects the person against whom the crime under par. (a) is committed or selects the property that is damaged or otherwise affected by the crime under par. (a) in whole or in part because of the actor's belief or perception regarding the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property, whether or not the actor's belief or perception was correct.

(2)(a) If the crime committed under sub. (1) is ordinarily a misdemeanor other than a Class A misdemeanor, the revised maximum fine is $10,000 and the revised maximum period of imprisonment is one year in the county jail. (b) If the crime committed under sub. (1) is ordinarily a Class A misdemeanor, the penalty increase under this section changes the status of the crime to a felony and the revised maximum fine is $10,000 and the revised maximum period of imprisonment is 2 years.

(c) If the crime committed under sub. (1) is a felony, the maximum fine prescribed by law for the crime may be increased by not more than $5,000 and the maximum period of imprisonment prescribed by law for the crime may be increased by not more than 5 years.

(3) This section provides for the enhancement of the penalties applicable for the underlying crime. The court shall direct that the trier of fact find a special verdict as to all of the issues specified in sub. (1).

(4) This section does not apply to any crime if proof of race, religion, color, disability, sexual orientation, national origin or ancestry or proof of any person's perception or belief regarding another's race, religion, color, disability, sexual orientation, national origin or ancestry is required for a conviction for that crime.

*Id.*

40. It is of note that while it is the general understanding that hate crime laws are passed to protect routinely victimized groups, the facts of *Wisconsin v. Mitchell* show that the law functions to punish bias-crime and that where legislators may have conceived of a law considering a white defendant and a black complainant, the equal hand of the Wisconsin statute applies to all crimes committed out of bias. Thus, the first test of the Wisconsin law involved a black defendant and a white complainant. *See generally Mitchell*, 508 U.S. 476.
a 14 year-old white male. The trial judge found that Mitchell had acted out of racial bias in the selection of the victim, which implicated the Wisconsin bias crime statute. In accordance with this statute, the potential sentence for a crime such as the aggravated battery for which Mitchell had been convicted is increased by five years if the actor chooses his victim "because of the [victim's] race, religion, color, disability, sexual orientation, national origin or ancestry." Ultimately, Mitchell was sentenced to four years of a maximum seven-year prison sentence.

Mitchell was unsuccessful in his appeal to the Wisconsin Court of Appeals, who affirmed the trial court's ruling. Subsequently, the Wisconsin Supreme Court granted review of the case. Upon its review, the Wisconsin Supreme Court found the bias crime penalty enhancement statute unconstitutional and consequently reversed that portion of Mitchell's sentence. Specifically, the Wisconsin Supreme Court found that the statute "violates the First Amendment directly by punishing what the legislature has deemed to be offensive thought." The Wisconsin Supreme Court relied principally on support from the U.S. Supreme Court's decision a year earlier in *R.A.V. v. City of St. Paul* in making its constitutional determination. From this ruling, Wisconsin appealed to the United States Supreme Court, who granted certiorari to the case just six months after the Wisconsin Supreme Court handed down its decision.

From the outset, the U.S. Supreme Court articulated its objective in hearing the case. In his majority opinion, Chief Justice Rehnquist made it clear that "[t]he question presented in this case is whether this
penalty enhancement is prohibited by the First and Fourteenth Amendments." Chief Justice Rehnquist's opinion elaborated further, citing the importance of the specific objective of the Court in hearing the case: "We granted certiorari because of the importance of the question presented and the existence of a conflict of authority among state high courts on the constitutionality of statutes similar to Wisconsin's penalty-enhancement provision." Without dissent, the U.S. Supreme Court reversed the decision of the Wisconsin Supreme Court. In so doing, it rejected Mitchell's argument that "the Wisconsin penalty-enhancement statute is invalid because it punishes the defendant's discriminatory motive, or reason, for acting." The Court made it clear that "motive plays the same role under the Wisconsin statute as it does under federal and state antidiscrimination laws, which we have previously upheld against constitutional challenge." The Court's decision also reconciled with its previous holding in R.A.V. v. City of St. Paul, saying "the ordinance struck down in R.A.V. was explicitly directed at expression (i.e., 'speech' or 'messages'), [whereas] the statute in this case is aimed at conduct unprotected by the First Amendment." The Court continued, saying, "the Wisconsin statute singles out for enhancement bias-inspired conduct because this conduct is thought to inflict greater individual and societal harm.

So it is, then, that the decision in Wisconsin v. Mitchell stands as the last word given by the U.S. Supreme Court with respect to the

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52. Id.
53. Id.
54. Id. at 483.
55. Id. at 487.
56. Id.
57. Id. ("Nothing in our decision last Term in R.A.V. compels a different result here.") (citation omitted).
58. Id. at 487–88. The Court explained that:

[According to the State and its amici, bias-motivated crimes are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest .... The State's desire to redress these perceived harms provides an adequate explanation for its penalty-enhancement provision over and above mere disagreement with offenders' beliefs or biases. As Blackstone said long ago, "it is but reasonable that among crimes of different natures those should be most severely punished, which are the most destructive of the public safety and happiness."

Id. at 488 (citation omitted).
Many proponents of hate crime legislation have viewed *Mitchell* as a victory in the modern crusade to enact these kinds of laws. First and foremost, the decision is rightly viewed as the first instance where the "modern court" expressly upheld the constitutionality of a bias crime statute against First and Fourteenth Amendment challenges. Furthermore, supporters of the decision claim that "Mitchell represents the constitutional authority for the enactment of bias crime laws."

Academic opponents of further hate crime legislation, particularly in the federal forum, naturally opt for a narrower reading of the Court's opinion in *Mitchell*. Such critics view the decision as, at best, a decision on what states may do in the purview of their own police powers, and, at worst, see the decision as "not persuasive" because "what is constitutionally impermissible under *R.A.V.* and what is constitutionally permissible under *Mitchell* is a distinction without a difference." These critics acknowledge that "[a]ccording to the Court, the legislature may properly single out . . . criminal conduct for increased punishment based on the judgment that such conduct causes greater harm to victims, third parties, and society generally," but are put off because they believe the holding in *Mitchell* makes it clear that "the sentence enhancement is triggered by some prejudices and not others." Nevertheless, even these
critics of the Mitchell decision are keenly aware that "Mitchell has declared... hate crime laws constitutional for purposes of the federal constitution." It is clear that the concussions of the Court's decision in Wisconsin v. Mitchell were felt by more than just the legislatures of the several states. The year after the Supreme Court's decision in Mitchell, the Violent Crime Control and Law Enforcement Act of 1994 (VCCLEA) was signed into law. The VCCLEA is an omnibus federal crime bill containing many provisions relating to hate crime. The Act showed a federal cognizance of the Mitchell decision, in that among its many provisions was a section separately titled: The Direction to United States Sentencing Commission Regarding Sentencing Enhancements for Hate Crimes. This portion of the law requires that the United States Sentencing Commission provide sentence enhancements for hate crimes. It is hardly questionable that the sentence-enhancing portion of the Act shows alertness on the part of the 103rd Congress to the Supreme Court's decision in Mitchell.

Further evidence of Congress's awareness of Mitchell can be garnered from the Act itself. Congress chose to recast the definition of hate crime for the purpose of the directive to the United States Sentencing Commission so as to comport with the statutory language that was upheld by the Supreme Court in Mitchell, just one year earlier.

candidate, now President George W. Bush). Proponents of hate crime legislation claim this is precisely the point, and that critics like Jacobs and Potter have missed it. Many of these proponents look to Mitchell as an affirmation that hate crimes, acts based on prejudice, represent conduct that is more culpable than "spite" or "jealousy." See JACOBS & POTTER, supra note 4, at 126.

67. JACOBS & POTTER, supra note 4, at 129 (accepting this proposition resignedly).
69. 28 U.S.C. § 994 note. The Direction to United States Sentencing Commission Regarding Sentencing Enhancements for Hate Crimes constitutes section 280003 of the VCCLEA. The directive to the Commission is as follows:

Pursuant to section 994 of title 28, United States Code, the United States Sentencing Commission shall promulgate guidelines or amend existing guidelines to provide sentencing enhancements of not less than 3 offense levels for offenses that the finder of fact at trial determines beyond a reasonable doubt are hate crimes. In carrying out this section, the United States Sentencing Commission shall ensure that there is reasonable consistency with other guidelines, avoid duplicative punishments for substantially the same offense, and take into account any mitigating circumstances that might justify exceptions.

Id.

70. Id. Accord WIS. STAT. ANN. § 939.645(1)(b) (West 2000). This statute states:
The Act defines the term 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." The passage of the VCCLEA is evidence that a majority in the 103rd Congress believed that the core constitutional questions regarding the validity of hate crime legislation, to that point, had been answered by Mitchell.

It is imperative as we part from our discussion on hate crime laws among the several states that the following comparative note is made. The Wisconsin statute that was at issue in Mitchell contains a broad classification of hate crime victims. Wisconsin's law, as well as the VCCLEA's directive to the United States Sentencing Commission, targets crimes where the defendant intentionally selects a victim because of his real or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation. However, as was mentioned at the outset of this section, all states' hate crime statutes are not equal. Close examination of the hate crime statutes of the several states shows that only twenty-one have language relating to bias against persons because of their real or perceived sexual orientation, only twenty-one states have language in their statutes relating to gender, and only nineteen include language protecting people because of disability. This latter note is germane to a discussion of federal hate crime legislation because these figures are viewed by some as an insufficient state response to hate crime that warrants further federal action in this area.

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*Intentionally selects* the person against whom the crime under par. (a) is committed or selects the property that is damaged or otherwise affected by the crime under par. (a) in whole or in part because of the actor's belief or perception regarding the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property, whether or not the actor's belief or perception was correct.

*Id.* (emphasis added).


72. 28 U.S.C. §§ 991–998; see also supra note 16.


75. Lawrence, supra note 22, at app. A. Lawrence's appendix also includes data on other classifications as well. For example, the table also tracks state statutes that regard ancestry, creed, age, and political affiliation, in addition to the most common classifications of race, religion, national origin, and ethnicity. See *id*.

76. *Id.* at 155; see also supra note 32.
C. The Federal Government and Hate Crimes

1. Generally

Throughout the history of the United States, persons seeking protection of their civil rights have turned to the federal government for aid. Indeed, many cite as the earliest enactment of federal civil rights legislation those laws passed under Congress's authority to enforce the post-Civil War Amendments to the Constitution. The utility of this legacy to supporters of federal hate crime legislation is that it lends historical credence to the theory that the federal government must act as a fail-safe with respect to hate crimes when states demonstrate an insufficient response.

To be sure, President John F. Kennedy was aware of this legacy when he addressed the nation on June 11, 1963 to rally public support for an expansive civil rights bill. The address had come in the wake of the widely publicized police beatings in the streets of Birmingham, Alabama earlier that spring. In the address, the President solemnly asserted that "[w]e face . . . a moral crisis as a country and as a people. It cannot be met by repressive police action."

77. Kalam, supra note 7, at 594.
78. JACOBS & POTTER, supra note 4, at 36–37. The authors elaborate by saying, "After the Civil War, in many places within the former Confederacy, local law enforcement agencies would not prosecute crimes committed by whites against blacks, nor would local governments permit blacks to exercise rights guaranteed by the Fourteenth Amendment." Id. at 36. The authors make the further point that "[t]he federal statutes did not aim to enhance punishment or to recriminalize conduct already covered by criminal law." Id. The authors contend, rather, that the statutes only provided a "de facto law enforcement action." Id. Thus, if the local authorities faithfully investigated and prosecuted those who "victimized the former slaves," there would be virtually no need for the federal laws. Id. See also LAWRENCE, supra note 22, at 112 ("The general intent behind the criminal civil rights laws called for vigorous enforcement to address a compelling social ill.").
79. Kalam, supra note 7, at 595 ("The legacy of such federal protection suggests that legislation like the [Hate Crime Prevention Act of 1999] could act as an umbrella, protecting minorities in states hesitant to punish hate crimes and remaining unused in others.").
80. CHARLES WHALEN & BARBARA WHALEN, Introduction to THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT, at xix–xx (1985). Indeed, John F. Kennedy's political instincts told him such a bill had little chance of passing. Id. Beyond the probability of the bill's failure, Kennedy was certain that introducing the bill would ruin his chances for re-election. Id. Fateaufully, the rest is a well known story. The bill was submitted to Congress eight days after the television address on June 11, 1963. See id. In November of that year, Kennedy was shot in Dallas, Texas. President Johnson signed into law the Civil Rights Act of 1964—the law that was the subject of the address—the very next year. See generally id.
81. Id. at xviii–xx.
increased demonstrations in the streets. It cannot be quieted by token moves or talk. It is a time to act in Congress... For Kennedy, the core of the debate over federal civil rights legislation was clear. "The heart of the question," he asserted steadily, "is whether all Americans are to be afforded equal rights and equal opportunities..."

It perhaps goes without saying that the Civil Rights Act of 1964, which Kennedy submitted to Congress just eight days after his beseeching address, has significantly shaped the role of the federal government in the investigation and prosecution of civil rights violations. This is true both generally, and with respect to hate crime in particular. Indeed, many of the laws that are viewed as part of the stream of modern federal hate crime legislation have amended or propose to amend the very same sections of the United States Code that were created by the 1964 Act. However, it can be said without exaggeration that then, as now, congressional debate over the proper role of the federal government in the enforcement of the civil rights of its citizens has been more contentious and virulent than on most other questions.

2. Federalism

One reason the question of federal involvement with civil rights laws is so hotly disputed is because this question uniquely implicates the delicate balance of authority between the states and the federal government under the United States Constitution that is known as federalism. Perhaps no principle of our American government has been more controversial. One modern text, warning that this truth should not be doubted, reminds us that "more than 500,000 people died during the Civil War settling problems of federalism." The debate over

82. Id. Kennedy explained in his address that the moral dilemma he referred to "is as old as the Scriptures and... as clear as the American Constitution." Id.

83. Id.

84. Kalam, supra note 7, at 598 (stating that "there do exist obvious precedents for federally expansive legislation like the [Hate Crime Prevention Act of 1999], namely the Civil Rights Act of 1964").

85. See, e.g., CAPA, 18 U.S.C. § 247 (1994 & Supp. III 1997). This Act, added to title 18, included prohibitions against damaging religious property that affected interstate commerce and HCPA, S. 622 at section 4 also proposed to amend the same section identified above.

86. See generally WHALEN & WHALEN, supra note 80.

87. LAWRENCE, supra note 22, at 110 ("Bias crimes... occur at the intersection of three fundamental values of the American polity: equality, free expression, and federalism.").

88. MILTON C. CUMMINGS & DAVID WISE, DEMOCRACY UNDER PRESSURE: AN INTRODUCTION TO THE AMERICAN POLITICAL SYSTEM 68 (8th ed. 1997).
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federalism has raged on since. As support for this theory, some point to President Eisenhower sending federal troops to Little Rock, Arkansas to assist the court ordered integration of Central High School, or to President Kennedy's requisitioning of the Mississippi National Guard to aid James Meredith's enrollment in the University of Mississippi.89

In recent years, there have also been examples of the unique relationship between the states and the federal government regarding law enforcement. In 1992, massive rioting erupted in the Los Angeles streets following the acquittal of four police officers charged with the videotaped beating of Rodney King.90 Three days into the melee, President George Bush sent 1000 federal law enforcement officers and ordered 4500 federal troops to stand by in an attempt to "restore law and order."91

Many students of the federal system have noted that "the American federal system has always been characterized by such shared functions at the federal, state, and local levels."92 Still, the fact remains that the United States Constitution imbued the federal government with little power to regulate criminal activity.93

While it can be said that the modern concept of federalism has evolved from the notion of the federal system shared by the framers of our Constitution, the question as to the proper balance of authority between the states and federal government remains, too, a perennial one. This has been especially true with regard to criminal law.94

89. Id. at 73 ("There have been other dramatic examples of tension within the federal system. Several times in recent decades the president of the United States has deployed armed federal troops in states experiencing civil disorders."). The tension between states and the federal government is perhaps best illustrated by an instance in June of 1963 when Alabama governor George Wallace, who would less than five years later make a losing bid for the presidency, carried out a pledge that he had made while running for governor to "'stand in the schoolhouse door'" to prevent integration of the University of Alabama. Id. Wallace, however, retreated after President Kennedy "federalized" the Alabama National Guard to enforce the federal court integration order. Id. at 73–74.

90. Id. at 175.

91. Id. at 176. In addition, then-President Bush addressed the nation on television to plead for racial harmony and a restoration of order. President Bush also made predictions that the Department of Justice "might prosecute the police officers under federal civil rights laws." Id.

92. Id. at 74. One of these scholars in particular, Michael D. Reagan, suggests that it is not accurate any longer to think of our federal system as erecting "'a wall separating the national and state levels of government.'" Id. Instead, Reagan says extensive federal financial aid to the states has given us "'a nationally dominated system of shared power and shared functions.'" Id.

93. LAWRENCE, supra note 22, at 114.

94. Id. at 113. Lawrence, to highlight this idea, shows a dichotomy. He first cites Chief
worth the statistical note that, while it is indeed true that the federal
government possesses no general police powers, Congress has enacted
over three-thousand federal offenses since the time of Reconstruction,
and they have done so with the ratification of the United States
Supreme Court. Moreover, many of these federal laws were enacted to
address crimes that were traditionally seen as "state crimes." Still, the
problem of federalism remains firmly rooted in the conscience of both
lawmakers who support and those who oppose federal laws that involve
the investigation and prosecution of civil rights in general, and hate
crimes in particular.

3. The Commerce Power

The unwavering constant that exists now, as it did during the
legislative and judicial battles fought over enforcement of the Civil
Rights Act of 1964, is that "Congress . . . must identify some particular
constitutional power [when it] enact[s] any piece of criminal
legislation." Over the past century, we as a country have become, as one scholar
has termed it, a "culture of mobility." This reality led to Congress's
expansive use of the commerce power guaranteed to it under the
Constitution. Much ink has been spilled over the evolution of this
nebulous Congressional power; however, it remains the principle
authority relied upon by Congress in their efforts to enforce civil rights
in the modern era. One prominent example of Congress's use of the

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Justice Earl Warren's comments on the subject which are as follows: "It is essential that we
achieve a proper jurisdictional balance between the federal and state Court systems, assigning
to each system those cases most appropriate in the light of the basic principles of federalism."
Id. Lawrence contrasts Warren's view, which he characterizes as decidedly "optimistic" with
Frederick Douglas's view of federalism expressed nearly a century before:

While there remains such an idea as the right of each State to control its own local
affairs—an idea, by the way more deeply rooted in the minds of men of all sections
of the country than perhaps any other political idea—no general assertion of human
rights can be of any practical value.

Id. at 113–14.

95. Id. at 114–15.

96. Id. at 115. See also Kalam, supra note 7, at 598 ("Since the Civil War, Congress has
created over 3,000 federal criminal offenses, offenses that conventionally were prosecuted by
the states."); LAWRENCE, supra note 22, at 115.

97. Baker, supra note 2, at 1192.

98. LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 115
(1994).

commerce power in enforcing federal civil rights laws is illustrated by the companion civil rights cases of Heart of Atlanta Motel, Inc. v. United States and Katzenbach v. McClung, which were decided during the Supreme Court's 1964 Term. The Court's decisions in these cases upheld, as a valid exercise of the power to regulate interstate commerce, the public accommodation provisions contained in the Civil Rights Act of 1964, notwithstanding the fact that the obstruction to commerce at issue was caused by what had been deemed a "social or moral wrong." Since 1964, the extent of Congress's power to regulate civil rights via the commerce power has undergone significant change. Indeed, it was early in our country's existence that John Marshall declared in McCulloch v. Maryland that the question regarding "the extent of the powers actually granted [to Congress], is perpetually arising, and will probably continue to arise, so long as our system shall exist." In United States v. Lopez, the Supreme Court succeeded in normalizing an analysis for determining the extent to which Congress may utilize its granted power over interstate commerce. In Lopez, the Court identified three broad categories of activity that Congress may regulate under its commerce power, namely the channels and instrumentalities of interstate commerce, and those activities having a "substantial relation to interstate commerce."

100. 379 U.S. 241 (1964).
102. CONSTITUTIONAL LAW 229-30 (Geoffrey R. Stone et al. eds., 3d ed. 1996). The editor describes the rationale of this use of the commerce power using the Court's own words in Heart of Atlanta Motel:

[In framing the public accommodation provisions of the Civil Rights Act of 1964,] Congress also was dealing with what it considered a moral problem. But that fact does not detract from the overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse. It was this burden which empowered Congress to enact appropriate legislation, and, given this basis for the exercise of its power, Congress was not restricted by the fact that the particular obstruction to interstate commerce with which it was dealing was also deemed a moral and social wrong. Id. (quoting Heart of Atlanta Motel v. United States, 379 U.S. 241, 257 (1964)).

103. 17 U.S. (4 Wheat.) 316, 405 (1819) ("This government is acknowledged by all, to be one of enumerated powers. The principle, that it can exercise only the powers granted to it... is now universally admitted.").
104. Id.
106. See id.
107. Id. at 558-59. Using these articulated criteria, the Supreme Court struck down the Federal Gun-Free Zones Act, which was aimed at the prohibition of firearms in a place that a
Indeed, as scholars have surmised, "[t]he reach of Lopez is not yet clear." The Supreme Court left hanging the fact that many of its previous cases have given substantial deference to Congress in the exercise of its power under the Commerce Clause and have "suggested the possibility of additional expansion." Yet, the Court declined at the time of Lopez to "proceed any further." Despite this, the Commerce Clause continues to be used as the authority for the right of the federal government to enforce civil rights. This is true both generally and with respect to hate crimes. However, in using the power to enact legislation relating to hate crimes, Congress must be mindful of the Court's narrow interpretation of the scope of Congress's power under the Commerce Clause.

III. Modern Federal Hate Crime Legislation and the Debate Over Sexual Orientation

A. The Hate Crime Statistics Act of 1990: Setting the Stage

Congress has faced federalism issues when enacting federal legislation aimed at the problem of hate crime; however, Congress has confronted other problems with this type of legislation as well. Struggles over the spearhead act of modern federal hate crime legislation, the HCSA, give us our best insight into the struggle we now face, or, perhaps it is more accurate to say, still face, with hate crime legislation. In many ways, the debate over passage of a hate crimes bill in the 106th Congress resembles the debate in the 100th Congress over passage of the HCSA. Once passed, HCSA required the Department

108. LAWRENCE, supra note 22, at 117.
109. Id. (quoting Lopez, 514 U.S. at 567).
110. Id. (quoting Lopez, 514 U.S. at 567).
111. See HCPA, S. 622, 106th Cong. (1999); To Combat Hate Crimes, S. 1406, 106th Cong. (1999). Both of these bills cite the Commerce Clause of the U.S. Constitution for authority of their respective provisions.
113. LAWRENCE, supra note 22, at 117.
115. See generally WHALEN & WHALEN, supra note 80.
of Justice to systematically collect hate crime data for a period of five
years.116 As early as 1985, though, many advocacy groups lobbied
Congress for a federal hate crime recording statute.117 After many
hearings, a bill was drafted and passed by the House in 1985; however,
Congress adjourned before the bill could be put before the Senate for a
vote.118

When the HCSA was re-introduced to the 100th Congress, there was
wide support for passing such a law.119 Many advocacy groups, as well as
the bill's sponsors, testified to the importance of the law.120 John
Conyers (D–Mich.), a co-sponsor of the bill, testified that "'[d]evoting
federal resources to the collection of more information about this
problem will demonstrate a national commitment to the eradication of
hate crimes.'"121 Beyond its active supporters, the bill had wide support
in Congress.122 In 1989, there was political utility to passing a law that
sent an "anti-prejudice" message.123 The off-year congressional elections
were around the corner, and a federal statistical act provided legislators

116. HCSA, 28 U.S.C. § 534 note; see also discussion supra note 6.
117. JACK LEVIN & JACK McDEVITT, HATE CRIMES: THE RISING TIDE OF BIGOTRY
AND BLOODSHED 200 (1993). Many of these groups advocated an approach based on their
own experience tracking racial or bias violence. Most prominent among these advocates was
the Southern Poverty Law Center whose Klanwatch publication had been tracking hate crime
almost from its inception, believing that to do so was a critical first step. See SOUTHERN
POVERTY LAW CENTER, supra note 11. The idea is that it is unable to address a problem,
until one knows with sufficiency the depth and breadth of that problem. See LEVIN &
McDEVITT, supra, at 200; see also discussion supra note 11.
118. See 131 CONG. REC. H5988-93 (daily ed. July 22, 1985). In the subsequent re-
introduction of the statistical act, definition would be critical to the debate. This early version
of the statistical act was targeted at collecting data on crimes motivated by race, religion, and
ethnicity. Id. See also JACOBS & POTTER, supra note 4, at 69.
119. JACOBS & POTTER, supra note 4, at 69-70.
120. Id. The authors distill the testimony of the many private groups advocating for a
statistical law as outlining the following objectives:

1) help communities, legislatures, and law enforcement personnel respond
effectively by providing information on the frequency, location, extent, and patterns
of hate crime; 2) improve law enforcement's response by increasing awareness of
and sensitivity to hate crimes; 3) raise public awareness of the existence of hate
crimes; and 4) send a message that the federal government is concerned about hate
crime.

Id. (emphasis omitted). The authors note that looking back, it appears to them that it was the
latter two objectives and not the former that were accomplished by the HCSA. Id. at 70.
This frames the author's later discussion of "symbolic" legislation. See id. at 70, 130-44.
121. Id. at 70 (quoting H.R. REP. NO. 100-575, at 3 (1988)).
122. See generally id. at 69-70.
123. Id. at 70.
with a safe way to delve into hate crime legislation. For one thing, the Act would indeed be seen as a "significant step" that would "send an additional important signal to victimized groups everywhere that the U.S. Government is concerned about this kind of crime." Most importantly, however, it was only a step. Indeed, the HCSA did not extend any substantive rights to any groups of victims; it merely called for the systematic collection of data on this kind of crime. In many ways, the HCSA can be called "symbolic" legislation. Yet, supporters and advocates did not view the Act as being merely symbolic; rather, they saw the Act as the critical first step of the attack—namely, identifying the problem. Solving the problem would, of course, be left to subsequent legislation.

By the time the HCSA was re-introduced, the breadth of the bill significantly changed. The new HCSA expanded the data collection provisions contained in the 1985 Act to include a category for violence against persons because of their sexual orientation. This expansion of the Act was the result of significant lobbying and substantial fact finding into anti-gay violence by the criminal justice arm of the House Judiciary Committee. When the HCSA appeared in the Senate, the provisions relating to sexual orientation raised substantial questions with the membership. Perhaps the most frank assessment of the expansion was that this inclusion of sexual orientation prejudice would alter what had, to then, been the understanding of the Civil Rights Act of 1964.

But the most vehement opposition of the HCSA went well beyond this assessment. A group of four senators, led by Jesse Helms (R–N.C.),...
harshly condemned the extension of the HCSA to include collecting data on sexual orientation prejudice. This contingent, indeed, viewed the HCSA as symbolic politics, and was virulently opposed to the kind of "message" with respect to homosexuality that was being sent by this measure. The opposition was unequivocal about its disdain for the language including sexual orientation bias because they knew, as did proponents, that the law would view homosexuals as a protected class.

This opposition bitterly condemned the Act in a written record, and represented the four votes against the HSCA in the Senate.

What offset this ultra-conservative minority, and perhaps steadied bipartisan support for the HCSA, was a "compromise move." This move was to affix certain congressional findings to the Act that expressed some of these reservations about the extension of the Act to more palatably include sexual orientation bias. The findings, however, which were made in terms revering the American family, made it clear that "[n]othing in this Act shall be construed... to promote or encourage homosexuality." With these findings attached to the bill, it passed easily in the Senate, and then in the House.

The passage of the HCSA was seen as a victory to many, and for those, the Act marks, unequivocally, "the first time in history that sexual orientation [was] included in a federal civil rights law."
Though the HCSA extended no substantive rights on the basis of sexual orientation, the inclusion of language regarding this distinct group meant federal recognition of the problem of violence against gays, despite qualification of the affixed findings. As opponents of the measure recognized, a statistical act, while extending no substantive rights, is, in fact, the "foundation for a subsequent federal response."\(^{140}\) In this light, many advocacy groups, especially those advocating for the inclusion of provisions relating to sexual orientation, were content to wait—believing that the statistics would speak for themselves and compel subsequent action.\(^ {141}\) The concussions of the Congressional debate over the HCSA would be felt throughout the following decade.

In 1992, William Jefferson Clinton was elected President. With him, came a staunch agenda for action in the area of civil rights.\(^ {142}\) For many minority groups who were affected, symbolically, or otherwise by the Clinton agenda, his administration intensified the federal commitment to civil rights.\(^ {143}\) The Clinton administration also seized upon opportunities presented by Supreme Court decisions, such as Wisconsin v. Mitchell, to amplify its response to the problem of hate crime, which due to the efforts of the FBI and the Department of Justice, was becoming a problem with substantially more objective shape.\(^ {144}\) Additionally, because of what was viewed administratively as progress with regard to the data collecting effort, Congress accepted a provision in the Church Arson Prevention Act of 1996 that would extend the data collecting efforts for five more years.\(^ {145}\)

**B. ENDA and DOMA: Fuel to the Fire**

For advocates of gay civil rights, the decade following the enactment of the HCSA was not as fortuitous. While these advocates continued working to build on the success of the HCSA, the law's opponents

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141. *See generally id.*

142. *See, e.g.,* CAPA, 28 U.S.C. § 534 note (1994 & Supp. III 1997). At President Clinton's urging, Congress passed the Church Arson Prevention Act to respond to a rash of arsons of black churches in the middle of the 1990s. *Id.* The move was seen as a commitment to combat continued racial violence, particularly in the South. Kalam, *supra* note 7, at 597. Congress used as an authority for this law, powers they possess over interstate commerce. *Id.* *See also* CAPA, 28 U.S.C. § 534 note.


144. *See generally LAWRENCE, supra* note 22, at 22–23.

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began to garner more support. The American family provisions that were affixed to the HCSA framed the new question that now faced the 104th Congress. Despite the language used by some in debating the HCSA, the question was: Is there a federal obligation to protect citizens in their sexual orientation?

There was substantial support in the 104th Congress for additional expansions in the area of gay rights that built upon the new consideration given to sexual orientation under federal law, which though not clearly expressed, was implied by the HCSA. In 1996, Congress began to craft a federal employment non-discrimination law, which would come to be known as the Employment Non-Discrimination Act (ENDA). ENDA proposed, quite simply, to include the category of sexual orientation to already existing provisions of the Civil Rights Act of 1964 prohibiting employment discrimination on the basis of race, religion, and ethnicity.

Meanwhile, a large number among the 104th Congress concentrated their efforts on expanding upon the resolutions regarding the American family provisions of the HCSA. The efforts of this contingent produced a different law, the Defense of Marriage Act (DOMA). DOMA, while seen by many as another form of symbolic legislation, was viewed by others as far from benign. Proponents and advocates of gay civil rights understand the Act to be a means for the federal government to subvert the Full Faith and Credit Clause with regard to gay marriage.

By 1996, the debate in Congress over recognition of gay civil rights had built up sufficient steam. Opposing forces in this debate met head
on in the 104th Congress, and the membership, with their actions on ENDA and DOMA, unequivocally answered the question on sexual orientation. When ENDA went before the floor of the Senate it failed by one vote, fifty to forty-nine. Just subsequent to the ENDA's failure on the Senate floor, both the Senate and the House passed DOMA, which was signed into law by President Clinton in September 1996.

The Human Rights Campaign (HRC), which is a prolific advocate of gay civil rights, viewed these successive actions by Congress as staunch defeats. Paramount among their concerns was that the message sent by the 104th Congress was not only not cordial to those advocating gay civil rights, but rather was overtly hostile to them.

The Supreme Court's decision in *Romer v. Evans*, also handed down in 1996, offered little consolation to groups like the HRC. In *Romer*, the Supreme Court struck down Colorado's "Amendment 2," which was designed to prohibit any governmental action designed to protect the civil rights of homosexuals. In the words of the Court, the Colorado law was "inexplicable by anything but animus toward the class it affects." Facially, the *Romer* decision appeared to be positive for those advocating for recognition of gay civil rights; but, the opinion authored by Chief Justice Rehnquist said something more. While the majority found the Colorado law to be characterized as an expression of nothing more than "animus" towards homosexuals, the decision could not be seen, by any terms, as advancing recognition of gay civil rights. Perhaps the most telling part of the Court's decision in *Romer*, though, was illustrated by the equal protection analysis to which the Colorado law was subject. Because the class implicated by the case was composed of gay, lesbian, and bisexual men and women, the Colorado law was only subjected to the rational basis test rather than the strict scrutiny test which is applied to laws that implicate race, religion, or ethnicity.

156. HRC, *supra* note 150.
158. *Id.*
159. *See generally id.*
161. *See generally id.*
162. *Id.* at 632.
163. *Id.* at 633.
164. *Id.*
165. *Id.* Traditionally, the analysis of laws challenged under the equal protection guarantees of the Fourteenth Amendment are subjected to different levels of scrutiny when
All said, 1996 was seen as a difficult year for advocates of gay civil rights. The years leading up to the close of this century did not prove to be any more fortuitous for these advocates. The legislative potential that many saw in the HCSA's recognition of sexual orientation prejudice at the beginning of the 1990s now languished in the wake of the words and actions of the 104th Congress.

C. The 106th Congress and the Hate Crime Prevention Act of 1999

In the 106th Congress, the debate over sexual orientation raged on. The societal backdrop, however, had raised the stakes for legislators. The media widely publicized the brutal 1998 slayings of Matthew Shepard and James Byrd, Jr. This broad coverage captured the minds of legislators and their constituents. The juxtaposition in time of these two murders, as well as the prolific and sensational coverage of these crimes by the media, not only compelled a national discussion of hate crime, but also seemed to assume that they were the same kind of crime.

The sensational coverage of these criminal acts by the media operated as a catalyst for action on behalf of the federal government, much as it did in 1963 when cameras caught the brutal police violence against blacks on the streets of Birmingham, Alabama. In the opening
months of the 106th Congress, Senator Edward Kennedy of Massachusetts introduced, with thirty-three co-sponsors, a response in the form of the Hate Crime Prevention Act of 1999.171

D. The Hate Crime Amendment of 1999—The "Kennedy" Bill

From the time he introduced the Hate Crimes Prevention Act of 1999 (HCPA), Senator Kennedy made clear that this new hate crime law had a simple goal—to fill two distinct voids in the hate crimes legislation already in place.172 Indeed, many viewed this new law as the "logical culmination" of the line of federal hate crime legislation that began with the HCSA.173 The HCPA proposed to amend 18 U.S.C. § 245 to fill these distinct voids. First, the bill would extend Title 18's protections by making violence against persons because of race, religion, or ethnicity, punishable regardless of whether the victim was engaged in one of six narrowly defined federal activities.174 Second, it would extend the same protections to persons victimized because of disability, gender, and sexual orientation.175

Congress passed the HCPA using its authority under the Commerce Clause.176 The bill is clear about the commerce nexus, showing Congress's awareness of the modern Supreme Court's view on this power, as expressed in *Lopez*.177 Adopting language directly from the majority opinion in *Lopez*, the bill purports to punish bias crimes when the circumstances show that "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 . . . the offense is in or affects interstate or foreign commerce."178

Kennedy proffered his bill with strong language, saying "[i]t's an embarrassment that we haven't already acted to close these glaring gaps in present law," and that "Congress has a responsibility to act this
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The HCPA was submitted immediately to the Senate Judiciary Committee, and the debate in Congress over the HCPA moved to that committee.

Less than two months later, the Senate Judiciary Committee heard testimony from Judy Shepard, the mother of Matthew Shepard. Judy Shepard told the Committee that she was there "to urge the expedient passage of the Hate Crime Prevention Act." As part of her testimony, she solemnly recounted details of her son's tragic death, showing a keen awareness of the constitutional issues raised by the legislation she was there to urge. She told the Committee, "I can assure opponents of this legislation first hand, it was not words or thoughts, but violent actions that killed my son."

Even before Judy Shepard's testimony before the Senate, the story of her son had become synonymous with hate crime in the public imagination. For the remainder of the term, much of the discussion in Congress with respect to hate crime concerned the expanded definition of hate crime proffered by the HCPA. This discussion was perhaps most acutely captured by Gordon Smith (R–Or.), who was once an opponent of the inclusion of sexual orientation protection in hate crime legislation. Senator Smith addressed the Senate floor saying, "This is a very controversial thing with many Senators. ... It is controversial because it includes a new category: '... for sexual orientation.' And many of my friends in the Senate believe that disqualifies it from consideration. Smith, who was speaking immediately before Senate

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180. Id. (referring HCPA to the Senate Judiciary Committee).
182. Id.
183. Id.
184. See generally supra note 2 and accompanying discussion.
185. Wheeler, supra note 25 (quoting Representative Nathan Deal (R–Gainesville) as asking "'[W]hy should we be making it a federal offense because of the sexual orientation of a victim? ... I don't believe we need to expand federal jurisdiction into these areas.'"). Accord 145 CONG. REC. H14400 (daily ed. Nov. 9, 1999) (including statement from Representative Feinstein, (D–Cal.): "Unfortunately, there are those who would stop short of supporting this important legislation because it extends protections to those targeted on account of their sexual orientation.").
187. Id. at S5337.
voted on the HCPA, concluded saying, "[s]ome will say: [t]he Kennedy amendment is not constitutional. I believe it is constitutional. I believe it is OK to say we will help Americans—how we find them—whether they are black, whether they are disabled, or whether they are gay." 188 In June 2000, almost a year after Judy Shepard's testimony to the Senate Judiciary Committee, the Senate approved the HCPA by a vote of fifty-seven to forty-two. 189 Many supporters were optimistic at the result of the vote, but they knew that though they were out of the Senate, they were not yet out of the woods. 190

In the course of its referral to the Senate committee, the HCPA had been attached to an annual defense authorization bill. 191 Controversy arose when the House version of the legislation had omitted the crucial language relating to sexual orientation. 192 To resolve this controversy, the HCPA was set before a conference committee, which is one of three principle vehicles with which differences between the two chambers of Congress are worked out. 193 Thus, the HCPA awaited action in one of the safest places that Congress may place a bill. 194 Supporters of the HCPA, however, knew full well that should the measure make it out of conference committee, House members would "vote up or down on the overall bill, not individual pieces." 195

E. The "Hatch" Bill

From the outset of the 106th Congress, Senator Orrin Hatch had opposed the extension of federal hate crime legislation in the way that Senator Kennedy's HCPA proposed. 196 Just as he had in the 100th Congress, Hatch publicly advocated an approach to hate crimes that was

188. Id. at S5838.
189. Simon, supra note 13, at A17.
190. See generally HOW CONGRESS WORKS, supra note 12, at 102 ("Before a bill can be sent to the White House for the president's signature, it must be approved in identical form by both chambers of Congress.").
193. HOW CONGRESS WORKS, supra note 12, at 102 ("There are three ways of resolving differences between the two Houses: one chamber may yield to the other and simply accept its amendments; amendments move back and forth between the two houses until both agree; or a conference committee may be convened.").
194. See id. at 102–09.
geared more toward aid to local law enforcement and reporting efforts.\textsuperscript{197} Hatch's argument was that "[b]efore we take the step of making every criminal offense motivated by hatred a federal offense, we ought to equip states and localities with the resources necessary so that they can undertake these criminal investigations... on their own."\textsuperscript{198} Senator Hatch realized, perhaps prophetically, the importance of the coming elections in 2000. Indeed, in the 2000 presidential election, where crime was a perennial platform issue, hate crime was the only criminal issue that was disputed by the candidates.\textsuperscript{199}

Senator Hatch, one of the architects of the compromise that enabled passage of the HCSA in the 100th Congress, designed a solution again in the 106th.\textsuperscript{200} Sensing partisan rancor in Congress over the defense bill due to the disputes over the HCPA, Hatch introduced a competing hate crimes measure to take the place of Kennedy's bill.\textsuperscript{201} Hatch carefully designed the bill to effectuate a compromise, so that many Republicans could go to their constituents in an election year and be able to say they voted for a hate crimes bill.\textsuperscript{202} At the same time, Hatch's measure dubiously stripped the measure of the critical language regarding sexual orientation, while purporting to remain focused on crime against this particular group.\textsuperscript{203}

Again, we must be reminded that the devil is in the details. Hatch's measure, entitled "To Combat Hate Crimes," was carefully designed. Though the Hatch bill shared many characteristics with the Kennedy measure, it was also crucially different. Like Kennedy's bill, the Hatch measure proposed to amend the United States Code.\textsuperscript{204} Also like Kennedy's bill, the Hatch bill purportedly relies on Congress's power under the Commerce Clause to authorize the substantive part of the law.\textsuperscript{205} This fact alone would seem to undermine any argument between

\begin{thebibliography}{99}
\bibitem{197} Id.; Kalam, supra note 7, at 597.
\bibitem{198} Davidson, supra note 196, at B4.
\bibitem{199} During the presidential debates, the candidates even went so far as to invoke the names of both Kennedy and Hatch as signaling the approach to hate crime that each advocated. Bush, of course, with Hatch, and Gore with Senator Kennedy.
\bibitem{200} JACOBS & POTTER, supra note 4, at 71.
\bibitem{201} To Combat Hate Crimes, S. 1406, 106th Congress (1999); see also supra note 5.
\bibitem{202} Griffin, supra note 191, at A1, available at 2000 WL 10212981 ("The really key issue here is we have an election year coming.") (quoting Raj Purohit, Director of Legislative Affairs for the National Association of Criminal Defense Lawyers).
\bibitem{203} S. 1406; see also supra note 5.
\bibitem{204} S. 1406 § 4(e)(1). This section entitled "INTERSTATE TRAVEL TO COMMIT HATE CRIME" seeks to amend title 18 with a new section 249.
\bibitem{205} Id.
\end{thebibliography}
Democrats and Republicans as to the legitimacy of exercising this power to enforce hate crimes. Yet, the critical difference of the Hatch measure is that, unlike Kennedy's HCPA, it does not extend its substantive protections to persons victimized because of their sexual orientation.206

The Hatch measure can be fairly divided into two parts. The first part focuses on "studies,"207 and the second part focuses on "interstate travel to commit hate crime."208 The "studies" part of the Hatch bill calls for a dramatic augmentation of the work begun with the HCSA and expanded by both the VCCLEA and CAPA.209 The bill proposes to accomplish through this section a stronger link between the federal government and local authorities, an approach that Hatch has advocated since the HCSA.210 The "studies" section calls for grants, data collections, and reimbursements.211 For the purpose of this section of the Act, Hatch adopts the definition of hate crime given in the first section of the HCSA.212 This definition, as Hatch knew full well from his experience with the bill in the 100th Congress, as well as in subsequent years, included victims of sexual orientation bias as one of its focus groups, along with race, religion, ethnicity, gender, and disability.213

The part of the Hatch bill that is slightly more dubious is the section focused on "interstate travel to commit hate crimes"—the section of the bill containing substantive protections.214 This section proposes to add a new section 249 to the already established provisions of title 18.215 In much the same way as Kennedy's bill, the Hatch measure creates a new substantive proscription against hate crime when such activity "affects" interstate commerce.216 The difference in this part of the bill is that these substantive provisions are only extended on the basis of "race, color, religion, or national origin."217 This is the critical difference. Without embellishment, it can be said that the only real difference between the Kennedy and Hatch measures is that the Hatch bill did not

206. See id. § 4(e).
207. Id. § 1(b)(1).
208. Id. § 4(e).
209. Id. § 1(b).
210. See generally JACOBS & POTTER, supra note 4, at 69–71.
211. S. 1406 § 1(b).
213. See generally JACOBS & POTTER, supra note 4, at 69–71.
214. See S. 1406 § 4(e).
215. This part of title 18 was established by provisions in both the Civil Rights Acts of 1964 and 1968.
216. S. 1406 § 4(e) (1999); see also supra note 5.
217. S. 1406 § 4(e).
propose to extend federal hate crime legislation to protect citizens in their sexual orientation. On the other hand, Senator Kennedy's measure did. Just prior to being dropped from the defense bill to which it was attached, President Clinton was sanguine about the controversy that remained over hate crimes, saying "[w]e all know what the deal is here... [t]he Republican majority does not want a bill that explicitly provides hate crimes protections for gay Americans."\textsuperscript{218}

Despite the tireless work of Kennedy and nearly 40 years after President John F. Kennedy asked whether \textit{all} Americans would be afforded equal rights and equal opportunities, the 106th Congress did not have an answer.\textsuperscript{219} In October of 2000, citing exigencies of national security associated with the annual defense authorization bill, Senator John W. Warner (R-Va.), chairman of the Senate Armed Service Committee, said that the hate crimes measure had to be dropped "[i]n the interest of national defense."\textsuperscript{220} Senator Warner said that he had pushed for the removal of the bill in an effort to subvert a filibuster by conservative Republicans that was likely to block passage of the defense spending bill, part and parcel.\textsuperscript{221}

IV. CONCLUSION

\begin{quote}
\textit{We shall not cease from exploration}
\textit{And the end of all our exploring}
\textit{Will be to arrive where we started}
\textit{And know the place for the first time.}\textsuperscript{222}
\end{quote}

So it is that the struggle to extend modern federal civil rights legislation remains right where it started. In the late 1980s, the question was posed whether there was a federal obligation to protect citizens in their sexual orientation.\textsuperscript{223} Actions by Congress leading up to the 106th term appeared to negatively answer that question. After the 106th Congress, apparently the best answer is that we are not yet sure.

\textsuperscript{218} Simon, \textit{supra} note 13, at A-17.
\textsuperscript{219} See WHALEN \& WHALEN, \textit{supra} note 80, at xx.
\textsuperscript{220} Simon, \textit{supra} note 13, at A-17.
\textsuperscript{221} \textit{Id.} It is sadly ironic that the threat of a filibuster by conservative Republicans killed the HCPA. It was thirty-five years ago when an equally conservative Republican contingent failed at killing the Civil Rights Act of 1964 by a filibuster. \textit{See generally} WHALEN \& WHALEN, \textit{supra} note 80, at 149–51.
\textsuperscript{223} \textit{See supra} note 185 and accompanying text.
The problem of hate crimes is still lodged in the public imagination. More than two years after the tragic death of Matthew Shepard, his story is still in the forefront of the public discussion of hate crime. On January 10–11, 2000, in an effort to atone for profit it earned from controversial rapper Eminem, MTV suspended its regular programming to air, commercial free, hate crime victims' names and stories.224 "Our hope is it really gets the attention of our audience and motivates them to get involved," said Brian Graden, the network's programming president.225 The week following the airing of victims' names, MTV intended to air a made-for-TV movie about Matthew Shepard.226 In addition, on January 4, 2001, Yahoo, one of the Internet's most prolific launch sites, set into effect a ban on the sale of all hate-related items on their auction site.227 Brian Fitzgerald, senior producer for Yahoo auctions said, "We're trying to improve the quality of the site and these items have been detracting from the quality."228 This action by Yahoo seems to reflect a national consensus against hate activity of all kinds, conveniently couched, as it is by Yahoo, as a quality of life issue.229

Though the public remains concerned with the issue of hate crimes, it is imperative that Congress acts to extend civil rights legislation to include proscriptions against anti-gay violence.230 This necessity is perhaps best explained by Frederick Lawrence, who posits that:

[A government] makes a normative statement about the treatment of gays and lesbians when it frames its bias crime law. Failure to include sexual orientation implies that gays and lesbians are not as deserving of protection as racial, religious, or ethnic minorities, and that sexual orientation is not as serious a social fissure line as race, religion, and ethnicity.231

225. Id.
226. Id.
227. George A. Chidi Jr. & Rick Perera, Yahoo Bans Hate-Group Commerce Sites from its Web Portal, INFOWORLD, Jan. 8, 2001, available at 2001 WL 8082829 (banning all Nazi or KKK items and any other items from groups that "promote or glorify hatred and violence").
228. Id.
229. Id.
230. LAWRENCE, supra note 22, at 20. Lawrence operates on the assumption that the same normative statement is made when the federal government frames its laws. See generally id. at 110–60 (discussing the federal role in prosecuting bias crimes).
231. Id. at 20.
To some, however, this is a slippery slope. Senator Hatch observed that the HCPA would make it possible to prosecute a suspect who was charged with rape under Kennedy's hate crime law. Moreover, opponents of including a classification for sexual orientation in federal hate crime legislation view the inclusion of such a classification as unwarranted. To these opponents, gay, lesbian, and bisexual men and women are seeking special rights, to which they are not legally entitled. Naturally, these same opponents direct their concern toward what kinds of groups might next seek federal protection of its civil rights. Anthony Winer addresses the question, saying simply:

If any such group could show that hate crimes against its members across the country were widespread, persistent and significant, that a social history of hate crime against its members existed, that such incidents were tabulated and recorded, and that such incidents produced identifiable and distinct patterns of criminal behavior in perpetrators, then the social reality of their victimization would be established.

Such a case has been amply made regarding the victims of violence because of sexual orientation. Though we are wise to be careful with hate crime statistics, it is gay, lesbian, and bisexual men and women who are among the most victimized by hate crimes. And, indeed, as Senator Kennedy has remarked, this is an "embarrassment."

In the time since the close of the 106th session of Congress and the

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232. It seems almost inevitable that in discussions over expanding federal civil rights laws, someone invokes this oft-trotted out phrase.
233. See Davidson, supra note 196, at B-4.
234. See generally Baker, supra note 2; see also Jacobs & Potter, supra note 4, at 65–68, 90. Though these authors may not claim to see gay, lesbian, and bi-sexual men and women as unaffected by hate crime, they do view the struggle of these people in the area of hate crime legislation as seeking special rights. Id.
235. Winer, supra note 27, at 434.
236. See id.
237. See generally supra note 11.
238. Lawrence, supra note 22, at 17–18 ("It is difficult to make a strong argument that crime motivated by bias based on sexual orientation—'gay bashing'—does not fit the bias crime model.... If one of the purposes of bias crime statutes is to protect frequently victimized groups, sexual orientation is particularly worthy of inclusion.... A Department of Justice report noted that 'homosexuals are probably the most frequent victims of hate crimes.").
start of the 107th session, we have changed our guard. On January 20, 2001, George W. Bush was sworn in as President of the United States.\(^{240}\) Many proponents of civil rights have questioned whether the new presidential administration will be committed to advancing hate crime legislation.\(^{241}\) These critics point in particular to his choice of John Ashcroft as Attorney General.\(^{242}\) Nevertheless, it has been nearly a year that the current administration, with John Ashcroft, has been in place. In that time, the Administration has sent mixed messages on civil rights. On the one hand, John Ashcroft has taken his post as Attorney General and come out unequivocally against the use of racial profiling as a method of law enforcement.\(^{243}\) This and similar expressions on the part of the Attorney General have ameliorated some of the pre-conceived fears about this Administration's stance on civil rights, at least in the context of race.\(^{244}\)

With respect to the civil rights of gay, lesbian, and bisexual men and women, however, the message is decidedly less comforting. The Bush Administration has made efforts to significantly advance what it has termed as faith-based initiatives.\(^{245}\) This past summer, the Bush Administration formed an alliance with the nation's largest charity, the Salvation Army, to forward these initiatives.\(^{246}\) In essence, the alliance was based on a commitment by the Administration to issue regulations exempting charities like the Salvation Army from state and local discrimination laws.\(^{247}\) In return, the Salvation Army agreed to use its


\(\text{\textsuperscript{242}}\) White, supra note 241, at 30; Gibbs & Duffy, supra note 241, at 20.

\(\text{\textsuperscript{243}}\) Thomas B. Edsall, Attorney General Cites 'Candid Exchange' and Stresses Agreement on Profiling, WASH. POST, March 1, 2001, at A6 ("'I believe profiling is an unconstitutional deprivation of equal protection under our Constitution,' Ashcroft said.").

\(\text{\textsuperscript{244}}\) See generally supra note 238.

\(\text{\textsuperscript{245}}\) Dana Milbank, Charity Cites Bush Help in Fight Against Hiring Gays Salvation Army Wants Exemption from Laws, WASH. POST, July 10, 2001, at A1. These initiatives essentially seek to direct an increasing amount of government funds to religious charities. Id.

\(\text{\textsuperscript{246}}\) Id.

\(\text{\textsuperscript{247}}\) Id. ("The matter stems from a national debate spurred by an increasing number of local jurisdictions that have adopted laws requiring religious groups such as the Salvation Army to adhere to laws barring discrimination against gays in hiring, job promotion and benefits. What the administration is suggesting... is a federal regulation that would forbid states and localities from barring such discrimination when administering programs with federal funds.").
influence to advance the Administration's faith-based programs. The move was controversial, as it would enable religious charities to discriminate against gays in hiring, promotion, and domestic partner benefits, despite local laws.

Once the story broke in the national media, the Administration was quick to clarify the alliance with the Salvation Army. White House press secretary, Ari Fleischer, informed the press that faith-based groups already had the power under current federal law to discriminate against gays in hiring, and that it was state and local jurisdictions that were seeking to require these groups to include gays in their employment protections. In an immediate about face, the Bush Administration dropped its consideration of the regulation it committed to the Salvation Army. The Administration abandoned the alliance after Democratic leaders in Congress came out against it. In response to reports about the agreement between the Bush White House and the Salvation Army, Senate Majority Leader Tom Daschle (D–S.D.) expressed his concern, saying "I'm troubled by secret deals. I'm troubled by any deal that would not show the kind of tolerance that I think we should show in this country."

Senator Daschle's comments illustrate that the torch carried by some in Congress for gay civil rights is not extinguished. In fact, Daschle and his Democratic colleagues in the Senate are now in a sturdier position to advance legislation on hate crime, and the inclusion of sexual orientation in such legislation, following the power shift caused by Vermont Senator Jim Jefford's announcement that he would become an Independent. From this new position of power, Daschle has stated

248. Id. According to the article, the Salvation Army projected spending $88,000–$110,000 per month in its effort to advance Bush's charitable choice initiatives. Id.

249. Id. (claiming that the document containing the agreement between the Administration and the Salvation Army, "offers a rare glimpse into the private dealings of the Bush White House, and it suggests President Bush is willing to achieve through regulation ends too controversial to survive the legislative process"); see also supra note 238.

250. Milbank, supra note 245.


252. Id.

253. Id. In addition, gay rights groups have reacted angrily to this action on the part of the Bush Administration. Ralph G. Neas, the president of the liberal group, People for the American Way, contends that the proposed regulation acts to "imperil fundamental rights." Id.

that his "'message will be, let's find a way to work together, to find a middle ground on the array of issues we all care about.'" Among the issues cited by Daschle, was the issue of "hate crimes."

Even before the power shift in the Senate, the opening weeks of the first session of the 107th Congress saw the introduction of a hate crimes measure almost identical to the HCPA introduced to the House of Representatives by a Texas Democrat. And, again, Congress has the opportunity to answer the fundamental question of "whether all Americans are to be afforded equal rights and equal opportunity." Unfortunately, the bill proposed by Sheila Jackson-Lee, which was referred to the House Committee on the Judiciary in January of 2001, has remained there, untouched, while the House focuses on other objectives of the Bush agenda. So it is that this Comment is unfortunately named. Rather than being a Comment about recent legislation, the piece is decidedly about 'a failure to pass recent legislation.' Thus, the modern line of hate crime legislation ends where it started—with an embroilment in Congress over the issue of sexual orientation.

Certainly, the issue of whether to include sexual orientation in the protections of federal hate crime law is a "value-driven question." Ultimately, this means that if we are to go further with federal hate crime legislation, Congress must squarely answer the question posed early on: Does the federal government have a duty to protect its citizens in their sexual orientation? Many advocates have compellingly answered yes. When Judy Shepard testified before the Senate Judiciary Committee in 1999, she urged that the committee understand that her son was dead because the men who killed him learned to hate. Somehow and somewhere they received the message that the lives of gay people are not as worthy of respect, dignity and honor as the lives of other people. They were given the impression that

255. Id.
256. Id.
258. WHALEN & WHALEN, supra note 80, at xx.
260. LAWRENCE, supra note 22, at 19.
261. JACOBS & POTTER, supra note 4, at 68–71.
society condoned or at least was indifferent to violence against gay and lesbian Americans.262

It is clear from this statement that the only way for our government to not condone or perpetuate this kind of intolerance is to condemn it. Facing this truth, let us hope that our government will soon, in some measure of earnestness, undertake this task.

GEORGE S. PEEK


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