

## HATE CRIME AND PUNISHMENT: WHY TYPICAL PUNISHMENT DOES NOT FIT THE CRIME

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*This Note explores the arguments for and against hate crime laws, ultimately determining that changes are necessary to balance the harm to victims and the burden on offenders caused by enhanced penalties. Hate crime laws provide for enhanced penalties when the perpetrator is motivated by hatred of the victim's race, gender, sexual orientation, etc. This Note details the history of hate crime laws in the United States and sets out the debate surrounding them. On one side of the debate are those who support enhanced punishments because of the despicable nature of hate crimes. The other side has advocated for abandoning hate crime laws, arguing that such laws incorrectly punish hateful thoughts.*

*This Note also includes an extensive look at philosophical theories of punishment, and how enhanced penalties for hate crimes fit within these theories. This Note ultimately concludes that effective punishment must involve elements that change the hateful mindset of the perpetrator. Finally, this Note asserts that hate crime punishment must be just, only punishing criminals in proportion to the harm that they have caused.*

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\* J.D. Candidate, Class of 2014, University of Illinois College of Law. My sincerest thanks to the Illinois Law Review editors, members and staff for their helpful comments and edits. My deepest gratitude to my parents who taught me that hate is never okay. I dedicate this Note to my wife, Marissa Meli, who has shown me that love conquers all.

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## I. INTRODUCTION

On September 22, 2010, a gay Rutgers student by the name of Tyler Clementi jumped off the George Washington Bridge to his death upon discovering that his roommate, Dharun Ravi, had secretly videotaped him in a romantic interlude with another man and posted homophobic comments about it on Twitter.<sup>1</sup> Since Ravi's actions were motivated by homophobia, Ravi was charged with a hate crime. Under New Jersey's hate crime statute, Ravi would receive an enhanced penalty because homophobia motivated him to spy on Clementi.<sup>2</sup> Rather than face an invasion-of-privacy charge that typically carries a sentence of up to five years, Ravi faced up to ten years in prison and deportation back to India.<sup>3</sup> Clementi's suicide sparked national outrage about bullying.<sup>4</sup> It also exposed a nation deeply divided about hate crime laws. LGBT rights groups (and others) applauded the enhanced penalty Ravi faced.<sup>5</sup> They found this steep penalty justified because Ravi's actions were egregious enough to justify it. Many people, however, found the penalty excessive. They argued that Ravi was just an ignorant kid who made a very poor decision.<sup>6</sup>

1. Lisa W. Foderaro, *Private Moment Made Public, Then a Fatal Jump*, N.Y. TIMES (Sept. 30, 2010), <http://www.nytimes.com/2010/09/30/nyregion/30suicide.html?pagewanted=all>.

2. N.J. STAT. ANN. § 2C:16-1 (West 2014).

3. David Ariosto, *Guilty Verdict in Rutgers Webcam Spying Case*, CNN (Mar. 17, 2012, 1:21 PM), <http://www.cnn.com/2012/03/16/justice/new-jersey-rutgers-trial/index.html>.

4. Ellen DeGeneres expressed her disgust about the events leading to Clementi's suicide. Jane Lasky, *Ellen Outraged by Tyler Clementi Outing and Subsequent Suicide*, EXAMINER.COM, (Oct. 1, 2010), <http://www.examiner.com/article/ellen-outraged-by-tyler-clementi-outing-and-subsequent-suicide>.

5. Joel Rose, *Former Rutgers Student Faces Hate Crime Trial*, NPR (Feb. 16, 2012), <http://www.npr.org/2012/02/16/146965277/former-rutgers-student-faces-hate-crime-trial>.

6. Bill Maher expressed his opposition to hate crime laws on his show "Real Time." *Maher: Hate Crime Laws Give "Liberals A Bad Name,"* REAL CLEAR POLITICS, (Mar. 24, 2012), [http://www.realclearpolitics.com/video/2012/03/24/maher\\_hate\\_crime\\_laws\\_give\\_liberals\\_a\\_bad\\_name.html](http://www.realclearpolitics.com/video/2012/03/24/maher_hate_crime_laws_give_liberals_a_bad_name.html); see also Richard Cohen, *Tyler Clementi and the Questionable Wisdom of Hate Crime Laws*, WASH. POST,

While hate crimes have existed since America's founding, the United States has seen an explosion in hate crime legislation in the last thirty years.<sup>7</sup> In 1981, the Anti-Defamation League drafted a model hate crime statute.<sup>8</sup> States were quickly persuaded by the model statute, and forty-nine states now have hate crime laws on the books.<sup>9</sup> The federal government was also persuaded to pass numerous hate crime laws, most recently the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act.<sup>10</sup> Under any of these statutes, a hate crime perpetrator either faces an enhanced penalty or an entirely separate charge that is solely based on his hateful mental state.<sup>11</sup> A primary goal of hate crime statutes is to eradicate hatred.<sup>12</sup> Scholars, policymakers, and activists, however, have questioned how effective hate crime laws, and their corresponding punishments, have been at actually curbing hatred.<sup>13</sup>

Part II presents an overview of hate crimes, current hate crime laws, and the theories behind such laws. It begins with defining what a hate crime is, listing what groups of people are protected and what sorts of actions are condemned under hate crime laws, and determining how frequently hate crimes occur in the United States. Next, a history of state and federal hate crime legislation is presented. Finally, a discussion of the causes of hatred, and what type of hate is punished by hate crime laws, is presented.

Part III begins by examining four justifications for hate crime laws. Section One argues that hate crime laws are legitimized because they realize the goals of classical theories of punishment. Section Two argues that hate crime laws and enhanced penalties are justified because hate crimes harm victims more than traditional crimes. Section Three examines critics' arguments that hate crime laws may actually harm society

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POST-PARTISAN BLOG (Mar. 19, 2012 11:49 AM), [http://www.washingtonpost.com/blogs/post-partisan/post/tyler-clementi-and-the-questionable-wisdom-of-hate-crime-laws/2012/03/19/gIQA1paENS\\_blog.html](http://www.washingtonpost.com/blogs/post-partisan/post/tyler-clementi-and-the-questionable-wisdom-of-hate-crime-laws/2012/03/19/gIQA1paENS_blog.html).

7. See *infra* Part II.B. This is likely attributable to the upward trend in violent crimes committed against people for reasons related to their immutable characteristics. See also WILLIAM J. KROUSE, CONG. RESEARCH SERV., HATE CRIME LEGISLATION 6–7 (2010), available at [http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1801&context=key\\_workplace](http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1801&context=key_workplace).

8. PHYLLIS B. GERSTENFELD, HATE CRIMES: CAUSES, CONTROLS, AND CONTROVERSIES 24 (2004).

9. *Hate Crime*, NATIONAL INSTITUTE OF JUSTICE, <http://www.nij.gov/topics/crime/hate-crime/welcome.htm> (last visited Jan. 14, 2014).

10. David Jackson, *Obama Signs Hate-Crimes Law Rooted in Crimes of 1998*, USA TODAY OVAL BLOG, (Oct. 28, 2009, 4:55 PM), <http://content.usatoday.com/communities/theoval/post/2009/10/620000629/1#.Ulm2ShDhfOo>.

11. James B. Jacobs, *The Emergence and Implications of American Hate Crime Jurisprudence*, in HATE CRIME: THE GLOBAL POLITICS OF POLARIZATION 150 (Robert J. Kelly & Jess Maghan eds., 1998).

12. President Barack Obama, Remarks at Reception Commemorating the Enactment of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act (Oct. 28, 2009), available at <http://www.whitehouse.gov/the-press-office/remarks-president-reception-commemorating-enactment-matthew-shepard-and-james-byrd-> (noting that such legislation “is about whether we value one another—whether we embrace our differences, rather than allowing them to become a source of animus”).

13. See, e.g., Jack Levin, *Hatemongers, Dabblers, Sympathizers and Spectators: A Typology of Offenders*, in THE HATE DEBATE: SHOULD HATE BE PUNISHED AS A CRIME? 73–75 (Paul Iganski ed., 2002); see also TOM STREISSGUTH, HATE CRIMES 178–97 (2003).

and protected classes. Section Four examines the argument that hate crime laws punish freedom by looking at scholars' arguments as well as the Supreme Court's rulings on hate crime laws. This Section examines these sub-debates by surveying prominent hate crime scholars' perspectives on the legislation. There are two primary "camps" in this debate: the Heidi Hurd and Michael Moore camp<sup>14</sup> and the Frederick Lawrence camp.<sup>15</sup> Part IV recommends a solution that maintains hate crime laws but offers an alternative method of punishment to challenge the hatred in the heart of the perpetrator.

## II. BACKGROUND

This Part begins by defining hate crimes, specifically looking at what types of groups and acts are involved in hate crimes. The history of hate crime laws in the United States is then outlined. Finally, this Part presents an analysis of hatred and analyzes theories of how hateful feelings develop.

### A. *What Qualifies as a Hate Crime?*

This Section first explores what hate crimes are, starting by defining hate crimes. Next, this Section determines which groups are protected under hate crime laws. This Section then discusses what mental state is required to charge an offender with committing a hate crime. Then, it lists types of hateful conduct that are prohibited under hate crime laws. It explains how hate crime laws punish offenders. Finally, this Section details the frequency that hate crimes happen in the United States, as well as how available hate crime statistics do not fully capture the epidemic of hate crimes.

#### 1. *Defining Hate Crimes*

This Subsection begins by defining the term "hate crime." It then pinpoints which types of groups are protected by hate crime legislation, the types of criminal action that law considers hateful, and the mental state required of the perpetrator to convict him of committing a hate crime. Finally, this Subsection explains how hate crime offenders are punished.

##### a. Definition

Black's Law Dictionary defines a hate crime as a "crime motivated by the victim's race, color, ethnicity, religion, or national origin."<sup>16</sup> The

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14. See Heidi M. Hurd & Michael S. Moore, *Punishing Hatred and Prejudice*, 56 STAN. L. REV. 1081 (2004).

15. See FREDERICK M. LAWRENCE, *PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW* (2002).

16. BLACK'S LAW DICTIONARY 428 (9th ed. 2009).

United States government defines a hate crime as “a crime in which the defendant intentionally selects a victim . . . because of the actual or perceived race, color, [etc.] . . . of any person.”<sup>17</sup> The term “hate crime” has two requirements. First, an individual must perpetrate a crime, like commit murder or arson.<sup>18</sup> Second, the perpetrator must be motivated to commit a crime because he hates the victim.<sup>19</sup> That hatred, however, must be “special.” Many crimes are committed out of animus, and in order for a crime to qualify as a hate crime, that animus must be protected by hate crime laws.<sup>20</sup> Furthermore, the crime must be substantially motivated by hatred of the victim’s perceived or actual immutable characteristic.<sup>21</sup> Crimes that happen to be committed against someone who is Black or Muslim, absent a hateful mental state, will not be considered hate crimes. Most importantly, that hatred needs to be expressed through the perpetration of a crime.<sup>22</sup> Hatred in and of itself is not a crime, and, consequently, is not punishable by law.<sup>23</sup> Hate crimes have a vast range and can include anything from vandalizing a mosque to genocide. While the term “hate crime” is rapidly becoming more common parlance, it describes a phenomenon with a long history.<sup>24</sup>

b. Who Is Covered?

Under the Uniform Crime Reporting Program, hate crime victims can be individuals, businesses, institutions or society, in general.<sup>25</sup> The federal government considers crimes committed because of the victim’s race, color, religion, national origin, gender, sexual orientation, gender identity, or disability to be hate crimes.<sup>26</sup> States differ greatly in what groups they protect through hate-crime legislation.<sup>27</sup> Some states protect political affiliation.<sup>28</sup> Other states deem crimes motivated by an individual’s homelessness as a hate crime.<sup>29</sup> Several states prosecute as hate

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17. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 280003, 108 Stat. 1796, 2096.

18. GERSTENFELD, *supra* note 8, at 9.

19. *See id.*

20. *Id.*

21. LAWRENCE, *supra* note 15, at 10.

22. GERSTENFELD, *supra* note 8, at 9–10.

23. Hate speech is, to some extent, protected under the First Amendment. *See* LAWRENCE, *supra* note 15, at 86–87.

24. BARBARA PERRY, SILENT VICTIMS: HATE CRIMES AGAINST NATIVE AMERICANS 9 (2008).

25. U.S. DEP’T OF JUSTICE, FED. BUREAU OF INVESTIGATION, *Victims, HATE CRIME STATISTICS 2010*, available at <http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2010/narratives/hate-crime-2010-victims> (last visited Jan. 15, 2014).

26. Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009, 18 U.S.C. § 249.

27. ANTI-DEFAMATION LEAGUE, ANTI-DEFAMATION LEAGUE STATE HATE CRIME STATUTORY PROVISIONS (2013), [http://www.adl.org/assets/pdf/combating-hate/state\\_hate\\_crime\\_laws\\_march\\_2013.pdf](http://www.adl.org/assets/pdf/combating-hate/state_hate_crime_laws_march_2013.pdf).

28. California, D.C., Iowa, Louisiana, and West Virginia protect political affiliation. *Id.*; *see also* Chris Wilson, *Is Killing Liberals a Hate Crime?*, SLATE (July 30, 2008, 6:43PM), [http://www.slate.com/articles/news\\_and\\_politics/explainer/2008/07/is\\_killing\\_liberals\\_a\\_hate\\_crime.html](http://www.slate.com/articles/news_and_politics/explainer/2008/07/is_killing_liberals_a_hate_crime.html).

29. For example, the homeless are covered by Florida, Maine, Maryland and D.C. *See* Kate Santich, *Florida Among First States to Make Attacks on Homeless Hate Crimes*, ORLANDO SENTINEL (May

crimes an offense motivated by the victim's age.<sup>30</sup> Many states consider it a hate crime to interfere with religious worship.<sup>31</sup> The overwhelming trend in state hate crime legislation has been to expand the number of groups protected under hate crime legislation.<sup>32</sup> Hate crime legislation not only protects people, but it also protects property. Institutional vandalism, which is considered destruction of cemeteries, schools, community centers, and houses of worship,<sup>33</sup> is considered a hate crime when such vandalism is motivated by hatred of the person occupying or using the institution.<sup>34</sup>

c. What Mental State Is Required?

In determining culpability, traditional criminal law assesses the perpetrator's *mens rea*,<sup>35</sup> or his mental state or motivation for acting.<sup>36</sup> Similarly, in order for a hate crime to be tried as such, the prosecutor must prove the perpetrator's hateful motivation for committing the crime. Yet, there is ambiguity in the law about exactly how strong the causation between hateful motivation and crime must be. For example, if a racist perpetrator mugs a Muslim man, should the racist be prosecuted as committing a hate crime if he was motivated to mug for money and not because the victim is Muslim?<sup>37</sup> Further problems arise in actually showing that the perpetrator was motivated by hatred at all.<sup>38</sup> It would be obvious if the penniless racist mugged a Muslim man and then posted on Facebook: "I just mugged a Muslim guy. I hate Muslims so I love stealing their money." It is a much harder case if a drunken frat boy goes over to the Muslim man's house and intentionally breaks his window during Ramadan. The perpetrator might have just broken the window in

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18, 2010), [http://articles.orlandosentinel.com/2010-05-18/features/os-homeless-hatecrimes-20100518\\_1\\_homeless-people-homeless-person-national-law-center](http://articles.orlandosentinel.com/2010-05-18/features/os-homeless-hatecrimes-20100518_1_homeless-people-homeless-person-national-law-center).

30. These jurisdictions include California, D.C., Florida, Idaho, Hawaii, Kansas, Louisiana, Maine, Minnesota, Nebraska, New Mexico, New York and Vermont. See ANTI-DEFAMATION LEAGUE, *supra* note 27.

31. These jurisdictions include Arkansas, California, D.C., Florida, Idaho, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nevada, New Mexico, New York, North Carolina, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Virginia, and West Virginia. *Id.*; see, e.g., *What is a Hate Crime?*, LOS ANGELES COUNTY DISTRICT ATTORNEY'S OFFICE, <http://da.co.la.ca.us/hate/hcdefined.htm> (last visited Jan. 15, 2014).

32. MICHAEL SHIVELY, STUDY OF LITERATURE AND LEGISLATION ON HATE CRIME IN AMERICA, at ii (2005), <https://www.ncjrs.gov/pdffiles1/nij/grants/210300.pdf>.

33. ANTI-DEFAMATION LEAGUE, HATE CRIME LAWS 4 (2012), <http://www.adl.org/assets/pdf/combating-hate/Hate-Crimes-Law.pdf>.

34. Only Alaska, Indiana, New Hampshire, North Dakota, Vermont, West Virginia and Wyoming do not. See ANTI-DEFAMATION LEAGUE, ANTI-DEFAMATION LEAGUE STATE HATE CRIME STATUTORY PROVISIONS (2013), [http://www.adl.org/assets/pdf/combating-hate/state\\_hate\\_crime\\_laws\\_march\\_2013.pdf](http://www.adl.org/assets/pdf/combating-hate/state_hate_crime_laws_march_2013.pdf).

35. Megan Sullaway, *The Psychology of Hate Crime Law, Victims, and Offenders*, in CRITICAL RACE REALISM: INTERSECTIONS OF PSYCHOLOGY, RACE, AND LAW 236 (Gregory S. Parks et al. eds., 2008).

36. *Id.*; see also BLACK'S LAW DICTIONARY 1075 (9th ed. 2009).

37. See Jacobs, *supra* note 11, at 161.

38. GERSTENFELD, *supra* note 8, at 42 (noting that jurors are often thrust into the unfair position of having to determine the perpetrator's mental state based on circumstantial evidence).

his drunken state, or he may have seen the family praying and broke the window to send a hateful message about Islam.

Jurisdictions differ greatly in their linguistic approach to the mens rea requirement. Many states require that the hate crime be committed “because of” the perpetrator’s hatred of the victim’s immutable characteristic.<sup>39</sup> The “because of” requirement is augmented in some states by the addition of a “maliciousness” condition.<sup>40</sup> Some states only require that the perpetrator was motivated “in whole or in part because of the [perpetrator’s] belief or perception” regarding the victim’s immutable characteristic.<sup>41</sup> Still, other states merely require that the commission of the crime “evidences prejudice.”<sup>42</sup> This difference in semantics may lead courts in different jurisdictions to rule oppositely about whether the same crime is a hate crime.<sup>43</sup> Furthermore, the vagueness of these standards may confuse jurors, leading some juries to convict and others to exonerate in cases involving the same evidence.<sup>44</sup>

Finally, in cases of institutional vandalism, no animus is necessary on behalf of the offender.<sup>45</sup> The offender must have known that the institution he vandalized is one protected by law.<sup>46</sup> Proof of vandalism is all that is necessary to convict the offender of a hate crime.

#### d. What Conduct Is Punished?

Universally punishable hate crimes are those such as an assault on a Chinese man because the perpetrator hates Asians. Many states further punish any crimes (misdemeanors or felonies)<sup>47</sup> where it is clear that the victim was selected by the perpetrator because the perpetrator hates the perceived or actual group the victim belongs to.<sup>48</sup> Some states also punish a perpetrator for intimidating a victim because of the victim’s protected characteristic—in these states, for example, threatening to assault someone at a later date because they are Jewish would count as a hate crime.<sup>49</sup>

39. LAWRENCE, *supra* note 15, at 35; *see, e.g.*, COLO. REV. STAT. § 18-9-121 (2014).

40. LAWRENCE, *supra* note 15, at 36; *see, e.g.*, IDAHO CODE ANN. §§ 18-7901, 7902 (2014) (“It shall be unlawful for any person, maliciously and with the specific intent to intimidate or harass another person because of . . .”).

41. WIS. STAT. § 939.645 (2014).

42. *See, e.g.*, FLA. STAT. § 775.085 (2014).

43. Anthony M. Dillof, *Punishing Bias: An Examination of the Theoretical Foundations of Bias Crime Statutes*, 91 NW. U. L. REV. 1015, 1022–23 (1997).

44. Juries have struggled to understand what some of these mental state descriptions mean. James Morsch, Comment, *The Problem of Motive in Hate Crimes: The Argument Against Presumptions of Racial Motivation*, 82 J. Crim. L. & Criminology 659, 664–69 (1991). Vagueness challenges brought under the Due Process Clause, however, have generally been unsuccessful. *See, e.g.*, *State v. Stalder*, 630 So. 2d 1072 (Fla. 1994).

45. LAWRENCE, *supra* note 15, at 38.

46. *Id.*

47. These crimes vary from serious offenses such as murder to minor offenses such as trespassing. STREISSGUTH, *supra* note 13, at 53–55.

48. *See, e.g.*, FLA. STAT. § 775.085 (2014).

49. *See, e.g.*, CONN. GEN. STAT. § 53a-181k (2014).



Hate crimes are also committed when the perpetrator burns a cross or other symbol on a victim's property in order to terrorize the victim.<sup>50</sup> Yet, there is a fine line between hate crimes and hate speech, the former of which can be prosecuted and the latter of which cannot.<sup>51</sup> To illustrate the distinction: it is a hate crime if I burn a cross on the property of another with the intent to intimidate<sup>52</sup> but hate speech if I burn the cross on my own property.<sup>53</sup>

With the advent of the internet and social media, hate crimes are also increasingly being perpetrated virtually.<sup>54</sup> Hatred can be expressed through Facebook comments, Twitter feeds, YouTube videos, hate websites,<sup>55</sup> online petitions, and even domain names themselves.<sup>56</sup> Because the internet is a far less regulated platform than others, users are able to express their hateful views without fear of repercussions.<sup>57</sup> Whether expressed to the victim's face or plastered on the internet, hate comments inflict great harm on their target. After all, Tyler Clementi jumped off the George Washington Bridge because of Dharun Ravi's Twitter comments.<sup>58</sup> Although internet hatred is not currently penalized, this is an area that likely will be explored by courts and legislatures.<sup>59</sup>

#### e. How Are Offenders Punished?

If a federal hate crime is committed, that offender could receive a penalty enhancement<sup>60</sup> which increases the length of the sentence.<sup>61</sup> State hate crime laws, however, are much more diverse. Some states do have penalty enhancers,<sup>62</sup> the effects of which vary rather substantially, in-

50. See, e.g., GA. CODE ANN. § 17-10-17 (2014).

51. GERSTENFELD, *supra* note 8, at 30–31. Westboro Baptist Church, for example, is a group that holds up hateful posters while heckling funeral attendees. The Supreme Court has held that even hate speech that disrupts funerals is protected by the First Amendment. *Snyder v. Phelps*, 131 S. Ct. 1207, 1217 (2011).

52. The Supreme Court has upheld the constitutionality of cross-burning statutes. See *Virginia v. Black*, 538 U.S. 343 (2003).

53. GERSTENFELD, *supra* note 8, at 30–31.

54. Brian Levin, *CYBERHATE: A Legal and Historical Analysis of Extremists' Use of Computer Networks in America*, in *HATE AND BIAS CRIME: A READER* 363, 380 (Barbara Perry ed., 2003); THE LEADERSHIP CONFERENCE, *The State of Hate: Exploiting the Internet to Promote Hatred*, in *CONFRONTING THE NEW FACES OF HATE: HATE CRIMES IN AMERICA* 2009, <http://www.civilrights.org/publications/hatecrimes/exploiting-internet.html> (last visited Jan. 15, 2014).

55. See, e.g., THE KNIGHTS PARTY, <http://www.kkk.bz> (last visited Jan. 15, 2014).

56. See, e.g., GODHATESFAGS, <http://www.godhatesfags.com> (last visited Jan. 15, 2014).

57. Marguerite J. Moritz, *Hate Speech Made Easy: The Virtual Demonisation of Gays*, in *RACIAL, ETHNIC AND HOMOPHOBIC VIOLENCE: KILLING IN THE NAME OF OTHERNESS* 123, 125 (Michel Prum et al. eds., 2007).

58. Clementi checked Ravi's Twitter feed thirty-eight times. Note that Dharun Ravi was not prosecuted for a hate crime because of his hateful internet comments but for invasion of Clementi's privacy. Christina Boyle, *Tyler Clementi Checked His Roommate's Twitter Feed 38 Times & Saw Posts Mocking Him*, N.Y. DAILY NEWS (March 6, 2012, 12:55 PM), <http://www.nydailynews.com/news/crime/rutgers-expert-bolsters-student-testimony-tyler-clementi-case-article-1.1033903>.

59. See Richard Jones, *Cybercrime and Internet Security: A Criminological Introduction*, in *LAW AND THE INTERNET* 601, 619 (Lilian Edwards & Charlotte Waelde eds., 3d ed. 2009).

60. Violent Crime Control and Law Enforcement Act, 28 U.S.C. § 994 (2010).

61. *LAWRENCE*, *supra* note 15, at 93. The constitutionality of penalty enhancers was upheld in *Wisconsin v. Mitchell*, 508 U.S. 476, 476 (1993).

62. See, e.g., DEL. CODE ANN. tit. 11, § 1304 (2014).

creasing the maximum penalty for an offense double, triple, or even more.<sup>63</sup> In some states, a misdemeanor can transform into a felony if the misdemeanor was motivated by hatred.<sup>64</sup> Some states also consider community service or programs focused on diversity sensitivity for offenders when sentencing.<sup>65</sup>

## 2. *The Prevalence of Hate Crimes*

This Subsection looks at the most recent release of the Hate Crime Statistics (2010) and notes what types of hate crimes are being committed, what groups are being targeted, and the demographics of the offenders. Next, it explores how police enforcement influences those statistics.

### a. Statistics

Since 1990, the FBI has published an annual report on hate crime statistics.<sup>66</sup> The FBI collects data regarding crimes motivated (at least partially) by hatred of the victim's race, religion, sexual orientation, ethnicity/national origin, or disability.<sup>67</sup> The data is reported from law enforcement agencies across the United States; in 2010, the Uniform Crime Reporting Program's Hate Crime Statistics program included 14,977 participating law enforcement agencies.<sup>68</sup> In 2010, 1,949 law enforcement agencies reported hate crimes to the FBI.<sup>69</sup> There were 6,628 hate crimes involving 7,699 offenses in 2010.<sup>70</sup> These crimes were committed by 6,001 offenders.<sup>71</sup> Those hate crimes affected a total of 8,199 victims.<sup>72</sup> 58.8 percent were victims of crimes against persons.<sup>73</sup> 46.2 percent of the victims were intimidated by their perpetrator.<sup>74</sup> 34.8 percent were victims of

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63. GERSTENFELD, *supra* note 8, at 25–26; *see, e.g.*, FLA. STAT. ANN. § 775.085 (2010) (declaring that enhanced penalties are provided for any felony or misdemeanor based on the victim's immutable characteristic).

64. GERSTENFELD, *supra* note 8, at 26; *see, e.g.*, 720 ILL. COMP. STAT. 5/12-7.1 (2010).

65. Cal. R. Ct. 4.427 (2013).

66. Hate Crimes Statistics Act of 1990, 28 U.S.C. § 534 (2010).

67. U.S. DEP'T OF JUSTICE, FED. BUR. OF INVESTIGATION, UNIFORM CRIME REPORT: HATE CRIME STATISTICS (2010), *Methodology*, <http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2010/resources/hate-crime-2010-methodology> (last visited Jan. 14, 2014) [hereinafter *Methodology*].

68. U.S. DEP'T OF JUSTICE, FED. BUR. OF INVESTIGATION, UNIFORM CRIME REPORT: HATE CRIME STATISTICS (2010), *Hate Crimes By Jurisdiction*, <http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2010/narratives/hate-crime-2010-jurisdiction> (last visited Jan. 14, 2014).

69. U.S. DEP'T OF JUSTICE, FED. BUR. OF INVESTIGATION, UNIFORM CRIME REPORT: HATE CRIME STATISTICS (2010), *Incidents and Offenses*, <http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2010/narratives/hate-crime-2010-incidents-and-offenses> (last visited Jan. 14, 2014) [hereinafter *Incidents and Offenses*].

70. *Id.*

71. *Id.*

72. U.S. DEP'T OF JUSTICE, FED. BUR. OF INVESTIGATION, UNIFORM CRIME REPORT: HATE CRIME STATISTICS (2010), *Victims*, <http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2010/narratives/hate-crime-2010-victims> (last visited Jan. 14, 2014) [hereinafter *Victims*].

73. *Id.* The other hate crime victims were victims of crimes against property. *Id.*

74. *Id.*

simple assault, while 18.4 percent were victims of aggravated assault.<sup>75</sup> Four people were forcibly raped and seven people were murdered.<sup>76</sup>

Racial bias was the most common motivation for committing hate crimes.<sup>77</sup> 48.4 percent of hate crimes were committed as a result of racial bias.<sup>78</sup> The victims of these hate crimes were overwhelmingly (seventy percent) Black.<sup>79</sup> The second most common bias motivation is religion, which accounted for 18.9 percent of the victims.<sup>80</sup> Anti-Semitic incidents were the most frequent religious-bias hate crimes, and Jews constituted sixty-seven percent of the victims.<sup>81</sup> Sexual-orientation bias was the third most common bias motivation.<sup>82</sup> Most homosexual-bias perpetrators were motivated by hatred of gay men (57.3 percent), 11.8 percent were motivated by hatred of lesbians, and 27.5 percent were motivated by homophobia in general.<sup>83</sup> Some perpetrators (13.7 percent) were also motivated by hatred of the victim's ethnicity.<sup>84</sup> Hispanics bore the brunt of ethnicity-motivated hate crimes, constituting 66.6 percent of victims.<sup>85</sup> Finally, only a small percentage of hate crimes targeted those with a disability (0.6 percent).<sup>86</sup> Of those victims, half were targeted because of their mental disability and half were targeted because of their physical disability.<sup>87</sup>

#### b. Enforcement

These statistics, although alarming, do not tell the full story. In November 2005, the Bureau of Justice Statistics released a report titled "Hate Crime Reported by Victims and Police."<sup>88</sup> While the FBI has reported annual hate crime totals of between 6,000 to 10,000 crimes, the Bureau of Justice Statistics report estimated an annual total of around 191,000 hate crimes in the United States.<sup>89</sup> In other words, the hate crime epidemic in America is truly nineteen to thirty-one times greater than what has been reported by the FBI.<sup>90</sup>

A few variables account for the disparity in numbers between the Bureau of Justice Statistics and what the FBI has reported. First, just

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75. *Id.*

76. *Id.*

77. *Incidents and Offenses, supra* note 69.

78. *Id.*

79. *Victims, supra* note 72.

80. *Id.*

81. *Id.*

82. *Incidents and Offenses, supra* note 69.

83. *Victims, supra* note 72.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. CAROLINE WOLF HARLOW, U.S. DEP'T OF JUSTICE, BUR. OF JUSTICE STATISTICS, HATE CRIME REPORTED BY VICTIMS AND POLICE (2005), <http://bjs.ojp.usdoj.gov/content/pub/pdf/hcrvp.pdf>.

89. *Id.*

90. SOUTHERN POVERTY LAW CENTER, *Report: FBI Hate Crime Statistics Vastly Understate Problem*, 120 INTELLIGENCE REPORT (Winter 2005) [hereinafter *SPLC Report*], available at <http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2005/winter/hate-crime>.

around forty-four percent of hate crimes are actually reported to the police.<sup>91</sup> Many victims of hate crimes do not report these crimes to the police for a variety of reasons: they thought the police would not help,<sup>92</sup> they thought the police could not help, or they reported the crime to another official or agency.<sup>93</sup> Furthermore, just because a victim reports the crime to the police does not mean that the hate crime will make it into the FBI's statistics.<sup>94</sup> Some police may fail to record a crime as a hate crime, and some police departments might not even report hate crime statistics to the FBI as they are required to.<sup>95</sup> Additionally, determining a perpetrator's mental state is subjective, and so police do not always know for sure whether a crime was committed out of hatred.<sup>96</sup> The FBI notes that law enforcement officials only report a hate crime when they have "sufficient evidence" that would lead a "reasonable and prudent person" to determine that hate motivated the crime.<sup>97</sup> Even if the hate crimes that were reported constitute only a fraction of a much larger amount of hate crimes occurring each year, FBI statistics alone confirm that hate crimes are an all too common occurrence in the United States.

### B. *History of Hate Crime Legislation*

This Section begins with a look back to the origins of hate crime laws in the United States. It continues with an analysis of the different types of crimes that are covered in various states. Next, the evolution of federal hate crime laws is explored. Finally, major federal hate crime laws are detailed.

#### 1. *State Hate Crime Laws*

This Subsection examines the impetus for hate crime laws in the United States. Next, it presents challenges to state hate crime laws.

##### a. *The Skokie Nazi March and the ADL Model Hate Crime Legislation*

In 1977, the National Socialist Party of America (NSPA) wanted to hold an anti-Semitic demonstration in front of the village hall in Skokie, Illinois.<sup>98</sup> At that time, one out of every six Jewish citizens of Skokie was

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91. HARLOW, *supra* note 88, at 1.

92. JEANNINE BELL, *POLICING HATRED: LAW ENFORCEMENT, CIVIL RIGHTS, AND HATE CRIME* 4 (2002) (noting that particularly with respect to crimes fueled by homophobia, the historical harassment of gays and lesbians by police means that victims may not want to go to the police).

93. HARLOW, *supra* note 88, at 5, Table 7.

94. See Jack McDevitt et al., *Improving the Quality and Accuracy of Bias Crime Statistics Nationally: An Assessment of the First Ten Years of Bias Crime Data Collection*, in *HATE AND BIAS CRIME*, *supra* note 54, at 81–82 (Barbara Perry ed., 2003).

95. *SPLC Report*, *supra* note 90. Furthermore, reporting is voluntary. *Methodology*, *supra* note 67.

96. *Id.*

97. *Id.*

98. GERSTENFELD, *supra* note 8, at 23.

a Holocaust survivor or directly related to someone who survived the Holocaust.<sup>99</sup> Consequently, the Village of Skokie denied the neo-Nazi group the ability to hold their demonstration by first obtaining an injunction against the event and then passing numerous ordinances to prevent the NSPA from obtaining a permit.<sup>100</sup> The NSPA sued, and the case *National Socialist Party of America v. Skokie* made its way to the U.S. Supreme Court.<sup>101</sup> On remand, the Illinois Supreme Court allowed the NSPA to demonstrate.<sup>102</sup>

The actions of the NSPA caused an organization called the Anti-Defamation League (ADL) to start tracking anti-Semitic incidents across the United States.<sup>103</sup> The ADL discovered that between 1978 and 1981, the number of reported anti-Semitic incidents increased from 49 to 974.<sup>104</sup> In response, the ADL drafted a Model Ethnic Intimidation Statute in 1981.<sup>105</sup> Foundational to the model statute is the legal approach of “penalty-enhancement,”<sup>106</sup> which increases the degree of criminal liability when someone commits a crime out of hatred.<sup>107</sup> A little more than a decade after this model legislation was drafted, thirty-four states and the District of Columbia had a penalty-enhancement hate crime law.<sup>108</sup> Currently, forty-five states have penalty-enhancement hate crime legislation<sup>109</sup> and forty-nine states have some sort of hate crime legislation on the books.<sup>110</sup>

State hate crime statutes have been challenged, most notably in two U.S. Supreme Court cases. The first challenge occurred in 1992 in *R.A.V. v. City of St. Paul*.<sup>111</sup> A group of teenagers constructed a cross out of broken chair legs, placed it on the front yard of an African-American family, and set it on fire.<sup>112</sup> In effect at the time was the St. Paul Bias-Motivated Crime Ordinance, which dictated that anyone who burns a cross to arouse anger or alarm on the basis of race would be guilty of disorderly conduct.<sup>113</sup> Writing for the majority, Justice Scalia found that the ordinance violated the First Amendment by prohibiting speakers from expressing views on disfavored topics.<sup>114</sup>

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99. See PHILIPPA STRUM, *WHEN THE NAZIS CAME TO SKOKIE: FREEDOM FOR SPEECH WE HATE* 7 (1999).

100. GERSTENFELD, *supra* note 8, at 23.

101. 432 U.S. 43 (1977).

102. *Village of Skokie v. National Socialist Party of America*, 373 N.E.2d 21 (1978).

103. GERSTENFELD, *supra* note 8, at 23.

104. *Id.* at 23–24.

105. *Id.* at 24.

106. ANTI-DEFAMATION LEAGUE, *Hate Crime Laws*, <http://www.adl.org/99hatecrime/print.asp> (last visited Jan. 14, 2014).

107. LAWRENCE, *supra* note 15, at 92.

108. GERSTENFELD, *supra* note 8, at 25.

109. ANTI-DEFAMATION LEAGUE, *PIONEERING HATE CRIME LEGISLATION AND ADVOCACY: ADL'S LEGACY OF ADDRESSING VIOLENT BIGOTRY IN AMERICA* (2013), <http://www.adl.org/assets/pdf/combating-hate/Hate-Crimes-2-pager.pdf>.

110. *Hate Crime*, *supra* note 9.

111. 505 U.S. 377 (1992).

112. *Id.* at 379.

113. ST. PAUL, MINN., LEGIS. CODE § 292.02 (1990).

114. *R.A.V.*, 505 U.S. at 391.

In 1993, penalty-enhancing state hate crime legislation was challenged in *Wisconsin v. Mitchell*.<sup>115</sup> Mitchell, along with a group of other African-Americans, attacked a fourteen-year-old white boy walking home and beat him into a coma.<sup>116</sup> The perpetrators chose their victim because he was white, as Mitchell and his friends had been talking that evening about wanting to assault white people.<sup>117</sup> Wisconsin has a hate crime statute<sup>118</sup> that was fashioned after the model ADL hate crime legislation.<sup>119</sup> Mitchell was convicted of aggravated battery, an offense that generally carries a maximum sentence of two years of imprisonment.<sup>120</sup> After the jury determined that Mitchell was racially-motivated when committing aggravated battery, he was sentenced to four years of imprisonment.<sup>121</sup> Chief Justice Rehnquist, on behalf of a unanimous Court, held that penalty-enhancement legislation was constitutional because the State has a compelling interest in preventing negative secondary effects of hate crimes such as inflicting greater emotional distress on the victim and inciting community unrest.<sup>122</sup>

## 2. *Federal Hate Crime Legislation*

This Subsection begins by exploring the first federal hate crime law, the Civil Rights Act of 1968. Next, it discusses the benefits of the Hate Crime Statistics Act of 1990. Finally, it analyzes the most recent piece of federal hate crime legislation, the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act.

### a. Civil Rights Act of 1968

After the slaying of Dr. Martin Luther King, Jr., a wave of violent riots swept the country.<sup>123</sup> These events caused Congress to take pause and scrutinize the cause of the nation's upheaval: rampant racial inequality and unrest.<sup>124</sup> The result of Congress' reflection was the passage of the Civil Rights Act of 1968.<sup>125</sup> This landmark legislation allowed federal authorities to punish crimes motivated by racial, religious or nationalist bias if the victim was participating in one of six federally protected activi-

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115. *Wisconsin v. Mitchell*, 508 U.S. 476, 479 (1993).

116. *Id.* at 480.

117. *Id.*

118. WIS. STAT. § 939.645 (2014).

119. ANTI-DEFAMATION, HATE CRIME LAWS (2012), available at <http://www.adl.org/assets/pdf/combating-hate/Hate-Crimes-Law.pdf>.

120. *Mitchell*, 508 U.S. at 480.

121. *Id.* at 480–81.

122. *Id.* at 487–88.

123. Looting and violence were commonplace in the United States upon hearing of Dr. King's murder. James Coates, *Riots Follow Killing of Martin Luther King Jr.*, CHI. TRIB. (Apr. 5, 1968), <http://www.chicagotribune.com/news/politics/chi-chicagodays-kingriots-story,0,4609945.story>.

124. President Lyndon Baines Johnson, Remarks on Signing the Civil Rights Act (Apr. 11, 1968), available at <http://millercenter.org/president/speeches/detail/4036>.

125. Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (1968).

ties.<sup>126</sup> These federally protected activities include: (1) applying for or enjoying employment; (2) serving as a juror in state court; (3) enrolling or attending public school or college; (4) travelling in interstate commerce; (5) enjoying the goods and services of certain places of public accommodation; and (6) participating in a program or activity provided by state or local government.<sup>127</sup>

While this list of activities grants fairly narrow protection, its passage was revolutionary. It is important to reflect on the fact that, before the passage of this legislation, it was not a crime to intimidate an African-American man from voting or to have an anti-Semitic hiring policy.<sup>128</sup> Yet the Civil Rights Act of 1968 only protects minorities that are engaging in these federally protected activities.<sup>129</sup> Consequently, the brutal murder of fourteen year old Emmett Till in 1955 would not qualify as a hate crime under this Act.<sup>130</sup> Notwithstanding its obvious limitations, the Civil Rights Act of 1968 is the origin of all federal hate crime legislation.<sup>131</sup>

b. Hate Crime Statistics Act of 1990

Before 1990, there were no collected data of hate crimes occurring in the United States.<sup>132</sup> The term “hate crime” has gained familiarity at least in part due to the federal government officially recognizing the occurrence of hate crimes in the United States.<sup>133</sup> In 1990 Congress passed the Hate Crimes Statistics Act (“HCSA”), mandating that the Attorney General collect data of crimes that “manifest evidence of prejudice based on race, religion, sexual orientation, or ethnicity” from law enforcement agencies.<sup>134</sup> The Attorney General then delegated this task to the FBI.<sup>135</sup> In order to assist law enforcement in reporting, the FBI created two publications that explain the psychology of prejudice, definitions of hate crimes, and case-study exercises: *Hate Crime Data Collection Guidelines* and the *Training Guide for Hate Crime Data Collection*.<sup>136</sup> Even with these publications to reference, law enforcement may need further edu-

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126. 18 U.S.C. § 245 (2010).

127. *Id.*

128. See GERSTENFELD, *supra* note 8, at 10.

129. Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (1968).

130. Jonathan L. Entin, *Why the Federal Government Did Not Prosecute Emmett Till's Killers* 30 (Case Legal Studies, Working Paper No. 05-38, 2005), available at <http://ssrn.com/abstract=845008>.

131. See KROUSE, *supra* note 7.

132. U.S. DEP'T OF JUSTICE, FED. BUR. OF INVESTIGATION, UNIFORM CRIME REPORT: HATE CRIME STATISTICS (2010), *About Hate Crime Statistics* <http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2010/resources/hate-crime-2010-about-hate-crime> [hereinafter About Hate Crimes] (noting that the first collected hate crimes data publication happened in 1990).

133. James J. Nolan et al., *The Hate Crime Statistics Act of 1990: Developing a Method for Measuring the Occurrence of Hate Violence*, 46 AM. BEHAV. SCIENTIST 136, 137 (2002).

134. Hate Crime Statistics Act of 1990, 28 U.S.C. § 534 (2010).

135. Nolan et al., *supra* note 133, at 137.

136. *Id.* at 139.

cation in order to properly report crimes.<sup>137</sup> From 1994 to 1999, around eighty-five percent of law enforcement participants reported zero hate crimes in their jurisdictions.<sup>138</sup> Yet thirty-seven percent of the law enforcement agencies that listed having no hate crimes in their jurisdictions did, in fact, report that hate crimes had occurred.<sup>139</sup> The South is particularly suspect in this respect, as that region has the second-highest crime rate of the four U.S. regions but reports the lowest number of hate crimes.<sup>140</sup>

Hate crime laws do not work without police officer enforcement. Despite mandates from the government to enforce the law, police officers act (or fail to act) because of their own personal beliefs or to accord with the beliefs of their co-workers.<sup>141</sup> For instance, if a police department does not take seriously transgender people being harassed as they walk outside the local gay bar, the police will not intervene despite the fact that they should. Every time the police arrest or fail to arrest someone, it is a political decision.<sup>142</sup> Whether something is reported as a hate crime, or prosecuted as a hate crime, is entirely up to the discretion of law enforcement.<sup>143</sup>

c. Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act

In 1998, three white men offered a ride home to an African-American man named James Byrd, Jr. in Jasper, Texas.<sup>144</sup> Byrd never got home; instead, the men tied Byrd to the back of their pickup truck, dragged him behind their vehicle for three miles, and left his decapitated body on the side of the road in a predominantly black neighborhood.<sup>145</sup> Four months later, a gay man named Matthew Shepard was beaten, tied to a fence and left to die in Laramie, Wyoming.<sup>146</sup> Responses to these murders led to public outrage, ranging from demonstrations to vigils.<sup>147</sup> Eleven years after these heinous crimes were committed, President Obama signed into law the Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act (HCPA), bearing both Shepard's and Byrd's names.<sup>148</sup>

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137. See Karen L. Bune, *Law Enforcement Must Take Lead on Hate Crimes*, 71 POLICE CHIEF 4 (2004), available at [http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display\\_arch&article\\_id=270&issue\\_id=42004](http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=270&issue_id=42004).

138. Nolan et al., *supra* note 133, at 140.

139. *Id.*

140. *Id.*

141. See BELL, *supra* note 92, at 14–16.

142. See *id.*

143. See *id.* at 2.

144. JENNIFER PETERSEN, MURDER, THE MEDIA, AND THE POLITICS OF PUBLIC FEELINGS: REMEMBER MATTHEW SHEPARD AND JAMES BYRD JR. 1 (2011).

145. *Id.*

146. *Id.*

147. *Id.* at 2.

148. 18 U.S.C. § 249 (2010).



To convict someone for a hate crime under the HCPA, the government needs to prove that the crime was in or affected interstate commerce.<sup>149</sup> This Act also amended the Hate Crime Statistics Act by mandating the collection of data for crimes that were committed because of hatred based on the victim's gender or gender identity, as well as crimes committed by or directed at juveniles.<sup>150</sup> Finally, the HCPA removes the prerequisite that the victim be engaged in a federally protected activity when he was victimized.<sup>151</sup> So long as the crime was motivated by animus, the government need not prove any additional jurisdictional element to convict.<sup>152</sup> This legislation also protects a wider class of victims, amending prior federal hate-crime law by including crimes motivated by gender, disability, sexual orientation, or gender identity.<sup>153</sup>

The inclusion of gender in federal hate crime legislation was monumental. Legislators have been hesitant to include gender because it has not gotten the same level of legislative support as categories such as race.<sup>154</sup> Even hate crime legislation supporters have been hesitant to include gender in hate crime statutes.<sup>155</sup> The most common anti-female hate crime incident is rape.<sup>156</sup> Some believe that rape is not ever motivated by misogyny, but it is instead motivated by a desire for power over women.<sup>157</sup> Additionally, lawmakers have hesitated to include gender in hate crime legislation because every time a rape happens (once every two minutes in the United States alone),<sup>158</sup> the prosecution would have to determine whether it was a gender-bias rape, resulting in a great burden on the criminal justice system.<sup>159</sup> Yet, there are plenty of unambiguous gender-motivated acts of violence. For example, in 2009 in Collier Township, Pennsylvania, George Sodini opened fire on a group of women in an aerobics class because many women had rejected his romantic advances.<sup>160</sup> Anti-female violence is a problem, and its existence affects

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149. U.S. DEP'T OF JUSTICE, *Matthew Shepard & James Byrd, Jr., Hate Crimes Prevention Act of 2009*, <http://www.justice.gov/crt/about/crm/matthewshepard.php> [hereafter U.S. DEP'T OF JUSTICE, *Matthew Shepard*] (last visited Oct. 14, 2013).

150. 18 U.S.C. § 249 (2010).

151. U.S. DEP'T OF JUSTICE, *Matthew Shepard*, *supra* note 149.

152. *Id.*

153. 18 U.S.C. § 249(a)(2) (2010).

154. JESSICA P. HODGE, *GENDERED HATE: EXPLORING GENDER IN HATE CRIME LAW 4* (2011).

155. *Id.* at 5.

156. Rape is the most common crime, hate crime or otherwise, committed against women. *Rape, ARMING WOMEN AGAINST RAPE AND ENDANGERMENT*, <http://www.aware.org/crimes/rape> (last visited Jan. 14, 2014).

157. HODGE, *supra* note 154, at 59.

158. *How Often Does Sexual Assault Occur?*, RAPE, ABUSE & INCEST NAT'L NETWORK, <http://www.rainn.org/get-information/statistics/frequency-of-sexual-assault> (last visited Jan. 14, 2014).

159. HODGE, *supra* note 154, at 61. *But see* Rebecca Solnit, *A Rape a Minute, A Thousand Corpses a Year*, NATION (Mar. 14, 2013), <http://www.thenation.com/article/172408/rape-minute-thousand-corpses-year#> ("The pandemic of violence [against women] always gets explained as anything but gender, anything but what would seem to be the broadest explanatory pattern of all.").

160. Toby Harnden, *George Sodini's Blog Tells of Years of Rejection by Women Before Gym Shooting*, TELEGRAPH (Aug. 5, 2009), <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/5978615/George-Sodinis-blog-tells-of-years-of-rejection-by-women-before-gym-shooting.html>.

women collectively just like burning a cross on the lawn of an African-American family affects an entire racial community.<sup>161</sup>

The HCPA also expanded protection to persons discriminated against on the basis of perceived sexual orientation or gender identity.<sup>162</sup> Curiously, sexual orientation is not defined; however, the term is thought to include heterosexuality, homosexuality, and bisexuality.<sup>163</sup> In addition to prosecuting hate crimes motivated by gender, the federal government will also protect against crimes motivated by gender identity. Gender identity is defined as “actual or perceived gender-related characteristics.”<sup>164</sup> There have been plenty of gender identity-based crimes in the United States, most notably the rape and murder of Brandon Teena in 1993.<sup>165</sup> There are currently no statistics available to provide an exact number for these crimes, but this changed in 2013 when the FBI began collecting hate crime data on gender identity.<sup>166</sup>

Finally, the HCPA also quietly included disability as a protected group.<sup>167</sup> Although this inclusion did not generate the same fanfare as the inclusion of gender and sexual orientation/gender identity, it was a very important step for federal hate crime law. While no one contests that hate crimes against the disabled happen, some question whether those crimes are motivated by ableism (which would count as a hate crime) or if crimes are just perpetrated against the disabled because they are sometimes easier targets.<sup>168</sup> Similar to aforementioned unambiguous gender-motivated crimes, many crimes are perpetrated against the disabled because of distinctive ableism.<sup>169</sup> For example, a cognitively disabled man named Eric Krochmaluk was brutally tortured by eight people in New Jersey in 1999 because he was disabled.<sup>170</sup> Disabled persons now deservingly have federal protection under this hate crime law.

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161. HODGE, *supra* note 154, at 5.

162. 18 U.S.C. § 249(a)(2) (2010).

163. *Questions and Answers: The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act*, HUMAN RIGHTS CAMPAIGN (Feb. 1, 2010), <http://www.hrc.org/resources/entry/questions-and-answers-the-matthew-shepard-and-james-byrd-jr.-hate-crimes-pr>.

164. 18 U.S.C. § 249(c)(4) (2010).

165. This hate crime inspired the movie *Boys Don't Cry*. JOEY L. MOGUL ET AL., *QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES* 119 (2011).

166. Press Release, Human Rights Campaign, *New FBI Data Shows Hate Crimes Based on Sexual Orientation on the Rise* (Dec. 10, 2012), <http://www.hrc.org/press-releases/entry/new-fbi-data-shows-hate-crimes-based-on-sexual-orientation-on-the-rise>. As of publication, this data had not been released.

167. 18 U.S.C. § 249(a)(2) (2010).

168. See MARK SHERRY, *DISABILITY HATE CRIMES: DOES ANYONE REALLY HATE DISABLED PEOPLE?* 29 (2010).

169. See generally *id.*

170. Neil MacFarquhar, *8 Are Charged in Tormenting of Learning-Disabled Man*, N.Y. TIMES (Feb. 17, 1999), <http://www.nytimes.com/1999/02/17/nyregion/8-are-charged-in-tormenting-of-learning-disabled-man.html>.

### C. *Hatred*

#### 1. *Defining Hatred*

##### a. Hatred as Distinguished from Anger

Hate crimes occur when a victim is selected because he is (or apparently is) a member of a group that the perpetrator hates.<sup>171</sup> The first task is to define “hatred,” which may seem incredibly rudimentary but is important. The Oxford English Dictionary defines hatred as the “condition or state of relations in which one person hates another” and “active dislike [or] detestation.”<sup>172</sup> The term “*active* dislike” indicates the intent of the hater to hate. When A cuts in front of B in line, B might feel like he hates A, but B is merely angry at A. In order to hate A, B has to intend that hatred. The feeling of anger that B experiences is a reflexive, passive emotion rather than an intended, active emotion such as hatred.<sup>173</sup>

Another helpful definition of hatred is “a sustained emotion of rage that occupies an individual through much of his life, allowing him to feel delight in observing or inflicting suffering on the hated one. It is always obsessive and almost always irrational.”<sup>174</sup> The word “sustained” in this definition suggests that hatred is not felt suddenly, here one moment and gone the next. Hatred is not a fleeting emotion; rather, it is something sustained over a long period of time, potentially for the entire life of the hater.<sup>175</sup> The hater does not just hate the person in this moment, but he hates the person’s existence in general.<sup>176</sup> One often exclaims, “I hate this object” when he means “I strongly dislike this object.” Although hatred is an extreme form of anger, it is not the same thing as anger.<sup>177</sup> In a sense, all people can identify with the underlying feeling of hatred because all people become angry at some point. Yet, hatred is very different from mere anger. This definition also offers the added element that the hater not only wishes to see the hated suffer but derives pleasure from that suffering.<sup>178</sup> This definition also suggests that hatred is not a normal human condition, because it is “irrational” as well as “obsessive.”

171. Martha Minow, *Regulating Hatred: Whose Speech, Whose Crimes, Whose Power?*, in *BREAKING THE CYCLES OF HATRED: MEMORY, LAW, AND REPAIR* 31, 33 (2002).

172. WILLARD GAYLIN, *HATRED: THE PSYCHOLOGICAL DESCENT INTO VIOLENCE* 21 (2003).

173. The OXFORD ENGLISH DICTIONARY emphasizes this passivity by defining the verb of “anger” to “fill (someone) with anger.” *Anger Definition*, OXFORDDICTIONARIES.COM, <http://www.oxforddictionaries.com/definition/english/anger?#anger> (last visited Jan. 14, 2014). This suggests that the actor receives the emotion. Contrarily, the verb of hate is only defined in active terms: to “feel intense dislike for.” *Hate Definition*, OXFORDDICTIONARIES.COM, <http://www.oxforddictionaries.com/definition/english/hate?q=hate> (last visited Jan. 14, 2014).

174. GAYLIN, *supra* note 172, at 34.

175. *Id.* at 21–22.

176. See JEAN-PAUL SARTRE, *BEING AND NOTHINGNESS* 387 (2d ed. 1965).

177. Gordon W. Allport, *The Nature of Hatred*, in *BIGOTRY, PREJUDICE AND HATRED: DEFINITIONS, CAUSES & SOLUTIONS* 31, 31 (Robert M. Baird & Stuart E. Rosenbaum eds., 1992) (noting how Aristotle observed that while people have angry outbursts and often immediately repent, people who hate generally do not feel bad for hating).

178. GAYLIN, *supra* note 172, at 24.

What hate crime laws are punishing is not an everyday emotion, but something disgusting, disturbing, and different.

b. Hatred Existing in the Form of a Relationship

Now that hatred has been defined, it is important to unpack one other element of hatred, namely that hatred only exists in the form of a relationship.<sup>179</sup> One cannot hate generally; rather, hatred exists in the form of a relationship where the hater hates the hated. There are multiple objects of hatred, but in the United States those hated groups include persons of color, LGBT individuals, women, immigrants, non-Protestant religious persons, and the disabled.<sup>180</sup> Although these hated groups are vastly different from one another, they have all been labeled as an “Other” by mainstream America.<sup>181</sup> Once a group has been “Othered,” it allows the hater to hold an irrational view that the “Other” is not like him.<sup>182</sup> Othering is the metaphorical murder of the hated group, accomplished by ontological discrimination.<sup>183</sup> The “Other” is defined as “beyond the pale of one’s own humanity, community, its values and beliefs.”<sup>184</sup> Hate crimes occur when the perpetrators break laws to keep the “Other” in line.<sup>185</sup>

c. What Hate Is Punishable?

Some have argued that the existence of hatred is a poor criterion by which to determine whether a hate crime has occurred.<sup>186</sup> After all, when a father stabs the serial killer who killed his child, undoubtedly the father hates the serial killer and is motivated by such deep-seated hatred for the serial killer that he stabs him. Hate crime laws, however, were not designed to punish hatred as it exists in all forms. Thus, if someone murders a mailman because the perpetrator hates the mailman for fathering a child with his wife, that act will not be called a hate crime. If the perpetrator murders the mailman because the mailman is Muslim, however, that will be considered a hate crime.

The hatred that hate crime laws seek to punish is hatred leading to actions persecuting another based on a protected characteristic. Even amongst hate crimes, hatred will look different. In some cases, the perpetrator will be so filled with hatred that he will seek out someone in the

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179. *See id.* at 21.

180. Minow, *supra* note 171, at 33. Of course, this is in no way an exhaustive list.

181. IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 164 (1990).

182. *Id.* at 168.

183. Moritz, *supra* note 57, at 1; *see also* Howard J. Ehrlich, *Ethnoviolence and Hate Crimes*, in *HATE CRIMES AND ETHNOVIOLENCE: THE HISTORY, CURRENT AFFAIRS AND FUTURE OF DISCRIMINATION IN AMERICA* 17, 28 (2009).

184. Irene R. Bush & Anthony Sainz, *Competencies at the Intersection of Difference, Tolerance, and Prevention of Hate Crimes*, in *FROM HATE CRIMES TO HUMAN RIGHTS: A TRIBUTE TO MATTHEW SHEPARD* 205, 207 (Mary E. Swigonski et al. eds., 2001).

185. DAVID GADD & BILL DIXON, *LOSING THE RACE: THINKING PSYCHOSOCIALLY ABOUT RACIALLY MOTIVATED CRIME* 5 (2011); PERRY, *supra* note 24, at 10.

186. *See* Sullaway, *supra* note 35, at 236.

hated class and harm him.<sup>187</sup> Other perpetrators might harm a victim because the perpetrator determines that the victim is “out of place,”<sup>188</sup> like a particularly flamboyant gay man in an ultra-masculine environment. Hatred is a “fluid, internally conflicted, and overpowering” emotion that will manifest itself differently within hate crimes.<sup>189</sup> The discerning characteristic of hate crime hatred is that such hatred has “dynamic racial, political, ideological, and cultural dimensions.”<sup>190</sup> While the emotion of hatred is complex and complicated, hatred is the key component of hate crimes. Without understanding and appreciating this emotion, hate crimes cannot successfully be deterred.<sup>191</sup>

## 2. Causes of Hatred

### a. Is Hatred Innate?

It is normal and natural to feel association and belonging with some people and not with others.<sup>192</sup> It is quite another thing to feel prejudice and hatred toward another human being. Theorists have developed numerous theories for why prejudice exists. Some scholars have theorized that some people are more inclined to hate because of their personalities.<sup>193</sup> For example, previous studies have concluded that people with authoritarian personalities are more likely to have generalized prejudice.<sup>194</sup> This theory is not entirely compelling, however, for two reasons. First, critics of this theory suggest that authoritarian personality is not so much a personality but is instead a social attitude.<sup>195</sup> Second, while many perpetrators of hate crimes have authoritarian “personalities,” most people with authoritarian personalities do not commit hate crimes.<sup>196</sup>

Other scholars have theorized that the way that human beings perceive the world is limited by the brain’s information processing capacity,

187. See *Wisconsin v. Mitchell*, 508 U.S. 476, 480 (1993).

188. Rini Sumartojo, *Contesting Place: Antigay and Lesbian Hate Crime in Columbus, Ohio*, in SPACES OF HATE: GEOGRAPHIES OF DISCRIMINATION AND INTOLERANCE IN THE U.S.A. 87 (Colin Flint ed., 2004).

189. Robert J. Kelly & Jess Maghan, *Introduction*, in HATE CRIME: THE GLOBAL POLITICS OF POLARIZATION, *supra* note 11, at 1, 19 (Robert J. Kelly & Jess Maghan eds., 1998).

190. Robert J. Kelly & Jess Maghan, *Epilogue*, in HATE CRIME: THE GLOBAL POLITICS OF POLARIZATION, *supra* note 11, at 222.

191. See Thomas J. Scheff, *Alienation, Love and Hate as Causes of Collective Violence*, in EMOTIONS, CRIME AND JUSTICE 275, 283 (Susanne Karstedt et al. eds., 2011) (“Those who map mountains without also viewing them can easily lose touch with their immensity.”).

192. NATHAN HALL, HATE CRIME 234 (2005); see also Bill Hathaway, *Infants Prefer Individuals Who Punish Those Not Like Themselves, Yale Researchers Find*, YALE NEWS (Mar. 12, 2013), <http://news.yale.edu/2013/03/12/infants-prefer-individuals-who-punish-those-not-themselves-yale-researchers-find>.

193. See generally Nazar Akrami & Bo Ekehammar, *Right-Wing Authoritarianism and Social Dominance Orientation: Their Roots in Big-Five Personality Factors and Facets*, 27 J. INDIVIDUAL DIFFERENCES 1 (2006), available at [http://www.overcominghateportal.org/uploads/5/4/1/5/5415260/rwa\\_sdo.pdf](http://www.overcominghateportal.org/uploads/5/4/1/5/5415260/rwa_sdo.pdf).

194. *Id.*

195. *Id.* at 2.

196. Donald P. Green et al., *Hate Crime: An Emergent Research Agenda*, in HATE AND BIAS CRIME, *supra* note 54, at 27, 32.

which necessarily leads to biases and prejudices.<sup>197</sup> Categories and generalizations help human beings form their own personal epistemology and also allow them to process world phenomena.<sup>198</sup> These categories and generalizations create separateness, breaking down communication amongst groups.<sup>199</sup> The breakdown of communication leads to both genuine and imaginary conflicts, and intergroup conflicts lead members of each group to develop “in-group” loyalty.<sup>200</sup> Hence, group members become prejudiced against the “out-groups.”<sup>201</sup> Even if this is an accurate account of why human beings are predisposed to prejudice, it does not explain how this prejudice becomes extreme or violent in only some people but not others. Social phenomena, then, seem to be formative in producing hateful actions.

#### b. Causes of Hatred

While the capacity for prejudice may be innate, the object of hatred is developed through experience. Two major causes of hatred are developed through groups and through societal structures. “Models of small group dynamics suggest how contagion, conformism, extremification of attitudes, disinhibition, and yearning for group acceptance can all conspire to push a person to acts of hate crime.”<sup>202</sup> Children choose who to hate based on conversations around the dinner table or observations of teachers and adults.<sup>203</sup> While some parents or other adults may express their hateful views to their children directly, children may also pick up on hatred by observing their parents exhibiting prejudice.<sup>204</sup> Those attitudes stick with children as they grow into adults, potentially leading to hateful actions down the road. Many youth may develop these attitudes and, in order to fit in with their peers, these individuals may be compelled to demonstrate their hate through crimes.<sup>205</sup>

Hateful feelings further permeate society through social institutions.<sup>206</sup> For example, social structures such as racially segregated housing may also play a role in fostering hatred.<sup>207</sup> Redlining and other egregious practices by lending institutions and real-estate agencies reinforce

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197. Evan R. Harrington, *The Social Psychology of Hatred*, 3 J. HATE STUD. 43, 43 (2004), available at <https://journals.gonzaga.edu/index.php/johs/article/view/52/33>.

198. HALL, *supra* note 192, at 25 (citing Gordon Allport’s seminal work, *THE NATURE OF PREJUDICE* (1954)).

199. *See id.* at 26.

200. *Id.*

201. *Id.*

202. Green et al., *supra* note 196, at 32.

203. Jack Levin, *Hatemongers, Dabblers, Sympathizers and Spectators: A Typology of Offenders*, in *THE HATE DEBATE: SHOULD HATE BE PUNISHED AS A CRIME?* 71, 80 (Paul Iganski ed., 2002).

204. GERSTENFELD, *supra* note 8, at 83.

205. *See* MILTON KLEG, *HATE PREJUDICE AND RACISM* 182 (1993). Since most crimes are committed by young people, the desire to fit in with hateful peers is particularly influential in the decision to commit hate crimes. GERSTENFELD, *supra* note 8, at 85.

206. Barbara Perry, *Accounting for Hate Crime: Doing Difference*, in *HATE AND BIAS CRIME*, *supra* note 54, at 97, 100.

207. Jeff R. Crump, *Producing and Enforcing the Geography of Hate: Race, Housing Segregation, and Housing-Related Hate Crimes in the United States*, in *SPACES OF HATE*, *supra* note 188, at 227, 228.

segregation.<sup>208</sup> When such institutions separate communities, members of those communities might feel compelled to maintain those boundaries. Hate crimes are a method offenders use to maintain those differences.<sup>209</sup> One example is the notorious Cicero Race Riot of 1951, during which a mob of thousands of white citizens attacked an apartment building where just one black family resided.<sup>210</sup> Segregation also reinforces amongst individuals a division of resources. When individuals feel that “their” resources are being usurped by another group, they may retaliate with hateful violence.<sup>211</sup>

### III. ANALYSIS

One primary question that comes to the foreground in the hate crime debate is whether there is justification for the continued existence of hate crimes and accompanying enhanced penalties. This Part explores four arguments for hate crime laws and determines whether they justify enhanced punishment of hate crimes. The first argument is that hate crime laws nicely perpetuate the goals of classic theories of punishment. This Section begins with an overview of some of the classical theories of punishment: retributivism, utilitarianism, expressivism, and moral education. After summarizing each of these theories, this Section examines how hate crime laws promote the punishment objectives of each theory. By achieving these goals, hate crime laws are legitimized. The second argument is that hate crime laws and enhanced penalties are justified because crimes that produce greater harms warrant greater punishments. Hate crime victims suffer more harm than victims of other crimes. The third argument concerns whether hate crime laws lead to illogical results that are contrary to the impetus of hate crime laws. This Section explores three arguments, which allege that hate crimes laws may cause more harm to society, as well as protected classes, than if the laws ceased to exist. Finally, the fourth argument posits that punishing hate ends up punishing freedom. This Section explores whether freedom is infringed upon, examining the Supreme Court’s position on whether hate crime laws are Constitutional.

#### A. *Theories of Punishment Legitimize Hate Crime Laws*

This Section discusses four of the most common theories of punishment: retributivism, utilitarianism, expressivism, and moral education. After providing a general overview of these classical theories of punish-

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208. See Jacob S. Rugh & Douglas S. Massey, *Racial Segregation and the American Foreclosure Crisis*, 75 AM. SOC. REV. 629, 630 (2010) (explaining how high home loan rates and residential segregation reinforce one another).

209. Crump, *supra* note 207, at 228.

210. *Cicero Race Riot of 1951*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Cicero\\_Race\\_Riot\\_of\\_1951](http://en.wikipedia.org/wiki/Cicero_Race_Riot_of_1951) (last visited Mar. 26, 2014).

211. See Green et al., *supra* note 196, at 34 (noting that black lynchings and cotton prices were inversely correlated).

ment, there is an analysis of how each of these goals is realized through hate crime laws.

### 1. *Retributivism*

#### a. The Theory of Retributivism (Immanuel Kant and Michael Davis)

One theory of punishment is retribution, famously advocated by Immanuel Kant and recently espoused by Michael Davis. The goal of retribution is to punish the criminal for his prior act; in other words, to make him suffer for the bad act he committed.<sup>212</sup> Consequently, the aim of retribution is exclusively backward-looking.<sup>213</sup> Central to retributivist punishment is a “fitting” punishment: the punishment must fit the crime.<sup>214</sup> Retributivists differ from one another, however, in calculating what the just dessert is.<sup>215</sup>

Kant’s theory of justice is that human beings have a universal right of freedom so long as their actions do not infringe upon the freedom of another.<sup>216</sup> When that freedom is used to violate another’s freedom, however, Kant advocates for punishment of the criminal.<sup>217</sup> Kant declares that it is a “categorical imperative” for the criminal to be punished for his crimes.<sup>218</sup> The specific type of punishment, Kant asserts, comes from the “law of retribution.”<sup>219</sup> Kant theorizes that the crime that was committed is what is owed to the criminal.<sup>220</sup> For example, one who commits murder must die.<sup>221</sup> There is no leniency in Kant’s formulation of punishment.<sup>222</sup> Kant famously proclaims, “[W]oe to him who crawls through the windings of eudaemonism in order to discover something that releases the criminal from punishment or even reduces its amount by the advantage it promises . . . .”<sup>223</sup> Furthermore, Kant avows that judicial punishment should never be used to promote some good for society or for the criminal.<sup>224</sup> Furthering justice is the paramount duty of government, and any benefit or disadvantage of punishment is inconsequential.<sup>225</sup>

212. Arthur Shuster, *Kant on the Role of the Retributive Outlook in Moral and Political Life*, in *THE PHILOSOPHY OF PUNISHMENT AND THE HISTORY OF POLITICAL THOUGHT* 114, 114 (Peter Karl Koritansky ed., 2011).

213. *Id.*

214. *Exodus* 21:24 (King James) (noting “Eye for eye, tooth for tooth, hand for hand, foot for foot . . .”).

215. LAWRENCE, *supra* note 15, at 46.

216. IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 30 (Mary Gregor ed., trans., Cambridge Univ. Press 1996) (1797).

217. Shuster, *supra* note 212, at 116.

218. KANT, *supra* note 216, at 105.

219. *Id.* at 105–06.

220. *Id.* at 105.

221. *Id.* at 107.

222. *See id.* at 105.

223. *Id.*

224. *Id.*

225. As the famous Latin phrase goes, “Let justice be done though the heavens fall.”



Michael Davis espouses a slightly different view of retributive punishment. While Kant's ideal punishment is classical *lex talionis* (an eye for an eye), Davis argues that the criminal should be punished in proportion to the amount of "unfair advantage" the criminal gets for committing his crime.<sup>226</sup> Davis defines "unfair advantage" as "the 'illicit pleasure' in every crime whether jaywalking or murder, prostitution or stealing."<sup>227</sup> Davis conceives of a "marketplace" of crimes, where each crime corresponds to a certain "price."<sup>228</sup> He imagines a world in which criminals could buy licenses, as if they bought a fishing license, in order to commit a crime.<sup>229</sup> The price of licenses would be set relative to the advantage that the licensee would receive by having the license to commit an illegal (without the license) act.<sup>230</sup> As if he had applied for a license, a criminal owes society the "price of his advantage."<sup>231</sup> That price is fair, Davis asserts, because the criminal is paying the fair price of what a license to do the same act would cost on the open market.<sup>232</sup>

b. Using Hate Crime Legislation to Punish Past Behavior

One of the justifications for hate crime laws, specifically enhanced penalties, is that hate crimes are so heinous that they require greater punishment than if the same crime was committed against the same person but was not motivated by hatred.<sup>233</sup> The retributive response is to determine a punishment that correlates to the harm produced (to the victim, to the society, etc.), and make the perpetrator pay his debt to society.<sup>234</sup> Conflict arises, however, in determining whether a punishment is "fitting."<sup>235</sup> Depending on the harm or wrong the retributivist seeks to fit with the perfect punishments, their suggested punishments will differ. Thus, if a retributivist determines that a hate crime is a different and worse class of crime than a traditional crime, a retributivist will recommend a harsher punishment.<sup>236</sup> Even for retributivists who agree that hate crimes are more harmful than other crimes, they might suggest different forms of punishment for that crime. Joel Feinberg, for example, argues that justice demands that an amount of social disapproval, rather than harm, should fit the crime.<sup>237</sup> While hate crime laws are necessarily

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226. Michael Davis, *How to Make the Punishment Fit the Crime*, 93 *ETHICS* 726, 743 (1983).

227. *Id.*

228. *Id.* at 744.

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.* at 745.

233. LAWRENCE, *supra* note 15, at 29.

234. *Id.* at 47–48.

235. See ALAN BRUDNER, *PUNISHMENT AND FREEDOM: A LIBERAL THEORY OF PENAL JUSTICE* 51–55 (2009) (discussing different justifications for "fitting" punishments).

236. LAWRENCE, *supra* note 15, at 63.

237. See JOEL FEINBERG, *DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* 118 (1974).

retributive, not all retributivists will agree about what punishments are appropriate for hate crime perpetrators.<sup>238</sup>

## 2. *Utilitarianism*

### a. Utilitarianism (John Stuart Mill)

Utilitarianism, famously espoused by John Stuart Mill, is a theory that “actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness.”<sup>239</sup> Any actions that maximize pleasure and happiness are acceptable.<sup>240</sup> Yet Utilitarianism is concerned with maximizing the happiness of all rather than of just the individual.<sup>241</sup> An action that makes many people happy may make another individual miserable as a consequence. It is important to note that Utilitarians do not bar destructive behavior until it harms another person; Mill argues that society should not interfere with an individual’s right to engage in destructive behavior.<sup>242</sup> Once that destructive behavior affects another individual or society at large, however, “the case is taken out of the province of liberty and placed in that of morality or law.”<sup>243</sup>

The Utilitarian theory of punishment has two main elements. First, it is necessarily forward-looking. Mill argues that he who commits misconduct is already punished for that misconduct by committing an error.<sup>244</sup> The perpetrator deserves to be punished for the harms inflicted upon society, not for self-inflicted harm.<sup>245</sup> Utilitarians judge actions by their consequences, not by their origins.<sup>246</sup> Second, the decision to punish is considered in light of Utilitarians’ push to maximize happiness. Taking into account the pain felt by the punished prisoner, and how that consequently deters society from committing crimes, Utilitarians hold that punishing criminals is beneficial.<sup>247</sup> Utilitarians justify punishment because punishing criminals will benefit society.<sup>248</sup>

### b. Forward-Looking Approach of Punishment

Punishing hate crimes realizes Utilitarian goals by deterring behavior that does not maximize the greatest happiness for all. Thinking about

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238. See *infra* Part IV for the punishment I deem “fitting.”

239. JOHN STUART MILL, *UTILITARIANISM* 9–10 (1901).

240. *Id.* at 10.

241. *Id.* at 16.

242. JOHN STUART MILL, *ON LIBERTY* 102 (Currin V. Shields ed., 1956) (arguing that “interference of the public with purely personal conduct” is likely to interfere “wrongly and in the wrong place”).

243. *Id.* at 100.

244. *Id.* at 96 (“We shall reflect that he already bears, or will bear, the whole penalty of his error . . .”).

245. *Id.* at 97.

246. See Christopher Heath Wellman, *A Defense of Stiffer Penalties for Hate Crimes*, 21 *HYPATIA* 62, 64 (2006).

247. See *id.*

248. See *id.*

happiness in a formulaic manner: all actions that generate happiness, minus harms they cause, equals overall happiness. If hate crimes are more harmful actions, then they consequently lead to a lower overall general happiness.<sup>249</sup> The problem with this train of thought, however, is that both sides of the hate crime debate disagree about whether there is empirical proof that hate crimes indeed hurt more.<sup>250</sup> Mill finds that infringement upon the offender's liberty is only warranted when the offender harms another individual.<sup>251</sup> Professor Dan Kahan argues that an orthodox Millian can avoid going into this rabbit hole.<sup>252</sup> Law does not just punish harms but takes into account the offender's motivating values in determining punishment.<sup>253</sup> Whether hate crime statutes deter harms or repudiate the offender's values should be of no consequence to a Utilitarian.<sup>254</sup> It is disingenuous to discount moral valuations in determining whether society need intervene to prevent harm.<sup>255</sup> "To determine whether punishing an individual will promote desired states of affairs, we must first make contentious judgments about what state of affairs is desirable."<sup>256</sup> For example, Lord Patrick Devlin's famous argument for punishing homosexuality is that allowing homosexuality would cause the harm of social disorder.<sup>257</sup> Underneath this anticipated "harm" is the "value" of disgust for same-sex desire. Values influence when society decides that a particular harm is too great.

### 3. *Expressivism*

#### a. Expressivism (Dan Kahan)

The expressivist theory of punishment views crimes, and society's response, as an exchange of messages.<sup>258</sup> Criminals send messages through crimes; by violating the victim, the criminal is essentially saying to the victim: "I do not value you."<sup>259</sup> Society responds by punishing the criminal in such a way that "evinces the community's repudiation of the wrongdoer's valuations."<sup>260</sup> "[P]unishment is a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation."<sup>261</sup> Expressivism explains why, for

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249. See *id.* at 69.

250. See *infra* Part III.B for further discussion on the physical and psychological harms that hate crimes cause.

251. MILL, *supra* note 242, at 102.

252. Dan M. Kahan, *Two Liberal Fallacies in the Hate Crimes Debate*, 20 LAW & PHIL. 175, 185 (2001).

253. *Id.* at 179.

254. *Id.* at 185.

255. See *id.* at 190.

256. *Id.*

257. See PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* (1965).

258. Hurd & Moore, *supra* note 14, at 1101.

259. Dan M. Kahan, *The Anatomy of Disgust in Criminal Law*, 96 MICH. L. REV. 1621, 1641 (1998) (reviewing WILLIAM IAN MILLER, *THE ANATOMY OF DISGUST* (1997)).

260. *Id.*; see also Hurd & Moore, *supra* note 14, at 1101.

261. FEINBERG, *supra* note 237, at 98.

example, society condemns and punishes rape more harshly than assault.<sup>262</sup> American society values autonomy, including the power for individuals to choose with whom to have sexual intercourse.<sup>263</sup> Rape law allows America to condemn the rapist not only for violating the victim but for violating American values. “[T]he state does not merely lock criminals up, it typically does so with a rhetorical flourish that allows a society to express and reinforce its values.”<sup>264</sup> The expressive function of punishment is deeply rooted in the foundation of criminal law.<sup>265</sup>

Although expressivism runs through theories of punishment,<sup>266</sup> many philosophers and others have downplayed its significance.<sup>267</sup> While scholars such as the late Robert Nozick argue that expressivism is an independent justification of punishment,<sup>268</sup> others have called such an argument “radical”<sup>269</sup> and insist that expressivism only exists as an offshoot of a more traditional framework such as retributivism.<sup>270</sup> Kahan argues that it is impossible “to develop sensible conceptions” of retributivism without referring to expressivism.<sup>271</sup> Thus, it is theories like retributivism that rely on expressivism, reinforcing the validity of this theory of punishment.

#### b. Expressing Disapproval Through Punishment

Through hate crime laws, the government sends a message to perpetrators that crimes motivated by hatred are particularly abhorred by society.<sup>272</sup> Professor Kahan asserts that hate crime legislation can be used to “criticize the devaluation” of targeted groups by perpetrators.<sup>273</sup> Some also argue that hate crime laws are a form of “symbolic politics” in which the government sends a message to targeted groups that society affirms them.<sup>274</sup> Punishing hate crimes sends a message to society, specifically targeted groups, that they are “fully equal under the law.”<sup>275</sup> Special punishment of hate crimes “implies a general affirmation of the societal value of the groups targeted by hate crimes and a recognition of their right-

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262. Kahan, *supra* note 252, at 181.

263. *Id.*

264. Wellman, *supra* note 246, at 65.

265. See Dan M. Kahan, *What Do Alternative Sanctions Mean?* 63 U. CHI. L. REV. 591, 593 (1996) [hereinafter *Alternative Sanctions*].

266. See, e.g., ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 370–71 (1981).

267. See, e.g., NIGEL WALKER, *PUNISHMENT, DANGER & STIGMA: THE MORALITY OF CRIMINAL JUSTICE* 24 (1980).

268. NOZICK, *supra* note 266, at 363–97.

269. Hurd & Moore, *supra* note 14, at 1110.

270. Kahan, *Alternative Sanctions*, *supra* note 265, at 601.

271. *Id.* at 604.

272. See Jacobs, *supra* note 11, at 169; MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 108 (Alan Sheridan trans., 1977) (“For punishment is directed above all at others, at all the potentially guilty.”).

273. Kahan, *Alternative Sanctions*, *supra* note 265, at 599.

274. JAMES B. JACOBS & KIMBERLY POTTER, *HATE CRIMES: CRIMINAL LAW & IDENTITY POLITICS* 66 (1998).

275. MARTHA C. NUSSBAUM, *HIDING FROM HUMANITY: DISGUST, SHAME AND THE LAW* 296 (2004).

ful place in society.”<sup>276</sup> Professor Wellman hypothesizes that had the policemen that savagely beat Rodney King received a hate crime punishment, it would have conveyed a “powerful, countervailing message that racist violence is emphatically not accepted.”<sup>277</sup> Similarly, LGBT people living in a society where homosexuality is criminalized versus LGBT people living in a society criminalizing anti-homosexual behavior will have vastly different experiences, different values, and different feelings about themselves. Hate crime laws validate all members of society, as well as express to would-be perpetrators that hate is not tolerated.

Professor Janine Young Kim argues that hate crime laws rest on the erroneous notion that Americans collectively abhor discrimination.<sup>278</sup> Kim presents two arguments against hate crime laws promoting such a message. First, she argues that America is not a post-racial or post-discriminatory society, and so such a message is false.<sup>279</sup> Kim is correct in asserting that America is clearly not a post-racial nation.<sup>280</sup> The message conveyed by hate crime laws, however, is from lawmakers to potential criminals. It is of no consequence that many Americans are racist, homophobic, and sexist. What matters is that the United States government expresses through its laws that it will not tolerate such behavior. The American government can simultaneously espouse that it detests hate crimes while many of its citizens are hateful.

Second, Kim argues that this statement highlights the hateful behavior manifesting at a larger scale, at the expense of not educating people about hatred manifesting in smaller, hidden, everyday forms.<sup>281</sup> It is far easier for people to see the racism inherent in dragging James Byrd, Jr. behind a truck than to see the racism inherent in a clerk suspiciously following young African-American men in hoodies around a store. Both forms of hatred are abhorrent and should be eradicated. There is nothing wrong with the government capitalizing on people’s understanding of the racism inherent in Byrd’s case and using it as an opportunity to state America’s opposition to such crimes. Furthermore, to eradicate the second manifestation of hatred, laws must eradicate the first type. If Americans believe that it is acceptable behavior to drag a man behind a truck, they will not think twice about racially profiling a similar man at the store. Hate crime laws serve a limited purpose, but just because they cannot send all the messages they should send<sup>282</sup> does not mean that they should send no messages.

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276. Sara Sun Beale, *Federalizing Hate Crimes: Symbolic Politics, Expressive Law, or Tool for Criminal Enforcement?*, 80 B.U. L. REV. 1227, 1255 (2000).

277. Wellman, *supra* note 246, at 68.

278. Janine Young Kim, *Hate Crime Law and the Limits of Inculcation*, 84 NEB. L. REV. 846, 893 (2006).

279. *Id.*

280. See generally H. ROY KAPLAN, *THE MYTH OF POST-RACIAL AMERICA* (2011).

281. Kim, *supra* note 278, at 893.

282. As Professor Kim notes, these laws may not convince people to make the connection between violent hate crimes and everyday acts of prejudice. GADD & DIXON, *supra* note 185, at xviii–xix.

#### 4. *Moral Education Theory of Punishment*

##### a. Moral Education Theory (Jean Hampton)

Those who subscribe to the moral education theory of punishment, famously Jean Hampton, suggest that punishment is justified because it educates an offender about the wrongness of his criminal action.<sup>283</sup> Punishment is a form of moral education not only for the offender but also for society.<sup>284</sup> When an offender is punished, it sends the message that such behavior is being punished because it is unacceptable. In order to avoid unpleasant punishment in the future, the offender must refrain from similar behavior.

Such a theory seems very natural. Hampton asks us to consider an example of a parent who tells his child after spanking him that he hopes he will “learn his lesson.”<sup>285</sup> The parent wishes to rid the child of his moral deficiency through punishment. Michel Foucault asserts, “We punish, but this is a way of saying that we wish to obtain a cure.”<sup>286</sup> The behavior cannot be cured merely by an admonition not to do such conduct in the future; punishment reinforces that such offenses are prohibited.<sup>287</sup> It is important to note, however, that moral education is not synonymous with conditioning; that is, the State is not destroying the prisoner’s autonomy.<sup>288</sup> The key to moral education is to convince the offender to act with respect for the autonomy of others.<sup>289</sup>

##### b. Morally Educating Through Punishment

Proponents of the moral education approach advocate for punishments that fit the crime. “Fit” is determined by appropriateness rather than equality.<sup>290</sup> That is, even a particularly severe crime may not warrant an equally severe punishment. The goal of punishment, under this theory, is to correct the offender’s actions. If there is a less severe punishment that will thoroughly morally educate the prisoner, then that punishment is appropriate. A hate crime may be punished through methods less than increased incarceration times, under the moral education theory, so long as the punishment challenges the hatred motivating the offender.<sup>291</sup> Moral education is the only theory of punishment that prioritizes correcting the offender’s morality as well as deterring the offender from committing the same offense.

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283. Jean Hampton, *The Moral Education Theory of Punishment*, in PUNISHMENT 112, 117 (A. John Simmons et al. eds., 1995).

284. *Id.* at 120.

285. *Id.*

286. FOUCAULT, *supra* note 272, at 22 (internal quotations omitted).

287. Hampton, *supra* note 283, at 130.

288. *Id.* at 126.

289. *Id.*

290. *See id.* at 131–32.

291. *Id.* at 132.

Some scholars have argued that the moral education justification for punishing hate crimes would be more persuasive had hate crimes previously been lawful.<sup>292</sup> They reason that since crimes have always been condemned by the government that moral education will do little to correct their future behavior. While acts of violence such as murder and arson have always been criminalized, it has not always been the case that certain groups of people have been protected by the law. For example, it is still legal to discriminate against LGBT people in many respects.<sup>293</sup> Hate crime penalties not only help to persuade the offender that the underlying act is wrong, but also that his reason for acting is morally wrong.

### B. *Are Hate Crimes More Harmful Than Other Crimes?*

Some argue that it is unfair to the families of two victims, both brutalized in exactly the same way, that the hate crime perpetrator will get significantly more punishment than the other victim's offender.<sup>294</sup> Of course, the criminal justice system frequently doles out unequal punishments. For example, the distracted motorist who strikes and kills a Good Samaritan helping a stranded motorist in a construction zone will not be punished as heftily as if he strikes and kills a construction worker.<sup>295</sup> A repeat offender often gets punished more severely than a first-time offender for the same exact criminal act.<sup>296</sup> This is because society has determined that these actions produce more harm. Hate crimes come with higher penalties, and so elevated penalties must be justified by evidence of greater harm. Hate crimes differ from other crimes because they tend to be organized and systematic.<sup>297</sup> They also generally last longer than traditional crimes.<sup>298</sup> This Section argues that hate crimes cause greater harm for the individual victim, the individual victim's community, and larger society than traditional crimes do, justifying stiffer penalties for hate crime offenders.

#### 1. *Individual Crime Victims Experience Greater Harm*

This Subsection examines two types of harm that hate crime victims experience: physical harm and emotional harm. It determines that both

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292. JACOBS & POTTER, *supra* note 274, at 90.

293. It is legal in over half of states to discriminate against LGBT employees and illegal in most states for same-sex couples to marry. Nick Wing, *It's 2013, And It's Still Perfectly Legal To Fire Somebody for Being Gay*, HUFFINGTON POST (Aug. 16, 2013, 10:02 AM), [http://www.huffingtonpost.com/2013/08/16/enda-gay-discrimination\\_n\\_3767043.html](http://www.huffingtonpost.com/2013/08/16/enda-gay-discrimination_n_3767043.html); FREEDOMTOMARRY, <http://www.freedomtomarry.org/states> (last visited Jan. 14, 2014).

294. Paul Iganski, *Introduction: The Problem of Hate Crimes and Hate Crime Laws*, in THE HATE DEBATE, *supra* note 13, at 1, 9; *see also* Hurd & Moore, *supra* note 14, at 1090 (noting that whether a hermit or much-loved father is murdered, both acts are equally wrong).

295. *See, e.g.*, 720 ILL. COMP. STAT. 5/9-3(e-7) (2009) (providing a fourteen year penalty for a driver who recklessly kills a construction worker with his vehicle).

296. Wellman, *supra* note 246, at 72.

297. Peter Tatchell, *Some People Are More Equal Than Others*, in THE HATE DEBATE, *supra* note 13, at 54, 58.

298. *Id.*

the physical and emotional harm that victims experience is greater than the harm experienced by victims of traditional crimes.

a. Greater Physical Harm

Hate crimes are four times more likely to involve assault than other crimes.<sup>299</sup> Hate crimes that are assaults are also far more likely than other assaults to cause serious bodily harm to the victim.<sup>300</sup> Hate-motivated assaults are two times as likely to cause injury and four times as likely to necessitate hospitalization.<sup>301</sup> Nearly two-thirds of hate crimes involve two or more perpetrators, and a greater number of perpetrators is related to increased severity of the crimes.<sup>302</sup> Victims of hate crimes suffer more harm,<sup>303</sup> so that harm justifies increased punishment.

In their piece, *Punishing Hatred and Prejudice*, Professors Hurd and Moore make it clear that they are not persuaded by these harrowing statistics that hate crime offenders should face elevated punishments.<sup>304</sup> To illustrate their distaste for enhanced punishment, they present an analogy in which people with bad tempers are four times more likely to engage in assaultive behavior.<sup>305</sup> They argue that a bad tempered person should not be punished more than someone without a bad temper because bad-tempered people do not always commit assaults, and sometimes good-tempered people commit assaults.<sup>306</sup> Certainly, not all hateful people commit assaults and sometimes people not motivated by hatred (perhaps instead motivated by jealousy) commit assaults. The studies still show, however, that hate crimes generally cause more physical harm.<sup>307</sup> Murder causes more harm than attempted murder. Rape causes more harm than mail theft. Crimes that cause more harm are and should correlate with steeper punishments.

b. Greater Emotional Harm

Certainly, most crime victims experience emotional effects alongside any physical effects. A woman who is robbed of her purse on the subway will not only have to deal with the loss of money and other personal effects, but will likely experience fear every time she is on the subway. All crime victims are shaken up after being victimized, but hate

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299. Steven Bennett Weisburd & Brian Levin, "On the Basis of Sex": Recognizing Gender-Based Bias Crimes, 5 STAN. L. & POL'Y REV. 21, 23 (1994).

300. LAWRENCE, *supra* note 15, at 39.

301. Weisburd & Levin, *supra* note 299, at 23.

302. Kellina M. Craig, *Examining Hate-Motivated Aggression: A Review of the Social Psychological Literature on Hate Crimes as a Distinct Form of Aggression*, in HATE AND BIAS CRIME, *supra* note 54, at 117, 118.

303. Note that one study of hate crimes found no difference in injuries suffered by hate crime victims and victims of other crimes. That study, however, is over twenty years old and was conducted at a time when hate crimes were first really being recorded and reported. Jacobs, *supra* note 11, at 165.

304. Hurd & Moore, *supra* note 14, at 1086.

305. *Id.*

306. *Id.*

307. See *supra* notes 299–302 and accompanying text.



crime victims have an enhanced sense of vulnerability.<sup>308</sup> “It is one thing to avoid the park at night because it seems unsafe. It is quite another to avoid certain neighborhoods because of one’s race.”<sup>309</sup> Hate crime victims are more likely to “regard the world as unsafe” and “to view people as malevolent.”<sup>310</sup>

Hate crime victims experience multiple psychological effects from the crime including depression, suicidal thoughts, and sleep problems.<sup>311</sup> The stigmatization underlying hate crimes causes hate crime victims to feel “humiliation, isolation, and self-hatred.”<sup>312</sup> In a report for the National Institute of Justice, Garcia and McDevitt found that hate crime victims more strongly experience psychological effects from the crime than non-hate crime victims do.<sup>313</sup> Another study found that victims of hate crimes report significantly higher levels of “depression, traumatic stress, anxiety, and anger” than victims of non-hate crimes five years after the crime.<sup>314</sup>

While many studies have demonstrated that hate crime victims’ emotional responses are different than other victims’ responses,<sup>315</sup> other studies have inconclusive results.<sup>316</sup> The question arises of how the same exact crime could impact one person so much more than another simply because one victim happened to be targeted for his race, for example. When crimes happen, the victim’s notion of a predictable world is eviscerated. To recapture some control, the victim often tries to find a reason for which to (at least partially) blame himself for the crime’s occurrence. Professor Janoff-Bulman distinguishes between two sorts of self-blame: behavioral self-blame and characterological self-blame.<sup>317</sup> Behavioral self-blame occurs when a victim blames a crime’s occurrence on a personal misstep,<sup>318</sup> for example, the lady on the subway who is robbed of her purse might blame herself for not holding her purse tight to her body. Characterological self-blame, on the other hand, exists when a victim

308. Frederick M. Lawrence, *Racial Violence on a ‘Small Island’: Bias Crime in a Multicultural Society*, in *THE HATE DEBATE*, *supra* note 13, at 36, 38.

309. LAWRENCE, *supra* note 15, at 40.

310. Gregory M. Herek et al., *Psychological Sequelae of Hate-Crime Victimization Among Lesbian, Gay, and Bisexual Adults*, 67 *J. CONSULTING & CLINICAL PSYCHOLOGY* 945, 949 (1999).

311. Weisburd & Levin, *supra* note 299, at 26; *see also* AM. PSYCHOL. ASS’N, *The Psychology of Hate Crimes* 1–2, <http://www.apa.org/about/gr/issues/violence/hate-crimes-faq.pdf> (last visited Jan. 14, 2014).

312. LAWRENCE, *supra* note 15, at 41.

313. LUIS GARCIA ET AL., NAT’L INST. OF JUSTICE, U.S. DEP’T OF JUSTICE, FINAL REPORT ON THE PSYCHOLOGICAL AND BEHAVIORAL EFFECTS OF BIAS AND NON-BIAS MOTIVATED ASSAULT (Dec. 13, 1999), *available at* <https://www.ncjrs.gov/pdffiles1/nij/grants/192010.pdf>.

314. Sullaway, *supra* note 35, at 240.

315. *See, e.g.*, Howard J. Ehrlich et al., *The Traumatic Impact of Ethnviolence*, in *THE PRICE WE PAY: THE CASE AGAINST RACIST SPEECH, HATE PROPAGANDA, AND PORNOGRAPHY* 62, 66 (Laura J. Lederer & Richard Delgado eds., 1995); *see also* Howard J. Ehrlich et al., *The Traumatic Effects of Ethnviolence*, in *HATE AND BIAS CRIME*, *supra* note 54, at 153, 157 tbl.2.

316. *See* Arnold Barnes & Paul H. Ephross, *The Impact of Hate Violence on Victims: Emotional and Behavioral Responses to Attacks*, 39 *SOC. WORK* 247, 250 (1994).

317. *See generally* Ronnie Janoff-Bulman, *Characterological Versus Behavioral Self-Blame: Inquiries Into Depression and Rape*, 37 *J. PERSONALITY & SOC. PSYCHOL.* 1798 (1979).

318. *Id.* at 1798.

blames a crime on who they are;<sup>319</sup> for example, the lady on the subway might think she was robbed because she is female. If the lady on the subway has behavioral self-blame, she may just start holding her purse tighter to her body. If she engages in characterological self-blame, however, she might feel that she cannot prevent another attack because she cannot change her gender. Feeling unable to prevent future attacks would lead to heightened anxiety, stress, and fear.

Hate crime victims who engage in characterological self-blame may feel that, to prevent being targeted in the future, they should try to hide who they are. “Covering” is a phenomenon where an individual who is frequently stigmatized and persecuted may try and hide his identity to avoid negative consequences.<sup>320</sup> Covering is essentially hiding who one is. Those who are forced to hide their identity frequently suffer in silence, leading to depression and sometimes suicide.<sup>321</sup>

## 2. *Hate Crimes Harm Communities*

When crimes happen to an individual, the effects of that crime likely will affect that victim’s community.<sup>322</sup> Upon hearing about a neighbor’s home invasion in the cul-de-sac, an individual might think: “My house could have been robbed instead.” Surely the other neighbors will shudder as they double-check that their doors are locked at night. Yet, hate crimes affect target communities more profoundly and also differently than other crimes. When hate crimes occur, those target communities perceive the crime as if they were direct attacks.<sup>323</sup> For example, if a gay man is attacked in a high school locker room, other gay people will fear that a similar crime will happen to them, and will look twice before walking into a locker room. They will further feel that the attack of that gay student was also an attack on them, too, as gay and lesbian individuals. This is because the attacker is making two statements through his actions. The first expression is an expression of power over the individual victim. The second is a statement to the LGBT community: “I am not only attacking this high school student, but I am also attacking the LGBT community.”<sup>324</sup> This feeling of a personal attack differentiates a hate crime from a parallel crime.<sup>325</sup> Those in favor of hate crime laws find that the pain to both primary victims and their target groups is so egregious

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319. *Id.*

320. KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS 18 (2006).

321. LGBT youth, for example, are almost three times as likely as their heterosexual peers to attempt suicide. They believe that they cannot be themselves, so they take their lives. *Lesbian, Gay, Bisexual and Transgender Health*, CENTER FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/lgbthealth/youth.htm> (last visited Jan. 14, 2014).

322. JACOBS & POTTER, *supra* note 274, at 87.

323. Lawrence, *supra* note 308, at 38–39; Wellman, *supra* note 246, at 67.

324. Jon Garland, *The Victimisation of Goths and the Boundaries of Hate Crimes*, in HATE CRIME: CONCEPTS, POLICY, FUTURE DIRECTIONS 40, 42 (Neil Chakrabarti ed., 2010).

325. LAWRENCE, *supra* note 15, at 42.

that the government needs to “employ extraordinary measures to affirm all those who have been degraded” beyond typical criminal censure.<sup>326</sup>

Hurd and Moore question whether target communities suffer more psychic injury in response to hate crimes more than in response to other crimes.<sup>327</sup> One need only look at how the Matthew Shepard killing affected the LGBT community. Shepard was referred to as a “lost brother” of the gay and lesbian community.<sup>328</sup> Another poignant example is the brutal beating of Rodney King by Los Angeles police officers. Many blacks took the attack on Rodney King as a personal attack, setting off race riots.<sup>329</sup>

### 3. *Hate Crimes Shake Society*

The effects of hate crimes are felt not only by the individual victim or the victim’s community, but can be felt by society at large. Members of society may experience “fear and anxiety that is related to a breakdown of community order and civility in their surroundings.”<sup>330</sup> For example, many U.S. citizens were affected by 9/11 although only a small portion of the population was directly affected. The September 11 attacks left people questioning why terrorism exists and left us in fear of future terrorism, even a decade later.<sup>331</sup> These harms to society further justify hate crime penalties.

Hurd and Moore claim that this “societal harm” justification is nonsensical for two reasons.<sup>332</sup> First, they argue that all crimes harm society and so hate crimes should not be punished more severely than other crimes.<sup>333</sup> Hate crimes do affect society in a deeper way than most other crimes. A recent example is the murder of Trayvon Martin, the effects of which permeated American society and led to national protests.<sup>334</sup> The 1963 16th Street Baptist Church Bombing in Birmingham, Alabama is another example. The KKK planted a bomb at an African-American church, killing four little girls.<sup>335</sup> This despicable crime not only affected

326. Wellman, *supra* note 246, at 67.

327. Hurd & Moore, *supra* note 14, at 1091–93.

328. Thomas R. Dunn, *Remembering Matthew Shepard: Violence, Identity, and Queer Counter-public Memories*, 13 RHETORIC & PUB. AFF. 611 (2010).

329. *Rodney King Race Riots: Then and Now*, GUARDIAN (May 1, 2012, 3:00 PM), <http://www.guardian.co.uk/world/gallery/2012/may/01/rodney-king-race-riots-gallery>.

330. Weisburd & Levin, *supra* note 299, at 26–27.

331. See, e.g., Sharon E. Perlman et al., *Short-term and Medium-term Health Effects of 9/11*, 378 LANCET 925 (2011) (noting that the entire United States population felt the impact of the 9/11 attacks).

332. Hurd & Moore, *supra* note 14, at 1092.

333. *Id.*

334. “*We Are All Trayvon Martin: Photos and Video From the Million Hoodie March*,” MOTHER JONES (Mar. 21, 2012, 9:24 PM), <http://www.motherjones.com/mojo/2012/03/photos-million-hoodie-march-trayvon-martin>.

335. *16th Street Baptist Church Bombing: Forty Years Later, Birminham Still Struggles with Violent Past*, NPR (Sept. 15, 2003), <http://www.npr.org/templates/story/story.php?storyId=1431932>.

the African-American community but shook the entire nation.<sup>336</sup> Second, Hurd and Moore argue that hate crimes will not lead to society's collapse.<sup>337</sup> They compare the argument that hate crimes may lead to social disorder with Lord Patrick Devlin's argument that if homosexual behavior is not criminalized then society will collapse in an attempt to portray hate crime legislation advocates as hysterical.<sup>338</sup> Of course, these arguments are very different. Since *Lawrence v. Texas* struck down sodomy criminalization laws,<sup>339</sup> American society has not gone to hell. On the other hand, some hate crimes have led to social disorder.<sup>340</sup>

While few individual crimes shake society such that riots occur, hate crimes have transformed into widespread community violence.<sup>341</sup> Furthermore, an absolute breakdown of society is not necessary to prove societal harm. Hate crimes affect society in a more profound way than traditional crimes, and this justifies hate crime penalties.

### *C. Do Hate Crime Laws Produce Harmful Results?*

This Section examines the concern that hate crime legislation can have unanticipated, contrary consequences. First, this Section examines whether hate crime legislation might actually incite greater intergroup violence than if hate crime legislation did not exist. Next, this Section determines if hate crime legislation punishes the groups it intends to protect. Finally, this Section examines the possibility of hate crime laws encompassing too many protected groups.

#### *1. Fostering Greater Intergroup Violence*

One concern has been that hate crime legislation might actually lead to greater intergroup tension and violence.<sup>342</sup> An offender might reason that, but-for the protected class the victim falls under, he would not be convicted of a hate crime and would face a lesser charge.<sup>343</sup> Consequently, the offender may channel his resentment towards the community he had targeted in the future. No determinative studies or statistics have shown, however, that hate crime laws lead to increased intergroup conflict.<sup>344</sup> There are no known instances of hate crimes that were perpetr-

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336. Riots, protests, and national outrage ensued after the bombing. *Birmingham Church Bombing*, HISTORY.COM, <http://www.history.com/topics/birmingham-church-bombing> (last visited Jan. 14, 2014).

337. Hurd & Moore, *supra* note 14, at 1092.

338. *Id.*

339. *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003).

340. For example, there were widespread riots after the beating of Rodney King. *Then & Now: Images from the Same Spot as the L.A. Riots, 20 Years Later*, LAWEEKLY, <http://www.laweekly.com/microsites/la-riots/> (last visited Jan. 14, 2014).

341. LEADERSHIP CONF. ON CIVIL RIGHTS EDUC. FUND, CONFRONTING THE NEW FACES OF HATE: HATE CRIMES IN AMERICA 36 (2009), available at [http://www.protectcivilrights.org/pdf/reports/hatecrimes/lccref\\_hate\\_crimes\\_report.pdf](http://www.protectcivilrights.org/pdf/reports/hatecrimes/lccref_hate_crimes_report.pdf).

342. JACOBS & POTTER, *supra* note 274, at 89.

343. See GERSTENFELD, *supra* note 8, at 65–68.

344. Sullaway, *supra* note 35, at 244.

ed because the offender previously faced an additional hate crime charge.

## 2. *Punishing the Groups It Seeks to Protect*

One argument against hate crime legislation is that it sometimes criminalizes the same groups that it seeks to protect.<sup>345</sup> For example, in 2013, an Amish man was convicted of a hate crime for cutting the beards off of fellow Amish.<sup>346</sup> He received a sentence of fifteen years in prison.<sup>347</sup> Some proponents of this argument point to sentences such as this and identify them as illogical consequences of hate crime laws.<sup>348</sup> They argue that hate crime laws were designed to protect certain classes of people, but then harm those same classes with enhanced punishments if people from those classes commit hate crimes.<sup>349</sup> Hate crime legislation, however, was drafted to protect the victims of hate crimes, not the perpetrators. Whether an African-American man or a white man killed Matthew Shepard should be of no consequence in sentencing. Hatred is hatred, no matter what protected class the offender happens to fall under.

Beyond asking whether a perpetrator from the victim's group should be prosecuted with a hate crime, some have questioned whether a perpetrator within the target group can commit hate crimes against someone else in their target group.<sup>350</sup> For example, in 2012, three women repeatedly punched and kicked a gay man at a train station while calling him homophobic slurs; they claimed that they should not be convicted of a hate crime because they are all lesbians.<sup>351</sup> Just because the lesbian perpetrators also experience same-sex attraction should not factor into whether they should be charged with committing a hate crime. The same "othering" that dominant groups do to subordinate groups occurs amongst subordinated groups.<sup>352</sup> Furthermore, that same "othering" can be directed at the self. That a perpetrator might be fueled by self-loathing<sup>353</sup> should be of no consequence in prosecuting that individual to the full extent of the law.

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345. Marc L. Fleischauer, *Teeth for a Paper Tiger: A Proposal to Add Enforceability to Florida's Hate Crimes Act*, 17 FLA. ST. U. L. REV. 697, 706 (1990).

346. *Amish Leader Gets 15 Years for Beard Attacks*, CNN (Feb. 11, 2013), <http://www.cnn.com/2013/02/08/justice/amish-beard-cutting-trial/index.html>.

347. *Id.*

348. Fleischauer, *supra* note 345, at 708.

349. *See id.* at 706.

350. *See generally id.* at 704 (arguing that only hate crimes committed by whites against blacks should be considered hate crimes and not vice versa).

351. *Women Who 'Beat Up Gay Man' Say They Can't Be Charged With a Hate Crime . . . Because They're Lesbians*, DAILY MAIL (Feb. 26, 2012), <http://www.dailymail.co.uk/news/article-2106722/Women-beat-gay-man-say-charged-hate-crime--theyre-lesbians.html>.

352. BARBARA PERRY, IN THE NAME OF HATE: UNDERSTANDING HATE CRIMES 120 (2001).

353. It is perfectly reasonable that minorities who themselves are hate crime victims may become hate crime perpetrators against people in their own community. Becoming socialized in a society where one is frequently persecuted, one may turn the hatred he experiences into self-hatred. PERRY, *supra* note 24, at 113.

### 3. *Will Hate Crime Laws Eventually Encompass Everything?*

Over the history of hate crime laws, the number of protected classes has grown.<sup>354</sup> This expansion is cause for concern for some who hypothesize that defining hate crimes may become a slippery slope.<sup>355</sup> They theorize that, in the future, everything the government may want to prosecute will be considered a hate crime.<sup>356</sup> Admittedly, it is hard to determine which groups should be protected by hate crime laws and which should not. Protecting some groups and not others sends a message to the other groups that they are not worthy of extra protection by the law.<sup>357</sup> There are compelling arguments for expanding the term “hate crime” to apply to all crimes where the victim is targeted because of any particular characteristic. Professor Jon Garland cites the case of a Goth female who was stomped to death because of her Goth clothing.<sup>358</sup> Garland argues that the term “hate crime” may need to be modified to include any incident where the victim was targeted for his differentiating characteristic.<sup>359</sup> The problem with Garland’s argument is that victims are frequently targeted for their difference, and modifying the definition of hate crimes this way would definitely lead down a slippery slope.

Frederick Lawrence addresses this issue by offering a three-step methodology for lawmakers to construct a list of groups worthy of protection by hate crime laws.<sup>360</sup> The first step is to examine a case of discrimination and determine whether the hate crime victim and perpetrator understand themselves to be members of a particular group.<sup>361</sup> While this first step is overly inclusive, it also helps weed out cases such as one where a brown-eyed person assails a blue-eyed person.<sup>362</sup> The second step for lawmakers is to examine these groups and identify group “characteristics that implicate societal fissure lines, divisions that run deep in the social history of a culture.”<sup>363</sup> Societal fissure lines may be national or local.<sup>364</sup> The third step requires valuing these characteristics.<sup>365</sup> Lawrence highlights two methods of valuation: (1) looking at the qualities of the characteristic itself or (2) determining if there is any similarity between the present characteristic and characteristics that are generally protected.<sup>366</sup> Of course, such an analysis is subjective and has the potential to be

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354. SHIVELY, *supra* note 32, at ii.

355. See, e.g., Nat Hentoff, *Definition of Hate Crime is Slippery Slope*, KY. NEW ERA, June 28, 2007, at A8, available at [http://news.google.com/newspapers?nid=266&dat=20070628&id=a\\_krAAAABAJ&sjid=HW0FAAAAIBAJ&pg=5239,8884913](http://news.google.com/newspapers?nid=266&dat=20070628&id=a_krAAAABAJ&sjid=HW0FAAAAIBAJ&pg=5239,8884913).

356. See *id.*

357. See GERSTENFELD, *supra* note 8, at 46.

358. *Goth Clothes Prompted Killing*, BBC NEWS (Mar. 12, 2008), [http://news.bbc.co.uk/2/hi/uk\\_news/england/lancashire/7291985.stm](http://news.bbc.co.uk/2/hi/uk_news/england/lancashire/7291985.stm).

359. Garland, *supra* note 324, at 53–54.

360. LAWRENCE, *supra* note 15, at 12–13.

361. *Id.* at 12.

362. *Id.*

363. *Id.*

364. *Id.* at 13.

365. *Id.* at 14.

366. *Id.*

both underinclusive and overinclusive. It does present safeguards to protect against the ever-expanding definition that critics fear.

*D. Hate Crime Laws Do Not Infringe on Freedom*

Critics of hate crime laws argue that these laws punish the criminal for possessing a certain mental state, and that such laws infringe on freedom of thought.<sup>367</sup> This Section argues two points. First, hate crime laws punish actions rather than thoughts. Second, the Supreme Court has consistently held that hate speech is not criminal behavior.

1. Hate Crime Laws Do Not Punish All Hatred

In a famous 1999 New York Times Magazine piece titled “What’s So Bad About Hate?,” Andrew Sullivan denounces violence but declares that hatred could not and should not be eradicated by hate crime legislation.<sup>368</sup> He argues that hate crime laws punish people for having hateful feelings.<sup>369</sup> Sullivan suggests that instead of trying to transcend hatred, victims of prejudice need to become indifferent to hatred, turn the other cheek and triumph in the face of adversity.<sup>370</sup> The major problem with Sullivan’s argument is that hate crime laws in no way punish people for merely having hateful thoughts. Just like it is not a crime to think about stealing a loaf of bread, it is not a crime to hate someone for being Latino, even to the point of fantasizing about physically harming that person. So long as those thoughts do not become actions, hate crime laws do not come into play. Perpetrators of hate crimes are punished because their hateful thoughts translate into hateful actions.

Martha Nussbaum addresses arguments similar to Sullivan’s in *Hiding from Humanity* with three points.<sup>371</sup> First, hate crime laws are focused on protecting vulnerable people rather than punishing hateful offenders.<sup>372</sup> Nussbaum notes that the law’s commitment to protecting vulnerable people is evident by severely punishing those who prey on vulnerable members of society.<sup>373</sup> Hate crime laws protect those who are vulnerable, so these laws punish actors who prey on vulnerability rather than actors who have hateful thoughts. Despite Sullivan’s thought that vulnerable communities could learn to defend themselves, vulnerable communities need the law to protect their interests. Second, while hate

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367. Jesse Lerner, *Hate Crime/Thought Crime*, 57 *DISSENT* 74–79 (Spring 2010), available at <http://www.dissentmagazine.org/article/hate-crimethought-crime>.

368. Andrew Sullivan, *What’s So Bad About Hate*, *N.Y. TIMES MAG.*, Sept. 26, 1999, available at <http://www.nytimes.com/library/magazine/home/19990926mag-hate-essay.html> (“To put it another way: violence can and should be stopped by the government. In a free society, hate can’t and shouldn’t be.”).

369. *Id.*

370. *Id.*

371. NUSSBAUM, *supra* note 275, at 294.

372. *Id.*

373. *Id.* (noting that blackmailers receive higher penalties under the Federal Sentencing Guidelines).

crimes have a mental element, there is a big difference between having hateful feelings and expressing that hatred through acts of violence. Americans are free to possess hateful feelings, so long as they do not express those hateful feelings through violent actions. Third, those who commit hate crimes have two mental processes occurring. The first mental process is what she deems a “political opinion,”<sup>374</sup> which is essentially their hateful thought. The second mental process is “hate-based mens rea” which is directed towards conduct.<sup>375</sup> A perpetrator’s first mental process is not being criminalized; rather, a perpetrator is punished for having a mens rea grounded in hatred that led to the criminal conduct.

## 2. The Supreme Court Has Made It Clear That Freedom Is Protected

To be sure, hate crime laws do punish points of view that the government deems “reprehensible.”<sup>376</sup> The government, however, only punishes hate crimes but not hate speech. The difference between hate speech and a hate crime is not an easy one to point out and should not be an easy distinction.<sup>377</sup> For example, Catherine MacKinnon argues that letting the Nazis march in Skokie reenacts the Holocaust, subjecting spectators to relive their trauma or instead “avert their eyes.”<sup>378</sup> Certainly, the scenario MacKinnon describes is traumatic for Holocaust victims, the Jewish community and larger society, and may cause some of the same psychological effects that hate crimes cause victims. The Supreme Court has made clear that while hate speech is reprehensible, hate speech is still protected under the First Amendment.<sup>379</sup>

## IV. RECOMMENDATION

Criminal justice scholars from all sides of the debate admit that hate crimes are *different* than other crimes.<sup>380</sup> Yet, the solutions proposed have been dissatisfactory to at least one of the hate crime camps. Critics of hate crime laws condemn the extreme punishment of offenders who commit hate crimes as opposed to non-hate crimes.<sup>381</sup> Victims, and the vast majority of Americans, support hate crime laws and their accompanying enhanced punishments.<sup>382</sup> They would not favor the critics’ solution of treating hate crimes like all other crimes. This impasse exists be-

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374. *Id.*

375. *Id.*

376. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 926 (2d ed. 1988).

377. NUSSBAUM, *supra* note 275, at 295.

378. CATHARINE A. MACKINNON, ONLY WORDS 105 (1993).

379. R. A.V. v. City of St. Paul, 505 U.S. 377, 396 (1992).

380. LAWRENCE, *supra* note 15, at 1 (noting that hate crimes “have a special and compelling call on our conscience”).

381. See Hurd & Moore, *supra* note 14, at 1082.

382. A whopping seventy-eight percent of Americans favors hate crime legislation. Frank Newport, *Public Favors Expansion of Hate Crime Law to Include Sexual Orientation*, GALLUP (May 17, 2007), <http://www.gallup.com/poll/27613/public-favors-expansion-hate-crime-law-include-sexual-orientation.aspx>.



cause rather than thinking outside traditional criminal justice models, both sides repeatedly apply traditional models of punishment to a *different* situation.<sup>383</sup> A *different* crime requires a *different* punishment. The only way not to trivialize the victims' trauma, while also not unjustly punishing perpetrators, is to devise a more creative punishment for hate crimes.

My recommendation has two parts. First, governments should abolish significantly longer prison sentences for hate crimes. Second, hate crimes should be treated with mandatory diversity education and service to the target community. The latter rehabilitation will be in addition to the typical sentence that the criminal faces for the underlying offense.

#### A. *Abolish Longer Sentences*

Much of the debate about whether hate crime laws are justified centers on the consequence of enhanced punishment. Under penalty enhancement statutes, hate crime offenders often spend more time in prison than they would have had they committed a non-hate crime.<sup>384</sup> Those who determine that hate crimes cause more harm justify penalty enhancers. While it seems evident that hate crimes are more harmful than non-hate crimes,<sup>385</sup> this debate may be circumvented entirely. Proving or disproving that hate crimes hurt more than other crimes is only necessary to justify harsher, longer punishments. That is irrelevant to my analysis because my solution involves abolishing increased prison sentences.

In 1999, a meta-study of fifty different studies involving 336,052 offenders was conducted.<sup>386</sup> The study revealed that offenders who served longer prison sentences had a three percent increase in recidivism.<sup>387</sup> There are no studies on the recidivism rate of hate crime offenders serving enhanced prison sentences. Nevertheless, it stands to reason that putting a perpetrator in prison for a significantly longer time than he would had he committed the same crime against a different victim will probably increase the offender's hatred, thus increasing the probability that he will reoffend. Besides increased recidivism, incarceration has other negative consequences such as disrupting communities and families.<sup>388</sup> Incarcerated prisoners return to communities and often strain them, producing tensions that may lead to further crimes. Perhaps the most glaring problem with increased incarceration terms is that they do nothing to correct the reason that offenders commit these crimes in the first place: hatred.

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383. HALL, *supra* note 192, at 238.

384. *See supra* notes 48–50 and accompanying text.

385. *See supra* Part III.B.

386. PAUL GENDREAU ET AL., THE EFFECTS OF PRISON SENTENCES ON RECIDIVISM (1999).

387. *Id.*

388. William J. Sabol & James P. Lynch, *Assessing the Longer-run Consequences of Incarceration: Effects on Families and Employment*, in CRIME CONTROL AND SOCIAL JUSTICE: THE DELICATE BALANCE 3, 7 (Darnell F. Hawkins et al. eds., 2003).

*B. Make Diversity Education and Service to the Affected Community Mandatory*

As the debate on enhanced penalties stands, there are two options: get rid of enhanced penalties or keep enhanced penalties. Going with the first option would not only trivialize the trauma that hate crime victims experience but would remove the powerful message of affirmation that governments send to affected communities. The key shortcoming of the second option is that enhanced penalties condemn “individual acts of violence” instead of “dismantling the systemic forces that promote, condone and facilitate” hate crimes.<sup>389</sup> Penalties that do not focus on eradicating hatred are merely punitive and do nothing to prevent future acts of violence.<sup>390</sup> It is only by destroying prejudice and eradicating hatred that hate crimes will truly cease to be a phenomenon. My solution is to replace longer prison sentences with mandatory diversity education including a rigorous service element. Offenders will still face the same punishments other offenders of non-hate crimes face, obviating concerns that such a solution would let hate crime perpetrators off easy.<sup>391</sup>

Diversity education may take two forms: proactive education and rehabilitative education. Proactive education will serve to expose both potential offenders and nonoffenders to the values, beliefs, and cultures of various communities, with the goal that this exposure will prevent would-be offenders from committing hate crimes. Rehabilitative education has the goal of preventing past offenders from reoffending. Both forms of education are necessary, but it is rehabilitative punishment that should become the new type of “enhanced penalty” hate crime offenders face.

1. Proactive Education

One of the spheres with the greatest potential for the most impact to eradicate hatred is the classroom. Educators are in a unique position to correct their students’ hateful feelings before they manifest into violence.<sup>392</sup> One resource that has been developed is the “Teaching Tolerance” Project. It has a website full of classroom activities specifically designed to combat particular types of biases that also fit into a particular school subject and grade level.<sup>393</sup> The major criticism of proactive education is that there have been no studies testing the actual impact of diver-

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389. MOGUL ET AL., *supra* note 165, at 126.

390. The public overwhelmingly favors hate crime legislation because of its effect in countering hate rather than its effect of penalizing the perpetrator. TERRYLYNN PEARLMAN, SANCTIONING BIAS CRIME: A PUBLIC PERSPECTIVE 238 (Marilyn McShane & Frank P. Williams III eds., 2008).

391. Kahan argues that community service is expressively irrational because it does not condemn. Kahan, *supra* note 265, at 628–29. This concern is only valid if community service completely replaces harsher punishment. I suggest that offenders serve time plus serve communities.

392. TERRANCE L. FURIN, COMBATING HATRED: EDUCATORS LEADING THE WAY, at xvi (2009).

393. *Classroom Resources*, TEACHING TOLERANCE, SOUTHERN POVERTY L. CTR., <http://www.tolerance.org/classroom-resources> (last visited Jan. 14, 2014).

sity training on the public.<sup>394</sup> There are no empirical studies that demonstrate that proactive diversity education will prevent would-be offenders from perpetrating hate crimes. Still, it is undisputed that hatred and prejudice develop because of miscommunication amongst groups.<sup>395</sup> Diversity education would allay some of those misunderstandings, lessening the probability that a would-be offender will commit a hate crime.

## 2. Rehabilitative Education

The reasoning behind rehabilitative education is that hateful violence is perpetuated at least in part because the offender does not understand or have compassion for the community he has targeted. The idea of rehabilitative education is not a new one. Massachusetts, for example, requires convicted hate crime offenders to participate in diversity programs.<sup>396</sup> My solution, however, involves requiring rehabilitative education in place of extended prison sentences when a hate crime statute calls for an enhanced penalty. The length and type of education will be proportional to the offense committed, the age of the offender, and the target group. For example, a teenager who vandalizes a synagogue will receive different and shorter education than an adult who murders a rabbi. Education will be above and beyond the criminal sentence that the offender would serve whether or not he committed a hate crime. Much like defensive driving courses, education will not take place during work hours. Depending on the offense, education may be in the form of a class or conducted online. Minor exams would test the student's comprehension and ensure that he is engaged in learning.

Effective education must also include a service component. Those who subscribe to the social control theory believe that criminal offenses occur because offenders' bonds to society have loosened.<sup>397</sup> Community service in the affected community not only serves to strengthen those bonds to larger society, but also helps build a bridge between the offender and the affected community. Diversity education students would be immersed in the communities they have affected in ways that they could not by simply sitting in a classroom or even by listening to speakers. Let us take Dharun Ravi, for example. Ravi may learn about the LGBT community by attending a pride festival or reading a book on the LGBT civil rights movement. If Ravi is exposed to work at a suicide hotline for LGBT teenagers, he will not only learn a lot more but he will become engaged with the LGBT community. Listening on a headset to the calls of desperate teenagers contemplating suicide, Ravi will understand what Tyler Clementi felt in his last minutes on earth. Ravi will appreciate the gravity of his actions, and Ravi will be a lot less likely to reoffend.

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394. Phyllis B. Gerstenfeld, *Hate Crimes*, in *VIOLENT CRIME: CLINICAL AND SOCIAL IMPLICATIONS* 257, 269 (Christopher J. Ferguson ed., 2010).

395. See *supra* notes 199–200 and accompanying text.

396. Gerstenfeld, *supra* note 394, at 270.

397. PERRY, *supra* note 352, at 33.

There are three major criticisms of such an approach. First, no empirical studies have been conducted to determine the efficacy of such programs in reducing hate violence.<sup>398</sup> Empirical studies on the effects of diversity education on hate crime offenders should be conducted to determine whether they are effective. If education does not alter the offender's future behavior, then the education may need to be altered or discontinued. Second, some may find this type of punishment dissatisfactory because they feel like the offender gets off easy. Punishment is commonly conceived of as something that hurts.<sup>399</sup> Mandatory service will at worst inconvenience the offender; at best, it will educate and enlighten the offender, as well as give the offender an opportunity to make amends. The offender, however, will still face the same amount of jail time as any other offender. He will do community service and receive diversity education above and beyond his sentence. As reprehensible as the offender's actions are, keeping the offender in prison for longer will either do nothing or make him more likely to re-offend. This solution is not about making it easier for the offender, but for protecting vulnerable communities from future crimes. The third criticism of this approach is that education may intrude upon the personal beliefs of the offender. Jacobs and Potter have expressed concerns about efforts to rehabilitate offenders, noting that "[t]he line between education and indoctrination may be fuzzy."<sup>400</sup> They express worries that rehabilitators might try and force an offender to "adopt the 'right position' on gay marriage."<sup>401</sup> First, this education will expose the offender to the culture, beliefs, and community of the victim. Mere exposure is not indoctrination. Second, after the education, offenders are free to maintain bigoted viewpoints, vote however they want, join hate groups, picket funerals, and burn crosses on lawns. I believe that after seeing the rich, diverse cultures of the victims, offenders will be far less likely to engage in any of these activities.

## V. CONCLUSION

Increasing diversity in the United States, along with a suspicion and fear of the "Other" perpetuated by hate groups and larger society, will contribute to the incidence of hate crimes. Regardless of what side of the hate crime debate one is on, all parties agree that hate crimes are reprehensible. The point of contention in the hate crime debate is whether hate crime laws should continue to exist. Because hate crimes differ from traditional crimes in their effect on the victim, the victim's community, and society at large, I argue that hate crime laws can and should continue to exist to punish offenders in a different way.

Hate crime laws have two main objectives. The short-term objective is to punish offenders harshly enough that they hopefully never

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398. Gerstenfeld, *supra* note 394, at 270.

399. JACOB ADLER, *THE URGINGS OF CONSCIENCE: A THEORY OF PUNISHMENT* 80 (1991).

400. JACOBS & POTTER, *supra* note 274, at 150.

401. *Id.*

commit a hateful offense again. The long-term objective is to eradicate hatred so that hate crimes cease to happen. The short-term objective is crucial because preventing recidivism is key. The long-term objective, however, will prevent crimes from ever occurring, rendering concerns about recidivism unnecessary.

Holocaust scholar Lawrence Langer once remarked, “[T]he logic of law can never make sense of the illogic of extermination.”<sup>402</sup> This remark reminds us that a novel approach to hate crimes is required. Drafting stricter hate crime laws with harsher penalties will not cure hateful behavior. In fact, harsh punishment will likely exacerbate the perpetrator’s hatred because the perpetrator perceives that he has been unjustly treated by the criminal justice system. Hatred is an illogical phenomenon that can only be eradicated by building empathy in the offender. The criminal justice system has a unique opportunity to build empathy by exposing the offender to the values, culture, and history of the community he persecuted.<sup>403</sup> It is certain that such an approach will neither cure all hatred nor prevent all hate crimes. Yet, it is the only approach that targets the crime itself along with the hatred underlying it.

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402. LAWRENCE L. LANGER, *ADMITTING THE HOLOCAUST: COLLECTED ESSAYS* 171 (1995).

403. See JACOBS & POTTER, *supra* note 274, at 150.

