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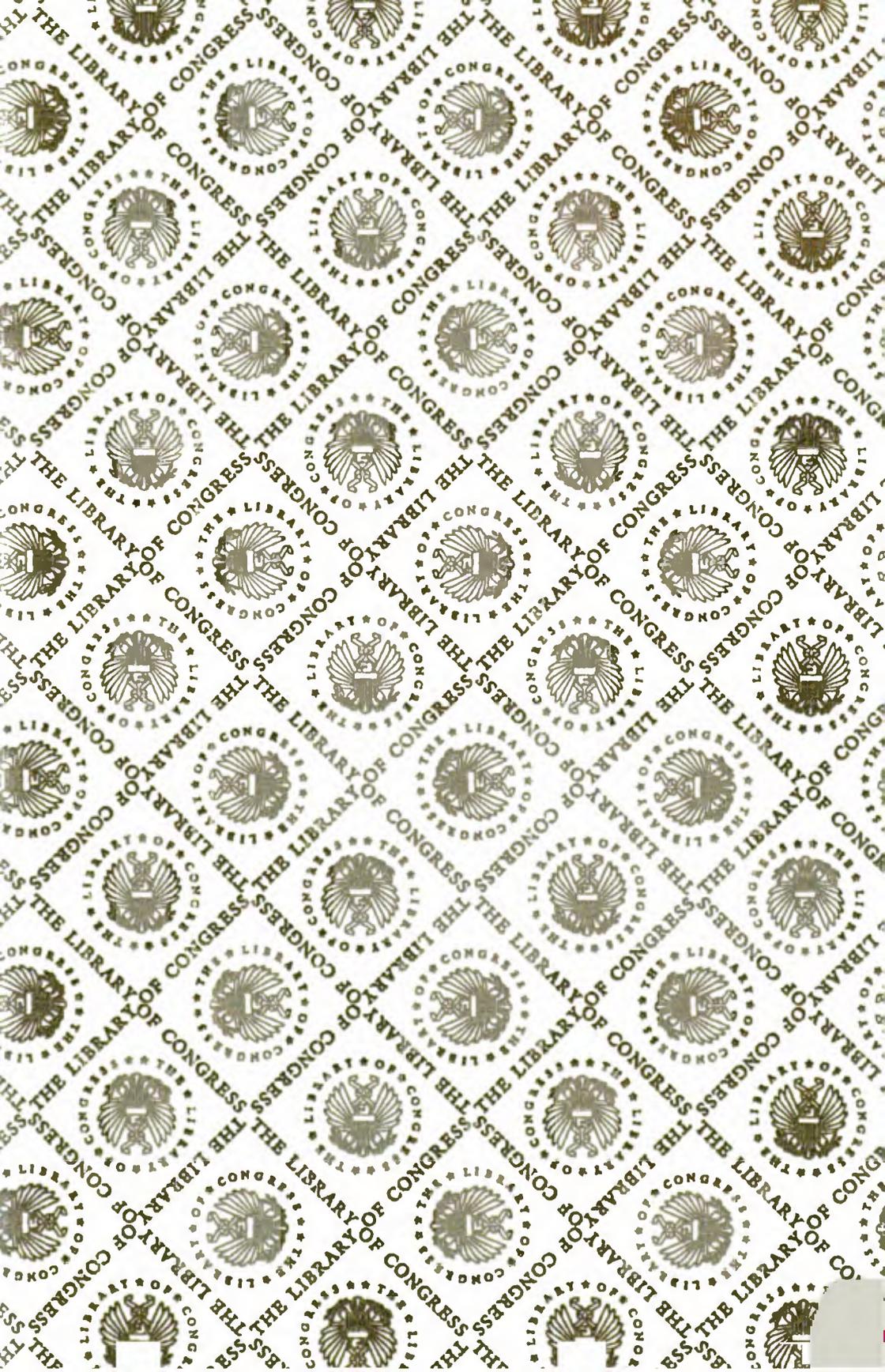
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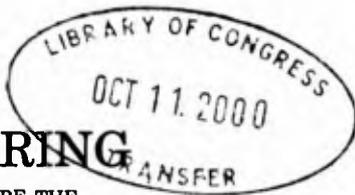




United States.

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HATE CRIMES VIOLENCE



HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED SIXTH CONGRESS

FIRST SESSION

—
AUGUST 4, 1999
—

Serial No. 74



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HATE CRIMES VIOLENCE

WEDNESDAY, AUGUST 4, 1999

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to call, at 10:05 a.m., in Room the Honorable Henry J. Hyde (chairman) presiding.

Present: Representatives Henry J. Hyde, F. James Sensenbrenner, George W. Gekas, Charles T. Canady, Steve Chabot, Bob Barr, William L. Jenkins, Asa Hutchinson, Lindsey O. Graham, Mary Bono, Joe Scarborough, David Vitter, John Conyers, Jr., Barney Frank, Jerrold Nadler, Robert C. Scott, Melvin L. Watt, Zoe Lofgren, Sheila Jackson Lee, Maxine Waters, Martin T. Meehan, Robert Wexler, Steven R. Rothman, Tammy Baldwin, and Anthony D. Weiner.

Staff Present: Thomas E. Mooney, Sr., general counsel-chief of staff, Jon Dudas, deputy general counsel-staff director, Daniel M. Freeman, parliamentary-counsel, Sharee Freeman, counsel, Kirsti Garlock, counsel, Samuel F. Stratman, communications director, James B. Farr, financial clerk, Elizabeth Singleton, legislative correspondent, Shawn Friesen, staff assistant/clerk, Majority Staff; Ray Smietanka, chief counsel, Jim Harper, counsel, Susan Jensen-Conklin, counsel, Subcommittee on Commercial and Administrative Law; George Fishman, chief counsel, Subcommittee on Immigration and Claims.

OPENING STATEMENT OF CHAIRMAN HYDE

Mr. HYDE. The committee will come to order. It is the intention of the Chair to recognize myself and the ranking member, Mr. Conyers, for 5 minutes each, for purposes of an opening statement and other members may insert their statements in the record, because we have a large panel today and we want to get through the testimony.

Members can use their 5 minutes when they are permitted to question the witnesses to make a statement if they wish as well.

Good morning. Welcome to this hearing on Hate Crimes Violence. I understand Deputy Attorney General Holder can be with us only until 11:30 so we will try to be brief. We are lucky and blessed to live in a society that boasts a wide diversity of peoples, cultures and religions, all of which support a strong and prosperous Nation. We must all admit that the United States has made tremendous strides in the last half of the 20th century in becoming a more tolerant, multicultural society.

Some of us are old enough to remember a sad history of segregation, numerous incidents of racial and ethnic prejudice and violence that went unpunished, but we will also acknowledge that much of this discrimination has been significantly erased from the landscape of our American society. We have made great progress in coming together for the good of ourselves, our children, and our country but we are yet far from a perfect harmonious society. We still have too many events that shock the conscience of the country.

An unfortunate and offensive byproduct of a heightened consciousness of race, religion, gender and sexual orientation is what has been coined by sociologists and mass media as a "hate crime." A hate crime is based on prejudice, on bias. It was added to our criminal law lexicon in the mid-1980's and used to define crimes against victims who are of a particular race, religion, national origin, sexual orientation, gender, or disability. When crime plagues a neighborhood, women and men and children are intimidated. Violence in any form frightens people and makes us huddle together to search for answers and for protection. Violence and animus based on prejudice is often swiftly punished at the State level. In some instances defendants even face the death penalty for their action.

But despite our universal condemnation and continual attempts to stop hate crimes in America, this unspeakable behavior continues to occur. These are senseless acts of inhumanity. Let us not look away. Let us try and determine how best to root out this evil.

It is my belief, and this is personal with me, that violence motivated by prejudice will never be eliminated without a spiritual component that reflects a realization by all people that we share a common humanity, and that realization must be grounded in the belief that we are in fact all brothers and sisters made in the likeness of our Creator.

The endless challenge for our modern society is to live up to that spiritual belief in human dignity and how we live our lives and how we treat others. As we craft laws to meet this challenge, our goal is that which is etched in stone atop the mantle of the of United States Supreme Court building: Equal Justice Under Law.

Today we will have an opportunity to hear much more about what has been done to address these crimes and what can be done at the Federal level to assist States that, after all, are in the front line in dealing with this difficult problem.

I now turn with pleasure to the ranking member, Mr. Conyers, for his opening statement. Mr. Conyers.

[The prepared statement of Chairman Hyde follows:]

PREPARED STATEMENT OF HON. HENRY J. HYDE, A REPRESENTATIVE IN CONGRESS
FROM THE STATE OF ILLINOIS, AND CHAIRMAN, COMMITTEE ON THE JUDICIARY

Good morning, ladies and gentlemen and welcome to this hearing on Hate Crimes Violence. I understand that Deputy Attorney General Holder can only be with us until 11:30 a.m., so I will keep my remarks brief.

We are lucky and blessed to live in a society that boasts a wide diversity of peoples, cultures, and religions which support a strong and prosperous nation. We must all admit that the United States has made tremendous strides in the last half of the twentieth century in becoming a more tolerant multi-cultural society. Some of us are old enough to remember a sad history of segregation, numerous incidents of racial and ethnic prejudice and violence that went unpunished. But we will also acknowledge that much of this discrimination has been significantly erased from the

landscape of our American society. We have made great progress in coming together for the good of ourselves, our children and our country. But we are not a perfect, harmonious society. We still have events that shock the conscience of the country.

A unfortunate and offensive byproduct of a heightened consciousness of race, religion, gender and sexual orientation is what has been coined by sociologists and mass media as a "hate crime." A hate crime is based on prejudice and bias. It was added to our criminal law lexicon in the mid-80's and used to define crimes against victims who are of a particular race, religion, national origin, sexual orientation, gender, or disability. When crime plagues a neighborhood, women, men and children are intimidated. Violence in any form frightens people and makes us huddle together to search for answers. Violence and animus based on prejudice is often swiftly punished at the state level. In some instances, defendants face the death penalty for their actions. Despite our universal condemnation and continual attempts to stop hate crimes in America, this unthinkable behavior continues to occur. These crimes are senseless acts of inhumanity.

Let us not look away. Let us try and determine how best to root out this evil.

It is my belief that violence motivated by prejudice will never be solved without a spiritual component that reflects a realization by all people that we share a common humanity, and that realization must be grounded in belief that we are all brothers and sisters made in the likeness of our Creator. The never ending challenge for our modern society is to live up to that spiritual belief in how we live our lives and treat others. As we craft laws to meet this challenge, we must strive to achieve that which is etched in stone atop the mantel of the United States Supreme Court building, "Equal Justice under Law."

Today, we will have an opportunity to hear more about what has been done to address these crimes and what can be done at the federal level to assist states that have the first line of offense in prosecuting these criminal cases. I will now turn to the Ranking Member, Mr. Conyers, for an opening statement. The opening statement of any other Member will, without objection, be inserted in the record. Mr. Conyers.

Mr. CONYERS. Thank you, Chairman Hyde. I want to, first of all, commend you for bringing these hearings to an early hearing because it gives us hope that this legislative process would allow us to pass a bill before the end of this Congress, and also I think our compliments are in order for the amazing number of experts, victims, legal professors and others that are here including, of course, Eric Holder.

We just left, Chairman Hyde and I, just left the United States Senate Judiciary Committee, where we had hearings on the confirmation of a former staff member, Robert Raben, to be the assistant attorney general for legislative affairs, and amazingly enough, the hate violence hearings came up, and we were pleased to learn that Senator Hatch, the chairman of Judiciary, would have been here, but he has sent through the chairman a statement of his own about this subject. This leads my hopes of a settlement of this legislation and passage to be much higher.

I also want to single out from Michigan, Jeffrey Montgomery, the executive director of Triangle, who, while he may not be—of the Triangle Foundation, while he may not be a witness, is from an organization with whom I have worked closely across the years in trying to deal with hate crimes based on sexual orientation.

Now we had a press conference earlier in room 2237 and I almost wish that that could be incorporated into the hearings today because it was really great. The people that I heard were very brief and right on the mark, and it moved quite well, but I did want to point out, although I arrived there late, that there was one witness who has written a book on this subject that I was happy to hear—Professor of Law Frederick Lawrence of Boston University School of Law, who made several points that I want to introduce into this hearing. I hope that he will remake them in his own way.

One—that hate crimes is a murder of the spirit—and in that way they are really distinguishable from other kinds of violent offenses, and what we are doing here today is extending in my view a long tradition of the civil rights organizations, particularly the NAACP. The whole notion that hate crimes should be federalized because they go against the national grain, that they are too important to be left just to local prosecution, although it is our intention that local prosecution be the primary conduit for these crimes but we want to have a backup, and that is what this measure is all about.

I remember when Roy Wilkins, the executive director of the NAACP, used to lobby Lyndon Johnson, who was then a Congressman, about hate crimes legislation. It was called then “The Federal Anti-Lynch Law” and when you drag someone with a truck down a road, that is a lynching, and it takes many modern forms.

Another amazing consideration that should be taken into consideration today at these hearings is the fact that hate crimes appear to be on the increase, and this is stunning in view of the progress that has been commented on.

We have come a long way but we are beginning to find that underneath our American fabric there are violent tendencies and violent organizations re-emerging to take their toll on the human spirit and the democratic ideal that we hold so valuable.

We dealt with church burnings, which is another form of a hate crime. This committee expeditiously passed legislation in that regard, and we now here are brought back again.

I am looking, in the work that I do on the committee, for connections and deeper understanding about what motivates people and organizations even in this day and age of relative prosperity and good feelings to have this counter-wave of violence and hatred re-emerging. I look for any guidance or suggestions from the witnesses, and I hope that we realize that we already have hate crimes legislation on the books, but what we are really doing is extending it so that there are no jurisdictional hangups and that we include, of course, disabled people, people whose sexual orientation might be the cause of such hatred, and it seems to me that that fills out the fullness of what we are doing here today in the Committee on the Judiciary in hearings on hate crimes violence.

I commend all of the members. We have over 180 co-sponsors. The Senate is moving on this. It is a bipartisan undertaking and I am very, very pleased that we are all gathered here this morning for further consideration of this matter. Thank you very much, Mr. Chairman.

Mr. HYDE. Thank you, Mr. Conyers. Without objection, the opening statements of any other members will be received into the record.

[The prepared statement of Mr. Conyers follows:]

PREPARED STATEMENT OF HON. JOHN CONYERS, JR., A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF MICHIGAN

At one time lynchings were commonplace in our nation. Nearly 4,000 African-Americans were tortured and killed between 1880 and 1930. Today, with shocking regularity, our fellow citizens are being tortured and killed not only because of their race, but also because of their religion, their disability, their gender, and their sexual orientation. It is long past time that Congress passed a comprehensive law banning such contemptible acts.

Since the March introduction of the Hate Crimes Prevention Act of 1999 (H.R. 1082), the list incidents and victims continues to grow:

- An August attack on a Jewish Community Center daycare facility and murder of Asian-American postal worker.
- An Independence Day weekend shooting spree by an avowed white supremacist in Illinois and Indiana left two dead and nine others wounded. All the shooting victims, and those shot at but not injured, were members of racial or religious minorities. The gunman used weapons purchased in the underground market a day after failing a mandatory background check with a licensed firearms dealer.
- In Sacramento, California, three synagogues were set ablaze and leafleted with anti-Semitic fliers during the night of June 18. Investigators believe that the arson was committed by several people. The fire at Temple B'nai Israel destroyed a library full of thousands of historic books and documents.
- A gay couple in northern California was shot to death on July 1. The suspects in the shooting have been linked to the three Sacramento synagogue arsons.
- In Bloomvale, South Carolina, two white men were arrested and charged with assault and battery with intent to kill for the May 27 grabbing and dragging a black man more than quarter mile in a stolen truck.
- In Kenosha, Wisconsin, a white man was charged with attempted murder on May 26 for driving his car onto a sidewalk to hit two black teenagers riding their bicycles. Both were injured, with one requiring extended hospitalization.

This is an issue that cuts across partisan lines, and I am glad to be joined by so many of my colleagues on both sides of the aisle and both sides of the Capitol in supporting this legislation.

These atrocities, like the wave a church burnings across the South, illustrate the need for continued vigilance and the passage of the Hate Crimes Prevention Act of 1999. This legislation will make it easier for federal authorities to prosecute racial, religious, ethnic and gender-based violence, in the same way that the Church Arson Prevention Act of 1996 helped federal prosecutors combat church arson: by loosening the unduly rigid jurisdictional requirements under federal law.

Current law only covers situations where the victim is engaging in certain specified federally protected activities, such as voting. The legislation will also help plug loopholes in state criminal law, as ten states have no hate crimes laws on the books, and another 21 states fail to specify sexual orientation as a category for protection.

Under this legislation, the states will continue to take the lead in the prosecution of hate crimes. However, the Justice Department will provide the back-up and resources necessary to ensure that hate crimes will not go unpunished.

In the years 1991 through 1997 there were more than 50,000 hate crimes reported. From 1990 through 1998, there were only 42 federal hate crimes prosecutions nationwide under the original hate crimes statute. Our bill will result only in a modest increase in the number of federal prosecutions of hate crimes. The Attorney General or other high ranking Justice Department officials must approve all prosecutions under this law, ensuring federal restraint, and further ensuring that states will continue to take the lead.

These continuing outrages give us further notice that our work in addressing hate crimes is not complete. It is a federal crime to hijack an automobile or to possess cocaine, and it ought to be a federal crime to drag a man to death because of his race or to hang a person because of his or her sexual orientation. These are crimes that shock and shame our national conscience and they should be subject to federal law enforcement assistance and prosecution.

Mr. HYDE. Our first panel consists of one witness, United States Department of Justice Deputy Attorney General Eric Holder.

Mr. Holder is a graduate of Columbia College and Columbia University Law School. He joined the Department of Justice as part of the Attorney General's Honors Program and was assigned to the newly-formed Public Integrity Section in 1976. In 1988 Mr. Holder was nominated by the President to become an associate judge on the Superior Court of the District of Columbia, and in 1993 Mr. Holder was named the United States attorney for the District of Columbia and he served in this position until his appointment as Deputy Attorney General of the Department of Justice.

In this position, Deputy Attorney General, Holder is responsible for the supervision of the day-to-day operation of the U.S. Department of Justice.

The committee thanks you and all of the witnesses in advance for their testimony and I would like to—did I say 1933? [Laughter.]

Mr. HOLDER. I am getting on in years, but not quite that bad yet, Mr. Chairman.

Mr. HYDE. You age very gracefully. [Laughter.]

Mr. HYDE. In—I remember 1933. In 1993 Mr. Holder was named U.S. attorney for the District of Columbia.

I would like to respectfully suggest that if you could limit your oral testimony to 5 minutes so we can get to all of the witnesses, and your statement will be received into the record. Mr. Holder.

STATEMENT OF ERIC H. HOLDER, DEPUTY ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC

Mr. HOLDER. Thank you very much, Mr. Chairman, Mr. Conyers, members of the committee. I thank you for the opportunity to testify today on the important and troubling issues of hate crimes. The administration very much appreciates your decision to hold this hearing. President Clinton and the Attorney General have remained deeply committed to preventing and prosecuting hate crimes since the 1997 White House Conference on Hate Crimes, and we continue to dedicate significant time and resources to this very important issue.

The battle against hate crimes has always been bipartisan and this committee has always been at the forefront of that battle. In 1990 and 1994 the committee strongly supported the enactment of the Hate Crimes Statistics Act and the Hate Crimes Sentencing Enhancement Act. In 1996, the committee responded in a time of great national need by quickly endorsing the Church Arson Prevention Act, and I hope that you will respond once again to the call for a stronger Federal stand against hate crimes, and that you will join law enforcement officials and community leaders across the country in support of H.R. 1082, the Hate Crimes Prevention Act of 1999.

Now, unfortunately, recent events have only reinforced the need for Federal hate crimes legislation. We are all horrified at the brutal murders of Billy Jack Gaither in Alabama, Matthew Shepard in Wyoming and James Byrd in Jasper, Texas, but just in the weeks since I testified on these issues before the Senate Judiciary Committee in May, a young man linked to a white supremacist organization shot several people in Illinois and in Indiana, including a group of Jewish men walking home from Sabbath services in Chicago. Two others died from their injuries—Won-Joon Yoon, a student at Indiana University from South Korea, and Ricky Byrdsong, an African American male who was only walking with his daughters near his home in Skokie, Illinois. In California, three synagogues in Sacramento erupted in flames on the same morning, and Winfield Scott Mowder and Gary Matson, a gay couple, were brutally murdered in their Redding home.

These crimes and others around the country are not just a law enforcement problem. They are a problem for our schools, our religious institutions, our civic organizations, and also for our national

leaders. When we pool our expertise, experiences and resources together, we can help build communities that are safer, stronger and more tolerant.

First, we must gain a better understanding of the problem. In 1997, the last year for which we have complete statistics, 11,211 law enforcement agencies participated in the data collection program and reported just over 8,000 hate crime incidents. Eight thousand hate crime incidents are about one hate crime incident per hour. But we know that even this disturbing number significantly underestimates the true level of hate crimes. Many victims do not report these crimes, and police departments do not always recognize, appropriately categorize or adequately report hate crimes.

Second, we must learn to teach tolerance in our communities so that we can prevent hate crimes by addressing bias before it manifests itself in violent criminal activity. We must foster understanding and should instill in our children the respect for each other's differences and the ability to resolve conflicts without violence. The Department of Education, with the National Association of Attorneys General, recently published a guide to confronting and stopping hate and bias in our schools, and I am also pleased that the Department is assisting a new partnership in its efforts to develop a program for middle school students on tolerance and diversity.

Third, we must work together to effectively prevent and prosecute hate crimes. The centerpiece of the administration's Hate Crimes Initiative is the formation of local working groups in United States attorneys, districts around the country. These task forces are hard at work bringing together the FBI, the U.S. attorney's office, the community relations service, local law enforcement, community leaders and educators to assess the problem in their area and to coordinate our response to hate crimes. These cooperative efforts are reinforced by the July 1998 Memorandum of Understanding between the National District Attorneys' Association and the Department of Justice. Where the Federal Government does have jurisdiction, the MOU calls for early communication among local, State and Federal prosecutors to devise investigative strategies.

Finally, we should never forget that law enforcement has an indispensable role to play in eradicating hate crimes. We must ensure that potential hate crimes are investigated thoroughly, prosecuted swiftly and punished soundly. In order to do this effectively, we must address the gaps that exist in the current Federal law.

The principal Federal hate crimes statute, 18 USC §245, prohibits certain hate crimes committed on the basis of race, color, religion, or national origin. This law has two serious deficiencies. First, even in the most blatant cases of racial, ethnic or religious violence, no Federal jurisdiction exists unless the violence was committed because the victim engaged in one of six federally protected activities. This unnecessary extra intent requirement has led to acquittals in several cases. It has also limited our ability to work with State and local officials to investigate and prosecute many incidents of brutal hate-motivated violence. Any Federal legislative response to hate crimes must close this gap. H.R. 1082 would amend §245 so that in cases involving racial, religious or ethnic violence the Federal Government would have jurisdiction to inves-

tigate and prosecute cases involving the intentional infliction of bodily injury *without* regard to the victim's participation in one of the six enumerated, federally protected activities.

As I said, this is an essential fix. In my written testimony I highlight several cases that we have lost because of the federally protected activity burden. We can offer much to these localities, but, in most circumstances, only if we have jurisdiction in the first instance. The level of collaboration achieved between Federal and local officials in Jasper with regard to the James Byrd case was possible only because we had a colorable—a colorable claim of Federal jurisdiction in that matter. The State-Federal partnership in this case led to the prompt indictment of three men on State capital charges.

The second jurisdictional limitation on §245 is that it provides no coverage whatsoever for violent hate crimes committed because of bias based on the victim's sexual orientation, gender or disability.

These crimes pose a serious problem for our Nation. Full Federal response to hate crimes must provide protection for these groups, and H.R. 1082 would do just that. The bill would prohibit the intentional infliction of bodily injury based on the victim's sexual orientation, gender or disability, whenever the incident involved or affected interstate commerce.

We know that a significant number of hate crimes based on the sexual orientation of the victim are committed every year in this country. Despite this fact, 18 USC §245 does not provide coverage for these victims unless there is an independent basis for Federal jurisdiction. We also know that a significant number of women are exposed to brutality and even death because of their gender. Indeed, Congress with the enactment of the Violence Against Women Act in 1994 has recognized that some violent assaults committed against women are bias crimes rather than mere random attacks. And we also know that because of their concern about the problem of disability-related hate crimes, Congress amended the Hate Crimes Statistics Act in 1994 to require the FBI to collect information about such hate-based incidents from State and local law enforcement agencies. Similarly, the Federal Sentencing Guidelines include an upward adjustment for crimes where the victim was selected because of his or her sexual orientation, gender, or disability.

H.R. 1082 is consistent with recent court decisions on Congress' legislative power under section 5 of the 14th amendment and is mindful of commerce clause limitations. Congress has the constitutional authority to regulate violent acts motivated by racial or ethnic bias.

The bill is also mindful of the traditional role that States have played in prosecuting crime. Indeed, State and local officials investigate and prosecute the vast majority of the hate crimes that occur in their communities and would continue to do so if this bill was enacted. But we need to make sure that Federal jurisdiction covers everything that it should so that in those rare instances where States cannot or will not take action, the Federal Government can step in to assure that justice is done. It is by working in collaboration that State and Federal law enforcement officials stand the best chance of bringing the perpetrators of hate crimes swiftly to justice.

The Hate Crimes Prevention Act will bring together State, local and Federal teams to investigate and prosecute incidents of hate crime wherever they occur. The enactment of H.R. 1082 is a reasonable, measured and necessary response to the wave of hate-based incidents taking place around our country because of biases built on the race, color, national origin, religion, sexual orientation, gender or disability of the victim.

I look forward to answering any questions that any member of the committee might have.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Holder follows:]

PREPARED STATEMENT OF ERIC H. HOLDER, DEPUTY ATTORNEY GENERAL, U.S.
DEPARTMENT OF JUSTICE, WASHINGTON, DC

Mr. Chairman, Members of the Committee, thank you for the opportunity to testify today on the important and troubling issue of hate crimes. The Administration very much appreciates your decision to hold this hearing. President Clinton and the Attorney General have remained deeply committed to prosecuting and preventing hate crimes since the 1997 White House Conference on Hate Crimes. We continue to dedicate significant time and resources to this issue. The battle against hate crimes has always been bipartisan, and this Committee has always been at the forefront of that battle. Members of this Committee have long recognized that hate crimes have no place in a civilized society, whether based on the race, religion, ethnicity, sexual orientation, gender, or disability of the victims. In 1990 and 1994, the Committee strongly supported the enactment of the Hate Crimes Statistics Act and the Hate Crimes Sentencing Enhancement Act. In 1996, the Committee responded in a time of great national need by quickly endorsing the Church Arson Prevention Act. I am hopeful that you will respond once again to the call for a stronger federal stand against hate crimes, and that you will join law enforcement officials and community leaders from across the country in support of H.R. 1082, the Hate Crimes Prevention Act of 1999. The bill enjoys bipartisan support in both the House and the Senate. If enacted, this legislation will continue the tradition of forceful Congressional action to eradicate hate crimes.

Unfortunately, recent events have only reemphasized the devastation that hate crimes can bring to a community. This past February, in Sylacauga, Alabama, the body of 39-year-old Billy Jack Gaither was found bludgeoned with an ax handle and charred on a pile of burned tires; killed, as one paper described it, "for being himself." Last October, in Laramie, Wyoming, Matthew Shepard, an openly gay young man, was found badly beaten and tied to a fence. He died five days later from 18 blows to the head. The state charged two men with the murder; one defendant has pled guilty to the murder, and the second awaits trial on first-degree murder charges. And last June, the nation was horrified by the dragging death of James Byrd, Jr., an African-American man.

Just in the weeks since I testified on these issues before the Senate Judiciary Committee in May, a young man linked to a white supremacist organization allegedly shot several people in Illinois and Indiana. They included a group of Jewish men walking home from Sabbath services in Chicago. Two others died from their injuries: Won-Joon Yoon, a young man who came to Indiana University from South Korea for graduate school, and who was shot as he stood outside of a Korean United Methodist Church; and Ricky Byrdson, an African American male, who was walking with his daughters near his home in Skokie, Illinois. In California, three synagogues in Sacramento erupted in flames on the same morning, and Winfield Scott Mowder and Gary Matson, a gay couple, were brutally murdered in their Redding home. We, as a nation, are stunned and horrified at the hatred and brutality of these crimes.

Preventing hate crimes and eliminating bigotry and bitterness are among our most important challenges. There is never an excuse for violence against an innocent person. But these attacks, committed because the victims look different, practice a different faith, or have a different sexual orientation, threaten America's most cherished ideals. They represent an attack not just on the individual victim, but on the victim's community. And their impact is broader because they send a message of hate. They are intended to create fear and dissension.

These incidents and other hate crimes like them are not just a law enforcement problem. They are a problem for the entire community: for our schools, for our reli-

gious institutions, for our civic organizations and for each one of us as an individual. And when we come together to respond to these crimes, we help build communities that are safer, stronger and more tolerant. All of us working together—at the federal, state, local, and community levels—must redouble our efforts to rid our society of hate crimes.

I. THE PROBLEM & CURRENT EFFORTS

A. Inadequate Reporting

First, we must gain a better understanding of the problem. The data we have now are inadequate. As a result of the Hate Crimes Statistics Act, enacted in 1990, the FBI began collecting information from law enforcement agencies around the country. In 1991, the first year that the FBI reported its findings, 2,700 law enforcement agencies reported 4,560 hate crimes. In 1997, the last year for which we have statistics, 11,211 law enforcement agencies participated in the data collection program and reported 8,049 hate crime incidents.

8,049 hate crime incidents represent almost one hate crime incident per hour. But we know that even this disturbing number significantly underestimates the true level of hate crimes. Many victims do not report these crimes. Police departments do not always recognize hate crimes. Many don't collect any hate crime data. And about 80 percent of those that do, even some in large metropolitan areas, report few or no hate crimes in their jurisdictions, even when most observers conclude a larger problem exists.

B. Training

There are many ways to improve our data collection. First and foremost, increased hate crime training for law enforcement officials is essential. Police officers must know how to identify the signs of a hate crime. What might appear to some as a crime like so many others, can turn out, upon investigation, to be motivated by bias.

Some of you may know that, about a year and a half ago, President Clinton launched, at a first-ever White House Conference on Hate Crimes, a multi-faceted Hate Crimes Initiative. The Department of Justice is a integral part of this effort, which includes improving data collection and enhancing law enforcement training. To meet these goals, we recently commissioned a study by Northeastern University to survey some 2,500 law enforcement agencies in order to better understand and improve police reporting practices; and we brought together state police academies, police chiefs, state attorneys general and others around the country to develop uniform curricula for hate crime training. As a result of these efforts, the Department now has available three law enforcement training curricula on hate crimes—for patrol officers, investigators, and a mixed audience. Since December 1998, more than 500 law enforcement officers have been trained with Department of Justice curricula. We also work with communities in their own training and outreach efforts.

C. Prosecutions: Current Law

Identification and reporting are, of course, not a complete answer. We must also ensure that potential hate crimes are investigated thoroughly, prosecuted swiftly and punished soundly. Our long term goal must be to prevent hate crimes by addressing bias before it manifests itself in violent criminal activity. In the meantime, however, it is imperative that we have the law enforcement tools necessary to ensure that, when hate crimes do occur, the perpetrators are identified and swiftly brought to justice.

We know that we are most effective when we work together. The centerpiece of the Administration's Hate Crime Initiative is the formation of local working groups in United States Attorneys' districts around the country. These task forces are hard at work bringing together the FBI, the U.S. Attorney's office, the Community Relations Service, local law enforcement, community leaders and educators to coordinate our response to hate crimes. The groups are assessing the hate crime problem in their local areas and developing specific strategies to respond to the problem. While local law enforcement has the primary role in responding to and pursuing these crimes, federal law enforcement can provide additional resources and can assist with training. And by involving community organizations in these working groups, we are enhancing our ability to prosecute these crimes. Quite simply we are more effective when we enjoy the trust and support of the community. Community support makes it easier to uncover information, enlist witnesses to testify, and solve cases.

The principal federal hate crimes statute, 18 U.S.C. §245, prohibits certain hate crimes committed on the basis of race, color, religion, or national origin. It prohibits the use of force, or threat of force, to injure, intimidate, or interfere with (or to attempt to injure, intimidate, or interfere with) "any person *because of* his race, color,

religion or national origin," and because of his participation in any of six "federally protected activities" specifically enumerated in the statute. The six enumerated "federally protected activities," written into the law 30 years ago when Congress first enacted the statute, are: (A) enrolling in or attending a public school or public college; (B) participating in or enjoying a service, program, facility or activity provided or administered by any state or local government; (C) applying for or enjoying employment; (D) serving in a state court as a grand or petit juror; (E) traveling in or using a facility of interstate commerce; and (F) enjoying the goods or services of certain places of public accommodation.

State and local officials are on the front lines and do an enormous job in investigating and prosecuting hate crimes that occur in their communities. In fact, most hate crimes are investigated and prosecuted at the state level. But we want to make sure that federal jurisdiction to prosecute hate crimes covers everything that it should. Concurrent federal jurisdiction is needed to authorize the federal government to share its law enforcement resources, forensic expertise, and civil rights experience with state and local officials. And in rare circumstances—where state or local officials are unable or unwilling to bring appropriate criminal charges in state court, or where federal law or procedure is significantly better suited to the vindication of the federal interest—the United States must be able to bring federal civil rights charges. In these special cases, the public is served when, after consultation with state and local authorities, prosecutors have a federal alternative as an option.

D. Federalism

The most important benefit of concurrent state and federal criminal jurisdiction is the ability of state and federal law enforcement officials to work together as partners in the investigation and prosecution of serious crimes. When federal jurisdiction does exist in the limited hate crimes contexts authorized by 18 U.S.C. §245, the federal government's resources, forensic expertise, and experience in the identification and proof of hate-based motivations often provide an invaluable investigative complement to the familiarity of local investigators with the local community and its people. It is by working together cooperatively that state and federal law enforcement officials stand the best chance of bringing the perpetrators of hate crimes swiftly to justice.

Such cooperative efforts have recently been reinforced by the July, 1998, Memorandum of Understanding (MOU) between the National District Attorneys Association and the Department of Justice. This MOU was signed by the Attorney General and William Murphy, President of the NDAA, on behalf of district attorneys offices. The MOU is intended to foster a more cooperative approach by local, state and federal authorities in the investigation and prosecution of color of law and hate crimes cases. It requires early communication among local, state and federal prosecutors to explore the most effective way to investigate these cases and to utilize the best investigative resources or combination of resources available. There are many benefits to such an approach: it encourages the use of coordinated or joint local, state and federal investigations in those instances where coordinated or joint investigation is in the best interest of justice; it decreases time delay between local, state and federal authorities about these important cases; and it increases public confidence in the criminal justice system. It is this type of cooperative effort, endorsed by the Department of Justice and the National District Attorneys Association, that maximizes all of our law enforcement capabilities in these important cases.

It is useful in this regard to consider the work of the National Church Arson Task Force, which operates pursuant to jurisdiction granted by 18 U.S.C. §247 and other federal criminal statutes that have no limitations analogous to the "federally protected activity" requirement of 18 U.S.C. §245. Created almost three years ago to address a rash of church fires across the country, the Task Force's federal prosecutors and investigators from ATF and the FBI have collaborated with state and local officials in the investigation of each and every church arson that has occurred since January 1, 1995.

The foundation for this coordinated effort was laid when Congress, led in large part by this Committee, passed the Church Arson Prevention Act of 1996. Before the enactment of the Church Arson Prevention Act of 1996, section 247 prohibited the intentional defacement, damage, or destruction of any religious real property because of the religious character of the property if, in committing the offense, the defendant either traveled in interstate or foreign commerce or used a facility or instrumentality of interstate or foreign commerce in interstate or foreign commerce. Confronted with a rash of arsons at houses of worship in early 1996, the Department and the Congress concluded that section 247 had proven totally ineffective because of these restrictive interstate commerce requirements. Even jurisdiction over crimes where the defendant crossed state lines didn't cover very many of these arsons. In

fact, between its enactment and the 1996 amendments, only one case was brought under section 247.

Recognizing this problem, Congress enacted the Church Arson Prevention Act of 1996, which amended section 247 to eliminate the interstate commerce element entirely for racially motivated arsons and to cover other offenses that are "in or affect interstate commerce." Thus it is no longer necessary to establish as a jurisdictional prerequisite that the defendant moved in interstate commerce or used a facility in interstate commerce. The "affects" standard is more in line with existing criminal statutes outlawing, for example, the possession of certain weapons, e.g. 18 U.S.C. 922(g), 924, or the use of fire or explosive devices, e.g. 18 U.S.C. 844(i).

These amendments and the expanded Federal jurisdiction have contributed to the success of the Church Arson Task Force, which has worked with State and local investigators and prosecutors to investigate 785 fires that occurred after January 1995, with 340 total defendants arrested. The vast majority of these cases have been prosecuted in State courts under State law.

The results of these state-federal partnerships have been extraordinary. Thirty-four percent of the joint state-federal church arson investigations conducted during the life of the Task Force have resulted in arrests of one or more suspects on state or federal charges. The Task Force's 34% arrest rate is more than double the normal 16% rate of arrest in all arson cases nationwide, most of which are investigated by local officials without federal assistance. More than 80% of the suspects arrested in joint state-federal church arson investigations during the life of the Task Force have been prosecuted in state court under state law.

Because the Department of Justice has not maintained statistics regarding the outcomes of the joint state-federal hate crimes investigations in which it has participated, we are unable to provide similarly stark statistical information regarding arrest rates in hate crimes cases. Nevertheless, we are confident that additional state-federal partnerships would result in an increase in the number of hate crimes solved by arrests and successful prosecutions analogous to that achieved through joint state-federal investigations in the church arson context. We certainly know, from example, that these joint efforts have been extremely successfully.

We have a particularly effective example of these partnerships in South Carolina, where a team of agents from federal, state, and local law enforcement agencies worked hand-in-hand to bring to justice a group of Ku Klux Klansmen responsible for wave of crimes across the north-eastern part of that state. Representatives from the Justice Department and several state district attorneys offices met to chart the course the investigation would take. These meetings were not without issues of turf, but eventually the agents worked together to compare the relative strength of the statutes involved, the available resources, and the potential terms of imprisonment for state vs. federal prosecutions. In the end, they decided it made sense to use both sources of jurisdiction. So they formed a joint federal-state task force.

Both the federal and state governments devoted agents, prosecutors, and supporting resources to the joint investigative team, which used the nationwide subpoena power of a federal grand jury sitting in Charleston, South Carolina. Federal agents from the FBI and ATF rode together as partners with agents of the South Carolina State Law Enforcement Division (SLED) and the fire departments from the counties affected. Their investigation led to five Klansmen being charged with two church arsons, the assault with intent to kill a black mentally retarded man, arsons of several migrant camps, and various firearms offenses. To date, these are the only convictions of members of an organized white supremacist group arising out of the rash of church fires. Those five Ku Klux Klansmen stand convicted on both state and federal offenses and have been sentenced to serve real time prison terms of between 15 and 21½ years.

Another example can be found in the National Church Arson Task Force, where a defendant has been indicted for 12 fires in Indiana and Georgia, and for conspiring in 17 additional fires in six other states—California, Kentucky, Missouri, Ohio, South Carolina, and Tennessee. This is the largest number of fires charged to any one defendant during the life of the Task Force. One of the Georgia fires resulted in the death of a volunteer firefighter, and injuries to three others. It was a local officer in Indiana involved with that district's church arson task force that first recognized the name of the defendant when he heard a report on an ambulance pickup for severe burns. He questioned the suspect at the hospital and called federal officials. The hard work of investigators from the FBI, the ATF, and the local arson and law enforcement offices led to charges in other fires in Indiana, and ultimately to charges in Georgia and the conspiracy covering the other states. The investigation continues, supported by federal investigators and prosecutors.

II. GAPS IN CURRENT LAW

The current federal hate crimes law has two serious deficits. First, even in the most blatant cases of racial, ethnic, or religious violence, no federal jurisdiction exists unless the federally protected activity requirement is satisfied. This unnecessary, extra intent requirement has led to acquittals in several of the cases in which the Department of Justice has determined a need to assert federal jurisdiction and has limited the ability of federal law enforcement officials to work with state and local officials in the investigation and prosecution of many incidents of brutal, hate-motivated violence. Second, §245 provides no coverage whatsoever for violent hate crimes committed because of bias based on the victim's sexual orientation, gender, or disability. Together, these limitations have prevented the federal government from working with state and local law enforcement agencies in the investigation and prosecution of many of the most heinous hate crimes.¹

H.R. 1082, the Hate Crimes Prevention Act of 1999, would amend 18 U.S.C. §245 to address each of these jurisdictional limitations. In cases involving racial, religious, or ethnic violence, the bill would prohibit the intentional infliction of bodily injury without regard to the victim's participation in one of the six specifically enumerated "federally protected activities." In cases involving violent hate crimes based on the victim's sexual orientation, gender, or disability, the bill would prohibit the intentional infliction of bodily injury whenever the incident involved or affected interstate commerce. These amendments to 18 U.S.C. §245 would permit the federal government to work in partnership with state and local officials in the investigation and prosecution of cases that implicate the significant federal interest in eradicating hate-based violence.

The Hate Crimes Prevention Act is a good fix. In May, President Clinton joined with a bipartisan group of legislators to urge its swift passage. I am pleased to join him in offering my strong support of this bill.

It must be emphasized that, even with enactment of the bill, state and local law enforcement agencies would continue to play the principal role in the investigation and prosecution of all types of hate crimes. From 1993 through 1998, the Department of Justice brought a total of only 32 federal hate crimes prosecutions under 18 U.S.C. §245—an average of fewer than six per year. We expect that the enactment of H.R. 1082 would result in a modest increase in this number but would significantly help in our ability to assist local and state prosecutions. Our partnership with state and local law enforcement would continue, with state and local prosecutors continuing to take the lead in the great majority of cases.

A. The Federally Protected Activity Requirement

In several cases in recent years, the Department of Justice has sought to satisfy the federally protected activity requirement by alleging that hate crimes occurred on public streets or sidewalks—i.e., while the victims were using "facilities" provided or administered by a State or local government.² The Department has used this theory successfully to prosecute the stabbing death of Yankel Rosenbaum in Brooklyn (Crown Heights), New York and the racially-motivated shooting of three African-American men on the streets of Lubbock, Texas.³ Although the "streets and sidewalks" theory has enabled the Department to reach some bias crimes that occur in public places, these prosecutions remain subject to challenge. In the Lubbock case, for example, the defendants appealed their convictions, arguing that public streets and sidewalks are not "facilities" that are "provided or administered" by a state subdivision within the meaning of 18 U.S.C. §245(b)(2)(B). The United States Court of Appeals for the Fifth Circuit upheld the Lubbock convictions in a short, unpublished opinion. But an appeal on similar grounds in the Crown Heights case is now pending before the Second Circuit.

¹ Roughly two-thirds of the hate crimes prosecuted under federal law are pursued as criminal violations of the Fair Housing Act, which protects the rights of all persons to live wherever they choose free from violence because of their race, religion, national origin, family status, gender, or handicap. While this statute broadly protects interference with the housing process, it is limited to residential property and thus has significant limitations.

² See 18 U.S.C. §245(b)(2)(B).

³ The Department of Justice brought federal civil rights charges against two defendants in the Crown Heights case after the state failed to charge one of the defendants in state court and the state's case against the second defendant ended in acquittal. The Department brought federal charges against three defendants in the Lubbock case when federal and local prosecutors, who had collaborated throughout the investigation, agreed that the procedures and sentences available in federal court were significantly better suited to the interests of law enforcement, of the victims of the crime, and of the entire affected community than were those available in state court.

In some cases, this jurisdictional problem has undermined the vindication of the federal interest in fighting hate-based violence. Let me briefly tell you about three cases where the Department of Justice brought federal hate crimes prosecutions under 18 U.S.C. §245 after state and local prosecutors were unsuccessful at or declined to bring prosecutions under state law. In each case, the Department lost at trial due to the statute's "federally protected activity" requirement:

- In 1994, a federal jury in Fort Worth, Texas acquitted three white supremacists of federal criminal civil rights charges arising from unprovoked assaults upon African-Americans, including one incident in which the defendants knocked a man unconscious as he stood near a bus stop. Some of the jurors revealed after the trial that although the assaults were clearly motivated by racial animus, there was no apparent intent to deprive the victims of the right to participate in any "federally protected activity." The government's proof that the defendants went out looking for African-Americans to assault was insufficient to satisfy the requirements of 18 U.S.C. §245.
- In 1982, two white men chased a man of Asian descent from a night club in Detroit and beat him to death. The Department of Justice prosecuted the two perpetrators under 18 U.S.C. §245, but both were acquitted despite substantial evidence to establish their animus based on the victim's national origin. Although the Department has no direct evidence of the basis for the jurors' decision, it appears that the government's need to prove the defendants' intent to interfere with the victim's exercise of a federally protected right—the use of a place of public accommodation—was the weak link in the prosecution.
- In 1980, a notorious serial murderer and white supremacist shot and wounded an African-American civil rights leader as the civil rights leader walked from a car toward his room in a motel in Ft. Wayne, Indiana. The Department of Justice prosecuted the shooter under 18 U.S.C. §245, alleging that he committed the shooting because of the victim's race and because of the victim's participation in a federally protected activity, i.e. the use of a place of public accommodation. The jury found the defendant not guilty. Several jurors later advised the press that although they were persuaded that the defendant committed the shooting because of the victim's race, they did not believe that he also did so because of the victim's use of the motel.

Each of these cases involved a heinous act of violence clearly motivated by the race, color, religion, or national origin of the victim. In these cases, state prosecutors sought federal assistance due to inadequate state laws or prosecutions, or they did not bring state criminal charges at all. Yet in each case, the extra intent requirement of 18 U.S.C. §245—that a hate crime be committed because of the victim's participation in one of the federally protected activities specifically enumerated in the statute—prevented the Department of Justice from vindicating the federal interest in the punishment and deterrence of hate-based violence.

The murder of James Byrd is an important example in this regard. The collaboration between local, state and federal investigators was essential in that case; the FBI aided a relatively small jurisdiction in Texas with its forensic and laboratory expertise, while the U.S. Attorneys office assisted in the trial and death penalty phase regarding one of the defendants. We can offer much to these localities but, in most circumstances, only if we have jurisdiction in the first instance. The level of collaboration in Jasper was possible only because we had a colorable claim of federal jurisdiction in that matter.

The Department has also filed charges against defendants after determining that the state response was inadequate to vindicate the federal interest, or that the state could not respond as effectively as the federal government because of less severe state penalties differences in applicable procedure. For example:

- *U.S. v. Lee and Jarrard* (11/3/94) (S.D. Ga.), involved two defendants who were convicted at trial of conspiracy and housing interference, and related firearms offenses, stemming from a drive-by shooting into several homes of African-American residents. Although there were no injuries in the incident, one bullet struck the headboard of one victim's bed and the other hit the bedroom wall below which one of the victim's daughters was sleeping. The State did not prosecute Lee because of insufficient evidence. Jarrard pled guilty to a state charge, but received only 5 months jail time and 5 years probation. In federal court, both defendants were sentenced to 81 months imprisonment, to be followed by three years supervised release.
- In *U.S. v. Black and Clark* (12/12/91) (E.D. Calif.), two white supremacists were charged federally in the assault of a black man at a convenience store/gasoline station. The victim received multiple stab wounds and required hos-

pital treatment. The county sheriff did not have the resources to devote to an investigation, and ceded its investigatory authority to the FBI. The local prosecutors did not consider the matter a priority case. After indictment on federal charges, Clark pled guilty to violating Section 245 and was sentenced to serve seven years and 10 months in prison, to be followed by three years supervised release. Black was convicted at trial and sentenced to serve 10 years in prison. Under 18 U.S.C. Section 245, the federal government would have lacked jurisdiction to prosecute the defendants if the convenience store had not been considered a place of entertainment due to the presence of a pinball machine in the store.

- In *U.S. v. Bledsoe* (2/17/83) (W.D. Kan.), the defendant was convicted of clubbing to death a 26 year old Black jazz musician with a baseball bat in a Kansas City park. The victim, Steven Harvey, frequently visited the park late at night to practice his music. A local homicide prosecution of Bledsoe resulted in acquittal. Bledsoe was sentenced to life imprisonment on the federal charges. Under 18 U.S.C. Section 245, the federal government would have lacked jurisdiction to prosecute Bledsoe if he had been, for instance, across the street from the park at the time of the attack.
- In *U.S. v. Mungia, Mungia, and Martin* (N.D. Texas), the Department successfully brought federal charges against three defendants in a racially motivated shooting of three African-American men in Lubbock, Texas. Federal and local prosecutors, who worked closely together throughout the investigation, determined together that federal prosecution was preferable to state charges for two reasons. First, all three defendants could be tried jointly in federal court. Second, because of overcrowding in the state prisons, prosecutors were concerned that even if sentenced to life, the defendants would not serve their full terms. The defendants were sentenced to terms of life plus 50 years.
- In *U.S. v. Lane and Pierce* (D. Col. 11/17/87), the Department obtained convictions against two defendants following the fatal shooting of Mr. Alan Berg. The defendants were members of a neo-Nazi group, and evidence indicated that they hoped the shooting would spark a race war. Because most of the critical witnesses were in federal custody in several different states, local prosecutors agreed the case was best pursued in federal court. The defendants received sentences of 150 years.

B. Violent Hate Crimes Based on Sexual Orientation, Gender, or Disability

Under current law, section 245 provides no federal jurisdiction for violent attacks that occur because of sexual orientation, gender, or disability.

1. Sexual Orientation

From statistics gathered by the federal government and private organizations, we know that a significant number of hate crimes based on the sexual orientation of the victim are committed every year in this country. Data collected by the FBI pursuant to the Hate Crimes Statistics Act indicate that 1,102 bias incidents based on the sexual orientation of the victim were reported to local law enforcement agencies in 1997; that 1,256 such incidents were reported in 1996; 1,019 such incidents were reported in 1995; and that 677 and 806 such incidents were reported in 1994 and 1993, respectively. The National Coalition of Anti-Violence Programs (NCAVP), a private organization that tracks bias incidents based on sexual orientation, reported 2,445 such incidents in 1997; 2,529 in 1996; 2,395 in 1995; 2,064 in 1994; and 1,813 in 1993.

Even the higher statistics reported by NCAVP may significantly understate the number of hate crimes based on sexual orientation that actually are committed in this country. Many victims of anti-lesbian and anti-gay incidents do not report the crimes to local law enforcement officials because they fear that their sexual orientation may be made public or they fear that they would receive an insensitive or hostile response or that they would be physically abused or otherwise mistreated. According to the NCAVP survey, 45 percent of those who reported hate crimes to the police in 1997 labeled their treatment by police as "indifferent to hostile."

Despite the prevalence of violent hate crimes committed on the basis of sexual orientation, such crimes are not covered by 18 U.S.C. § 245 unless there is an independent basis for federal jurisdiction, such as race-based bias. Accordingly, the federal government is without authority to work in partnership with local law enforcement officials, or to bring federal prosecutions, when gay men or lesbians are the victims of murders or other violent assaults because of bias based on their sexual orientation.

2. Gender

Although acts of violence committed against women traditionally have been viewed as "personal attacks" rather than as hate crimes, many people have come to understand that a significant number of women "are exposed to terror, brutality, serious injury, and even death because of their gender."⁴ Indeed, Congress, through the enactment of the Violence Against Women Act (VAWA) in 1994, has recognized that some violent assaults committed against women are bias crimes rather than mere "random" attacks. The Senate Report on VAWA stated:

The Violence Against Women Act aims to consider gender-motivated bias crimes as seriously as other bias crimes. Whether the attack is motivated by racial bias, ethnic bias, or gender bias, the results are often the same. The victims are reduced to symbols of hatred; they are chosen not because of who they are as individuals but because of their class status. The violence not only wounds physically, it degrades and terrorizes, instilling fear and inhibiting the lives of all those similarly situated. "Placing this violence in the context of the civil rights laws recognizes it for what it is—a hate crime."

Senate Report (No. 103-138 91993) (quoting testimony of Prof. Burt Neuborne).

VAWA provides private parties a broad civil remedy for violence against women motivated by gender-based bias.⁵ However, VAWA's two criminal provisions regarding violence against women provide extremely limited coverage. Specifically, VAWA's prohibition on interstate domestic violence, 18 U.S.C. § 2261, is limited to violence against a defendant's "spouse or intimate partner" and requires that the defendant travel across a state line. VAWA's other criminal provision, 18 U.S.C. § 2262, prohibits the violation of a "protection order" if the defendant travels across state lines with the intent to engage in conduct that violates that order.

The structure of VAWA's criminal provisions gives rise to at least two important concerns. First, because of VAWA's victim-based limitation—the requirement that the victim be a "spouse or intimate partner"—VAWA does not give the Department of Justice adequate authority to address a significant number of violent gender-motivated crimes. Serial rapists, for example, fall outside the reach of VAWA's criminal provisions even if their crimes are clearly motivated by gender-based hate and even if they operate interstate. Second, because VAWA's criminal provisions contain no requirement that the violence be motivated by gender-based bias, a conviction under VAWA may not fully vindicate the interest in punishing gender-based crimes.

The federal government should have jurisdiction to work together with state and local law enforcement officials in the investigation of violent gender-based hate crimes. And, in rare circumstances, the federal government should have jurisdiction to bring federal prosecutions aimed at vindicating the strong federal interest in combating the most heinous gender-based crimes of violence.⁶

I want to emphasize that including gender in § 245 would not result in the federalization of all sexual assaults or acts of domestic violence. The language of the bill itself, together with the manner in which the Department of Justice would interpret that language, would strictly limit federal investigations and prosecutions of violent gender-based hate crimes, especially since federal prosecutors will have to prove not only that the perpetrator committed the act, but also that the perpetrator did so *because of* gender-based bias. We would rely on this authority only in cases where federal jurisdiction is needed to achieve justice in a particular case. Just as with other categories of hate crimes, state and local authorities would continue to prosecute virtually all gender-motivated hate crimes.

We would expect courts deciding gender-bias cases under an amended § 245 to consider the same types of evidence that they consider in analogous contexts in which motive must be proved. This evidence could include: (i) statements of motive the defendant made before, during, or after the offense that tend to indicate the defendant's motive; (ii) the absence of any evidence of an alternative motive; (iii) the defendant's use of epithets during the offense; (iv) other aspects of the offense itself, such as mutilation of the victim's genitals or other acts of extreme violence, that may indicate hatred based on gender; and (v) other related or similar bias-motivated conduct of the defendant. As indicated elsewhere, we expect that most gender based crimes would continue to be prosecuted by state and local prosecutors.

⁴ Statement of Helen R. Neuborne, Executive Director, NOW Legal Defense and Education Fund, *Women and Violence: Hearing Before the Senate Judiciary Committee*, 101st Congress, 2nd Sess. 62 (1990).

⁵ See 42 U.S.C. § 13981.

⁶ Although all 50 states have statutes prohibiting rape and other crimes typically committed against women, only 19 states and the District of Columbia have hate crimes statutes that include gender among the categories of prohibited bias motives.

3. Disability

Congress has shown a sustained commitment over the past decade to the protection of persons with disabilities from discrimination based on their disabilities. With Section 504 of the Rehabilitation Act of 1973, the 1988 amendments to the Fair Housing Act,⁷ and the Americans with Disabilities Act of 1990, Congress has extended civil rights protections to persons with disabilities in many traditional civil rights contexts.

Concerned about the problem of disability-based hate crimes, Congress also amended the Hate Crimes Statistics Act in 1994 to require the FBI to collect information about such hate-based incidents from state and local law enforcement agencies. The information we have available indicates that a significant number of hate crimes committed because of the victim's disability are not resolved satisfactorily at the state and local level. For example, in Denver in 1991, a paraplegic died from asphyxiation when a group of youths stuffed him upside down in a trash can. Calling the incident a "cruel prank," local police declined to investigate the matter as a bias-related crime.

The Department of Justice believes that the federal interest in working together with state and local officials in the investigation and prosecution of hate crimes based on disability is sufficiently strong to warrant amendment of 18 U.S.C. §245 to include such crimes when they result in bodily injury and when federal prosecution is consistent with the Commerce Clause.

C. Federalization and Jurisdiction

The Department of Justice has carefully reviewed H.R. 1082 and concluded that its enactment would neither result in a significant increase in federal hate crimes prosecutions nor impose an undue burden on federal law enforcement resources. The language of the bill itself, as well as the manner in which the Department would interpret that language, would ensure that the federal government would strictly limit its investigations and prosecutions of hate crimes—including those based on gender—to the cases where jurisdiction is needed to achieve justice in a particular case. The decision to use this authority would only be made after consultation with state and local officials.

The Department's efforts under the proposed amendments to 18 U.S.C. §245 would be guided by Department-wide policies that would impose additional limitations on the cases prosecuted by the federal government. First, under the "backstop policy" that applies to all of the Department's criminal civil rights investigations, the Department works with state and local officials and would generally defer prosecution in the first instance to state and local law enforcement. Only in highly sensitive cases in which the federal interest in prompt federal investigation and prosecution outweighs the usual justifications of the backstop policy would the federal government take a more active role. Under this policy, we are available to aid local and state investigations as they pursue prosecutions, as we did in the Jasper case. Under this policy, we are also in a position to ensure that, in the event a state can not or will not vindicate the federal interest, we can pursue prosecutions independently. Second, under the Department's formal policy on dual and successive prosecutions, the Department would not bring a federal prosecution following a state prosecution arising from the same incident unless the matter involved a "substantial federal interest" that the state prosecution had left "demonstrably unvindicated."

The express language of the bill also contains several important limiting principles. First, the bill requires proof that an offense was motivated by hatred based on race, color, national origin, religion, sexual orientation, gender, or disability; as it has in the past, this requirement would continue to limit the pool of potential federal cases to those in which the evidence of hate-based motivation is sufficient to distinguish them from ordinary state law cases. Second, the bill excludes misdemeanors and limits federal hate crimes based on sexual orientation, gender, or disability to those involving bodily injury (and a limited set of attempts to cause bodily injury); these limitations would narrow the set of newly federalized cases to truly serious offenses. Third, the bill's Commerce Clause element requires proof of a nexus to interstate commerce in cases involving conduct based on bias covered by any of the newly protected categories; this requirement would limit federal jurisdiction in these categories to cases that implicate interstate interests. Finally, 18 U.S.C. §245 already requires a written certification by the Attorney General, the Deputy Attorney General, the Associate Attorney General, or a specially designated Assistant Attorney General that "in his [or her] judgment a prosecution by the

⁷ Congress amended the Fair Housing Act in 1988 to grant the Attorney General authority to prosecute those who use force or threats of force to interfere with the right of a person with a disability to obtain housing.

United States is in the public interest and necessary to secure substantial justice" before any prosecution under the statute may be commenced.⁸ This statutory certification requirement, which would extend to all prosecutions authorized by H.R. 1082, would ensure that the Department's new areas of hate crimes jurisdiction would be asserted in a properly limited fashion.

Finally, the Hate Crimes Prevention Act is fully consistent with constitutional requirements regarding the scope of Congressional powers. Proposed subsection (c)(1), the provision which essentially eliminates the "federally protected activity" requirement, is authorized by the Thirteenth Amendment, which permits Congress to regulate violent hate crimes motivated by race, color, religion or national origin. Proposed subsection (c)(2), which would prohibit the intentional infliction of bodily injury (or an attempt to inflict bodily injury through the use of fire, a firearm, or an explosive device) on the basis of religion, gender, sexual orientation, or disability, requires proof of a Commerce Clause nexus as an element of the offense. Specifically, the government would have to prove "that (i) in connection with the offense, the defendant or the victim travels in interstate or foreign commerce, uses a facility or instrumentality of interstate or foreign commerce, or engages in activity affecting interstate or foreign commerce; or (ii) the offense is in or affects interstate or foreign commerce." The government would bear the burden at trial of proving the interstate commerce nexus beyond a reasonable doubt. We believe that the interstate commerce element contained in H.R. 1082 for hate crimes based on sexual orientation, gender, or disability would fully satisfy Congress' obligation to comply with the Commerce Clause. The interstate commerce nexus required by the bill is analogous to that required in many other federal criminal statutes, including the Church Arson Prevention Act, the Hobbs Act, and the Racketeer Influenced and Corrupt Organizations Act (RICO). Accordingly, the interstate commerce element would ensure that hate crimes prosecutions brought under the new statute would not be mired in constitutional litigation concerning the scope of Congress' power.

CONCLUSION

We must look at the root causes of hate crime. Intolerance often begins not with a violent act, but with a small indignity or bigoted remark. To move forward as one community, we must work against the stereotypes and prejudices that spawn these actions. We must foster understanding and respect in our homes and our neighborhoods, in our schools and on our college campuses.

We also realize that legislation, while an important part of the solution, will not solve this problem alone. We must look at the root causes of hate crime. Intolerance often begins not with a violent act, but with a small indignity or bigoted remark. To move forward as one community, we must work against the stereotypes and prejudices that spawn these actions.

Hate is learned. It can be unlearned. We must engage our schools in the crucial task of teaching our children moral values and social responsibility. Educators can play a vital role in preventing the development of the prejudice and stereotyping that leads to hate crime. I am pleased that the Department will be assisting a new partnership announced last month by the President in its efforts to develop a program for middle school students on tolerance and diversity. Also, over the past few years, through an interagency agreement, the Departments of Justice and Education helped publish the curriculum called "Healing the Hate, a National Bias Crime Prevention Curriculum for Middle Schools" and have conducted 3 regional training and technical assistance conferences throughout the nation. In addition to the regional training, we have provided Training and Technical Assistance to a dozen or more national juvenile prevention groups and organizations, including the National Council of Juvenile Court Judges and various local communities in which churches were burned.

Where does hatred start? Hatred starts oftentimes in someone who feels alone, confused and unloved. I look at a young perpetrator and I know that at so many points along the way, we could have intervened and helped him take a better path. We have to invest in our children. We have to help them grow in strength, in positive values, and in respect and love for others.

We also believe, however, that law enforcement has a significant role to play. The enactment of H.R. 1082 would significantly increase the ability of state and federal law enforcement agencies to work together to solve and prevent a wide range of violent hate crimes committed because of bias based on the race, color, national origin, religion, sexual orientation, gender, or disability of the victim. This bill is a thoughtful, measured response to a critical problem facing our Nation.

⁸ See 18 U.S.C. § 245(a)(1).

I look forward to answering any questions that you might have.

Mr. HYDE. Thank you very much, Mr. Holder. We are challenged by not having our light working, so we are sending our top-flight electrician up there now.

Mr. Nadler, do you have questions for Mr. Holder?

Let me suggest that we expect 10:30ish, more or less, a couple of votes, and I would like to let Mr. Holder go rather than hold him over, so if we could be expeditious.

Mr. NADLER. I will be expeditious.

Mr. Chairman, I have an opening statement which I will submit for the record. It was a lengthy opening statement, but I will submit it for the record and I won't read it.

Mr. HYDE. Thank you. That is what we would like you to do.

Mr. NADLER. And I also—who do I give this to—also, Mr. Chairman, I feel I must comment on one comment that the chairman made in his opening statement, and I quote, because I strongly disagree with it, “an unfortunate and offensive byproduct of a heightened consciousness of race, religion, gender, and sexual orientation is what has been coined by sociologists and mass media as a, “hate crime.”

I don't believe that hate crimes are a byproduct, unfortunate and offensive or otherwise, of a heightened consciousness of race, religion, gender and sexual orientation. Hate crimes have always been with us, probably as long as human society has existed. Hate crimes are motivated by hatred. They have always been there and a heightened consciousness of race, religion, gender and sexual orientation has perhaps made us aware of hate crimes as hate crimes.

I don't think that hate crimes are caused by an awareness or a heightened consciousness of race, religion, gender and sexual orientation. The heightened awareness makes us aware that some of the crimes which we might otherwise have simply dismissed as another mugging or another assault are in fact hate crimes and in fact deserve a different way of dealing with them or an additional way of dealing with them, but I think that hate crimes always have been with us, period.

I would also say that rather than ask Mr. Holder any questions at this point, given the fact that we do expect votes momentarily, I would ask that the questions I asked of Mr. Lee at the hearing 2 years ago and his answers be read into the record.

[The prepared statement of Mr. Nadler follows:]

PREPARED STATEMENT OF HON. JERROLD NADLER, A REPRESENTATIVE IN CONGRESS
FROM THE STATE OF NEW YORK

Mr. Chairman, last year we held hearings on the Hate Crime Prevention Act but never even held a markup on the legislation. Meanwhile, thousands more people have been victimized. Matthew Shepard was left on a post to die, and we haven't lifted a finger to help others like him.

Now it is a year later. The Hate Crime Prevention Act has broad bipartisan and bicameral support. The Senate has passed a version of this bill as an amendment to the Commerce, Justice, State Appropriations bill. It is now up to us in the Judiciary Committee to take action. Is this hearing simply the first step in the process or is it the end of the road, Mr. Chairman? Are we going to pass this bill or not?

Hate crimes in America continue to be a serious problem, with over 8,000 total incidents being reported to the FBI in a single year. More than 4,700 of these crimes were based on racial bias. Another 1,385 hate crimes were based on religion, and more than 1,100 hate crimes were based on sexual orientation. Of the crimes reported based on religious bias, tragically 78.5 percent were Anti-Semitic hate

crimes. We know these crimes are occurring, and that some of these crimes are based on sexual orientation, gender, and disability and yet we have failed to amend our laws to cover these specific categories of crimes. That makes no sense. The problem has been clearly reported to us, and we have a proposed solution before us. We ought to expand the definition of hate crimes to include sexual orientation, disability, and gender, and we ought to strengthen existing law to permit federal prosecutors to assist local jurisdictions in prosecuting hate crimes. It is time to pass the Hate Crime Prevention Act now.

I have mentioned some of the statistics that have been reported to us from the FBI. Keep in mind that these numbers are based only on limited reporting data. I fear that the real problem is actually much worse than even these terrible statistics suggest.

And what is behind the statistics—real human tragedies, Mr. Chairman.

For example, a gay man living with AIDS was surrounded as he rode the subway in New York City by a group of young men and women, who screamed "How do you cure AIDS? Kill the faggots! Stamp out AIDS!" He was thrown to the ground and kicked in the face, sustaining serious injuries.

A mentally disabled man from Port Monmouth was kidnaped by a group of nine men and women and was tortured for three hours, then dumped somewhere with a pillowcase over his head. While captive, he was taped to a chair, his head was shaved, and his clothing was cut to shreds. He was punched, whipped, beaten with a toilet brush, and possibly, sexually assaulted. Prosecutors believe the attack was motivated by disability bias.

It is absolutely critical that we take effective steps to address the violent bigotry of hate crimes. It is important that we send a message that these violent expressions of hatred are not acceptable in our society. These crimes deserve special attention, because the victims of hate crimes are not only the one or two people involved in a specific incident, but whole communities that may be intimidated, or made to feel vulnerable by a specific action. We have often seen an isolated incident explode into widespread community tension. These crimes often strike at the heart of what we value most and deeply affect whole segments of our society. They can fragment communities, and stir up feelings of anger that often lead to further acts of violence.

Since these crimes can have such devastating and lasting effects on victims and the communities from which they come, it is entirely appropriate to involve federal prosecutors and federal resources. We ought to make it easier for federal investigators to aid state and local law enforcement efforts. Furthermore, many states lack comprehensive hate crime laws, and FBI statistics show the incidence of hate crimes reported continues to be unacceptably high. Clearly, more must be done to combat hate crimes and I believe this legislation is a good step in that direction.

Creating tougher penalties and expanding federal authority may help prosecutors punish those who commit hate crimes, but I fear we must also address the fundamental bigotry that leads to these crimes. We should support hate crime prevention programs like those sponsored by the Anti-Defamation League. We should fund special training for law enforcement professionals, teach tolerance and support for diversity in our schools, and confront head-on the daily prejudice that we see in our communities. There is no simple solution to this problem. I believe that we must adopt a comprehensive multi-level approach to combat racism, sexism, and other forms of discrimination that unfortunately lead to violent hate crimes.

I look forward to hearing from our witnesses and any ideas they may have to reduce the number of hate crimes in America. But we must translate their ideas into legislation and take action now to address these heinous crimes. We ought to follow this hearing with a markup of the bipartisan and bicameral hate crime prevention bill. Thank you.

REPRESENTATIVE NADLER'S QUESTIONS IN 1998

Mr. NADLER. Thank you. Let me first make a comment to follow up some of the discussion on the question of trust of local governments and the Federal role. Let me comment that James Madison in *The Federalist* talked about how in local jurisdictions and local governments sometimes one faction or interest might gain control and prejudice the political and even the judicial processes in that government and that the Federal Government, which is much larger, so that one faction was much less likely to gain control, would be the protector of our liberties. That was certainly true in the 1960s in some of the southern jurisdictions where a racist faction had control of many local governments and the Federal Government had to be called in for the protection of liberties. And God knows, it may be true in the future, too. The question is not one of trust of local governments. In general, yes, we do trust local government. The question is a question of fact. Is the local government or a local

society so prejudiced or acting with such prejudice against a racial group or a gap group or a lesbian group or a gender group, that in fact the wider society has to be called in. That might happen in the future. It has happened in the past.

This is not a question of do we generally trust local governments. It is that history shows, as Madison foretold, that in fact the answer has to be usually we do, but sometimes you cannot. The Federal Government is likely to be less captured by one prejudiced group than is a local government which is smaller and has fewer diverse groups within it. So on that basis the Federal Government ought to have the power to act.

Secondly, let me ask you, sir, Mr. Secretary, a question following up on the discussion with the gentleman from Pennsylvania, Mr. Gekas before, asking was it really necessary for the Federal Government to have some of this jurisdiction. I want to read you descriptions of two different crimes and tell me how this bill, if it were a statute, would affect this.

One is from your testimony, one is not. In 1994, a Federal jury in Fort Worth, Texas acquitted three white supremacists of Federal criminal civil rights charges arising from unprovoked assaults upon African Americans, including one incident in which the defendants knocked a man unconscious as he stood near a bus stop. Some of the jurors revealed after the trial that although the assaults were clearly motivated by racial animus, there was no apparent intent to deprive the victim of the right to participate in federally protected activity. The government's proof that the defendants were out looking for African Americans to assault was insufficient to satisfy the statutory requirements of the current law 18 USC section 245.

Under this bill, how would the statutory requirements have been different so that the jury would have been able to convict?

Mr. LEE. There would be no requirement of looking to see that that man was attacked because he was at the bus stop or because he was on a sidewalk. We would be looking at what really matters. We would be looking at evidence of racial motivation. We would be looking at whether when individuals go on a crime spree and target African Americans that there is a —

Mr. NADLER. In that fact pattern, there would have been plenty of law to convict?

Mr. LEE. There would be plenty to investigate, and it is likely that given the kind of evidence that is not in that brief encapsulation was available.

Mr. NADLER. Thank you. I have one further question. I want to read one other statement of an actual case. This is a case of murder from Tennessee in 1995. January 1995, Michael Westerman, a 21-year-old white male was driving his pickup truck along the Tennessee-Kentucky border—could I have an additional 2 minutes?

Mr. HUTCHINSON. You are recognized for an additional 2 minutes.

Mr. NADLER. He had a Confederate flag mounted on the bed of his pickup truck. By all accounts he was not a member of any hate group but simply took pride in his southern heritage. A group of African Americans observed the truck and decided to kill Westerman because they were offended by the flag. Westerman was gunned down by the subjects in what was clearly a racially-motivated killing. The killing provoked considerable community unrest as well as national attention. In response to the murder a number of crosses were burned in predominantly African Americans sections of southern Kentucky, which further exacerbated racial tensions in the area. A number of groups called for Federal intervention of these incidents. Due to the statutory limitation of section 245, it appeared that the Federal Government did not have jurisdiction to prosecute the defendants who were responsible for the racially motivated murder because although the shooting was clearly racially motivated, the victim was not exercising a federally protected right at the time of the shooting. On the other hand, the Federal Government probably did have jurisdiction under other hate crimes provisions, housing interference statutes, to prosecute the cross burnings. Thus, due to the gaps in section 245 the Federal Government was in the unfortunate position of not being able to respond to the more serious precipitating incident, the murder, but was able to prosecute the retaliatory cross burnings.

Could you comment on whether you think that that observation is correct under this set of facts and whether this proposed bill would change that?

Mr. LEE. With H.R. 3081, it would be very different. The Federal Government would be able to proceed against that as a hate crime.

Mr. NADLER. So the Federal Government would be able to prosecute both the cross burnings and the precipitating murder as a hate crime?

Mr. LEE. Yes. The effect of H.R. 3081 is to make sure that prosecutors be able to make those decisions based on the best interests of the case, what the needs of the case are. If the case falls for Federal prosecution, that is what will happen. If a case calls for State prosecution, that is what will happen.

Mr. NADLER. Whereas under the present statute, you would not have the authority?

Mr. LEE. That is right. It is the best interest of the case, that is how the decisions will be made, which I think is the appropriate way these kinds of decisions ought to be made.

Mr. HYDE. Mr. Gekas.

Mr. GEKAS. I thank the Chair. Mr. Holder, many of us have always felt that the area of hate crimes can best be addressed through the cooperation between the Federal agencies and the local government agencies, when it is recognized that the enforcement requirements lie chiefly in those local law enforcement agencies.

You say in your statement that even if we enacted this bill, the State and local law enforcement agencies will continue to play the principal role in the investigation and prosecution of all types of hate crimes. So what you are saying, I suppose, and what I would like to emphasize in the record, is that even with passage of this bill the core of responsibility will still rest with the local law enforcement agencies, and that we on the Federal level will enhance our cooperative efforts.

Is that a fair statement?

Mr. HOLDER. Yes, I think that is accurate. We would expect that there would be an increased number of cases that we would bring, a modest increase in the number of cases that we would bring, but it would enhance our ability to support the primary role that State and local law enforcements would still play.

Mr. GEKAS. A modest increase—we can't put numbers to that, can we?

Mr. HOLDER. No, I mean it is hard to say. We have averaged, I think since 1993, about six prosecutions per year on the Federal level.

As I said, I would expect a modest increase. It is hard to quantify that but we would not in any way, I think, overwhelm the system, and that is one of the fears that has been expressed.

Mr. GEKAS. What rationale do you employ, Mr. Holder, when someone poses a hypothetical of the type that an assault with intent to kill X and an assault almost simultaneously with intent to kill Y, who happens to be one of the protected classes in the hate crime arena, what rationale do you employ to respond as to why one is being treated differently than the other?

They are both maybe paralyzed for life, maybe hurt beyond reclamation. What rationale do we employ in saying one should be treated differently from the other in the consequences to the assailant?

Mr. HOLDER. Well, the attack on a person, a random attack that is not hate-based, is obviously serious and something for which the law should take into account. The attack, for instance, on James Byrd because of his color was as much an attack on me as a black man as it was on James Byrd. The attack on Matthew Shepard, a gay man, was an attack on every gay person and lesbian person in this country. That is why they are more serious.

It is not only an attack on an individual. It is also an attack on the group that that person is a member of, and that is why those crimes, it seems to me, are more serious.

Mr. GEKAS. Well, how do you characterize the attack on the individual who is not a person of those categories? As a prosecutor I

remember we never inquired or weren't asked to inquire of what the race or ethnic background was of the victim.

We went after the assailant, the defendant, with a vengeance for committing a heinous crime. That was the criterion that we used. I worry about what burden you place on prosecutors when they see the hypothetical to which I refer.

What do you do with the individual who is not a part of the hate crime categories?

Mr. HOLDER. Well, you take those crimes very seriously and generally there are adequate punishments for those kinds of crimes.

What I think we are looking for is an enhanced response by the criminal justice system to those crimes that I consider, quite frankly, to be more serious where the attacks are based on hate.

An assault with intent to kill is always obviously a very serious crime. An assault with intent to kill because that person is a member of one of these classes is, it seems to me, a more serious crime and worthy of the enhanced treatment that we are proposing in the bill.

Mr. NADLER. Would the gentleman yield?

Mr. GEKAS. Very troublesome.

Mr. NADLER. Would the gentleman yield for a moment?

Mr. GEKAS. Yes.

Mr. NADLER. Thank you. The way the question was asked I think really doesn't fit the statute.

Isn't it true, Mr. Deputy Attorney General, that in those attacks that Mr. Gekas posited, first that there are no protected classes in this bill, and that the question is not that you punish the attack on Y differently than the attack on X because Y has a certain characteristic, but that the question is the motive of the attacker and if he attacks a white male because he hates white males, it is a hate crime as if he attacked a gay person or a black person because of their sexual orientation or their race. It is not a question of classes but of motive.

Mr. GEKAS. Seizing back the balance of non-time, the gentleman and I should have a discussion as to what kind of hate crime would be associated with an attack on the white male.

Mr. NADLER. If someone hated white males, if you had a black racist who hated white males, then that would be a hate crime if he did it for that motive.

Mr. GEKAS. That would become a part of the inquiry to determine, and in every case, even if it is an attack on someone which nobody would associate with a hate crime, we should also find out whether—

Mr. NADLER. If you had a reason to believe that.

Mr. GEKAS. It seems to me that every vicious crime that is committed is committed by reason of hate or partially by reason of hate or in some proportion attributed to hate. I yield back the balance of my time.

Mr. HYDE. The gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. Holder, there are two major aspects of the bill, one that expands the jurisdiction because you are not relegated to the specific activities in the former legislation, and it expands to cover sexual orientation, gender or disability.

Are there other parts of the bill that are significant?

Mr. HOLDER. Well, I think that those are the two most significant—the fact that we would do away with the federally-enumerated, federally-protected activity requirement, and also expand the bill to include people who are attacked on the basis of their sexual orientation, gender or disability. I think those are the two main provisions in the bill.

Mr. SCOTT. We passed several years ago the Hate Crimes Sentencing Enhancement Act. What would this bill do that that bill is not presently accomplishing?

Mr. HOLDER. Well, it would give the Federal Government an ability to assist our State and local partners. We do not have the ability to extend to our State and local partners the vast forensic capabilities that we have in the Federal Government unless there is at least a colorable claim that there is Federal jurisdiction to investigate or to prosecute a particular kind of crime. By expanding the definition of hate crimes, Federal hate crimes, we would have a greater ability to handle those kinds of crimes, to assist our partners with regard to our forensic capabilities. Also in those instances where, for whatever reasons, State and local authorities choose not to or are unable to prosecute those kinds of crimes, the Federal Government would then be in a position to step in and actually prosecute them.

Mr. SCOTT. And you can't do that now with the Sentencing Enhancement provisions? You don't have the jurisdiction in the case?

Mr. HOLDER. No. What we are talking about in the expansion, in the bill here is to expand the jurisdiction of the Federal Government to become involved in these matters. The Enhancement Act does not do that.

Mr. SCOTT. There is some criticism that the legislation may punish someone for their beliefs. How do we differentiate someone's beliefs from what is criminal under this bill?

Mr. HOLDER. Well, this bill is designed to punish people who commit violent acts. That is the primary concern. You then work back from there and try to determine what was the cause, what was the reason, what was the motivation of the person who committed the violent act.

If you find on the basis of this act that the violent act occurred because of a motivation that is based on hate for a particular person based on the person's gender or sexual orientation, their disability, we say that that is an instance where the Federal Government should have jurisdiction.

If it is not designed to punish somebody because of the beliefs that they have, it is designed to punish people who commit violent acts and who do so based on a hatred for individuals who are in those classes that are enumerated in the bill.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. HYDE. The gentleman from Florida, Mr. Canady.

Mr. CANADY. Thank you, Mr. Chairman.

Mr. Holder, we appreciate your being here today. You have given testimony that is helpful to the committee.

I would like to ask you if you could give the committee an example of an instance where the State government with jurisdiction ei-

ther could not or would not take action to vigorously prosecute an individual who is guilty of a hate crime.

Mr. HOLDER. Well, in my written testimony at pages—I guess starting at page 15 or so, we talk about cases where the State response was inadequate. In the case of *United States v. Lee and Jarrard*, a 1994 case, in Georgia, the State did not prosecute one of the individuals there and one of the other individuals in that case only received 5 months of jail time and 5 years of probation. These were two individuals who were convicted at a trial of shooting into the homes of several African Americans. The State, as I said, did not prosecute one and there was an inadequate sentence with regard to the other.

Mr. CANADY. Do you know why the State decided not to prosecute the one who was not prosecuted?

Mr. HOLDER. I do not know. We can maybe do some more research, and I could provide you with the answer to that.

Another case from California involves two individuals named Black and Clark. There the County Sheriff did not have the resources to do an investigation of the incident. It was the assault of a black man at a convenience store at a gas station, and the Federal Government stepped in and actually brought the cases, so in one instance there was—

Mr. CANADY. But in that case you said the Federal Government stepped in, so you were able to assist in that case?

Mr. HOLDER. Right. The local prosecutors in that case said that they did not believe that the matter was a priority case. The Federal Government was able to step in there and using §245 charge both of the individuals.

Mr. CANADY. Okay, so you don't need—you wouldn't need additional jurisdiction to deal with that sort of a case. Do you have any other examples, other than those?

If they are in your testimony—

Mr. HOLDER. Yes, they are in the testimony, as I said, starting at page 15 and going through, I guess, page 17, there are a number of cases.

Mr. HYDE. The Chair would intervene to announce there are two votes on. One is a journal. The other one is on a patent bill that was debated last evening, and so I would ask that we withhold further questioning and we have a brief recess, and we will let Mr. Holder go because I know you have a busy morning, and we would like to feel free to write you some questions on this subject in lieu of your being here to testimony.

Mr. HOLDER. Thank you very much, Mr. Chairman.

Mr. HYDE. Thank you. The committee will stand in recess until after the second vote, and please return. We have 10 witnesses on the second panel.

[Recess.]

Mr. HYDE. The committee will come to order. Our second panel consists of 10 witnesses who will give us a variety of perspectives on hate crimes violence.

Our first witness is Dan Troy, who is a partner at the Washington law firm of Wiley, Rein & Fielding, where he specializes in constitutional and appellate litigation. Mr. Troy is an associate scholar

at the American Enterprise Institute and recently he completed a book on retroactive legislation.

He served in the Office of Legal Counsel of the U.S. Department of Justice and clerked for District Court Circuit Judge Robert Bork.

He is a graduate of Cornell University and Columbia University School of Law and is the author of an extensive number of articles on constitutional law.

The next witness will be Professor Frederick M. Lawrence. He was an editor of the *Yale Law Journal* and later served as law clerk for Judge Amalya Kearsse in the United States Court of Appeals for the second circuit. He was associated with the Manhattan law firm of Kramer, Levin, Nessen, Kamin and Sole.

Professor Lawrence has served as an assistant United States attorney for the Southern District of New York and chief of the Civil Rights Unit of that office. He currently is the associate dean of academic affairs for Boston University School of Law. He teaches civil procedure, criminal law, and civil rights criminal law. He has published articles concerning Federal criminal civil rights laws, sentence enhancement for bias crimes, and freedom of speech issues.

Next is Professor John S. Baker, a graduate of the University of Dallas and the University of Michigan Law School. He is a professor of law at Louisiana State University Law Center. He served as a law clerk in the Federal District Court and an assistant district attorney in New Orleans.

He has argued constitutional and criminal cases in various courts including the U.S. Supreme Court. In addition to numerous articles on constitutional and criminal issues, his writings include the following books: *The Intelligence Edge*, *How to Profit from the Information Age*; *Hall's Criminal Law—Cases and Materials*; and *Introduction to the Law of the United States*.

He teaches constitutional law, criminal law, Federal courts, and jurisprudence. He served on an ABA, American Bar Association, Task Force which issued the 1998 Report, *The Federalization of Crime*.

Our next witness is Professor Heidi M. Hurd, a graduate of Queens University in Ontario, Canada. She has her master's degree in legal philosophy from—and I am going to mispronounce this—Dalhousie University in Nova Scotia, Canada, and her J.D. and Ph.D. in philosophy from the University of Southern California.

She is a professor of law and philosophy and she co-directs the University of Pennsylvania's Institute for Law and Philosophy. In addition to numerous articles on criminal law, she has recently published a book on the theory of criminal legislation entitled *Moral Combat*. Her principal research is in the areas of criminal law, torts, and legal and moral philosophy.

Next we have Professor John Yoo, a summa cum laude graduate of Harvard and Yale University Law Schools. He is a professor of law at Boalt Hall School of Law at the University of California at Berkeley where he teaches constitutional law, separation of powers, public lawmaking, and foreign relations law among other subjects.

He has been a scholar-in-residence at the George Washington University Law School, and this year was a John M. Olin Foundation faculty fellow. He also served as general counsel to the Senate

Judiciary Committee and as a law clerk to Justice Clarence Thomas of the Supreme Court and Judge Lawrence Silberman of the D.C. Circuit. He has published numerous articles on constitutional law and international law.

Our next witness is Dennis Jay, who is the executive director of the Coalition Against Insurance Fraud. In this position he serves as chief executive officer of that organization, consisting of consumer groups, government agencies and insurers dedicated to combatting all forms of insurance fraud through public information and advocacy.

He has provided testimony to legislatures on the State and Federal level about the severity of fraud and proposed solutions to counter the growth of white collar crime.

Mr. Jay served as vice president of communications for the National Association of Professional Insurance Agents. He holds a degree in business administration.

Our next witness is Carole Carrington, a resident of Eureka, California, the mother of five children and nine grandchildren. Mrs. Carrington's daughter Carole and granddaughter Julie were murdered in February of this year near Yosemite National Park. Mrs. Carrington, the loss of your child and grandchild is a very sad and chilling tragedy and, of course, our prayers and sympathy are offered to you and your loved ones.

Our next witness is Tony Orr. Mr. Orr is from Tulsa, Oklahoma. He is here to tell his ordeal as a victim of crime where he and his friend Timothy Beauchamp were attacked in Tulsa, Oklahoma, and beaten.

Next we have Chief Reuben M. Greenberg, who is chief of police for Charleston, South Carolina, their police department. He was formerly under-sheriff of San Francisco County's Sheriff's Department, a major with the Savannah, Georgia, Police Department, Chief of Police at Opalocka, Florida, chief deputy sheriff of Orange County, Florida, director of public safety of Mobile, Alabama, and a deputy director of the Florida Department of Law Enforcement.

Chief Greenberg received a B.A. degree from San Francisco State University, a master's degree in public administration from the University of California at Berkeley and a master's degree in city planning, also from Berkeley, University of California.

He has taught at California State University, the University of North Carolina and Florida International University. He has conducted law enforcement seminars and training sessions in numerous countries. He is the past president of the South Carolina Law Enforcement Officers Association, is also a board member of the South Carolina Commission on Racial Relations, and his first book, *Let's Take Back our Streets*, was published in November 1989.

Our next witness is Patrick J. Sullivan, Jr., who is the sheriff of Arapahoe County in Littleton, Colorado, and member of the executive committee of the board of directors of the National Sheriffs' Association.

Sheriff Sullivan is a graduate of Trinidad State Junior College and Metropolitan State College in Denver, Colorado. He served in the U.S. Army Intelligence Command. His career started as a police officer and he served as a sergeant and lieutenant for the Littleton, Colorado, Police Department. He then served as a cap-

tain under-sheriff and was elected sheriff of the Arapahoe Sheriff's Office in January 1985.

It would be appreciated if this distinguished panel could limit their opening statements to 5 minutes. We won't be inflexible, but it would help so we can hear from everybody and the members can ask questions, so we will start out with you, Mr. Troy.

STATEMENT OF DANIEL E. TROY, ESQUIRE, ASSOCIATE SCHOLAR, AMERICAN ENTERPRISE INSTITUTE AND PARTNER, WILEY, REIN & FIELDING

Mr. TROY. Thank you, Mr. Chairman. I appear before you today not just as a constitutional lawyer and as a think-tank scholar, but also as a proud member of what Justice Felix Frankfurter called the, "most vilified and persecuted minority in history." This century the hatred we Jews have for so long endured led to the murder of six million of my people—including a million children, a crime I think about every day of my life.

I grew up in New York of the 1970's, a place that is much more lawless than it is today, and I remember what it was like to walk to synagogue wearing my yarmulke on Saturday mornings and to have racial and ethnic epithets hurled at me. I also remember being punched out when my yeshiva high school was attacked during a school dance.

But despite my background and experience, I oppose Federal hate crime legislation on the grounds that it is contrary to the notion that we are all children of G-d, equal in his eyes, and that we are all therefore entitled to the equal protection of the law. Such legislation is also contrary to our Judeo-Christian and common law traditions, as well as to the best principles of the Civil Rights Movement.

Let us begin with the Bible. Many read the Torah's statement about "an eye for an eye" as requiring strict retributive justice. Not so. The Torah's statement was a major egalitarian advance over the legal codes at the time. For example, under the Code of Hammurabi, punishment depended on who the victim was—a member of the landed gentry who broke the bone of his equal would have his bone broken, but if he broke a commoner's bone he was only required to pay a mina of silver.

Well, Mr. Chairman, the Bible rejected this model of punishment that turned on the victim's identity. It substituted this equal and proportional mandate of "eye for an eye, tooth for a tooth"—generally, the Bible did not recognize class or status distinctions in punishment.

Similarly, early in English history, injuries were thought to have been sustained by the group, by the clan, not by the individual. As English law developed, it took on the individualistic and egalitarian outlook that Christianity inherited from Judaism. The common law thus came to punish all crimes regardless of the victim's status or immutable characteristics.

Now, tragically, the United States' Constitution did not initially secure equal protection for all Americans. It took the Civil War—as well as the noble efforts of far too many for far too long—for that principle to be enshrined in our basic law.

A key purpose of the 14th amendment was to give all Americans the same legal protections as the white majority, but of course even the equal protection clause did not end America's history of disparate treatment of certain groups. But the purpose of the Reconstruction Era Federal civil rights laws was not to punish crimes based on race more harshly. It created a Federal remedy when States failed to enforce the law on a neutral, equal basis.

Now, fortunately, today States do enforce the law, particularly laws against murder, arson, and assault. Witness for example the rapid action against the horrible murders in Wyoming, Jasper, Texas, and Indiana—and there are other, more effective ways to deal with the few cases where States fail to fulfill this primary police power function, including the enforcement of Federal laws already on the books.

Hate crimes are already crimes. We may need more Federal dollars to help States in assisting and enforcing existing law, but as the ABA Task Force on Federalization of Crime made clear, we don't need more duplicative Federal laws.

Mr. Chairman, the promise of the Civil Rights Movement was of an America in which everyone would be treated equally. As Thurgood Marshall said in 1953, and I quote, "I want to get things done to a point where there won't be a NAACP, just a National Association for the Advancement of People."

Creating a special category of crimes in which punishment varies based on the victim's characteristics turns Thurgood Marshall's 1953 vision on its head. Although such legislation is styled as criminalizing a particular motivation or thought, which itself raises first amendment issues, hate crime legislation wrongly suggests that one person's life is worth more than that of another.

To quickly illustrate—does it make sense for Dylon Kliebold, had he lived, to have been subjected to a greater penalty for killing Cassie Bernall on account of her religious beliefs than for killing Corey DePooter because he was a jock? Certainly I look forward to the day when my Jewishness is not a reason for anybody to hate me, and since the 1950's America has made strides—great strides—in reducing antisemitism and racism, but hate crimes legislation, I am sorry to say, I think, takes us back in the wrong direction.

I think such laws encourage racial and ethnic groups to vie for protected status by emphasizing their degree of victimization, thus promoting further balkanization.

In conclusion, whether someone were to kill me while yelling "Yuppie Swine" or calling me a "Hymie" or a "Jewboy," I would be dead and my children would be fatherless. Any criminal who does that should go to jail, regardless of his or her motivation. Federal hate crime legislation builds walls, not bridges. Everyone in America, everyone in America, has the right to be free from fear. I urge the committee to abandon this enterprise and instead to focus on fighting crime in ways that brings us together, instead of driving us apart.

Thank you very much, Mr. Chairman.

[The prepared statement of Daniel E. Troy follows:]

PREPARED STATEMENT OF DANIEL E. TROY, ESQUIRE, ASSOCIATE SCHOLAR, AMERICAN ENTERPRISE INSTITUTE AND PARTNER, WILEY, REIN & FIELDING

My name is Daniel Troy. I am an associate scholar at the American Enterprise Institute in legal studies and a partner at Wiley, Rein & Fielding, where I specialize in constitutional and appellate litigation. I have argued cases on constitutional and administrative law before the United States Courts of Appeal as well as the United States Supreme Court. I recently wrote a book for AEI entitled "Retroactive Legislation" that addressed the importance of notice to the rule of law. I have published and spoken on a variety of legal and policy issues including hate crime legislation, the proper relationship of church and state, and free speech issues. A copy of my curriculum vitae is attached. The views I present here are my own, and not those of AEI, Wiley, Rein & Fielding, or any of its clients. I am not being compensated for this testimony.

There are at least four key reasons why I believe that federal hate crimes legislation or the expansion thereof is unnecessary and in fact counterproductive. First, basing the degree of punishment on the status or characteristics of the victim marks a step away from the recognition that every one of us is a child of G-d, equal in His eyes, and therefore entitled to the equal protection of the law. Second, hate crimes legislation further balkanizes American society along racial and ethnic lines, building walls instead of bridges. Third, I am generally opposed to more federal crime legislation, especially in circumstances where, as here, the data shows that the states are enforcing the law. Finally, hate crimes legislation punishes thought in a manner at odds with the First Amendment.

The way a society gives voice to the need for justice, punishment, and vengeance is through the criminal law. If our criminal laws are not tough enough to satisfy our communal need for justice, by all means let us make them tougher. But we should not give greater legal effect to the grievances of one group over those of another. Crimes should be punished regardless of a victim's immutable characteristics.

I. HATE CRIME LEGISLATION IS INCONSISTENT WITH THE EGALITARIAN PROGRESSION AGAINST STATUS BASED CRIMES

Both our Judeo-Christian heritage and the Anglo-American law have rejected the idea that punishment should vary based on the status of the victim. Instead, we have come to recognize that, because we are all equal in the eyes of G-d and in the eyes of the law, punishment should not depend on a victim's immutable characteristics.

Let's begin with the Bible. Many believe that the injunction in Exodus that with regard to punishment, there shall be "life for life, an eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, bruise for bruise" is a harsh statement of strict, retributive justice.¹ This is a misconception based on a misunderstanding of history and historical context. In fact, the Bible was making a strong statement in favor of equal and proportional punishment.

To illustrate, under the Code of Hammurabi (circa 1728-1686 B.C.), punishment was dependent on two factors. The first, still with us today, was the nature of the offense. But punishment also varied with status of the victim. For example, the Code stated that "If a seignior has destroyed the eye of a member of the aristocracy, they shall destroy his eye." But, "[i]f he has destroyed the eye of a commoner or broken the bone of a commoner, he shall pay one mina of silver." Other portions of the Code similarly provided that:

If a seignior has struck the cheek of a seignior who is superior to him, he shall be beaten sixty (times) with an oxtail whip in the assembly.

If a member of the aristocracy has struck the cheek of a(nother) member of the aristocracy who is of the same rank as himself, he shall pay one mina of silver.

If a commoner has struck the cheek of a(nother) commoner, he shall pay one mina of silver.²

By varying punishment as it did based on the victim's status, the Code of Hammurabi reinforced a rigid caste system.

The Bible essentially discarded this status-based approach to imposing punishment, treating the victim's status as irrelevant.³ It substituted the equal and pro-

¹ Exodus 21:22.

² The Code of Hammurabi §202, 203, 204, cited in Elliot Dorff and Arthur Rosett, *A Living Tree: The Roots of Growth of Jewish Law* 44-45 (1988).

³ The sole exception was with regard to slaves (who could be Hebrews or foreigners) and whose treatment was regulated according to a strict code. See, e.g., Exodus 21:26 ("When a man strikes

portionate mandate of "an eye for an eye" without regard to the victim's status or characteristics. This change represented an important egalitarian advance.

A similar development took place in the history of Anglo-American law. English law initially focused on group behavior. A murder was regarded as an affront to the clan, not to the individual murdered. Recompense took place among groups. As Theodore Plucknett writes in *A Concise History of the Common Law*, the pre-Christian law was grounded in familial relationships. Individualism in the law "contrasted strongly with the custom of the English tribes which looked less to the individual than to the family group of which the individual formed a part."⁴ Because of this emphasis, early English law "had little place for an individualistic sense of morals, for the group, although it was subjected to legal liability, can hardly be credited with moral intention in the sense that an individual can."⁵

Gradually, English law began to assume the individualistic outlook that Christianity had inherited from Judaism. Ultimately, "responsibility for actions . . . shifted from the whole group to the particular individual who did the act."⁶ Similarly, punishment came to be assessed without regard to the status of the victim within the group. Accompanying this change—more gradually—was the growing acceptance of the notion that "all men are created equal," eventually embodied in the Declaration of Independence.

Crime and Punishment in America

In many ways the story of America's last few centuries has been a struggle to realize in practice the promise of equality in the Declaration of Independence. Just as the Bible had promised equal treatment for all, so too did the American colonies before and after the Revolutionary War. And colonial America did realize that vision for many. Unfortunately, like the Bible, colonial America fell significantly short of its stated aspiration in failing to accord equal protections of the law to all, particularly with regard to free blacks and slaves. (Arguably, colonial America fell farther short of its stated aspirations in its treatment of slaves than did the Bible, but that is a debate for another day.) As Professor Lawrence Friedman makes clear in *Crime and Punishment in American History*, it was nearly impossible for a white slave owner to be found guilty of murdering a slave.⁷ A 1774 law in colonial North Carolina provided "punishment for killing a slave 'willfully and maliciously'" with a year imprisonment and the requirement that the murderer pay the owner the value of the slave. In 1791, the same North Carolina legislature declared such a law "disgraceful to humanity and degrading in the highest degree to the laws and principles of a free, Christian and enlightened country" because it drew a "distinction of criminality between the murder of a white person and of one who is equally an human creature, but merely of different complexion." The legislature changed the law so "it was murder to kill a slave willfully and maliciously."⁸

As is well known, however, practice in Southern states did not live up to these aspirations or to the rhetoric of equality. Laws such as the one passed by North Carolina in 1791 were rarely enforced, usually leaving slave owners free to do what they wanted with their "property." Friedman chronicles how even in cases where slave owners were convicted by a jury of murdering a slave, the verdicts were nearly always overturned on appeal.⁹

These injustices surrounding the South's "peculiar institution" culminated in the Civil War. Tragically, not even that bloody conflict led to equal protection of the laws for all. Especially in the decades after Reconstruction, local officials, especially in South, vigorously prosecuted crimes against whites, but often failed to prosecute crimes against blacks.

Even though the South in particular (although by no means only the South) repeatedly fell short of America's stated ideals of equal justice for all, many Americans of good will continued trying to make good on that promise. Thus, in 1876-1877, the Reconstruction Congress enacted a series of laws that provided a novel remedy for the problem of selective prosecution. Most importantly, Congress passed 18 U.S.C. § 242, also known as the Ku Klux Klan Act. It provided that

the eye of his slave, male or female, and destroys it, he shall let him go free on account of his eye. If he knocks out the tooth of his slave, male or female, he shall let him go free on account of his tooth.")

⁴Theodore Plucknett, *A Concise History of the Common Law* (1956).

⁵*Id.*

⁶*Id.*

⁷Lawrence M. Friedman, *Crime and Punishment in American History* 90-91 (1993).

⁸*Id.*

⁹*Id.* at 92.

Whoever, under color of any law, . . . willfully subjects any person . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined . . . or imprisoned . . .¹⁰

This Act targeted governmental officials at all levels of government who deliberately deprived private citizens of their rights on the basis of certain characteristics like race or color.

Importantly, as James Jacobs and Kimberly Potter point out in *Hate Crimes: Criminal Law & Identity Politics*, "these statutes apply to everyone."¹¹ They are thus "unlike modern-day hate crime statutes, which cover only those victims who fall within the groups listed in the hate crime statute." The KKK law was written generically to apply to any individual who could demonstrate that state officials had failed to protect them through lax enforcement of state laws—*race notwithstanding*. With the mandate of the Equal Protection Clause fresh in their minds, the authors of the KKK Act recognized the paradox of simultaneously speaking the language of equal protection, and passing special protective legislation out of the other. Thus, the bold KKK Act was written in a neutral manner and for the benefit of all citizens regardless of any immutable characteristics.¹²

Hate crimes laws are different, however. First, they are directed at private conduct. Also, the sole basis for their invocation is when that private conduct is motivated by a specifically enumerated bias.

Sadly, neither the Civil War Amendments to the Constitution nor the Civil Rights Acts ended selective prosecution and punishment of blacks. And, with the advent of Jim Crow, America's ability to make good on its promise of equality to all became further compromised. It is important to emphasize, however, that even as America was falling short on the promise and reality of equality for African-Americans, millions of immigrants of all ethnicities and religions were pursuing and finding the American dream not just of material prosperity, but also of equal treatment under the law.

The Promise of the Civil Rights Movement

In the years following World War II, several courageous lawyers began to mount an offensive on the structure of Jim Crow. Importantly, they did not seek special protections for blacks. Rather, they sought the same equality of treatment that American law and American society was increasingly granting to all.

To illustrate, according to his biographer Juan Williams, Thurgood Marshall—the leader of the Civil Rights movement through the 1940s and 50s—sought "a color-blind, fully integrated America."¹³ Marshall wanted every American to be judged, as he said, on "individual merit rather than to be limited by such irrelevant considerations as race and color."¹⁴ He regularly campaigned for racial solidarity commenting, "let's stop drawing the line [between] colored and white. Let's draw the line on who wants democracy for all Americans."¹⁵ In fact, Marshall once remarked, "I want to put myself out of business. I want to get things to a point where there won't be an NAACP—just a National Association for the Advancement of People."¹⁶

Particularly since the 1950s, America has made great strides in realizing the promise of equality under the law for all Americans. At the same time, and in a not unrelated phenomenon, America has witnessed a sharp decline in racism, anti-Semitism, and the like. To take just one example, comments like those of former Dodger executive Al Campanis about blacks in baseball, which were once commonplace, are now properly the impetus for firing and obloquy. These examples can be multiplied many times over. We have not yet eradicated the scourge of racism and prejudice. But we have generally been moving in the right direction.

II. THE BALKANIZING EFFECT OF HATE CRIMES

Along with the eminent, liberal historian Arthur Schlesinger, Jr., I believe that among the most serious threats to the promise of equal protection facing the United States today is an over-emphasis on the racial, gender, religious, and other dif-

¹⁰ James B. Jacobs and Kimberly Potter, *Hate Crimes & Identity Politics* 37 (1988), citing § 18 U.S.C. 242.

¹¹ *Id.*, at 37.

¹² *Id.* at 36.

¹³ Juan Williams, *Thurgood Marshall: American Revolutionary* 232 (1998).

¹⁴ *Id.*

¹⁵ *Id.* at 241.

¹⁶ *Id.* at 231–32.

ferences between us rather than on our common concerns. I am particularly worried by attempts to write these differences into law, which cuts against not just Thurgood Marshall's vision, but also against the tide of Judeo-Christian and Anglo-American law, which I discussed above. In his book *The Disuniting of America*, Schlesinger, points out this on-going process of balkanization.¹⁷ And like Schlesinger, I reject the views of the "militants of ethnicity, [who] now contend that the main objective of public education should be the protection, strengthening, celebration, and perpetuation of ethnic origins and identities."¹⁸ Because such separatism, when recognized by law, "nourishes prejudices, magnifies differences, and stirs antagonisms," to quote Schlesinger again.¹⁹

To be sure, as Schlesinger notes, recognizing once over-looked cultures has its positive effects. Our society benefits from exposure to new types of music, art, and literature, and we must ensure that all individuals in our nation of immigrants participate in our civic society.²⁰ But writing these differences into law reinforces differences between individuals on the basis of certain immutable characteristics, and makes it impossible for us to coalesce as a single entity.²¹

Unfortunately, in modern-day America, it often seems that the fastest way for a group to achieve political power and status is to proclaim its status as a victim.²² Status as a disfavored group paves the way for special protections and special handouts. Thus, hate crimes legislation makes crimes into political footballs, further polarizing America on the basis of group and identity politics. Specifically, hate crimes legislation incentivizes special interest groups to put political pressure on local prosecutors to declare that a crime visited on a member of their particular group was a "hate crime." Why? To ensure the defendant will be punished? Especially with regard to serious crimes, this will happen anyway. For what other purpose then? The most likely reason, I'm sorry to say, is so that a relevant identity group can use the "hate crime" as further evidence of its disfavored treatment so that it can then claim the need for special laws, special handouts, and special treatment.

This is not to say that everyone who calls for the tough prosecution of a hate crime is engaging in such demagoguery. But we should be horrified by all crimes, without regard to the victim's group, and we should demand justice in all cases. As a Jew, I may feel particularly aggrieved when another Jew is harmed, but that is no reason for my particular grievance to be written into law.

This is because we all belong to one group or another. When a military person is harmed, perhaps because they were a member of the military, all of the people in the military—or at least on the victim's base—are likely to feel particularly affected by the crime. The way a society gives voice to that feeling of being aggrieved and to the need for justice, punishment, and vengeance is through the criminal law. If our criminal laws are not tough enough to satisfy our communal need for justice, by all means let us make them tougher. But we should not give greater legal effect to the grievances of one group over those of another.

Indeed, by further forcing society into groups based on permanent status—racial, gender, religious, etc.—hate crime laws ultimately erode the core unifying values of our country. Instead of developing a civil society in which groups form and disband to advocate ever-changing interests, this sort of legislation encourages the maintenance of permanent groups along lines that should, ultimately, be irrelevant under the law.²³ By emphasizing the static nature of groups and status-based affiliations, hate crimes legislation entrenches *pluribus* and makes *unum* an unattainable phrase, bland enough only for printing on currency.

Politicizing law enforcement

In *Hate Crimes: Criminal Law & Identity Politics*, James B. Jacobs and Kimberly Potter show that one of the most difficult aspects of implementing hate crimes legislation is the all-important "labeling decision."²⁴ Although this decision may seem simple, in fact it is fraught with political implications and pitfalls. Jacobs and Potter conclude that "[w]hatever one's position on the effects of politicization, it is clear

¹⁷ Arthur M. Schlesinger, Jr., *The Disuniting of America: Reflections on a Multicultural Society* (1992).

¹⁸ *Id.* at 17.

¹⁹ *Id.* at 16.

²⁰ *Id.*

²¹ *Id.* at 101–18.

²² Robert H. Bork, *Slouching Towards Gomorrah: Modern Liberalism and American Decline* 82 (1996).

²³ See James Madison, *The Federalist No. 10* (arguing that a system in which factions would regularly form and disband prevents their more dangerous tendencies from gaining hold).

²⁴ Jacobs and Potter, at 96.

that the bias-labeling process contributes to those effects.”²⁵ Yet, the problem of politicization is obvious. It can force prosecutors to make decisions about what charges to bring based not on the available evidence and what can be proven in court, but instead on how loud a certain group can yell.

To illustrate the difficulty of classification, consider the criteria used by the New York Police Department Bias Unit to identify bias-motivated crimes. The list includes such criteria as “The absence of any motive,” “The Perception of the Victim,” and “A common-sense review of the circumstances.”²⁶ As Jacobs and Potter note, “[t]hese criteria are so broad and loose that practically any intergroup offense could plausibly be labeled a bias crime,” and “the criteria, rather than answering questions, create more questions.”²⁷ In fact, the problems that the Bias Unit faced labeling crimes led to the creation of a Bias Review Panel, essentially designed to prevent crimes originally classified as being bias motivated from being reclassified.²⁸ The authors point out that “[c]ommunity pressures and controversies made a bias review panel a political necessity” (emphasis added).²⁹ Clearly, this sort of attention, pressure, and lobbying on law enforcement detracts from what should be the objective process of law enforcement and prosecution.

Forcing a prosecutor first to determine whether to file charges under the hate crimes law, and to focus secondarily on building his or her case, exacerbates community tensions already on edge from the initial crime. The net increase in community divisions and mistrust can easily diminish faith in the criminal justice system. As Jacobs and Potter show in an examination of some of the most notable and divisive intergroup incidents—the 1989 rape and beating of a jogger in Central Park, Colin Ferguson’s shooting rampage on the Long Island Railroad, the trial of Lemerick Nelson for the murder of a rabbinical student during the 1990 Crown Heights riots—in each case attention was drawn away from the horrible fact that people were killed, beaten, or raped. Instead, various identity groups—and these are groups of all stripes—dominated discourse with criticism or praise about how to classify the underlying crime.³⁰ These conflicts, political in nature, have important consequences. They breed inter-group hatred, more conflict, and even more crime. Jacobs and Potter even remind readers that the preoccupation with whether this or that crime was bias-motivated, even leads to retaliatory inter-group crime.³¹

Also, perversely, classifying a crime as a “hate crime” may give a criminal more of a “justification” in his or her own mind, or in the minds of others. Violent crimes should be viewed for what they are: lawless and venal actions against all of civilized society. To illustrate, Timothy McVeigh’s slaughter of innocents in Oklahoma City should be seen for what it was: mass murder, pure and simple. Calling it a “hate crime” directed against federal employees adds nothing to the analysis.

The evidence collected by Jacobs and Potter shows that hate crime legislation further balkanizes America and is contrary to the best ideals of the American system. It is true that, as I have discussed, America has not always attained these ideals. But we should not abandon the road Thurgood Marshall and others set us on to go back in the direction of differential treatment under the law.

III. HATE CRIME LEGISLATION IS INCONSISTENT WITH FEDERALISM PRINCIPLES

It is important, at the outset, to emphasize the lack of evidence of any hate crime “epidemic” warranting federal intervention.³² To illustrate, Jacobs and Potter report, based on FBI statistics, that from 1992 to 1994, bias motivated attacks against blacks, whites, Jews, gays and ethnic groups, and ethnic groups generally *all declined*.³³ Underscoring the decrease in the total number of bias motivated incidents—from 6,623 in 1992 to 5,852 in 1994—was a corresponding decrease in types of hate crime.³⁴

Moreover, state and local governments have quite obviously deployed a great many of their resources to combat “hate crimes” in the context of attacking all crime. There is little if any evidence that states are not prosecuting all of the crimes that the proponents of such laws want to see prosecuted. And there is no evidence that serious crimes are being ignored.

²⁵ *Id.*

²⁶ *Id.*, at 97–98.

²⁷ *Id.* at 98.

²⁸ *Id.* at 99.

²⁹ *Id.*

³⁰ Jacobs and Potter, at 137–42.

³¹ *Id.* at 142–44.

³² Jacobs and Potter, at 55–59.

³³ *Id.*

³⁴ *Id.*

By every account, just the opposite is taking place. Consider the multi-jurisdiction response to the recent shootings of Jews, African-Americans, and Asians in and around Chicago in early July. Or consider also the rapid and appropriate response of state and local authorities to the horrifying crimes perpetrated against Matthew Shepard in Wyoming and James Byrd in Jasper, Texas. The outcome of the trials in both of these cases is also instructive. One defendant in the James Byrd Jr. trial was sentenced to death, while two other suspects are awaiting trial.

The state and local responses to serious crimes such as the Byrd and Shepard murders highlight an important weakness in the arguments of those favoring hate crimes legislation. In their rhetoric, they point to murders like those of Byrd or Shepard as evidence of continuing discrimination and hatred. But when it is shown that such crimes are indeed investigated and successfully prosecuted, they maintain that hate crimes legislation is really needed for those category of minor crimes—such as vandalism and minor assaults—which states are not prosecuting because they lack the will or resources.

They can't have it both ways. If the debate about hate crimes legislation is about serious crimes, let the supporters of these laws come forward with evidence that serious crimes are not being investigated or prosecuted. So far as I know, there is no such evidence. In that case, let us recognize this debate for what it is really about—the attempt to make a federal case, literally, out of a range of relatively more minor crimes. In fact, after surveying the FBI's reports on hate crimes, Jacobs and Potter concluded that "most reported hate crimes were low-level offenses, not brutal or murderous attacks."³⁵

There is a misperception among some that states are universally hate crime friendly places. This is not the case. The same political pressures which bear on Congress can be even more intense when focused on local and state prosecutors as they are urged to "throw the book" at perpetrators of such crimes.

Consider the nature of a "hate" crime. It is local. It hurts a community. It rarely affects the interests of other states directly. It is true that crimes seemingly directed at a particular group may leave many other members of that group feeling less secure. But the key point is that everyone in America has the right to be free from fear. If the states don't have enough money to adequately enforce the laws, then let that issue be confronted directly, perhaps in the form of block grants—without strings attached directing that one group or another be subjected to favored treatment. But we need not federalize an act which is already illegal.

Thus, an additional reason why federal hate crime legislation is unwise—is, because it continues the misguided trend of federalizing crimes that can and should be prosecuted at the local level. As was documented in last year's report by the Task Force on the Federalization of Criminal Law, chaired by former Attorney General Edwin Meese, more than 10,000 federal crimes are contained within the U.S. Code (an exact count is impossible).³⁶ These sanctions—many of which are criminal, some of which are civil—are often duplicative and imprecise. And they seem to be growing. Indeed, as the ABA Task Force states, more than 40% of the federal criminal provisions enacted since the Civil War have been enacted since 1970.³⁷

As the preface to that report notes, this "federalization phenomenon is inconsistent with the traditional notion that prevention of crime and law enforcement in this country are basically state functions."³⁸ The Constitution assigned the federal government the power and responsibility to act where there was a need for unified action. And indeed, for much of the nation's history, criminal law and punishment was regarded as one of those spheres of governance better handled at the state level rather than at the federal.

Yet, particularly in recent years, both Democrats and Republicans have elevated political expediency over principle and have adopted a veritable deluge of federal crimes. To quote the ABA Federalism Report, lacking "any underlying principle," Congress duplicated crimes already punishable at the state level with new federal laws.³⁹ Unfortunately, Congress did not limit itself to only those crimes that state and local governments lacked the resources to combat. Rather, "[n]ew crimes are often enacted in a patchwork response to newsworthy events, rather than as part of a comprehensive code developed in response to an identifiable federal need."⁴⁰

³⁵ Jacobs and Potter, at 58–59.

³⁶ Report of the Task Force on the Federalization of Crime (1998) [hereinafter ABA Federalism Report].

³⁷ *Id.* at 7.

³⁸ *Id.* at 2.

³⁹ *Id.* at 14.

⁴⁰ *Id.*

As the ABA Task Force pointed out, these laws unnecessarily concentrate police power at the federal level. They blur lines of accountability. They diminish the prestige of the state courts, and promote disrespect and disregard for the state criminal justice system. Perhaps worst of all, they allow disparate results for identical conduct. Rules of evidence, procedural protections, and punishments are likely to vary between states and the federal government. And in some instances, the states will deal more harshly with criminals, in some other cases it will be the federal government.⁴¹

Harm to the federal administration of justice

Federalizing crimes doesn't only run counter to the principle that states and local governments should be trusted as a general matter to enforce criminal laws. Federal criminal laws also harm the federal system. Among other things, these laws often spring onto the scene as a result of some particularly egregious account reported in the media after having lain dormant for years. They then overwhelm federal prosecutors, judges, and jails.

In his 1997 annual report, Chief Justice William Rehnquist criticized Congress for bringing ever more crimes within the federal government's jurisdiction. After noting that there were more than 50,000 federal criminal cases in 1997, he stated that adding more federal crimes to the books would "exacerbate the problem revealed by these numbers because adult criminal proceedings are far more time-consuming" than many other types of cases.⁴² Yet, as the ABA Federalism Report noted, federalization of crime is unlikely to have a "meaningful impact on street safety and local crime."⁴³ It is similarly unlikely to deter those who are already committed to break a state law by committing a violent act on a member of a minority group.

As the preface to the ABA Federalism Report concluded, "it is precisely because federal law enforcement is so necessary in dealing with indisputable federal interests that a legislative instruction to federal prosecutors to utilize their time and resources to prosecute relabeled common law crimes ought to be restrained."⁴⁴ Once again, federal hate crimes legislation points in the wrong direction.

IV. Hate Crime Legislation Is In Tension With First Amendment Principles

Hate crime legislation punishes people for the content of their ideas. Of course, these ideas are noxious and repulsive to the vast majority of the population—and well they should be. However, the level of disgust harbored by the masses for an idea has never been legitimate criteria for allocating punishment. As Justice Robert Jackson said in his 1943 *Barnette* decision: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."⁴⁵ Justice Jackson's eloquent words apply equally to protect flag burners, Jehovah's Witnesses, and even racists.

In *R.A.V. v. St. Paul*, the Supreme Court reaffirmed that content-based speech restrictions are presumptively invalid and wrong, even when applied to hate speech.⁴⁶ *R.A.V.* struck down a hate-speech law, even though, in the case at issue, a black family had been harassed with a burning cross on their front lawn. Notwithstanding the terrible wrong done to the family, the Supreme Court recognized that punishing the perpetrators based on their racist beliefs—as opposed to punishing them for their actions—was wrong. In so declaring, the Supreme Court reaffirmed a principle championed by Justice Oliver Wendell Holmes, Jr. in his remark that, "[i]f there is any principle of the Constitution that more imperatively calls for attachment than any other, it is the principle of free thought—not free thought for those who agree with us but freedom for the thought we hate."⁴⁷ The *R.A.V.* Court also noted that the act—burning a cross—was already unlawful under generally applicable laws.⁴⁸

RAV v. St. Paul is thus consistent with the centuries-old ideal in the United States that individuals are free to believe what they wish without fear of prosecution. In America, although we certainly hope that individuals will choose wisely in deciding what to believe, we do not punish them when they choose "incorrectly"—even if they choose to become racists.

⁴¹ *Id.*

⁴² Rehnquist report cited at <<http://www.uscourts.gov/ttb/jun98ttb/index.html>>

⁴³ *ABA Federalism Report*, at 22.

⁴⁴ *Id.* at 3-4.

⁴⁵ *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).

⁴⁶ *R.A.V. v. St. Paul*, 505 U.S. 377 (1992)

⁴⁷ *U.S. v. Schwimmer*, 279 U.S. 644, 654-55 (1929)(Holmes, J. dissenting), *overruled*, *Girouard v. U.S.*, 328 U.S. 61 (1946).

⁴⁸ *R.A.V.*, 505 U.S. 379 fn. 1. (noting that "[t]he conduct might have violated Minnesota statutes carrying significant penalties").

Of course, hate crimes legislation applies only where an individual acts on those beliefs. But to be consistent with First Amendment values, the criminal law should focus on effects more than on motivation. To illustrate, it is not at all clear that killing me for my money is worse than killing me because I am Jewish. Certainly my family is equally aggrieved—my children left fatherless, my wife a widow. Punishing the criminal more harshly in the latter case inevitably sends the message that it's somehow less wrong to kill for money. More to the point, punishing the criminal more harshly in the latter case punishes him for his beliefs, when he should be punished (equally, and harshly) for his actions.

It is true that the Supreme Court has not always seen the matter precisely this way. A few years after *R.A.V.*, the Court affirmed Wisconsin's enhancement of a penalty for crimes motivated by religious, racial, or gender bias.⁴⁹ This decision seems to be at odds with *R.A.V.*⁵⁰ It is hard to avoid the conclusion that the additional punishment is a form of criminal sanction for the content of one's thoughts. As Jacob and Potter queried, "If the purpose of hate crime laws is to punish more severely offenders who are motivated by prejudices, is that not equivalent to punishing hate speech or hate thought?"⁵¹

Proponents of hate crime legislation point out that the prosecution of many crimes depends on evidence of the criminal's thoughts. This is indeed true. For many crimes, *mens rea*, or intent, must be established. Yet the inquiry into whether a defendant acted willfully is very different than an inquiry as to whether the criminal was motivated by bias or prejudiced. The inquiries differ in scope and in kind. One difference is in the relative ease in determining willfulness. Evidence that a criminal was willful or intended to maim might be deduced from such activities as casing a target or selecting a particular sort of weapon. Moreover, we have centuries of experience with such a distinction.

Also, the willfulness inquiry is based on conduct not constitutionally protected. By contrast, a successful hate crime prosecution might well rely on evidence of the books the defendant read, the political organizations to which he belongs, and even the remarks one makes. For example, an important piece of evidence in *Wisconsin v. Mitchell* pertained to a recent popular movie the perpetrators had recently watched.⁵² Courts of law should be wary of inquiring into the most intimate details of an individual's personal beliefs, and then meting out punishment accordingly.

Another difference between the traditional probing of motive and the attempt to determine hatred in these crimes is vividly depicted in an example from Jacobs and Potter's book. Consider the example of several white youths who beat a black youth after he reportedly had attempted to rob them. During the course of their beating the black youth—a clearly unlawful overreaction—they hurled racial epithets at him. However, the incident was ultimately *not* labeled a bias-motivated crime because the racial insults were made during, as opposed to before, the crime took place.⁵³

This inquiry typifies the sorts of arbitrary determinations that must be made under hate crimes laws: what did you say and when did you say it, what did you think and when did you think it? Such inquiries are avoided in traditional criminal trials because they are irrelevant. More importantly, there are already fixed rules governing the use of such information. Hate crime laws ultimately force courts into making rulings like this one, because they must enter a domain for which they are ill-equipped and ill-suited—the probing of individuals' constitutionally protected beliefs and associations.

Federal hate crimes legislation enables Congress to claim that it is "doing something" about hate crimes. People may have two different responses. Some may actually believe this. When it turns out not to be true—few criminals are likely to be deterred by an additional federal penalty for a crime that is already unlawful—they will become more cynical. Others will recognize immediately that Congress is posturing, and in the process become even more cynical. Heightened cynicism is the outcome in either event. Yet, at the same time, such legislation invites political warfare along racial, ethnic, religious, and other lines, with each group claiming to be more victimized than the other.

Thus, in my view, we have little to gain and much to lose from this sort of legislation. Federal hate crimes legislation takes us back in the wrong direction, and hurts our national effort at cohesiveness and unity.

⁴⁹ *Wisconsin v. Mitchell*, 508 U.S. 476 (1993)

⁵⁰ Jacobs and Potter, at 126–27 (criticizing the *Mitchell* Court's attempt to explain its decision in light of *R.A.V.* by invoking the speech-conduct distinction).

⁵¹ *Id.* at 121.

⁵² *Mitchell*, 508 U.S. 480.

⁵³ Jacobs and Potter, at 138.

Hate Crime Laws Make Some More Equal Than Others

The Clinton administration has seized on the horrible murder of Matthew Shepard, a gay University of Wyoming student, to justify expanding the scope of existing hate crime legislation. Specifically, the administration proposes to extend the Crime Sentencing Enhancement Act of 1984 to cover crimes motivated by prejudice based on disability, sex and sexual orientation. Politicians and their lobbyists are clamoring. After all, who isn't

For despite the political attractiveness of the measure, the legislation should be rejected for several reasons. First, it results in an unequal and arbitrary treatment of status ju-

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the system. Second, it criminalizes thought rather than conduct. And most important of all, it varies punishment according to the victim's characteristics, thus contravening our society's longstanding and cherished view that every person is equal under the law.

Since the mid-1960s, advocacy groups have claimed that hate crimes are on the increase. In their recent new book "Hate Crimes: Criminal Law and Identity Politics," James Jacobs and Kimberly Potter prove them wrong. They assess the evidence of the supposed rise in hate crimes and conclude that, in contemporary America, there is less prejudice-motivated violence against minority groups than in many earlier periods of American history. The statistics bear this out. The FBI reported 15 bias-related murders nationwide in 1962, and 13 in 1964—hardly a widespread "epidemic."

Even one such crime is unacceptable, but federal intervention is not needed.

Wyoming law enforcement officials have access only to Mr. Shepard's murder aspects are already in conflict. This kind of reaction is representative of the law enforcement agencies across the country. In Milwaukee, for example, the old South, where there were not always evidence to produce convictions. There is evidence that states fail to prosecute crimes against minorities. Sex is a characteristic that makes one better off criminals who attack minorities. The old racialization of state laws gives rise to big battles and an unnecessary piling and are a distraction from the primary goal of swift and severe justice.

Hate crimes legislation also contravenes important American values by creating the category of "thought crimes." Essentially, such laws punish people because of their point of view, however offensive. Many criminal prosecutions require an inquiry into a defendant's intent, but assessments of his actions differs markedly from assessing his opinions about his victim. And distinguishing between opinions and prejudice is often difficult.

Although the current Supreme Court has unanimously upheld a hate crime law, an earlier justice had a different view of First Amendment principles. Justice Oliver Wendell Holmes once said, "If there is any principle of the Constitution that more insistently calls for attachment than any other, it is the principle of free thought—no free thought for those who agree with us but freedom for the thought we hate."

Moreover, although hate crime laws are styled as measures that criminalize a particular motivation, their real purpose is to punish more severely crimes against those possessing a particular status—namely, in the case of the proposed amendment, women, gays, and disabled people. By varying a criminal's punishment based on the victim's status, these laws conflict with both the Judeo-

Christian and common-law traditions. Under ancient laws such as the Code of Hammurabi (1776-1763 B.C.), punishment depended on the status of the victim. A man of his equal would have his own bone broken, but breaking the bone of a commoner required payment of only one mina of silver. Similarly, a member of the leading society struck the daughter of a member of his class, causing a miscarriage, he was obliged to pay to the bride's father a double



having the same effect on a commoner's daughter would cost him only five shekels. The Old Testament rejected the model of punishment that depended on the victim's identity, substituting the equal and proportional standard of "an eye for an eye, a tooth for a tooth." As a general rule, the Bible did not recognize class distinctions in punishment.

The common law followed a similar path. Early in English history, punishments varied by status. The focus of the law was on family groups rather than individuals. As English law developed, it took the individuals and acquitted from punishment that Christians inherited from Jewish law and punish all crimes, without regard to the victim's status.

The U.S. Constitution did not secure equal protection of the laws for all Americans; it took the Civil War for that principle

to be enshrined in our basic law. A key principle of the 14th Amendment was to provide blacks the same legal protection as whites. America's history of disparate treatment of certain groups and individuals is the 14th Amendment's chief aim and its chief test. Federal civil rights laws, such as the Civil Rights Act of 1964, were needed, but the KKK Act was not intended to punish crimes based on race more harshly than other crimes. The purpose of such laws was to create a federal remedy when states failed to enforce the law on a neutral basis. The law is on the books today and has been used in the rare instances where states fail to apply the law neutrally, as in the case of Rodney King's police attackers.

Moreover, the promise of the civil rights movement was of an America in which everyone would be treated equally. The notion of a special category of crime in which the punishment varies based on characteristics of the victim turns the victim of equal protection of the laws on its head. It says that one person's life is worth more than that of another.

More fundamentally, hate crimes legislation encourages groups to vie for protected status by emphasizing the degree of their victimization. In doing so, hate crime laws promote balkanization and resentment. Bill Dobbie, spokesman for the gay group QueerWatch, opposes hate-crime legislation giving gays special protection because it encourages people to "point fingers" resentfully at gay people and say "you're not better than us."

Hate cannot be legislated away; the real struggle is to change attitudes. Crime affects the life of every American. We should all join together to combat it, not convert the fight against crime into another arena for group conflict.

Mr. Troy is a Washington lawyer and an associate scholar at the American Enterprise Institute.

Mr. HYDE. Thank you, Mr. Troy. Professor Lawrence.

**STATEMENT OF FREDERICK LAWRENCE, PROFESSOR OF LAW,
BOSTON UNIVERSITY LAW SCHOOL**

Mr. LAWRENCE. Thank you, Mr. Chairman, and members of the committee. I am delighted, indeed I am honored by the opportunity to testify today on the issue of bias motivated violence, more commonly known as hate crimes, but in fact, as was discussed a little earlier this morning, many crimes are motivated by hate. In fact, what is of precise concern today are those that are motivated by bias of certain kinds—of race, ethnicity, religion, gender, sexual orientation, and disability.

Mr. Chairman, I have spent the last 11 years as an academic and prior to that 5 years as a prosecutor and assistant United States attorney involved with issues of civil rights enforcement, involved with the study and the practice of civil rights crimes enforcement and civil rights enforcement generally.

I would say that the proposed Hate Crime Prevention Act of 1999 will be the most significant piece of Federal criminal civil rights legislation in the last three decades. Indeed, I would go as far as to say that it would be the most significant Federal criminal civil rights legislation in the last 130 years, since the time of Reconstruction.

The proposed legislation raises many significant issues that implicate fundamental values of the American society including free expression and federalism. In my written testimony I have focused on four interrelated questions—whether or not the problem is in fact getting worse; whether or not it is appropriate for the criminal law to punish on the basis of perpetrator's motivation; whether gender and sexual orientation and disability ought to be included in the Federal bias crime law; and finally the issues of federalism.

Mr. Chairman, I would like in the interests of time, and taking your admonition of staying within 5 minutes as seriously as an academic can, to focus on two of those four issues in my time now, namely whether or not it is appropriate to punish based on motivation, and the questions of federalism.

Bias crimes are distinguished from what I will call parallel crimes, meaning similar crimes lacking the bias motivation, by precisely that bias motivation of the perpetrator. Now ordinarily the criminal law is far more concerned with the perpetrator's culpability or mens rea—that is, did he act purposely, recklessly, negligently, or only accidentally—rather than the actor's motivation for his criminal acts.

In the case of bias crimes, however, as with a select group of other crimes where motivation is deemed relevant, motivation is a critical and valid part of the definition of a crime. Motivation is a critical part of the definition of bias crimes because it is the bias motivation of the perpetrator that causes the unique harm of bias crimes.

Bias crimes, as the ranking member mentioned earlier—someone asked whether I was concerned that Congressman Conyers was going to steal my thunder, whatever thunder I have got I can think of nothing I would rather see done with it than have Congressman Conyers steal it.

Bias crimes do in fact attack not only the physical well-being of the victim but it is a spirit murdering. It is an attack not only on the body. It is indeed an attack on the soul and in that way it is a different kind of crime and indeed a worse kind of crime.

Above the impact on the individual, bias crimes because of the bias motivation of the perpetrator, affect not only the individual but the entire target community. Mr. Troy may well be correct when he says that if he is attacked because he is a—what was it, a yuppie?—was that it?—as opposed to being murdered because he is a Jew, that it leaves his children fatherless. That is true. But the truth is, G-d forbid Mr. Troy is attacked as a Jew, then I am attacked as a Jew as well, and that is a privilege and that is a harm that Mr. Troy can't waive for me, so that a bias crime, in fact, harms not only the individual but the entire target community.

Finally, bias crimes have an impact on the society at large because they implicate not only the social contract that we ought not to harm one another, but the particular social contract of equality in this society. It is for precisely that reason that bias crimes must be of concern not only to localities and States but to the Federal Government because of the Federal commitment to equality not as a local right and not as a State right but indeed as a national right of American citizenship. So for all those reasons, motivation is in fact a critical part of the harms that bias crimes cause.

Now the fact that bias motivation is a key element of bias crimes has drawn criticism from those who would say that bias crimes impermissibly stray beyond the punishment of act and purposeful intent and go on to punish motivation. But purely as a matter of positive law, this turns out not to be correct. Concern with punishment of motivation in fact is involved in, for example, a defendant's motivation for homicide, where most States that have a death penalty look to among other factors for the motivation of the killing.

Particularly bias motivation may serve as an aggravated circumstance for those States that have death penalties—*Barclay v. Florida* upheld that precise provision in 1983 by the Supreme Court, reaffirmed in *Dawson v. Delaware*.

Finally, the distinction between motivation and intent is in fact a fairly tricky one and one that we ought not to go down too quickly. The fact is that by motivation we often mean that which is not part of the statute itself, something that is extrinsic to the statute, but that is a matter of how the statute is written. We understand a bias crime to be purposeful conduct, selecting a victim on the basis of race, religion, ethnicity, sexual orientation, or disability. It is purposeful conduct and takes us no further into punishing motivation in any inappropriate way.

[The prepared statement of Mr. Lawrence follows:]

PREPARED STATEMENT OF FREDERICK LAWRENCE, PROFESSOR OF LAW, BOSTON
UNIVERSITY LAW SCHOOL

SUMMARY

The time for a federal hate crime law is long overdue. A federal hate crime law would demonstrate a national commitment to the eradication of a kind of violence that threatens not only our physical safety but our core value of equality. The Hate Crime Prevention Act, H.R. 1082, would be the most important piece of Federal criminal civil rights legislation in thirty years, and, in some ways, the most impor-

tant such legislation since Reconstruction. The proposed legislation raises many significant questions that implicate fundamental values of the American polity. I will focus on four inter-related questions: (i) is the problem of bias crimes getting worse, (ii) is it appropriate for a criminal law to punish on the basis of a perpetrator's motivation, (iii) should gender and sexual orientation be included in a federal bias crime law and (iv) is a prominent federal role in the prosecution and punishment of bias crimes consistent with the proper division of authority between state (and local) government and the federal government in our political system.

As to the first question, the level of bias crimes is hard to measure with precision but it is clearly serious enough to warrant legal attention. As to the other questions, I offer a firm answer in the affirmative. Bias motivation is the key reason that bias crimes cause the harm they do. The resulting harm of a bias crime exceeds that of a similar crime lacking bias motivation on each of three levels: the nature of the injury sustained by the immediate victim of a bias crime; the palpable harm inflicted on the broader target community of the crime; and the harm to society at large. Gender-motivated violence and crimes targeting victims on the basis of sexual orientation are as much bias crimes as racially- and ethnically-motivated crimes. A federal bias crime statute is warranted as a matter of constitutional law and public policy. There is Constitutional authority for the law and it is part of our commitment to the equality ideal. Not all will agree on what exactly "the equality ideal" means. But none can deny that the commitment to equality is a core American principal. Bias crimes thus violate the national social contract, and not only that of the local or state community.

The punishment of hate crimes alone will not end bigotry in our society. That great goal requires the work not only of the criminal justice system but of all aspects of civil life, public and private. Criminal punishment is indeed a crude tool and a blunt instrument. But our inability to solve the entire problem should not dissuade us from dealing with parts of the problem. If we are to be staunch defenders of the right to be the same or different in a diverse society, we cannot desist from this task.

STATEMENT

Mr. Chairman and Members of the Committee:

I am honored by the opportunity to testify today on the issue of bias-motivated violence, more commonly known as hate crimes. My name is Frederick M. Lawrence. I am a Professor of Law at Boston University School of Law where I have been a member of the faculty since 1988. Last week, I completed a three year term as Associate Dean for Academic Affairs. Prior to joining the Boston University faculty I served for five years as an Assistant United States Attorney for the Southern District of New York. From 1986-88 I was the Chief of the Civil Rights Unit of that office. A key focus of my career has been Federal Civil Rights enforcement and civil rights crimes. My book on the subject of bias crimes, *Punishing Hate: Bias Crimes Under American Law* was published by Harvard University Press this past Spring.

I would like to express today my strong support for the proposed amendments to 18 U.S.C. §245 which will delete the current requirements that bias crime victims have engaged in one of six narrowly defined "federal protected activities" in order to fall within the reach of federal criminal law enforcement protection and that extends the protection of federal law to bias crimes motivated by the victim's sexual orientation, gender or disability. These amendments are not only permitted by doctrines of criminal and constitutional law but that are mandated by our societal commitment to equality.

Bias crimes are a scourge on our society. Is there a more terrifying image in the mind's eye than that of the burning cross? Crimes that are motivated by racial hatred have a special and compelling call on our conscience. When predominantly Black churches were in flames across the South during the Summer of 1996, it took only a matter of weeks for Congress to enact and the President to sign the Church Arson Prevention Act of 1996.¹ The Hate Crime Prevention Act, H.R. 1082, would be the most important piece of Federal criminal civil rights legislation in thirty years, and, in some ways, the most important such legislation since Reconstruction. The proposed legislation raises many significant questions that implicate fundamental values of the American polity, including free expression, and federalism. I will focus on four inter-related questions: (i) is the problem of bias crimes getting worse, (ii) is it appropriate for a criminal law to punish on the basis of a perpetrator's motivation, (iii) should gender and sexual orientation be included in a federal bias crime

¹ Church Arson Prevention Act of 1996, 104th Congress, Second Session H. R. 3525, amending 18 U. S. C. § 247.

law and (iv) is a prominent federal role in the prosecution and punishment of bias crimes consistent with the proper division of authority between state (and local) government and the federal government in our political system.

I offer a tentative answer to the first question which suggests that the problem of bias crimes certainly warrants legal attention, and a firm answer in the affirmative to each of the other questions. The enhanced punishment of bias crimes, with a substantial federal enforcement role, is not only permitted by doctrines of criminal law and constitutional law, it is mandated by our societal commitment to the equality ideal.

Is the Problem Getting Worse?

Is the problem of bias crimes actually becoming worse or if it is only our perception that it is worsening? Although it is hard to track the level of the problem with precision, we may offer some helpful preliminary conclusions.

During the 1980's, public concern over the level of racially-motivated violence in the United States rose dramatically. This decade saw the most significant legislative response to the problem of bias crimes since Reconstruction. Such public concern and the consequent enactment of bias crime statutes across the United States probably stemmed, at least in part, from an apparent worsening of the bias crime problem during this period. However, it remains difficult to gauge whether the bias crime problem has actually worsened or merely appears to have done so. Though statistics gathered by both independent and governmental data-gathering organizations support the conclusion that the bias crime problem has worsened, these statistics remain inconsistent and incomplete. Moreover, the statistics gathered toward the end of the 1980's and throughout the early to mid-1990's reflect not only a growth in the bias crime problem, but also an obscuring growth in legislative and administrative response to this problem. Likewise, socio-economic trends, though they also point to a worsening of this problem, remain laden with guesswork and ambiguity. Although determining the true magnitude and morphology of the bias crime problem presents myriad problems, we can draw some tentative conclusions based on the data we do have.

In general, experts and commentators on bias crime agree that these crimes had, throughout the mid and late 1980's and early 1990's, increased annually. For example, the Anti-Defamation League (ADL), the Southern Poverty Law Center (SPLC) and the National Gay and Lesbian Task Force (NGLTF), organizations that collect data on the subject, all reported such persistent growth. The NGLTF reported an increase in anti-gay and lesbian incidents from 2,042 in 1985 to 7,031 in 1989.² Similarly, the ADL, in its Audit of Anti-Semitic Incidents for 1994, reported an all-time high of 2,066 religious bias incidents for that year, coming at the end of a series of significant increases during the early 1990's. Recently, however, some of these groups have reported decreases in bias crimes. For instance, in their 1997 Audit, the ADL reported a twenty-four percent decrease in the number of anti-Semitic incidents since 1994,³ and the National Coalition of Anti-Violence Programs, a nationwide alliance of gay and lesbian advocacy groups, reported a similar decline in anti-gay incidents in 1996.⁴

These trends are difficult to interpret. There is evidence that bias crimes, even if less numerous, have become more violent. Monitoring groups have observed a shift from racially-motivated property crimes such as spray painting, defacement and graffiti, to personal crimes such as assault, threat and harassment.⁵ The SPLC's data-gathering arm, Klanwatch, in 1990, reported that homicides linked to white supremacists or bias motivation had more than tripled since 1989, reaching a total of twenty.⁶ By 1993, Klanwatch noted a "shocking reversal" in the racial profile of the perpetrators and victims of these deadly crimes. Though law enforcement officials had charged whites with all of 1989's and all but one of 1990's racially-motivated slayings, of the fifty-eight such slayings reported nationwide from 1991 to 1993, law enforcement officials charged African-Americans with twenty-seven—a

² Craig Peyton Gaumer, "Punishment for Prejudice: A Commentary on the Constitutionality and Utility of State Statutory Responses to the Problem of Hate Crime," 39 *South Dakota Law Review*, 1, 5 (1994).

³ Anti-Defamation League, *Audit of Anti-Semitic Incidents for 1997*; Anti-Defamation League, *Audit of Anti-Semitic Incidents for 1994*.

⁴ *Ibid.*; "Attacks on Gays Decline Nationwide," *San Francisco Chronicle*, (May 12, 1996).

⁵ Anti-Defamation League, *Audit of Anti-Semitic Incidents for 1996*; "Rise in Hate Crimes Looms Behind Church Burnings," *Christian Science Monitor*, (June 28, 1996); "Combating Hate Crimes," *Los Angeles Times*, 1B (May 17, 1994).

⁶ Charles Lewis Nier III, "Racial Hatred: A Comparative Analysis of the Hate Crime Laws of the United States and Germany," 13 *Dickinson Journal of International Law*, 241, 263 (1995). "The Face of Hatred in America," *The Christian Science Monitor*, 8 (Nov. 27, 1991).

full forty-six percent.⁷ This shift in the African-American's bias crime role—from victim only to perpetrator as well—marked a significant departure from the traditional perception of the bias crime problem. Minorities were no longer only victims, and whites, no longer only victimizers.

In an effort to provide trustworthy statistics for bias crime observers and simultaneously to address flourishing concern over the bias crime problem, Congress, in 1990, passed the Hate Crime Statistics Act (HCSA).⁸ Under this Act, the Department of Justice must collect statistics on the incidence of bias crimes in the United States as a part of its regular information-gathering system. The Attorney General delegated the development and implementation of the HCSA to the Federal Bureau of Investigation's (FBI) Uniform Crime Reporting Program for incorporation among its 16,000 voluntary law enforcement agency participants.⁹ Accordingly, the FBI initiated intensive education and training of state and local law enforcement personnel in the investigation, identification, reporting, and appropriate handling of bias crime.¹⁰

Since the HCSA's implementation in 1991, the FBI has documented general rise in bias crimes. The data collected under the HCSA reveal the following number of bias crimes.¹¹

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

However, these figures, like those reported by other data-gathering organizations, remain vulnerable to charges of inaccuracy. Because the FBI's numbers simply mirror the numbers reported by state and local law enforcement agencies, and because agency participation under the HCSA is voluntary, the completed data more aptly reflect popular perception of the bias crime problem rather than the problem itself. For example, the near seventy percent increase in bias crimes reported between 1991 and 1993 evidences a simultaneous increase in the reporting of such crimes. Specifically, only 2,771 police departments in 32 states participated in data collection and reporting in 1991 while, in 1993, 6,840 police departments in 46 states and the District of Columbia did so.¹² In addition to such inconsistent reporting, the FBI's data also suffer from consistent under-reporting: even with nearly 7,000 agencies participating under the HCSA in 1993 and 1994, over 9,000 agencies throughout the country failed to report altogether, many of them located in major urban centers.¹³

There is a mutual-feedback relationship between the bias crime problem and both the popular perception and official response to the problem. A perceived increase in bias crime as fostered by independent data-gathering and reporting leads to increased public concern regarding such crimes. Such concern leads, in succession, to

⁷"Around the South Hate Crimes by Blacks Soar, Anti-Klan Group Says," *Atlanta Constitution*, A3 (Dec. 14, 1993).

⁸101st Congress, 1st session, 1989, S. Rept. 21, 158.

⁹"Statement of Steven L. Pomerantz, Assistant Director, Criminal Justice Information Services Division, FBI, on the Hate Crime Statistics Act Before the Senate Subcommittee on the Constitution of the Committee on the Judiciary," *Federal Document Clearing House Congressional Testimony*, June 28 1994, available in LEXIS, Nexis Library, CURNWS File.

¹⁰*Ibid.*

¹¹Federal Bureau of Investigation, United States Department of Justice, *Uniform Crime Reports, Hate Crime Statistics 1997; Uniform Crime Reports, Hate Crime Statistics 1996; Uniform Crime Reports, Hate Crime Statistics 1995; Uniform Crime Reports, Hate Crime Statistics 1994; Uniform Crime Reports, Hate Crime Statistics 1993; Uniform Crime Reports, Hate Crime Statistics 1992; Uniform Crime Reports, Hate Crime Statistics 1991*.

In 1994, the only year of a decline in FBI bias crime statistics, Massachusetts, Alabama and Kansas, states that had previously reported bias crimes to the FBI, did not participate in the annual survey. If Massachusetts alone had participated in the 1994 survey, 808 bias crimes would have added to that year's total, yielding an overall level of 8,306, a 7.5% increase over 1993. See Sally J. Greenberg, "The Massachusetts Hate Crime Reporting Act of 1990: Great Expectations Yet Unfulfilled?" 31 *New England Law Review* 125, n 107 (1996).

¹²"Statement of the Anti-Defamation League for Hate Crime Statistics Act Oversight Hearings Before the Senate Judiciary Subcommittee on the Constitution" [hereinafter "The ADL's HCSA Oversight Hearings"], *Federal Document Clearing House Congressional Testimony*, June 28, 1994, available in LEXIS, Nexis Library, CURNWS file.

¹³*Ibid.* Only twenty of the United States's largest thirty cities reported bias crime data to the FBI in 1992. Of the twenty that did report, eight submitted data that was "obviously incomplete."

legislative and administrative response, to increased official reporting and, in effect, to an even greater perceived increase in bias crime, and so on. Thus, problem and perception conflate, and the apparent growth in bias crime becomes not simply a reflection of increased hatred and apathy (as the statistics alone would suggest) but also an indication of increased understanding and action (as the increased response to the problem suggests).

On the other hand, some organizations, including the National Institute Against Prejudice and Violence, report that, despite increased bias crime reporting by police agencies, a majority of bias crime victims do not report incidents at all.¹⁴ In fact, "[d]ue to factors such as [the victim's entrenched] distrust of the police, language barriers, the fear of retaliation by the offender, and the fear of counting exposure," even organized attempts to collect bias crime data, such as the HCSA, probably fail to provide an accurate count of hate crime and its changing face in America.¹⁵ Some bias crime victims view the bias incident as simply too minor to report, thus skewing the statistics even further. Given that intimidation constitutes the most frequently perpetrated bias behavior, and given that intimidation sometimes appears "minor," the problem of under-reporting takes on even greater urgency.¹⁶ Under-reporting by law enforcement agencies, when coupled with under-reporting by victims, points to drastic under-reporting of bias crimes in general.

In addition to all of the problems with measuring the current level of hate crimes, we also face a significant problem with establishing a base-line for a meaningful comparison. The abysmal data available on the hate crime problem prior to the mid-1980's exacerbates the difficulties of gauging whether this problem has actually worsened or only appears to have done so. For instance, it was not until 1978 that the Boston City Police Department became the first law enforcement agency to track racially motivated crimes;¹⁷ it was not until 1981 that Maryland became the first state to pass a reporting statute;¹⁸ and it was not until the mid to late 1980's that several other states implemented similar recording statutes.¹⁹ Furthermore, the SPLC's Klanwatch Project only began gathering statistics on bias crime across the nation in 1979. Likewise, the ADL began gathering and publishing statistics on bias crimes in 1979, but these statistics covered only anti-Semitic incidents, thus leaving a wide gamut of other bias crimes untouched and unreported.

In addition, the growth of organized "hate groups" throughout the United States may further evidence, or perhaps foreshadow, a worsening of the bias crime problem. While it appears that "most hate crimes are committed by individuals who are not associated with any organized group," the greater militancy and violence, as well as the increased membership, of these groups has many observers worried.²⁰ And rightly so.

Klanwatch has reported that, though membership in the traditional Ku Klux Klan has decreased, increased membership in other white supremacist groups has offset this older group's decline.²¹ For example, the Skinhead movement has expanded its ranks from between 1,000 and 1,500 throughout twelve states in 1988 to between 3,300 and 3,500 throughout forty states in 1993.²² Even more frightening than these membership numbers alone, however, is this group's "extraordinary [and increasing] record of violence."²³ Between 1991 and 1993, the Skinhead movement claimed responsibility for twenty-two murders, some perpetrated against minorities, some

¹⁴ "Rise in Hate Crimes Looms Behind Church Burnings," *Christian Science Monitor*, (June 28, 1996); Abraham Abramovsky, "Bias Crime: A Call For Alternative Responses," 19 *Fordham Urban Law Journal*, 875, 885 (1992).

¹⁵ Fernandez, "Bringing Hate Crime into Focus," 291; "Police Beat: Fear, intimidation cloud true statistics on hate-bias crimes," *The Nashville Banner*, (January 9, 1996).

¹⁶ "The ADL's HCSA Oversight Hearings," available in LEXIS.

¹⁷ "Hate Crime Reports Rise in Boston," *The Boston Globe*, 1A (June 20, 1994). The Boston City Police Department actually recorded its highest rate of bias crime during 1978, its first year implementing the recording practice. In that year, the Department recorded 607 bias crimes, a figure which fell steadily to 152 in 1988, but has since risen to 276 in 1993.

¹⁸ Fernandez, "Bringing Hate Into Focus," 267. See *Maryland Annotated Code* art. 88B, §§9(b), 10 (1985).

¹⁹ See 1987 *Conn. Legis. Serv.* 279 (West); *Fla. Stat. Ann.* §877.19 (West 1990); *Idaho Code* §67-2905; *Ill. Rev. Stat.* ch. 127, para. 55a (1988); *Minn. Stat.* §626.5531 (1990); *N.J. Exec. Directive No. 3* (1987); *Okla. Stat. Ann.* tit. 21, §850 (West Supp. 1988); *Or. Rev. Stat.* §181.550 (1989); 71 *Pa. Cons. Stat. Ann.* §250 (Purdon Supp. 1987); *R. I. Gen. Laws* §42-28-46 (1988); *Va. Code Ann.* §52-8.5 (1988).

²⁰ Langer, "The American Neo-Nazi Movement Today," 85.

²¹ "The Face of Hatred in America," 8; "Klan Leader Fights On, Low Membership Hurts KKK's Influence," *Greensboro News and Record*, (April 1, 1997).

²² "Anti-Defamation League, *Audit of Anti-Semitic Incidents for 1996*.

²³ *Ibid.*

against fellow Skins.²⁴ In the preceding three years, the group had claimed responsibility for only six such murders.²⁵

Although it is not possible to say with confidence the extent to which the bias crimes are increasing and the extent to which the increase is in our perception, there are several things that we may say with confidence and it is important that we do so. First, the obvious relationship between perception and problem in no way undercuts the severity of the problem. Our ability to measure the trajectory with precision may be limited, but we are able to confirm the existence today of a serious level of bias-motivated crime. The growth of violence associated with so-called "militias," for example, strongly suggests an increase in hate crimes that is far more than a matter of mere perception. Second, the mutual-feedback relationship between the level of bias crime and the popular perception of this level does not necessarily undermine our determination of the severity of the problem. Here, as elsewhere in criminal law (such as the incidence levels of rape or domestic violence), perception and problem are related. As we broaden our understanding of what constitutes a bias crime, the desecration of a particular graveyard that may have been dismissed as a "prank" in an earlier time is revealed for what it is: bias-motivated vandalism. This does not mean that we are "over-counting" bias crimes today. On the contrary, it means only that previously we were "under-counting" these crimes. In sum, we should be wary of the risk of overkill but not freed from the obligation of vigilance.

Motivation as an element of Bias Crimes

Bias crimes are distinguished from "parallel crimes" (similar crimes lacking bias motivation) by the bias motivation of the perpetrator. A "gay bashing" is the parallel crime of assault with bias-motivated on the basis of sexual orientation. A cross burning on the lawn of a Black family is the parallel crime of vandalism or criminal menacing with racial motivation. Ordinarily, the criminal law is far more concerned with the perpetrator's culpability—did he, for example, act purposely, recklessly, negligently, or only accidentally—rather than the actor's motivation for his criminal acts. In the case of bias crimes, however, as with a select group of crimes where motivation is deemed relevant—motivation is a critical and valid part of the definition of a crime.

Motivation is a critical part of the definition of bias crimes because it is the bias motivation of the perpetrator that caused the unique harm of the bias crime. I will first address the way in which the resulting harm of a bias crime exceeds that a parallel crime on each of three levels: the nature of the injury sustained by the immediate victim of a bias crime; the palpable harm inflicted on the broader target community of the crime; and the harm to society at large. I will then turn to the question of whether motivation may be punished. This question is distinct from the related question of whether punishment of bias crimes is consonant with the First Amendment right to free expression. I believe that it is, as I have argued elsewhere.²⁶ I shall not, however, address this question in this testimony.

Motivation and the Harm Caused by Bias Crimes

Impact of Bias Crimes on the Immediate Victims

Bias crimes may be distinguished from parallel crimes on the basis of their particular emotional and psychological impact on the victim. The victim of a bias crime is not attacked for a random reason—as is the person injured during a shooting spree in a public place—nor is he attacked for an impersonal reason—as is the victim of a mugging for money. He is attacked for a specific, personal reason. Moreover, the bias crime victim cannot reasonably minimize the risks of future attacks because he is unable to change the characteristic that made him a victim.

Bias crimes thus attack the victim not only physically but at the very core of his identity. It is an attack from which there is no escape. It is one thing to avoid the park at night because it is not safe. It is quite another to avoid certain neighborhoods because of, for example, one's race or religion. This heightened sense of vulnerability caused by bias crimes is beyond that normally found in crime victims. Bias crime victims have been compared to rape victims in that the physical harm associated with the crime, however great, is less significant than the powerful accompanying sense of violation.²⁷ The victims of bias crimes thus tend to experience psychological symptoms such as depression or withdrawal, as well as anxiety, feel-

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ See Frederick M. Lawrence, *Punishing Hate: Bias Crimes Under American Law*, 80-102 (1999).

²⁷ Joan Weiss, "Ethnoviolence: Impact Upon the Response of Victims and the Community," in *Bias Crime: American Law Enforcement and Legal Response*, 174, 182 (1993).

ings of helplessness and a profound sense of isolation.²⁸ One study of violence in the work-place found that victims of bias-motivated violence reported a significantly greater level of negative psycho-physiological symptoms than did victims of non-bias motivated violence.²⁹

The marked increase in symptomatology among bias crime victims is true regardless of the race of the victim. The psychological trauma of being singled out because of one's race exists for white victims as well as members of minority groups.³⁰ This is not to suggest, however, that there is no difference between bias crimes committed by white perpetrators against people of color and those bias crimes in which the victim is white, as in *Wisconsin v. Mitchell*. A difference exists between black and Hispanic victims and white victims concerning a second set of factors—that is, defensive behavioral changes. Although bias crimes directed at minority victims do not produce a greater level of psychological damage than those aimed at white victims, they do cause minority bias crime victims to adopt a relatively more defensive behavioral posture than white bias crime victims typically adopt.³¹

The additional impact of a bias-motivated attack on a minority victim is not due solely to the fact that the victim was selected because of an immutable characteristic. This much is true for all victims of bias crimes. Rather, the very nature of the bias motivation, when directed against minority victims, triggers the history and social context of prejudice and prejudicial violence against the victim and his group. The bias component of crimes committed against minority group members is not merely prejudice per se but prejudice against a member of a historically oppressed group. In a similar vein, Charles Lawrence, in distinguishing racist speech from otherwise offensive words, described racist speech as words that "evoke in you all of the millions of cultural lessons regarding your inferiority that you have so painstakingly repressed, and imprint upon you a badge of servitude and subservience for all the world to see."³² Minority victims of bias crimes therefore experience the attack as a form of violence that manifests racial stigmatization and its resulting harms.

Stigmatization has been shown to bring about humiliation, isolation and self-hatred.³³ A individual who has been racially stigmatized will often be hypersensitive in anticipation of contact with other members of society whom he sees as "normal" and will even suffer a kind of self-doubt that negatively affects his relationships with members of his own group.³⁴ The stigmatized individual may experience clinical symptoms such as high blood pressure³⁵ or increased use of narcotics and alcohol.³⁶ In addition, stigmatization may present itself in such social symptoms as an approach to parenting which undercuts the child's self-esteem and perpetuates an expectation of social failure.³⁷ All of these symptoms may result from the stigmatization that results from non-violent prejudice. Non-violent prejudice carries with it the clear message that the target and his group are of marginal value and could be subjected to even greater indignities, such as violence that is motivated by the prejudice. An even more serious presentation of these harms results when the

²⁸ See, e.g., Weiss, *Bias Crime*, 182–183; Melinda Henneberger, "For Bias Crimes, a Double Trauma," *Newsday*, 113 (Jan. 9, 1992); N. R. Kleinfeld, "Bias Crimes Hold Steady, But Leave Many Scars," *New York Times*, A1 (Jan. 27, 1992).

²⁹ Joan C. Weiss, Howard J. Ehrlich, Barbara E. K. Larcom, "Ethnoviolence at Work," 18 *The Journal of Intergroup Relations*, 28–29 (Winter, 1991–92).

³⁰ *Ibid.* The data collected for the study of bias-motivated violence at work was analyzed by ethnicity. There was no statistically significant difference among whites, blacks, and Hispanics in the average number of psychological symptoms experienced as a result of being the victim of bias-motivated violence. *Ibid.*, 29. Moreover, the rates of "ethnoviolent victimization" among whites and blacks in the study were approximately the same. *Ibid.*, 23.

³¹ *Ibid.*, 29. The defensive behavior changes included such items as staying home at night more often, watching children more closely, trying to be "less visible," or moving to another neighborhood. *Ibid.*, 27–28.

³² See Charles R. Lawrence III, "If He Hollers Let Him Go: Regulating Racist Speech on Campus," 1990 *Duke Law Journal*, 461 (1990).

³³ See Richard Delgado, "Words That Wound: A Tort Action for Racial Insults, Epithets, and Name Calling," 17 *Harvard Civil Rights Civil Liberties Law Review*, 136–137 (1982).

³⁴ See, e.g., Allport, *Nature of Prejudice*, 148–149; Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity*, 7–17, 130–135 (1963); Robert M. Page, *Stigma*, 1 (1984); Stevenson & Stewart, "A Developmental Study of Racial Awareness in Young Children," 9 *Child Development*, 399 (1958).

³⁵ See, e.g., Harburg, Erfurt, Havenstein, Chape, Schull & Schork, "Socio-ecological Stress, Suppressed Hostility, Skin Color, and Black-White Male Blood Pressure: Detroit," 35 *Psychosomatic Medicine*, 276, 292–294 (1973).

³⁶ See, e.g., Kenneth Clark, *Dark Ghetto: Dilemmas of Social Power*, 82–90 (1965).

³⁷ See, e.g., Irwin Katz, *Stigma: A Social Psychological Analysis*, (1981); Harry H. L. Kitano, *Race Relations*, 125–126 (1974); Kiev, "Psychiatric Disorders in Minority Groups," *Psychology and Race*, 416, 420–424 (P. Watson, ed., 1973).

potential for physical harm is realized in the form of the violent prejudice represented by bias crimes.³⁸

The Impact of Bias Crimes on the Target Community

The impact of bias crimes reaches beyond the harm done to the immediate victim or victims of the criminal behavior. There is a more wide-spread impact on the "target community"—that is, the community that shares the race, religion or ethnicity of the victim—and an even broader based harm to the general society. Members of the target community of a bias crime experience that crime in a manner that has no equivalent in the public response to a parallel crime. Not only does the reaction of the target community go beyond mere sympathy with the immediate bias crime victim, it exceeds empathy as well.³⁹ Members of the target community of a bias crime perceive that crime as if it were an attack on themselves directly and individually. Consider the burning of a cross on the lawn of an African-American family or the spray-painting of swastikas and hateful graffiti on the home of a Jewish family. Others might associate themselves with the injuries done to these families, having feelings of anger or hurt, and thus sympathize with the victims. Still others might find that these crimes triggered within them feelings similar to the sense of victimization and attack felt by these families, and thus empathize with the victims. The reactions of members of the target community, however, will transcend both empathy and sympathy. The cross-burning and the swastika-scrawling will not just call up similar feelings on the part of other blacks and Jews respectively. Rather, members of these target communities may experience reactions of actual threat and attack from this very event. Bias crimes may spread fear and intimidation beyond the immediate victims and their friends and families to those who share only racial characteristics with the victims.⁴⁰ This additional harm of a personalized threat felt by persons other than the immediate victims of the bias crime differentiates a bias crime from a parallel crime and makes the former more harmful to society.

This sense of victimization on the part of the target community leads to yet another social harm uniquely caused by bias crimes. Not only may the target community respond to the bias crime with fear, apprehension and anger, but this response may be directed at the group with which the immediate offenders are, either rightfully or, even more troubling, wrongfully, identified. Collective guilt always raises complicated questions of blaming the group for the acts of certain individuals. But it is one thing when groups are rightfully identified with the immediate offenders, for example, the association of a bias crime offender who is a member of a skin-head organization with other members of that organization. It is quite another when groups are wrongfully identified with the immediate offenders. Consider, for example, the association of those individuals who killed Yankel Rosenbaum with the Crown Heights black community generally, or of those who killed Yousef Hawkins with the Bensonhurst white community generally. In addition to generating the generalized concern and anger over lawlessness and the perceived ineffectuality of law enforcement that often follows a parallel crime, therefore, a single bias crime may ignite inter-community tensions that may be of high intensity and of long-standing duration.⁴¹

The Impact of Bias Crimes on Society as a Whole

Finally, the impact of bias crimes may spread well beyond the immediate victims and the target community to the general society. This effect includes a large array of harms from the very concrete to the most abstract. On the most mundane level—but by no means least damaging—the isolation effects discussed above have a cumu-

³⁸ Allport, *Nature of Prejudice*, 56-59 (discussing the degrees of prejudicial action from "antilocution," to discrimination, to violence).

³⁹ See, e.g., Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law*, 221 (1990) (stating the importance of empathy in combating discrimination in the United States).

⁴⁰ See, e.g., Robert Elias, *The Politics of Victimization*, 116 (1986); A. Karmen, *Crime Victims: An Introduction to Victimology*, 262-263 (2d ed., 1990); Levin & McDevitt, *Hate Crimes*; Mari J. Matsuda, "Public Response to Racist Speech: Considering the Victim's Story," 87 *Michigan Law Review*, 2330-2331 (1989).

⁴¹ See Robert Kelly, Jess Maghan & Woodrow Tennant, "Hate Crimes: Victimized the Stigmatized," in *Bias Crime: American Law Enforcement Responses*, 26 (Robert Kelly, ed., 1993). The Crown Heights Riots exemplify how the mere perception of a bias crime can lead to violence between racial groups. See, e.g., Lynne Duke, "Racial Violence Flares for 3rd Day in Brooklyn," *Washington Post*, A04 (Aug. 22, 1991) (describing how racial tensions from the vehicular killing of a black child led to riots in Crown Heights between African-Americans and Jews); "Crown Heights the Voices of Hate Must Not Prevail," *Detroit Free Press*, 2F (Aug. 25, 1991) (stating that violence erupted between the African-American and Jewish community after the accidental killing of a black child by a Hasidic Jew).

lative effect throughout a community. Consider a family, victimized by an act of bias-motivated vandalism, which then begins to withdraw from society generally; the family members seek safety from an unknown assailant who, having sought them out for identifiable reasons, might well do so again. Members of the community, even those who are sympathetic to the plight of the victim family and who have been supportive to them, may be reluctant to place themselves in harm's way and will shy away from socializing with these victims or having their children do so. The isolation of this family will not be solely their act of withdrawal; there is a societal act of isolation as well that injures both the family that is cut off and the community at large.

Bias crimes cause an even broader injury to the general community. Such crimes violate not only society's general concern for the security of its members and their property but also the shared value of equality among its citizens and racial and religious harmony in a heterogeneous society. A bias crime is therefore a profound violation of the egalitarian ideal and the anti-discrimination principle that have become fundamental not only to the American legal system but to American culture as well.⁴²

This harm is, of course, highly contextual. We could imagine a society in which racial motivation for a crime would implicate no greater value in society than the values violated by a criminal act motivated solely by the perpetrator's dislike of the victim. It is not easy to imagine such a society, but it is possible. It is indicative of racism's pervasiveness that real-world examples are hard to come by and require us to look to another time and a distant place. In the 1930's anthropologist Ethel John Lindgren reported findings about the Tungus and the Cossacks who, although racially and culturally distinct, lived in close proximity without conflict. Although the Tungus were Mongolian nomads and the Cossacks were Caucasoid Christian village-dwellers, neither group believed itself to be racially superior and, although their cultural practices remained distinct, they maintained supplementary and complementary relations.⁴³

We may thus hypothesize that an assault committed by a Cossack against a Tungus out of bias against the Tungus race would cause no greater injury to the victim, the Tungus community generally, or the entire society, than a simple assault would cause. The animus against the Tungus held by this individual Cossack would represent only an individual abnormal psychological profile. It would not implicate the broad and deep fabric of racial and ethnic prejudice that such acts implicate in our society.

Whatever may be said of the Tungus' and Cossacks' society, it is very clear that its level of racial harmony and absence of racial tension is not present in our society with its legal and social history. Bias crimes implicate a social history of prejudice, discrimination, and even oppression. As such, they cause a greater harm than parallel crimes to the immediate victim of the crime, the target community of the crime, and to the general society.

Motivation as an Element of the Crime

The fact that bias motivation is a key element of bias crimes has drawn criticism from some who have argued that bias crime laws impermissibly stray beyond the punishment of act and purposeful intent and go on to punish motivation. This concern was well stated by the Wisconsin Supreme Court, later overruled by the United States Supreme Court, in *Wisconsin v. Mitchell*:

Because all of the [parallel] crimes are already punishable, all that remains is an additional punishment for the defendant's motive in selecting the victim. The punishment of the defendant's bigoted motive by the hate crimes statute directly implicates and encroaches upon First Amendment rights.⁴⁴

This holding, however, is not required by a careful analysis of the relevant doctrines. Purely as a matter of positive law, concern with the punishment of motivation is misplaced. Motive often determines punishment. In those states with capital punishment, the defendant's motivation for the homicide stands prominent among the recognized aggravating factors that may contribute to the imposition of the

⁴² See, e.g., Delgado, "Words That Wound: A Tort Action for Racial Insults, Epithets, and Name Calling," 140-141. See generally Paul Brest, "The Supreme Court, 1975 Term—Forward: In Defense of the Antidiscrimination Principle," 90 *Harvard Law Review*, 1 (1976).

⁴³ See Kitano, *Race Relations*, 100-101.

⁴⁴ *Mitchell*, 485 N. W. 2d at 812. See Wyant,, 597 N. E. 2d at 812-814.

death sentence. For instance, the motivation of profit in murder cases is a significant aggravating factor adopted in most capital sentencing schemes.⁴⁵

Bias motivation itself may serve as an aggravating circumstance. In *Barclay v. Florida*,⁴⁶ the Supreme Court explicitly upheld the use of racial bias as an aggravating factor in the sentencing phase of a capital case. The Court reaffirmed *Barclay* in 1992 in *Dawson v. Delaware*.⁴⁷ The prosecution in *Dawson* sought to use the defendant's membership in the Aryan Brotherhood as an aggravating circumstance. The Court rejected the prosecution argument but only because the defendant had been convicted of a same race murder, not a bias-motivated murder, and because the prosecution did not argue that the defendant's relationship with the Aryan Brotherhood indicated a propensity for future violence. In this case, therefore, the evidence was deemed irrelevant and thus inadmissible. But in reaching that holding, the Court reaffirmed the holding in *Barclay* that evidence of racial intolerance and subversive advocacy were admissible where such evidence was relevant to the issues involved in sentencing.⁴⁸ Moreover, several federal civil rights crimes statutes explicitly make racial motivation an element of criminal liability.⁴⁹

Finally, racial motivation is the *sine qua non* for a vast set of civil anti-discrimination laws governing discrimination in employment⁵⁰ and housing⁵¹ among others. In most states, for example, unless an employment contract or collective bargaining agreement provides otherwise, an employer may fire an employee for any reason at all or for no reason whatsoever. Under Federal (and often State) civil rights laws, however, this same firing becomes illegal if it is motivated by the employee's race or a number of other protected characteristics. Thus, the only way to determine whether such a firing is legal or not is to inquire at some level into the motivation of the employer. If bias crime laws unconstitutionally punish motivation as a matter of First Amendment doctrine, then this argument should apply with equal weight to those statutory schemes that authorize civil damage awards for otherwise permissible actions such as discharging an at-will employee. No one has seriously challenged civil anti-discrimination laws on this basis nor would any court uphold such a challenge. Bias crime laws do not raise a different issue in any relevant manner.

The second flaw with the argument that motive may not be a basis for punishment is somewhat more abstract. The argument against the punishment of motive is necessarily premised on the assertion that motive can be distinguished from *mens rea*, that is, that motive can be distinguished from intent. Plainly, an actor's intent is a permissible basis for punishment. Indeed, intent serves as the organizing mechanism of modern theories of criminal punishment. Specifically, intent concerns the mental state provided in the definition of an offense in order for assessing the actor's culpability with respect to the elements of the offense.⁵² Motive, on the other hand, concerns the cause that drives the actor to commit the offense.⁵³ On this formal level, motive and intent may be distinguished.

The distinction between intent and motive does not hold the weight that some would place upon it because the decision as to what constitutes motive and what constitutes intent depends on what is being criminalized. Criminal statutes define the elements of the crime and a mental state applies to each element. The mental state that applies to an element of the crime we will call "intent" whereas any men-

⁴⁵ See, e.g., *Model Penal Code* §210.6(3)(g) (Official Draft 1985) (among aggravating circumstances to be considered is whether the "murder was committed for pecuniary gain"); *Conn. Gen. Stat. Ann.* ch. 952, §53a-46a (1958); *Del. Code Ann.* ch. 42, §4209 (1974 & Supp. 1992); *N. H. Rev. Stat. Ann.* ch. 630, §5 (1986 & Supp. 1992).

⁴⁶ *Barclay v. Florida*, 463 U.S. 939, 940 (1983) ("U. S. Constitution does not prohibit a trial judge from taking into account the elements of racial hatred," provided it is relevant to the aggravating factors).

⁴⁷ *Dawson v. Delaware*, 503 U.S. 159 (1992).

⁴⁸ *Ibid.*, 163.

⁴⁹ See 18 U. S. C. §245(b)(2) (proscribing force or intimidation against a victim because of the victim's race and because the victim is engaged in one of certain enumerated activities); 18 U. S. C. §242 (proscribing, inter alia, disparate punishment of persons based on race or national origin); 42 U. S. C. §3631 (proscribing racially-motivated interference with right of access to housing by intimidation and the threat of force). See also Church Arson Prevention Act of 1996, 104th Congress, Second Session H. R. 3525, amending 18 U. S. C. §247.

⁵⁰ See, e.g., *Civil Rights Act of 1964*, Title VII, 42 U. S. C. §§2000e (1988 & Supp. III 1992). See also *Wards Cove Packing Co. v. Atonio*, 490 U. S. 642 (1989); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981) (disparate treatment claims require showing of intentional discrimination by the defendant).

⁵¹ See *Fair Housing Act of 1968*, §804, 42 U. S. C. §3604 (1988), Title VIII.

⁵² Joshua Dressler, *Understanding Criminal Law* 96-97 (1987). See also *Model Penal Code* §2.02(2)(a)(i) (Official Draft 1985) (defining the mental state of "purpose" as a person's conscious object to engage in certain conduct or cause a certain result).

⁵³ See Wayne R. LaFare & Austin W. Scott, *Criminal Law* §3.6, 227-228 (2d ed., 1986).

tal states that are extrinsic to the elements we will call "motivation." The formal distinction, therefore, turns entirely on what are considered to be the elements of the crime. What is a matter of intent in one context may be a matter of motive in another. Consider the bias crime of a racially-motivated assault upon an African-American. There are two equally accurate descriptions of this crime, that is, two different ways in which a state might define the elements of this bias crime: one describes the bias as a matter of *intent*; the other, as a separate matter of *motive*. The perpetrator of this crime could be seen as either:

- (i) possessing a *mens rea* of purpose with respect to the assault along with a *motivation* of racial bias; or
- (ii) possessing a first-tier *mens rea* of purpose with respect to the parallel crime of assault and a second-tier *mens rea* of purpose with respect to assaulting *this* victim because of his race.

Either description accurately states that which a bias crime law could criminalize. The defendant in description (i) "intends" to assault his victim and does so *because* the defendant is a racist. The defendant in description (ii) "intends" to assault an African American and does so with both an intent to assault and a discriminatory or animus-driven intent as to the selection of the victim.

Because both descriptions are accurate, the formal distinction between intent and motive fails. Whether bias crime laws punish motivation or intent is not inherent in those prohibitions. Rather the distinction simply mirrors the way in which we choose to describe them. In punishing bias-motivated violence, therefore, the Hate Crimes Prevention Act raises neither pragmatic nor doctrinal problems concerning a punishment of motivation. Properly understood, bias crime laws punish motivation no more than do criminal proscriptions generally.

Should Gender and Sexual Orientation be Included in a Federal Bias Crime Statute

A bias crime is a crime committed as an act of prejudice. Prejudice, in this context, is not strictly a personal predilection of the perpetrator. A prejudiced person usually exhibits antipathy towards members of a group based on false stereotypical views of that group. But in order for this to be the kind of prejudice of which we speak here, this antipathy must exist in a social context, that is, it must be an animus that is shared by others in the culture and that is a recognizable social pathology within the culture.

Gender and sexual orientation ought to be included in a federal bias crime law as they are in the Hate Crimes Prevention Act. The violence involved in each case arises from a social context of animus. Opponents to including gender generally do not argue that women as a class are unsuitable for bias crime protection. Sex is generally an immutable characteristic, and no one seriously argues that women are not victimized as a result of their gender. Instead, opponents argue that crimes against women are not real bias crimes, that is, that they do not fit the bias crime model. The argument against including sexual orientation instead looks to the qualities of the characteristic itself. Many legislators, either because they view sexual orientation as a choice and not as an immutable characteristic, or because they are wary of giving special rights to gays and lesbians, argue that homosexuals do not deserve inclusion in bias crime statutes.⁶⁴ Both sets of arguments, however, are ultimately flawed.

Should Gender be Included in Bias Crime Laws

Those who argue that gender should not be a bias crime category assert that gender-related crimes do not fit the standard bias crime model. The chief factor in bias crimes is that the victim is attacked because he possesses the group characteristic. From this chief factor, two things follow:

- (i) victims are interchangeable, so long as they share the characteristic; and
- (ii) victims generally have little or no pre-existing relationship with the perpetrator that might give rise to some motive for the crime other than bias toward the group.

⁶⁴ See, e.g., comments by Rep. Woody Burton of the Indiana House, arguing that gays and lesbians choose homosexuality and do not deserve protection under the state's hate crimes bill. "Gay Protection Stays in Hate Crimes Bill," *Chicago Tribune*, 3 (February 2, 1994); comments by Sen. John Hilgert of the Nebraska State Legislature arguing that gays and lesbians do not need protection under the state's a bias crimes bill because they are an "affluent, powerful class." "State Hate Crimes Law Urged Nebraska Legislators hear from Police, Civil Rights Officials," *The Omaha World-Herald*, (February 14, 1997).

Those who oppose the inclusion of gender in bias crime laws argue, among other things, that victims of many gender-related crimes are not interchangeable,⁵⁵ and that victims often have a prior relationship with their attackers.⁵⁶ Because assailants are acquainted with their victims in many gender-related cases, the argument goes, the victims are not interchangeable and the crime does not fit into the bias crime category. Particularly in cases of acquaintance rape and domestic violence, the prior personal relationship between victim and assailant makes it difficult to prove that gender animus, and not some other component of the relationship, is the motivation for the crime.

Gender-motivated violence, however, should be included in bias crime statutes. This is not to say that all crimes where the perpetrator is a man and the victim is a woman are bias crimes. But where the violence is motivated by gender, this is a classic bias crime. This is most obviously true in cases of stranger rape or random violence against women. The case of Marc Lepine makes the point powerfully. Lepine was a 25-year old unemployed Canadian man who killed fourteen women with a semi-automatic hunting rifle at the engineering school of the University of Montreal on December 7, 1989. After the shootings, Lepine took his own life. The killings were clearly gender-motivated. Lepine killed six women in a crowded classroom after separating the men and sending them out into the corridor. Before shooting, he told the women students "you're all a bunch of feminists." He left behind a three page statement in which he blamed feminists for spoiling his life. He listed the names of fifteen publicly-known women as the apparent objects of his anger.⁵⁷

Lepine's crime plainly fits the model of classic bias crimes: his victims were shot solely because they were women and, from his point of view, could well have been a different group of individuals, so long as they were women. An attacker's acquaintance with his victim would not make a race or religion-based crime any less a bias crime. Motive can be difficult to prove in a gender-related crime. Nonetheless, proof of discriminatory motive is difficult for any bias crime, and this has not and should not preclude the enactment of bias crime laws.⁵⁸ Bias crimes should include only gender-motivated violence and not all crimes that happen to have female victims. But those crimes where gender-motivation can be proved clearly share all the characteristics of bias crimes, and should be punished as such.

Sexual Orientation

It is difficult to make a strong argument that crime motivated by bias, on the basis of sexual orientation—"gay bashing"—does not fit the bias crime model. The factors that make some gender-related crimes so problematic, existence of a personal relationship or the lack of victim interchangeability, are not present in most crimes against homosexuals on the basis of their sexual orientation. Many crimes against homosexuals share all of the characteristics of bias crimes.⁵⁹ If one of the purposes of bias crime statutes is to protect frequently victimized groups, sexual orientation is particularly worthy of inclusion. Some surveys indicate that over fifty percent of homosexuals in the United States have been the victims of attacks motivated by sexual orientation.⁶⁰ A Department of Justice report noted that "homosexuals are probably the most frequent victims of hate crimes."⁶¹ Several legislators who have supported the addition of sexual orientation to state and local bias crime laws did

⁵⁵ See Center for Women Policy Studies, *Violence Against Women as Bias Motivated Hate Crime: Defining the Issues*, 32 (1991); Steven Bennett Weisburd & Brian Levin, "On the Basis of Sex: Recognizing Gender-Based Bias Crimes," 5 *Stanford Law and Policy Review* 21, 36 (1994).

⁵⁶ Weisburd and Levin, "On the Basis of Sex: Recognizing Gender-Based Bias Crimes," 38 (discussing the personal relationship dynamic and arguing that the existence of such a relationship should not preclude bias crime classification where there is also evidence of a group component, that is, evidence that victimization is due at least in part to bias against the victim's gender).

⁵⁷ "Montreal Gunman Kills 14 Women and Himself," *New York Times*, A23 (December 7, 1989); "Montreal killer laid blame on women for 'ruining' him," *Boston Globe*, 1 (December 8, 1989); "Montreal Women's Slayer Identified; Long Suicide Note Blames 'Feminists' for Troubles," *Washington Post*, A1 (December 8, 1989).

⁵⁸ Marguerite Angelari, "Hate Crime Statutes: A Promising Tool for Fighting Violence Against Women," 2 *American University Journal of Gender and Law* 63, 98-99 (1994).

⁵⁹ Anthony S. Winer, "Hate Crimes, Homosexuals, and the Constitution," 29 *Harvard Civil Rights—Civil Liberties Law Review*, 353 (1994).

⁶⁰ Gary D. Comstock, *Violence Against Lesbians and Gay Men* 36 (1991).

⁶¹ National Institute of Justice, United States Department of Justice, *The Response of the Criminal Justice System to Bias Crime: An Explanatory Review* (1987).

so at least partly in response to an increase, or at least an increase in reported bias-motivated crimes against homosexuals.⁶²

The debate over the inclusion of sexual orientation in bias crime laws has turned primarily on a different factor: whether homosexuality as a category deserves bias crime protection. At times, this argument has been couched in terms of whether homosexuality is an immutable characteristic in the way that race, color, ethnicity, or national origin are.

The argument for exclusion of sexual orientation from bias crime laws because of the non-immutability of homosexuality is weak for two sets of reasons. First, immutability of homosexuality is far from clear. There is much evidence that sexual orientation is indeed immutable, whether for genetic reasons alone, or some combination of genetic and environmental reasons.⁶³ Even if this evidence is not conclusive, there is certainly no scientific basis to conclude that sexual orientation is a matter of personal choice.

Second, immutability turns out to be a multi-layered concept. Even if we were to assume that homosexuality is indeed chosen behavior, sexual orientation would be appropriate for a bias crime law. After all, this same argument could be made with respect to religion, one of the classic bias crime characteristics. The choice not to remain Jewish or Catholic is certainly more real than the choice not to remain Black. The reason that religion, along with race, color, ethnicity, and national origin, is protected by virtually all bias crime statutes, is that we deem it unreasonable to suggest that a Jew or Catholic might just choose to avoid discrimination by giving up her religion. Indeed, we deem it outrageous. Understood in this light, the question of immutability collapses into a basic value-driven question: are homosexuals somehow deserving of less protection than other groups?

The recent decision of the Supreme Court in *Romer v. Evans*,⁶⁴ is instructive on this point. In *Romer*, the Court struck down Colorado's "Amendment 2," a state constitutional amendment that prohibited any governmental action designed to protect the civil rights of homosexuals. An explicit denial of rights to gays and lesbians is irrational and thus unconstitutional. Only ten years after upholding the Georgia sodomy statute in *Bowers v. Hardwick*,⁶⁵ the Supreme Court concluded that Amendment 2 was "inexplicable by anything but animus toward the class that it affects."⁶⁶ We need not conclude that omission of sexual orientation from a bias crime law is unconstitutional in the same sense as the expressed denial of protection at issue in *Romer*. I would conclude, however, that a government which excluded sexual orientation from a bias crime statute is making a normative statement about the nature of homosexuality and the treatment of gays and lesbians. We make a normative statement about the treatment of gays and lesbians when we frame a bias crime law. Simply put, Congress unavoidably makes a normative statement when it decides which categories to include in the Hate Crimes Prevention Act. Failure to include sexual orientation implies that gays and lesbians are not as deserving of protection as racial, religious, or ethnic minorities. There is no such thing as a "neutral" bias crime law.

The Federal Role and the State Role in the Punishment of Bias Crimes

Because bias crimes are distinguished from ordinary state law crimes solely by the actor's racial motivation toward the victim, we confront three sets of questions concerning federal bias crimes and the federalism problem.

(i) the constitutional question—is there a constitutional basis for federal criminal jurisdiction over bias crimes?

(ii) the prudential question—assuming a constitutional basis for federal criminal jurisdiction over bias crimes, is there a sufficient federal interest here to warrant such legislation?

(iii) the pragmatic question—assuming both a constitutional basis and prudential need for federal bias crime laws, how ought federal and state jurisdiction over these crimes work together?

⁶² See "Hate Crimes May Affect Legislation," *Charleston Daily Mail*, (March 13, 1997); "Panel Hears Harassment Bill Testimony," *Portland Oregonian*, D8 (February 10, 1993); Jo-Ann Armao, "Hate-Crime Bill Voted To Aid Gays," *The Washington Post*, B1 (September 20, 1989); "Lawyers Tell Legislators: Strengthen, Broaden 'Hate Crimes' Law," *AIDS Weekly*, (May 5, 1992).

⁶³ See John Travis, "X Chromosome Again Linked to Homosexuality," *Science News*, 295 (Nov. 4, 1995); Eliot Marshall, "NIH's 'Gay Gene' Study Questioned," *Science*, 1841 (Jun. 30, 1995).

⁶⁴ *Romer v. Evans*, 517 U. S. 620 (1996)

⁶⁵ *Bowers v. Hardwick*, 478 U. S. 186 (1986).

⁶⁶ *Romer v. Evans*, 517 U. S. at 632.

The constitutional question—is there a constitutional basis for federal criminal jurisdiction over bias crimes?

The Thirteenth Amendment provides constitutional authority for a federal bias crime law and I am pleased to see this constitutional source explicitly invoked in the Hate Crimes Prevention Act. The Thirteenth Amendment states that “[n]either slavery nor involuntary servitude . . . shall exist within the United States” and further provides Congress with the power to enforce the amendment “by appropriate legislation.”⁶⁷ Nineteenth and early Twentieth Century judicial interpretation of the amendment interpreted its scope and purpose narrowly, viewing it as a formal statement of emancipation which was largely already accomplished. For example, in *Hodges v. United States*, the Court dismissed an indictment that had charged a group of white defendants with conspiring to deprive black workers of the right to make contracts, because the violation of the right to make a contract was not an incident of slavery.⁶⁸ The modern view of the Thirteenth Amendment is much broader. In a series of cases, the Supreme Court has articulated a theory of the Thirteenth Amendment as a source of broad proscription of all the “badges and incidents” of slavery. Moreover, this proscription applied to the conduct of private individuals, not just to state actions.

The path-breaking case was *Jones v. Alfred Mayer Co.*⁶⁹ in which the Court held that private racial discrimination in the sale of property violated section 1982, a First Reconstruction civil statute that guarantees to all citizens the “same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold and convey real and personal property.”⁷⁰ In this regard, *Jones* expressly overruled *Hodges*. Several years later, in *Runyon v. McCrary*,⁷¹ the Court similarly held that section 1981, a statute of the same period providing all persons with “the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens . . .”⁷² prohibited private racial discrimination in any contractual arrangements. *Runyon* itself involved discrimination in education. In *Jones* and *Runyon*, the Court held that the Thirteenth Amendment provided the constitutional authority for the regulation of private discriminatory conduct. Just as the first section of the Amendment had abolished slavery and all “badges and incidents” of slavery, so the second section empowered Congress to make any rational determination as to that conduct which constitutes a badge or incident of slavery and to ban, whether from public or private sources.

The abolition of slavery in the Thirteenth Amendment, although clearly grounded in the enslavement of African-Americans has always been understood to apply beyond the context of race. As early as the *Slaughter House Cases*, Justice Miller saw the Thirteenth Amendment as a prohibition not only against slavery of black citizens but “Mexican peonage” and “Chinese coolie labor systems” as well.⁷³ Modern cases have extended the protection of the amendment to religious and ethnic groups as well.⁷⁴

As a matter of constitutional authority, Congress may enact a federal bias crime law so long as it is rational to determine that racially-motivated violence is as much a “badge” or “incident” of slavery as is discrimination in contractual or property matters. This determination is surely rational. Racially-motivated violence, from the First Reconstruction on, was in large part a means of maintaining the subjugation of blacks that had existed under slavery. Violence was an integral part of the institution of slavery, and post-Thirteenth Amendment racial violence was designed to continue *de facto* what was constitutionally no longer permitted *de jure*.

The broad reach of the Thirteenth Amendment as understood today goes beyond a prohibition of re-enslavement of those who have been previously enslaved. By protecting ethnic, religious and national origin and other groups whose victimization is based on their gender, sexual orientation or disability, the Thirteenth Amendment is more consonant with a positive guarantee of freedom and equal participation in

⁶⁷ *United States Constitution* Amendment XIII, sections 1, 2.

⁶⁸ *Hodges v. United States*, 203 U.S. 1 (1906). See also discussion in Part B of Chapter 5 of the Thirteenth Amendment and the judicial interpretation of the Amendment in *Slaughter House Cases* and *Civil Right Cases*.

⁶⁹ *Jones v. Alfred H. Mayer, Co.*, 392 U. S. 409 (1968).

⁷⁰ 42 United States Code § 1982.

⁷¹ *Runyon v. McCrary*, 427 U. S. 160 (1976).

⁷² 42 United States Code § 1981.

⁷³ *Slaughter-House Cases*, 83 U.S. 72.

⁷⁴ *St. Francis College v. Al-Khazriji*, 481 U. S. 604 (1987); *Shaare Tefila Congregation v. Cobb*, 481 U. S. 615 (1987).

civil society.⁷⁵ Violence, directed against an individual out of motive of group bias, violates this concept of freedom.

Perhaps out of concern that the Thirteenth Amendment may provide a surer constitutional footing for bias crimes based on race or ethnicity than against members of other groups, the proposed legislation seeks to ground bias crimes based on religion, gender, sexual orientation, and disability in the Commerce Clause. I agree that the Commerce Clause provides additional constitutional support for inclusion of these bias crimes in a Federal statute. Bias crimes affect the decisions of target group members as to where they might work and where they might live. Indeed, bias crimes are often directed at forcing their victims to leave the area where they have settled. The impact of bias crimes on the national economy thus brings the punishment of these crimes within the Commerce Clause power. Even as restricted by the decision in *United States v. Lopez*, in which the Supreme Court struck down the Federal Gun-Free Zones Act,⁷⁸ the Commerce Clause is broad enough to reach such activities as bias-motivated violence. *Lopez* did not overturn the well-established doctrine that upheld numerous federal criminal statutes on the basis of the Commerce Clause, such as a federal loan-shark statute without any showing of a specific interstate nexus,⁷⁷ and such federal crimes as arson,⁷⁸ disruption of a rodeo,⁷⁹ sale or receipt of stolen livestock⁸⁰, and wrongful disclosure of video tape rentals.⁸¹ Moreover, since *Lopez*, numerous lower courts have upheld such federal criminal laws as the 1992 Federal Carjacking Act, the Child Support Act of 1992, the Freedom of Access to Clinic Entrances Act, and the Migratory Bird Treaty Act in the face of challenges that, under *Lopez*, these laws exceeded federal jurisdiction.⁸²

The prudential question—is there a sufficient federal interest to warrant federal bias crime legislation?

There are two sources of strong federal interest in support of such legislation. The first source arises out of the problem of state default in bias crime prosecution. State default was the prime justification for the original creation of federal criminal civil rights. During the Nineteenth and the early Twentieth Century, state governments, particularly in the south, could not be relied upon to investigate and prosecute bias crimes within their jurisdiction. Even through the middle part of this century, state default had remained a critical factor warranting a federal role in bias crimes. But for federal intervention, criminal charges would never have been brought in cases such as *Screws v. United States*,⁸³ *United States v. Guest*,⁸⁴ *United States v. Price*,⁸⁵ (the case arising out of the murder of three civil rights workers, Michael Schwerner, James Chaney, and Andrew Goodman).

This crudest form of state default, present for a full century after the Civil War—of virtual or even literal state complicity in bias crimes—is far less true today. Nonetheless, a less pernicious form of state default continues to exist in some circumstances, and calls for a federal role in these crimes. The contemporary form of state default arises more from systemic factors than from volitional wrong-doing on the part of state actors. For example, cases involving racially-motivated violence are likely to be ones of great local notoriety and to be politically charged. In most states, these cases would have to be prosecuted by an elected District Attorney and decided by a jury from the county in which the event took place. Federal prosecutions would be brought by an appointed United States Attorney who, although not necessarily altogether isolated from the political process, is nonetheless largely immune from politics. It is highly unusual for United States Attorneys to serve more than a single four-year appointed term whereas local District Attorneys are never more than four years (and often less) from the next election. Moreover, federal juries are drawn

⁷⁵ See Charles H. Jones, Jr. "An Argument for Federal Protection Against Racially Motivated Crimes: 18 U. S. C. § 241 and the Thirteenth Amendment," 21 *Harvard Civil Rights—Civil Liberties Law Review* 728-733 (1986); Arthur Kinoy, "The Constitutional Right of Negro Freedom," 21 *Rutgers Law Review* 388-389 (1967).

⁷⁶ *United States v. Lopez*, 514 U. S. 549 (1995).

⁷⁷ *Perez v. United States*, 402 U.S. 146 (1971).

⁷⁸ 18 United States Code § 844(j)(1988).

⁷⁹ 18 United States Code § 43 (Supp V 1993).

⁸⁰ 18 United States Code § 2710 (1988).

⁸¹ 18 United States Code § 10 (1988).

⁸² *United States v. Mussari*, 95 F. 3d 787, (9th Cir. 1996), cert. denied, 117 S. Ct. 1567 (1997); *United States v. Oliver*, 60 F. 3rd 547 (9th Cir. 1995); *Cheffer v. Reno*, 55 F. 3rd 1517 11th Cir. 1995); *United States v. Bramble*, 894 F. Supp. 1384, 1995 Lexis 10745 (D. Hawaii 1995).

⁸³ 325 U.S. 91 (1945).

⁸⁴ *United States v. Guest*, 383 U. S. 745 (1966).

⁸⁵ *United States v. Price*, 383 U. S. 787 (1966).

from federal judicial districts that encompass a far broader cross-section of the population than the community in which a racially-charged event took place.

Consider, for example, the tragic events that occurred in Chattanooga, Tennessee in April, 1980. A group of Ku Klux Klansman fired on five elderly black women after a cross-burning. State criminal charges were brought against three defendants. Two of these defendants were acquitted. The one who was convicted received only a twenty-month sentence, and was paroled after four months. A federal jury, however, in a civil action, awarded the victims \$535,000.⁸⁶ It is arguable, therefore, that a federal criminal jury might well have returned a guilty verdict had the defendants been charged with a federal bias crime.⁸⁷

The second source of federal interest to support federal bias crime legislation applies even in the absence of state default. Although parallel crimes are generally state law crimes, bias crimes are not, or at least not exclusively state law crimes. Racial motivation implicates the commitment to equality that is one of the highest values of our national social contract. Bias crimes affect not only the immediate individual victims and the target victim community but the general community as well. Racial equality was at the center of the Civil War and the constitutional amendments that marked the end of that war and permitted the reintegration of the southern states. Needless to say, equality has not always been observed in deed in the United States and not all would agree on what exactly "the equality ideal" means. But none can deny that the commitment to equality is a core American principal. Bias crimes thus violate the national social contract, and not only that of the local or state community. Even if there were no issue of state default whatsoever, there is a firm prudential basis for a federal role in the investigation and prosecution of bias crimes.

A final aspect of the prudential question concerning a federal bias crime law concerns the need for new legislation. Existing federal criminal civil rights legislation is inadequate to address bias crimes fully. The federal sentencing enhancement legislation applies only to federal crimes that are committed with bias-motivation. Because the parallel crime must be a federal crime itself, this law misses the most common bias crimes which have as their parallel crimes the state law offenses of assault or vandalism. In order to obtain a conviction under section 245(b)(2), the closest thing that there is to an actual federal bias crime law today, the prosecution must prove two elements. The first element requires that the perpetrator committed the act with bias motivation. The second requires either that the perpetrator intended to interfere with certain of the victim's state rights, for example, use of public highways or public accommodations such as a restaurant or a hotel. This second element is often an insurmountable burden that precludes federal involvement in the prosecution of a serious bias crime. Two cases make the point well.

In California, federal prosecutors decided not to prosecute a racist skinhead gang under section 245, even though evidence pointed to a conspiracy to bomb a black church and assassinate some of its members. Instead, the gang members were prosecuted under weapons and explosive charges. The United States Attorney, Mark R. Greenberg, explained that "charging a civil rights violation would have made a very difficult case . . . because of the requirement that a specific 'protected right' be the purpose of the planned attacks."⁸⁸

In the Crown Heights section of Brooklyn, New York, calls for federal action intensified after a Brooklyn jury acquitted Lemrick Nelson of murdering Yankel Rosenbaum, a Hasidic scholar who was stabbed during the Crown Heights rioting. United States Attorney General Janet Reno expressed reluctance even to commence a grand jury investigation of the incident because of a lack of evidence. In particular, Reno stated that federal civil rights laws make it more difficult to successfully prosecute the case than state law.⁸⁹ Not only would federal prosecutors need to prove that Nelson committed the crime and that he did so out of religious motivation, but they would also need to show that the victim was chosen because of his use of public facilities. This last element would be extremely difficult to prove. Indeed, in all likelihood it simply was not true. Despite these evidentiary problems, the Federal government in August of 1994, indicted Nelson on federal charges that he violated Yankel Rosenbaum's civil rights. Two years later, the government ob-

⁸⁶ U. S. House of Representatives Committee on the Judiciary, *Increasing Violence Against Minorities: Hearing Before the Subcommittee on Crime*, 96th Congress, 2nd Session 1980, 26; Seltzer, "Survey Finds Extensive Klan Sympathy," *Poverty Law Reporter* 7 (May/June 1982).

⁸⁷ See Geoffrey Padgett, Comment, "Racially-Motivated Violence and Intimidation: Inadequate State Enforcement and Federal Civil Rights Remedies," *75 Journal of Criminal Law and Criminology* 114-118 (1984)

⁸⁸ Brian Levin, "A Matter of National Concern: The Federal Law's Failure to Protect Individuals from Discriminatory Violence," *3 Journal of Intergroup Relations* 4 (1994).

⁸⁹ "Reno's Doubt on Heights Persists," *Newsday*, 28 (Jan. 27, 1994).

tained the indictment of Charles Price on similar charges.⁹⁰ The Hate Crimes Prevention Act would have permitted the cases against Nelson and Paster to go forward on issues of religious motivation. Although both men were convicted, these cases were cluttered with the issue of the use of public facilities. The need for federal intervention in this case and the federal interest in the killing would have been the same had Rosenbaum been killed with religious motivation in a private building, well off of a public street. But for the seemingly unimportant fact that this bias-motivated murder took place in a street, under current federal law there would have been no convictions in the Crown Heights case.

The pragmatic question—how ought federal and state jurisdiction over bias crimes work together?

The best starting point for considering how concurrent federal and state jurisdiction over bias crimes would proceed is to look to the way in which concurrent federal and state jurisdiction over other civil rights crimes, specifically police brutality, has proceeded. Federal law enforcement has adopted a deferential posture toward state enforcement of civil rights crimes. According to Department of Justice policy, once state or local charges have been filed, federal civil rights investigations are suspended. Although the FBI may conduct an investigation of a civil rights crime at the same time as local authorities, the end-point of this investigation must still be a referral to the Department of Justice, which will defer to any local charges.⁹¹

The limited federal role is driven by prudential, not constitutional factors. As a matter of constitutional law, not only does the federal government have the authority to conduct concurrent investigations to state proceedings, federal prosecutors may proceed even after a full-blown state investigation, trial, and acquittal. This is the scenario that took place in the Rodney King beating case. Ordinarily, dual prosecutions that arise out of the same set of events are barred by the constitution's double jeopardy clause.⁹² There is an exception, however, to acts that violate both federal and state law. Such an act is deemed to violate the law of two sovereigns and, under the "dual sovereignty doctrine," is two separate offenses for double jeopardy purposes.⁹³ The dual sovereignty doctrine has been severely criticized over the years and indeed, it is not easy to defend a doctrine that allows a defendant to be tried twice for what is in reality the same crime.⁹⁴

There is not space here for a full examination of the merits of the dual sovereignty doctrine; this has been done well elsewhere.⁹⁵ Moreover, that is not my purpose. The goal here is, working within existing constitutional doctrine, to devise the best means of facilitating the enforcement of bias crime laws with overlapping federal and state authority. I should note, however, that even though there is federal constitutional authority to engage in dual prosecutions, as a matter of practice these are very rare. Pursuant to an internal policy known as the "Petite Policy," after a case of the same name, the Department of Justice had adopted its own version of a double jeopardy bar to federal prosecutions following state trials for the same criminal acts, whether those trials resulted in conviction or acquittal. The Pe-

⁹⁰ Jim Carnes, *Us and Them: A History of Intolerance in America*, 127 (1995); New York Times, p. B1, col. 5 (Aug. 22, 1996).

⁹¹ Laurie L. Levenson, "The Future of State and Federal Civil Rights Prosecutions: The Lessons of the Rodney King Trial," 41 *UCLA Law Review* 539-540 (1994); *United States Attorney's Manual*, 8-3.340 (vol. 8, July 1, 1992); Ronald Kessler, *The FBI* 209 (1993).

⁹² *United States Constitution*, Amendment V. The double jeopardy clause state: ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life, or limb."

⁹³ *Heath v. Alabama*, 474 U. S. 82 (1985); *Bartkus v. Illinois*, 359 U. S. 121 (1959); *United States v. Lanza*, 260 U. S. 377 (1922).

⁹⁴ See, e. g., Walter T. Fisher, "Double Jeopardy, Two Sovereignties and the Intruding Constitution," 28 *University of Chicago Law Review*, 591 (1961); Lawrence Newman, "Double Jeopardy and the Problem of Successive Prosecutions," *Southern California Law Review*, 252 (1961); Harlan R. Harrison, "Federalism and Double Jeopardy: A Study in the Frustration of Human Rights," 17 *University of Miami Law Review* 306 (1963); Dominic T. Holzhaus, "Double Jeopardy and Incremental Culpability: A Unitary Alternative to the Dual Sovereignty Doctrine," 86 *Columbia Law Review* 1697 (1986); Susan Herman, "Double Jeopardy All Over Again: Dual Sovereignty, Rodney King, and the A.C.L.U.," 41 *UCLA Law Review* 609 (1994).

⁹⁵ There are, roughly speaking, three positions on the Dual Sovereignty doctrine: (i) opposition to the doctrine in all cases because it violates the defendant's constitutional rights; (ii) support of the doctrine as a recognition of the duality of governmental power in a federal system; and (iii) opposition to the doctrine in most cases, but supporting the doctrine in certain exceptional cases, particularly the enforcement of criminal civil rights laws, as was at issue in the Rodney King case. See Herman, "Double Jeopardy All Over Again," Paul Hoffman, "Double Jeopardy Wars: The Case for a Civil Rights Exception," 41 *UCLA Law Review* 649 (1994); and Paul G. Cassell, "The Rodney King Trials and the Double Jeopardy Clause: Some Observations on Original meaning and the ACLU's Schizophrenic Views of the Dual Sovereign Doctrine," 41 *UCLA Law Review* 693 (1994).

tite Policy restricts federal prosecution following a state trial to instances in which compelling reasons exist to prosecute, such as cases in which there remain "substantial federal interests demonstrably unvindicated" by the state procedures.⁹⁶ The Rodney King case, where such compelling reasons were deemed to exist, is thus the exceptional case that proves the rule.⁹⁷ Interestingly, in the appeal of Stacey Koon's federal sentence for his role in beating King, the Supreme Court ruled that the trial judge had not abused his discretion in making a downward departure from the federal sentencing guidelines because of the burden of successive prosecutions.⁹⁸

The Petite Policy uses some of the right reasons to draw the wrong conclusions. Dual prosecutions are surely to be avoided whenever possible and not only due to concern for the defendant but also because of resulting problems for the prosecution. Assume that the state court prosecution ended in an acquittal. Were there a conviction, the argument for a subsequent federal trial would be weak indeed. The testimony of any witness at the state trial would be available for use by the defendant in its cross-examination of that witness if called by the prosecution in the federal trial. Problems in the state case cannot go away merely by trying again. Moreover, there is the risk that federal prosecutors in a subsequent action may be seen, even by a federal jury, as officious intermeddlers and outsiders. In the federal Rodney King trial, the trial judge agreed with a prosecution request that defense counsel would not be permitted to refer to Department of Justice lawyers as "Washington lawyers" during the trial, and issued the following startling ruling: "There will be no reference to 'lawyers from Washington,' . . . That's a stigma that cannot be tolerated."⁹⁹

The Petite Policy is thus correct to try to avoid dual prosecutions as often as possible. It is wrong, however, to assume that the single prosecution that is brought must be a state court prosecution. If, as I have proposed, there were concurrent federal and state criminal jurisdiction over racially-motivated crimes, then bias crimes would join numerous others instances of concurrent criminal jurisdiction—narcotics and organized crime just to mention two. In these areas there is no notion of federal deference to state law enforcement. Indeed, in many instances the presumption is exactly to the contrary. For our purposes, however, the better analogy is to those areas in which federal and state law enforcement work together, particularly at the investigatory stage, and then, when it comes time to determine what criminal charges are to be brought, the merits of each is weighed. At its best, this process produces a careful evaluation of whether relevant federal or state law is the best vehicle for law enforcement in order to right the criminal wrong that was committed. Admittedly, at its worst, this process can degenerate into political squabbling about which office will win a "turf battle" and whether the United States Attorney or the District Attorney will receive the credit for bringing the case. In determining the best means by which to punish bias crimes, however, we need not assume the worst of law enforcement.

A federal bias crime statute should give federal investigators and prosecutors the authority and incentive to pursue racially-motivated violence as vigorously as they might drug cartels or organized crime. Local authorities should do so as well. In cooperation, each may enhance the other's abilities. In states with strong bias crime statutes, and in municipalities with well organized and well trained bias investigation units, federal authorities may well decide to defer to state law enforcement. In states that lack these capabilities, federal authorities should, as they historically were charged to do in cases of outright state default, take the lead.

It has long been recognized that the purpose of federal civil rights enforcement is to create both a sword and a shield: a sword for national government action against the perpetrators of serious social wrongs and a shield to protect the victims.¹⁰⁰ This proposed framework provides a means for strengthening the shield and sharpening the sword.

Conclusion

The punishment of bias crimes by the Federal government will not end bigotry in our society. That great goal requires the work not only of the criminal justice sys-

⁹⁶ Executive Office for United States Attorneys, United States Department of Justice, *United States Attorney's Manual*, 21-25 (Vol. 9, 1985).

⁹⁷ See United States Commission on Civil Rights, *Who is Guarding the Guardians?* 112, 116 (Oct. 1981); *United States v. Davis*, 906 F. 2d 829, 832 (2nd Cir. 1990).

⁹⁸ *Koon v. United States*, 518 U.S. 81, 64 U.S.L.W. 4512, 4521 (1996).

⁹⁹ Levenson, "Civil Rights Prosecutions," 41 *UCLA Law Review*, 560 (1994); Jim Newton, "Judge Rejects Talk of New Riots, Refuses to Delay Trial of Officers," *Los Angeles Times*, B4 (Feb. 3, 1993).

¹⁰⁰ Carr, *Federal Protection of Civil Rights*, 1-5, quoting *Pollock v. Williams*, 322 U.S. 4, 8 (1944).

tem but of all aspects of civil life, public and private. Criminal punishment is indeed a crude tool and a blunt instrument. But our inability to solve the entire problem should not dissuade us from dealing with parts of the problem. If we are to be staunch defenders of the right to be the same or different in a diverse society, we cannot desist from this task.

Mr. HYDE. Thank you, Mr. Lawrence.

Mr. LAWRENCE. Thank you, Mr. Chairman.

Mr. HYDE. Mr. Baker.

**STATEMENT OF JOHN S. BAKER, JR., PROFESSOR OF LAW,
PAUL M. HERBERT LAW CENTER, LOUISIANA STATE UNIVERSITY**

Mr. BAKER. Mr. Chairman, members of the committee, thank you for this opportunity to testify. I am going to focus, given the range of the panel, on what happens in the transition from a high ideal to the practical reality of a statute and the prosecution under it.

In terms of historical development, under the common law all felonies are hate crimes. The common law uses the term "malice" and the definition in the Oxford Eighth Dictionary of hate is "to bear malice." But, as often happens when lawyers get done with a word, the word ends up meaning something much broader or narrower than what the common understanding is. While there may be a consensus that something has to be done about hate, the question is this: how do you define and prosecute acts of hate under the criminal law?

I think it is important to realize how this term "hate crime" developed. The chairman said it was coined in the 1980's and it was, but it was by and large not used until the 1990's. Generally the term, as mentioned by Professor Lawrence, was "bias-motivated crime" but it has expanded. It was expanded largely by the media because it is much easier to say "hate crime" in covering a spectacular story in 30 seconds than it is to explain the elements of criminal law.

The problem with any motive-based crime is not just theoretical. It raises practical and constitutional problems of how you actually prosecute such a crime. The term "hate crime" is not a criminal law term. It is a term, as I have said, developed really in the media. It was legitimated by Congress when this body passed the Hate Crimes Statistics Act of 1990. With statistics developed under this act, sociologists have developed the concept of "hate crimes." If you look at leading and standard criminal law casebooks and treatises, however, you won't find the term "hate crime."

Under criminal law, of course, you couldn't deal with a hate crime because there is no such category; when you create a category like this and you try to translate it into legislation you are generating problems that you haven't anticipated. That is to say you have a definition in the Hate Crimes Statistics Act that you can't simply move into a criminal statute without triggering problems that you have not yet faced.

For instance, we know that the Supreme Court in two cases dealing with the issue has sketched some parameters. *R.A.V. v. City of St. Paul* involved a "hate speech" crime. The crime punished cross-burning. The Supreme Court threw it out on first amendment grounds. In a later case, *Wisconsin v. Mitchell*, however, the Supreme Court upheld what some people thought a hate crime. What

the Supreme Court upheld was, in fact, a penalty enhancement based on motivation. But there is a big difference between considering motivation as a factor in penalty enhancement and putting it in the definition of guilt.

Professor Lawrence talked about the death penalty. Motivation comes into death penalty cases in the penalty phase, not in the guilt phase. If you put a motive element in the guilt phase, strangely, you are making it more difficult for the prosecutor to win his case and you are giving the defendant a platform to testify about his hate views. That happens because by moving it from the penalty phase to the element phase, motivation becomes an element the prosecution must prove. The defense therefore can raise and argue motivation. You allow the defendant to go into his motivations before the jury.

If you thought that criminal courts became involved in a mess when there was broad-ranging psychiatric testimony permitted—something Congress cut back on after the Hinckley case—you will learn that you are opening up similar testimony opportunities for psychologists, psychiatrists, sociologists, and everyone else to decide what the motivation of this particular defendant was.

As a prosecutor, I would tell you that is crazy. Motivation is one thing I would want to keep out of the trial, as a prosecutor trying to prove my case. I don't want the defendant to be able to stand up there and start spouting the reasons why he inflicted this harm on the victim. The proper issues are similarly these: did the defendant have the mental element, did he have the intent, did he commit the crime? If he did that, I don't care what his motive was. Thank you.

Mr. HYDE. Thank you, Professor. Professor Hurd.
[The prepared statement of Prof. Baker follows:]

PREPARED STATEMENT OF JOHN S. BAKER, JR., PROFESSOR OF LAW, PAUL M. HERBERT LAW CENTER, LOUISIANA STATE UNIVERSITY

Mr. Chairman and Members of the Committee: I am grateful for the opportunity to appear before you this morning to testify about "Hate Crimes Violence." Of course, I am expressing my own views and am not representing the university at which I teach.

COINING A TERM

The term "Hate Crime" is not an established criminal law term. While this may seem surprising, one can begin to appreciate the novelty of the term by consulting any of the standard national case books¹ or the leading treatises² on Criminal law. If you do, you will not find the term "hate crime" in any of the indices or tables of contents in these casebooks or treatises.³ The term is not one which fits criminal law terminology; it comes from somewhere else.

¹LLOYD L. WEINREB, CRIMINAL LAW (6th ed. 1998); RICHARD BONNIE ET AL., CRIMINAL LAW (1997); GEORGE E. DIX & M. MICHAEL SHARLOT, CASES AND MATERIALS ON CRIMINAL LAW (4th ed. 1996); SANFORD H. KADISH & STEPHEN J. SHULHOFER, CRIMINAL LAW AND ITS PROCESSES (6th ed. 1996); JOHN KAPLAN ET AL., CRIMINAL LAW (3d ed. 1996); PHILIP E. JOHNSON, CRIMINAL LAW (6th ed. 1995); JOSHUA DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW (1994); JOHN S. BAKER, JR. ET AL., HALL'S CRIMINAL LAW (The Michie Co., 5th ed. 1993).

²WAYNE R. LAFAVE & AUSTIN W. SCOTT, CRIMINAL LAW (2d ed. 1986); ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW (3d ed. 1982); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW (2d ed. 1995); GEORGE FLETCHER, RETHINKING CRIMINAL LAW (1978).

³But for a specialized loose-leaf publication on "hate crimes," see LU-IN WANG, HATE CRIMES LAW (Clark Boardman Callaghan, Release #2, Feb., 1996).

Reading newspapers and listening to television news, though, you would believe that the term "hate crime" has a well-understood and accepted meaning.⁴ Invoking the term certainly does simplify the job of headline writers. It does away with the need for legal analysis, rarely a strength among print or broadcast journalists. But is the term simply the creation of journalists or did they have help from politicians? If politicians favor the term, does that reflect their need to squeeze comments into the 30-second limit on "sound bites"? And who else contributed to creating this term?

The term "hate crime" was an innovation of the 1990s. It has been claimed that state "hate crime" statutes existed since the 1980s.⁵ The model for these state statutes, however, did not mention "hate."⁶ Articles on the subject were relatively rare prior to 1990, and generally before 1992-93.⁷ Some of those articles referred in their titles, not to "hate" crimes, but to "bias" crimes. With its adoption of the "Hate Crimes Statistics Act" in 1990,⁸ though, Congress officially named the newborn. But much of the credit for suggesting the name belongs to the media.⁹

IDENTIFYING HATE

Into the early 1990s, the state hate crimes statutes that did exist commonly involved only data collection, and they differed from state to state.¹⁰ Prior to the federal data collection statute, national data was collected by three private groups: the Anti-Defamation League, the National Gay and Lesbian Task Force Policy Institute, and the Southern Poverty Law Center.¹¹ Each group kept statistics on the types of bias-motivated crimes of particular interest to it. They apparently came together in support of the federal statute to collect statistics, with "the goal of the act [being] to set the stage for beefing up both state and federal legislation."¹²

Definitions of "hate crimes" vary from jurisdiction to jurisdiction.¹³ While that is problem enough for collecting statistics,¹⁴ it becomes a danger any time ill-considered terms are used in the definition of crimes. The term "hate crime" has been applied to a range of statutes and regulations from federal civil rights statutes to university speech codes.¹⁵ In the popular media, the label headlines stories about criminal attacks on racial minorities and homosexuals. Like the label "hate speech" in academia, the adjective "hate" as used in the media to describe crime has become a synonym for "racist" or "bigoted." At least one sociological journal article, however, references a "hate crimes" article in a discussion of serial and mass murder such as depicted in "Silence of the Lambs" and "Natural Born Killers."¹⁶ Even if one is more interested in crimes that have an exclusively racist or homophobic motivation, it would be difficult to dispute that mass killings, as occurred at Columbine High School in Colorado, qualify as "hate crimes," even as to those who were murdered for reasons which do not fit within some definitions of "hate crime."

Assuming a general, a basic agreement on what constitutes a "hate crime," the question arises as to how much of it occurs. As of 1993, the data "reveals that hate offenses are relatively rare."¹⁷ Since then, according to some, supposedly the "statistics show that the incidence of hate crime has been increasing yearly, and has reached a crisis stage."¹⁸ Others, however, dispute the claimed rise in statistics.¹⁹ If the statistics are correct, however, one wonders what explains the rise. It

⁴Media coverage is credited with raising consciousness about hate crimes. JACK LEVIN & JACK McEWITT, HATE CRIMES: THE RISING TIDE OF BIGOTRY AND BLOODSHED 198 (1994).

⁵Wang, *The Disintegrating Power of "Hate": Social Cognition Theory and the Harms of Bias*, 20 *CRIME & JUSTICE* 1, 10 (1997).

⁶ANTI-DEFAMATION LEAGUE OF BNAI B'RITH, HATE CRIMES STATUTES: A 1991 STATUS REPORT 4 (1991) (citing and revised ALL model statute, as cited in Eric J. Granis, *Statewide Hate Crime Legislation: The Construction of a Federal Environment for Bias Crimes*, 20 *CRIME & JUSTICE* 128, 131 (1997)).

⁷WANG, *supra* note 5 at Appendix C, Selected Bibliography.

⁸LEVIN & McEWITT, *supra* note 4 at 197-98.

⁹LEVIN & McEWITT, *supra* note 4 at 197-98.

¹⁰LEVIN & McEWITT, *supra* note 4 at 197-98.

¹¹LEVIN & McEWITT, *supra* note 4 at 197-98.

¹²LEVIN & McEWITT, *supra* note 4 at 197-98.

¹³LEVIN & McEWITT, *supra* note 4 at 197-98.

¹⁴LEVIN & McEWITT, *supra* note 4 at 197-98.

¹⁵LEVIN & McEWITT, *supra* note 4 at 197-98.

¹⁶LEVIN & McEWITT, *supra* note 4 at 197-98.

¹⁷LEVIN & McEWITT, *supra* note 4 at 197-98.

¹⁸LEVIN & McEWITT, *supra* note 4 at 197-98.

¹⁹LEVIN & McEWITT, *supra* note 4 at 197-98.

²⁰LEVIN & McEWITT, *supra* note 4 at 197-98.

²¹LEVIN & McEWITT, *supra* note 4 at 197-98.

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²⁴LEVIN & McEWITT, *supra* note 4 at 197-98.

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³⁰LEVIN & McEWITT, *supra* note 4 at 197-98.

³¹LEVIN & McEWITT, *supra* note 4 at 197-98.

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³⁴LEVIN & McEWITT, *supra* note 4 at 197-98.

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³⁸LEVIN & McEWITT, *supra* note 4 at 197-98.

³⁹LEVIN & McEWITT, *supra* note 4 at 197-98.

⁴⁰LEVIN & McEWITT, *supra* note 4 at 197-98.

⁴¹LEVIN & McEWITT, *supra* note 4 at 197-98.

⁴²LEVIN & McEWITT, *supra* note 4 at 197-98.

⁴³LEVIN & McEWITT, *supra* note 4 at 197-98.

⁴⁴LEVIN & McEWITT, *supra* note 4 at 197-98.

⁴⁵LEVIN & McEWITT, *supra* note 4 at 197-98.

⁴⁶LEVIN & McEWITT, *supra* note 4 at 197-98.

⁴⁷LEVIN & McEWITT, *supra* note 4 at 197-98.

⁴⁸LEVIN & McEWITT, *supra* note 4 at 197-98.

⁴⁹LEVIN & McEWITT, *supra* note 4 at 197-98.

⁵⁰LEVIN & McEWITT, *supra* note 4 at 197-98.

⁵¹LEVIN & McEWITT, *supra* note 4 at 197-98.

⁵²LEVIN & McEWITT, *supra* note 4 at 197-98.

⁵³LEVIN & McEWITT, *supra* note 4 at 197-98.

⁵⁴LEVIN & McEWITT, *supra* note 4 at 197-98.

⁵⁵LEVIN & McEWITT, *supra* note 4 at 197-98.

⁵⁶LEVIN & McEWITT, *supra* note 4 at 197-98.

⁵⁷LEVIN & McEWITT, *supra* note 4 at 197-98.

⁵⁸LEVIN & McEWITT, *supra* note 4 at 197-98.

⁵⁹LEVIN & McEWITT, *supra* note 4 at 197-98.

⁶⁰LEVIN & McEWITT, *supra* note 4 at 197-98.

⁶¹LEVIN & McEWITT, *supra* note 4 at 197-98.

⁶²LEVIN & McEWITT, *supra* note 4 at 197-98.

⁶³LEVIN & McEWITT, *supra* note 4 at 197-98.

⁶⁴LEVIN & McEWITT, *supra* note 4 at 197-98.

⁶⁵LEVIN & McEWITT, *supra* note 4 at 197-98.

⁶⁶LEVIN & McEWITT, *supra* note 4 at 197-98.

⁶⁷LEVIN & McEWITT, *supra* note 4 at 197-98.

⁶⁸LEVIN & McEWITT, *supra* note 4 at 197-98.

⁶⁹LEVIN & McEWITT, *supra* note 4 at 197-98.

⁷⁰LEVIN & McEWITT, *supra* note 4 at 197-98.

⁷¹LEVIN & McEWITT, *supra* note 4 at 197-98.

⁷²LEVIN & McEWITT, *supra* note 4 at 197-98.

⁷³LEVIN & McEWITT, *supra* note 4 at 197-98.

⁷⁴LEVIN & McEWITT, *supra* note 4 at 197-98.

⁷⁵LEVIN & McEWITT, *supra* note 4 at 197-98.

⁷⁶LEVIN & McEWITT, *supra* note 4 at 197-98.

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¹⁰⁴LEVIN & McEWITT, *supra* note 4 at 197-98.

¹⁰⁵LEVIN & McEWITT, *supra* note 4 at 197-98.

¹⁰⁶LEVIN & McEWITT, *supra* note 4 at 197-98.

¹⁰⁷LEVIN & McEWITT, *supra* note 4 at 197-98.

¹⁰⁸LEVIN & McEWITT, *supra* note 4 at 197-98.

¹⁰⁹LEVIN & McEWITT, *supra* note 4 at 197-98.

¹¹⁰LEVIN & McEWITT, *supra* note 4 at 197-98.

¹¹¹LEVIN & McEWITT, *supra* note 4 at 197-98.

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¹¹³LEVIN & McEWITT, *supra* note 4 at 197-98.

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¹²³LEVIN & McEWITT, *supra* note 4 at 197-98.

¹²⁴LEVIN & McEWITT, *supra* note 4 at 197-98.

¹²⁵LEVIN & McEWITT, *supra* note 4 at 197-98.

¹²⁶LEVIN & McEWITT, *supra* note 4 at 197-98.

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¹²⁸LEVIN & McEWITT, *supra* note 4 at 197-98.

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¹³⁰LEVIN & McEWITT, *supra* note 4 at 197-98.

¹³¹LEVIN & McEWITT, *supra* note 4 at 197-98.

¹³²LEVIN & McEWITT, *supra* note 4 at 197-98.

¹³³LEVIN & McEWITT, *supra* note 4 at 197-98.

¹³⁴LEVIN & McEWITT, *supra* note 4 at 197-98.

¹³⁵LEVIN & McEWITT, *supra* note 4 at 197-98.

¹³⁶LEVIN & McEWITT, *supra* note 4 at 197-98.

¹³⁷LEVIN & McEWITT, *supra* note 4 at 197-98.

¹³⁸LEVIN & McEWITT, *supra* note 4 at 197-98.

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¹⁴¹LEVIN & McEWITT, *supra* note 4 at 197-98.

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¹⁴⁹LEVIN & McEWITT, *supra* note 4 at 197-98.

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¹⁵¹LEVIN & McEWITT, *supra* note 4 at 197-98.

¹⁵²LEVIN & McEWITT, *supra* note 4 at 197-98.

¹⁵³LEVIN & McEWITT, *supra* note 4 at 197-98.

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is clear that the media basically created the classification "hate crime" by giving it disproportionate coverage when it was in fact relatively rare. It is also indisputable that highly publicized crimes, like those at Columbine High School, spawn copy-cat crimes. So if, in fact, biased-motivated crimes are on the rise, it is fair to inquire whether media coverage is, unintentionally, fanning the flames of hatred.

CRIME AND HATE

In fact, all true crimes are "hate crimes." The dictionary definition of hate is "to bear *malice* to."²⁰ "Malice" is the traditional common law term used to describe the mental element of all felonies. The use of "malice," specifically "malice aforethought," is most commonly identified with the common law definition of murder. Nevertheless, "malice" is a common-law term used to identify the intent of any felony.²¹ Some of the legal meanings given to the term "malice," however, do not seem to correspond to ordinary meaning.²² The Model Penal Code does not use the term because its draftsmen thought the term confusing. The Model Penal Code's more analytical terminology, however, has led to its own confusions.²³

Thus, it sometimes happens that disconnections occur between the legal meaning and popular understanding of words. The legal meaning of a word may be narrower or broader than the popular meaning. For crimes, however, courts have traditionally insisted that words be given a strict construction,²⁴ which is to say a narrower meaning than common usage might have given to the words. This common law principle of strict or narrow construction reflects the concern to protect the innocent from being prosecuted for acts that do not clearly fall within the prohibition of the statute. Similarly, constitutional principles of due process require that the definitions of crimes have a degree of clarity which avoids "vagueness and overbreadth." The core principle of notice in the Due Process Clause requires not only that citizens know what the law prohibits, but that police, prosecutors, and courts not be permitted to use vague criminal statutes to punish the innocent.²⁵

When courts enforce the rules of construction and the prohibition against "vagueness and overbreadth," they require legislatures to draft clearer and, sometimes, narrower language. A way that legislatures can usually avoid vagueness and overbreadth problems in new statutes is to use common law terminology. By doing so, they need not define a term because the courts will generally assume the legislature understood the term as it was understood at common law.²⁶ Thus, if a legislature uses the term "malice" in a statute, though that term may not seem to be clear to the general public, the courts will give that word the relatively clear legal meaning it has come to have over the centuries. That meaning, in turn, gives notice to the public and restricts the exercise of discretion by police and prosecutors. When, on the other hand, legislators use new terminology, they subject it often to greater scrutiny through construction and the application of the constitutional standards regarding vagueness and overbreadth.

Traditional common law crimes prohibiting murder, rape, robbery, etc., which rarely raise vagueness and overbreadth problems, certainly punish acts of hate which are criminal. Such statutes do not use the word "hate," but through their terminology describing the guilty state of mind (whether employing "malice" or modern language), together with the act, they do in fact punish acts of hate. If someone *intentionally* injures another person or that person's property, the law punishes that hateful act. Thus, despite the "legal technicalities," the criminal law has always punished the most common acts of hate.

CONSTITUTIONAL AND PRACTICAL PROBLEMS

Regardless of the adequacy of current criminal law, many in Congress seem convinced that more should be done to "fight crime;" not only so-called "hate crimes," but all sorts of crimes. I have testified against the federalization of crimes, making both constitutional and practical arguments against the trend.²⁷ Many of these same arguments apply, as well, to federal hate crimes statutes. Nevertheless, I cer-

²⁰ VII OXFORD ENGLISH DICTIONARY 6 (2d ed. 1989) (emphasis added).

²¹ 2 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 120 (1883).

²² *Id.* See also W. LAFAVE & A. SCOTT, CRIMINAL LAW, 606 (2d ed. 1986).

²³ See R. PERKINS & R. BOYCE, CRIMINAL LAW, 860-61 (3d ed. 1982).

²⁴ LAFAVE & SCOTT, CRIMINAL LAW, *supra* note 2 at 77-78.

²⁵ *Id.* at 94-95.

²⁶ *Id.* at 79.

²⁷ John S. Baker, Jr., *Federalization of Criminal Law*. Congressional testimony regarding S.1214 (Federalism Accountability Act of 1999), May 6, 1999. (1999 Westlaw 16947251).

tainly recognize the prerogative of the people's representatives to add new crimes if they do so within constitutional bounds.

So, what specific constitutional limits—other than vagueness and federalism—affect “hate crimes”? Some acts of hate are also speech acts, which means that a “hate crimes” statute may implicate the First Amendment (in addition to overbreadth). Although, as noted above, the term “hate crimes” does not appear in criminal law casebooks or texts, the term “hate speech” certainly does appear in constitutional law books. The Supreme Court's decision in *R.A.V. v. City of St. Paul*²⁸ invalidates under the First Amendment a city's disorderly conduct ordinance which made it a crime to burn a cross or create a Nazi swastika when “one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.”²⁹ On the other hand, the Supreme Court's decision in *Wisconsin v. Mitchell*³⁰ upholds a statute's use of bias motivation to enhance the penalty.

If Congress wishes to do more about bias-motivated crimes, what can it do that it has not already done? The criminal, civil rights statutes already cover much of the ground.³¹ In addition to the federal Hate Crimes Statistics Act,³² the Congress has also passed “Guidelines Regarding Sentencing Enhancements for Hate Crimes” as part of the Federal Sentencing Guidelines.³³ The only thing that Congress has not done is to pass a “hate crime” statute in which “hate” is made an element of the offense, rather than only a penalty enhancement. Should the Congress do so, if it can overcome the constitutional obstacles under the vagueness and overbreadth doctrines, as well as the First Amendment?

As well intentioned as the impulse might be, such legislation would represent yet another example of “feel good” criminal law that does not accomplish what is hoped for and may bring about unfortunate and unintended results. Adding a bias-motivation as an element of a crime does what adding any kind of motivation element does: *it makes convicting the defendant more difficult*. Prosecutors sometimes complain about the difficulty of proving a defendant's intention. Proving motive is even more difficult. Intention goes to the mental element to perform the criminal act (e.g., to strike a person) and/or to achieve a certain end (e.g., death). Motive, on the other hand, involves the reasons for the criminal act. Generally speaking, motive does not and should not matter. It is, therefore, no defense that one committed a crime with a “good” motive. See e.g., *Employment Div., Dept. of Human Resources of Oregon v. Smith*³⁴ (religious belief does not provide a constitutional defense to state law prohibiting the use of peyote). If made an element of a crime, however, motive becomes not only something the prosecution must prove beyond a reasonable doubt, but it provides a potential defense.

From a practical or prosecutorial point of view, it is difficult to understand why any one concerned about bias-motivated crime would want to burden the prosecution with such a requirement and open opportunities for the defense. If bias motivation is added as an element of a simple battery, for example, what was simple becomes potentially complicated. Not only must the prosecution prove the motivation, but it allows the defense to inject its racist or political views as a legitimate issue into the trial. If the defendant is an aggressive racist, it provides him a platform to pitch his views to the jury and possibly divide it along racial lines.

CONCLUSION

Fundamental principles regarding the rule of law emphasize equal treatment before the law. It does not matter why one injures or kills another person. Unless the defendant is legally insane or justified by self defense or one of the related defenses, he is guilty of the crime if he commits a criminal act, with the stated criminal mental element, and that act causes the proscribed harm to a person or property. Consideration of motivation may be appropriate as a sentencing factor, but it rarely has a legitimate connection to the issue of guilt or innocence.

²⁸ 505 U.S. 377 (1992).

²⁹ *Id.* at 380.

³⁰ 508 U.S. 476 (1993).

³¹ WANG, *supra* note 3 at Appendix A (Provisions of Federal Law Relevant to Hate Crimes).

³² *Supra* note 8.

³³ 28 U.S.C. Section 994 (1994); Federal Sentencing Guidelines, Section 3A1.1, (Hate Crime Motivation or Vulnerable Victim), 18 U.S.C. (1998).

³⁴ 494 U.S. 872 (1990).

STATEMENT OF HEIDI M. HURD, ASSOCIATE DEAN FOR ACADEMIC AFFAIRS AND PROFESSOR OF LAW AND PHILOSOPHY, UNIVERSITY OF PENNSYLVANIA LAW SCHOOL

Ms. HURD. Good morning. I am a lawyer, a political philosopher, and also a girl from the west side of Laramie, Wyoming, whose parents live just blocks away from the sad childhood homes of Russell Henderson and Aaron McKinney. As you know, they were the boys who a year ago pistol-whipped to death Matthew Shepard on a buck-and-pole fence crossing a barren, windswept plain outside of Laramie very near to a buck-and-pole fence that I built when I was working for the Youth Conservation Corps in Wyoming when I was 16 years old.

For the past several months my mother has devoted her very considerable energies to lobbying Wyoming legislators for hate crime legislation. So the morality and the political efficacy of this sort of legislation has become a family matter for me; although in keeping with the perverse ways in which daughters must rebel against their mothers, it is still for me, unlike for her, a very troubling matter. And that is because, as a liberal political philosopher, I fear that hate crime legislation is inconsistent with the aspirations of a liberal democracy.

There are two ways to justify hate crime legislation. One is to claim that victims of hate-motivated crimes are harmed more than other victims, and hence, that defendants should be punished more for the greater wrong that they do. The other is to claim that defendants who act out of hate and bias are more culpable than otherwise-motivated defendants, and hence, for that reason, should be punished more.

It is with this latter justification that I am principally concerned. If hate is construed as a *mens rea* requirement, then hate crimes radically depart from all other crimes in three very profound ways.

First, hate and bias crimes alone punish motivations. Criminal culpability is standardly established by showing that the defendant knew what he was doing. Hate crimes commit fact-finders to assessing, in addition, the motivations with which the defendant acted.

Now there are so-called "specific intent crimes" that punish defendants for pursuing certain goals—for example, burglary, that punishes a defendant if and only if he broke and entered with a further motivation of committing a felony therein. But—and this is the second special feature about hate and bias as *mens rea* requirements—hate and bias are not goals. Hatred is an emotion within which a defendant acts, while bias is a standing disposition to make and act on false judgments about others. Specific intent crimes thus punish defendants for pursuing or choosing certain goals. Hate crimes punish defendants experiencing certain feelings or having certain dispositions.

This brings me to the third special feature of hate and bias as *mens rea* requirements. That is that hatred and bias, whether learned or innate, are character traits. Unlike all other criminal mental states, group hatred and bias constitute standing dispositions that, whether learned or innate, reflect enduring aspects of a defendant's personality. In short, unlike all other crimes, hate

crimes punish defendants for bad character. And this fact raises three very profound questions.

First, can we choose our character? Can we will our emotions? Most of us are pretty confident that we and others can choose not to kill, not to rape, not to steal. But inasmuch as we cannot abandon our emotions the way that we can abandon our goals, namely by choice, criminal legislation that punishes emotions targets things that are not readily within our control. And if law ought not to punish us for things that we cannot autonomously affect, then hate crime legislation is suspect for doing just that.

Second, is group hatred worse than the other emotions that typically accompany criminal action? If hate crimes are going to remain unique in picking out emotions as bases for enhanced penalties, then it must be possible either to defend the claim, for example, that misogyny is worse than jealousy, greed, or sadistic desire, or to advance reasons to think that it is at least uniquely responsive to criminal sanctions in a way that other emotions are not.

I don't think we can make out these claims and if we can't make them out, then we have to admit either that hate crime legislation is unjustly arbitrary, because it picks out for extra punishment one of many equally vicious motivations, or we have to generalize hate crime legislation so as to, in all cases, punish defendants proportionate to the viciousness of the emotions with which they act.

Third and most importantly: should legislators in a liberal State be in the business of punishing bad character? Inasmuch as hate crimes punish defendants for vicious character traits, they are most at home within what we call a character theory of the criminal law, one that espouses the punishment of vice and the cultivation of personal virtue. Now these are distinctly nonliberal goals.

Political liberals allow the State to make us act rightly. But they have long insisted that the State may not use its power to improve our thoughts, our beliefs, our hopes and ambitions. In short, government may make our actions good, but it may not make us good actors. Those who favor criminalizing hate must thus admit that they are not liberals. They are rather what we call "legal perfectionists" who would use the law to coerce virtue. It is in its "illiberal" implications that hate crime legislation is profound, and profoundly disturbing. Because such legislation suggests that the State has abandoned the ideal of limited government and is instead extending its power to affect not only what we do but who we are. Thank you.

[The prepared statement of Ms. Hurd follows:]

PREPARED STATEMENT OF HEIDI M. HURD, ASSOCIATE DEAN FOR ACADEMIC AFFAIRS AND PROFESSOR OF LAW AND PHILOSOPHY, UNIVERSITY OF PENNSYLVANIA LAW SCHOOL

I. INTRODUCTION

I am a liberal political philosopher whose work concerns the scope and limits of legitimate criminal legislation. I am also a girl from the West Side of Laramie, Wyoming, whose parents live just blocks away from the sad childhood homes of Russell Henderson and Aaron McKinney—the boys who, a year ago, horrifically pistol whipped to death Matthew Shepard on a buck-and-pole fence crossing a barren windswept plain outside of town—a fence very near one that I helped to build while working for the Youth Conservation Corp when I was 16 years old. Over the past months, my mother has devoted her considerable energies to lobbying Wyoming legislators for hate crime legislation. The morality and political efficacy of this sort of

legislation has thus become a family matter for me—although, in keeping with the perverse ways in which daughters must rebel against their mothers, it is for me, unlike for her, a worrisome matter.

What I want to do today is to raise questions befitting a criminal law scholar and political philosopher. I leave to those who are far better-versed in constitutional doctrine the questions that have arisen concerning the constitutionality of hate and bias crime legislation and the wisdom of further federal criminal legislation of this, or any, sort. I shall focus on the following questions:

1. Is legislation that makes hatred or bias a mens rea requirement consistent with the traditional mens rea doctrines of the criminal law (both federal and state)? Or is such legislation revolutionary in importing into the criminal law wholly new mens rea conditions?
2. If hate and bias crime legislation revolutionizes criminal law mens rea doctrines, what are the moral and political implications of its so doing? Is hate and bias crime legislation consistent with the aspirations of a liberal democracy?

My hope is that, in addressing these questions, I shall make clear just why criminal legislation that targets hate or bias has far-reaching moral and political implications.

II. TWO WAYS TO CONCEPTUALIZE THE DOCTRINAL ROLE OF HATE AND BIAS

Let me begin with the question of how hate and bias crime statutes target a defendant's hatred or bias towards a particular group of persons. There are two possible ways in which legislatures might define a hate or bias crime.

1. *Hate and bias as actus reus elements*

On one interpretation, hate and bias would figure in the actus reus requirement for the crime: To do a hate or bias crime would be to do an action that is experienced by members of a particular community as hateful, disdainful, contemptuous, or uniquely harmful to them qua members of that community. On this interpretation, a defendant is thought to do a greater wrong when he does a criminal deed that appears to a community of persons to be motivated by hatred for, or prejudice against, that community.

Now, it may well be that criminal actions that are motivated by hatred or prejudice are more harmful to their victims than are criminal actions that are otherwise-motivated. And it may well be that hate and bias crime legislation can help to protect vulnerable communities from these special wrongs. These are much-debated empirical questions that I am ill-equipped to address. Whatever their answers, most hate and bias crime statutes do not characterize hate and bias as actus reus conditions. Instead, the language of such statutes appears to favor the second interpretation of the role that hate or bias plays in assessing a defendant's criminal responsibility.

2. *Hate and bias as mens rea elements*

On the second interpretation, a defendant's hatred of or bias against a group makes the defendant more culpable for doing traditionally prohibited harms to members of that group. On this interpretation, hate and bias constitute unique mens rea that merit judgments of increased culpability, and hence, increased criminal liability. This is certainly the role assigned to hatred and bias by the plain language of most state statutes and proposed federal provisions.

If hate and bias crime legislation construes hate and bias as mens rea requirements, rather than actus reus requirements, then there are three important differences between hate and bias crimes and virtually all other sorts of crimes with which the criminal law is concerned. And these differences, it seems to me, are both practically and philosophically profound.

III. THREE DIFFERENCES BETWEEN HATE/BIAS CRIMES AND OTHER INTENTIONAL CRIMES

1. *Hatred and bias are motivational mens rea, unlike all other traditional mens rea.*

The standard means of measuring culpability in criminal law has long been via a very spare set of mental states: Did the defendant purposefully cause a legally prohibited result? Did he knowingly cause it? Was he consciously aware of a substantial and unjustifiable risk that he would cause it—i.e., was he reckless in bringing it about? Or should he have been consciously aware of the risk—i.e., was he negligent with regard to causing the result? The mens rea of hate crimes is unlike the mens rea required for any other crime in that it is uniquely *motivational*.

It has traditionally been true that if a defendant purposefully or knowingly did what he did as a result of *good* or, at least, exculpatory, motivation, that fact has entered into the analysis of the defendant's responsibility at the level of the defenses. For example, if a defendant reasonably believed that his *prima facie* prohibited action was the lesser of two evils, or constituted a necessary means of defending against a culpable aggressor, then the justifications of necessity and self-defense alleviate his liability. If a defendant killed as a result of being provoked into passion in circumstances in which a reasonable person might become similarly impassioned, then the provocation/passion doctrine will reduce his liability from murder to voluntary manslaughter. So good, or at least exculpatory, motivations have traditionally been rewarded by defining defenses in ways that fully or partially exonerate persons for well-motivated or understandably ill-motivated conduct.

But before the enactment of hate crimes, *bad* motivations did not enter into the *prima facie* definition of offenses. At most, they were used to inform decision-makers in the assessment of how much punishment to impose upon a defendant once he was found guilty of an offense. Now, you might ask, what about specific intent crimes? Don't these have motivational *mens rea* requirements? Consider burglary (the defendant must break and enter with some further intention, say to steal, rape, or kill) and attempted murder (the defendant must take a substantial step toward killing another with the further purpose of bringing about that person's death).

The comparison of hate and bias crimes to specific intent crimes brings us to the second difference between the *mens rea* of hate and bias and the traditional *mens rea* with which the criminal law has been concerned (including that of specific intent).

2. *The mens rea required for hate or bias crime liability is an emotional state, not a reason for which one acts.*

Specific intentions have as their objects future states of affairs—perceived goals that constitute reasons for action. To act so as to get money, or so as to subject another to sexual intercourse, or so as to kill someone is not (necessarily or intrinsically) to act on an emotion—it is rather to act so as to obtain what one perceives as a future good. In contrast, hatred and prejudice are not goals. Rather, hatred constitutes an emotional state within which a defendant acts, while bias constitutes a disposition to make and act on false judgments about others.

It might be thought that whatever problems attend these distinctions can be avoided by omitting reference to hatred or bias in the drafting of hate and bias crime legislation (as some state statutes and some proposed federal provisions in fact do). For example, as H.R.77 reads, fact-finders need only find that the defendant picked his victim *because* of the victim's race, ethnicity, religion, gender, sexual orientation, etc. But I take this language to ill-fit the purpose of this sort of legislation and the occasions on which it is, or will be, invoked.

Suppose, for example, that a defendant picks a black victim because he wants to kill someone, and given the bright lighting, the dark color of his victim's skin allows the defendant to see and take aim at that victim better than at surrounding white prospects. Or suppose that a defendant simply wants to steal from someone who was unlikely to put up a serious fight, and so for that reason chooses to mug a woman rather than a man. While in these cases the defendants chose their victims because of their race or gender, these are not paradigm cases of hate crimes, nor, I suspect, would they be prosecuted as such—for they do not reflect actions done out of prejudice against particular communities of people. Indeed, were these hate crimes, virtually all rapes would be hate crimes.

As these cases suggest, the point of hate or bias crime legislation is not to punish defendants who use race, or gender, or other group-defining characteristics of their victims as reasons to choose them as victims. It is rather to punish those who do what they do because they hate, or are prejudiced against, those who are of a particular race, ethnicity, religion, gender, etc. But this makes clear that the real *mens rea* with which hate and bias crimes are concerned is hatred and bias.

Inasmuch as hatred is an *emotion* and bias is a *disposition* to make false judgments, both hatred and bias are quite different from the motivations with which defendants act when committing specific intent crimes. Specific intent crimes criminalize the having of certain goals or further reasons for action. Hate and bias crimes, on the other hand, criminalize the having of certain emotions or dispositions while acting. And these differences bring us to the third special feature of the *mens rea* required for hate and bias crime liability.

3. *Hatred and bias towards particular groups of people are standing character traits, not occurrent mental states.*

The mental states with which hate and bias crimes are concerned are not occurrent states of mind—they are, rather, dispositions possessed over time. While one can form a purpose or fix on a desired object in a moment's time, it is hard to conceive of what it would mean to hate or be prejudiced against a group only momentarily (and were it possible, it would be hard to imagine why the law would deem such momentary emotions uniquely culpable). Rather, to harbor hatred or bias towards a particular group appears to be a (bad or vicious) character trait—that is, a disposition to act in ways that subjugate members of the group when opportunities to do so without recrimination present themselves.

If I am right that hate crime legislation punishes persons for bad character, then hate and bias crime statutes have some surprising implications and raise some very important political questions. Let me pose three such questions, and say why the answers that one gives may have profound implications for the future of American criminal law.

IV. THE IMPLICATIONS OF CRIMINALIZING VICIOUS CHARACTER TRAITS

1. *Can we choose our character traits? Can we will our emotions?*

Most of us are pretty confident that would-be defendants can choose not to rape, steal, and kill. But it seems less clear to what degree people can will away, or choose not to have, particular character traits, and specifically, particular emotions.

People clearly spend lots of money in therapy to change themselves for the better. And people can, with mixed success, alter their character by repeatedly putting themselves in circumstances that challenge them to behave in ways that, over time, affect their beliefs, emotional reactions, and dispositional responses. For example, someone might not be able to will away his disdain for the poor; but he might be able to rid himself of that disdain by moving to the ghetto and volunteering his time to help those in need, so that over time his disdain fades to pity, and then to admiration for the hardiness required to persevere in poverty. And perhaps by punishing people particularly harshly when they do bad deeds out of hatred for, or bias against, their victim's race, ethnicity, religion, sexual orientation, etc., we will motivate people to take actions that will indirectly alter, over time, their emotional responses to such characteristics.

But mothers are famous for telling their daughters not to marry men on a promise that they will change. And parents regularly marvel that their children's most defining character traits were largely fixed at birth. So while it's certainly the case that character isn't immutable, it also can't readily be changed merely by willing it to be other than it is.

Inasmuch as we can't abandon our emotions or dispositions the way we can abandon our goals—i.e., simply by choice—criminal legislation that targets emotions or dispositions targets things that are not fully or readily within a defendant's immediate control. And if law ought not to punish us for things that we cannot autonomously affect, then hate and bias crime legislation is suspect for doing just that.

2. *Is hatred or bias toward persons because of their particular race, religion, gender, sexual orientation, etc., worse than other emotional states that often accompany criminal action?*

I am in fact quite sympathetic to the view that moral culpability is largely a function of character—of the motivations that guide us and the emotions that attend our actions. But hatred and bias towards a particular group are but two of many culpable emotions and dispositions. Are they the worst of the bunch? Are they so rotten as to justify special criminal attention?

How does hate compare to greed, or jealousy, or revenge, or cowardliness? If hate and bias crimes are going to remain unique among crimes in picking out emotional and dispositional motivations as bases for increased punishment, then it must be possible either:

- (1) to defend the claim that, say, racial hatred or gender bias is morally worse than greed, jealousy, and revenge; or
- (2) to advance some reason to think that such hatred and bias is uniquely responsive to criminal sanctions in a way that greed, jealousy, and vengeance are not.

I think it unlikely that we can sustain either of these arguments.

If it is not possible to defend either of these reasons to target the motivations of hatred and bias uniquely, then it is necessary either:

- (1) to conclude that hate and bias crime legislation is arbitrary, and hence, unjust, because it picks out for extra punishment a set of emotional and dispositional states that are a subset of a larger class of equally vicious states; or
- (2) to generalize hate crime legislation by radically revising our culpability doctrines so as to take into account, and mete out punishment in proportion to, all culpable emotional and dispositional states that motivate defendants to do criminal deeds—from racial bias to jealousy to sadism to road rage.

3. *Should the criminal law punish persons for bad character?*

Inasmuch as hate crime legislation ultimately punishes persons for standing traits of character, it is best explained by, and most at home within, what is called a "character theory of the criminal law"—a theory that takes the proper goals of criminal law to be the punishment of vice and the cultivation of virtue. And these are distinctively *non-liberal* goals.

Political liberals allow that the State may use its power to make us act in ways that are right; but they generally insist that the State may not use its power to impose a particular conception of the good life on its citizens. It may not legislate virtue or suppress vice. It may not invade the realm of private beliefs, desires, hatreds, biases, hopes, ambitions, etc. In short, it may make our *actions good*, but it may not make us *good actors*.

Those who favor hate crime legislation, and its implicit license to use the power of the state to suppress vice and encourage virtue, have to admit that they are not liberals. They are, rather, "political perfectionists," who view the legitimate power of the state as extending to legislation that will nurture in us charitable, kind, courageous dispositions, and eliminate selfish, cowardly, cruel dispositions. Political perfectionism is not without impressive defenders. But the power that it bequeaths to the State is breathtaking in comparison to the power that is jealously awarded legislators by liberals and conservatives who alike favor limited government (with all of its inevitable foregone opportunities).

It is in its "il-liberal" implications that hate crime legislation is profound, and it is in its "il-liberal" implications that it is, and ought to be, profoundly disturbing—even to those who do not count themselves card-carrying liberals. For such legislation suggests that the state has abandoned the constraints of liberalism and extended its power to affect not only what we do, but who we are.

Mr. HYDE. Thank you very much, Professor Hurd. Professor Yoo.

STATEMENT OF JOHN YOO, PROFESSOR OF LAW, BOALT HALL SCHOOL OF LAW, UNIVERSITY OF CALIFORNIA AT BERKELEY

Mr. YOO. Thank you, Mr. Chairman, and thank you to the committee for giving me the opportunity to comment on the constitutionality of federalizing—making a Federal crime out of hate crimes.

It is my considered opinion, and after talking with numerous colleagues who teach constitutional law at different schools in the country, that much of an effort to make hate crimes a Federal crime would probably fail to pass constitutional muster at the Supreme Court if Congress were to pass the legislation this year without taking more time and engaging in more fact-finding to actually determine whether hate crimes are truly a national problem and whether they have a sufficient connection to other interstate commerce or to the lasting lingering effects of slavery.

First, let me address the commerce clause grounds justifications for hate crimes legislation, and then I will discuss the 13th amendment grounds.

In the commerce clause area, the Supreme Court's most recent precedent is *United States v. Lopez*, and in *United States v. Lopez* the Supreme Court said that there are only two bases on which Congress can justify using its commerce clause powers to pass legislation to affect activities that have a substantial effect on interstate commerce.

First, Congress can do so if it can show or if the statute—I am sorry—the activity regulated has a substantial effect on interstate commerce, and in this respect the Court said that it would not just take Congress' word for it, that it would engage in its own independent review of whether a certain activity had an impact on interstate commerce, and it had to be a substantial effect and further, and this was the major innovation I think of *Lopez*, the Court said it had to be a commercial activity. Congress could not try to regulate what it called a non-commercial activity that it asserted had a substantial effect on interstate commerce.

Second, the Court said in *Lopez* that Congress could use its commerce clause powers if the statute contained what it called a jurisdictional nexus, in other words, that in each and every crime that was actually prosecuted under a statute there would have to be a link to interstate commerce in some way which the prosecution would have to prove as an element of the crime at trial.

Now under these two elements of the test I think that hate crimes legislation has some serious problems unless Congress engages in fact-finding first.

First, it doesn't seem to me that hate crimes are a commercial activity in the sense that the Supreme Court used the phrase in *United States v. Lopez* and in *Lopez* itself Congress had passed a law that made possession of guns near school zones or within school zones a Federal offense, and the Supreme Court there said that that was not a commercial activity that had a sufficient impact on interstate commerce. In fact, the Court said possession of handguns in schools is essentially a non-commercial activity.

I think hate crimes will fall into the same category. Hate crimes themselves are not a commercial enterprise that involve production or sale of different kinds of goods or services.

One way to see what the courts might do with some kind of hate crimes legislation would be to look at the fourth circuit's opinion in *Brzonkala v. Virginia Polytechnic Institute*, which it decided en banc a few months ago. In that opinion the fourth circuit, sitting as a whole circuit, struck down the Violence Against Women Act, which Congress had passed on very similar rationale to the rationales that are being given for hate crimes legislation.

There, even though Congress had included in its committee reports and even though defenders of the statute in court had argued that the statute—that violence against women had a sufficient impact on interstate commerce, nonetheless the court there said that it was a non-commercial activity and could not survive constitutional review.

Let me turn quickly to the 13th amendment. I suppose the other justification for hate crimes legislation would be under Congress' section 2 enforcement powers under the 13th amendment. In the *Jones* case the Supreme Court has said that that provision gives Congress the ability to regulate private activity and to try to outlaw private activity that is the result of what it called the badges and incidents of slavery.

The problem with hate crimes legislation I think is that if it goes beyond race, it would fall outside what the Supreme Court has recognized to be at the core of the 13th amendment, and so if Congress were to attempt to pass a law involving hate crimes that go

beyond race, it would raise what we call City of Boerne problems. Essentially in the last three terms of the Court, in City of Boerne and a case called Florida Prepaid, the Court said that it would not be willing to allow Congress to expand the definition of rights under the reconstruction amendments unless Congress conducted substantial fact-finding procedures that showed an actual national problem to essentially justify the use of the 13th or 14th amendments.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Yoo follows:]

PREPARED STATEMENT OF JOHN YOO, PROFESSOR OF LAW, BOALT HALL SCHOOL OF LAW, UNIVERSITY OF CALIFORNIA AT BERKELEY

Mr. Chairman and members of the Committee, my name is John Yoo and I am a professor of law at the University of California at Berkeley School of Law (Boalt Hall), where I teach constitutional law, foreign relations law, and the legislative process. In the last few years, I have devoted substantial research and writing to issues of federalism, the separation of powers, and constitutional remedies.¹ I also have served as General Counsel to the Judiciary Committee of the U.S. Senate and as a law clerk to Justice Clarence Thomas of the U.S. Supreme Court and to Judge Laurence Silberman of the U.S. Court of Appeals for the District of Columbia Circuit.

I would like to thank the Chairman and the Committee for the opportunity to testify on "Hate Crimes Violence." I would like to focus my comments on the constitutional issues that arise from proposals to make a federal crime certain criminal acts taken because of the race, color, religion, national origin, gender, sexual orientation, or disability of the victim. In essence, a federal prohibition on such crimes would go beyond 18 U.S.C. § 245, which currently prohibits violent crimes against individuals who are conducting six federally protected activities.

There can be no doubt that hate crimes are a terrible problem. As a lawyer, former public servant, and a citizen of Asian descent, I believe that our law enforcement agencies should use all of the resources at their disposal to wipe out crimes that result from hatred of a community of people, solely because they share an immutable trait. Hate crimes may be more likely to provoke an escalating spiral of other crimes, they leave deep, long-lasting harms to whole communities as well and individual victims and their families, and they deny the very essence of what it is to be an American.

Nonetheless, I have serious concerns about whether federal criminal legislation is the appropriate response to the incidents of hate crimes that have occurred recently. Any federal efforts to regulate hate crimes would have to be undertaken pursuant to Congress's powers under either the Interstate Commerce Clause or the Thirteenth Amendment. In recent years, the Supreme Court has clarified the Constitution's restrictions on Congress's exercise of its powers under both the Interstate Commerce Clause and Section Five of the Fourteenth Amendment. See *United States v. Lopez*, 514 U.S. 549 (1995); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Florida Prepaid Postsecondary Educ. Expense Board v. College Savings Bank*, 119 S. Ct. 2199 (1999). Having closely examined these cases with hate crimes in mind, it is my considered judgment that most federal efforts to criminalize hate crimes cannot survive the federalism standards recently articulated by the Supreme Court. Not only does much of the hate crime problem go beyond what Congress may regulate under the Interstate Commerce Clause, but Congress has yet to perform the extensive fact-finding required to demonstrate that hate crimes are a national problem that requires a federal solution. Efforts to seek justification from the enforcement provision of the Thirteenth Amendment would encounter similar constitutional problems.

Of course, Congress could choose to ignore the Supreme Court and pass federal hate crimes legislation anyway. Congress has an independent right to interpret the Constitution and to seek to enforce its meaning, but it cannot force the other branches to accept that meaning. Such an unfortunate exercise of power in this case

¹ See John Yoo, *The States and Judicial Review* in FEDERALISM (Daniel B. Rodriguez & Mark Killenbeck, eds., forthcoming 2000); John Yoo, *Sounds of Sovereignty: Defining Federalism in the 1990s*, 32 Ind. L. Rev. 27-44 (1998); John Yoo, *The Judicial Safeguards of Federalism*, 70 S. Cal. L. Rev. 1311-1405 (1997); John Yoo, *Who Measures the Chancellor's Foot?: The Inherent Remedial Powers of the Federal Courts*, 84 Cal. L. Rev. 1121-1177 (1996).

could have long-term negative effects for Congress and the cause of eradicating hate crimes. A hate crimes law only would present the federal courts with another opportunity to restrict congressional power. Unlike the transient problems that give rise to much federal legislation, such a precedent would be a permanent bar on all future exercises of legislative authority. Further, another example of judicial invalidation would create the public impression that the government does not have the ability to combat hate crimes, when in fact there are several other tools available to the federal government aside from federalizing yet another area of state law. A more effective response would be not the adoption of constitutionally-defective criminal laws, but instead the implementation of more modest proposals—such as federal aid or more cooperative arrangements between federal and state law enforcement—to address hate crimes.

I. FEDERALISM

I will begin with some first principles. The Constitution establishes a government of limited, enumerated powers. The framers believed that the national government would act in certain, discrete areas, such as foreign affairs and interstate commerce, while the states and the people as a whole would retain authority over all of the areas not delegated to Congress. As James Madison declared in *Federalist No. 39*, the federal government's "jurisdiction extends to certain enumerated objects only," while the states continued to possess "a residuary and inviolable sovereignty over all other objects." *The Federalist No. 39*, at 256 (James Madison) (Jacob E. Cooked ed. 1961). Or, as Alexander Hamilton argued during the New York ratifying convention, the Constitution ought to be rejected if the federal government could "alter, or abrogate . . . [a State's] civil and criminal institutions [or] penetrate the recesses of domestic life, and control, in all respects, the private conduct of individuals." 2 *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 267–68 (Jonathan Elliot ed. 1836). Denying the federal government a general police power, the framers and the Supreme Court have recognized, was important in ensuring a republican government and securing liberty. As the Court has recognized many times, "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Gregory v. Ashcroft*, 510 U.S. 452, 458 (1991).

In other words, the federal government does not have the full power to solve every problem, in every way. Instead, the Constitution places limits on how far Congress may exercise its legislative powers, even when no individual rights are at stake. Even in areas where Congress possesses enumerated authority, the Constitution can bar the exercise of federal power in areas where the states retain sovereignty. Thus, the Court in recent years has invalidated legislation that, while valid under the Commerce Clause, still infringed on certain elements of state sovereignty. See *Alden v. Maine*, 119 S. Ct. 2240 (1999); *Printz v. United States*, 521 U.S. 898 (1997); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996); *New York v. United States*, 505 U.S. 144 (1992). These cases demonstrate that the Supreme Court in recent years has been sensitive to congressional efforts to act in ways that upset the balance of powers. This is particularly the case where the federal government seeks to expand its powers into areas that have traditionally been the province of the states.

A federal law criminalizing violent actions taken because of the victim's immutable characteristics would be such an act. Such a law criminalizes acts that have long been regulated primarily by the states. Under the federal system, the Supreme Court has observed, "States possess primary authority for defining and enforcing the criminal law." *Brecht v. Abrahamson*, 507 U.S. 619, 135 (1993) (quoting *Engle v. Isaac*, 456 U.S. 107, 128 (1982)). "Our national government is one of delegated powers alone. Under our federal system the administration of criminal justice rests with the States except as Congress, acting within the scope of those delegated powers, has created offenses against the United States." *Screws v. United States*, 325 U.S. 91, 109 (1945) (plurality opinion). The Court has viewed the expansion of federal criminal laws with great concern due to their alteration of the balance of federal-state powers. "When Congress criminalizes conduct already denounced as criminal by the States, it effects a change in the sensitive relation between federal and state criminal jurisdiction." *United States v. Lopez*, 514 U.S. 549, 561 n. 3 (quoting *United States v. Emmons*, 410 U.S. 396, 411–12 (1973)). Congress should not act quickly or without due deliberation before it chooses to further federalize yet another area that generally lies within the competence of the States. Given the principles of federalism that govern the Constitution, Congress should not use its powers until it

is confident that hate crimes are a problem that is truly national scope, and that it is a problem that state law and state resources cannot handle.

II. COMMERCE CLAUSE PROBLEMS WITH A FEDERAL HATE CRIME LAW

In *United States v. Lopez*, the Court re-affirmed that these federalism principles applied even to the Commerce Clause, which it had been willing to interpret quite liberally in the years after the New Deal. The Court observed that its cases had recognized that Congress could use the Commerce Clause to regulate three types of activity. First, Congress could regulate "the use of the channels of interstate commerce." *Lopez*, 514 U.S. at 558. Second, it may regulate and protect "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities." *Id.* Third, Congress may regulate "those activities having a substantial relation to interstate commerce," in other words "those activities that substantially affect interstate commerce." *Id.* at 558-59.

The Court was aware that much federal regulation occurs under this third category, as did the law that was before it in *Lopez* itself. *Lopez* made clear that even though the Court had upheld federal laws that regulated matters that "substantially effect interstate commerce," this did not mean that Congress could regulate any activity that merely had some effect upon interstate commerce. *Id.* at 559. *Lopez* also made clear that whether an activity had a "substantial effect" on interstate commerce was "ultimately a judicial rather than a legislative question." *Id.* at 557, n. 2 (quoting *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 273 (1964) (Black, J., concurring)). Although the Court observed that it would take congressional findings into account in determining an activity's effects on interstate commerce, they would not receive deference. Whether something falls within the substantial effects test, therefore, is more than just a factual question; it is also a legal one.

Lopez then articulated a two-part test to determine whether a federal law fell within Congress's powers under the substantial effects portion of the Commerce Clause. First, the Court will uphold laws that regulate "activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." *Lopez*, 514 U.S. at 561. This prong limits congressional regulation to commercial activity, such as intrastate coal mining, see *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264 (1981), intrastate loan sharking, *Perez v. United States*, 402 U.S. 146 (1971), restaurants using substantial interstate supplies, see *Katzenbach v. McClung*, 379 U.S. 294 (1964), inns and hotels catering to interstate travelers, see *Heart of Atlanta Motel*, 379 U.S. 241 (1964), and even the growing of wheat for home consumption, *Wickard v. Filburn*, 317 U.S. 111 (1942). As the Court put it, "[w]here economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained." *Id.* at 560.

Second, the Court will uphold laws that contain a "jurisdictional element which would ensure, through case-by-case inquiry, that [the law] in question affects interstate commerce." *Id.* If a federal law, therefore, does not regulate a commercial activity, then it must contain a jurisdictional element that requires the particular incident to have a "nexus" to interstate commerce. The jurisdictional element serves to "limit [a law's] reach to a discrete set of [conduct] that additionally have an explicit connection with or effect on interstate commerce." *Id.* at 562.

We can see how this two-part test applies by examining *Lopez* itself. *Lopez* involved a schoolchild who had a gun in a school zone, in violation of the Gun Free School Zones Act, but there was no showing that either the child or the gun had traveled in interstate commerce. The law did not require that such a nexus exist between the conduct charged and interstate commerce, nor did it contain any legislative findings that firearm possession in school zones had a substantial impact on interstate commerce. The *Lopez* Court invalidated the law. The possession of the gun in a school zone, the Court concluded, "is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." *Id.* at 567. Nor was there any "indication that [the defendant] had recently moved in interstate commerce, and there [was] no requirement that his possession of the firearm have any concrete tie to interstate commerce." *Id.*

This analysis suggests that federal legislation to outlaw hate crimes generally could not survive constitutional scrutiny, if the law were based on the Commerce Clause. First, a proposal to amend 18 U.S.C. §245(c)(1) to reach all hate crimes throughout the nation would not be limited by a jurisdictional element. Such a proposal could not require that either the defendant or the victim have traveled in interstate commerce, such as by crossing state lines, have used an instrumentality of interstate commerce, such as the telephone, internet, or mail, or have engaged

in an activity affecting interstate commerce, if it sought to apply to every hate crime in the nation.

Therefore, the regulated conduct must constitute economic activity in order to fall under the first prong of the *Lopez* test. I think that there is little doubt that hate crimes fail to qualify as an economic activity. A hate crimes law would not regulate the production, shipment or sale of any goods or services, nor would it touch upon any commercial transactions of any kind. Furthermore, unlike robbery or fraud, the crime itself is not economic in motivation or purpose. Indeed, we want to impose harsher penalties on hate crimes precisely because they are motivated by an animus—hatred of a group because of an immutable characteristic—that is utterly irrational. In this respect, hate crimes have an ever more attenuated link to interstate commerce than did the Gun Free School Zones Act, which could have attempted to regulate gun possession as the result of a commercial transaction involved goods that are sold in interstate commerce.

Supporters of federal hate crimes legislation no doubt would attempt to show some link between hate crimes and interstate commerce through findings. As Congress did in the Violence Against Women Act, it could pass a bill with findings that assert that such violence affects interstate commerce in many ways, such as interfering with the interstate travel of members of targeted groups, or preventing members of targeted groups from participating in commercial activities. Findings also could assert that perpetrators of hate crimes cross state lines, that they use instrumentalities of interstate commerce in committing violence, and that they commit these crimes with articles that have traveled in interstate commerce.

The problem with such findings is that they cannot show that hate crimes themselves are economic or commercial in nature. They do not attempt to show that hate crimes “arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce,” as required by *Lopez*. 514 U.S. at 561. Drafting findings in this way simply fails to meet the Court’s current understanding of the requirements of the Interstate Commerce Clause. Hate crimes legislation, therefore, would be a “statute that by its terms has nothing to do with ‘commerce’ or any sort of economic enterprise, however broadly one might define those terms.” *Id.*

Even if one believed that *Lopez*’s substantial effects test, in regard to its non-jurisdictional nexus component, is not limited to economic or commercial activity, a general prohibition on all hate crimes would still be lacking. In order to satisfy the Commerce Clause’s requirements, Congress would have to show that hate crimes, in some way, substantially affect interstate commerce sufficiently to justify federal jurisdiction. As the Court made clear in *Lopez*, it will consider congressional findings because they allow the Court “to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye.” *Id.* at 563. Here, however, as far as I know, Congress has not undertaken a detailed study or conducted any substantial fact-finding that demonstrates that hate crimes do have a substantial effect on interstate commerce. At the very least, Congress must conduct some fact-finding about the extent of hate crimes and their economic impact before it passes this statute.

Simply including into a statute a statement that hate crimes substantially affect interstate commerce, without any significant efforts at fact-finding to back it up, will not satisfy the Supreme Court’s federalism jurisprudence. While *Lopez* does not discuss the nature of congressional fact-finding, we can seek guidance in two recent cases, *Florida Prepaid Post Secondary Education Expense Board* and *City of Boerne*. Both cases discuss the type of fact-finding that must occur when Congress seeks to pass statutes that infringe areas of state sovereignty. In cases where Congress uses its enforcement powers under Section Five of the Fourteenth Amendment, the Court has said, it must identify conduct that violates Fourteenth Amendment rights, and its must tailor the legislative scheme to remedying or preventing such conduct. To meet these requirements, Congress must conduct fact-finding to demonstrate the concerns that led to the law. For example, the Court observed in *Florida Prepaid*, in the case of the Voting Rights Act Congress developed an “undisputed record of racial discrimination” and so it upheld the statute. *Florida Prepaid*, 1999 WL 412723 at p. *8. In *City of Boerne*, however, the Court found that Congress had “little evidence of infringing conduct on the part of the States” in the use of facially-neutral laws to infringe religious liberties. *City of Boerne*, 521 U.S. at 530–32. Similarly, in *Florida Prepaid*, the Court found that Congress had found few instances in which States had violated federal patent laws, and so invalidated the Patent Remedy Act’s abrogation of state sovereign immunity. *Florida Prepaid*, at p. *8–10.

It seems to me that Congress, in order to create a case for the constitutionality of a law criminalizing hate crimes, ought to engage in fact-finding in order to avoid

the fate that befell the Religious Freedom Restoration Act and the Patent Remedy Act. To be sure, the Court examined the legislative record in those cases to ensure that Congress was not attempting to re-define a constitutional right, rather than passing remedial or preventative legislation. Nonetheless, it seems to me that the Court would use a similar approach to fact-finding in both the Commerce Clause and the Fourteenth Amendment areas. In both areas, the Court's major concern is that Congress may be using its enumerated powers in such a way that undermines the Constitution's structural guarantees for the sovereignty of the states and for their continued regulatory control over certain subject matters. I would not be surprised that when the Court next considers the substantially affects aspect of the Commerce Clause, it will employ an approach to reviewing the legislative record similar to that used in *City of Boerne* and *Florida Prepaid*. To meet this standard, Congress must hold hearings concerning the scope of hate crimes in this country, their numbers, and their impact on the economy. Until Congress engages in this sort of legislative spadework, it will not be able to justify an amendment to 18 U.S.C. §245, that expands federal jurisdiction to all hate crimes, under the Commerce Clause.

It is also important to note that Congress cannot limit its fact-finding solely to whether hate crimes have some economic effect. In responding to Justice Breyer's dissent in *Lopez*, the Court made quite clear that more than just showing economic effects of some kind, however broadly spread throughout the economy, was necessary in order to meet its substantial effects test. Both the government and Justice Breyer, for example, argued that guns near school cause school violence, which both itself has costs and which also impacts on the educational environment, which contributes directly to national productivity. See *Lopez*, 514 U.S. at 563-64; *id.* at 619-23 (Breyer, J., dissenting). While this all may be true, the Court responded, it found that such attenuated links between the regulated conduct and interstate commerce were not enough because they would give Congress broader powers than the Constitution permits. Under such theories, Chief Justice Rehnquist wrote, "it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign." *Id.* at 564. "Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate." *Id.* The Court declared that it was unwilling "to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Id.* at 567.

We can see how this test would apply to federal hate crimes legislation by examining the fate of the Violence Against Women Act's civil cause of action, 42 U.S.C. §13981, before an en banc U.S. Court of Appeals for the Fourth Circuit. Defenders of the statute's constitutionality made the same arguments as those that would justify a federal hate crimes law: gender-motivated violent crime imposes direct economic costs and it interferes with women's employment and other commercial activities. See *Brzonkala v. Virginia Polytechnic Institute and State University*, 169 F.2d 820, 838 (4th Cir. 1999) (en banc). Citing *Lopez*, the Fourth Circuit observed that such reasoning only demonstrated that "violence motivated by gender animus affects interstate commerce . . . only in the same way that any significant problem does." *Id.* at 839. Virtually repeating *Lopez*, the Fourth Circuit concluded that "To extend such reasoning beyond the context of statutes regulating economic activities and uphold a statute regulating noneconomic activity merely because the activity, in the aggregate, has an attenuated, though real, effect on the economy, and therefore presumably on interstate commerce, would be effectively to remove all limits on federal authority, and to render unto Congress a police power impermissible under our Constitution." *Id.* at 840. Unless Congress undertakes sufficient fact-finding that demonstrate hate crimes to have more of an impact on the economy than does school violence or violence against women, a federal hate crimes law will likely fail on Commerce Clause grounds.

I should note before moving on that these concerns about the constitutionality of federal hate crimes legislation would be alleviated if Congress included a jurisdictional nexus element, as described by *Lopez*. Such an element would require that, in connection with the crime, the defendant traveled in interstate commerce, used the instrumentalities or channels of interstate commerce, or sent articles in interstate commerce. The statute must make clear that all of these ways of touching upon interstate commerce had a tight connection with the commission of the crime itself. Just because a defendant traveled across state boundaries, or used the telephone, or used a gun that had traveled in interstate commerce, at some time before committing the crime does not by itself provide a constitutional justification for federal jurisdiction. Otherwise, as the *Lopez* Court warned, to adopt such reasoning

would give the federal government the general police power that was reserved to the states.

Of course, in including a jurisdictional nexus requirement, federal legislation would make the jurisdictional nexus an element of the crime. Federal prosecutors would have to prove a significant contact between the commission of the crime and interstate commerce in each and every case. This will be a difficult thing to do, and in some cases it will require the courts to undertake the same Commerce Clause analysis just described above. Further, a jurisdictional nexus requirement, by itself, may not be enough to satisfy the Supreme Court in the future. *Lopez* itself was unclear about whether even federal statutes that only rested on a jurisdictional nexus would still be limited to the regulation only of commercial or economic activity. If future Supreme Court cases in the Commerce Clause area advance further in that direction, then a jurisdictional nexus requirement would not be enough to justify federal hate crimes legislation.

III. THE RECONSTRUCTION AMENDMENTS

It is possible that a federal hate crimes law would seek constitutional support in the Thirteenth Amendment to the Constitution, which barred slavery at the end of the Civil War. Section Two of the Thirteenth Amendment provides Congress with the "power to enforce" the amendment "by appropriate legislation." I am unsure whether supporters of federal hate crimes legislation would turn to Section Two for support, but it very well may be the case that Congress might try to link justify its efforts to outlaw hate crimes on its powers to suppress the lasting effects of slavery. This might be the course that some would urge especially if, as I believe is the case, the Supreme Court is likely to invalidate such legislation as beyond Congress's Commerce Clause powers.

The Court has addressed Congress's power under Section 2 in only a few cases, the chief of which is *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). In that case, the Court upheld 42 U.S.C. § 1982—passed originally as part of the Civil Rights Act of 1866—which was read to bar discrimination against African-Americans in the sale or rental of property. Unlike the Fourteenth Amendment, the Court emphasized, the Thirteenth Amendment allows Congress to enact laws that operate upon the acts of individuals, regardless of whether they are sanctioned by state law or not. Moreover, in the *Civil Rights Cases* and again in *Jones*, the Court made clear that Section 2 gave Congress powers that went beyond merely terminating the practice of slavery. Section 2 "clothed Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States." *Jones*. Therefore, the Court observed, "[s]urely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation." *Jones*. The Court, however, has not provided much guidance beyond *Jones* on what constitutes "the badges and the incidents of slavery." See, e.g., *Griffin v. Breckenridge*, 403 U.S. 88 (1971); *Carpenters, Local 610 v. Scott*, 463 U.S. 825 (1983).

Congress should tread carefully before it chooses to pass a hate crimes statute on the basis of Section 2 of the Thirteenth Amendment. First, such a law would have to be utterly clear that it is based on Section 2's grant of authority to combat slavery. Only vaguely asserting that some hate crimes might be linked to vestiges, badges, or incidents of slavery or segregation would not be enough. A bill would have to declare outright that there is a link between all of the hate crimes punished by its provisions and the effects of slavery. Any ambiguity would provide the Court with the opening, should a case challenging the constitutionality of a hate crimes statute arise, to interpret the law as not relying upon Section 2. Given the doctrine that courts should interpret statutes so as not to reach difficult constitutional questions, *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring), it is possible that the Court would not allow the government to justify the constitutionality of a hate crimes law on Section 2.

But suppose that Congress were to make clear that it is invoking its enforcement powers under the Thirteenth Amendment. Then congressional efforts to define a badge and incident of slavery to include hate crimes will provoke the question whether Congress has the independent authority to define the Thirteenth Amendment at variance with the interpretations of the Supreme Court. This would be especially the case if Congress sought to expand its coverage of hate crimes beyond those just motivated in race. Although there have been few judicial pronouncements on the scope of the Thirteenth Amendment, the *Jones* case was limited to discrimination on the basis of race, specifically discrimination against African-Americans. Efforts to include within a hate crimes prohibition those crimes motivated by na-

tional origin, religion, gender, sexual orientation, disability and any other factor other than race would amount to a congressional effort to interpret the Thirteenth Amendment beyond that so far permitted by the Supreme Court.

This is what the *City of Boerne* Court said that Congress could not do in regard to the substantive terms of the Fourteenth Amendment. On the other hand, by allowing Congress to define the badges and incidents of slavery, the Court was acknowledging that Congress "may prohibit certain practices, although those practices themselves do not constitute slavery, when Congress rationally finds that their prohibition will help to prevent slavery." See Jesse H. Choper, *Congressional Power to Expand Judicial Definitions of the Substantive Terms of the Civil War Amendments*, 67 Minn. L. Rev. 299, 313-14 (1982). It is difficult to predict what standards the Court will impose on congressional efforts to define badges and incidents of slavery. *City of Boerne* provides some obvious parallels, and I would not be surprised if the Court were to adapt the framework it has developed for the Fourteenth Amendment to the similar problems raised by the Thirteenth Amendment. Section 2 of the Thirteenth Amendment and Section 5 of the Fourteenth Amendment are almost identical in language, they were adopted within about three years of each other, and they have parallel goals in mind.

The Court will want to ensure that, in defining badges and incidents of slavery to include hate crimes, Congress has enacted remedial and preventative legislation that seeks to end the true effects of slavery, rather than attempted to re-define the term "slavery" or "involuntary servitude" as it has been interpreted by the Supreme Court. If that is the case, then the Court will require that Congress develop a legislative record that demonstrates that there is "congruence and proportionality" between the measures Congress has enacted and the alleged constitutional violations that have or will occur. *Florida Prepaid*, 1999 WL 412723 at p. *8; *City of Boerne*, 521 U.S. at 519-20. In order to meet this standard, Congress first must create a legislative record that shows a history of "widespread and persisting deprivation of constitutional rights" that require remedy by congressional statute. *City of Boerne*, 521 U.S. at 526. Only then can the Court determine whether the federal statute responds in proportion to the nature of the constitutional violations. In both *City of Boerne* and *Florida Prepaid*, Congress had failed to develop such a record.

It may be the case that the Supreme Court may choose not to impose this standard upon Section 2 of the Thirteenth Amendment, despite its close similarity to Section 5 of the Fourteenth Amendment. I think it unlikely, given the further articulation of the *City of Boerne* analysis in *Florida Prepaid*, but it is certainly possible. Nonetheless, Congress ought not to take the chance that it will receive a freer hand under the Thirteenth Amendment than it does under the Fourteenth Amendment. As an institutional matter, Congress ought to guard its powers jealously from restriction by the courts. By putting forward a law that is not based on any thorough examination of whether hate crimes are linked to the lasting effects of slavery, Congress makes it easy for the Court to adopt the *City of Boerne* analysis and to use it to invalidate hate crimes legislation. This will not only strike down hate crimes legislation, but it will forever limit the extent of Congress's powers under the Thirteenth Amendment.

To avoid this result, Congress ought to conduct further fact-finding, of the sort described in *City of Boerne* and *Florida Prepaid*, to determine whether a link does exist between hate crimes and the lasting effects of slavery. Congress should investigate the sources of hate crime, whether they are linked to the lasting effects of slavery in some way, how widespread hate crimes are, the effects of hate crimes on the economy and the society, and whether state laws and resources are inadequate to the job of combatting hate crimes. To seek answers to these questions is an exercise in responsible and prudential lawmaking. To pass a federal hate crimes law without undertaking such fact-finding would invite another conflict between Congress on the one hand, and the Supreme Court and the states on the other. Recent history does not suggest that Congress's odds are good in such a conflict.

I am happy to answer any questions, either oral or in writing.

Mr. HYDE. Thank you, Professor—

Mr. CONYERS. Excuse me, Mr. Chairman. One of our witnesses is bearing a placard around his chest and a mask over his mouth, and with all deference to his first amendment rights we don't permit advertising of positions in the hearing room, and I would like to ask you to correct that defective conduct or leave the room.

Mr. HYDE. Is there some rule we can—we will check the rules and see if there is some rule against that.

Mr. CONYERS. Well, it has always been the practice that nobody can bring placards or signs of a political intent or their position on the matter.

This is a hearing that is based upon us listening to the witnesses, not all of our guests coming in with placards and banners one way or the other, and I—that has been the practice here since I have been on the committee and I am, I strongly insist that at a hate crime hearing that we don't begin to fall into this position at this point.

Mr. HYDE. Well, I want to certainly accommodate you, Mr. Conyers. I am—the gentleman back there, if he would be kind enough to—now he is—

Mr. CONYERS. Oh, that is wonderful.

Mr. HYDE. Now that we have highlighted him, he is getting the attention—-[Laughter.]

Mr. CONYERS. Yes.

Mr. HYDE [continuing]. The attention he wasn't getting before.

Mr. CONYERS. Well, he was getting plenty before from me, because I have had to look at it ever since I have been, since he came into—

Ms. JACKSON LEE. Will the gentleman yield? Will the gentleman yield?

Mr. HYDE. Mr. Conyers has taken the time.

Mr. CONYERS. Yes, of course.

Ms. JACKSON LEE. Mr. Conyers, for fear of anyone thinking that you have been offended alone, I am equally offended and have a great respect for the first amendment, and I think, Mr. Chairman, the comment is that we are trying to secure unbiased testimony in this hearing room to make an informed and intelligent decision.

I think the presence of a biased gentleman, no matter how much he has the right to express that, he can do so outside in the hallway. I think he is disturbing and distractive and for me offensive—go back to the gentleman.

Mr. HYDE. Well, we are going to—I am sorry this intervened. We were doing well. I am going to, I am trying to check with the parliamentarian to get some ruling as to whether—

[Discussion off the record.]

Mr. HYDE. Well, I am advised by the parliamentarian that the matter of decorum in the room is my responsibility and I would ask the gentleman if he would mind taking his hat off and unstoping his mouth so we can continue.

I think you have made your point, sir, and I appreciate that very well. Thank you for your courtesy.

Mr. CONYERS. I thank the Chair.

Mr. HYDE. I thank you. I am going to intervene here just because some thoughts are racing through my mind and I am sure I will forget them when we get to the questions, and I usually go last anyway so it seems to me that all of you are spending wonderful time emphasizing hate crimes which involve by definition some passion.

It seems to me we are as troubled in the violence category by the exact opposite of hate crime—no caring whatsoever, total cynicism toward the value of a fellow human being, total indifference—out of my way—and that cynicism, that is just the cold opposite of the

passion involved in hating somebody and acting on that hate—is a real problem that we have.

It is the devaluing of human life and we are on a train wreck travail—travel—to do that. Cynicism, cold indifference to the plight of others. We need passion. We need to direct it in the right way, not in the evil way, but I wish some of you who have these marvelous thoughts and credentials would think about the cold indifference that we suffer from as predicate to violence too.

Anyway, thank you for indulging me. Ms. Carrington.

**STATEMENT OF CAROLE CARRINGTON, VICTIMS' MOTHER
AND GRANDMOTHER, EUREKA, CA**

Ms. CARRINGTON. Thank you. I think this is going to be a relief from all the intense brainpower here, because all I am going to do is tell you my story.

Good morning. It is almost still morning. Chairman Hyde and ranking member Conyers, and the other members of the hearing. I am Carole Carrington. I am from Eureka, California, up near the Oregon border in the redwoods and I live with my husband of 48 years, Francis, and thank you for inviting me here today.

I am very nonpolitical. I am a registered Republican, but I am here today simply to tell you my story and say we need more resources to fight this kind of crime, and I don't know how to do that. Unlike our learned people here at the table, I can't make heads or tails of the hate crime legislation including the State laws and the Federal laws and all of it. All I know is what I know about what happened to my family.

My daughter Carole, my granddaughter Julie, and a dear friend, Silvina Peloso, were killed near Yosemite National Park in February of this year. My daughter Carole was a very active participant in the community. She worked for abused and neglected children, helped found CASA, Court Appointed Special Advocates. She was on the board of two adoption groups. She worked for a home for the retarded adults. She was very active at school. In other words, she was the kind of citizen we need.

She had four children, three of them adopted. On the 13th of February she took her daughter Julie and Silvina on a trip. They flew in a plane to San Francisco, rented a car, and drove to Stockton, where Julie participated in a cheerleading competition. My daughter had been an exchange student when she was a senior in high school and because of this she became very close with the family she lived with.

Silvina was the granddaughter of the family that she had lived with years before. They had gone back to visit the family at one point, when Julie was about a year old, and we have pictures of Julie and Silvina together as babies, a year and 2 years old.

Silvina decided she wanted to come and see the United States, so she was on her summer vacation, visiting my daughter Carole, and she and Julie got to be very good friends.

Carole wanted to take her to the park because she was going to go home in a couple of weeks, and she wanted her to see as much of the United States as she could. They were to fly then after they turned in their rental car, after their trip to Yosemite, they were going to fly to San Francisco and meet Jens, who was going to take

Silvina to the Grand Canyon. His sister lives down there and he was going to take her for a visit there.

After 2 days in the park they had dinner at the lodge where they were staying, and that is the last time that they were ever seen. They rented some videos, went to their room, and there were no confirmed sightings after that evening.

When we found out that they were missing, when Jens did not meet them at the airport he went on to Arizona, thinking because he was 4 hours late that it had been because of that, that they had gone on, sent Silvina on to Arizona and gone on home. Carole and Julie were going to go to Eureka. The thing was that no one heard from Carole and that was very unlike her. She was very conscientious. If she was going to be late for anything, she would let you know, so when Jens could not reach her at home, she had not called his sister, nothing had happened, he called us the next day, on Wednesday.

My husband that night threw some things in the car, a four-wheel drive, an ax, a rope, blankets, thinking that they were in an accident somewhere down in the Yosemite area in the snow. It was February. Jens got on a plane and flew back to California and he and his brother-in-law drove down to Yosemite. They looked all along the roads for an accident. They spent days doing that and as every day passed, more friends, family, relatives converged on the area of Yosemite. Then on Saturday Carole's wallet was found—actually it was found on Friday, but not reported until Saturday.

Suddenly the whole thing changed. It was not an accident probably. There was something very, very wrong. The wallet did—one very good thing—it brought in the FBI into the investigation. We had hundreds of people looking, but there were people looking out in the woods for a wreck. All of our family and friends then converged in Modesto and we began to put out flyers, knock on doors, talk to people.

Jens, Carole's husband, wore himself out down there talking night and day almost to anyone who would listen to all kinds of press and news. Finally we sent him home and my husband and I started doing that, and I am sure people were rather tired of looking at us after this period of time, because especially in that area we did a great deal.

We also offered a \$250,000 reward for their safe return and when that received no—thinking perhaps it was kidnapping—when that didn't have any results we offered a \$50,000 reward for the car. We felt and the police felt that it was very important to find that car. How could three women in a bright red car disappear when—they are three almost grown size women—the girls were two inches bigger than Carole—they're athletic, three women together, how could they disappear?

Well, it was a month before we found the car and when we found it, it was found burned very badly in a dirt road way down a wooded area, obviously deliberately burned.

About a week or 10 days later, Julie's body was found in a wooded area overlooking a dam, a lake area. It was a very, very wrenching time in our lives and we were very grateful for the wonderful help the volunteers, the police, the FBI, everyone, people in the Modesto area and the area around Yosemite did everything and

anything they could to help us. It was just wonderful what kind of community of support we received from all over the area including our home town of Santa Rose and the Eureka area where we now live.

About a couple of weeks ago another body was found in Yosemite. This is a young lady who was a naturalist, who was working in the park. She was missing for a day or so, and then her body was found behind her house in the woods with her head cut off. Apparently she put up quite a battle and so there were some clues left, and the authorities were able to think that they possibly had a suspect. That suspect left the area and they did pick him up.

After he was arrested he confessed to Joey Armstrong's murder. Then, surprisingly because we thought that there was no connection, he confessed to the murder of Carole and Julie and Silvina. He told us, he told the authorities that he had posed as a worker, a plumber who needed to get in and look at the plumbing. He came into the room after they had gone to bed or, you know, gotten ready for bed—I assume the girls probably were still watching videos or something.

He says that he strangled Carole, he strangled Silvina. He separated them in some way so that Julie didn't know this. He put them in the trunk of the car. They were in a very remote area of this lodge. It is a big lodge and their room was off by itself. There was no one around them in the lodge, so after he did this, he took Julie with him, took her to this dam area and some reports reported sexual assault. Those—those times with us are very heart-wrenching because we worry about how our daughter felt when she knew she couldn't help the girls, when she knew they were in serious trouble and couldn't do anything about it.

She was just a tiger about her children and very defensive of them—

Mr. FRANK. Mr. Chairman—I apologize—

Mr. HYDE. The gentleman from Massachusetts.

Mr. FRANK [continuing]. It is a terrible situation, but we do—we are going to lose ourselves to votes at some point and I would ask that—

Mr. HYDE. Do you think, Ms. Carrington—

Mr. FRANK [continuing]. Some consideration too.

Mr. HYDE [continuing]. Kind of summarize—

Ms. CARRINGTON. Very quickly, yes.

Mr. HYDE. Thank you.

Ms. CARRINGTON. I will do that. The thing is he did not know any of them. He did not know Carole or Julie or Silvina at all. He did not do this because he was angry at them. He had no idea what kind of people they were or what—there just was no connection.

He did it because he said he saw—he wanted to kill women. That was the whole purpose. Now it seems to me that this is a hate crime. I don't know. Maybe all murders are hate crimes. I am not sure about what the legislation should be but I do know that from what we have learned since then and in setting up the foundation that we have—we put \$200,000 into a foundation to help others in this situation—that there are many, many more than we know of. There are just an enormous amount of people missing and for a few days and then it goes away.

It is in the paper for a few days and no one knows about it. We need to have more resources in the area of helping police or we need to have FBI step in sooner in these cases. We need to have, particularly in rural areas—can you imagine a Sheriff's office with maybe two or three people in it? What do they do in a case like this? How do they handle it?

I think what I want to say is that we need more resources, whether it is through the hate law act and any changes in that or some other way. I think the whole Nation gets—needs to get behind this and put this kind of criminal away because obviously they don't do it once. They do it again and again and again.

[The prepared statement of Ms. Carrington follows:]

PREPARED STATEMENT OF CAROLE CARRINGTON, VICTIMS' MOTHER AND GRANDMOTHER, EUREKA, CA

Good morning Chairman Hyde, Ranking Member Conyers, and other distinguished members of the committee. My name is Carole Carrington, I am from Eureka, California, where I live with my husband Francis. Thank you for inviting me here to speak to you today.

I am not a political person, nor did I ever want to expect to be sitting before Congress testifying about hate crimes against women in our country. My daughter, Carole Sund, my granddaughter, Juli Sund, and a close friend of our family, Silvina Pelosso, were the victims of a brutal hate crime earlier this year, simply because they were women. It is necessary to provide additional federal resources to prevent and investigate these kinds of crimes, and to send a message to perpetrators that "violence against women will be punished."

My daughter Carole Sund was very active in our community with organizations that work with abused and neglected children. She donated time to CASA (Court Appointed Speciality Advocates), two different adoption agencies, a group care home for retarded adults, and volunteered at her children's schools. She had four children: one biological, and three that she adopted because she loved children and wanted to give them a good home.

On Saturday, February 13th of this year, Carole drove her fifteen year old daughter, Juli, and sixteen year old Silvina Pelosso to a cheerleading competition in Stockton, California. Silvina was a close family friend visiting from Argentina. Carole wanted to show Silvina Yosemite National Park before she returned home to Argentina. After the cheerleading competition ended on Saturday, the three drove from Stockton to Merced. On Sunday, February 14th, they drove to Yosemite and checked into the Cedar Lodge. She took the girls to the Park, spent the night at Cedar Lodge and returned to the Park on Monday, February 15th. That night they had dinner at the Lodge, took video tapes back to their room and called Carole's husband, Jens. That was the last time they were ever heard from.

Carole's husband and their other three children were to meet Carole, Juli and Silvina at the San Francisco airport the next day. When the girls did not arrive, Jens thought it was because his plane was 4 hours late. But when he learned that the rental car was never returned, and he still had not heard from Carole, Jens became concerned and telephoned my husband and me. We were sure that they had been in an accident. My husband, Jens, friends, and relatives converged on the area to look for them. A week went by with no word from or about them or their car. Then Carole's wallet was found in Modesto, 100 miles away.

After an excruciating month, a passerby discovered the car 1,000 yards down a dirt road in a heavily wooded area. Authorities found Carole and Silvina's bodies in the trunk. They were so badly burned that the cause of death was difficult to establish. About a week after that, authorities received a tip that led them to Juli's body. Her throat had been slashed so deeply she was nearly decapitated.

We never imagined that something like this could happen to our family. Carole, Juli, and Silvina were all very friendly, kind people—but savvy, not people who could be easily fooled, not easy targets. Even at fifteen, Juli knew about the danger to women and girls. Two years ago, Juli had two friends coming to visit her when, while passing through the wooded area near her home in Eureka, they were attached and raped at knife point. Juli helped start a support group for them and they all took defense classes. Juli was a very athletic person, active in sports, and two inches taller than her mother.

A few months after Carole, Juli, and Silvina disappeared, twenty-six year old Joie Armstrong was murdered in her home in Yosemite. After an intense struggle, Joie was decapitated and dumped in a stream near her home. Cary Stayner has since confessed to murdering Joie, as well as Carole, Juli and Silvina. He claims to have fantasized about killing women for the last thirty years. He did not now any of his victims, he targeted them simply because they were women. Carole, Juli, Silvina and Joie are no longer with us today because Stayner hated women, viewed them not as individuals worthy of respect and dignity, but as objects to be controlled and destroyed. There is no question that this was a hate crime.

With Cary Stayner's confession, we now know that he managed to get into Carole's room by pretending to be a Lodge employee. We know that he strangled Carole and Silvina in the room, and put them in the trunk of the car, not killing Juli until the next day. We know he dumped the car on the dirt road, left Juli's nearly decapitated body on the side of a hill more than an hour away, and, came back two days later to torch the car.

With this new information, the worst part is wondering how much they suffered. Especially Carole, who was a fierce tiger of a mother and who would have tried to tear anybody apart who hurt her children. But at least now we know that they are at peace, and we are trying to go forward and do something positive.

This terrible tragedy has affected our family, and it has also had a devastating effect on our community and, the community surrounding Yosemite. Women and girls are afraid to travel and enjoy our beautiful country and parks. Our community has come together to support us, strangers have volunteered long hours and lent support however they could. We are grateful for their tireless assistance and emotional support. At the same time, we were horrified to realize that we are not alone.

We have involuntarily become part of a club of families whose women and girls have disappeared, some never found, some found murdered and/or assaulted. We have very suddenly had our eyes opened to the staggering numbers of families dealing with the loss of their wives, sisters and daughters. At a Vigil for Carole, Juli and Silvina, given in the first month that we were looking for them, we met at least ten families with stories like ours, in limbo, cases in which authorities have no leads. Many more have reached out to us to share their stories.

Because of the circumstances of our case, the FBI was able to get involved in the investigation. We are grateful for the assistance of the FBI and would like to thank the authorities who worked so hard to solve this case. But as we have learned from the families who have approached us, as they provide empathy and comfort to us during this time, not every family who is victimized by hate violence is as fortunate as ours.

Not all hate crimes happen on federal land or trigger federal jurisdiction by some other means. Many occur outside of the 22 states that have gender based hate crime laws. Many are not given the attention they deserve, where local law enforcement lacks the personnel, resources, expertise or determination needed to properly investigate and prosecute hate crimes. Too many women and girls are vanishing in the United States, without sufficient resources to locate them and their assailants.

If Congress, can expand federal jurisdiction to increase resources for the investigation of hate-based arson of churches and synagogues, surely it can do the same for hate crimes against our nation's mothers, sisters, and daughters.

We were so touched by families who attended the Vigil, that my husband and I set up the Carole Sund/Carrington Reward Fund and donated \$200,000. We had offered a \$50,000 reward from our own funds just for information regarding Carole's rental car. Because of that publicity, the attention of the press, and the community, the car was found with two of the girl's bodies inside. The law enforcement agencies were then able to begin assembling clues.

The Carole Sund/Carrington Reward Fund not only posts rewards for families missing loved ones, but gives support to the family by helping to establish a volunteer center, co-ordinate news reports, prepared missing persons fliers, and assists with the telephones and the press.

We were astonished to learn of how many missing persons—the large majority being women or children—there are in our country. And no one knows what has happened to them. *Additional federal resources to address this problem are needed badly.*

You cannot bring my daughter or my granddaughter back to me. You can, however, make a commitment to all families that hate-based violence against their loved ones will be taken seriously by passing tough legislation that makes the necessary federal resources available. You can take responsibility for this so that I can try to go back to my life, to my four other children, my eight other grandchildren, assured that our Congress is doing all it can to eliminate hate-motivated violence against women.

Mr. HYDE. Thank you very much, Ms. Carrington. That has been very useful. Mr. Orr.

STATEMENT OF TONY ORR, VICTIM, TULSA, OK

Mr. ORR. Good afternoon. My name is Tony Orr, and this is my partner, Tim Beauchamp, and we are residents of Tulsa, Oklahoma.

Mr. HYDE. Can you pull that mike closer?

Mr. ORR. Thank you, Mr. Chairman, ranking member Conyers, and committee members for having this hearing and allowing us to testify.

We are here to tell the story of how we were severely beaten in September 1997, because of our sexual orientation. We are here to tell you how we believe our case was mishandled by local authorities and why we need the Federal Hate Crimes Prevention Act, H.R. 1082.

I am a native Oklahoman, but I had been working as a crime reporter in Savannah for a number of years before moving back to Oklahoma in September of '97. It didn't take long for me to realize what the climate for gay people in Tulsa is like. Shortly after my arrival in town I was at a club with Tim. We left to go to a nearby ATM machine. As Tim was withdrawing money, three men approached me. One of them asked me if I was gay or in his words if I were an "effing faggot."

I told him I was. The men then knocked me to the ground and began kicking me in the head and stomach repeatedly. When Tim tried to help me, they beat him too, only worse. Our assailants didn't stop kicking Tim's head and face until some nearby women screamed that they were calling the police on their cellular telephone. The perpetrators ran into a nearby club and were later apprehended by the police. They reportedly told the officers that they were only "rolling a couple of fags."

We were taken to the hospital to receive treatment. I suffered a concussion and bruises all over my body and head and required stitches for the gashes on top of my head from being kicked. Tim fared worse. They broke the orbital bone around his eye on the right side of his face, from which he suffered nerve damage. In addition to bruises and contusions he also required close to 30 stitches in his mouth where his lips were lacerated from being kicked in the mouth. I honestly believe he saved my life that night.

The officers later came to the hospital and told us that we were lucky to be alive because our assailants were well-known to them. We later found out it was only through the insistence of one rookie police officer, Darren Glanz, that the perpetrators were even arrested and pursued the night of our attack.

The three assailants, two 20-year-olds and a 21-year-old, entered plea agreements and received minimal sentences. Two were sentenced to 40 hours of community service and a suspended jail term. The other was sentenced to 40 hours of community service and a deferred 90-day jail term. Later one of the three had to be resentenced because he hadn't even completed his community service.

We do not believe that justice was served in our case for a number of reasons, which we communicated to the Tulsa County District Attorney's Office.

First, our assailants were not ordered to pay restitution as is customary in cases like this. I was uninsured at the time and we both incurred more than \$1000 in medical expenses and are still in debt today.

Secondly, the charges were filed as a single attack, when in fact the assailants attacked each of us.

Finally, at least one of the perpetrators had a prior arrest record which was not considered during the sentencing.

I was able to discover the assailant's record through my criminal reporting background, but the district attorney continued to purport that there had been no criminal, prior criminal record.

Mr. Chairman, we were targeted for violence because we are gay. We are lucky to be alive. We are lucky we escaped with our lives and the vicious criminals who attacked us were given 40 measly hours of community service. A bench warrant had to be issued for one of them who failed to even do this.

The perpetrators never showed any remorse and the case did not even remain on their criminal records. How can anyone believe that justice has been served?

We complained to the local authorities who handled our case—to no avail. We can't appeal to higher authority in Oklahoma because our State does not recognize hate crimes based on sexual orientation. Just this year the State legislature again failed to pass a bill that would have added sexual orientation to the State hate crimes law.

Our lives will never be the same because of the attack on us. We still live in fear of being targeted for violence in Oklahoma because we are gay. In fact, a few years before we were attacked, Tim received several death threats on his answering machine because of his work with the local Christian gay organization in Tulsa. We thought about moving to another State, but we both have family members in the area and we want to be close with them.

In addition, we know that hate crimes occur in every State of the union and there are many other States that don't have comprehensive hate crimes laws either. In fact, while close to 40 States have hate crime laws on the books, only 22 and the District of Columbia have laws that include sexual orientation. People like us in communities all across this country need someplace to turn when justice is not served.

We need to be able to appeal to a higher authority when localities and States do not, for whatever reason, fully investigate and prosecute a hate crime. Hate crimes are not like other crimes. I have been the victim of a random burglary, and believe me, this felt different. This was not a crime of opportunity. We were targeted because of who we are, not for any other reason.

They were trying to send a message that our kind are not welcome in Tulsa and deserve to be beaten or to die. The crime was devaluing and an attempt to force us to become invisible and hide who we are. Somehow the three men who assaulted Tim and I had gotten the message from society that it was okay to roll a couple of fags for fun on a Saturday night and they continued to receive that message when they were given what amounted to a slap on the wrist for brutally beating us.

Mr. Chairman, members of the committee, we love our country and we are proud to be Americans. As Americans who have been victimized because of who we are, we look to you to make good on this Nation's promise of equal protection under the law and to send the message to our assailants that rolling a couple of fags will be met with the full force of the law, not a slap on the wrist.

We urge you to pass the comprehensive hate crimes statute like the Hate Crimes Prevention Act, H.R. 1082, as soon as possible. This legislation will allow the Federal Government to assist in the prosecution of hate crimes based on the gender, disability or sexual orientation of the victim no matter which State the victim lives in.

Mr. HYDE. Could you bring your remarks to a close, please?

Mr. ORR. Yes, sir. How many more people must be brutalized or killed before Congress takes action on this issue? You simply cannot leave this important issue to the States. Historically the Federal Government has taken its responsibility to fight crimes based on prejudice seriously.

I understand that the underlying Federal criminal civil rights statute that the Hate Crimes Prevention Act amends has been on the books for close to 30 years and as recently as 1996, in response to a series of church arsons in the South, this very committee and Congress passed the Church Arson Prevention Act to allow the Federal Government to assist in church arson cases based on violence.

Since the FBI began collecting national statistics in '91, hate crimes based on sexual orientation have more than doubled. It is time for Congress to take the next step and pass the Hate Crimes Prevention Act.

Mr. HYDE. Thank you very much, Mr. Orr. Chief Greenberg.
[The prepared statement of Mr. Orr follows:]

PREPARED STATEMENT OF TONY ORR, VICTIM, TULSA, OK

Good morning. My name is Tony Orr, and this is my partner, Tim Beauchamp, and we are residents of Tulsa, Oklahoma. Thank you, Mr. Chairman, Ranking Member Conyers and committee members for having this hearing and allowing us to testify. We are here to tell the story of how we were severely beaten in September 1997 because of our sexual orientation. We are here to tell how we believe our case was mishandled by local authorities and why we need the federal Hate Crimes Prevention Act, H.R. 1082.

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Our assailants didn't stop kicking Tim's head and face until some nearby women screamed that they were calling the police on their cellular telephone. The perpetrators ran into a nearby club and were later apprehended by the police. They reportedly told the officers that they were only "rolling a couple of fags."

We were taken to the hospital to receive treatment. I suffered a concussion and bruises all over my body and head and required stitches for the gashes on the top of my head from being kicked. Tim fared worse. They broke the orbital bone—around his eye—on the right side of his face from which he suffered nerve damage. In addition to bruises and contusions, he also required close to 30 stitches in his mouth where his lips were lacerated from being kicked. I honestly believe he saved my life that night.

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it was only through the insistence of one rookie police officer, Darren Glanz, that the perpetrators were even pursued and arrested the night of our attack.

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Finally, at least one of the perpetrators had a prior arrest record which was not considered during the sentencing. I was able to discover the assailant's record, through my criminal reporting background, but the assistant district attorney continued to purport that there was no prior criminal record.

Mr. Chairman, we were targeted for violence because we are gay. We were lucky to escape with our lives, and the vicious criminals who attacked us were given 40 measly hours of community service. A bench warrant had to be issued for one of them who failed to even do this. The perpetrators never showed any remorse, and the case did not even remain on their criminal records. How can anyone believe that justice has been served? We complained to the local authorities who handled our case—to no avail.

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People like us in communities all across this country need some place to turn when justice is not served. We need to be able to appeal to a higher authority when localities and states do not—for whatever reason—fully investigate and prosecute a hate crime. Hate crimes are not like other crimes. I've been the victim of a random burglary, and believe me this felt different. This was not a crime of opportunity. We were targeted because of who we are, not for any other reason. They were trying to send a message that "our kind" are not welcome in Tulsa and deserve to be beaten or die. The crime was devaluing and an attempt to force us to become invisible and hide who we are.

Somehow, the three men who assaulted Tim and I had gotten the message from society that it was okay to "roll a couple of fags" for fun on a Saturday night. And, they continued to receive that message when they were given what amounted to a slap on the wrist for brutally beating us.

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We urge you to pass a comprehensive federal hate crime statute like the Hate Crimes Prevention Act, H.R. 1082, as soon as possible. This legislation would allow the federal government to assist in the prosecution of hate crimes based on the gender, disability or sexual orientation of the victim no matter which state the victim lives in.

How many more people must be brutalized or killed before Congress takes action on this issue? You simply cannot leave this important issue to the states. Historically, the federal government has taken its responsibility to fight crimes based on prejudice seriously. I understand that the underlying federal criminal civil rights statute that the Hate Crimes Prevention Act amends has been on the books for close to 30 years. And, as recently as 1996, in response to a series of church arsons in the South, this very committee and the Congress passed the Church Arson Preven-

tion Act to allow the federal government to assist in church arson cases based on bias.

Since the FBI began collecting national statistics in 1991, hate crimes based on sexual orientation have more than doubled. It is time for Congress to take the next step and pass the Hate Crimes Prevention Act. This bill only covers crimes resulting in death and bodily injury, not property.

Surely if the Congress has the ability to protect church property, they have the ability, in fact the responsibility, to protect individuals like Tim and myself. Passing the Hate Crimes Prevention Act would send the message that our lives and the lives of women and people with disabilities are worth protecting. And, would-be perpetrators like those who attacked us would be put on notice that our society will not tolerate this kind of hate-filled, senseless violence.

We urge you to pass H.R. 1082, the Hate Crimes Prevention Act, without delay. Thank you.

STATEMENT OF REUBEN GREENBERG, CHIEF OF POLICE, CHARLESTON, SOUTH CAROLINA POLICE DEPARTMENT

Mr. GREENBERG. Honorable Members of Congress, members of the committee, ladies and gentlemen, I am happy to be able to present my views regarding proposed Federal hate crime legislation in consideration before this committee. We are all familiar with the history of our country in regards to the past reluctance of agents of State and local government to support and ensure the rights and safety of Americans targeted by various racist, extremist and anti-religious individuals and groups who have as their agenda the discrimination of, destruction of, and illegal elimination of certain minorities, religions and creeds in our country.

I will not dwell here even with a short list of the virtual thousands of instances of disrespect and denial of rights that have actively been perpetrated against some of our citizens simply because those citizens chose certain religions, were members of certain ethnic groups and members of certain races or who chose certain lifestyles. The record is well-documented with such instances.

What we have strived for and seldom had until recently was to have government at its lowest levels in the towns, cities, counties and States actively enforce the rights of all of their citizens. As a member of a minority group, I doubted if I would ever see this long-sought transformation of State and local government take place almost universally in our country.

In almost nowhere has local government or State government not seized its responsibility in providing adequate prosecution, investigation, and detection of crimes committed against citizens because of their beliefs and the lawful exercise of their rights.

In the recent case in Jasper County, Texas, where a black man was dragged to his death down a road while tied to a pickup truck, the local and State authorities acted quickly and decisively to arrest, prosecute and convict those local persons who were responsible for this appalling and despicable act.

There was no delay, no hesitation and no reluctance. Most significantly, the local community unanimously endorsed and supported the jury's verdict after the evidence was presented and the conviction came down. This location was far from the glaring lights and sophistication of the big city with all of its special organizations and support groups. Likewise, in the recent case in Wyoming, wherein a young man was beaten to death simply because of his lifestyle and his body left hanging on a fence, there was no evi-

dence of lack of investigation, prosecution or interest in this terrible incident on the part of local law enforcement or prosecution authorities. There was a keen interest in seeking justice by the local authorities and the local community alike.

Wyoming has no hate crime legislation on the books, nor does it have so-called sentence enhancements available. This case was investigated, prosecuted and convictions obtained using existing laws and penalties that adequately and purposefully punished those responsible in the same way that any criminal should be punished who is convicted of such horrific acts. Ninety-six percent of the total law enforcement is conducted by local and State authorities. This is what our founding fathers provided for so long ago and now today this is what we have finally virtually achieved.

Let us celebrate the success we have achieved. There was once a time, an unenlightened time, when Federal legislation in this area was seen as our only hope. We longed for local initiatives. Let us now enjoy and build up the enforcement and prosecution that we have achieved at the local level. Now that we have begun to cross the threshold of institutional and local community interest in equal protection, let us keep this responsibility where it will provide all of us with the greatest level of public access, and that access is where it ought to be and where it is likely to be most effective, and that is at the State and local level.

The International Association of Chiefs of Police, the Commission for the Accreditation of Law Enforcement Agencies, and most of the police training academies and police departments in this country maintain and operate various types of bias crime units, and conduct bias crime seminars.

There are things that the Federal Government can do to really help.

First of all, they can help to provide funds for training. They can keep this issue of bias highlighted through training of law enforcement agencies of all kinds, through regular training. They can train police, prosecutors, and social service providers. They can provide investigative support when it is required. They can offer their expertise and advice. They can help to process evidence and the Federal Government can also help to relocate and make up for the loss of income that is suffered by many victims of bias crimes and other crimes as well. It can help to provide financial assistance for the proper medical treatment that is needed by the victims of these types of incidents.

These things can be done in support of local efforts. These things can be done in support of victims and their families.

The subject of this hearing is the very type of thing that is very attractive and very sexy, the kind of thing you would think that people really would want to be in favor of, something that we could do, but the fact is that this job is best left at the local and State levels. What can be done in a practical sense is for the Federal Government to assist that effort through the kinds of investigative support, evidence processing and so forth that I spoke about previously.

This is really the practical approach that can help us in what we need to do. It is very difficult to fit the entire bias crime type of situation into our legal tradition. Thank you.

[The prepared statement of Mr. Greenberg follows:]

PREPARED STATEMENT OF REUBEN GREENBERG, CHIEF OF POLICE, CHARLESTON,
SOUTH CAROLINA POLICE DEPARTMENT

I am happy to be able to present my views regarding proposed Federal Hate-Crime Legislation in consideration before this committee. We are all familiar with the history of our country in regards to the past reluctance of agents of State and Local government to support and insure the rights and safety of Americans targeted by various racist-extremist and anti-religious individuals and groups who have as their agenda the discrimination of, destruction of, and illegal elimination of certain minorities, religions, and creeds in our country. I will not dwell here with even a short list of the virtual thousands of instances of disrespect and denial of rights that have actively been perpetrated against some of our citizens simply because those citizens chose certain religions, were members of certain ethnic groups and members of certain races, or who chose certain lifestyles. The record is well documented with such instances.

What we have strived for and seldom had until recently, was to have government at its lowest levels in the towns, cities, counties and states actively enforce the rights of all their citizens. As a member of a minority group, I doubted if I would ever see this long sought transformation of local and state government take place almost universally in our Country. In almost nowhere has local government or state government not seized its responsibility in providing adequate prosecution, investigation, and detection of crimes committed against citizens because of their beliefs and the lawful exercise of their rights.

In the recent case in Jasper County, Texas where a black man was dragged to his death down a road while tied to a pickup truck, the local and state authorities acted quickly and decisively to arrest, prosecute and convict those local persons who were responsible for this appalling and despicable act. There was no delay, no hesitation and no reluctance. Most significantly, the local community unanimously endorsed and supported the jury's verdict after the evidence was presented and the conviction came down. This location was far from the glaring lights and sophistication of the big city with all of its organizations and support groups. Likewise, in the recent case in Wyoming wherein a young man was beaten to death simply because of his lifestyle; and his body left hanging on a fence. There was no evidence of lack of investigation, prosecution, or interest in this terrible incident on the part of local law enforcement or prosecution authorities. There was a keen interest in seeking justice by local authorities and the local community alike. Wyoming has no hate crime legislation on the books. Nor does it have so called sentence enhancements available. This case was investigated, prosecuted, and convictions obtained, using existing laws and penalties that adequately and purposefully punished those responsible, in the same way that any criminal should be punished who is convicted of such horrific acts. Ninety-six percent of total law enforcement is conducted by local and state authorities. This is what our founding fathers provided for so long ago, and now, today, this is what we have finally virtually achieved. We should celebrate the success we have obtained.

There was once a time, an unenlightened time, when Federal legislation was seen as our only hope. We longed for local initiatives. Let us now enjoy and buildup the enforcement and prosecution we have achieved at the local level. Now that we have begun to cross the threshold of institutional and local community interest in equal protection, let us keep this responsibility where it will provide all of us with the greatest level of public access. That access is where it ought to be, and where it is likely to be most effective, at the local and state level.

Mr. CHABOT. [Presiding.] Thank you very much, Chief Greenberg. Sheriff Sullivan.

STATEMENT OF PATRICK J. SULLIVAN, JR., ARAPAHOE COUNTY SHERIFF AND MEMBER OF THE EXECUTIVE BOARD OF DIRECTORS OF THE NATIONAL SHERIFFS' ASSOCIATION

Mr. SULLIVAN. Thank you, Mr. Chairman. My name is Pat Sullivan. I am the Sheriff of Arapahoe County, Colorado. I have been in law enforcement in Arapahoe County 37 years, the last 16 years as the elected Sheriff.

I chair the Congressional Affairs Committee of the National Sheriffs' Association, and I am here representing the National Sheriffs' Association. I also serve as a Commissioner on the Commission for the Accreditation of Law Enforcement Agencies mentioned by Chief Greenberg, of which Mr. Barney Frank was one of the original commissioners. I am also involved in the Colorado Hate Crimes Task Force, as mentioned by Mr. Holder—that each U.S. attorney is hosting in their district, and I have assisted or facilitated the hate crimes training in Colorado put on by the Training Unit of the Criminal Justice Information Services Division of the FBI.

The last training we did was put on in four cities in Colorado and one in Cheyenne. The one in Cheyenne was 2 weeks before the Matthew Shepard homicide.

I am also involved in the committee planning the Hate Crimes Summit for Colorado for October 4th of this year.

The National Sheriffs' Association supports both Federal and State hate crimes legislation. Like Chief Greenberg, we do not look for the Federal takeover of local hate crimes. We look for the Federal legislation to provide the jurisdiction for the U.S. attorney and the FBI to assist local law enforcement to investigate hate crime incidents and where the State law fails to address the hate crimes, then the U.S. attorney has jurisdiction to proceed.

We see it as a parallel to our existing Federal-local partnership on the Church Arson/Burning Project. This is where Federal and local join together to address a problem as partners, possibly in task forces, to investigate hate crimes.

Mr. HYDE. [Presiding.] Sheriff, if you don't mind, we have a vote on. It is just one vote. It is the rule so we will go, we will recess and we will vote and hurry back so we can finish this, so if you don't mind, we will interrupt you in mid-presentation—

Mr. SULLIVAN. Okay.

Mr. HYDE [continuing]. And we will be back shortly. It is just one vote and then we will finish with you, Mr. Jay, then we will do questions. Thanks for your patience.

[Recess.]

Mr. HYDE. The committee will come to order, and when we last were visiting, Sheriff Sullivan was making his presentation and so if he could pick up where we left off, that would be fine.

Mr. SULLIVAN. Thank you, Mr. Chairman.

The National Sheriffs' Association supports the Federal legislation. We look for the Federal legislation to provide the jurisdiction for the U.S. attorney and the FBI to be able to assist local law enforcement in this local crime. It is much like the church burning or the church arsons projects, which was a great Federal and local partnership, where the Feds were able to bring training and expertise and technology to assist in the case without taking it over and making it a Federal crime.

The Federal Government brings the training and the technical assistance to help develop the skills in investigating hate crimes such as was provided by the Training Unit of the Criminal Justice Information Services Division of the FBI to local law enforcement in implementing the Hate Crimes Statistics Act of 1990.

Issues in determining intent are unique to the hate crime laws. Local law enforcement generally does not get involved with determining the intent of the crimes they investigate and simply investigate the facts and turn them over to the district attorney or the prosecutor to make those determinations. The prosecutor will never know he has a hate crime if local law enforcement isn't trained in getting behind the facts and determining the intent to see if there is a hate crime in the case at hand.

NSA supports the hate crime legislation for its importance as public policy at both the Federal and the State level. These public policy statements have strong prevention aspects to them in condemning the victimizations based on the victim's religious beliefs, race, origin, disability, gender or sexual orientation.

The Hate Crimes Statistics Act passed in 1990 presented a major training issue for local law enforcement. We are up to, as Mr. Holder mentioned, 83 percent of the population is covered by agencies that understand the Hate Crimes Statistics Act, and conduct the investigations accordingly and the numbers are being produced now. That can be a problem, Mr. Chairman and members of the committee. We need to understand that as the sensitivity to the hate crimes issue increases and law enforcement recognizes them better and the numbers do increase that they can cause a problem for local communities.

As the numbers increase, it doesn't mean that there is increased hate in a community. It means that there is increased awareness and training to detect, report, and deliver the services to the victims of the various hate crimes.

With that, Mr. Chairman, I conclude my testimony.

Mr. HYDE. Thank you very much, Sheriff Sullivan. Before Mr. Jay, who is our last but certainly not least, witness on this panel and then we will go to questions, I don't—we don't usually do this, but I think today is an unusual day. We can welcome one of our members back and that is Congressman Barney Frank from Massachusetts, who as I understand it, underwent open heart surgery Friday, a quintuple bypass, and he was here yesterday and talked about the wonders of modern medicine, I think he is a living example of that and we all hope he—we love to have him here but we don't want him to get over-tired.

Mr. FRANK. Thank you, Mr. Chairman, and I really do appreciate the courtesy that you have all shown, and like the man who is released from a mental institution and had certification of his mental capacity, I may be the only member of this committee who has proof that he has a heart. [Laughter.]

Mr. HYDE. I have always thought of you as the Tin Woodsman. [Laughter.]

Mr. HYDE. Or was that the Cowardly Lion? He was courage, the lion. The Tin Woodsman needed a heart, yes. Well, anyway, welcome back, Barney and you are instructed by your ranking member and by your chairman not to overdo it.

Mr. FRANK. Thank you.

[The prepared statement of Sheriff Sullivan follows:

PREPARED STATEMENT OF PATRICK J. SULLIVAN, JR., ARAPAHOE COUNTY SHERIFF
AND MEMBER OF THE EXECUTIVE BOARD OF DIRECTORS OF THE NATIONAL SHERIFFS' ASSOCIATION

Thank you, Mr. Chairman, for allowing me to submit extended remarks on the issue of hate crime violence. The five and one-half hour hearing, interrupted by votes, tested the endurance of both the Committee and the eleven-member panel on which I was the second to last witness.

First off, Federal jurisdiction is necessary to vindicate the federal interest when the state response is inadequate to do so. In *U.S. v. Lee and Jarrard*, (11/3/94) (S.D. Ga.), two defendants were convicted and sentenced to 81 months imprisonment in federal court on charges stemming from a drive-by shooting into several homes of African-American residents. The State did not prosecute Lee because of insufficient evidence. Jarrard pled guilty to a state charge, but received only 5 months jail time and 5 years probation.

In *U.S. v. Black and Clark* (12/12/91) (E.D. Calif.), two white supremacists were charged federally in the stabbing of a black man at a convenience store/gasoline station. The county sheriff did not have the resources to devote to an investigation, and the local prosecutors did not consider the matter a priority case. Faced with federal charges, Clark pled guilty and was sentenced to serve seven years and 10 months in prison. Black was convicted at trial and sentenced to serve 10 years in prison. The federal government would have lacked jurisdiction to prosecute the defendants if the convenience store had not been considered a place of entertainment due to the presence of a pinball machine in the store.

The Hate Crime Prevention Act (HCPA) would not interfere with state prosecutions. The Department of Justice (DOJ) would continue to limit its investigations and prosecutions to those cases where federal jurisdiction is necessary to achieve justice in a particular case. A decision to use federal authority would only be made after consultation with the state and local officials involved, a policy that is explicitly reflected in the Memorandum of Understanding (MOU) DOJ entered last July with the National District Attorneys Association (NDAA).

Enacting the HCPA would not federalize all violent crimes. State and local law enforcement would continue to play the primary role in the investigation and prosecution of hate crimes, and building productive partnerships with state and local law enforcement would be the Department of Justice's primary goal. Federal jurisdiction is necessary to permit joint state-federal investigations, and to authorize federal prosecution in those cases in which state and local officials are either unable to or unwilling to bring appropriate criminal charges in state court, or where federal law or procedure is suited to the vindication of the federal interest in punishing and deterring hate crimes, such as where the federal law imposes a longer sentence than state law.

Between 1993 and 1998, the Department brought an average of fewer than six hate crimes prosecutions under 18 U.S.C. §245 each year. The enactment of the HCPA would modestly increase this number but would significantly enhance our ability to assist in state and local prosecutions.

The evidentiary prohibition on a defendant's beliefs or membership in an organization suggested by the American Civil Liberties Union (ACLU) is unnecessary and ill-advised. That kind of prohibition could prompt judges to exclude all evidence of a defendant's beliefs or membership in an organization. Where the United States is required to prove as an element of the crime that the defendant acted because of race, the defendant's membership in a group that advocates racist violence may be extremely relevant and should be admissible. The ACLU acknowledges that the Constitution permits a court to consider this evidence. The Supreme Court held so in *Dawson v. Delaware*.

Excluding such evidence could severely compromise the government's ability to prosecute defendants who do not explicitly state their reason for an attack during the attack itself. The existing Federal Rules of Evidence, which mandate excluding evidence that is not relevant to the charges, and the constitutional standard set by the Supreme Court strike the proper balance in determining when to allow consideration of evidence of a defendant's beliefs or membership in an organization.

The majority of states do not have hate crimes statutes that include gender among the categories of prohibited bias crimes. The federal government should have jurisdiction to work with state and local law enforcement in states that do have such laws to investigate and prosecute violent gender-based hate crimes.

In most circumstances, DOJ can provide substantial investigatory and prosecutorial assistance to small localities like Jasper, Texas only where there is a colorable claim of federal jurisdiction. Under current law, we could not provide that type of

help to a small town investigating and prosecuting a violent attack based on gender rather than race, color or national origin.

Adding gender bias crimes to the HCPA will not overwhelm the FBI or the federal courts. State and local investigators and prosecutors would continue to play the primary role in the investigation and prosecution of crimes in which women are victims, including crimes based on gender-bias.

The language of the HCPA itself will limit the number of cases subject to federal jurisdiction. Most crimes in which women are victims would not present the type of evidence necessary to demonstrate the gender bias required under the statute. Moreover, the Department of Justice would prosecute only those cases with the strongest evidence, and only when the use of federal jurisdiction was necessary to achieve justice in a particular case. The purpose of including gender-based violent crimes in the HCPA is to provide a backstop to state and local enforcement and to permit federal assistance in investigations.

As an additional measure to avoid overtaxing the FBI's investigatory resources, DOJ and the FBI are working to develop a new protocol that will clearly define those elements of gender-biased hate crimes that must be present *before* the FBI initiates an investigation. The protocol will go into effect when the HCPA is enacted.

The HCPA will not interfere with or infringe on the state's authority to prosecute violent crimes against women. The overlapping jurisdiction of state and federal laws for hate crimes is not unique. Violent crimes, whether motivated by discrimination or not, are generally covered under state law. Just like homicides, bank robberies, kidnappings, fraud and other crimes covered by both state and federal law, there will be no need for federal prosecution in the majority of cases. States would retain full authority to investigate and prosecute these crimes pursuant to state law.

While the number of reported incidents based on sexual orientation is less than that based on race, it is clear from statistics collected by the FBI and private organizations that an alarmingly high number of hate crimes based on sexual orientation occur each year in this country, and even the Bureau's statistics understate the problem.

Some organizations have reported that the severity of attacks on gays is increasing. While the FBI data offers perspective on the general nature of hate crime occurrences, it is difficult to assess the relative number and severity of these attacks from year to year using the FBI data. For example, the number and distribution of law enforcement agencies participating in the Hate Crimes Statistics Program has not remained constant from one year to the next, and the FBI report cautions that the data are not sufficient to allow valid national or regional measurement of the volume and type of hate crimes.

Mr. Chairman, and members of the Committee, as the Sheriff from Littleton, Colorado, I want to address sexual orientation as an issue in schools since it was mentioned as an issue at Columbine High School where some students referred to the Faggot Trench Coat Mafia. Are schools safe for all of our children. what are the facts?

Are gay, lesbian and bisexual (GLB) students more likely than other students to suffer violent attacks in school settings? Yes, they are. According to surveys of high school-aged students in the Seattle Public Schools and in the states of Massachusetts and Vermont,¹ GLB students were from one and three quarters to over four times more likely to have been threatened or injured with a weapon at school in the past year than other students.

Are they the only students victimized by anti-gay violence? No, they are not. For every gay, lesbian and bisexual student who was the victim of anti-gay harassment, there were about four students who identified themselves as heterosexual who reported anti-gay harassment. Heterosexual victims of anti-gay harassment were over two times more likely than other heterosexual students to have been threatened or injured with a weapon at school in the past year.

Did being victimized by anti-gay violence make students feel unsafe and result in their skipping school? Of course it did. GLB students were from two to four and a half times more likely to skip school because of feeling unsafe on route to or at

¹ *The Youth Risk Behavior Survey (YRBS)*, developed by the Centers for Disease Control and Prevention, is administered in selected states and school districts every two years. Massachusetts, Vermont and the Seattle Public Schools were among a small group of states and school districts that added questions on sexual orientation identification, the sex/gender of sexual partners, and experience of anti-gay harassment. Responses to these questions were correlated with the other health risk behavior information collected in the YRBS. Students classified as GLB included those that identified themselves as gay, lesbian, or bisexual (and in the case of Massachusetts, not certain), and/or who had had same-gender sexual experiences. Data comparing heterosexual students who were victims of anti-gay harassment with other heterosexual students is from the Seattle Public Schools.

school during the past month than other students. Heterosexual students who experienced anti-gay harassment were over three times more likely to have skipped school because of feeling unsafe in the past month than other heterosexual students.

But, aren't students with other differences targeted for equally violent attacks? Yes, they are. We need to protect all at-risk students. Statistics show that GLB students and heterosexual students perceived to be gay are comparable to other groups of students at elevated risk of school-based attacks. Results of the 1993 *National Household Education Survey* of 6th through 12th graders found that 10% of African-American students, 11% of Hispanic students, and 5% of Caucasian students said they sometimes stayed home from school because they worried about harm.² This can be compared to the 14% to 20% of GLB students, and the 16% of heterosexual students reporting anti-gay harassment, who missed school because of feeling unsafe. Gay and lesbian students have been identified by their peers as the most likely victims of violence in their schools according to safe school surveys of high school students in the state of Minnesota. These surveys have been conducted annually since 1994 by the Office of the Minnesota Attorney General.³

Does anti-gay harassment in and around schools have other serious consequences besides students skipping school? It certainly can. GLB students and heterosexual students targeted for anti-gay harassment are more likely than other students to engage in behaviors that place them at risk of school suspension or expulsion. They are also more likely to engage in health risk behaviors such as being in a physical fight at school, using alcohol and other drugs, engaging in risky sexual activities, and attempting suicide. Heterosexual students who were victims of anti-gay harassment were over five times more likely to have made a suicide attempt requiring medical treatment in the past year than other heterosexual students. GLB students were over four times more likely to have made a suicide attempt requiring medical treatment in the past year than other students.

What about our state? Do we know the extent and consequences of anti-gay harassment in Colorado schools? No, we do not. Due to many realistic concerns and fears, students who are victims of anti-gay harassment rarely tell their parents or school staff. Therefore, schools are unlikely to know the true extent of anti-gay harassment in their buildings and neighborhoods. Although the Colorado Department of Education and many school districts in the state conduct anonymous surveys on school climate and health risks behaviors, they have never asked students about their sexual orientation or experiences of anti-gay harassment.

What can we do? The Colorado Safe Schools Coalition is initiating a research project to gather information on anti-gay harassment in Colorado schools and to offer referral and advocacy. We are setting up a safe and confidential hotline for students to report harassment on the basis of sexual orientation or gender identity differences. We encourage parents, community members, schools and youth-serving organizations and agencies to support this project by placing posters advertising our hotline number in school buildings and other youth settings. We also encourage school districts and the Colorado Department of Education to ask questions about sexual orientation and harassment of all kinds, including anti-gay harassment, in their school climate and health behavior surveys.

Thank you Mr. Chairman and members of the Committee for the opportunity to address you today on hate crime violence.

Mr. HYDE. Mr. Jay. At last to get to you. Thank you.

STATEMENT OF DENNIS JAY, EXECUTIVE DIRECTOR, COALITION AGAINST INSURANCE FRAUD

Mr. JAY. Thank you very much, Mr. Chairman.

My organization, the Coalition Against Insurance Fraud, takes no position related to Federal actions to curb hate crime. Our purpose here today is to convey one small aspect of this problem that we see growing and how it is likely to impact communities in responding to hate crimes.

²"Student Strategies to Avoid Harm at School," *Creating Safe and Drug-Free Schools: An Action Guide*, National Center for Educational Statistics, September 1996.

³*Safe Schools Secondary Survey Compilation Report: 1994-1997*, Office of the Minnesota Attorney General, March, 1998 (available on the internet at: www.ag.state.mn.us/issues/sss98/sss98.html).

One of the responsibilities of our organization is to monitor local as well as Federal or national trends concerning insurance fraud, and one we monitor is property losses intentionally caused by people for the purposes of collecting on insurance. These include staged break-ins, burglaries, arson, vandalism and automobile accidents. We see hundreds of cases a year of these types of crimes.

One new twist on these intentionally-caused losses is the element of hate. In 1997 our national data showed a small but certain rise in the number of arrests and convictions of people who stage hate crimes for the purposes of illegally collecting on insurance policies. During the preceding years we saw maybe one or two cases a year. Starting in 1998 we started to see one or two cases a month. While these numbers, and I emphasize this, are still very small, it was enough for us to probe further to determine whether this was the beginning of a trend.

From our inquiries to law enforcement and insurance companies, there is some evidence to suggest that there are many more hate crimes that may have been staged by alleged victims for either financial gain through insurance proceeds or to evoke community sympathy. While again these numbers aren't great, they are enough to raise concern about whether this crime will grow and what impact it may have on community response to real victims.

The element of hate adds a certain amount of legitimacy to staging a crime and is an attempt to deflect suspicion from the actual perpetrator. In some cases the criminal sets the stage for the supposed hate crimes by forging letters or documents purported to be from some hate group in order to have a convenient scapegoat to point to after the crime occurs.

Now the economic damage to these fake hate crimes is not great, relatively speaking, but the damage to communities that discover that their good will and generosity has been betrayed often is severe.

We have got several cases that we cite in our written testimony. I would just like to mention one local one that kind of illustrates this point.

In Maryland, Sonia James of Laurel, Maryland, told police she came home one day to find that her kitchen and bathroom were flooded, furniture overturned, clothes damaged by bleach, her children's toys were broken, and her walls painted with racial slurs telling her to get out of the neighborhood.

The community, rallying to what local officials called the worst hate crime in history, contributed food, clothing, toys, another home and \$5,000 collected on her behalf. She also received a \$14,000 settlement.

She tried to point the finger to a neighboring family who had given her, what she said, "hard looks." In reality, she staged this fraud including passing out leaflets from phony hate groups just prior to this—doing this crime. Imagine how the people in this community felt after learning that their good will had been betrayed. Imagine still how these same people will respond when a real hate crime next occurs in their community.

These fake hate crimes also tear at the fabric of communities, casting doubt about whether the crimes are real or not and giving

people one more reason not to get involved in lending a hand to a neighbor when they are in trouble.

As a society we need to deter this type of crime as much as possible for the sake of all real victims, whether they be victims of hate crimes or anybody who pays insurance premiums

Effective deterrents include thorough investigation by law enforcement and by insurance companies to uncover any evidence that a hate crime might be staged. Insurance companies need to be encouraged to cooperate fully with law enforcement when they have a suspicious case, and while hate crime victims obviously always should be given the benefit of the doubt, insurance companies need to be ever vigilant to scam artists who prey upon the insurance system for financial gain.

We also need more public education to reinforce deterrents. People need to understand, if they commit this type of crime, there is a good chance they will get caught and if they get caught they will get punished severely, and our organization is working with States to do just that.

In summary, let me just say that there is currently a large minority of Americans who tolerate insurance fraud and unfortunately that seems to encourage a few to take the desperate act to stage fake hate crimes, and while it is not my purpose here today to cast aspersions on anyone who alleges that they are a victim of hate, I think there is enough cases out there that we need to take a look at this and to make sure it doesn't negatively impact on what society is trying to do to deter this type of crime.

[The prepared statement of Mr. Jay follows:]

PREPARED STATEMENT OF DENNIS JAY, EXECUTIVE DIRECTOR, COALITION AGAINST
INSURANCE FRAUD

Good morning and thank you for the opportunity to testify here today. My name is Dennis Jay and I'm the Executive Director of the Coalition Against Insurance Fraud. We are a Washington, D.C.-based national alliance of public interest groups, government organizations and private insurance companies who are dedicated to fighting all forms of insurance fraud. We seek to curb fraud through public advocacy, consumer education and research.

Our organization takes no position related to federal solutions to curb hate crime. Our purpose here today is to convey one aspect of this problem we see growing, and is likely to affect how communities respond to hate crimes.

One of the responsibilities of our organization is to monitor local as well as national trends concerning insurance fraud. Our goal is to spot new or changing criminal behavior so law enforcement and victims can better prepare to counter these economic crimes, or at least be aware of them when they do occur.

In late 1997, our national data showed a small but certain rise in the number of arrests and convictions of people who stage hate crimes for the purposes of illegally collecting on insurance policies. These cases involved property damage to homes and cars, either by burning, defacing or damaging them in some other way. During the preceding years, our systems logged few, if any, of these types of cases. We perhaps saw one or two cases a year. In 1998, we started logging one or two faked hate crimes a month. While these numbers still remain very small compared to the total number of reported hate crimes, it was enough for us to develop an initial inquiry into whether these few cases might be the beginning of a trend.

From our inquiries to law enforcement and insurance companies, there is some evidence to suggest that many more hate crimes may have been staged by alleged victims for either financial gain through insurance proceeds or to evoke community sympathy. The numbers are not great, but enough to raise concern about whether this crime will grow and what affect it could have on community response to real victims.

A few examples from our files:

- Sandra Benson and Freeman Berry were indicted on charges they defaced their home in Jonesboro, Georgia, with racial slurs and set the house on fire in an attempt to collect more than \$300,000 in insurance money for the home and personal property supposedly destroyed in the fire. The couple claimed they were targeted because Benson, a white woman, lived with a black man. The two reportedly received anonymous threatening phone calls, and showed television news crews racial slurs and swastikas painted on a fence and shed in the couple's yard. In reality, the couple stored their possessions prior to the fire. After an investigation, the couple was charged on 23 fraud counts covering several schemes that took place over the years, including another house fire. Benson and Berry pled guilty to fraud and arson charges.
- DeWayne Byrdsong, a black minister in Coralville, Iowa, claimed his Mercedes-Benz had been spray-painted with racial slurs. When his insurer delayed paying the claim, he contacted everyone from Oprah Winfrey to the local media, charging the delay was racially motivated. However, local body shops reported that Byrdsong had been seeking repainting estimates before the alleged crime occurred. He was found guilty of making a false report to authorities.
- Matthew Porter of Williamsport, Pa., was found guilty of arson and fraud in an attempt to collect \$60,000 in insurance money. During the trial, prosecutors presented documents that Porter, a former federal prison counselor, sent to the wardens of three federal prisons and a local police chief and left at the crime scene, intended to show that the Ku Klux Klan was behind the fire. In a sentencing memorandum, prosecutors discussed the damage Porter had done to racial relations. He was sentenced to 10 years and three months in prison and ordered to pay \$147,000 in restitution.
- Angela Jackson of Chicago, an art distributor, was indicted in connection with a scheme to make it appear as though racist UPS employees were damaging with racial epithets packages being sent to her that contained art work. She was accused of mailing the packages herself as part of an elaborate scheme in which she also mailed similarly defaced packages to notables such as the Rev. Jesse Jackson, his son U.S. Rep. Jesse Jackson Jr., U.S. Rep. Bobby Rush and Kweisi Mfume, among others. She also wrote to prominent black Members of Congress, seeking assistance in collecting from UPS, which she claimed damaged the entire African-American community through its actions.
- In Cooper City, Fla., Jerry and Jamie Roedel were accused of defacing their home with swastikas and other signs of vandalism to cover up a burglary they apparently staged themselves. The crime sparked an anti-hate rally that drew more than 500 people to a local synagogue. The face of Jerry, who is Jewish, was blacked out of family photographs. Jamie filed a \$48,000 claim with her insurer and collected \$28,000.

One reason the arrest and conviction numbers may be suppressed is that both law enforcement and insurance companies generally are hesitant to press cases of fake hate crimes unless the evidence is overwhelming. To falsely accuse a real victim of hate would be the gravest injustice, compounding the hurt and damage already suffered. And no insurance company wants to be on the wrong side of a civil trial decision accusing it of dealing in bad faith with a hate crime victim.

Nonetheless, we know from research that our organization and others have conducted that there is a small minority of Americans that seek to take advantage of opportunities such as the growing profile of hate crimes to use as cover to commit insurance fraud. Arson, for example, is a convenient method to score a big insurance settlement for loss of a home or business. The element of hate adds legitimacy to the crime and is an attempt to deflect suspicion from the actual perpetrator. In some cases, the criminal sets the stage for the supposed hate crimes by forging letters or documents purported to be from some hate group or other, in order to have a convenient scapegoat to point to after the crime occurs.

The economic damage caused by fake hate crimes is not great, relatively speaking. But the damage to communities that discover that their goodwill and generosity has been betrayed may often be severe.

A local case in Maryland illustrates this point. Sonia James of Laurel, Maryland, told police she came home one day to find her kitchen and bathroom flooded, furniture overturned, clothes damaged by bleach, her child's toys broken, and the walls painted with racial slurs telling her to leave the neighborhood. The community, rallying to what local officials called the worst hate crime in their history, contributed food, clothing, toys, another home and \$5,000 collected on her behalf. She also received a \$14,000 insurance settlement. She tried to point the finger at a neighboring

family who had given her, she said, "hard looks." In reality, she staged the fraud, including passing out leaflets from a phony hate group just prior to the crime. She pled guilty and was sentenced to nine months in prison and more than \$26,000 in restitution.

Imagine how the people in her community felt after learning that their goodwill was betrayed. Sylvia Vacchio Chiodaroli, one of James's neighbors, told the *Baltimore Sun* that the incident destroyed many residents' sense of trust and community. "It really makes me angry," she said. "It caused tension. People were pulled against each other."

Imagine still how these same people will respond when a real hate crime next occurs in their community. These fake crimes tear at the fabric of communities, casting doubt upon whether crimes are real or not, giving people one more reason not to get involved in lending a hand to a neighbor in trouble.

As a society we need to deter this type of crime as much as possible for the sake of all real victims. But before we can work to deter the crime, we must recognize the hard fact that people will take advantage of others in this fashion. It's hard to admit that this sort of thing goes on in our society; it rightfully sickens many people just to think that someone could fake a hate crime. Yet if we don't admit that it happens, we won't be in a position to learn the signs and take the steps necessary to investigate this crime. Yes, it's a sensitive area, and one that must be handled accordingly. But if we're to have any hope of maintaining our trust in one another, honest people must step forward and deal with truth, and seek solutions to deter this crime.

Effective deterrence includes thorough investigation by law enforcement and insurance companies to uncover any evidence that a hate crime might be staged. Insurance companies also should be encouraged to cooperate fully with law enforcement when they have a suspicious case. While hate crime victims should always be given the benefit of the doubt, insurers need to be ever vigilant to scam artists who prey upon the insurance system for financial gain.

Public education also is a key to reinforce deterrence. These people need to understand that if they commit this crime, there's a good chance they will get caught. And if they get caught, they will be punished severely.

Currently, there is a large minority of Americans who tolerate insurance fraud, and unfortunately, that seems to encourage a few to take the desperate act of staging fake hate crimes.

Mr. HYDE. Thank you very much, Mr. Jay. We will now start the questioning with Mr. Conyers.

Mr. CONYERS. I am going to yield to my colleague from Massachusetts, Mr. Frank.

Mr. FRANK. I thank the ranking member—I appreciate that—so I can leave early.

Let me just begin with Mr. Jay, and obviously these fraudulent cases are horrible.

I notice you mentioned Georgia. Does Georgia have a State hate crimes statute?

Mr. JAY. I am not aware of one—

Mr. FRANK. So as far as you know there is no correlation between the existence of State hate crimes statute and people's propensity to fake hate crime? You are not alleging that?

Mr. JAY. No.

Mr. FRANK. Okay. I think that is fine. You know, they tell me 20 States have them and if I had to pick one, I wouldn't put Georgia as the likeliest or a couple others so I appreciate your testimony but it does seem to me, to be honest, to be irrelevant in the sense that there is no correlation and you are not alleging that the existence of hate crimes statutes promote this.

Let me ask Mr. Troy, I was particularly struck in one of the things that you didn't get a chance to say when you quote what you aptly called Justice Jackson's eloquent words, "Nobody can prescribe what shall be orthodox" and you say "These eloquent words

apply to protect flag-burners, Jehovah's Witnesses and even racists."

That is, to the extent that you oppose this on first amendment grounds—I realize there are other grounds—you would also apply that opposition to flag-burning—efforts to criminalize flag-burning?

Mr. TROY. Personally? Yes.

Mr. FRANK. You are the only one I am asking.

Mr. TROY. Yes.

Mr. FRANK. I appreciate that, because—and I think it is relevant that in your statement of opposition on first amendment grounds to this legislation you would—I guess I would caution that if this committee has its way you will be factually incorrect soon and Justice Jackson's eloquent words will no longer equally protect flag-burners, Jehovah's Witnesses, and racists. They will protect Jehovah's Witnesses and racists but we will have mandated the criminalization of flag-burners.

Well, that is a relevant point for this. I am a libertarian. I thought *R.A.V.* was the right decision. I think that a right to burn that cross in Virginia, as long as it is your cross and it is on your property—and you can't burn a cross in Massachusetts because you can't burn leaves in Massachusetts under the open burning law, but if it is not content-related.

One of the things that ought to be very clear is the statute we are talking about in no way, shape or form criminalizes thought and I would say I differ from my colleagues. The man with the hat is not here anymore but I am not one who thinks that the privilege of looking ridiculous should be confined in a hearing to only the members of the congressional committee involved. [Laughter.]

Mr. FRANK. I am perfectly prepared to extend that to anybody who feels particularly foolish at a given time, but I would oppose anything that criminalized thoughts, et cetera.

We are talking, clearly, only about things that criminalize acts.

Now let me ask Professor Baker, you said that many of the problems you saw from the prosecutorial standpoint would be resolved if this became a sentencing enhancement. Would you be supportive of sentencing enhancement then?

Mr. BAKER. Sentencing enhancement already exists.

First of all, let me go back—

Mr. FRANK. No, please don't go back, because I am tired and I am going to have to go home.

I need you to answer my question. Would you be in favor of this law if instead of making it a new crime we made it a Federal sentencing enhancement?

Mr. BAKER. I don't care whether you make it an enhancement. I am against further federalization—

Mr. FRANK. Sir, I understand that but—

Mr. BAKER [continuing]. Of criminal law, period.

Mr. FRANK. Okay, but you have made a big point—

Mr. BAKER. Right.

Mr. FRANK [continuing]. Of saying that it would be better—that an enhancement would resolve the problem. I wondered whether that frankly was just arguendo—

Mr. BAKER. Could I—

Mr. FRANK. Excuse me, Mr. Baker—it is a simple question.

Mr. BAKER [continuing]. Answer the question?

Mr. FRANK. Yes, but let me pose it to you, because you may not have heard it.

Would you be in favor of this statute if instead of creating a new offense, it simply created a sentencing enhancement?

Mr. BAKER. If it creates a sentencing enhancement, it does not raise the problems that I have raised.

Mr. FRANK. Is that a yes or a no? I may be slow today. I understand it doesn't raise those.

Would you be in favor of the statute if it was simply a sentencing enhancement?

Mr. BAKER. I don't think---

Mr. FRANK. Please say yes or no. I am a sick man.

Mr. BAKER. But wait a minute. I don't give a yes or no answer---

Mr. FRANK. So say yes or no and then elaborate.

Mr. BAKER. I would like to elaborate. You just said a minute ago, with all due respect, that this statute would not do certain things.

I am reading the definition---

Mr. FRANK. Professor Baker, I will go back to it. Excuse me. I will go back to you on that, but you are evading the question now.

Mr. BAKER. I would like to give a predicate to the answer, if I could.

Mr. FRANK. Well, but I would like to know, it doesn't seem--this isn't tricky. You brought up sentencing enhancement. I am not being tricky. I am asking you a very straightforward question. Would it make sense, given you were talking about the criminal procedures, to make this a sentencing enhancement. It is not---

Mr. BAKER. If it is a legitimate Federal crime, it is a legitimate enhancement, but I dispute that many of the things to which it is an enhancement are legitimate Federal crimes. That is why I have to qualify the answer.

Mr. FRANK. Okay, so you are not in favor of making the statute an enhancement. You were explaining why.

I must say the legitimate Federal crimes are only about grounds. Let me ask those who are against this, we have on the books in various States and on the Federal level some legislation that deals with this regarding race, et cetera.

Are there any of the members of the panel who are against this statute who are in favor of maintaining on the books existing Federal legislation that seeks to penalize or criminalize prejudice based on the existing categories?

Mr. Troy?

Mr. TROY. No. Can I respond on your thought question.

Mr. FRANK. Let's make a deal. Could you answer both?

Mr. TROY. Sorry?

Mr. FRANK. If you answer both, yes.

Mr. TROY. Yes. I think I answered your---

Mr. FRANK. What is the first question. You would abolish them all?

Mr. TROY. I am opposed to Federal hate crimes legislation.

Mr. FRANK. All right. Before you get there---

Mr. TROY. Okay.

Mr. FRANK [continuing]. How about State—excuse me, we will get to it. How about State hate crimes, because some of what you say is federalism, but first amendment principles would be State.

Mr. TROY. Yes. Can I just quote Larry Tribe to you on this issue of—

Mr. FRANK. No. I will call him up and I will know what he says.

Mr. TROY. Okay.

Mr. FRANK. What I want to ask you is this. There are States that have laws that penalize people who commit crimes against people who are 60 or older or based on race. Would you be in favor of repealing all of those?

Mr. BAKER. Yes.

Mr. FRANK. Mr. Troy first.

Mr. TROY. I think particularly—for example, children might fall into a different category, okay? That is I think different than—

Mr. FRANK. How about people 60 or older?

Mr. TROY. I think that is also different.

Mr. FRANK. Sixty or older?

Mr. TROY. Why? Because there is a particular physical vulnerability that one is addressing presumably in that context.

Mr. FRANK. So if there is a particular physical vulnerability, it is okay. Look—

Mr. TROY. You know a lot about the Constitution. There has got to be a rational relationship—

Mr. FRANK. Please don't—no, no. I am asking you a question.

Mr. TROY. There has to be a rational relationship—

Mr. FRANK. Mr. Troy, you are filibustering and you are really trying to avoid difficult answers, I think, because, see, we have to look at the principles.

You said violence is violence and if someone kills me because I am Jew, I am dead, if someone kills me because I am a Democratic—by the way, if somebody assaults me because I am a Member of Congress and also assaults you, I am more protected, so I assume we would repeal that.

Mr. TROY. It makes sense you would have passed that law.

Mr. FRANK. We should appeal the statute that protects us—but my question is if someone—I am 59 years old. I am going to have a birthday in March. Doctor says it is going to happen, so if like a year from now someone shoots me it should be worth or hits me than today. How in your principles can you justify that?

Mr. TROY. Because in that case what you are trying to do is protect a particularly vulnerable population and I believe that you can make a case that there is a rational relationship between enhancing the penalty for the crime and deterrence.

Mr. FRANK. One last question—

Mr. TROY. However, I believe that, like those who fought for civil rights, I believe that race, creed, color, national origin, religion are immutable characteristics that are and should be irrelevant under the law.

Mr. FRANK. And age is not an immutable characteristic? You will have to tell me how I can mutate my age. I will be very interested in that later, but I do have a question for you and it is this, and this will be my last question, but you are conceding, it seems to me, an important principle.

If we make a factual determination that a particular population is particularly vulnerable—

Mr. TROY. Physically.

Mr. FRANK. Only physically?

Mr. TROY. Physically.

Mr. FRANK. What if they are—for instance, transgendered people in my experience have been likelier to be victimized. They are right now great victims of prejudice and I hope that if we do something we will explicitly include in the hate crimes transgendered people—if we could prove that a particular population was particularly vulnerable to assault, et cetera, that still wouldn't make a justification? Only if they are more physically vulnerable?

So you would include then children, people over 60—the handicapped, is that right? In your—

Mr. TROY. I think there is a much better case to be made in that case than for race—

Mr. FRANK. I didn't ask you for better cases.

Mr. TROY [continuing]. Creed, color, sex and national origin.

Mr. FRANK. Okay, see, but—I will thank you, Mr. Chairman. You know, when you tell me it is better, it is this, it is that, I don't vote that way. I don't vote this would be better than that in a hypothetical situation. I am going to vote on a piece of paper that says I am either voting for it or against it. I mean you testify well, that would at least be better than this, that wouldn't be as bad as that, that wouldn't be so worse as the other. You have given me no help whatsoever, and now I have to go, Mr. Chairman.

Mr. HYDE. Thank you. Ms. Bono.

Ms. BONO. Thank you, Mr. Chairman. Barney, you better check your pulse right now, I think. [Laughter.]

Ms. BONO. It is exciting that I am the first one to go. This is a first for me. I should offer the rest of the committee free lunch more often.

I want to just ask Sheriff Sullivan a couple of questions.

Recently we addressed youth violence in this committee and it is a topic that is very important to all of us here, but there are students who are victims in the Columbine shooting who the shooters said they picked to murder because of their color and their religion.

Do you think those crimes for those victims should be separated from those who were picked because they were jocks and handled separately by Federal law enforcement, and wouldn't passage of H.R. 1082 permit the Federal Government to separate these cases from the others, and is that a fair result?

Mr. SULLIVAN. No, in view of the total of 15 people killed in the single episode.

Ms. BONO. All right, but some were singled out specifically because of their race, one because of her religion, and certainly they targeted jocks, but we are not talking about including jocks here.

I mean how do we differentiate? Would you not handle those separately then?

Mr. SULLIVAN. No, ma'am.

Ms. BONO. No, it would be all the same?

Mr. SULLIVAN. All 15 would be one criminal episode and be handled together.

Ms. BONO. So do you then think the States are not doing their job, to bring justice to those who victimize people because of their race, religion, color, sexual orientation, gender or disability?

Mr. SULLIVAN. I believe that States are doing their best and the States that do have those statutes that can address it.

Ms. BONO. You know, I think, as I sit up here, I like many Americans wonder how you can say something is a hate crime and something is not a hate crime. I personally believe anything is hate.

I think we heard from Mrs. Carrington that certainly this assailant hated the women and any time a woman has to fear for her life, and I think it is something a woman always lives with, I think that the most heinous of crimes might be an elderly woman who sits home at night worried for her very life because somebody wants to break in and victimize or simply to burglarize her, so when you talk about hate crimes I understand that it is the fear of terrorizing the community that is larger than the one specific victim, so when I look at this I wonder—I don't understand how we can differentiate here and when we add the next group or the next group.

So I think like most Americans there is a big question here, and also I sit on this panel. I am not a lawyer and I came to Washington believing that the most effective way of having government is to send it home, to do what we can on the local level, and I think, Mrs. Carrington, in your case, you know, my heart goes out to you and I can't imagine what it was like for you just waiting for the month.

I remember for me waiting for news of what happens to your loved ones, I think, is the most anguishing part of all, but I have to say to you, I am certain and hopeful that the State will do its job and do its job effectively, but as I sit up here I need, I guess, truthful testimony from you all and I am not saying nobody is not being truthful here, but I am a little bit in the dark with Orr's testimony and if you could clarify for me a little bit in your case.

Our staff has been in contact with the DA's that handled your case, and we were informed that you and your partner, Mr. Beauchamp, were, "less than cooperative" throughout your investigation and that you refused to work with the DA appointed to your case.

Is this true?

Mr. ORR. That is patently untrue.

Ms. BONO. Can you explain then for the committee the circumstances surrounding your interaction with the DA?

Mr. ORR. Certainly. The ADA who handled our case, Stephen Hightower, never contacted us. We never heard from him. The only time I heard from anyone from the assistant district attorney's office—excuse me—from the district attorney's office was when I called victim witness.

It was only through my background in criminal reporting that I was able to track down what happened.

Ms. BONO. I understand though that a standard form letter was sent to all victims asking for medical records and documentation of injuries for purposes of restitution.

Did you mention or present documents to the DA's office at the time of your—

Mr. ORR. We never received that letter. We never received that letter. We did send documentation to the DA's office. We did call and ask why no one had been in contact with us.

I checked with them every month.

Ms. BONO. Thank you. You know, I guess once again as the hearing goes forward I hope I can truly—yes, sir, go ahead.

Mr. ORR. Can I add one more thing?

Ms. BONO. Yes.

Mr. ORR. I would like to add, though, that after Stephen Hightower had made his deals with our assailants, I spoke with Brian Crane. He is the first assistant district attorney for the Tulsa County Prosecutor's Office, and he himself told me that this was not handled in the fashion that it is usually handled in.

Bill LaFortune, the district attorney at that time, later resigned, not over that, but he just resigned, so he is not even in the office anymore, but Brian Crane can speak to what I just said.

Ms. BONO. Thank you. Thank you, Mr. Chairman.

Mr. HYDE. Thank you. Mr. Conyers.

Mr. CONYERS. Thank you very much. Attorney Troy, are you against all hate crime legislation or just this particular bill?

Mr. TROY. The principles that I have articulated, I think, cut against all hate crime legislation.

Mr. CONYERS. So you suggest then repeal of any hate crime legislation that may be on the books?

Mr. TROY. I just suggest that you should abandon this enterprise and focus on enforcing the criminal law.

The way a society gives voice to its need for justice and vengeance is through the criminal law. And if our laws are not tough enough—and maybe Mr. Orr's story suggests that they are—are not tough enough—then let us make them tougher. Let us deploy resources, but crime should be punished—my point is—without regard to a victim's immutable characteristics.

Mr. CONYERS. Well, you know what that ignores is the history of racism in America.

Mr. TROY. I don't think I have ignored the history of racism in America. I think I addressed that in my testimony.

Mr. CONYERS. Well, I think that—well, you mention it, but there has been very little discussion about the fact that historically most hate crimes were directed at African Americans and the fact of the matter is we now have, after years of the NAACP trying to get anti-lynch laws federalized back in the days of Roy Wilkins, we now are coming back into that era again and we are doing it very effectively, I think, not only with the existing law but with hate crime statistics that are being compiled, with church burning laws that are being added—that have been added recently from this committee, and so I think we are moving in a direction that tries to deal with this incredible activity that seems to be increasing, and that it includes gender, race, sexual orientation, and these matters—disability—are all to me extremely critical and very important.

Now let me ask—

Mr. TROY. May I respond to that for a second?

Mr. CONYERS. No, you can't.

Mr. TROY. Okay.

Mr. CONYERS. Thank you very much. Professor Lawrence, the most serious discussion that I have heard from this panel outside of personal comments and experience of a tragic nature is the fact that this statute, proposed statute, might bump up against the commerce clause and the 13th amendment, and that is precisely what we are trying to do is facilitate—to take away those barriers that now restrict the application of these laws, and I wonder if you see any way around this or how we might want to deal with it.

Mr. LAWRENCE. I think that the statute in fact is fully consonant, indeed is based, its constitutional authority is based on the 13th amendment and the commerce clause, but before I turn to that, if I may just for a moment, I think it is important to highlight where the statute is breaking new ground—where the proposed legislation breaks new ground and where it does not.

The fact is that §245, which would be amended by the Hate Crimes Protection Act of 1999, has been upheld as a proper exercise of Federal authority, so the question is can that be expanded upon, but that is not a new issue.

Mr. CONYERS. Exactly.

Mr. LAWRENCE. The church arson statute was passed through this committee and by the Congress and presumably has no problem of jurisdiction as well, so that is the slate that this amendment would be written upon. It is not a blank slate at all.

Starting then with that slate, the 13th amendment certainly provides authority at least with respect to race and ethnicity. I would myself argue religion and other categories as well. Badges and incidence of slavery are given to Congress to make decisions under section II of the 13th amendment and as long as they are rational decisions as to what actually counts as an incident of slavery that is considered appropriate, and the courts have held, going back really to the 19th century as well as recently, it does not literally mean slavery. It does not apply only to African Americans whose ancestors were literally enslaved.

So my understanding is the 13th amendment is distinct just from an abolition of slavery but one need not take that theory to ground the statute. Turning to the commerce clause, which is what the amendment itself does for religion and for sexual orientation, for gender and for disability, I think the commerce clause provides more than ample authority.

I think one of the things that is important to illustrate is that the *Lopez* case did not undo years of precedent of a broad authority to Congress under the commerce clause—certainly it restricted it but it did not undo it altogether. I think the *Brzonkala* case should be understood for what it is, which is an outlier case. A case was decided in a Federal District Court in Illinois at the very end of July—I think it now brings the numbers to 13 district courts going the other direction and upholding the Violence Against Women Act.

As a matter of fact, that decision—*Cahn v. Cahn* is the name of that case—it is a fresh case out of Illinois—explicitly looks at the *Brzonkala* case and says well, the seventh circuit precedent, post-*Lopez*, is very different from the fourth circuit's view on this, so the fourth circuit is the outlier on this. Obviously the Supreme Court will give us an answer, but if one were counting circuits and district courts within circuits, one would say that the strong precedent

is that *Lopez* does not undo commerce clause jurisprudence and does require that there be some nexus with the commerce clause, and I think that the statute does provide that. I think that hate crimes do in fact provide that.

The final thing I would say, Congressman, is that the statute itself provides for a jurisdictional element that requires proof within the prosecution's case of jurisdictional connection with the commerce clause. Now I say as a former assistant U.S. attorney: is that going to be an easy burden? It most certainly will not be. It is in fact going to be a very hard burden. But what I heard the Deputy Attorney General of the United States say was: "I will take that burden"—give me the statute, I will take that burden—so I think that if the biggest concern is that this statute makes it too hard on prosecutors. Take it from one former prosecutor and from one current prosecutor from whom you heard, which is to give—for Congress to give to the prosecutors this authority.

Mr. CONYERS. Well, I thank you so much for this very short discussion.

Mr. HYDE. The gentleman from New York, Mr. Nadler.

Mr. NADLER. Thank you. Professor or Mr. Troy, you talk in your prepared statement about status, that we shouldn't make hate crime legislation—it is inconsistent with the egalitarian progression against status-based crimes. You talk about varying punishment as based on the victim's status, the Code of Hammurabi. You bring that up—a very interesting historical discussion—through the Bible up to date. You quote Professor Schlesinger as saying that one of the great dangers is balkanizing the country.

It strikes me as very interesting and perhaps relevant to something else but not to this bill at all, because this bill is not based on status. The bill says whoever—I am going to paraphrase here—whoever assaults somebody because of the person's actual or perceived religion, gender, sexual orientation, et cetera, et cetera, makes that a crime. It seems to be the motive of the perpetrator that is the issue in here, not the status of the person, so that we are not creating protected classes. If someone attacks, as I mentioned before, a white heterosexual male because he is a racist and hates white heterosexual males, that is as much a hate crime under this statute as anything else.

How do you answer the—how do you reconcile what you are saying with the fact that this statute does not go off on status but on motive? That is to say, we add a criminal offense if you assault someone because of your perception of certain characteristics of that person?

Mr. TROY. Let me answer that in two ways. Number one, this is what Professor Tribe, by no means a conservative, says about whether hate—whether statutes like this actually criminalize the thought.

He said, "To be sure, one who incites arson against an NAACP headquarters in a racist speech is more reprehensible than one who incites the same arson to collect insurance proceeds, but to punish the former more severely than the latter is arguable to penalize a reprehensible point of view as such" so the first point is you are criminalizing particular points of view and particular thoughts. That is number one.

Number two, I think it is inescapable that the purpose of this legislation is to recognize the grievances of particular groups and not others. We are all members of a great many groups. Why should we write into the law—

Mr. NADLER. Excuse me, you are filibustering, not going to my question.

My question is we are not criminalizing or giving effect to status. Your supposition is that it is because of the grievances of people of certain statuses. I would say it is because of our recognition that people do special crimes and do have special effects—that is extra effects on making whole groups fearful of exercising their rights, and that is why we are doing it, and of course your first answer, when you talked about thought goes exactly to the point.

The question here is motive, not status—

Mr. TROY. You are criminalizing thought.

Mr. NADLER. Professor Baker—Professor Troy, rather—Professor Baker, you said before in your testimony that by making the motive an element of the crime you are making it much harder to convict someone of the crime and you are making the job of the prosecutor much harder.

I think every State in the Union that I know of and certainly the Federal Government has in its law in our criminal code what we call “lesser included offenses”—in other words, if I assault you, and I do it because I hate people named Baker, well, it might be a hate crime under the statute—well, it is not—I am sorry—I do it because I hate heterosexual males, that would be a hate crime if you could prove the motive, but it would equally be an assault, so you are not making it harder for the prosecutor. You are giving the opportunity to prove the added crime, if he thinks he can, but you are not making it harder for him to prove the underlying crime of assault.

Mr. BAKER. That is—

Mr. NADLER. Can't hear you.

Mr. BAKER. That is not necessarily true. It depends on the—

Mr. NADLER. Talk into the mike, please.

Mr. BAKER. Your statement is not necessarily true at all. First of all, the structure of lesser included offenses varies from State to State on a number of factors—one.

Two, if you indict, you open up to evidence all kinds of issues that would not otherwise be opened.

You get in and you lengthen the trial and you allow the defense to get into things that they couldn't otherwise get in, and ultimately what you are doing is allowing an argument, whether on race, on sexual orientation, that is there to divide the jury.

Mr. NADLER. Excuse me, what you are doing is giving the prosecutor the option of adding to the assault if he can prove—he can't prove the assault, the whole thing is irrelevant. You are giving the prosecutor the option of adding to the assault elements the elements necessary to prove this additional crime and he can make a judgment or she can make a judgment as to whether he or she wants to do that and thinks it worth doing, and you can always instruct the jury to ignore all the rest of this if you want, but if you can prove the assault, convict on assault only, correct?

Mr. BAKER. What you are going to find—

Mr. HYDE. The gentleman's time has expired. The gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman. Mr. Chairman, I think there has been some debate on this committee, I don't want to prolong that, on whether or not these are more serious crimes.

I believe that if you hunt down a member of a minority group and assault them, that is different from an assault on someone else. It has a different effect on the community. It has a different effect on that person's even right to live in certain communities, and that is not so with a simple assault, but without getting into that debate, because I think people are going to just believe what they want to believe on whether or not it is a more serious crime or not, Professor Baker, I want to follow through a little bit on this last round of questions.

What happens if you are in the middle of the trial and cannot prove the hate element of the crime?

Mr. BAKER. You are going to lose the trial.

Mr. SCOTT. You are going to lose the entire case, not the lesser included offense, as the gentleman from New York has—

Mr. BAKER. I said it depends upon the State's structure of law and whether lesser included crimes are automatic—

Mr. SCOTT. This is Federal—you are in Federal prosecution. This is a Federal law so you would be prosecuting under this statute. We are not talking about hate crimes in general—

Mr. BAKER. Yes, but I—

Mr. SCOTT [continuing]. We are talking about this statute.

Mr. BAKER. Okay. I am looking at the statute and I don't see the lesser included structure.

Mr. SCOTT. So that if you are in the middle of the trial and you can prove all of the elements of a serious crime but trip over and cannot beyond a reasonable doubt show the hate element of the hate crime, a defendant would be entitled to a not guilty verdict on his crime?

Mr. BAKER. It depends on whether you do have the lesser included that is responsive and if you have proof on all those elements, but remember, the jury is going to go back there and you are going to have in the jury room the debate over the hate element. It is going to still be there. It is there to divide the jury.

Mr. SCOTT. And if the hate element was the only thing that got you in Federal court altogether, you probably would lose your entire case?

Mr. BAKER. I am sorry, I didn't understand the question.

Mr. SCOTT. You have to have jurisdiction to be in Federal court to begin with. A simple assault would not be a Federal offense.

Mr. BAKER. Yes, I mean you—but the way you have structured the statute, or at least the section on the Hate Crimes Statistics Act, which uses the Senate bill definition, it covers intimidation. Representative Frank said that there would be no involvement in speech, but if you make hate intimidation a Federal crime, what you are doing is criminalizing hate speech. That is the issue I wanted to make with Representative Frank.

You are going well beyond anything that is being claimed here, and that is why I insist on actually looking at the words you use,

because when you actually get into a trial, that is what the lawyers focus on. It is not on the category "hate crime."

We have to focus on the individual words actually used in here. That will govern the jury charge. That will govern the argument to the jury. That will govern their deliberation, and as Mrs. Carrington pointed out, ordinary laymen are confused about a lot of things. The whole point of a trial is to keep it simple, and when you throw this in. . . . That is why many times, as Deputy Attorney General Holder pointed out, the Federal Government has not been successful in criminal civil rights prosecutions, because the jurisdictional elements gum everything up.

The reason why the Federal Government used civil laws to enforce the civil rights changes in the South was because civil law was much more effective than Federal criminal law ever could be.

Mr. SCOTT. Thank you. Professor Hurd, following up on that one is a question that has been raised of whether or not you are in fact prosecuting beliefs rather than prosecuting the crime.

How can we avoid—how can we focus on prosecuting the crime without prosecuting the beliefs?

Ms. HURD. Well, you can't if hate and bias constitute mental state requirements.

Ultimately the point of hate crime legislation is to elevate the penalties for already prohibited and already penalized conduct where the additional increment of punishment is for hate and bias. And so it is the case that you have Mr. Gekas' much earlier question to Mr. Holder: When two defendants come before you, each having intentionally committed precisely the same prohibited action, and ask you why it is that one is being punished up to, say, three times more than the other, your answer ultimately is the answer that in Moliere's famous play Robespierre's prosecutor has to give to Robespierre when Robespierre says, "Why are you ordering my execution?": "Because you lack grace."

It is precisely for hate and bias, which, as I argue, constitute character traits of an enduring sort, that the incremental punishment is added if—and again this is a very important "if"—if your justification for hate crime legislation is predicated on claims of greater culpability rather than greater wrongdoing.

Notice that I fully left open Congressman Conyers' alternative justification for it (a justification predicated on the claim that hate crimes do more harm than other crimes), which rests entirely on an empirical claim that I leave to the social scientists.

Mr. HYDE. The gentleman's time has expired. The gentlelady from Texas.

Ms. JACKSON LEE. First, let me thank the chairman for his kindness and his insight in helping us to have this hearing at this time, and although I am tempted to quarrel with and interject my legal analysis into this debate, I will reserve that for the markup that I hope the chairman will grant up on this legislation, and I will not hide any cards and say that short of the victims, who I offer my deepest sympathy to you, I am in total disagreement with most of the panelists, and I thank the Sheriff for his straightforward answer, and I may have missed one other supporter for this legislation.

As I listened to you, I am reminded of a journey we took some 30 years ago on the Civil Rights Act of '64 and the Voter Rights Act of '65 and I can just imagine the very same sounds and voices coming in opposition to what the people of the United States needed and wanted, and so it gives me greater courage to be able to say to you today I will listen, because I respect your presence here, but I will vigorously disagree and find enormous fault in your reasoning.

One, when we pass laws in the United States Congress we are comforted by the fact that we have three branches of government, and I am assured that the courts will tell me when the legislative initiatives that I have passed are wrong constitutionally or otherwise, but what they cannot do for me is to tell me about the racial bias.

In 1997, 58 percent in total, anti-black 38 percent, 12 percent white, religious bias some, if I read this correctly, 17 percent, antisemitic, 13 percent, ethnicity 10.4 percent, and sexual orientation 13.7 percent.

What they cannot tell me is, as we describe the death of James Byrd, as Byrd's body rounded the corner it swung across the road and struck the culvert which sheared off Byrd's head and right arm. A pink circle near the driveway is labelled "head." At 2.6 miles the truck reached the cemetery where Byrd's tormentors cut his body loose. Investigators said that spot is marked with pink police tape and a large stain in the shape of a torso.

Nor can we respond to Matthew Shepard where those who came upon his body said he looked like a scarecrow.

And in using the Judeo-Christian interpretation of what the Lord wanted for us, let me cite for you Matthew V—"Blessed are they which do hunger and thirst after righteousness, for they shall be filled."

I would prefer Matthew V. I seek righteousness, I seek justice, and I think your interpretation and argument about nexus and the difficulty of prosecuting the case is a bogus one. I respect your ability to say so, but these crimes that we are talking about are heinous crimes. They are distinctive crimes.

In fact, in the FBI interpretation of such, these crimes were noted to have multiple stab wounds, 20 or more, to be extremely violent and to in particular multiple perpetrators, mutilation, and overkill.

Do you think James Byrd was an overkill situation? Do you think Matthew Shepard was an overkill situation? Do you think Frank Mangione, where two skinheads left another State and travelled across State lines, was overkill?

I appreciate local government being involved and I want to applaud Jasper, Texas, for what they did, but you are misconstruing what Federal hate crimes means. It means that we, the higher authority, the Federal Government, indicates that these standards, community standards cannot stoop to the level to deny human dignity so that we accept hateful acts that result—result—in violence.

You are wrong when you talk about that we are construing or prosecuting thought. Absolutely wrong. For I pass by hateful people all the time. I would imagine some may accuse me of such. I hope that every day of my life a live a different live, but I cannot stop

them from their hate, but I can stop them by enhancing criminal penalties for the violence that they do to human lives.

Give me a break. I thank you for your explanation, but I am going to listen to the people's voice, and I hope that we in this Congress, in a bipartisan way, Mr. Chairman, because this is bipartisan legislation, will allow the courts to decide when we do the right thing and promote hate crimes legislation that says we will not tolerate this indignity to human life.

Mr. HYDE. The gentleman from Georgia, Mr. Barr.

Mr. BARR. Thank you, Mr. Chairman.

Mr. Chairman, I served under two Presidents as a United States attorney and we far too frequently had to prosecute cases involving improper racial prejudice hate crimes. Although under the current Federal code that was operative in 1986 to 1990, the years I served as U.S. attorney, they didn't designate crimes as hate crimes, we vigorously prosecuted those crimes in which the civil rights of our citizens were violated, whether those were cases against police officers or other government officials.

During my tenure as United States attorney, and I know from contacts that I still maintain at the Department of Justice and others involved in law enforcement, I know there has been absolutely no slacking off of the commitment of the Department of Justice prosecuting crimes that violate civil rights.

I also know that United States attorneys are very particular about the laws under which they operate, and they pay very close attention to the language of the laws and that, Mr. Chairman, is a concern of mine that I had expressed in hearings on similar legislation in the last Congress and I think in the previous Congress as well, and that is with the language of the legislation that is before the Congress right now, in particular, for example, H.R. 1082.

Whatever it is that the proponents of this legislation are trying to reach, I really think that the specific language that they are using in the statute, where you talk about the actual or perceived sexual orientation of a person, even if it were enacted, would be very problematic. I think it is vagueness that would render this particular statute, if it were enacted, unconstitutional. I think it would be vague. It would raise very clear questions of unequal protection and due process.

So while I appreciate this hearing, and certainly we can all appreciate the passion with which all of us approach the issue of violation of civil rights of our citizens, to be honest, Mr. Chairman, there are I believe more than sufficient laws at the Federal and State level to address these problems. I would urge those who seem to feel the need for additional legislation to keep in mind that it is going to be U.S. attorneys out there that would be charged with enforcing these particular statutes and if their intent is to tighten up and provide U.S. attorneys additional tools, they ought to be a little more mindful of the language that is used, because I think that the language in this statute, which is identical to language in the statute that we looked at last year, would be unconstitutional and would in fact cause very serious problems for U.S. attorneys who actually tried to use it.

Perhaps, at some time, if these things could be redrafted, they might fix some of the problems that I see inevitably that would

come out, and I would urge those that are proponents of the legislation to maybe take another look at some of the language in the statutes because the U.S. attorneys and the Department of Justice who would be tasked with enforcing these statutes would have serious problems because of the vagueness of some of the language that is used in them.

With that, I would yield back my time, Mr. Chairman.

Mr. HUTCHINSON. [Presiding.] I thank the gentleman and at this time the Chair would recognize the gentlelady from California, Ms. Waters, for 5 minutes.

Ms. WATERS. Thank you very much, Mr. Chairman, and members.

I have such mixed emotions about this hearing and I am just wondering since Thurgood Marshall's name was used here what he would think of a hearing like this and what he would think about the way in which his thoughts have been distorted in this hearing today.

I additionally wonder where all of the wonderful civil rights attorneys are, if they were invited, if those who have spent years working for the rights of all people even knew about this hearing today. It seems that there is a strange imbalance here today, and I will talk to the chairman about that. I don't like it and it doesn't feel good.

I don't expect those who would argue that we should not have Federal hate crime legislation to understand how we feel or what drives us to get this kind of legislation, and I take great exception to anybody who would try and make anyone believe that we would lessen the seriousness of other crimes. It is absolutely unconscionable and despicable for anybody to take one's life, and I don't take a back seat to anybody in believing that those people should be brought before the bar of justice and I don't want us to get divided in a hearing like this about whether one crime is more important than the other crime, made to believe that somehow because we push for hate crime legislation we don't think that crimes committed against your relatives and your friends does not deserve serious, serious justice, and so I want to make that clear, and the danger of these kinds of hearings is a continuation of that kind of division and that kind of polarization.

Let me tell you, those of you who talk about this in such a dispassionate way, in describing it in terms of whether or not we can legislate about emotion, or whether or not it meets the tests of commerce, that kind of dispassionate discussion certainly does not recognize the experience, the knowledge, and the understanding of hatred directed toward a particular individual.

My father had to leave town because he witnessed too many African Americans being tarred and feathered in the South. They were tarred and feathered because they were black—simply because they were black. He had to leave town or he would have been killed.

I am a friend of Coretta Scott King's, I am a friend of Merle Evers, both the widows of people who laid their lives on the line to get rid of this kind of hatred and to try and confront America on it. I can recall when Emmett Till was killed on a lonely stretch of road, a young man who had come from Chicago, and I can re-

member thinking all of my life how fearful it would be to travel throughout certain sections of this country, and I would never do it, and I would always advise other blacks not to do it, and still there are certain places in this country where I would say to blacks and to gays and others, "Don't go." And I would not be caught on certain stretches of highway in this country because I fear even today that I would be killed and there are those who write me and tell me they would like to see me dead. They don't like my politics.

We get letters on a weekly basis of people who hate me, and so I don't expect you to understand that. That is too much to ask most of you to understand, but let me tell you I didn't see people come here on mandatory minimum sentencing, where we elevated the crime of five grams of crack cocaine possession to 5 years' imprisonment, in the Federal penitentiary. Most of these people are drug addicts themselves with small amounts of crack cocaine and it was elevated to a Federal crime, and we have 19 and 20-year-olds who are locked up, locked up minimum 5 years, judges have no discretion—but it is a Federal crime.

They didn't kill anybody. They didn't boot anybody. They are stupid. They had a small amount of drugs and we elevated that to a Federal crime—but today—

Mr. HUTCHINSON. The gentlelady's time has expired.

Ms. WATERS. I ask unanimous consent for 1 minute.

Mr. HUTCHINSON. Without objection, 1 minute.

Ms. WATERS. Today, as I hear you in this dispassionate discussion about whether or not we should federalize the crime of hate, let me tell you every time somebody gets away with killing an African American or a Jew or a gay or anybody in the protected classes and it is not highlighted that this person is going to be sentenced not only because they killed but because they sought out a special kind of person to kill or maim or harm, and that message does not go out loud and clear, then we only give protection to others to keep doing that. They keep killing my people. They keep killing gay people. They keep killing people who are the victims of holocaust.

And so, yes we must do something very special. We must not allow people to do that because every time we take the description of that away that somehow we don't identify that then there is no recognition that something is going on that causes the life—loss of life or the maiming or the beating or violence against a special class of people, so we have to highlight it.

We have to highlight it so people know that it is going on. We have to highlight it so that people will know, yes, you are going to be targeted in a very special way because you did it. Now having said all of that—

Mr. HUTCHINSON. The gentlelady's time has expired.

Ms. WATERS. Thirty more seconds, sir.

I think I have a special right—

Mr. HUTCHINSON. Without objection, 30 more seconds.

Ms. WATERS [continuing]. As a woman—thank you very much—as a member of a group of people who were brought here in slavery and who were killed and still are being killed, but was killed, was hung from trees, tarred and feathered, because of our color—I think I have a special right to say to those of you I am glad I guess

you came because you were invited, but for those of you with your intellectual, dispassionate arguments about whether or not I should care about the identification of hate, what you said today means absolutely nothing to me—absolutely nothing—and I guess somebody should thank you for coming, but as far as African Americans go in this country, and I think the gay community and most Jews that I know, you can save those arguments for some other time and some other place because we do not welcome them and we really do not care about what you have had to say here today.

Mr. HUTCHINSON. I thank the gentlelady, and at this time the Chair would recognize the gentleman from Florida, Mr. Wexler, for 5 minutes.

Mr. WEXLER. Thank you, Mr. Chairman.

I would like to address Mr. Troy, if I could, particularly two aspects of your comments that I am trying to internalize and figure out how you reach your conclusions.

One, the idea, if I understood you correctly, that the consequence to the victim should not be the concern of this Congress, I think you very eloquently—well, let me just—you'll get your chance—if I understood you correctly, you basically gave a very personal analogy that if, heaven forbid, you were harmed and killed, whether it be because you were Jewish or whether it just be because you were there, your kids would be fatherless and the consequences the same, and therefore one action is no different than the other at least in terms of how Congress should deal with it.

That seems to me to fly in the face of the whole notion of much of what our criminal jurisprudence is based on. It is not the consequences to the victim that is all determinative, but, of course, it is the intent and the motives of the perpetrator. Certainly I think we would all agree that all killings are not culpable. There are killings that are culpable, and killings that are not culpable.

Mr. TROY. Certainly.

Mr. WEXLER. And within the category of culpable killings there are different degrees of culpability. Some are more culpable than others, so the notion that Congress or any legislative body would attach to a killing or any other illegal act a level of culpability based on the motive or intent of the perpetrator seems to me not only to be obvious, but it seems to be an extension of much of what our criminal jurisprudence is based on.

With respect to your argument that I actually find much more troubling is the notion that by somehow identifying crimes as hate crimes, we are perpetrating the victimization of African Americans or Asian Americans or gay people or Jewish people or Italian Americans or whomever it may be, I find this argument particularly troublesome, the reason being it seems to me in order to adopt that philosophy, and I can't believe that you would ultimately but maybe you have, you have to conclude that there are no such crimes.

If there were no such crimes based on the fact of somebody's color, then I would agree with you. If they were just making it up or exaggerating it, but if in fact there are such crimes, and surely I must conclude—

Mr. TROY. Of course.

Mr. WEXLER. You agree that there are?

Mr. TROY. Of course.

Mr. WEXLER. Then how by that group of people or by this Congress' seeking to react or to protect or to further punish, how could that possibly be the furtherization of the victimization of that group of people?

Mr. TROY. I didn't say that. What I said was that what this kind of legislation does is it promotes people to celebrate their own victimization as a means of getting into the protected classification.

Mr. WEXLER. What is the celebration about an African American man being dragged behind a truck and decapitated and whatever and Congress possibly reacting? Where is the celebration?

Mr. TROY. It is horrible. I agree with that. It is horrible. It should be illegal and fortunately it was aggressively prosecuted, which points out the lack of a need for Federal hate crimes laws, okay?

It was aggressively prosecuted by the State.

Mr. WEXLER. Excuse me, Mr. Troy. Had the man just been gay, there would have been no prosecution, would there?

Mr. TROY. Matthew Shepard—the horrible, terrible murder of Matthew Shepard—was aggressively investigated and prosecuted.

Mr. WEXLER. I agree.

Mr. TROY. And he was gay.

Mr. WEXLER. Right, yes, but there would be no hate crimes prosecution had the man been gay—

Mr. TROY. No hate crimes prosecution—

Mr. WEXLER [continuing]. If he had been in a jurisdiction where—excuse me?

Mr. TROY. I don't believe that there was a hate crimes prosecution in the case of Byrd. Wasn't that the application of the State law?

Mr. WEXLER. Agreed, agreed. That is the whole point of the legislation.

The whole point of the legislation—

Mr. TROY. The point of the legislation is to say you States aren't doing your job—we need Federal action—

Mr. WEXLER. Not at all—

Mr. TROY [continuing]. But the States are doing their jobs—

Mr. WEXLER. No.

Mr. TROY [continuing]. Particularly when it comes to heinous, horrible crimes like that. Fortunately—which is a good thing.

Mr. WEXLER. And I appreciate your comments, but I think then, respectfully, you have misconstrued the intent of the legislation.

The intent of the civil rights legislation wasn't to say that the laws in New York State weren't good enough. The intent of the civil rights legislation was to say that the policy of the United States with respect to civil rights was going to be this. And the intent of Mr. Conyers' bill, I would respectfully suggest—well, I can only speak for myself—would be that it is the intent of the United States Congress that this should be the law. It is not to say that New York or Maryland or X, Y, or Z isn't doing a good enough job. The whole point, I believe, and I think the sheriff made it exceptionally well, the point behind Mr. Conyers' bill is that it simply is a catch-all when there isn't sufficient effort or ability under State

law to do it, and I would like to yield to Mr. Conyers to ask him if that is correct.

Mr. CONYERS. I thank the gentleman—

Mr. HUTCHINSON. Without objection, an additional 1 minute is granted.

Mr. CONYERS. I thank you. This legislation is back-up to local prosecution. That is what it is here for. It is not to supplant local prosecution—and by the way, in the Byrd case, there was a great amount of FBI assistance in that case. There was a lot of concern about it, but in many other areas, as you know, Mr. Wexler, there aren't local prosecutorial talents or ability or resources to do anything in these kinds of crimes because the opposition in the environment of the community is so strong and the resources are so poor.

Mr. HUTCHINSON. The gentleman's time has expired, and I will now recognize myself for 5 minutes. I want to thank Mr. Conyers for raising this issue, and the panelists for discussing it today.

Let us share a bit of my background and tie this to some questions.

I had the occasion when I was United States attorney for the Western District of Arkansas to prosecute a group called The Covenant, The Sword and Arm of the Lord. Most considered this a hate group. They stored ammunition. They were an extremely violent group. They bombed homosexual churches. They killed an individual because he was of Jewish heritage. They were out to accomplish the destruction of minority groups. They had neo-Nazi literature we found as we searched their compound.

I could go on about this group, but the point is that they were clearly a hate group. As I prosecuted this group on racketeering charges, I was allowed to put into evidence the neo-Nazi pamphlets that we found at the compound, because it was determined by the Federal judge to go to their motivation—evidence that they were engaging in a pattern of violent activity. So after a hearing the literature was allowed into evidence with some difficulty. As I look at this legislation I have to tie it to my experience and how it fits in.

Under this bill there would have been an additional 10 years' penalty available for the hate crime, even though it was a 20 years penalty for the racketeering charge. We already had this material into evidence, and so I guess I want to ask Professor Hurd, if you would, to comment on what protections there would be for a defendant from having evidence of books or magazines found in the defendant's home or a tattoo or a speech attended years ago from being admitted as evidence that the defendant caused violence because of another person's membership in a protected class?

The judge in my case was very concerned about the rights of the individuals who I was prosecuting and it clearly was a hate crime but it was, a lot of it was what protections would there be and would there be any concern about that under this legislation, Professor Hurd?

Ms. HURD. Well, I think you are absolutely right to be concerned about just this issue.

Precisely because hate and bias ultimately constitute character traits that endure over time, they invite long-range evidentiary in-

quiries into past and possibly quite remote speech acts, associations, and activities. And these long-term inquiries, as your experience bears out, certainly threaten significant invasions of privacy, the chilling of speech and association, and they ultimately hold up the specter of finding people guilty by association alone. Such evidentiary inquiries also make all the more worrisome the prospect that in fact what this legislation will do is try the person far more than the act. And as Lon Fuller once I thought quite wisely pointed out, the more we try the person, the more we give opportunity for our own biases, because our question becomes, "Is he like me?"

Now whether or not our evidentiary worries can be assuaged by inserting language that bars the admissibility of certain sorts of speech or indicia of group of associations, I don't know. The ACLU certainly has given you language in the effort to limit H.R. 1082 in just the ways that you are worried about, so we prosecutors don't get remote speech and associational memorabilia into evidence.

Mr. HUTCHINSON. I thank you, Professor Hurd, and I look back again on my experience and there is probably not another group that deserved to be prosecuted more, and we prosecuted them very aggressively, but one of the most frequent questions I was asked by the media was, "Are you prosecuting them because of what they believe?" How do you distinguish a prosecution for their associational beliefs, their hatred of minority groups, which is so repugnant to society, versus for the substantive criminal acts?

Of course I always pointed out we are prosecuting them because of what they did—they took violence into their own hands—but I would be concerned that there is sort of a vagueness there, that we are drifting into an area of prosecutions for association with a particular group.

I think that as we evaluate this legislation, we should make sure that there is adequate Federal resources to go after any individual or group who acts violently, particularly whenever they are engaged in a hate campaign against a minority. We need to make sure the Federal resources are there.

Secondly, we need to be mindful of the basic constitutional rights and evidentiary concerns, and to make sure there is enough discretion given to a Federal judge that they are able to appropriately balance the evidentiary issues.

Then thirdly, I don't want to set up a system where there is a State prosecution that could get the death penalty but because the Feds jump in we usurp what could be a very vigorous State prosecution as we have seen as a pattern in the past, so I hope, Mr. Conyers, that this will be balanced out in the legislation. The Chair will now recognize the gentlelady from Wisconsin.

Ms. BALDWIN. Thank you, Mr. Chairman.

This hearing has evoked a wide range of emotions for me. I am a strong supporter of the pending Hate Crimes Protection Act legislation. I also come from Wisconsin, a State that passed hate crimes legislation and in fact one of the cited cases was argued by a colleague of mine in the State Senate before the U.S. Supreme Court.

I believe that laws have obviously substantive impact, and we have heard a lot of testimony to that today, but that they also have tremendous symbolic impact. And I think especially for our experts,

it is hard for you to testify with precision on what the symbolic impact is.

I thought Mr. Orr's testimony spoke volumes about the fact that in our Nation today, and I would add Ms. Carrington's testimony, we still have a situation where certain types of discrimination are still tolerated or accepted, and that there is a powerful impact when we as a Nation, through Congress, say that something is wrong.

I know this is a general oversight hearing on hate crimes and that you had not been asked to come to speak to a specific piece of legislation. Therefore, some of the comments made may have addressed a political situation that does not confront us right now. I don't think that there is any pending legislation to repeal 30 years of hate crimes legislation embodied in §245, but I do have a few questions, some that venture into the broader topic and some that narrow us back to the bill that I hope we will get a chance to mark up.

I want to ask Mr. Troy, one could make a plausible argument based on your testimony that you could extend your logic beyond criminal legislation to civil rights legislation.

You talked about crimes that should be punished without regard to a victim's immutable characteristics. You also said if you were murdered on the basis of being a Yuppie versus the basis of being a Jew, your children would still be without a father. I could argue that if you were fired from your job because you are Jewish versus being fired from your job because you are a Yuppie, your children would still have an unemployed father, or if you were evicted from your housing on either of those characteristics you would still have children with a homeless father.

Do you extend your arguments to reject Federal civil rights legislation in the areas of housing and public accommodations or employment?

Mr. TROY. Please let me address that. Absolutely not. There is one key difference, and that is hate crimes are already crimes. They are already against the law.

The 1964 Civil Rights Act acted against things that were not illegal already, okay? That is the point. Here, gratuitously, okay? In some senses, gratuitously, because the act is already unlawful. We are moving into an area that I think again builds walls, not bridges, that balkanizes us and needlessly divides us along group lines.

The Civil Rights Act was very different, and nothing I say here about whether you should have Federal hate crimes laws in particular, but hate crimes laws that criminalize already or recriminalize or additionally criminalize already criminal behavior, should at all be suggested to take any issue with the civil rights movement. As I said, I think that the argument I am making is truer to the principles of the civil rights movement, to the principles of people like Thurgood Marshall than is this attempt to, in the words of Maxine Waters, "protect a special class of person"—which absolutely belies what Mr. Nadler was saying in claiming that the legislation doesn't punish based on the victim's status.

Ms. BALDWIN. I wonder if any of the other members of the panel would extend the logic to Federal civil rights protections. Professor Baker?

Mr. HUTCHINSON. Does the gentlelady require additional time?

Ms. BALDWIN. Oh, I am sorry. I do have additional questions that I may ask to submit in writing at a later point, but could I have another minute without objection?

Mr. HUTCHINSON. Without objection, an additional minute, and certainly any questions you wish to submit would be acceptable.

Ms. BALDWIN. If you could take 15 seconds so I can ask one more question, I would be delighted.

Mr. BAKER. I just think it is important to add to what Mr. Troy said, that the fundamental distinction is between tort law and criminal law. That is, the civil rights statutes, although some of them are criminal, the ones that you were referring to are either tort or regulatory.

Ms. BALDWIN. You are in agreement, in other words.

I would be interested in Professor Lawrence's response to the gentleman from Georgia, Mr. Barr's comments about the assertion that the Hate Crimes Prevention Act language is vague.

Mr. LAWRENCE. I would be happy to address that. I don't think it is vague at all, and I think the precise example that he used is a good example of words not vague.

The language, which incidentally does not come from the Hate Crimes Statistics Act, it comes from the Hate Crimes Penalty Enhancement Act that Congress passed, but the language that it tracks would say that it is the object of a crime because of the actual or perceived race, color, et cetera.

The reason it says "actual" or "perceived" is a classic use of the criminal law to say that what we are concerned about is the state of mind of the actor, the culpability of the actor.

So, for example, if someone believing a victim to be gay assaults that person out of a homophobic motivation, and it turns out that person is not gay at all, then we would technically have to call that an attempted bias crime. It is not a completed bias crime because after all the person was not gay. That little technicality aside, the law would pick it up and should, so it has to say "actual or perceived" because what we are concerned about, and this does go back to what Congressman Nadler said, what we are concerned about is precisely the state of mind of the actor, of the perpetrator.

We are not concerned about the status of the victims per se in any individual case, and that is standard practice in criminal statutes.

Mr. HUTCHINSON. The gentlelady's time has expired. The Chair recognizes the gentleman from New York, Mr. Wiener.

Mr. WEINER. Thank you, Mr. Chairman, and I appreciate the testimony of the panel. One of the benefits of being the last person on the panel is very often the witnesses have become tired and perhaps they speak more freely.

Let me just—there has been some very interesting arguments made by members of the panel, but there also has been a certain Flat Earth choir when it comes to some of the opposition to this bill, and I would like to address a couple of those points now.

Mr. Orr, some have suggested, in fact I believe Mr. Jay has made this the substance of his testimony, that somehow this is going to swing the doors wide open to wanton insurance fraud.

Can you tell me, were you covered, did you have gay-bashing insurance when you were a victim of that crime?

Mr. ORR. No. I, in fact, had no gay-bashing insurance.

Mr. WEINER. Was there any time when you considered perhaps taking out a policy against gay-bashing?

Mr. ORR. Actually it did cross my mind at the time.

Mr. WEINER. While the event—

Mr. ORR. It crossed my mind.

Mr. WEINER. While the event was going on? Mr. Orr, perhaps also while I have asked you one question, there was also a suggestion made by one of my colleagues that perhaps you were uncooperative in the prosecution of this crime. Can you just reiterate what the penalties, what the ultimate penalties that the folks that victimized you, what they ultimately had to serve, what their penalty was for the crime they committed?

Mr. ORR. Their final penalty?

Mr. WEINER. Yes.

Mr. ORR. My understanding is that each of them paid a minimal fine, somewhere around \$200, that they served 40 hours of community service, one of whom did not even do that. He ended up back in court—

Mr. WEINER. Okay.

Mr. ORR [continuing]. For failing to do his community service.

Mr. WEINER. Thank you, and I think that Mr. Orr's experience speaks to other testimony today that there were successful prosecutions for people who did hateful things, therefore the need for this law is somewhat mitigated. I think that Mr. Orr's arguments and Mr. Orr's example are why we need the legislation.

Let me also ask you something else. There was a quote by one of the opponents of this legislation, someone who is the head of the Family Research Council, who said, and I quote, "Hate crimes legislation would practically outlaw fundamental truths held by people of faith."

Can we just very quickly, can I ask members of the panel just quickly, yes or no, whether you believe that that is the case. Mr. Troy?

Mr. TROY. I believe that to the extent that it criminalizes—

Mr. WEINER. This is going to be hard for me to do my little notes, Y got one, N got another, so you are going to have to just do a yes or no.

Do you agree with that quote that it would practically outlaw fundamental truths held by people of faith?

Mr. TROY. As long as it is directed at action, no.

Mr. WEINER. So that is a no. I am going to put you down in the No column.

Mr. TROY. I don't agree with that. [Laughter.]

Mr. WEINER. Troy is a no. Professor Lawrence?

Mr. LAWRENCE. You can put me down for a no, unless someone, as a position of faith, believes that it is important to commit acts of violence against—

Mr. WEINER. Well, you gave away what I was going to ask the yeses on the panel.

Mr. LAWRENCE. I am sorry.

Mr. WEINER. So please don't jump the gun.

Mr. LAWRENCE. Just call it a no.

Mr. WEINER. Professor Baker?

Mr. BAKER. I can't give you an answer. I don't know what the bill is. We have been talking here about two different versions of the bill, the Senate bill and the House bill. It depends on what bill you are talking about.

I mean you ask for answers that are totally out of context with a particular bill.

Mr. WEINER. No, this is actually—this is a quote that you really have to work very hard to say, to say that you agree with, so I am interested even if you have a stab at how it can be correct that hate crimes legislation would—

Mr. BAKER. I don't understand the quote.

Mr. WEINER [continuing]. Would practically outlaw fundamental truths held by people of faith, so that is pretty much a no-brainer, but if you have an argument for how it can possibly be true I will be glad to hear it.

Mr. BAKER. I don't, but I don't know what you are talking—

Mr. WEINER. I am going to put you down as a no.

Professor Hurd?

Ms. HURD. You can put me down as a "no" if "no" means I have no idea what that means. I literally have no idea what that quote means. If you tell me a story about it, I may tell you I agree with it.

Mr. WEINER. Okay, so there is a story that you can conceive of where hate crimes legislation would practically outlaw fundamental—well, perhaps, well, maybe I am going about this wrong.

Do any members of the panel have a fundamental truth that this, that are held by people of faith that any hate crimes legislation—let us take the church arson laws. How about that one? Does anything about the church arson laws outlaw someone's fundamental truth held by people of faith?

Mr. BAKER. No, but I can give you an example if you want one.

Mr. WEINER. Please. Please do.

Mr. BAKER. Go to the Senate bill and we pick up their definition of hate crime on intimidation. If somebody stood up and said that under Judeo-Christian belief homosexual conduct is wrong, and there was a gay in the audience and they said they felt intimidated, that would be a Federal crime under this definition.

Mr. WEINER. Let me ask you this question, because that was going to lead to my next question. Is a crime—during the burnings of synagogues during Kristalnacht at the outset of Nazi Germany, was a crime committed in a synagogue in a community an act that you would argue or you would agree extended intimidation to people beyond the people who were immediately there, extended intimidation to the entire community?

Mr. BAKER. Sure.

Mr. WEINER. Okay, so that is something that we in Congress legitimately can handle differently than someone who goes into a glass store and commits vandalism?

Mr. BAKER. You handle it—what you are trying to do is handle things sociologically. The problem you have is that whatever you pass has to go into a criminal court.

You are treating this as a sociologist.

Mr. WEINER. Okay, let me just—Mr. Chairman, just one additional minute?

Mr. HUTCHINSON. Without objection, one additional minute is granted.

Mr. WEINER. Has our system of jurisprudence, which I think that Professor Hurd and Professor Baker and to some extent Mr. Troy and I think Professor Woo has argued this, has our system of jurisprudence somehow ground to a halt because we passed the church arson laws?

Have we ceased to be able to go in to have trials because we are opening up the door, thinking about state of mind and why a person could—have we had any problems like that?

Mr. BAKER. But look, you are confusing things. State of mind and motive are not the same thing. We have had arson laws for years. We have been able to prosecute them. What you are doing—

Mr. WEINER. And the church arson laws, which took a particular type of arson and said we in Congress and we and our constituents believe that this is a type of arson that is not like every other type of arson—

Mr. BAKER. Look, if you want to do “feel good” legislation, that is what you did but the reality is that—

Mr. WEINER. What about existing—let me just—I only have 15 seconds. What about the existing hate crimes law, like the penalty enhancement? Would you say that because of the changes that we made in the existing standards and tests have somehow ground our system of jurisprudence to a complete halt because we have opened up all these new doors?

Have we really seen that anywhere?

Mr. BAKER. I haven't argued that.

Mr. WEINER. Have you argued that, Professor Hurd?

Ms. HURD. I certainly haven't, and it seems to me that the church arson bill is absolutely unobjectionable precisely because it doesn't pick out hate or bias as a mens rea requirement.

Mr. WEINER. The existing hate crimes—the other existing hate crimes laws do though, don't they?

Ms. HURD. Sure.

Mr. WEINER. Okay, now in those—

Ms. HURD. But if—

Mr. WEINER. Professor Hurd, I now have 4 seconds, in the—let us say the Hate Crime Penalty Enhancement Act, which is what we are building this upon, you have argued that the tests for state of mind are going to be so difficult that we are going to open up all kinds of doors and the prosecutor is going to have a difficult time.

Have I misunderstood that?

Ms. HURD. Yes.

Mr. WEINER. Okay, so this legislation is—

Ms. HURD. That may be true too, but that is not what I argued.

Mr. WEINER. Okay, but this legislation doesn't do that then, is that right? Is that your testimony now?

Mr. BAKER. I argued that.

Mr. HUTCHINSON. Answer the question, then the time will expire, if there is an answer.

Mr. BAKER. My argument is that it is very different. You can get into a penalty enhancement and you can get into all kinds of things that are totally irrelevant in the trial—on the merits, and that is the whole point of penalty enhancement. They are different.

When you move from penalty enhancement to the guilt phase—

Mr. HUTCHINSON. The gentleman's time has expired—

Mr. WEINER. Right. That is why you supported penalty enhancement.

Professor Hurd, do you support that as well?

Ms. HURD. [Nods negatively.]

Mr. WEINER. Thank you, Mr. Chairman.

Mr. HUTCHINSON. At this time does the gentleman from North Carolina seek recognition?

Mr. WATT. Thank you, Mr. Chairman.

Mr. HUTCHINSON. You are recognized for 5 minutes.

Mr. WATT. I will say to Mr. Weiner that I am not planning to use my entire 5 minutes, so if he wants me to yield the balance of it when I get through I will be happy to yield him some more time.

Let me first say—express my condolences to Ms. Carrington and my abhorrence at what happened to Mr. Orr and his friend.

This is a very difficult issue, and while I am at it I guess I should apologize to Sheriff Sullivan for missing half of his testimony and Mr. Jay for missing all of his testimony—

Mr. HUTCHINSON. Will the gentleman suspend for just a moment. I notice Professor Baker is indicating he might have to leave and I just didn't want him to feel badly if you have something you have to—

Mr. WATT. No, I am fine. I am used to having people walk out on me. [Laughter.]

Mr. HUTCHINSON. The gentleman may continue.

Mr. WATT. No, I say that jokingly. You are certainly free to go and anybody else who needs to go.

I, unlike some of the members on this side of the aisle, have a history of not being a supporter of hate crimes legislation. I voted against hate crimes legislation on a couple of occasions already in the past and I have some serious reservations about parts of this bill, although some parts of it I think are needed.

This is a very difficult issue and I guess I would just simply want to say to the Chair and to the ranking member that I certainly appreciate them having the hearing and having the array of witnesses that we have had on it, because I think it does enlighten us and helps us to understand that while our emotions may lead us in one direction or another, we also as a Judiciary Committee have an obligation to consider the constitutional and legal ramifications of any legislation that we consider and so I want to thank the chairman.

Mr. HUTCHINSON. I will pass it along.

Mr. WATT. You can pass that along and I will express my thanks.

Mr. Weiner, do you want me to yield the balance of my time to you or have you sufficiently grilled these people?

Mr. WEINER. No, thank you.

Mr. WATT. In that case, I think I will let the panel go and yield back, Mr. Chairman.

Mr. HUTCHINSON. I thank the gentleman, and without objection members will be permitted to insert their statements and extraneous material into the record.

I want to thank each of the panelists today for their testimony, for their thoughtfulness. I appreciate the discussion from the members today.

With that, this hearing will be adjourned.

[Whereupon, at 2:28 p.m., the committee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE ANTI-DEFAMATION LEAGUE

The Anti-Defamation League is pleased to provide testimony as the House Judiciary Committee conducts hearings on bias-motivated crime and H.R. 1082, the Hate Crimes Prevention Act (HCPA). This necessary legislation, introduced under the leadership of Reps. Conyers, Morella, Gephardt, Frank, and Forbes, would eliminate gaps in federal authority to investigate and prosecute bias-motivated crimes.

Along with the Leadership Conference on Civil Rights, the Human Rights Campaign, and the NOW Legal Defense and Education Fund, ADL is privileged to coordinate the activities of the national Hate Crime Coalition, which supports efforts to develop and enhance federal and state initiatives to prevent and deter hate violence. Under the leadership of the Hate Crimes Coalition, over 100 national law enforcement organizations, civil rights groups, religious denominations, and state and local government associations have endorsed the HCPA [*A list of the endorsing agencies to date are attached*]. Last month, the Senate voted to include the provisions of the HCPA as part of the Commerce State Justice Appropriations measure. In the House, the HCPA has received bipartisan support from over 180 Members. We urge the House Judiciary Committee to promptly act to approve this important measure.

DEFINING THE ISSUE: THE IMPACT OF HATE VIOLENCE

In recent months, the issue of hate violence has dramatically returned to the public consciousness because of tragic bias-motivated shootings in Illinois and Indiana over the July 4th weekend, which resulted in the deaths of two people and the wounding of nine others, the recent murder of a gay couple in northern California, the arsons at three synagogues in Sacramento in June, and the gruesome and apparently gender-based murders of four women in Yosemite National Park. Last year, according to FBI statistics, there were approximately 6,000 murders nationwide between June and October. But it was the particularly violent and depraved manner in which James Byrd, Jr. was murdered in Jasper, Texas in June, 1998 and Matthew Shepard was murdered in Laramie, Wyoming in October, 1998—and the fact that each was murdered for no other reason than his race and sexual orientation, respectively—that sparked national outrage, and helped raise awareness of the need for more effective federal, state, and local responses.

James Byrd, Jr. and Matthew Shepard were attacked for different reasons in different parts of the country. In each case, law enforcement officials aggressively pursued these crimes and apprehended the apparent perpetrators, who are now in custody facing severe consequences. Yet, thousands of hate crimes do not make national headlines. Too frequently, other victims of bias-motivated vandalism, hateful graffiti, threats, or assaults do not receive the police attention they merit.

All Americans have a stake in effective response to violent bigotry. These crimes demand priority attention because of their special impact. Bias crimes are designed to intimidate the victim and members of the victim's community, leaving them feeling isolated, vulnerable, and unprotected by the law. Failure to address this unique type of crime could cause an isolated incident to explode into widespread community tension. The damage done by hate crimes, therefore, cannot be measured solely in terms of physical injury or dollars and cents. By making members of minority communities fearful, angry, and suspicious of other groups—and of the power structure that is supposed to protect them—these incidents can damage the fabric of our society and fragment communities.

The Anti-Defamation League

Since 1913, the mission of ADL has been to "stop the defamation of the Jewish people and to secure justice and fair treatment to all citizens alike." Dedicated to combatting anti-Semitism, prejudice, and bigotry of all kinds, defending democratic ideals and promoting civil rights, ADL is proud of its leadership role in the development of innovative materials, programs, and services that build bridges of communication, understanding, and respect among diverse racial, religious, and ethnic groups.

Over the past decade, the League has been recognized as a leading resource on effective responses to violent bigotry, conducting an annual *Audit of Anti-Semitic Incidents*, drafting model hate crime statutes for state legislatures, and serving as a principal resource for the FBI in developing training and outreach materials for the Hate Crime Statistics Act (HCSA), which requires the Justice Department to collect statistics on hate violence from law enforcement officials across the country.

The attempt to eliminate prejudice requires that Americans develop respect and acceptance of cultural differences and begin to establish dialogue across ethnic, cultural, and religious boundaries. Education and exposure are the cornerstones of a long-term solution to prejudice, discrimination, bigotry, and anti-Semitism. Effective responses to hate violence by public officials and law enforcement authorities can play an essential role in deterring and preventing these crimes.

Hate Crime Statutes: A Message to Victims and Perpetrators.

In partnership with human rights groups, civic leaders and law enforcement officials can advance police-community relations by demonstrating a commitment to be both tough on hate crime perpetrators and sensitive to the special needs of hate crime victims. While bigotry cannot be outlawed, hate crime penalty enhancement statutes demonstrate an important commitment to confront criminal activity motivated by prejudice.

At present, forty states and the District of Columbia have enacted hate crime penalty-enhancement laws, many based on an ADL model statute drafted in 1981. In *Wisconsin v. Mitchell*, 508 U.S. 476 (1993), the U.S. Supreme Court unanimously upheld the constitutionality of the Wisconsin penalty-enhancement statute—effectively removing any doubt that state legislatures may properly increase the penalties for criminal activity in which the victim is intentionally targeted because of his/her race, religion, sexual orientation, gender, or ethnicity.

Improving the Federal Government's Response to Bias-Motivated Violence

Under President Clinton's leadership, activists from across the country gathered in Washington on November 10, 1997 for the first White House Conference on Hate Crimes. The Conference went far beyond the usual photo opportunities and Presidential pomp. In speeches, panels, and workshops throughout the Conference, the President, the Vice President, and six Cabinet members stressed the importance of direct action against bias-motivated crime. The diverse panels included presentations on effective law enforcement and educational strategies to confront this national problem.

The Conference provided a forum for the announcement of a number of significant and promising law enforcement and educational initiatives to confront hate violence:

- *Regional U.S. Attorney-led Police-Community Hate Crime Working Groups (HCWGs).* At the heart of the Administration's proposals was a well-conceived strategy to improve local community coordination among affected parties in responding to hate crimes. Ideally composed of representatives of the judicial district's U.S. Attorney's Office, FBI investigators, state and local law enforcement officials, prosecutors, community-based organizations, and civil rights groups, these HCWGs were designed to enhance communication on hate crime investigations and prosecutions, improve hate crime data collection efforts, and promote expanded law enforcement training.
- *Coordinated Law Enforcement Hate Crime Training Programs.* The President announced the development of a model hate crime training curriculum for Federal, state, and local law enforcement officials.
- *Additional Hate Crime Investigators and Prosecutors.* The President announced that the Department of Justice would add upwards of 50 FBI agents and federal prosecutors to enforce hate crime laws. The White House announced that this increase would more than double the existing number of federal agents and prosecutors currently assigned to this work.
- *Improved Data on Hate Crimes.* In an effort to better gauge the magnitude of the hate crime problem in America, the President announced plans to add questions about hate violence to the well-established National Crime Victim-

ization Survey (NCVS), an annual assessment of crime in America undertaken by the Justice Department's Bureau of Justice Statistics.

- *Educating Youth About Hate Crimes.* The President announced that the Department of Justice and the Department of Education would jointly distribute a manual for educators on the causes of hate crimes, responses to prejudice and bigotry, and useful resources on the subject. In addition, he announced plans for the development of a special Justice Department interactive hate crime web site for children.
- *Housing-Related Hate Crimes.* The President and HUD Secretary Andrew Cuomo announced an initiative to provide authority for victims of housing-related hate violence to seek monetary remedies from perpetrators.
- *Legislation to Expand Federal Hate Crime Investigative and Prosecutorial Authority.* Finally, the President announced his support for legislation which would expand authority for federal investigations and prosecutions in cases in which the bias violence occurs because of the victim's sexual orientation, gender, or disability.

Addressing Limitations in Existing Federal Civil Rights Statutes

H.R. 1082, the Hate Crimes Prevention Act (HCPA), would amend Section 245 of Title 18 U.S.C., one of the primary statutes used to combat racial and religious bias-motivated violence. The current statute, enacted in 1968, prohibits intentional interference, by force or threat of force, with the enjoyment of a federal right or benefit (such as attending school or serving as a juror) on the basis of race, color, religion, or national origin.

As mentioned, under the current statute, the government must prove *both* that the crime occurred because of a person's membership in a protected group, such as race or religion, *and because* (not *while*) he/she was engaging in a federally-protected activity. Justice Department officials have identified a number of significant racial violence cases in which federal prosecutions have been stymied by these unwieldy dual jurisdictional requirements. In addition, federal authorities are currently unable to involve themselves in cases involving death or serious bodily injury resulting from crimes directed at individuals because of their sexual orientation, gender, or disability—even when local law enforcement remedies are not available.

The HCPA would amend 18 U.S.C. 245 in two ways. First, the legislation would remove the overly-restrictive obstacles to federal involvement by permitting prosecutions without having to prove that the victim was attacked because he/she was engaged in a federally-protected activity. Second, it would provide new authority for federal officials to investigate and prosecute cases in which the bias violence occurs because of the victim's real or perceived sexual orientation, gender, or disability.

If adopted, the HCPA would expand the universe of possible federal criminal civil rights violations—and Congress and the Administration should match this increased authority with additional appropriations for FBI investigators and Justice Department prosecutors. Similarly, after expanding federal authority to address the disturbing series of attacks against houses of worship in the Church Arson Prevention Act of 1996, Congress provided additional funds to ensure that federal authorities had the resources to follow through on the promise of the new law.

Clearly, however, neither the sponsors nor the supporters of this measure expect that federal prosecutors will seek to investigate and prosecute every bias crime as a federal criminal civil rights violation. State and local authorities investigate and prosecute the overwhelming majority of hate crime cases—and will continue to do so after the HCPA is enacted. From 1991–1997, for example, the FBI documented over 50,000 hate crimes. During that period, however, the Justice Department brought only 37 cases under 18 U.S.C. Sec. 245. But some crimes *will* merit federal involvement—for exactly the same reasons that Congress in 1968 determined that certain crimes directed at individuals because of “race, color, religion or national origin” required a federal remedy.

The HCPA would provide a necessary backstop to state and local enforcement by permitting federal authorities to provide assistance in these investigations—and by allowing federal prosecutions when necessary to achieve a just result. In those states without hate crime statutes, and in others with limited coverage, local prosecutors are simply not able to pursue bias crime convictions. Currently, including the District of Columbia, only twenty-two states include sexual orientation-based crimes in their hate crimes statutes, twenty-one states include coverage of gender-based crimes, and twenty-two states include coverage for disability-based crimes. [See the attached chart of state hate crimes statutory provisions and the separate maps on this point]. Other cases which could clearly merit federal involvement include those in which local law enforcement officials refuse to act because, for exam-

ple, the rapist or the batterer in a small town is a friend or relative of the Police Chief, the District Attorney, or the Mayor.

Limitations on Federal Hate Crime Prosecutions

As drafted, the HCPA contains a number of significant limitations on prosecutorial discretion. First, the bill's requirement of actual injury, or, in the case of crimes involving the use of fire, a firearm, or any explosive device, an attempt to cause bodily injury, limits the federal government's jurisdiction to the most serious crimes of violence against individuals—not property crimes.

Second, for the proposed new categories—gender, sexual orientation, and disability—federal prosecutors will have to prove an interstate commerce connection with the crime—similar to the constitutional basis relied upon for the Church Arson Prevention Act passed *unanimously* by Congress in 1997.

Third, the HCPA retains the current certification requirement under 18 U.S.C. Sec. 245. This institutional limitation on prosecutions requires the Attorney General, or her/his designee, to certify in writing that an individual prosecution “is in the public interest and necessary to secure substantial justice.”

Justice Department officials have historically been extremely selective in choosing which cases to prosecute under the federal criminal civil rights statutes. For example, in 1997, a year in which the FBI's HCSA report documented 8,049 hate crimes reported by 11,211 police agencies, the Justice Department brought only twenty-two racial violence cases under *all* federal criminal civil rights statutes combined—and only three cases under 18 U.S.C. Sec. 245. In fact, since its enactment in 1968, there have never been more than ten indictments in any year under 18 U.S.C. Sec. 245. Yet, while the number of federal prosecutions for racial violence is small, these efforts provide an essential supplement to state and local criminal prosecutions. The importance of these few cases cannot be overstated. For example, a number of the racial violence cases involve prosecutions of members of the Ku Klux Klan, neo-Nazi Skinheads, and other organized hate groups. These cases—6 in 1998, involving 13 defendants, and 7 more cases in the previous two years, involving 16 defendants—help to demonstrate the federal government's resolve to combat organized bigotry. *[A chart outlining the history of federal criminal civil rights prosecutions is attached.]*

Federal prosecutors can be expected to continue to defer to state authorities under its expanded authority—but the HCPA will permit prosecutions of bias-motivated violence that might not otherwise receive the attention they deserve. Supporters of the HCPA know well that new federal criminal civil rights jurisdiction to address crimes directed at individuals because of their gender, sexual orientation, or disability will not result in the elimination of these crimes. But the possibility of federal involvement in select cases, the impact of FBI investigations in others, and partnership arrangements with state and local investigators in still other cases, should prompt more effective state and local prosecutions of these crimes.

Recent Federal Responses to Hate Violence

The federal government has an essential leadership role to play in confronting criminal activity motivated by prejudice and in promoting prejudice reduction initiatives for schools and the community. In recent years, Congress has provided broad, bipartisan support for several federal initiatives to address these crimes. These initiatives have led to significant improvements in the response of the criminal justice system to bias-motivated crime. The HCPA is based on the hate crime definitions established in these previous enactments—and builds on the foundation of these existing laws.

Bigotry Burning: A Welcome Decrease in Arsons at Houses of Worship

In late 1995 and early 1996, law enforcement investigators and civil rights leaders began to monitor a notable increase in the number of reported attacks on houses of worship—especially against African-American churches in the South. Though slow to recognize the national scope of the problem, over time the Administration developed a well-coordinated interagency campaign focusing on public education, prevention, enforcement, and rebuilding.

Complementing bipartisan Congressional action (discussed below), Federal agencies have responded with unusually integrated and coordinated action focused on prevention, enforcement, and rebuilding:

- In testimony before the Senate Judiciary Committee, Justice and Treasury Department officials labeled response to the attacks “one of the largest federal criminal investigations of any kind, one of the largest arson investigations in history, and the largest current civil rights investigation.”

- The Justice Department's Community Relations Service has played a central role in coordinating prevention activities and addressing community tensions in the aftermath of these attacks.
- The Federal Emergency Management Agency (FEMA) developed and distributed arson prevention materials and has provided arson training grants to affected states.
- The Bureau of Alcohol, Tobacco, and Firearms (BATF) prepared a "Church Threat Assessment Guide" to help houses of worship, especially rural ones, take steps to protect themselves from criminal arsonists and vandals.
- The Department of Housing and Urban Development has administered a \$10 million Federal Loan Guarantee Fund and has provided other technical rebuilding assistance.

This interagency response has been complemented by extraordinary outreach and cooperative efforts by private civil rights and religious organizations—ranging from financial and legal assistance to providing volunteers to help rebuild. Relationships established and cooperative efforts undertaken on this issue have had a very positive effect on intergroup relations nationally.

In June, 1996, President Clinton established the National Church Arson Task Force (NCATF), composed of FBI and BATF investigators and Justice Department prosecutors. The Task Force has benefited greatly from effective leadership from the Justice Department's Civil Rights Division and from the newly-established FBI Hate Crime Unit. Through the use of both a central clearinghouse in databases of the FBI and ATF to track leads and extensive efforts to coordinate information sharing and investigations with state and local law enforcement officials, the Task Force has achieved outstanding results—and clearly made a difference. On October 22, 1998, officials from the Justice Department and Treasury Department released the second-year National Church Arson Task Force report. The report documented a decrease in the number of reported attacks against houses of worship, attributing the decline to increased law enforcement vigilance, well-publicized arrests and prosecutions, and expanded prevention efforts.

According to the report, from January 1, 1995 to September 8, 1998, the Task Force opened 670 investigations of suspicious fires, bombings, and attempted bombings, including 225 incidents involving predominantly African-American house of worship—163 in the South. Federal, state, and local law enforcement officials have arrested 308 persons in connection with 230 of these incidents—254 whites, 46 African-Americans, and 8 Hispanics. 119 of the arrested persons have been juveniles, under the age of 18. Of the 106 suspects arrested for attacks against predominantly African-American churches, 68 are white, 37 are African-Americans, and 1 is Hispanic. Of the 197 suspects arrested for attacks against houses of worship that are not predominantly African-American, 181 are white, 9 are African-American, and 7 are Hispanics.

Federal and state prosecutors obtained convictions of 235 defendants in connection with 173 incidents—including the first convictions under the Church Arson Prevention Act. The report indicated that of the 61 defendants convicted of federal charges, 29 were convicted of hate crimes arising from 24 incidents. In addition, of the 171 defendants convicted of state criminal charges, 25 were convicted of 13 incidents determined to be hate crimes. Overall, the arrest rate in Task Force cases—34%—is more than double the arson arrest rate nationwide. Beyond arrests and convictions, the report documented extensive public and private efforts to assist communities in rebuilding trust and strengthening intergroup relations.

From the beginning, a critical question facing law enforcement officials and private watchdog groups, like ADL, was whether these attacks were part of a national conspiracy of domestic terrorism directed by organized hate groups. To date, investigators have determined that at least two of the fires were directly linked to Ku Klux Klan members. The overwhelming consensus view, however, is that the vast majority of the fires have not been part of a campaign driven by elements of the organized hate movement. This finding, of course, leads to a disturbing conclusion: individuals, in different parts of the country, at different times, often inspired by hate, were acting independently to commit these crimes.

1) The Hate Crime Statistics Act (HCSA) (28 U.S.C. Sec. 534)

Though a number of private groups and state law enforcement agencies track incidents of hate violence, the HCSA now provides the best national picture of the magnitude of the hate violence problem in America—though still clearly incomplete. Enacted in 1990, the HCSA requires the Justice Department to acquire data on crimes which "manifest prejudice based on race, religion, sexual orientation, or ethnicity" from law enforcement agencies across the country and to publish an annual sum-

mary of the findings. In the Violent Crime Control and Law Enforcement Act of 1994 (Public Law 103-322 September 13, 1994), Congress expanded coverage of the HCSA to require FBI reporting on crimes based on "disability."

Seven Years of HCSA Data: Progress and Significant Promise

The FBI documented a total of 4,558 hate crimes in 1991, reported from almost 2,800 police departments in 32 states. The Bureau's 1992 data documented 7,442 hate crime incidents reported from more than twice as many agencies, 6,181—representing 42 states and the District of Columbia. For 1993, the FBI reported 7,587 hate crimes from 6,865 agencies in 47 states and the District of Columbia. The FBI's 1994 statistics documented 5,932 hate crimes, reported by 7,356 law enforcement agencies across the country. The FBI's 1995 HCSA report documented 7,947 crimes reported by 9,584 agencies. The FBI's 1996 HCSA report documented 8,759 hate crimes reported to the FBI by 11,355 agencies.

The Bureau's 1997 HCSA summary report, released in November, 1998, documented a slight decrease in both the number of reported hate crimes, 8,049, and the number of participating law enforcement agencies, 11,211. Though activists and analysts were pleased to note the slight decrease in the number of reported hate crimes, it is too early to tell whether this drop reflects the general declining crime trends, effective programmatic and law enforcement response—or, instead, is attributable to the accompanying unwelcome decrease in the number of HCSA participating agencies. Other summary findings of the 1997 FBI HCSA report include:

- About 59% of the reported hate crimes were race-based, with 17% committed against individuals on the basis of their religion, 10% on the basis of ethnicity, and almost 14% against gay men and lesbians.
- Overall, approximately 39% of the reported crimes were anti-Black, 12% of the crimes were anti-White, 4.5% of the crimes were anti-Asian, and 6.5% anti-Hispanic.
- The 1,087 crimes against Jews and Jewish institutions comprised more than 13% of the total—and 79% of the reported hate crimes based on religion.
- Only 70% of the 16,000 law enforcement agencies that regularly report crime data to the FBI are reporting hate crime data to the Bureau. Moreover, as in years past, the vast majority of participating agencies affirmatively reported that *no hate crimes were committed in their jurisdictions*. Of the 11,211 departments participating in the 1997 HCSA data collection effort, only 1,732 (15%) reported even one hate crime. [For additional details, see the attached comparison of FBI hate crime statistics from 1991-97.]

1997 marks the first year that the number of participating agencies has declined from one year to the next. The six-year increase in the number of agencies that had implemented HCSA reporting mechanisms has been an important measure of its success. In 1998, the Justice Department's Bureau of Justice Statistics awarded a grant to examine why some local law enforcement agencies fail to collect or report hate crimes and why some other agencies have not continued earlier efforts to participate in the HCSA program. With the goal of improving the accuracy and geographic coverage of hate crime statistics, researchers at the Northeastern University College of Criminal Justice, led by Professor Jack McDevitt, will seek to identify strategies for increasing and sustaining HCSA reporting participation nationwide.

Clearly these hate crime numbers do not speak for themselves. Behind each and every one of these statistics is an individual or a community targeted for violence for no other reason than race, religion, sexual orientation, disability, or ethnicity.

Despite an incomplete reporting record over the first seven years of the Act, the HCSA has proved to be a powerful mechanism to confront violent bigotry against individuals on the basis of their race, religion, sexual orientation, or ethnicity. Importantly, the HCSA has also increased public awareness of the problem and sparked improvements in the local response of the criminal justice system to hate violence. Studies have demonstrated that victims are more likely to report a hate crime if they know a special reporting system is in place.

Police officials have come to appreciate the law enforcement and community benefits of tracking hate crime and responding to it in a priority fashion. Law enforcement officials can advance police-community relations by demonstrating a commitment to be both tough on hate crime perpetrators and sensitive to the special needs of hate crime victims. By compiling statistics and charting the geographic distribution of these crimes, police officials may be in a position to discern patterns and anticipate an increase in racial tensions in a given jurisdiction.

A recent ABC News "20/20" segment, ["Fake Hate, Phony Victims," July 25, 1999] focused attention on several "staged" hate crimes, allegedly perpetrated in further-

ance of fraudulent insurance claims. In our experience, phony hate crime claims are tragic, hurtful to the affected communities, and very rare. Phony hate crime claims are especially harmful because, at first, they have all the emotional and psychological impact of actual bias-motivated criminal activity on the community. If later revealed to be staged, such incidents can make community members cynical and wary of engaging in active efforts to support other actual victims of hate violence and bias-motivated vandalism. Of course, this type of criminal fraud should be aggressively investigated and punished to the full extent of the law.

As previously noted, it is clear that hate crime is dramatically underreported. Studies conducted by the National Organization of Black Law Enforcement Executives (NOBLE) and others have revealed that some of the most likely targets of hate violence are the least likely to report these crimes to the police. In addition to cultural and language barriers, some immigrant victims, for example, fear reprisals or deportation if incidents are reported. Many new Americans come from countries in which residents would never call the police—*especially* if they were in trouble. Gay and lesbian victims, facing hostility, discrimination, and, possibly, family pressures because of their sexual orientation, may also be reluctant to come forward to report these crimes. These issues present a critical challenge for improving law enforcement response to hate violence. When police departments implement the HCSA in partnership with community-based groups, the effort should enhance police-community relations.

2) *Hate Crime Sentencing Enhancement Act (28 U.S.C. Sec. 994)*

Congress enacted a federal complement to state hate crime penalty-enhancement statutes in the 1994 crime bill. This provision required the United States Sentencing Commission to increase the penalties for crimes in which the victim was selected "because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person." This measure applies, *inter alia*, to attacks and vandalism that occur in national parks and on federal property.

In May, 1995, the United States Sentencing Commission announced its implementation of a three-level sentencing guidelines increase for hate crimes, as directed by Congress. This amendment took effect on November 1, 1995. According to information prepared for the White House Hate Crimes Conference, 27 cases received enhanced sentences in 1996.

3) *Violence Against Women Act (VAWA) (42 U.S.C. Sec. 13981)*

Enacted as Title IV of the 1994 crime bill, VAWA addresses the problem of violent crime against women by providing authority for domestic violence and rape crisis centers and for education and training programs for law enforcement officials and prosecutors. The Act also included new federal criminal jurisdiction for interstate enforcement of restraining orders, to make acts of interstate domestic violence a federal offense, and to outlaw the possession of firearms and ammunition by persons who are subject to restraining orders.

Importantly, VAWA established a new federal civil remedy for victims of gender-based violent crimes which provides them with the right to sue perpetrators for compensatory and punitive damage awards, as well as injunctive relief. Defendants in the first cases to be litigated under VAWA's civil rights remedy have challenged the remedy's constitutionality, claiming that Congress lacked authority to enact the statute.

4) *The Church Arson Prevention Act (CAPA) (Public Law 104-155 July 3, 1996)*

This measure, sponsored by then-Sen. Lauch Faircloth (R-NC) and Sen. Edward Kennedy (D-MA), and, in the House, by Reps. Henry Hyde (R-IL) and John Conyers (D-MI), was originally designed solely to facilitate federal investigations and prosecutions of these crimes by amending 18 U.S.C. Sec. 247, a statute enacted by Congress in 1988 to provide federal jurisdiction for religious vandalism cases in which the destruction exceeds \$10,000. Hearings were held on both the impact of these crimes and the appropriate response of government. Federal prosecutors testified that the statute's restrictive interstate commerce requirement and its relatively significant damages threshold had been obstacles to federal prosecutions.

Following the hearings, Congress found that "[t]he incidence of arson of places of religious worship has recently increased, especially in the context of places of religious worship that serve predominately African-American congregations." Legislators appropriately recognized that the nation's response to the rash of arsons should be more ambitious and comprehensive than mere efforts to ensure swift and sure punishment for the perpetrators.

In a welcome, if very rare, example of bipartisanship, both the House and the Senate *unanimously* approved CAPA, which expanded federal criminal jurisdiction to investigate and prosecute attacks against houses of worship, increased the pen-

alties for these crimes, and authorized additional FBI and BATF investigators, and DOJ prosecutors and community conciliators.

FEDERAL HATE CRIME AWARENESS AND TRAINING INITIATIVES: A 1999 STATUS REPORT

A. Justice Department Programs and Initiatives

1) *The Federal Bureau of Investigation / Hate Crime Statistics Act (HCSA)*

- The FBI has been receptive to requests for HCSA training for state and local law enforcement officials. As of September, 1998, the FBI had held more than 126 hate crime training conferences across the country, training nearly 7,700 law enforcement personnel from more than 2,600 agencies nationwide. ADL and other groups with expertise in analyzing and responding to hate violence have participated in a number of these training seminars for state and local law enforcement authorities on how to identify, report, and respond to hate crimes.
- The Bureau updated both its Hate Crime Data Collection Guidelines and its excellent Training Guide for Hate Crime Data Collection in 1996. Responding to the 1994 Congressional mandate to collect data on disability-based crimes, the Bureau has recently developed and distributed training materials to help officials identify and respond to these hate crimes as well.
- In 1996, for the first time, the FBI incorporated an HCSA summary report within its annual *Crime in the United States* (CIUS) report. CIUS, essentially the Bible of crime statistics, is an impressive, 400-page compendium of jurisdiction-by-jurisdiction crime statistics, charts, and graphs. CIUS is a primary resource for criminologists, policymakers, and analysts. Inclusion in CIUS encourages researchers and criminologists to study hate violence, helps place it on the agenda for criminal justice and crime prevention conferences, and sends the signal to law enforcement officials that the HCSA is a permanent, integral part of the FBI's comprehensive data collection programs.
- In 1997, the FBI divided its Civil Rights Unit into a Color of Law Unit, to investigate official misconduct and police brutality, and a Hate Crime Unit to investigate federal criminal civil rights violations. The separate Hate Crime Unit provides a useful focal point for training and outreach on a range of FBI hate crime issues.

2) *Federal Hate Crime Training and Outreach Initiatives*

- Under the leadership of Justice Department officials in the Community Relations Service, Office of Justice Programs (including the Office of Juvenile Justice Delinquency Prevention, Office For Victims of Crime, Bureau of Justice Statistics, and Bureau of Justice Assistance), the Office of Community Oriented Policing Services (COPS), and the Department's Civil Rights Division, four versions of the hate crime training curriculum for law enforcement officials announced at the White House Conference on Hate Crime have now been developed. These excellent and inclusive curricula, developed in partnership with the International Association of Directors of Law Enforcement Standards and Training, the National Association of Attorneys General, and the Treasury Department, build on earlier hate crime training resources developed by, among others, the FBI, Treasury's Federal Law Enforcement Training Center (FLETC), the Massachusetts-based Educational Development Center, and the Office of the Massachusetts Attorney General. The curricula were presented at three regional train-the-trainers conferences in September and October, 1998. Almost 400 law enforcement officials, prosecutors, and representatives of civil rights and community-based organizations participated in the training sessions. Training teams made up of participants from those sessions are now promoting other regional and state training sessions.
- At the direction of Attorney General Janet Reno, many U.S. Attorneys have established or assisted in strengthening Hate Crime Working Groups (HCWGs), composed of state and local police and Sheriffs, FBI agents, prosecutors, and representatives from civil rights groups and community-based organizations. On February 18, 1998, the Justice Department hosted a conference for representatives from each U.S. Attorney's office to discuss strategies for establishing the HCWGs, enforcement priorities, and available national resources.

3) *The Community Relations Service (CRS)*

CRS is the only Federal agency that exists primarily to assist communities in addressing intergroup disputes. On many occasions since the establishment of CRS by

the 1964 Civil Rights Act, CRS professionals, working with police officials and civil rights organizations, have acted to defuse community tensions and prevent disorders that could have escalated into riots. For example, CRS professionals have frequently provided technical assistance to law enforcement officials and community groups facing the impact of a Klan rally or a demonstration by organized hate groups.

- CRS has also played a leading role in the implementation of the HCSA data collection effort. CRS professionals have participated in HCSA training sessions for hundreds of law enforcement officials from dozens of police agencies across the country.
- CRS mediators and conciliators have also played an essential role in addressing community tensions in the aftermath of attacks against houses of worship—and have played a coordinating role in the development and implementation of the Justice Department's new law enforcement training curriculum.
- In 1998, CRS published a Bulletin, *Hate Crime: The Violence of Intolerance*.

4) *The Office for Victims of Crime (OVC)*

- In 1992, at the direction of Congress, the Justice Department's Office for Victims of Crime (OVC) provided funds for the development of a training curriculum to improve the response of law enforcement and victim assistance professionals to victims of hate crimes. This excellent OVC training curriculum also promotes coordinated action between law enforcement officials and victim assistance professionals in the investigation and prosecution of these crimes.

5) *The Office of Juvenile Justice and Delinquency Prevention (OJJDP)*

In 1992, Congress approved several new hate crime and prejudice-reduction initiatives as part of the four-year Juvenile Justice and Delinquency Prevention Act reauthorization. The Act included a requirement that each state's juvenile delinquency prevention plan include a component designed to combat hate crimes and a requirement that the Justice Department's Office of Juvenile Justice and Delinquency Prevention (OJJDP) conduct a national assessment of youths who commit hate crimes, their motives, their victims, and the penalties received for the crimes.

- In response, in 1993, OJJDP allocated funds for this national assessment. After a baffling, extended delay, OJJDP submitted an incomplete and disappointing report in July, 1996 that failed to provide any insights into the magnitude of the problem, the characteristics of the offenders or victims, or the causes of juvenile hate violence. The report also failed to make recommendations for future study or future action.
- On the positive side, OJJDP also provided funds for the development of an excellent, wide-ranging curriculum, "Healing the Hate: A National Bias Crime Prevention Curriculum for Middle Schools," which is appropriate for educational, institutional, and other settings to address prevention and treatment of hate crimes committed by juveniles.

6) *The Bureau of Justice Statistics (BJS)*

- Under a grant funded by BJS, scholars and researchers from the Center for Criminal Justice Policy Research at Northeastern University in Boston are now studying differences in reporting rates among law enforcement agencies—and identifying strategies for increasing and sustaining reporting participation by these state and local officials.
- In addition, as announced at the White House Conference on Hate Crime, BJS received funding in its FY 1999 appropriation to develop and integrate questions about bias crime into its annual survey assessment of crime in America, the National Crime Victimization Survey (NCVS). The NCVS survey data, compiled through a national sampling of some 50,000 U.S. households, should complement the hard data collected by the FBI under the Hate Crime Statistics Act to provide a much more complete picture of hate violence across the country.

7) *The Bureau of Justice Assistance (BJA)*

Under the leadership of its Director, Nancy Gist, BJA has emerged as the Justice Department's most active and innovative source for positive initiatives to address bias-motivated crime.

- In 1997, under a grant provided by BJA, the National Criminal Justice Association prepared a comprehensive report on federal, state, and local response to hate crimes. This useful report, "A Policymaker's Guide to Hate Crimes,"

includes a review of relevant legal cases and law enforcement hate crime practices.

- BJA also provided funding for the International Association of Chiefs of Police (IACP) for its national Hate Crime Summit in June, 1998.
- BJA identified "Law Enforcement Partnership to Address Hate Crimes" as one of its ten Concept Paper Topic Areas for FY 1998. Under this program, BJA awarded four grants, ranging in amounts from \$100,000 to \$150,000, for innovative hate crime education, coordination, and outreach programs to prosecutors and other law enforcement authorities—including the San Diego Police Department in partnership with the San Diego Regional Office of the Anti-Defamation League and The San Diego Hate Crimes Community Working Group.
- BJA is also funding an important new initiative to develop and provide training for prosecutors in responding to hate crimes. The National District Attorneys Association, through its research arm, the American Prosecutors Research Institute, is developing these training materials, best practices, and model protocols for effective response to bias crimes.

8) National Institute of Justice (NIJ)

- Under a 1995 grant provided by NIJ, the American Prosecutors Research Institute of the National District Attorneys Association conducted a best practices review of prosecutor protocols in handling bias-motivated cases. The objective of the initiative was to develop a hate crimes training guide for prosecutors.

9) The Office of Violence Against Women

Under VAWA, "(A)ll persons within the United States shall have the right to be free from crimes of violence motivated by gender." The Office oversees the implementation of the Violence Against Women Act of 1994 (VAWA), including the establishment of domestic violence and rape crisis centers and education and training programs for law enforcement and prosecutors. The Office also tracks the incidence of the new VAWA criminal provisions.

10) The Office of Community Oriented Policing Services (COPS)

Hate violence can be addressed effectively through a combination of presence, prevention, and outreach to the community that is the hallmark of community policing.

- In 1998, the COPS Office provided essential funding for the IACP Hate Crime Summit and for the production and distribution of the Justice Department's excellent law enforcement hate crime training initiative. In addition, the COPS Office funded several bias crime-related initiatives under its \$40 million Problem-Solving Partnership grant program.

B. The Department of Education

There is growing awareness of the need to complement tough laws and more vigorous enforcement—which can deter and redress violence motivated by bigotry—with education and training initiatives designed to reduce prejudice. The Federal government has a central role to play in funding program development in this area and promoting awareness of initiatives that work.

In 1992, for the first time, Congress acted to incorporate anti-prejudice initiatives into the Elementary and Secondary Education Act (ESEA), the principal Federal funding mechanism for the public schools. Title IV of the Act, Safe and Drug-Free Schools and Communities, also included a specific hate crimes prevention initiative—promoting curriculum development and training and development for teachers and administrators on the cause, effects, and resolutions of hate crimes or hate-based conflicts. The enactment of these Federal initiatives represented an important advance in efforts to institutionalize prejudice reduction as a component of violence prevention programming.

In a significant step towards fulfillment of the promise of these measures, in July 1996, the Department of Education provided almost \$2 million in new grants to fund the development and implementation of "innovative, effective strategies for preventing and reducing the incidence of crimes and conflicts motivated by hate in localities directly affected by hate crimes." The Anti-Defamation League's A WORLD OF DIFFERENCE Institute received one of the grants under this initiative to implement an anti-bias, anti-hate crime training program at four high schools and their feeder elementary and middle schools in three states: California, Nebraska and New York.

- Under the leadership of the Department's Office of Civil Rights, in association with the National Association of Attorneys General, the Department has provided excellent counsel and programming for schools in a new publication, "Protecting Students from Harassment and Hate Crimes: A Guide for Schools." The Department should make this new guide available on its website and promote training materials on the issue.

C. The U.S. Commission on Civil Rights

The U.S. Commission on Civil Rights has historically held useful field hearings and briefings on race relations and hate violence. The Commission held community forums on the suspicious fires at houses of worship in six Southern states in July 1996. Hosted by its State Advisory Committees, the Commission heard testimony from community and civic leaders, and Federal, state and local law enforcement officials.

D. The Department of the Treasury

As mentioned above, agents from the Treasury Department's Bureau of Alcohol, Tobacco, and Firearms (BATF) have provided essential investigative resources as part of the government's Federal Church Arson Task Force.

- Hate crime response experts from around the country have assisted in the development of an excellent model hate crime training curriculum for use by the Federal Law Enforcement Training Centers (FLETC) for Federal, state and local police officials. The FLETC curriculum has been presented at twenty-two training seminars across the country to over 650 law enforcement training personnel and deserves much more attention and promotion.

E. The Department of Housing and Urban Development (HUD)

- In conjunction with the National Council of Churches and the Congress of National Black Churches, HUD has organized a series of information seminars at which HUD officials discuss its \$10 million loan guarantee rebuilding fund, with architects, lawyers, and construction specialists available to offer specific assistance. In addition, representatives from the Justice Department, BATF, and FEMA have also been on hand to discuss enforcement and arson prevention activities. Over 100 houses of worship have received rebuilding assistance through HUD's National Rebuilding Initiative.
- In December, 1997, HUD promulgated a proposed rule to expand civil penalties for Fair Housing Act violations. Under this new procedure, Administrative Law Judges would be explicitly authorized to assess a separate civil penalty for multiple acts involving housing discrimination. This initiative, called "Make 'Em Pay," is designed to combat housing-related acts of hate violence by increasing the severity of the consequences for committing such a crime. In February, 1999, the initiative went into interim effect.
- HUD officials are currently planning a national "Healing Neighborhoods" conference in an effort to increase the housing community's awareness of hate crime issues.

F. The Department of Defense.

In recent years, factions of the Ku Klux Klan and other organized hate groups have attempted to infiltrate the armed forces and establish cells at military camps and bases. The dangers of extremism in the military were most dramatically revealed in December, 1995, when two African Americans were murdered in Fayetteville, North Carolina by two white soldiers stationed at nearby Fort Bragg who had been involved in neo-Nazi skinhead activities. In the wake of these murders, the Army established a Task Force on Extremist Activities, which conducted extensive interviews and surveys of thousands of soldiers and released its report in March, 1996. The report found minimal evidence of extremist activity in the Army. Yet, even if organized hate group members in the military are few in number (as they are in general society), the access they have to weapons, explosives, and training make them a potentially significant threat to society. In addition, the presence of haters and extremists in the military poses a threat to morale and good order in the ranks.

The House National Security Committee held hearings on the issue on June 25, 1996. In an important follow up, Congress required each service branch to conduct "ongoing programs for human relations training for all members of the Armed Forces," and required the Defense Department to report to Congress the findings of an annual survey to measure the state of racial, ethnic, and gender discrimination in the military—as well as the extent of hate group activity. Each of the service

branches have subsequently revised and strengthened their policies against hate group activity and recruitment.

G. National Institute of Mental Health (NIMH).

According to information distributed at the White House Conference on Hate Crimes, NIMH is funding the first large-scale study of the mental health consequences of hate crimes, focusing on anti-gay hate violence. The study is also designed to elicit information about the prevalence of anti-gay hate crimes and the rate at which these crimes are reported to the police.

CONCLUSION

The fundamental cause of bias-motivated violence in the United States is the persistence of racism, bigotry, and anti-Semitism. Unfortunately, there are no quick, complete solutions to these problems. Ultimately, the impact of all bias crime initiatives will be measured in the response of the criminal justice system to the individual act of hate violence. Enactment of the Hate Crimes Prevention Act, along with implementation of other hate crime training, prevention, and anti-bias education initiatives announced at the White House Conference on Hate Crimes is, in the language of 18 U.S.C. Sec. 245 itself, "in the public interest and necessary to secure substantial justice."

We applaud the leadership of the sponsors of this measure and urge the Judiciary Committee to approve this important legislation as soon as possible.

THE HATE CRIMES PREVENTION ACT IS SUPPORTED BY TWENTY-TWO STATE ATTORNEYS GENERAL, AND OVER 100 NATIONAL LAW ENFORCEMENT, CIVIL RIGHTS, RELIGIOUS, AND CIVIC ORGANIZATIONS:

AIDS National Interfaith Network
 African-American Women's Clergy Association
 Alliance for Rehabilitation Counseling
 American-Arab Anti-Discrimination Committee
 American Association for Affirmative Action
 American Association of University Women
 American Association on Mental Retardation
 American Citizens for Justice
 American Council of the Blind
 American Counseling Association
 American Ethical Union, Washington Office
 American Federation of Government Employees
 American Federation of State, County, and Municipal Employees, AFL-CIO
 American Foundation for the Blind
 American Friends Service Committee
 American Jewish Committee
 American Jewish Congress
 American Medical Association
 American Music Therapy Association
 American Network of Community Options and Resources
 American Nurses Association
 American Speech-Language Hearing Association
 American Therapeutic Recreation Association
 American Psychological Association
 Americans for Democratic Action
 American Veterans Committee
 And Justice For All
 Anti-Defamation League
 Aplastic Anemia Foundation of America, Inc.
 Arab American Institute
 The Arc of the United States
 Asian American Legal Defense & Education Fund
 Asian Law Caucus
 Asian Pacific American Labor Alliance
 Asian Pacific American Legal Center
 AYUDA
 Bazelon Center for Mental Health Law
 Bi-Net
 B'nai B'rith International
 Brain Injury Association, Inc.
 Business and Professional Women, USA

Catholics for Free Choice
 Center for Community Change
 Center for Democratic Renewal
 Center for Women Policy Studies
 Chinese American Citizens Alliance
 Christian Church Capital Area
 Church Women United
 Coalition of Labor Union Women
 Congress of National Black Churches
 Consortium of Developmental Disabilities Councils
 Disability Rights Education and Defense Fund
 Disciples of Christ Advocacy Washington
 Network
 The Episcopal Church
 Equal Partners in Faith
 Evangelical Lutheran Church of America, Office
 for Government Affairs
 Fair Employment Council of Greater Washington
 Federal Law Enforcement Officers Association
 Federally Employed Women
 Feminist Majority
 Gender Public Advocacy Coalition
 General Federation of Women's Clubs
 Goodwill Industries International, Inc.
 Hadassah
 Hispanic National Law Enforcement Association
 Human Rights Campaign
 India Abroad Center for Political Awareness
 Interfaith Alliance
 International Association of Chiefs of Police
 International Association of Jewish Lawyers and Jurists
 International Association of Jewish Vocational Services
 International Dyslexia Association
 International Union of United Aerospace and Agricultural Implements
 Japanese American Citizens League
 Jewish Council for Public Affairs
 Jewish Labor Committee
 Jewish War Veterans of the USA
 Jewish Women International
 JAC-Joint Action Committee
 Justice for All
 LDA, The Learning Disabilities Association of America
 Labor Council for Latin American Advancement
 Latino/a, Lesbian, Gay, Bisexual & Transgender
 Organization
 Lawyers' Committee for Civil Rights Under Law
 Leadership Conference on Civil Rights
 LEAP-Leadership Education for Asian Pacifics Inc.
 Learning Disabilities Association of America
 Log Cabin Republicans
 MALDEF—Mexican American Legal Defense & Education Fund
 MANA—A National Latina Organization
 The McAuley Institute
 National Abortion Federation
 NAACP
 NAACP Legal Defense Fund, Inc.
 NA'AMAT USA
 NAKASEC—National Korean American Service &
 Education Consortium, Inc
 National Asian Pacific American Legal Consortium
 National Association of Commissions for Women
 National Alliance for the Mentally Ill
 National Alliance of Postal and Federal Employees
 National Asian Pacific American Bar Association
 National Association of the Deaf
 National Association of Developmental Disabilities Councils (NADDC)
 National Association of Latino Elected and Appointed Officials (NALEO)
 National Association of People with AIDS

National Association of Private Schools for Exceptional Children
 National Association of Protection & Advocacy Systems
 National Association of Rehabilitation Research and Training Centers
 National Association of Social Workers
 National Black Women's Health Project
 National Center for Victims of Crime
 National Coalition Against Domestic Violence
 National Coalition of Anti-Violence Programs
 National Coalition on Deaf-Blindness
 National Conference for Community and Justice (NCCJ)
 National Congress of American Indians
 National Council of Churches of Christ in the USA
 National Council of Jewish Women
 National Council of La Raza
 National Education Association
 National Federation of Filipino American Associations
 National Gay and Lesbian Task Force
 National Hispanic Leadership Agenda (NHLA)
 National Italian American Foundation
 National Jewish Democratic Council
 National Korean American Service and Education Consortium
 National Mental Health Association
 National Newspaper Publishers Association
 National Organization of Black Law Enforcement Executives
 National Parent Network on Disabilities
 National Partnership for Women & Families
 National Puerto Rican Coalition, Inc.
 National Rehabilitation Association
 National Respite Network
 National Sherrifs' Association
 National Spinal Cord Injury Association
 National Therapeutic Recreation Society
 National Urban League
 National Women's Law Center
 NOW—National Organization for Women
 NOW Legal Defense & Education Fund
 NETWORK, A National Catholic Social Justice Lobby
 Organization of Chinese Americans
 ORT—Organization for Educational Resources and
 Technological Training
 Paralyzed Veterans of America
 Parents, Families and Friends of Lesbians and Gays
 People For the American Way
 Police Executive Research Forum
 Police Foundation
 Presbyterian Church (USA), Washington Office
 Rehabilitation Engineering and Assistive Technology Society of North America
 A. Philip Randolph Institute
 Rock the Vote
 Service Employees International Union, AFL-CIO
 Society for the Psychological Study of Social Issues
 Southeast Asia Resource Action Center
 Spina Bifida Association of America
 Union of American Hebrew Congregations
 Union of Needletrades, Industrial & Textile Employees (UNITE)
 Unitarian Universalist Association
 United Church of Christ—Office of Church in Society
 United Methodist Church
 The United States Conference of Mayors
 United States Student Association
 United Synagogue of Conservative Judaism
 The Woman Activist Fund, Inc.
 Women of Reform Judaism, Federation of Temple Sisterhoods
 Women Work!
 Women's Alliance for Theology, Ethics & Ritual
 YWCA of the USA
 (Updated 8/99)



STATES THAT DO NOT PROVIDE FOR ENHANCED PENALTIES FOR HATE CRIME BASED ON SEXUAL ORIENTATION.



STATES THAT DO NOT PROVIDE FOR ENHANCED PENALTIES FOR HATE CRIMES BASED ON MENTAL AND PHYSICAL DISABILITY OR HANDICAP.

CRIMINAL CIVIL RIGHTS PROSECUTIONS INVOLVING VIOLENCE
(as of 8/4/1999)

Fiscal Year	Bias Motivated Violence Cases with KKK and Organized Hate Group Defendants		Non-KKK Defendant Bias Motivated Violence Cases		Total Number of Bias Motivated Violence Cases		Cases Brought Under 18 U.S.C. Sec. 245
	Cases	Defendants	Cases	Defendants	Cases	Defendants	
1999	1	2	19	24	20	26	4
1998	6	13	11	17	17	30	3
1997	2	4	19	39	22	44	3
1996	5	12	33	53	38	65	8
1995	6	10	37	56	43	66	10
1994	10	22	26	52	36	74	5
1993	5	8	18	29	23	37	3
1992	8	16	24	32	32	48	4
1991	14	28	16	35	30	53	4
1990	13	15	22	31	35	46	3
1989	9	18	33	45	42	63	5
1988	1	1	12	19	13	20	3
1987	2	9	13	19	15	28	5
1986	2	13	5	8	7	21	1
1985	6	16	5	14	11	30	3
1984	5	17	8	19	13	36	5
1983	4	12	6	12	10	24	3
1982	4	7	4	7	8	14	2
1981	2	5	2	2	4	7	2
1980	6	11	3	5	9	16	3
1979	2	23	3	3	5	26	2
1978	0	0	4	6	4	6	2
1977	0	0	4	8	4	8	0
1976							10
1975							8
1974							2
1973							2
1972							4
1971							2
1970							3
1969							2

Comparison of FBI Hate Crime Statistics 1991-1997*

	1991	1992	1993	1994	1995	1996	1997
Participating Agencies	2,771	6,181	6,865	7,356	9,584	11,355	11,211
Total Hate Crime Incidents Reported	4,558	7,486	7,587	5,332	7,947	8,750	8,040
Number of States, Including D.C.	32	42	47	44	46	50	49
Percentage of U.S. Population Agencies Represent	N/A	51	58	58	75	84	85

Offenders' Reported Motivations in Percentages of Offenses*

	1991	1992	1993	1994	1995	1996	1997
Racial Bias	62.3	60.7	62.4	59.8	60.7	61.6	58.5
Anti-Black	35.5	34.7	37.1	36.6	37.5	41.9	38.8
Anti-White	18.7	20.3	19.4	17.0	15.4	12.6	12.3
Religious Bias	19.3	17.5	17.1	17.9	16.1	15.9	17.2
Anti-Semitic	16.7	15.4	15.1	15.1	13.3	12.7	13.5
Anti-Semitic as Percentage of Religious Bias	86.4	87.5	88.1	86.2	82.9	79.2	78.5
Ethnicity	9.5	10.1	9.2	10.8	10.2	10.7	10.4
Sexual Orientation	8.9	11.6	11.3	11.5	12.8	11.6	13.7

* Charts created by the Anti-Defamation League Washington Office from data collected by the FBI.

State by State Comparison, HCSA Reporting 1991-1997*

*Number of agencies participating in HCSA for each state, B=Number of incidents reported by agencies in the state. --Did not report

STATE	1991		1992		1993		1994		1995		1996		1997	
	A	B	A	B	A	B	A	B	A	B	A	B	A	B
Alabama	--	--	4	4							399	0	392	0
Alaska	--	--	--	--	1	24	1	0	1	0				1
Arizona	1	48	90	172	80	206	82	206	67	230	81	354	85	230
Arkansas	100	10	163	37	187	13	188	0	190	7	191	1	194	0
California	2	0	7	76	11	364	19	364	744	1751	718	2062	720	1831
Colorado	194	128	197	258	196	178	231	173	228	140	230	133	232	113
Connecticut	29	99	23	82	30	117	88	86	84	87	98	114	59	113
Delaware	58	29	57	47	48	33	51	42	91	45	30	67	34	58
District of Columbia	--	--	1	14	1	10	1	3	1	4	1	16	1	9
Florida	--	--	374	334	374	239	370	214	411	164	394	187	589	93
Georgia	2	23	4	66	4	75	3	81	3	49	3	28	3	45
Hawaii	--	--	--	--	--	--	--	--	--	--	--	--	--	--
Idaho	68	23	115	34	110	70	117	70	118	114	112	72	118	45
Illinois	26	133	520	241	224	724	19	230	1	140	114	233	96	330
Indiana	1	0	5	16	52	52	80	32	164	35	179	36	130	62
Iowa	201	89	190	38	196	39	226	61	232	29	231	43	230	65
Kansas	3	9	2	3	1	0	--	--	--	--	1	28	1	18
Kentucky	1	0	2	5	3	13	5	4	513	81	527	109	213	48
Louisiana	8	0	10	13	58	23	92	6	146	7	140	8	127	4
Maine	--	--	9	18	9	32	0	7	130	75	131	58	131	67
Maryland	165	431	158	454	153	404	150	205	145	363	148	367	148	321
Massachusetts	30	200	108	424	135	343	--	--	202	393	405	454	389	441
Michigan	--	--	454	122	555	347	618	262	480	405	485	485	485	481
Minnesota	48	225	69	411	66	377	--	--	68	298	307	308	312	214
Mississippi	4	1	1	0	17	0	53	0	91	0	129	3	78	0
Missouri	18	136	17	158	91	188	156	130	167	135	230	150	194	167
Montana	--	--	--	--	18	21	2	0	0	11	66	10	95	15
Nebraska	--	--	--	--	--	--	--	--	--	--	10	3	18	3
Nevada	1	18	3	23	0	13	6	16	35	68	4	44	34	45
New Hampshire	--	--	--	--	1	0	2	3	3	24	2	1	--	--
New Jersey	271	895	291	1114	317	1001	559	885	568	768	548	138	867	894
New Mexico	1	0	--	--	13	4	57	4	70	24	70	44	38	24
New York	773	843	688	1112	671	934	567	911	820	845	690	903	692	853
North Carolina	--	--	1	1	0	10	7	7	50	52	63	34	445	62
North Dakota	--	--	1	1	91	1	82	6	74	3	191	1	84	2
Ohio	30	80	28	106	138	290	294	457	321	367	485	234	394	295
Oklahoma	7	89	0	147	0	80	4	30	7	37	283	68	380	41
Oregon	39	296	279	376	279	227	206	177	243	182	174	172	171	165
Pennsylvania	80	277	844	622	1698	381	1044	278	1134	282	1137	285	1168	108
Rhode Island	--	--	44	48	35	82	45	37	45	46	46	46	45	43
South Carolina	--	--	4	4	296	27	202	30	293	28	340	42	318	71
South Dakota	--	--	--	--	3	4	4	1	38	0	32	3	32	34
Tennessee	2	1	2	4	56	2	113	30	104	28	191	39	167	46
Texas	28	86	879	488	879	418	895	264	914	328	819	350	884	323
Utah	--	--	9	12	121	46	123	28	116	107	124	53	124	38
Vermont	--	--	--	--	1	1	10	12	18	10	3	4	30	3
Virginia	19	63	21	102	21	160	160	95	175	81	489	92	409	165
Washington	204	196	207	374	297	457	22	281	229	228	230	185	229	180
West Virginia	--	--	--	--	--	--	--	--	--	--	22	4	22	3
Wisconsin	203	41	145	67	161	19	180	40	237	35	238	43	245	58
Wyoming	--	--	0	0	48	10	60	9	39	19	70	4	36	6

* Charts created by the ADL Washington Office from data collected by the FBI.

PREPARED STATEMENT OF TRADITIONAL VALUES COALITION

Over the past couple of years, the promotion of a federal law to attempt to prevent hate crimes has become increasingly prevalent in Washington. The desires of some legislators to protect and legitimize homosexuals along the same lines as blacks and women from discrimination cannot be met when mandated by the federal government.

Federalizing such a law would put federal prosecutors in charge of an area that cannot be regulated and investigated: the beliefs and motivations of criminal defendants. Indeed murderers, rapists and batterers should be prosecuted with all the force at the state's disposal. However, the imposition of more stringent punishments for certain beliefs would pose a substantial risk to the First Amendment rights of persons who are suspected of harboring proscribed beliefs or motivations not condoned by the federal government. They would be asked to prosecute defendants with more difficult standards for conviction in an area that local law enforcement personnel have consistently shown they are best at handling.

This type of legislation amounts to an intrusion into the rights and abilities of state and local government to prosecute their own crime. Why should crimes be prosecuted at the federal, instead of at the state level?

The legislators' intent to stop violence is a noble one, but not at the expense of the freedoms that every American enjoys or the principles imbedded in our Constitution, not the least of which are the rights of individual states separate from the federal government.

Two very powerful legal opinions about the infringement upon state's rights come from the Chief Justice of the United States Supreme Court and the American Bar Association (ABA), both of whom lament the intrusion upon the states.

In his 1998 year end report of the federal judiciary, Supreme Court Chief Justice William Rehnquist presented problems the judicial branch faces that must be confronted. One of these is the growing caseload in the federal Judiciary resulting from continued expansion of federal jurisdiction, which threaten to change entirely the nature of our federal system." No words could better explain this issue than the Chief Justice's own when he states that, "Federal courts were not created to adjudicate local crimes, no matter how sensational or heinous the crimes may be."

An American Bar Association task force has joined him in voicing the danger of creating too many federal crimes, calling it "dangerous and counterproductive." Former Reagan Administration Attorney General Ed Meese chaired the task force that pointed out that 40% of the federal provisions enacted since the Civil War have been enacted since 1970. Task force member William Taylor, a former defense attorney added, "The panel found no persuasive evidence that federalizing crime makes the street safer."

The political popularity of being tough on crime has led many legislators to adopt the approach that federalizing crime is beneficial. However according to the ABA, federalizing crime, among other things, "undermines the state-federal fabric and disrupts the important Constitutional balance of federal and state systems."

Too many times the federal government has enacted legislation that is equated as an "exercise in symbolic politics." But the American people must comprehend that our individual rights and the balance between state and federal powers are not symbolic gestures, they are the backbone of our government.

Here are some of the falsehoods that are being used in attempt to advance such legislation and truth behind such claims:

Myth: "Protecting homosexuals requires special rights above and beyond those granted to other citizens."

Fact: Such special protection of specific groups denies all American citizens, who are not members of that group, their Constitutional right to *equal protection under the law*. Particularly troubling is the fact that homosexuals are given this special protected and endorsed status. This, coupled with the hate crime legislation's educational initiatives, threatens the freedom of Christian men and women who hold to biblical beliefs that homosexuality is a sin.

In a recent *New York Times* column, Clyde Haberman wrote about the "flaws in the logic of laws on hate crimes." Within his column he discussed the unfairness of hate crimes legislation by looking at both sides of the argument and drawing from the work of James B. Jacobs, a law professor at New York University and Kimberly Potter, a senior research fellow at New York University (author of a book entitled "Hate Crimes: Criminal Law and Identity Politics" Oxford University Press, 1998):

"When four subway riders were slashed within 24 hours a few days ago, no underground regular could avoid a shudder. Police assurances that subway assaults have been declining were good to hear, but they did not undo the trauma . . . Here is the question: When the attackers are brought to justice, should they

not be punished twice, once for harming their immediate victim and again for traumatizing two million people who ride subways everyday? In a sense they were victims, too."

"We all know this reasoning is unlikely to carry much weight in the Criminal Courts Building."

But this is exactly what hate crime legislation would do. It would increase the penalty for crimes committed against a person if that person is a member of a specific group. This is an unfair practice of discrimination that provides special rights to some while excluding others.

Calls for tolerance are being made on behalf of the beliefs of a certain few.

Myth: "Crimes against homosexuals are not being prosecuted."

Fact: Such crimes are being prosecuted. Case in point—Laramie, Wyoming! The murder of Matthew Shepherd is the event that is touted as the best example of the need for such legislation. Wyoming officials apprehended the killers of Matthew Shepherd and have already sentenced one and will be trying the other in August without the help of the federal government. The authorities in Wyoming have shown complete respect for justice in honor of Matthew Shepherd and his family. No piece of federal legislation could do any better than what the state of Wyoming has already accomplished. Justice has been served in the conviction of Russell Henderson and will in the trial of Aaron McKinney. *All this has been done in a state with no hate crime legislation of any kind in place!*

Myth: "Crimes against gay, lesbian, bisexual, and transgender (people of one gender who dress like the other or who by surgical procedure have become a different gender) Americans are increasing."

Fact: A recent report published by the National Coalition of Anti-Violence Programs (a homosexual advocacy group) stated that the number of anti-gay attacks has dropped from 2,665 in 1997 to 2,552 in 1998. Also a press release distributed by the Human Rights Campaign (a homosexual lobby organization) asserted that in 1996 11.5% of bias motivated incidents were against homosexuals. This is 1.2 % less than reported in 1995.

In 1997, the FBI found that more than half of the hate crimes reported were labeled as acts of intimidation, using threatening words and/or conduct, but without displaying a weapon or subjecting the victim to actual physical attack.

Myth: "We need this law because only in very rare circumstances can the federal government investigate and prosecute hate crimes against homosexuals."

Fact: The proposed legislation would so greatly increase the jurisdiction of the federal government that it would have a negative effect upon the ability to prosecute crimes. In Chief Justice Rehnquist's year-end report, he warned of the "growing caseload in the federal judiciary resulting from the continued expansion of federal jurisdiction" . . . It is this overwhelming caseload that threatens the effectiveness of all federal crimes. Currently, federal courts are unable to thoroughly review and rule upon the cases that they have. Therefore, it is actually counter-productive to federalize hate crimes because of the limited time and resources available to the federal judiciary.

The American Bar Association recently released a report that affirmed Chief Justice Rehnquist's warning. The report entitled "The Federalization of Criminal Law" asserts that "there is no persuasive evidence that federalization of local crimes makes the streets safer for American citizens."

The 56-page report, backed up by hundreds of pages of statistical findings, was prepared by a "blue ribbon" task force; chaired by former Attorney General Ed Meese III and included former Congressman Robert W. Kastenmeier.

"Highly publicized criminal incidents are frequently accompanied by proposals for congressional responses for no reason other than that the conduct is serious, even if the activity is already handled by state law," the summary says.

The report states that "increased federalization is rarely, if ever, likely to have any appreciable effect on the categories of violent crime that most concern Americans, because in practice federal law enforcement can reach only a small percent of such activity."

"Inappropriate federalization" often contributes to "long-range damage to real crime control." By diverting federal money better spent on state law-enforcement system, the federalization of a crime can deplete funding for other law-enforcement efforts that are not duplicated by the states.

"The expanding coverage of federal criminal law, much of it enacted in the absence of a demonstrated and distinctive federal justification, is moving the nation rapidly toward two broadly overlapping, parallel and essentially redundant sets of criminal prohibitions. . . . Such a system has little to commend it and much to condemn it," the report says.

Myth: "The federal government can intervene under its authority to regulate interstate commerce."

Fact: Hate crimes have nothing to do with interstate commerce. The Supreme Court's 1995 decision in *United States v. Lopez* established that the Commerce Clause authorizes only two kinds of statute. First, those which truly concern commerce—under which hate crimes clearly do not fit, and secondly, those statutes which contain a jurisdictional element, or limit application to matters which are within federal jurisdiction. The Fourth Circuit's recent and important *Brzonkala v. Virginia Polytechnic Institute* opinion struck down a key provision of the Violence Against Women Act on the grounds that it did not satisfy either of these requirements.

Myth: "The federal government can act to provide 'equal protection of the laws.'"

Fact: The Fourteenth Amendment authorizes enforcement only against states and not against purely private conduct, as the Supreme Court has recognized in a series of cases leading up to the recent *City of Boerne v. Flores*. Congress cannot regulate "purely private conduct," such as hate crimes, "because such private conduct can never violate Section 1 of the Fourteenth Amendment."

Myth: "State laws are not adequate."

Fact: State laws are adequate. In addition to the previous example of the murder of Matthew Shepherd is the murder of James Byrd, Jr. in Jasper Texas. The process that caught, tried, and convicted the murderers of this man without federal government assistance demonstrate how state laws are appropriately enforced and undeniably adequate. Furthermore, by their own admission in a March 9 letter to other members of Congress, co-sponsors for the Hate Crime Prevention Act of 1999, pointed out that, "state and local authorities currently prosecute the overwhelming majority of hate crimes and they will continue to do so under the legislation."

Additionally, local communities need to keep control over the actions that occur in their town so that they can properly heal from such reprehensible acts committed by persons who misrepresent the values of their community. National attention to such acts often mischaracterize and label communities that can only be erased when that community takes it upon itself, standing upon their own laws, to make sure that justice is served. The administration of justice done from within the community is more powerful and beneficial to the community and to the nation as a whole, than when dictated by the federal government.

Myth: "Hate crimes affect more than just the individual."

Fact: Bias related crimes are not the only offenses that traumatize whole groups of people. "Think of carjackings or the Central Park jogger . . ." Mr. Jacobs, co-author of *Hate Crimes: Criminal Law and Identity Politics* said. "Each of those crimes affects entire communities. Look at how many people feel vulnerable whenever someone is killed in the park. The logical development (of hate crime legislation) will be that every group not in the protected categories will demand to be included. Why not children? Why not union members?"

This goes to the core of the issue of fairness. *What violent crime doesn't affect an entire community?* Every carjacking causes concern, worry and trauma within every car owner; every abducted child causes concern, worry and trauma within every parent, and every rape causes concern, worry and trauma within every woman. So why only elevate some groups to protected status and not all groups? Isn't it discriminatory not to offer the same protection to every one regardless of what group they are a member?

Myth: "Hate crimes are under reported."

Fact: It has been said that hate crimes are underreported because of fear of becoming an even larger target for harassment, but couldn't it be that they are "underreported" because they are not occurring? If it is known they are underreported, then it must be known that they are happening, for someone must have reported them.

Myth: "Penalty enhancement sends the message that such crimes will not be tolerated."

Fact: If penalty enhancement sends this message then why are we limiting it to only a few select crimes. If it is limited to only a few select crimes then what does this say about those crimes that are not included in the penalty enhancement program? Are these crimes more tolerable? And if so then is this not extending special protection under the law rather than equal protection under the law. Who should be punished more severely, the murderer of a single, homosexual male, or the killer of a father of three, both of whom were targeted for who they are.

Myth: "Federal hate crimes legislation is Constitutional."

Fact: This type of breach by the federal government into the rights of the states violates the principle of federalism upon which our government is based. All powers not given specifically to the federal government in the Constitution are to be left

to the states. Just because this has been consistently overlooked over the past few years, it does not permit the Congress to violate the United States Constitution. Perhaps this can serve as a wake-up to individuals of the specific and distinct separation between the rights and duties of state and federal government.

EXTENDED REMARKS OF SHERIFF PATRICK J. SULLIVAN, JR., ARAPAHOE COUNTY, CO

Thank you, Mr. Chairman, for allowing me to submit extended remarks on the issue of hate crime violence. The five and one-half hour hearing, interrupted by votes, tested the endurance of both the Committee and the eleven-member panel on which I was the second to last witness.

First off, Federal jurisdiction is necessary to vindicate the federal interest when the state response is inadequate to do so. In *U.S. v. Lee and Jarrard*, (11/3/94) (S.D. Ga.), two defendants were convicted and sentenced to 81 months imprisonment in federal court on charges stemming from a drive-by shooting into several homes of African-American residents. The State did not prosecute Lee because of insufficient evidence. Jarrard pled guilty to a state charge, but received only 5 months jail time and 5 years probation.

In *U.S. v. Black and Clark* (12/12/91) (E.D. Calif.), two white supremacists were charged federally in the stabbing of a black man at a convenience store/gasoline station. The county sheriff did not have the resources to devote to an investigation, and the local prosecutors did not consider the matter a priority case. Faced with federal charges, Clark pled guilty and was sentenced to serve seven years and 10 months in prison. Black was convicted at trial and sentenced to serve 10 years in prison. The federal government would have lacked jurisdiction to prosecute the defendants if the convenience store had not been considered a place of entertainment due to the presence of a pinball machine in the store.

The Hate Crime Prevention Act (HCPA) would not interfere with state prosecutions. The Department of Justice (DOJ) would continue to limit its investigations and prosecutions to those cases where federal jurisdiction is necessary to achieve justice in a particular case. A decision to use federal authority would only be made after consultation with the state and local officials involved, a policy that is explicitly reflected in the Memorandum of Understanding (MOU) DOJ entered last July with the National District Attorneys Association (NDAA).

Enacting the HCPA would not federalize all violent crimes. State and local law enforcement would continue to play the primary role in the investigation and prosecution of hate crimes, and building productive partnerships with state and local law enforcement would be the Department of Justice's primary goal. Federal jurisdiction is necessary to permit joint state-federal investigations, and to authorize federal prosecution in those cases in which state and local officials are either unable to or unwilling to bring appropriate criminal charges in state court, or where federal law or procedure is suited to the vindication of the federal interest in punishing and deterring hate crimes, such as where the federal law imposes a longer sentence than state law.

Between 1993 and 1998, the Department brought an average of fewer than six hate crimes prosecutions under 18 U.S.C. §245 each year. The enactment of the HCPA would modestly increase this number but would significantly enhance our ability to assist in state and local prosecutions.

The evidentiary prohibition on a defendant's beliefs or membership in an organization suggested by the American Civil Liberties Union (ACLU) is unnecessary and ill-advised. That kind of prohibition could prompt judges to exclude all evidence of a defendant's beliefs or membership in an organization. Where the United States is required to prove as an element of the crime that the defendant acted because of race, the defendant's membership in a group that advocates racist violence may be extremely relevant and should be admissible. The ACLU acknowledges that the Constitution permits a court to consider this evidence. The Supreme Court held so in *Dawson v. Delaware*.

Excluding such evidence could severely compromise the government's ability to prosecute defendants who do not explicitly state their reason for an attack during the attack itself. The existing Federal Rules of Evidence, which mandate excluding evidence that is not relevant to the charges, and the constitutional standard set by the Supreme Court strike the proper balance in determining when to allow consideration of evidence of a defendant's beliefs or membership in an organization.

The majority of states do not have hate crimes statutes that include gender among the categories of prohibited bias crimes. The federal government should have jurisdiction to work with state and local law enforcement in states that do have such laws to investigate and prosecute violent gender-based hate crimes.

In most circumstances, DOJ can provide substantial investigatory and prosecutorial assistance to small localities like Jasper, Texas only where there is a colorable claim of federal jurisdiction. Under current law, we could not provide that type of help to a small town investigating and prosecuting a violent attack based on gender rather than race, color or national origin.

Adding gender bias crimes to the HCPA will not overwhelm the FBI or the federal courts. State and local investigators and prosecutors would continue to play the primary role in the investigation and prosecution of crimes in which women are victims, including crimes based on gender-bias.

The language of the HCPA itself will limit the number of cases subject to federal jurisdiction. Most crimes in which women are victims would not present the type of evidence necessary to demonstrate the gender bias required under the statute. Moreover, the Department of Justice would prosecute only those cases with the strongest evidence, and only when the use of federal jurisdiction was necessary to achieve justice in a particular case. The purpose of including gender-based violent crimes in the HCPA is to provide a backstop to state and local enforcement and to permit federal assistance in investigations.

As an additional measure to avoid overtaxing the FBI's investigatory resources, DOJ and the FBI are working to develop a new protocol that will clearly define those elements of gender-biased hate crimes that must be present *before* the FBI initiates an investigation. The protocol will go into effect when the HCPA is enacted.

The HCPA will not interfere with or infringe on the state's authority to prosecute violent crimes against women. The overlapping jurisdiction of state and federal laws for hate crimes is not unique. Violent crimes, whether motivated by discrimination or not, are generally covered under state law. Just like homicides, bank robberies, kidnappings, fraud and other crimes covered by both state and federal law, there will be no need for federal prosecution in the majority of cases. States would retain full authority to investigate and prosecute these crimes pursuant to state law.

While the number of reported incidents based on sexual orientation is less than that based on race, it is clear from statistics collected by the FBI and private organizations that an alarmingly high number of hate crimes based on sexual orientation occur each year in this country, and even the Bureau's statistics understate the problem.

Some organizations have reported that the severity of attacks on gays is increasing. While the FBI data offers perspective on the general nature of hate crime occurrences, it is difficult to assess the relative number and severity of these attacks from year to year using the FBI data. For example, the number and distribution of law enforcement agencies participating in the Hate Crimes Statistics Program has not remained constant from one year to the next, and the FBI report cautions that the data are not sufficient to allow valid national or regional measurement of the volume and type of hate crimes.

Mr. Chairman, and members of the Committee, as the Sheriff from Littleton, Colorado, I want to address sexual orientation as an issue in schools since it was mentioned as an issue at Columbine High School where some students referred to the Faggot Trench Coat Mafia. Are schools safe for all of our children . . . what are the facts?

Are gay, lesbian and bisexual (GLB) students more likely than other students to suffer violent attacks in school settings? Yes, they are. According to surveys of high school-aged students in the Seattle Public Schools and in the states of Massachusetts and Vermont¹, GLB students were from one and three quarters to over four times more likely to have been threatened or injured with a weapon at school in the past year than other students.

Are they the only students victimized by anti-gay violence? No, they are not. For every gay, lesbian and bisexual student who was the victim of anti-gay harassment, there were about four students who identified themselves as heterosexual who reported anti-gay harassment. Heterosexual victims of anti-gay harassment were over two times more likely than other heterosexual students to have been threatened or injured with a weapon at school in the past year.

¹The *Youth Risk Behavior Survey* (YRBS), developed by the Centers for Disease Control and Prevention, is administered in selected states and school districts every two years. Massachusetts, Vermont and the Seattle Public Schools were among a small group of states and school districts that added questions on sexual orientation identification, the sex/gender of sexual partners, and experience of anti-gay harassment. Responses to these questions were correlated with the other health risk behavior information collected in the YRBS. Students classified as GLB included those that identified themselves as gay, lesbian, or bisexual (and in the case of Massachusetts, not certain), and/or who had had same-gender sexual experiences. Data comparing heterosexual students who were victims of anti-gay harassment with other heterosexual students is from the Seattle Public Schools.

Did being victimized by anti-gay violence make students feel unsafe and result in their skipping school? Of course it did. GLB students were from two to four and a half times more likely to skip school because of feeling unsafe on route to or at school during the past month than other students. Heterosexual students who experienced anti-gay harassment were over three times more likely to have skipped school because of feeling unsafe in the past month than other heterosexual students.

But, aren't students with other differences targeted for equally violent attacks? Yes, they are. We need to protect all at-risk students. Statistics show that GLB students and heterosexual students perceived to be gay are comparable to other groups of students at elevated risk of school-based attacks. Results of the 1993 *National Household Education Survey* of 6th through 12th graders found that 10% of African-American students, 11% of Hispanic students, and 5% of Caucasian students said they sometimes stayed home from school because they worried about harm². This can be compared to the 14% to 20% of GLB students, and the 16% of heterosexual students reporting anti-gay harassment, who missed school because of feeling unsafe. Gay and lesbian students have been identified by their peers as the most likely victims of violence in their schools according to safe school surveys of high school students in the state of Minnesota. These surveys have been conducted annually since 1994 by the Office of the Minnesota Attorney General³.

Does anti-gay harassment in and around schools have other serious consequences besides students skipping school? It certainly can. GLB students and heterosexual students targeted for anti-gay harassment are more likely than other students to engage in behaviors that place them at risk of school suspension or expulsion. They are also more likely to engage in health risk behaviors such as being in a physical fight at school, using alcohol and other drugs, engaging in risky sexual activities, and attempting suicide. Heterosexual students who were victims of anti-gay harassment were over five times more likely to have made a suicide attempt requiring medical treatment in the past year than other heterosexual students. GLB students were over four times more likely to have made a suicide attempt requiring medical treatment in the past year than other students.

What about our state? Do we know the extent and consequences of anti-gay harassment in Colorado schools? No, we do not. Due to many realistic concerns and fears, students who are victims of anti-gay harassment rarely tell their parents or school staff. Therefore, schools are unlikely to know the true extent of anti-gay harassment in their buildings and neighborhoods. Although the Colorado Department of Education and many school districts in the state conduct anonymous surveys on school climate and health risks behaviors, they have never asked students about their sexual orientation or experiences of anti-gay harassment.

What can we do? The Colorado Safe Schools Coalition is initiating a research project to gather information on anti-gay harassment in Colorado schools and to offer referral and advocacy. We are setting up a safe and confidential hotline for students to report harassment on the basis of sexual orientation or gender identity differences. We encourage parents, community members, schools and youth-serving organizations and agencies to support this project by placing posters advertising our hotline number in school buildings and other youth settings. We also encourage school districts and the Colorado Department of Education to ask questions about sexual orientation and harassment of all kinds, including anti-gay harassment, in their school climate and health behavior surveys.

Thank you Mr. Chairman and members of the Committee for the opportunity to address you today on hate crime violence.

PREPARED STATEMENT OF HON. DIANNE FEINSTEIN, A U.S. SENATOR FROM THE
STATE OF CALIFORNIA

Mr. Chairman, Ranking Member Conyers, and Members of the committee. Thank you for extending this opportunity to submit my statement to the Committee Record on hate crime violence, an issue of great importance to California and the country.

This Committee has before it H.R. 1082, the Hate Crimes Prevention Act of 1999. Sponsored by Ranking Member Conyers, this measure is cosponsored by 181 members of the House of Representatives. It is identical to Senator Kennedy's S. 622, legislation which I am cosponsoring in the Senate.

² "Student Strategies to Avoid Harm at School," *Creating Safe and Drug-Free Schools: An Action Guide*, National Center for Educational Statistics, September 1996.

³ *Safe Schools Secondary Survey Compilation Report: 1994-1997*, Office of the Minnesota Attorney General, March, 1998. (available on the internet at: www.ag.state.mn.us/issues/sss98/sss98.html).

As you know, a version of S. 622 was recently adopted as an amendment to the Senate-passed Fiscal Year 2000 Commerce, Justice, State, Judiciary Appropriations bill. I urge the Committee to move swiftly to approve H.R. 1082/S. 622 and to pave the way for the CJS Conference Committee's adoption of this legislation during its deliberations.

This legislation is urgently needed to compensate for two limitations in the current law. First, the current federal hate crimes law covers only crimes motivated by bias on the basis of race, color, religion or national origin. As a result, federal authorities cannot prosecute individuals who commit violent crimes against others because of their sexual orientation, gender, or disability.

In addition, current law limits federal hate crime prosecutions to instances in which the victim was targeted because he or she was exercising one of six narrowly defined federally-protected activities (such as serving on a jury, voting, attending a public school, eating at a restaurant or lodging at a hotel). As a result, the law does not reach many cases where individuals kill or injure others because of racial or religious hatred.

The Hate Crimes legislation introduced this year in the House and Senate would remedy the glaring gaps and inadequacy of the current law by broadening the federal jurisdiction to cover all violent crimes motivated by racial or religious hatred, regardless of whether the victim was exercising a federally protected right. It would also include sexual orientation, gender and disability to the list of protected categories within current federal hate crime law, provided there is a sufficient connection with interstate commerce.

At the same time, federal involvement would only come into play if the Attorney General certifies that a federal prosecution is necessary to secure substantial justice. In recent years, the existing federal hate crimes law has been used only in carefully selected cases where the state criminal justice system did not achieve a just result.

What does this mean? It means that crimes based on race, color, religion or national origin would be covered under the federal hate crimes law whenever the defendant causes bodily injury, or through the use of fire, a firearm, or an explosive, attempts to cause injury.

Crimes based on sexual orientation, gender or disability would be limited to the same types of violent crimes, but only if the crime has a sufficient connection with interstate commerce. In all cases, the prosecution would have to show that the crime was motivated in part by the actual or perceived sexual orientation, gender, or disability of the victim—and this would be a matter for the jury to determine.

As would be the case for every element of a criminal offense, federal prosecutors would have to prove motivation beyond a reasonable doubt. In all cases, these prosecutions would present evidence that a motivating factor in the crime was bias against a particular group.

Hate crimes in these cases would carry a heavy penalty. Persons who cause bodily injury to another, or, through use fire, firearms, or explosives, attempts to cause bodily injury in the furtherance of a hate crime would face imprisonment up to 10 years. If the hate crime results in death or the offense included kidnaping, aggravated sexual abuse or an attempt to kill, the convicted offender could face life imprisonment.

For many years I have been deeply concerned about hate crimes and the immeasurable impact they have on victims, their families and our communities. In 1993, I sponsored the Hate Crimes Sentencing Enhancement Act, which was signed into law in 1994 as a part of the Violent Crime Control and Law Enforcement Act of 1994. The Act increased the penalties for hate crimes directed at individuals because of their perceived race, color, religion, national origin, gender, disability or sexual orientation.

Today, I believe the Hate Crimes legislation currently being considered, builds on this effort by modifying the current laws to allow the federal government to provide the vital assistance to states in investigating of crimes of this magnitude.

This legislation is long overdue. The brutal murders last year of an African American, James Byrd, in Texas; a gay man, Matthew Shepard, in Wyoming; and the murderous rampage in Littleton, Colorado earlier this year vividly portray why this legislation is so urgently needed.

Just recently, our nation awakened to the news of drive-by shooting attacks on Jews, an African-American, and Asian-Americans in Chicago, Illinois. These shootings were the despicable acts of virulent hatred. Undoubtedly these crimes have affected so many lives beyond its immediate victims. Two weeks before the shootings, three synagogues were torched in Sacramento, California, sending shockwaves throughout the Jewish community in America.

Sadly, hate crimes are becoming too commonplace in America. According to the U.S. Department of Justice, in 1997, the last year for which we have statistics, 8,049 hate crime incidents were reported in the United States. That is almost one such crime per hour. Within these incidents, there were 10,255 victims of these crimes.

Of that total, 4,710 or 58.5% of the crimes were committed on account of the victim's race. Of these reported crimes, there were almost 1,300 victims of anti-black crimes; 649 victims of anti-Hispanic crimes; and 466 victims of anti-Asian crimes.

In that same year, 1,385 or roughly 17% of the victims were targeted because of their religious affiliation. The number of anti-Jewish incidents is second only to those against blacks and far exceeds offenses against all other religious groups combined. Moreover, while by most accounts anti-Semitism in America has declined dramatically over the years, the level of violence is escalating.

The FBI reports that crimes against gays, lesbians and bisexuals ranked third in reported hate crimes in 1997, registering 1,102 or 13.7% of reported incidents. And, gender-motivated violence occurs in our country at alarming rates. According to the Leadership Conference on Civil Rights, "society is beginning to realize that many assaults against women are not 'random' acts of violence but are actually bias-related crimes."

In addition, according to the California Attorney General, more than 1,800 of the 8,000 hate crimes reported by the FBI were committed in California. That's a shocking number when one considers the motivation behind a hate crime. These are truly among the ugliest of crimes, in which the perpetrator thinks the victim is less of a human being because of his or her gender, skin color, religion, sexual orientation or disability.

By enacting this legislation, federal prosecutors will be able to work in full partnership with their state counterparts. In Wyoming, despite clear evidence that the killing of Matthew Shepard was motivated by bigotry against homosexuals, federal authorities lacked jurisdiction to assist state and local authorities in investigating the case.

It is imperative, therefore, that Congress move swiftly to address this situation and enact this legislation. Although the Byrd and Shepard, as well as the Littleton and Chicago atrocities, all have shocked the conscience of our nation, many hate crimes happen daily in our communities and do not receive national exposure and universal condemnation.

For example, an 18-year-old San Francisco youth was savagely attacked and beaten after a recent athletic event between St. Ignatius College Preparatory School and Sacred Heart Cathedral Preparatory School. During the beating, his attackers yelled racial slurs at him. Just a few days later, a 17-year-old senior at San Marin High School was beaten outside his school in Novato, a derogatory word regarding his presumed sexual orientation was etched into his arm with a pen.

And, in an especially disturbing case in Ventura, California, four skinheads attacked a Latino couple and an African-American couple returning from a high school homecoming date. Singing, and then shouting racial epithets, the skinheads followed the two couples and threw a brick at the head of the African-American teenager. When the students tried to drive away, the skinheads kicked the car and beat it with a baseball bat, causing \$2,000 in damage. These recent cases show far more vividly than I can express here today why we need this legislation now more than ever.

This legislation does not create any "special interests." Hate crimes are not just the concern of any one race, one gender, or one segment of society. The victims of these types of attacks are black and white, young and old, gay and straight, mother and son, father and daughter. Most importantly, they are all human beings whom other human beings loved and depended on. No one, no matter where he lives or to what group she belongs can be certain who will suffer from senseless acts of violence sparked by bigotry, hatred and prejudice.

History is replete with instances in which mindless fear, ignorance and prejudice propel unspeakable acts of inhumanity. There is a great monument to this in this very city: the Holocaust Museum. The Holocaust Museum serves as a stark and cogent reminder of how unchecked hatred can spiral into the genocide of countless millions of Jews and others who were singled out by Nazi Germany for no other reason than that they were different.

Unfortunately, as recent events suggest, we do not have to look back sixty years to find example of inhumanity fostered by hate. We can look across the ocean to Kosovo, where the consequences of "ethnic cleansing," mass rapes, and rampant crime, all point to the utter disregard for life and human dignity.

American values do not include attacking those who are "different" or those with whom we disagree. No one here can reasonably argue that violently attacking a per-

son because of his or her race, gender, disability, or sexual orientation is an acceptable form of behavior.

No one here can reasonably argue that protecting American values should not include protecting women, disabled persons, or gays and lesbians from hate crimes. And no one here today need fear a breakdown of society simply because we extend federal protection from acts of violent prejudice to those members of our society who currently face such an extraordinary threat of hate violence.

Instead, as Americans, we value the freedom to be individuals. We value the freedom to express ourselves peacefully. And, above all, we value freedom from fear and tyranny. And, what we must take from the experience of World War II and Kosovo is that our nation must never sit still and permit acts of hatred to go unpunished and undeterred.

That is why, if we truly want to defend American values, we should work to give our citizens protection from those who would do them harm simply based upon their race, gender, disability or sexual orientation. And, the Hate Crimes Prevention Act aims to send a message to our nation and the world that the singling out of an individual because of race, religion, sexual orientation, gender or disability will not go unnoticed or unpunished.

The Hate Crimes Prevention Act will make certain that those who commit violent acts because someone is of the "wrong gender, religion, race, sexual orientation, or disability" will be prosecuted because everyone, I repeat, everyone has a right to be free from violence and fear when they are going to school, work, travel, or doing something as simple as going to a movie.

Once again, Mr. Chairman, I urge the committee to approve the Hate Crimes Prevention Act. All Americans, and our future generations, deserve no less.

PREPARED STATEMENT OF THE AMERICAN CIVIL LIBERTIES UNION, SUBMITTED BY
CHRISTOPHER E. ANDERS, LEGISLATIVE COUNSEL

I. INTRODUCTION

The American Civil Liberties Union respectfully submits this statement to urge the House Committee on the Judiciary to respond by legislation to the continuing problem of an inadequate state and local response to criminal civil rights violations, but also to request that the Committee include a specific provision in such legislation that limits any potential chilling effect on constitutionally protected speech. The ACLU believes that the Congress can and should expand federal jurisdiction to prosecute criminal civil rights violations when state and local governments are unwilling or unable to prosecute, while also precluding evidence of mere abstract beliefs or mere membership in an organization from becoming a basis for such prosecutions.

The ACLU has a long record of support for stronger protection of both free speech and civil rights. Those positions are not inconsistent. In fact, vigilant protection of free speech rights historically has opened the doors to effective advocacy for expanded civil rights protections.

Six years ago, the ACLU submitted a brief to the Supreme Court urging the Court to uphold a Wisconsin hate crime sentencing enhancement statute as constitutional. However, the ACLU also asked the Court "to set forth a clear set of rules governing the use of such statutes in the future." The ACLU warned the Court that "if the state is not able to prove that a defendant's speech is linked to specific criminal behavior, the chances increase that the state's hate crime prosecution is politically inspired." The draft amendment described in this statement will help avoid that harm.

This statement explains the need for legislation to expand federal authority to prosecute federal civil rights violations, and the reason for adding an evidentiary restriction to section 245 of the federal criminal code. The ACLU will strongly support legislation expanding federal power to prosecute criminal civil rights violations, such as the Hate Crimes Prevention Act, H.R. 1082, if the Committee adds the evidentiary restriction and avoids any changes to H.R. 1082's substantive provisions.

II. THE PERSISTENT PROBLEM OF CRIMINAL CIVIL RIGHTS VIOLATIONS

The ACLU supports providing remedies against invidious discrimination and urges that discrimination by private organizations be made illegal when it excludes persons from access to fundamental rights or from the opportunity to participate in the political or social life of the community. The serious problem of crime directed at members of society because of their race, color, religion, gender, national origin, sexual orientation, or disability merits legislative action.

Such action is particularly timely as a response to the rising tide of violence directed at people because of such characteristics. Those crimes convey a constitutionally unprotected threat against the peaceable enjoyment of public places to members of the targeted group.

Pursuant to the Hate Crime Statistics Act, the Federal Bureau of Investigation annually collects and reports statistics on the number of bias-related criminal incidents reported by local and state law enforcement officials. In 1996, based on reports from law enforcement agencies covering 84% of the nation's population, the FBI reported 8,759 incidents covered by the Act. 5,396 of those incidents were related to race, 1,401 to religion, 1,016 to sexual orientation, 940 to ethnicity or national origin, and six to multiple categories.

Existing federal law does not provide any separate offense for violent acts based on race, color, national origin, or religion, unless the defendant intended to interfere with the victim's participation in certain enumerated activities. 18 U.S.C.A. §245(b)(2). During hearings last year in the Senate and House of Representatives, advocates for racial, ethnic, and religious minorities presented substantial evidence of the problems resulting from the inability of the federal government to prosecute crimes based on race, color, national origin, or religion without any tie to an enumerated activity. Those cases include violent crimes based on a protected class, which state or local officials either inadequately investigated or declined to prosecute.

In addition, existing federal law does not provide any separate offense whatsoever for violent acts based on sexual orientation, gender, or disability. The exclusion of sexual orientation, gender, and disability from section 245 of the criminal code can have bizarre results. For example, in an appeal by a person convicted of killing an African-American gay man, the defendant argued that "the evidence established, if anything, that he beat [the victim] because he believed him to be a homosexual and not because he was black." *United States v. Bledsoe*, 728 F.2d 1094, 1098 (8th Cir. 1984), cert. denied, 469 U.S. 838 (1984). Among the evidence that the court cited in affirming the conviction because of violence based on race, was testimony that the defendant killed the black gay victim, but allowed a white gay man to escape. *Id.* at 1095, 1098. Striking or killing a person solely because of that person's sexual orientation would not have resulted in a conviction under that statute.

In addition to the recent accounts of the deaths of Matthew Shepard and Billy Jack Gaither, other reports of violence because of a person's sexual orientation include:

- An account by the Human Rights Campaign of "[a] lesbian security guard, 22, [who] was assigned to work a holiday shift with a guard from a temporary employment service. He propositioned her repeatedly. Finally, she told him she was a lesbian. Issuing anti-lesbian slurs, he raped her."
- A report by Mark Weinress, during an American Psychological Association briefing on hate crimes, of his beating by two men who yelled "we kill faggots" and "die faggots" at the victim and his partner from the defendants' truck, chased the victims on foot while shouting "death to faggots," and beat the victims with a billy club while responding "we kill faggots" when a bystander asked what the defendants were doing.
- A report by the National Gay and Lesbian Task Force of a letter from a person who wrote that she "was gang-raped for being a lesbian. Four men beat me, spat on me, urinated on me, and raped me. . . . When I reported the incident to Fresno police, they were sympathetic until they learned I was homosexual. They closed their book, and said, 'Well, you were asking for it.'"
- An article in the November 22, 1997 issue of the *Washington Post* about five Marines who left the Marine Barracks on Capitol Hill to throw a tear gas canister into a nearby gay bar. Several persons were treated for nausea and other gas-related symptoms.

The problem of crimes based on gender is also persistent. For example, two women cadets at the Citadel, a military school that had only recently opened its doors to female students, were singled out and "hazed" by male cadets who did not believe that women had a right to be at the school. Male cadets allegedly sprayed the two women with nail polish remover and then set their clothes ablaze, not once, but three times within a two month period. One male cadet also threatened one of the two women by saying that he would cut her "heart out" if he ever saw her alone off campus.

Federal legislation addressing such criminal civil rights violations is necessary because state and local law enforcement officers are sometimes unwilling or unable to prosecute those crimes because of either inadequate resources or their own bias

against the victim. The prospect of such failure to provide equal protection of the laws justifies federal jurisdiction.

For example, state and local law enforcement officials have often been hostile to the needs of gay men and lesbians. The fear of state and local police—which many gay men and lesbians share with members of other minorities—is not unwarranted. For example, until recently, the Maryland state police department refused to employ gay men or lesbians as state police officers. In addition, only last year, a District of Columbia police lieutenant who headed the police unit that investigates extortion cases was arrested by the FBI for attempting to extort \$10,000 from a married man seen leaving a gay bar. Police officers referred to the practice as “fairy shaking.” The problem is widespread. In fact, the National Coalition of Anti-Violence Programs reports several hundred anti-gay incidents allegedly committed by state and local law enforcement officers annually. The federal government clearly has an enforcement role when state and local governments fail to provide equal protection of the laws.

III. IMPORTANCE OF ADDING A NEW EVIDENTIARY RESTRICTION

Despite the need to amend the principal federal criminal civil rights statute, 18 U.S.C. § 245, to expand federal jurisdiction to address the problem of an inadequate state and local response to criminal civil rights violations, the ACLU cannot support H.R. 1082 unless the Committee amends the legislation to limit its potential chilling effect on constitutionally protected speech. Specifically, the ACLU strongly urges the Committee to amend H.R. 1082 by adding the following evidentiary provision:

In any prosecution under this section, (i) evidence proving the defendant's mere abstract beliefs or (ii) evidence of the defendant's mere membership in an organization, shall not be admissible to establish any element of an offense under this section.

This provision will reduce or eliminate the possibility that the federal government could obtain a criminal conviction on the basis of evidence of speech that had no role in the chain of events that led to any alleged violent act proscribed by the statute.

On its face, H.R. 1082 punishes only the conduct of intentionally selecting another person for violence because of that person's race, color, national origin, religion, gender, sexual orientation, or disability. The prosecution must prove the conduct of intentional selection of the victim. Thus, H.R. 1082, like the present section 245, punishes discrimination (an act), not bigotry (a belief).

The federal government usually proves the intentional selection element of section 245 prosecutions by properly introducing ample evidence related to the chain of events. For example, as discussed above, in a recent section 245 prosecution based on race, a federal court of appeals found that the prosecution met its burden of proving that the defendant attacked the victim because of his race by introducing admissions that the defendant stated that “he had once killed a nigger queen,” that he attacked the victim “[b]ecause he was a black fag,” and by introducing evidence that the defendant allowed a white gay man to escape further attack, but relentlessly pursued the black gay victim.

Although the Justice Department maintains that it usually avoids attempting to introduce evidence proving nothing more than that a person holds racist or other bigoted views, it has at least occasionally introduced such evidence. In at least one decision, a federal court of appeals expressly found admissible such evidence that was wholly unrelated to the chain of events that resulted in the violent act. *United States v. Dunaway*, 88 F.3d 617 (8th Cir. 1996). The court upheld the admissibility of a tattoo of a skinhead group on the inside lip of the defendant because “[t]he crime in this [section 245] case involved elements of racial hatred.” *Id.* at 618. The tattoo was admissible even in the absence of any evidence in the decision linking the skinhead group to the violent act.

The decision admitting that evidence of a tattoo confirmed our concerns expressed in the ACLU's brief filed with the Supreme Court in support of the Wisconsin hate crimes penalty enhancement statute. In asking for guidance from the Court on the applicability of such statutes, the ACLU stated its concern that evidence of speech should not be relevant unless “the government proves that [the evidence] is directly related to the underlying crime and probative of the defendant's discriminatory intent.” The ACLU brief urged that, “[a]t a minimum, any speech or association that is not contemporaneous with the crime must be part of the chain of events that led to the crime. Generalized evidence concerning the defendant's racial views is not sufficient to meet this test.”

The ACLU's concern with H.R. 1082 is that we will see even more such evidence admitted in section 245 prosecutions if H.R. 1082 is enacted without an evidentiary

restriction. Many of the arguments made in favor of expanding section 245 are very different than the arguments made in favor of enacting section 245 nearly 31 years ago. At that time, the focus was on giving the federal government jurisdiction to prosecute numerous murders of African-Americans, including civil rights workers, which had gone unpunished by state and local prosecutors. The intent was to have a federal backstop to state and local law enforcement.

Although H.R. 1082 will also serve that important purpose in creating federal jurisdiction, its proponents are focusing on "combating hate," fighting "hate groups," and identifying alleged perpetrators by their membership in such groups—even in the absence of any link between membership in the group and the violent act. The arguments are even applied retroactively. During hearings before the Committee last year, the Justice Department referenced section 245, which passed as an important part of the Civil Rights Act of 1968, as "the federal hate crimes statute."

The danger is that—after a debate focused on combating "hate"—courts, litigants, and jurors applying an expanded and more powerful section 245 may be more likely to believe that speech-related evidence is a proper basis for proving the intentional selection element of the offense, even when it was unrelated to the chain of events leading to a violent act. The focus may be on proving the selection element by showing "guilt by association" with groups whose bigoted views we may all find repugnant, but which may have had no role in committing the violent act. We should add that evidence of association could also just as easily focus on many groups representing the very persons that H.R. 1082 was drafted to protect.¹ Our suggested amendment will preclude all such evidence from becoming the basis for prosecution, unless it was part of the chain of events leading to the violent act.

However, the proposed evidentiary amendment is not overly expansive. By inserting "mere" before "abstract beliefs" and "membership in an organization," the provision will bar only evidence that had no direct relationship to the underlying violent offense. It will have no effect on the admissibility of evidence of membership or belief that bears such a direct relationship to the underlying crime. Thus, the proposal will not bar all evidence of membership or belief.

Finally, we recognize that statutory restrictions on the admissibility of evidence in criminal matters are not common. However, such restrictions are not without precedent. In fact, the basic structure for the new paragraph is from 18 U.S.C.A. §2101(b), which defines admissible evidence for an element of the federal riot statute. We believe that the potential for misuse of an expanded section 245 is significant enough to warrant a statutory restriction on the admissibility of certain evidence.

IV. CONCLUSION

For the foregoing reasons, the ACLU urges the Committee to pass properly drafted legislation to expand federal jurisdiction to address the continuing problem of an inadequate state and local response to criminal civil rights violations. Specifically, the ACLU urges the Committee to amend H.R. 1082 to limit its potential chilling effect on constitutionally protected speech. The ACLU appreciates this opportunity to present our concerns.

PREPARED STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR
FROM THE STATE OF UTAH

Mr. Chairman, I am committed in my view that the Congress must lead and speak against hate crimes.

¹ For example, many of the principal First Amendment association decisions arose from challenges to governmental investigations of civil rights and civil liberties organizations. See, e.g., *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539 (1962) (holding that the NAACP could refuse to disclose its membership list to a state legislature investigating alleged Communist infiltration of civil rights groups); *Bates v. City of Little Rock*, 361 U.S. 516 (1960) (reversing a conviction of NAACP officials who refused to comply with local ordinances requiring disclosure of membership lists); *NAACP v. State of Alabama*, 357 U.S. 449 (1958) (holding as unconstitutional a judgment of contempt and fine on the NAACP for failure to produce its membership lists); *New Jersey Citizen Action v. Edison Township*, 797 F.2d 1250 (3rd Cir. 1986) (refusing to require the fingerprinting of door-to-door canvassers for a consumer rights group), *cert. denied, sub nom. Piscataway v. New Jersey Citizen Action*, 479 U.S. 1103 (1987); *Familias Unidas v. Briscoe*, 619 F.2d 391 (5th Cir. 1980) (refusing a request to compel the disclosure of the membership list of a public school reform group); *Committee in Solidarity with the People of El Salvador v. Sessions*, 705 F.Supp. 25 (D.D.C. 1989) (denying a request for preliminary injunction against FBI's dissemination of information collected on foreign policy group); *Alliance to End Repression v. City of Chicago*, 627 F.Supp. 1044 (1985) (police infiltrated and photographed activities of a civil liberties group and an anti-war group).

Many of America's greatest strides in civil rights progress took place during recent generations—from Congress' protection of Americans from employment discrimination on the basis of race, sex, color, religion and national origin with the passage of the Civil Rights Act of 1964, to the protection of the disabled with the passage of the Americans with Disabilities Act in 1990, and many other important pieces of legislation.

However, while America's elected officials have striven mightily through the passage of such measures to stop discrimination in the workplace, or at the hands of government actors, what remains tragically unaddressed in large part is discrimination against peoples' own security—that most fundamental right to be free from physical harm.

Despite our best efforts, discrimination continues to persist in many forms in this country, but most sadly in the rudimentary and malicious form of violence against individuals because of their identities.

As much as we condemn all crime, hate crime can be more sinister than non-hate crime. A crime committed not just to harm an individual, but out of the motive of sending a message of hatred to an entire community—oftentimes a community defined on the basis of immutable traits—is appropriately punished more harshly, or in a different manner, than other crimes. Moreover, hate crimes are more likely to provoke retaliatory crimes; they inflict deep, lasting and distinct injuries—some of which never heal—on victims and their family members; they incite community unrest; and, ultimately, they are downright un-American.

I am resolute in my view that the federal government can play a valuable role in responding to hate crime. One example here is my sponsorship of the Hate Crime Statistics Act of 1990, another is the passage in 1996 of the Church Arson Protection Act.

Given the seriousness of our objective to eradicate hate crime, it is imperative that any measure abide by the constitutional limitations imposed on Congress, and be cognizant of the limitations on Congress' enumerated powers that are routinely enforced by the courts. This is more true today than it would have been even a mere decade ago, given the significant revival by the U.S. Supreme Court of the federalism doctrine in a string of decisions beginning in 1992.

I have therefore proposed a response to hate crimes that is not only as effective as possible, but that carefully navigates the rocky shoals of these court decisions. To that end, I have prepared a measure that I believe will be not only an effective one, but one that would avoid altogether the constitutional risks that attach to other possible federal responses that have been raised.

There are four principal components to my approach:

First, it creates a meaningful partnership between the federal government and the states in combating hate crime, by establishing within the Justice Department a fund to assist state and local authorities in investigating and prosecuting hate crime. Much of the cited justification given by those who advocate broad federal jurisdiction over hate crimes is a lack of adequate resources at the state and local level.

Accordingly, before we take the step of making every criminal offense motivated by a hatred of someone's immutable traits a federal offense, it is imperative that we equip states and localities with the resources necessary so that they can undertake these criminal investigations and prosecutions on their own.

Second, my approach undertakes a comprehensive analysis of the raw data that has been collected pursuant to the 1990 Hate Crime Statistics Act, including a comparison of the records of different jurisdictions—some with hate crime laws, others without—to determine whether there is, in fact, a problem in certain states' prosecution of those criminal acts constituting hate crimes.

Third, my approach directs an appropriate, neutral forum to develop a model hate crimes statute that would enable states to evaluate their own laws, and adopt—in whole or in part from the model statute—hate crime legislation at the state level.

One of the arguments cited for a federalization of enforcement is the varying scope and punitive force of state laws. Yet there are many areas of grave national concern—such as drunk driving, by way of example—that are appropriately left to the states for criminal enforcement and punishment.

Before we make all hate crimes *federal* offenses, I believe we should pursue avenues that advance consistency among the states through the voluntary efforts of their legislatures. Perhaps, upon completion of this model hate crime law, Congress will review its recommendation and consider additional ways to promote uniformity among the states.

Fourth, my proposal makes a long-overdue modification of our existing federal hate crime law (passed in 1969) to allow for the prosecution by federal authorities

of those hate crimes that are classically within federal jurisdiction—that is, hate crimes in which state lines have been crossed.

Mr. President, I believe that passage of this comprehensive measure will prove a strong antidote to the scourge of hate crimes.

It is no answer for the Congress to sit by silently while these crimes are being committed. The ugly, bigoted, and violent underside of some in our country that is reflected by the commission of hate crimes must be combated at all levels of government.

For some, federal leadership necessitates federal control. I do not subscribe to this view, especially when it comes to this problem. It has been proposed by some that to combat hate crime Congress should enact a new tier of far-reaching federal criminal legislation. That approach strays from the foundations of our constitutional structure—namely, the first principles of federalism that for more than two centuries have vested states with primary responsibility for prosecuting crimes committed within their boundaries.

As important as this issue is, there is little evidence such a step is warranted, or that it will do any more than what I have proposed. In fact, one could argue that national enforcement of hate crime could decrease if states are told the federal government has assumed primary responsibility over hate crime enforcement.

Accordingly, we must lead—but lead responsibly—recognizing that we live in a country of governments of shared and divided responsibilities.

I encourage this body to question the dogma that federal leadership must include federal control, and I encourage this body to act anew by supporting a proposal that is far-reaching in its efforts to stem hate crime, and that is at the same time respectful of the primacy states have traditionally enjoyed in prosecuting crimes committed within their boundaries.

My proposal should unite all of us on the one point about which we should most fervently agree—that the Congress must speak firmly and meaningfully in denouncing as wrong in all respects those actions we have increasingly come to know as hate crimes. Our continued progress in fighting to protect Americans' civil rights demands no less.

PREPARED STATEMENT OF KATHRYN J. RODGERS, ESQ., EXECUTIVE DIRECTOR, NOW
LEGAL DEFENSE AND EDUCATION FUND

NOW Legal Defense and Education Fund (NOW LDEF) has a 29-year commitment to women's rights and equality. Working to end violence in women's lives, including eliminating gender-based bias crimes, is at the heart of our mission. We chair the National Task Force to End Violence Against Women that was instrumental in enacting the 1994 Violence Against Women Act ("VAWA") and we litigate to help women enforce their rights under the VAWA civil remedy. The Hate Crimes Prevention Act is an essential component to fulfilling our country's constitutionally guaranteed promise of equality for all individuals.

INTRODUCTION

We want to thank Chairman Hyde for holding these hearings and giving us the opportunity to submit testimony in support of the Hate Crimes Prevention Act of 1999, H.R. 1082, to the House Judiciary Committee. Hate crimes committed because of someone's race, color, religion, national origin, gender, sexual orientation or disability is an issue of grave importance to us all. Like all bias crimes, bias crimes against women are attacks against the community as well as the individual. These crimes are not random, but are directed at women because they are women. Individual bias-motivated attacks instill fear in all women, threatening and constricting women's lives. These crimes limit where women work, live and study. As a noted report on gender-based bias crimes by the Center for Women Policy Studies explains, "[w]omen—whether they are white or women of color, heterosexual or lesbian, old or young—know that they cannot go places men can go without the fear of being attacked and violated."¹ And, because of the great number of rapes and assaults by intimate partners, often they cannot go home, either.² Federal hate crime laws are critical because they provide uniform protection in every state from

¹ Center for Women Policy Studies, *Violence Against Women as Bias Motivated Hate Crime: Defining the Issues* 2 (1991).

² A recent Department of Justice Study revealed that women are five to eight times more likely than males to be victimized by an intimate. Lawrence A. Greenfield, et. al., U.S. Department of Justice, *Violence by Intimates: Analysis of Data on Crimes by Current or Former Spouses, Boyfriends, and Girlfriends* 4 (March 1998).

these systemic civil rights violations. HCPA would amend 18 U.S.C. § 245 ("Section 245"), the federal statute criminalizing certain bias crimes, to permit prosecution of bias crimes based on gender, sexual orientation or disability. This amendment is necessary in order to make real our national commitment to ending all forms of bias-motivated violence.

WHY THE AMENDMENT IS NEEDED

Adding gender to Section 245 provides recourse so that everyone in our country has the same protections against bias-motivated violence. While states hold primary authority for prosecuting bias crimes, gender-based hate crimes frequently go unpunished or underpunished by state and local authorities. The majority of states do not have laws against violence motivated by gender bias. Of the twenty-two states that do prohibit gender bias crimes, many lack comprehensive penalties, procedures, and enforcement. Federal authority to prosecute gender-based bias crimes is needed to ensure that women in every state have uniform recourse against bias motivated violence.

On the whole, women lack federal protection from bias crime. Currently, Section 245 permits federal prosecution of certain bias crimes committed because of the victim's race, color, religion, or national origin, but does not grant Federal prosecutors the authority to prosecute bias crimes based on gender. Although the 1994 Violence Against Women Act ("VAWA") addresses some gender bias crimes in its criminal provisions, those provisions are limited to cases of interstate domestic violence or interstate violations of a protective order.³ Women surviving all other forms of gender bias crimes have no federal recourse for criminal enforcement even if their state law enforcement system has not prosecuted the case. And, while the VAWA civil rights remedy represents a major legal advance, it is not a substitute for criminal prosecution in the aftermath of a violent crime.⁴

The following are a few examples of gender-based bias crimes for which federal authority under Section 245 might provide criminal redress:

- As recently as July 1999, women and girls attending the Woodstock music festival reported brutal sexual assaults. The Washington Post reported one case in which five men raped one girl, pulling off her pants off and violating her. Similar assaults were reported against at least five other women who visibly struggled to free themselves.
- In February 1999, Carole Sund, fifteen year old Juli Sund, and sixteen year old Silvina Pelosso were murdered in Yosemite National Park. The killer strangled Carole and Silvina and kept Julie alive for several more hours, reportedly forcing her to perform oral sex repeatedly. He then murdered Juli by slashing her throat. Within four months he struck again, decapitating Joie Armstrong in her Yosemite home. The murderer confessed to killing all four women, explaining that he had fantasized about killing women for the past thirty years.
- A serial batterer had a pattern of assaulting, terrorizing, and demeaning women. Although convicted five times for assaulting the same woman, a New Hampshire man never served time for any of his offenses. On his sixth conviction, the 1992 New Hampshire hate crime law was used to enhance the sentence. As a result the man was to serve two to five years for his crime. That 1994 case marked what is believed to be the first and only time New Hampshire has used its hate crimes law for a gender-bias crime.
- A woman was battered by her husband for many years. He had battered his former wife and former girlfriends as well. He refused to allow his wife to work, stating that women belong in the home and that he wouldn't tolerate his wife working. She went to the police on numerous occasions, but they responded in only a perfunctory way because they were good friends with her husband. They repeatedly declined to arrest him even when she called the police after he violated the restraining orders she had obtained.
- A serial rapist was accused of raping several women. The crimes were characterized by extreme violence and mutilation of the women's genitals. He fled the state once he learned the local police had identified him as a suspect.
- A woman alleged that she was gang raped by several men who uttered gender-based epithets such as "bitch" and "whore" as they raped her. They ap-

³ See 18 U.S.C. § 2261 (1998); 18 U.S.C. § 2262 (1998).

⁴ See 42 U.S.C. § 13981 (1997).

parently were in town visiting a friend. Local law enforcement officials said they could not prosecute them because they lived out of state.

- A Washington woman was raped, restrained, battered, disfigured, threatened verbally, as well as with a loaded shotgun. Although Washington currently has legislation prohibiting gender-bias crime, it was not used to prosecute her assailant. In the absence of federal criminal prosecution, the woman ultimately sought relief under the VAWA civil rights remedy, where a federal judge determined the allegations sufficient to conclude that the violence was motivated by gender bias.
- A woman was sexually assaulted by another passenger while she was riding on a train from Florida to New York. During the assault, he berated her, told her that she was getting what she deserved for traveling alone as a woman, and that should be at home raising her children. She had no idea which state the train was passing through at the time of the assault. The Florida and New York police apologetically said they could not prosecute as a result.
- In Florida, a state without laws against gender-bias crime, a woman ran from a fraternity house, naked and crying. She called the police and reported that she had been raped and that it had been videotaped. The police find the video tape in which at least one man assaulted the woman while several of his "brothers" commentate for the video, stating "This is what you call . . . Rape. Rape. Rape. Rape white trash"; "the night we rape a white trash crackhead bitch"; "It is Rape-thirty in the morning"; and "Notice the struggle of the hands". After viewing the video, local police concluded that the video demonstrated consent and arrested the woman for making a false report.
- In Nevada, another state without gender bias crime laws, a woman befriended a man on the internet and agreed to meet him. For security reasons she insisted that he meet her at her parents home, where she lives. He and another man came to the home, handcuffed her, stuffed her into the trunk of the car, kidnaped, raped and assaulted her. They then drove her home, and told her that no one would ever believe her. When she reported the assault, local police allegedly laughed at her, called her a liar, and told her that if she was lying she would have to pay for the cost of the lab tests. The matter was not pursued until months later when a second victim, a seventeen year old girl, was lured to the man's apartment, raped and escaped half naked. Four other women reported similar treatment by the local authorities.

As these cases demonstrate, some gender-based crimes contain all the earmarks of other bias crimes—such as biased epithets or comments, patterns of behavior, and lack of any other apparent motive. Some cry out for federal intervention to fill needed gaps when state law enforcement proves ineffective. While most gender-based bias crimes should continue to be prosecuted at the state level, and while resources should continue to be directed to improving the formal and informal responses of local law enforcement officials, federal assistance still is required in appropriate cases, to ensure that justice is served.

FEDERAL ACTION IS NEEDED TO RESPOND TO LIMITATIONS IN STATE LAW ENFORCEMENT

While states have made much progress in their responses to gender-based crimes, state law enforcement's failure to adequately recognize and address gender-motivated crimes unfortunately continues to pose substantial, and sometimes life-threatening obstacles for women.⁵ The 1994 VAWA took the first step in ameliorating the

⁵ For example, in enacting VAWA Congress cited study after study concluding that crimes disproportionately affecting women are treated less seriously than comparable crimes affecting men. See, e.g., *Ericson v. Syracuse Univ.*, 98 Civ. 3435, 1999 U.S. Dist. LEXIS 5225, at p.3 n.1 (S.D.N.Y. Apr. 13, 1999) (recounting reports of gender-bias task forces); 1993 Senate Report, at 49; (citing studies of state gender-bias task forces); 1991 Senate Report, at 46-47, 49. Congress also recognized that police, prosecutors, juries and judges routinely subject female victims of rape and sexual assault as well as domestic violence to unfair and degrading treatment that contributes to the low rates of reporting and conviction that characterize these crimes. See, e.g., *1993 Response to Rape at 2-6; accord Violence Against Women: Hearing Before the subcomm. On Crime and Criminal Justice of the House Comm. On the Judiciary*, 102d Cong. 63, at 75 (1992) ("*1992 Violence Against Women Hearing*"); (statement of Margaret Rosenbaum, Assistant State Attorney and Division Chief, Domestic Crimes Unit, Miami, Florida) (recognizing that police officers persist in failing to treat domestic violence as a "real crime"); 1991 Senate Report, at 39; *Violence Against Women: Hearing Before the Subcomm. On Crime and Criminal Justice of the House Comm. On the Judiciary*, 102d Cong. 63, at 75 (1992) ("*1992 Violence Against Women Hearing*"); *Women and Violence: Hearing Before the Senate Comm. on the Judiciary*, 101st Cong. 29-30 (1990) (statement of Maria Hanson).

problem of formal and informal failings of state laws.⁶ But reports of state task forces looking at gender bias, issued since VAWA's passage, reveal that these problems remain entrenched. For example, the 1996 report of the North Dakota Commission on Gender Fairness in the Courts indicates that women still are subjected to victim blaming, trivialization and stereotyped views of their credibility in criminal and civil domestic violence proceedings.⁷ In one instance, a judge informed a battered woman seeking a protective order that she would one day realize that it was all "her fault."⁸ A member of the Minnesota Supreme Court Gender Fairness Implementation Committee in 1997 reported that domestic assaults persistently are plea bargained down to disorderly conduct offenses and that the state law requiring presentence investigations in domestic assault situations is consistently ignored.⁹ She similarly noted that judges fail to apply appropriate sanctions for failures to comply with probation or treatment requirements in domestic violence cases.¹⁰

The need for federal jurisdiction as a remedy to states' failed responses to gender-based crimes starkly echoes the impetus in 1968 for the passage of 18 U.S.C. § 245. At that time, state criminal laws purportedly provided protection from bias-related violent crimes, but it became increasingly apparent that those laws were being unevenly enforced with respect to race. Those who enacted Section 245 recognized that "[u]nder the Federal system, the keeping of the peace is, for the most part, a matter of local and not Federal concern."¹¹ Yet, unchecked violence against African-Americans led Congress to enact a federal remedy. According to the Senate Report:

[L]ocal officials have either been unable or unwilling to solve and prosecute crimes of racial violence or to obtain convictions in such cases—even where the facts seem to warrant. As a result, there is need for Federal action to compensate for the lack of effective protection and prosecution on the local level.¹²

States' uneven responses to gender-based violent crimes similarly supports amending Section 245 today to permit federal prosecution.

Unfortunately, an extensive body of case law confirms that time and again violence, injury and death might have been prevented but for the neglect, inaction, bias or complicity of local police and police department policies.¹³ Appropriate federal intervention could have saved lives.

ADDING GENDER TO SECTION 245 ALSO IS CONSISTENT WITH INTERNATIONAL LAW

The HCPA's inclusion of gender comports with the United States' obligations as a signatory to the International Covenant on Civil and Political Rights ("ICCPR"), to provide broad protection against gender-based violence.¹⁴ International human

⁶For VAWA's legislative history documenting Congress' recognition of state judicial systems' long histories of treating gender-based crimes less seriously than other crimes warranted federal intervention, see, e.g., 1993 Senate Report, at 42. See also Staff of Senate Comm. on the Judiciary, 103d Cong., *The Response to Rape: Detours on the Road to Equal Justice* 1-2 (Comm. Print 1993) ("1993 Response to Rape"); S. Rep. No. 102-197, at 43-48 (1991) ("1991 Senate Report").

⁷A Difference in Perceptions: *The Final Report of the North Dakota Comm'n on Gender Fairness in the Courts*, 72 N.D. L. Rev. 1113, 1208-12 (1996).

⁸*Id.* at 1208.

⁹Letter from Judge Mary Klas to National Assoc. of Women Judges (Aug. 26, 1997) (on file with NOW LDEF).

¹⁰*Id.* at 2. See also Alaska Joint State-Federal Courts Gender Equality Task Force, *Final Report* 22, 44 (April 1996) (recognizing prevalence of gender bias and tendency of magistrates and judges to rely on subjective factors rather than evidence when deciding whether to issue domestic violence protective orders).

¹¹S. Rep. No. 90-721, reprinted in 1968 U.S.C.C.A.N. 1837, 1839.

¹²*Id.*, reprinted in 1968 U.S.C.C.A.N. 1840.

¹³See, e.g., *Soto v. Flores*, 103 F.3d 1056 (1st Cir. 1997) (batterer killed his two children and then himself after police, who were his friends, refused to arrest him despite mandatory arrest law), cert. denied, 118 S. Ct. 71 (1997); *Navarro v. Block*, 72 F.3d 712 (9th Cir. 1995) (batterer killed his wife and four others after police refused to respond to her call for help, even though she told dispatcher about restraining order and that he was headed to house to kill her); *Pinder v. Johnson*, 54 F.3d 1169 (4th Cir. 1995) (batterer burned former girlfriend's house, killing her three children, following battering incident, after which police assured her that he would be held in jail overnight but released him instead); accord *Eagleston v. Guido*, 41 F.3d 865 (2d Cir. 1994); *Ricketts v. City of Columbia*, 36 F.3d 775 (8th Cir. 1994); *Brown v. Grabowski*, 922 F.2d 1097 (3d Cir. 1990); *Raucci v. Town of Rotterdam*, 902 F.2d 1050 (2d Cir. 1990); *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696 (9th Cir. 1988); *McKee v. City of Rockwell*, 877 F.2d 409 (5th Cir. 1989); *Watson v. City of Kansas City*, 857 F.2d 690 (10th Cir. 1988); *Smith v. City of Elyria*, 857 F. Supp. 1203 (N.D. Ohio 1994).

¹⁴International Covenant on Civil and Political Rights, opened for signature Dec. 16, 1966, S. Treaty Doc. No. 95-2, 999 U.N.T.S. 171 (ratified by United States on June 8, 1992) (creating protections through guaranteeing freedom of liberty and security of person, the right to be free

rights standards have adopted that customary norm under which gender-based violence is recognized as an impermissible form of discrimination for which all countries are obligated to provide remedies.¹⁵ The HCPA is thus consistent with and would mark a step towards compliance with these international human rights standards.

DETERMINING GENDER-MOTIVATION

In order to ensure that federal resources are used appropriately, the HCPA only would apply to cases in which prosecutors could establish that the crime was committed because of gender bias, rather than another non-discriminatory or random motive. Assessing when acts of violence against women are gender-motivated is not a novel inquiry, particularly for federal courts. If Section 245 is amended to include gender, prosecutors and courts evaluating criminal bias crime allegations can employ the same analysis used in other civil rights and discrimination cases to determine whether a particular violent act was committed because of the victim's gender.

Courts already assess whether violent acts were gender-motivated in other contexts. For example, a series of discriminatory epithets combined with evidence of discriminatory views about women led one court to recognize a gender-based conspiracy by anti-abortion protestors that violated 42 U.S.C. §1985(3) ("Section 1985(3)"), the federal statute prohibiting conspiracies to violate an individual's civil rights.¹⁶ A few other courts have recognized that sexual harassment and discrimination at work could reflect gender-motivated conspiracies that also violate Section 1985(3).¹⁷ Courts also have begun to recognize that sexual assaults and domestic violence may be forms of gender-motivated violence that violate the Civil Rights Remedy of the 1994 Violence Against Women Act.¹⁸

Similarly, in evaluating sexual harassment claims brought under Title VII of the Civil Rights Act of 1964 ("Title VII"), courts routinely analyze the totality of the circumstances to assess whether the offensive conduct was committed because of the victim's gender.¹⁹ Applying that test to allegations of workplace sexual harassment, courts have found certain conduct to be indicative of gender motivation. That conduct includes: repeated lewd or sexually suggestive comments;²⁰ derogatory epithets or nicknames;²¹ display of pornographic pictures that was part of a pattern of har-

from torture or cruel, inhuman, or degrading treatment and equal and effective protection against discrimination, inter alia, on the basis of sex).

¹⁵ See, e.g., *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, at General Recommendation 19, p. 112 U.N. Doc. HRI/GEN/1/Rev.2 (29 March 1996) (referencing United Nations Committee on the Elimination of All Forms of Discrimination Against Women ("CEDAW")); Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women, opened for signature 9 June 1994, 3 IHRR 232 (adopted by acclamation of the General Assembly of the Organization of American States).

¹⁶ See *Libertad v. Welch*, 53 F.3d 428, 449 (1st Cir. 1995).

¹⁷ See, e.g., *Saville v. Houston County Healthcare Auth.*, 852 F. Supp. 1512, 1537-40 (M.D. Ala. 1994); *Larson v. School Bd. of Pinellas County*, 820 F. Supp. 596, 602 (M.D. Fla. 1993).

¹⁸ See, e.g., *Brzonkala v. Virginia Polytechnic*, 132 F.3d 949 (4th Cir.1997) (gang rape with comments evincing gender-bias), *rev'd on other grounds*, 169 F.3d 820 (4th Cir. 1999), petition for cert. filed (June 25, 1999); *Culberson v. Doan*, No. C-1-97-965 (S.D. Ohio Apr. 8, 1999) (allegations of domestic violence with circumstantial evidence gender bias); *Liu v. Striuli*, No. 96-0137 L, 1999 WL 673629 (D.R.I. Jan. 19, 1999) (allegations of rapes of graduate student by professor with lewd comments, threats and lack of other apparent motive); *Ziegler v. Ziegler*, 28 F. Supp. 2d 601 (D. Wa. 1998) (allegations of domestic violence with gender-specific epithets, acts that perpetuated stereotypes of women's submissive role, attacks during pregnancy and at times when plaintiff asserted her independence); *Kuhn v. Kuhn*, No. 98 C 2395, 1998 WL 673629 (N.D. Ill. Sept. 16, 1998) (allegations of criminal sexual assault by husband with evidence of derogatory gender based comments); *Mattison v. Click Corp.*, No. 97-CV-2736, 1998 U.S. Dist. LEXIS 720, at *23 (E.D. Pa. Jan. 27, 1998) (sexual assault, sexual harassment and battering by supervisor); *Crisonino v. New York City Housing Auth.*, 985 F. Supp. 385 (S.D.N.Y. 1997); *Anisimov v. Lake*, 982 F. Supp. 531 (N.D. Ill. 1997) (inappropriate sexual advances, including fondling, attempting to remove clothing, grabbing breasts, assault and rape by boss); cf. *McCann v. Rosquist*, No. 2:97-CV-0535-S, 1998 U.S. Dist. LEXIS 3685 (D. Utah Mar. 19, 1998) (stating that sexual assault and harassment by boss were gender-motivated while rejecting claims on other grounds).

¹⁹ See, e.g., *Oncala v. Sundowner Offshore Servs., Inc.*, 118 S. Ct. 998 (1998); *Harris v. Forklift Sys., Inc.*, 114 S. Ct. 367 (1993); *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

²⁰ See *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1514-15 (9th Cir. 1989) (sexual remarks, vulgarities, requests for sexual favors and disparaging comments about pregnancy created a hostile environment); *Bundy v. Jackson*, 641 F.2d 934, 944-45 (D.C. Cir. 1982) (sexually stereotyped insults and demeaning propositions created a hostile environment).

²¹ See, e.g., *Carr v. Alison Turbine*, 32 F.3d 1007, 1009 (7th Cir. 1994) (derogatory sexual remarks, sexual epithets, playing sex- or gender-related "pranks" contributed to hostile environ-

assessment;²² comments reflecting negative and stereotypical views of women;²³ or patterns of similar conduct toward other women.²⁴ Looking at the totality of the circumstances, courts analyzing workplace sexual harassment cases specifically have concluded that rapes or sexual assaults at work may reflect sufficient gender-motivation to create a hostile environment.²⁵ Applying the same type of analysis, courts can analyze whether rapes or sexual assaults reflected gender-motivation under HCPA.

Bias crimes based on race, color, religion or national origin that have been prosecuted under Section 245 and under Section 1985(3) also show that federal courts readily analyze the circumstances surrounding violent incidents to determine whether they were motivated by bias. Courts have relied on evidence similar to that cited in the cases described above: racial slurs or epithets;²⁶ derogatory comments about members of a particular race made in connection with the violent incident;²⁷ prior acts and statements reflecting racial animosity;²⁸ prior acts of violence committed against the members of a protected group;²⁹ and membership in a group espousing racially biased views.³⁰ Undoubtedly, courts can analyze similar types of evidence to determine whether and when violent crimes committed against women were gender-motivated.

NOT ALL VIOLENT CRIMES AGAINST WOMEN WILL BE PROSECUTED UNDER THE HCPA

Since the HCPA is a limited federal remedy, it would not authorize Section 245 to be used in every crime of violence committed against a woman or even in every case of sexual assault. Just as not all crimes committed against racial, religious or sexual minorities constitute bias crimes, only those crimes containing evidence of gender-bias would be subject to federal prosecution.³¹ Generally-accepted guidelines for identifying bias crimes direct courts to look at a range of factors, including language, severity of the attack, absence of another apparent motive, patterns of behavior, and "common sense."³² Congress recognized the applicability of those guidelines to gender-motivated crimes when it enacted the 1994 VAWA.³³ Drawing from these guidelines, prosecutors and courts can evaluate the totality of the circumstances in gender-based bias crime allegations to determine which cases contain sufficient evi-

ment); *EEOC v. A. Sam & Sons Produce Co.*, 872 F. Supp. 29, 34 (W.D.N.Y. 1994) (evidence included company vice-president's repeated references to female co-worker as a "whore").

²² See, e.g., *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482 n.3 (3rd Cir. 1990).

²³ See, e.g., *Harris*, 114 U.S. at 369 ("you're a woman, what do you know?"); cf. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235-36, 288 (1989) (sex discrimination case in which woman was charged with being "overly aggressive, unduly harsh," "macho" and directed to go to charm school because "it's a lady using foul language").

²⁴ See, e.g., *Paroline v. Unisys Corp.*, 879 F.2d 100, 103 (1989), *vacated in part on other grounds*, 900 F.2d 27 (4th Cir. 1990) (several female clerical workers subjected to pattern of sexually suggestive remarks and unwelcome touching).

²⁵ See, e.g., *Brock v. United States*, 64 F.3d 1421, 1423 (9th Cir. 1995) ("every rape committed in the employment setting is also discrimination based on the employee's sex"); *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1305 (2d Cir. 1995) ("even a single incident of sexual assault sufficiently alters the conditions of the victim's employment and clearly creates an abusive work environment"); *Yaba v. Roosevelt*, 961 F. Supp. 611, 620 (S.D.N.Y. 1997) (sexual assault and harassment by law firm partner created a hostile work environment); *Al-Dabbagh v. Greenpeace, Inc.*, 873 F. Supp. 1105, 1110-11 (N.D. Ill. 1994) (pattern of sexual assaults at work created a hostile environment).

²⁶ See, e.g., *United States v. Makowski*, 120 F.3d 1078, 1080 (9th Cir. 1997); *United States v. Dunnaway*, 88 F.3d 617, 618 (8th Cir. 1996); *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987); *Fisher v. Shamburg*, 624 F.2d 156, 158 (10th Cir. 1980); *Lac Du Flambeau v. Stop Treaty Abuse*, 843 F. Supp. 1284, 1292-93 (W.D. Wis.), *aff'd*, 41 F.3d 1190 (7th Cir. 1994), *cert. denied*, 514 U.S. 1096 (1995); *Hawk v. Perillo*, 642 F. Supp. 380, 392 (N.D. Ill. 1985).

²⁷ See, e.g., *Griffin v. Breckenridge*, 403 U.S. 88, 103 (1971); *Makowski*, 120 F.3d at 1080; *United States v. Bledsoe*, 728 F.2d 1094, 1095 (8th Cir. 1984); *United States v. Franklin*, 704 F.2d 1183, 1186 (10th Cir. 1983); *Johnson v. Smith*, 878 F. Supp. 1150, 1155 (N.D. Ill. 1995).

²⁸ See, e.g., *United States v. Woodlee*, 136 F.3d 1399, 1410 (10th Cir. 1998); *United States v. Dunnaway*, 88 F.3d 617, 618 (8th Cir. 1996); *United States v. Lane*, 883 F.2d 1484, 1496 (10th Cir. 1989).

²⁹ See, e.g., *United States v. Bledsoe*, 728 F.2d 1094, 1098 (8th Cir. 1984); *United States v. Franklin*, 704 F.3d 1183, 1187 (10th Cir. 1983).

³⁰ See, e.g., *United States v. Dunnaway*, 88 F.3d 617, 618 (8th Cir. 1996).

³¹ See generally Anti-Defamation League, *Hate Crimes Laws 2-3* (1997); Northwest Women's Law Center et al., *Gender Bias Crimes: A Legislative Resource Manual 12-14* (1994).

³² See U.S. Dep't of Justice, Federal Bureau of Investigation, *Hate Crime Data Collection Guidelines 1-4*; Center for Women Policy Studies, *Violence Against Women as Bias Motivated Hate Crime: Defining the Issues 8-12* (1991).

³³ See S. Rep. No. 103-138, at 53 n.61 (1993) ("1993 Senate Report").

dence that the crimes were committed because of the victim's gender, and therefore, are subject to federal prosecution.

HCPA contains two additional limitations on the cases that would be subject to prosecution. First, Section 245's certification requirement preserves the states' primary role in prosecuting criminal laws by requiring the Attorney General to certify that each prosecution is "in the public interest and necessary to secure substantial justice."³⁴

In addition, the bill only authorizes prosecutions of bias crimes based on gender, sexual orientation or disability where the crime is connected to interstate commerce.³⁵

ADDING GENDER TO 18 U.S.C. § 245 IS CONSTITUTIONAL

Adding gender to the protected groups against whom bias crimes may be prosecuted is well grounded in Congress' constitutional authority. Courts have upheld Section 245 as a valid exercise of Congress' power under the Commerce Clause, the Thirteenth Amendment and Section 5 of the Fourteenth Amendment.³⁶ Since it regulates conduct and not speech, it implicates no first amendment rights.³⁷

Most important, since any gender-based prosecutions would require proof that the offense had some impact on or was committed in connection with any activity involved in or affecting interstate commerce, there can be no doubt that HCPA firmly is grounded in Congress' Commerce Clause powers.³⁸ The Supreme Court has upheld the constitutionality of statutes like HCPA, which require the crossing of a state line, because they regulate conduct that squarely is in interstate commerce.³⁹ Courts have upheld analogous criminal provisions of the 1994 Violence Against Women Act against constitutional challenges, finding them within Congress' Commerce clause powers because both felonies contain a jurisdictional requirement similar to that in the HCPA.⁴⁰ Courts have uniformly upheld other similar federal criminal statutes containing jurisdictional elements as well.⁴¹ Moreover, HCPA poses none of the federalism issues that concerned the Supreme Court in *Lopez*,⁴² because civil rights enforcement is an area of traditional federal jurisdiction.⁴³

SENATOR HATCH'S PROPOSAL WOULD HAVE LITTLE IMPACT ON VIOLENCE AGAINST WOMEN

Senator Orrin Hatch, R-UT, chair of the Senate Judiciary Committee has also introduced a hate crimes proposal, S. 1406, that falls far short of what the HCPA can accomplish. Although we commend Senator Hatch's past leadership on the issue of violence against women, we are disappointed that he believes individuals victimized by violence based on gender, sexual orientation or disability deserve no protection

³⁴ 18 U.S.C. § 245(a)(1).

³⁵ See S. 622 (4)(2)(B); H.R. 1082 (4)(2)(B).

³⁶ See, e.g., *United States v. Lane*, 883 F.2d 1484 (10th Cir. 1989) (Commerce Clause); *United States v. Bledsoe*, 728 F.2d 1094 (8th Cir. 1984) (13th and 14th Amendments).

³⁷ The Supreme Court has upheld against first amendment-based challenges the constitutionality of bias-crime statutes that regulate conduct and not speech. See *Wisconsin v. Mitchell*, 508 U.S. 476, 487-90 (1993).

³⁸ Congress' Commerce Clause authority includes three categories of permissible regulation: 1) regulation of the channels of interstate commerce; 2) regulation of persons and things in interstate commerce; and 3) regulation of activity that substantially affects interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558-59 (1995).

³⁹ See *Lopez*, 514 U.S. at 562 (noting that jurisdictional element would ensure an otherwise-ambiguous statute's connection with interstate commerce); *Cleveland v. United States*, 329 U.S. 14 (1946) (upholding Mann Act, which regulates regulating interstate transport of a woman or girl for immoral purposes); *Caminetti v. United States*, 242 U.S. 470 (1917) (upholding White Slave Traffic Act, which regulates interstate transport of another for purposes of debauchery).

⁴⁰ See, e.g., *United States v. Page*, 167 F.3d 325 (6th Cir. 1999); See, e.g., *U.S. v. Hayes*, 135 F.3d 133 (2d Cir. 1998); *United States v. Von Foelkel*, 136 F.3d 339 (2d Cir. 1998); *United States v. Wright*, 128 F.3d 1274 (8th Cir. 1997), cert. denied, 118 S. Ct. 1376 (1998); *United States v. Bailey*, 112 F.3d 758 (4th Cir.), cert. denied, 118 S. Ct. 240 (1997). While a jurisdictional element is not required, its presence in the HCPA eliminates concerns that have arisen in challenges to the VAWA Civil Rights Remedy, 42 U.S.C. § 13981, which contains no such jurisdictional element.

⁴¹ See, e.g., *United States v. Cobb*, 144 F.3d 319 (4th Cir. 1998) (federal car jacking statute); *United States v. Wells*, 98 F.3d 808, 810-11 (4th Cir. 1996) (federal firearms statute); *United States v. Robinson*, 119 F.3d 1205, 1214 (5th Cir. 1997), cert. denied, 118 S. Ct. 1104 (1998) (Hobbs Act, which criminalizes interstate robbery or extortion); *United States v. Corona*, 108 F.3d 565, 570-71 (5th Cir. 1997) (federal arson statute).

⁴² See, e.g., 514 U.S. at 567.

⁴³ See, e.g., *City of Riverside v. Rivera*, 477 U.S. 561, 575 (1986) (noting "highest importance" of vindicating civil rights violations).

under federal law, and that Congress should keep federal law enforcement officials from responding to many bias crimes that implicate federal interests.

Senator Hatch's proposal seeks largely to *study* bias crime and create a model state statute. When Congress passed the Hate Crimes Statistics Act (HCSA) almost a decade ago, it promised that after studying the problem, it would take action. We have studied bias crime under the HCSA and through other means. A model state statute has been created by the Anti-Defamation League and adopted by many states. While we endorse the need for federal collection of data on gender based bias crimes, which are not currently counted under the HCSA, we have *studied* bias crimes long enough to know that it is time to *act*.

The sole enforcement provision of Senator Hatch's bill would prosecute only the handful of cases that happen to include actual interstate travel and only if those cases are motivated by violence based on race, religion or national origin, not those motivated by gender, sexual orientation, or disability. Under the current §245, we know that having too many complex jurisdictional restrictions on the ability of federal prosecutors to act lets important bias crimes fall through the cracks. With an extremely strict and limited interstate travel requirement, Senator Hatch's proposal goes in the wrong direction, compounding the very problems the HCPA seeks to solve. Further, there is simply no excuse for leaving out violence based on sexual orientation, gender or disability.

Congress should not adopt Senator Hatch's proposal as a substitute or "compromise" for the provisions of the HCPA. If Congress is serious about responding to violence against women, Congress must pass the Hate Crimes Prevention Act in full measure.

CONCLUSION

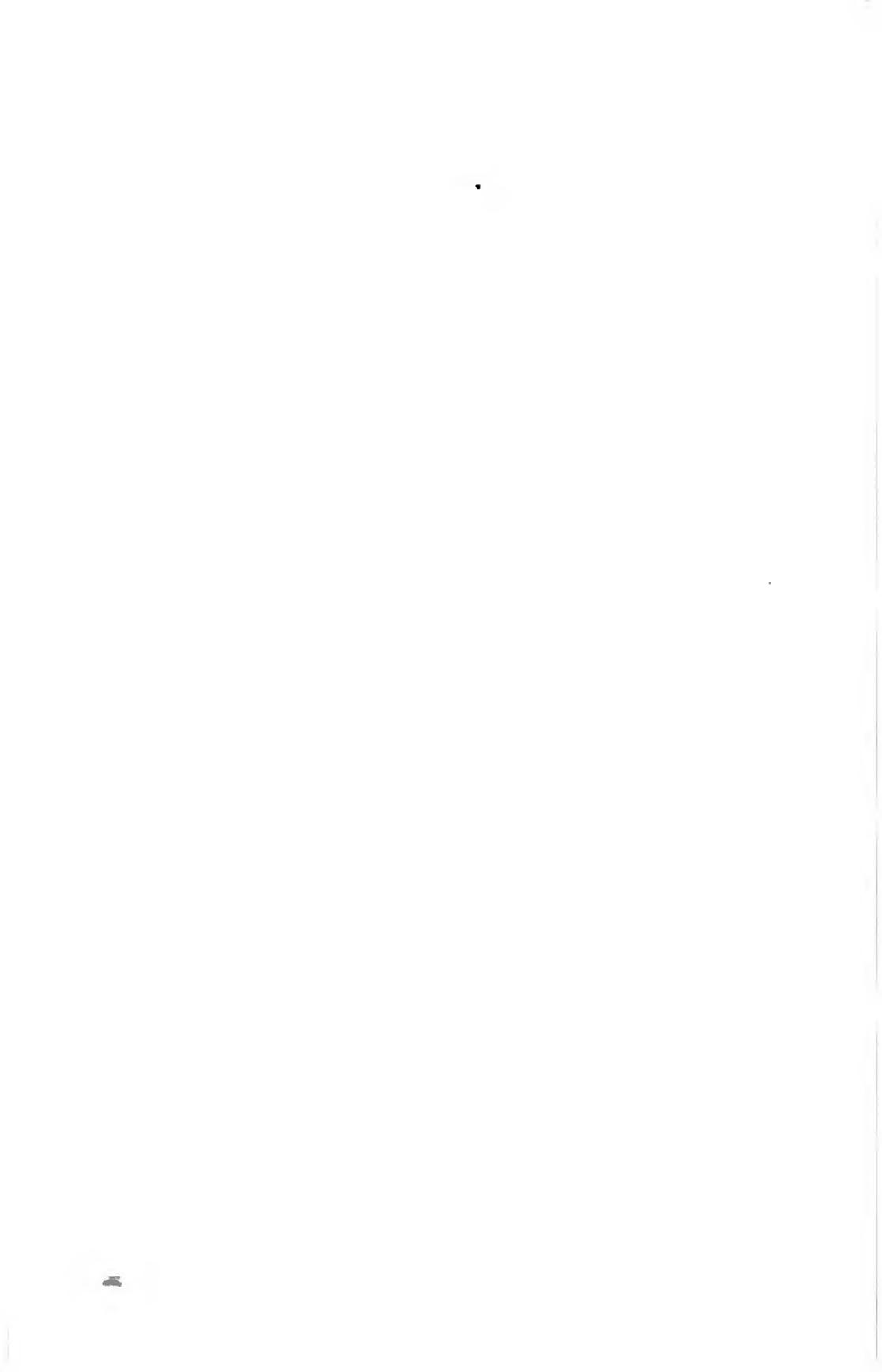
Women's continued subjugation to gender-motivated bias crimes combined with the limitations of state law enforcement systems provide compelling justification to amend Section 245 to include gender as one of the protected categories. Existing case law and standards for federal prosecution of other bias crimes show that discerning which of the violent crimes committed against women are committed because of the victims' gender is not a novel, unique, or overwhelming inquiry, but draws on analytical tools familiar to federal courts in similar contexts. Including gender in Section 245 will provide redress to women currently denied access to criminal justice and will substantially advance our country's efforts to fight this devastating epidemic of violence against women.

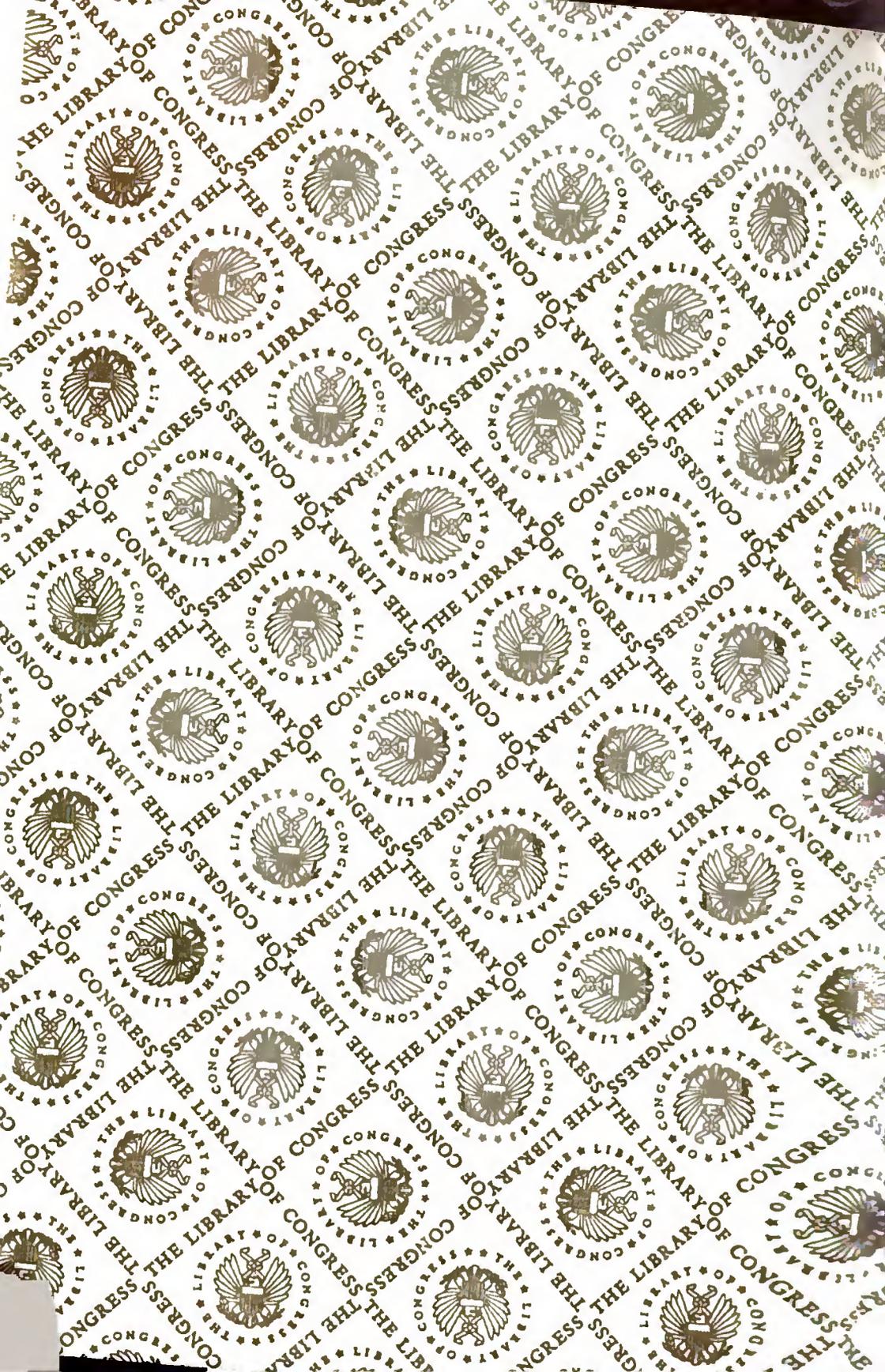


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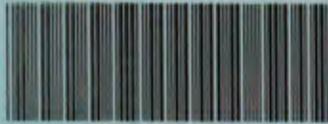
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