

HATE CRIME REGULATION AND CHALLENGES

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I. INTRODUCTION

The introduction of hate crime legislation within the legal framework of the United States has been a slow but steady endeavor, prompting polarizing debates between lawmakers, lobbyists, and the general public.¹ These arguments often center on the perceived subjectivity of hate crime liability.² Notwithstanding disagreements in interpretation and application, the definition of what constitutes a hate crime is laid out in federal statute.³

Hate crimes, or bias-motivated crimes, are characterized by two key factors. First, since “[h]ate, in and of itself, cannot be criminalized . . . hate crimes are ‘traditional offenses.’”⁴ In other words, hate crimes are not separate forms of criminal activity, but rather consist of actions that are already criminalized. A hate crime may consist of a violent act, destruction of property, interference with rights, or expressive conduct. Second, the perpetrator of the criminal act purposefully selects a victim on the basis of actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, or disability.⁵ Thus, what distinguishes hate crimes from the traditional offenses upon which they are

1. See Bill Dobbs, *Justice, Not Vengeance, for Hate Crimes*, N.Y. TIMES (Apr. 16, 2012), <https://perma.cc/KT8R-CCBJ>.

2. Ryan D. King, *Hate Crimes: Perspectives on Offending and the Law*, in HANDBOOK ON CRIME AND DEVIANCE 525, 527–33 (Marvin D. Krohn, Alan J. Lizotte, & Gina Penly Hall eds., 1st ed. 2009).

3. See generally 18 U.S.C.A. § 249 (West, Westlaw through Pub. L. No. 118-41).

4. PETER G. BERRIS, CONG. RSCH. SERV., R47060, OVERVIEW OF FEDERAL HATE CRIME LAWS 1 (2022).

5. King, *supra* note 2.

based is the perpetrator's biased motivation, which increases the associated penalties.⁶

This Article is an overview of legislation on hate crimes, an analysis of such legislation in the courts, and a review of related academic discussion. Part I begins with an overview of federal hate crime regulation, including the rationale for passing legislation and an analysis of the statistics supporting this rationale. Parts II and III review the types of federal hate crime statutes that have been passed, and the major categories of hate crimes that have been addressed or contemplated by federal legislators. Part IV discusses progress made in state hate crime legislation and how it differs from federal legislation.

A. RATIONALE

There are numerous rationales to statutorily distinguish hate crimes from traditional offenses.⁷ The most cited rationale is the idea of community harm; if an individual is victimized because of another's hatred for a group with which the victim identifies, the crime committed is not solely against the individual, but the group as well, and ultimately society as a whole.⁸ The extension of individual to societal harm proceeds on the logic that hate crimes "may effectively intimidate other members of the victim's community, leaving them feeling terrorized, isolated, vulnerable, and unprotected by the law. By making the victim's community 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."⁹ Essentially, to maintain large-scale order in society, crimes that target communities must be criminalized as a deterrent.

Opponents of legislative intervention do not find this rationale convincing. Commonly cited in arguments against hate crime legislation is the belief that additional charges for "thought crimes" are unnecessary and without legal basis. Said another way, a criminal's morally repugnant bias should not factor into the punishment when the crime could be charged under existing legislation.¹⁰ To opponents of hate crime laws, considering motivation in criminal liability is a

6. BERRIS, *supra* note 4, at 3.

7. David Brax & Christian Munthe, *The Philosophical Aspects of Hate Crime and Hate Crime Legislation: Introducing the Special Section on the Philosophy of Hate Crime*, 30 J. INTERPERSONAL VIOLENCE 1687, 1695 (2015) (arguing that hate crimes warrant separate legislation because of their tendency to cause more emotional harm than other crimes, because certain minority groups warrant enhanced protections, and because the victim's perception of the crime should potentially impact the execution of hate crime policies).

8. See generally Michael Lieberman, *Hate Crimes, Explained*, S. POVERTY L. CTR. (Oct. 27, 2021), <https://perma.cc/273X-9WUV> (explaining that the FBI has documented four main motivations for hate crimes: excitement seeking, defensive rationalizations, retaliatory efforts, and premeditated missions).

9. *Id.*

10. Tom Ellis & Nathan Hall, *Hate Crime*, in THE CAMBRIDGE HANDBOOK OF FORENSIC PSYCHOLOGY 511–519 (Jennifer M. Brown & Elizabeth A. Campbell eds., 1st ed. 2010).

breach of the constitutional right of freedom of thought, or even of “the right to be wrong.”¹¹

However, in *Wisconsin v. Mitchell*, the Supreme Court upheld hate crime legislation, affirming sentence enhancements where personal bias led to violent action.¹² Mitchell met with other young African-Americans to discuss a scene from the movie *Mississippi Burning* where a white man beat a young black boy while the boy prayed.¹³ Shortly after, Mitchell asked the group, “Do you all feel hyped up to move on some white people?”¹⁴ Then, seeing a young white boy walking across the street from the group, Mitchell said, “There goes a white boy; go get him.”¹⁵ The group ran to the boy and beat him unconscious, putting him in a coma for four days.¹⁶ Although the maximum sentence for aggravated battery was two years in prison, Mitchell faced a potential sentence of seven years because the jury found that he had intentionally chosen his victim because of the boy’s race;¹⁷ ultimately, Mitchell was sentenced to four years in jail under the Wisconsin hate crimes enhancement statute.¹⁸ The Court upheld the sentence on the grounds that while it is impermissible to punish abstract thoughts alone, it is permissible to punish thoughts that manifest into violence—as Mitchell’s did.¹⁹ The Court found that the Wisconsin law properly considered bias-motivated crime as more socially harmful than ordinary criminal acts.²⁰ Moreover, because the statute punished only abstract thought that manifested in violence, the Court held the statute did not violate the First Amendment.²¹

B. STATISTICS

Since *Wisconsin v. Mitchell* affirmed the legality of hate crime legislation, almost all states have criminalized or increased the penalty for injurious actions against protected groups.²² These statutes have prompted reporting of hate crimes

11. John Cloud, *Viewpoint: What’s Wrong with the Hate-Crimes Bill*, TIME (Oct. 11, 2008), <https://perma.cc/3MK7-B7DW>; see also Richard Cohen, *Hate-Crime Laws Turn Thoughts into Crimes*, WASH. POST (Oct. 19, 2010), <https://perma.cc/4RCV-SB8L>.

12. 508 U.S. 476, 476 (1993).

13. *Id.* at 480.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. 508 U.S. 476, 481 (1993).

19. *Id.* at 484.

20. *Id.* at 488 (“[I]t is but reasonable that among crimes of different natures those should be most severely punished, which are the most destructive of the public safety and happiness.” (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *16)).

21. *Id.*; cf. *Blakely v. Washington*, 542 U.S. 296 (2004) (invalidating Washington’s sentencing guidelines on the grounds that any fact leading to a sentence enhancement beyond the maximum described by law must be submitted to the jury and found to exist beyond a reasonable doubt); *United States v. Booker*, 543 U.S. 220 (2005) (extending the Supreme Court’s decision in *Blakely* to apply to the Federal Sentencing Guidelines).

22. Daniel Levy, *Hate Crime Laws: Cure or Placebo?*, STATE BAR OF MICH., <https://perma.cc/5K38-WUTY> (discussing legislation in Michigan and New Jersey following *Wisconsin v. Mitchell* decision).

to law enforcement, leading the Federal Bureau of Investigation (“FBI”) to collect and disseminate data on bias-motivated crimes in accordance with the Hate Crimes Statistics Act.²³ Statistics from the FBI’s 2021 report show that although race, ethnicity, and ancestry are the most prevalent motives for hate crimes, anti-LGBT²⁴ bias is the second-highest motivation for hate crimes.²⁵ It is important to note the difficulty of pinpointing accurate statistics with respect to hate crime incidents.²⁶ For instance, annual FBI reports typically differ drastically even from the Bureau of Statistics of the Department of Justice (DOJ), another government agency.²⁷

Aside from the discrepancies of reported crimes, some argue that there has been significant underreporting of hate crimes when the FBI switched their reporting mechanism to require all law enforcement agencies to submit reports through the National Incident-Based Reporting System.²⁸ Underreporting may occur for other reasons: officials in different states are not always willing to cooperate in data collection; undocumented immigrants may fear deportation from reporting racial or ethnic biased attacks; LGBT victims may choose to keep personal details about their sexuality private; victims may feel there is no reason to report hate crimes because less than 4% of reports result in conviction; and victims may fear further harm should they report prior attacks.²⁹ Thus, although there are statistics available as to the number of hate crimes experienced in the U.S., selective reporting and underreporting make it difficult to ascertain the true extent of the problem.

23. Hate Crimes Statistics Act, 34 U.S.C.A. § 41305 (Under the authority of 28 U.S.C.A. § 534) (West, Westlaw through Pub. L. No. 118-41).

24. The acronym “LGBT” refers to lesbian, gay, bisexual, transgender, and other sexual orientations and/or gender identities. It is sometimes used in place of “LGBTQIA+,” which expands the acronym to represent individuals who are queer, intersex, asexual, or who otherwise do not identify as cisgender and/or heterosexual.

25. *Crime Data Explorer*, FED. BUREAU OF INVESTIGATION, <https://perma.cc/2JA6-FVFG> (reporting that in 2022, the most recent year for which statistics are available, 6,570 reported incidents were based on race, ethnicity, or ancestry bias, 347 on multiple biases, and 2,511 on sexual orientation, gender, and gender identity bias).

26. *Id.* (explaining the difficulty of ascertaining whether a crime resulted from bias, as motivation is subjective, and indicating that agencies should report incidents as hate crimes only when a reasonably prudent person could consider, based on sufficient evidence, that the offender’s actions were motivated by bias).

27. *Compare, e.g.,* FED. BUREAU OF INVESTIGATION, *Crime Data Explorer*, *supra* note 25 (finding 7,287 hate crimes occurred in 2019), *with* Grace Kena & Alexandra Thompson, *Hate Crime Victimization, 2005–2019*, U.S. DEP’T. OF JUST. (Sept. 2021), <https://perma.cc/J57T-P7HF> (reporting over 305,000 hate crimes during the same year).

28. See Segio Olmos, *Researchers Say the FBI’s Statistics on Hate Crime Statistics Across the Country Are Flawed*, NAT’L PUB. RADIO (Jan. 1, 2023), <https://perma.cc/7N58-8XBW>.

29. J. Richard Cohen, *The FBI Has No Idea How Many Hate Crimes Happen in America Each Year*, WASH. POST (June 19, 2015), <https://perma.cc/2B85-888X>.

II. FEDERAL HATE CRIME LEGISLATION

Congress passed the first pieces of federal legislation targeting race-based crime shortly after the Civil War.³⁰ Since then, only four other major pieces of federal hate crime legislation have been passed: the Civil Rights Acts of 1964 and 1968; the Violent Crime Control and Law Enforcement Act of 1994, which includes Title IV, the Violence Against Women Act (“VAWA”); and the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009 (“Matthew Shepard Act”).³¹ Prior to VAWA’s passage, hate crime legislation largely centered on bias based on racial or ethnic identity. VAWA and the Matthew Shepard Act expanded federal hate crime legislation to cover gender, disability, and sexual orientation.³²

The penalty for crimes motivated by actual or perceived race, color, religion, or national origin, if bodily injury is attempted through the use of a dangerous weapon, is a fine or imprisonment of not more than ten years.³³ If death results, or if the offense includes kidnapping, aggravated sexual assault, or attempts at such, then the allowable penalty includes a fine or imprisonment for any term of years or for life.³⁴ These penalties also apply to crimes motivated by gender, sexual orientation, gender identity, and disability, but only if they affect interstate commerce.³⁵

Federal hate crime legislation can be divided into four categories: specific acts, sentence enhancements, civil remedies, and statistics collection. Each category plays a distinct role in federal hate crime regulation. Specific acts statutes authorize federal prosecutors to charge offenders with additional federal sanctions for the hate-based offense, in addition to the state-based charge for the basic crime committed (*i.e.*, a defendant could be charged with a federal hate crime in

30. See First Ku Klux Klan Act, ch. 114, 16 Stat. 140-146 (1870); Second Ku Klux Klan Act, ch. 99, 16 Stat. 433-440 (1871); Third Ku Klux Klan Act, ch. 22, 17 Stat. 13-15 (1871)); 42 U.S.C.A. § 1985 (West, Westlaw through Pub. L. No. 118-41).

31. Civil Rights Act of 1964, 42 U.S.C.A. § 2000d (West, Westlaw through Pub. L. No. 118-41); Civil Rights (Fair Housing) Act of 1968, 42 U.S.C.A. § 3601 (West, Westlaw through Pub. L. No. 118-41); Violent Crime Control and Law Enforcement (Crime Bill) Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994); Violence Against Women Act (VAWA), Pub. L. No. 103-322 (codified as amended at 42 U.S.C.A. §§ 13925-14045) (West, Westlaw through Pub. L. No. 118-41); Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act (Matthew Shepard Act), Pub. L. No. 111-84 (codified as amended at 18 U.S.C.A. ch. 13 § 249) (West, Westlaw through Pub. L. No. 118-41).

32. Civil Rights Act of 1964, Pub. L. No. 88-352 (codified as amended at 42 U.S.C.A. § 2000d) (West, Westlaw through Pub. L. No. 118-41); Civil Rights (Fair Housing) Act of 1968, Pub. L. No. 90-284 (codified as amended at 42 U.S.C.A. § 3601) (West, Westlaw through Pub. L. No. 118-41); Violent Crime Control and Law Enforcement (Crime Bill) Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994); Violence Against Women Act (VAWA), Pub. L. No. 103-322 (codified as amended at 42 U.S.C.A. §§ 12291-12514) (West, Westlaw through Pub. L. No. 118-41); Matthew Shepard Act, Pub. L. No. 111-84 (codified as amended at 18 U.S.C.A. ch. 13 § 249) (West, Westlaw through Pub. L. No. 118-41).

33. Hate Crime Acts, 18 U.S.C.A. § 249 (West, Westlaw through Pub. L. No. 118-41).

34. *Id.*

35. *Id.*

addition to a state murder charge for a murder motivated by bias).³⁶ Sentence enhancements allow for increased penalties against offenders convicted of a crime motivated by hate; rather than being charged with an additional crime, the defendant can receive a longer prison sentence upon conviction.³⁷ Civil remedies statutes enable victims to seek redress directly from hate-motivated offenders through the civil courts, separate from criminal proceedings against offenders.³⁸ Finally, statistics collection statutes require government agencies to collect data on hate crimes, in order to better combat crime motivated by bias.³⁹

A. THE ENFORCEMENT ACTS

The first federal legislation to address crimes motivated by hate-bias were the three Enforcement Acts, also known as the Ku Klux Klan Acts, enacted from 1870 to 1871 in response to the Ku Klux Klan's terror campaign against formerly enslaved Black people who wished to exercise their Fourteenth and Fifteenth Amendment rights.⁴⁰ The third of the Enforcement Acts (the "Third Act"), provides civil remedies to victims and allows federal prosecutors to charge defendants for specific hate-motivated acts.⁴¹ The Third Act also makes it illegal for anyone to subject "any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States."⁴² In particular, it prohibits persons from depriving any person or class of persons of equal protection of the laws; from depriving any person or class of persons of equal privileges and immunities under the laws; from hindering law enforcement from securing to all persons the equal protection of the laws; from conspiring with intent to deny any person the equal protection of the laws; from injuring any person or the person's property for enforcing the right of any person or class of persons to equal protection of the laws; and from using force, intimidation, or threat to keep any citizen from voting or participating in the political process.⁴³ The legislation also specifically prohibits persons from conspiring together, or going "in disguise upon the public highway or upon the premises of

36. See Ku Klux Klan Act of 1871, Pub. L. No. 42-22, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1985(3)); 18 U.S.C. § 245(b); Matthew Shepard Act, Pub. L. No. 111-84, Div. E, § 4701, 123 Stat. 2841 (codified at 18 U.S.C. § 249).

37. See Violent Crime Control and Law Enforcement Act of 1994 § 280003, 108 Stat. 1796 (1994).

38. See Conspiracy to Interfere with Civil Rights Act, 42 U.S.C. § 1985(3).

39. Hate Crimes Statistics Act, 34 U.S.C.A. § 41305 (under the authority of 28 U.S.C.A. § 534) (West, Westlaw through Pub. L. No. 118-41).

40. See Erick Trickey, *The 150-Year-Old Ku Klux Klan Act Being Used Against Trump in Capitol Attack*, WASH. POST (Feb. 18, 2021), <https://perma.cc/V9WQ-ZUNY>.

41. *Id.*

42. Third Ku Klux Klan Act, 17 Stat. 13-15 (codified as amended at 42 U.S.C. § 1985(3)).

43. *Id.*

another” to do any of the above.⁴⁴ This prohibition was aimed at the costumes worn by the Ku Klux Klan while spreading racially-motivated terror.⁴⁵

Following the passage of the Enforcement Acts, President Grant sent federal troops to the southern states in order to enforce the newly implemented legislation in places where resistance to its passage was strong; he sought to hold those defying the rule of law accountable.⁴⁶ Section 1986 of the Third Act imposes liability for all damages caused by such wrongful acts on anyone who knew of the wrongs that were conspired to be committed.⁴⁷ The Third Act proved particularly effective in South Carolina, where a number of Klansmen were tried in front of juries composed entirely of Black people.⁴⁸ By 1872, the Klan was all but dismantled.⁴⁹ However, the Supreme Court reduced the utility of the Third Act in the following years by construing the Fourteenth Amendment narrowly.⁵⁰ The Court ruled that civil rights were privileges of state citizenship and thus not protected by the Fourteenth Amendment;⁵¹ the Fourteenth Amendment did not apply to state action;⁵² and the criminal conspiracy section of the Act was deemed invalid as it applied to state action.⁵³ Since Section One of the Third Act was codified in 1961, it has been a tool for preventing abuse by state officials.⁵⁴

B. CIVIL RIGHTS ACT OF 1968

The Civil Rights Act (the “CRA”), the first modern federal hate crime statute, was enacted to protect victims from bias-based attacks on their federally protected activities⁵⁵ following racial violence against civil rights workers and individuals pursuing federally protected activities.⁵⁶ The CRA is an example of a specific act statute, providing that “whoever . . . by force or threat of force willfully injures, intimidates or interferes with . . . any person [participating in a

44. *Id.* (indicating that going in disguise on the highway for the purpose of interfering with civil rights is still illegal under § 1985(3)).

45. See Elaine Frantz Parsons, *Midnight Rangers: Costume and Performance in the Reconstruction-Era Ku Klux Klan*, 92 J. AM. HIST. 811 (2005); Trickey, *supra* note 40.

46. Richard Wormser, *The Enforcement Acts (1870–71)*, PBS (2002), <https://perma.cc/JZY5-STXR>; Andrew Glass, *President Grant Signs Enforcement Grant May 31, 1870*, POLITICO (May 31, 2016), <https://perma.cc/4J9J-RFJC>.

47. See 42 U.S.C.A. § 1986 (West, Westlaw through Pub. L. No. 118-41).

48. *Id.*

49. *Id.*

50. Catherine E. Smith, *(Un)masking Race-Based Intracorporate Conspiracies Under the Ku Klux Klan Act*, 11 VA. J. SOC. POL’Y & L. 129, 140–41 (2004).

51. See *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873).

52. See *United States v. Cruikshank*, 92 U.S. 542 (1875); *Virginia v. Rives*, 100 U.S. 313 (1880).

53. See *United States v. Harris*, 106 U.S. 629 (1883).

54. Karen M. Blum, *Section 1983 Litigation: The Maze, the Mud, and the Madness*, 23 WM. & MARY BILL RTS. J. 913, 913 (2015); Civil Action for the Deprivation of Rights Act, 42 U.S.C.A. § 1983 (West, Westlaw through Pub. L. No. 118-41).

55. 18 U.S.C.A. § 245(b) (West, Westlaw through Pub. L. No. 118-41).

56. See 42 U.S.C.A. § 3631 (West, Westlaw through Pub. L. No. 118-41); Troy A. Scotting, *Hate Crimes and the Need for Stronger Federal Legislation*, 34 AKRON L. REV. 853, 854 (2001) (referring to 18 U.S.C. § 245).

federally protected activity] because of his race, color, religion or national origin . . . shall be fined under this title, or imprisoned . . . or both.”⁵⁷ The CRA, which did not cover crimes motivated by bias against a person’s gender, sexual orientation, or disability, was the main federal hate crimes statute until the 1994 passage of VAWA.⁵⁸ Under the CRA, federally protected activities include: voting or participating in the election process; enrolling in or attending a public school; participating in or enjoying any service or program administered by any state or the federal government, or any program receiving federal money; applying for or enjoying employment, or using a labor organization or employment agency whether privately or publicly run; serving any state or federal court as a juror; traveling in interstate commerce; and enjoying the goods, services, and facilities of any establishment which provides lodging, food, beverages, gasoline, or entertainment to transient guests.⁵⁹ Behavior prohibited by the CRA is elevated from a misdemeanor to a felony punishable up to ten years if “bodily injury results from the act . . . or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosive or fire.”⁶⁰ Finally, if death, kidnapping, or aggravated sexual abuse is attempted or results from a violation of this statute, the offender can be punished with any term of years, including life imprisonment or the death penalty.⁶¹

Hate crime regulation in the CRA has been challenged as exceeding Congress’s enforcement power under Section 5 of the Fourteenth Amendment.⁶² For example, *United States v. Bledsoe* concerned a defendant who, along with companions, routinely harassed individuals he perceived as homosexual at a park in Kansas City, Missouri.⁶³ The defendant attacked Steven Harvey, a Black man, in a park restroom, crushing the victim’s skull with a bat and killing him.⁶⁴ Bledsoe then told his companion that he killed a “black faggot.”⁶⁵ Bledsoe appealed to the Eighth Circuit after he was convicted and sentenced to life in prison under 18 U.S.C. § 245(b) for racially motivated interference with Harvey’s ability to enjoy the privileges and facilities provided by Kansas City, Missouri.⁶⁶ Bledsoe challenged the constitutionality of the statute on the grounds that his actions were private, not state actions, and could not be prohibited under the Fourteenth Amendment. However, the Eighth Circuit recognized binding precedent stating that Congress can reach purely private action under the

57. Scotting, *supra* note 56, at 877.

58. *Id.* at 855.

59. 18 U.S.C.A. § 245(b)(1)-(2) (West, Westlaw through Pub. L. No. 118-41).

60. 18 U.S.C.A. § 245(b) (West, Westlaw through Pub. L. No. 118-41).

61. *Id.*

62. U.S. CONST. amend. XIV, § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”).

63. *United States v. Bledsoe*, 728 F.2d 1094, 1095 (8th Cir. 1984).

64. *Id.* at 1095–96.

65. *Id.* at 1096.

66. *Id.* at 1095.

Fourteenth Amendment.⁶⁷ As a result, the court held 18 U.S.C.A. § 245(b) constitutional, finding Congress had not exceeded the scope of its powers.⁶⁸

The CRA was also challenged under the Commerce Clause in *United States v. Lane*.⁶⁹ Defendants shot Alan Berg, a Jewish radio talk show host, and were convicted under 18 U.S.C. § 245(b)(2)(C)⁷⁰ for willful injury to Berg and for interference with his employment because of his race, religion or national origin.⁷¹ On appeal, the Tenth Circuit heard a challenge to the constitutionality of the statute.⁷² The defendants used an argument similar to that of the defendant in *Bledsoe*, claiming that Congress lacked the requisite power under the Commerce Clause to criminalize the conduct for which they were convicted because it regulated their private activity.⁷³ The Tenth Circuit disagreed, finding that Congress had adequately proven that prohibition of racially motivated interference with employment was necessary to provide for equal employment under Title VII.⁷⁴ Because such crimes, in the aggregate, affect interstate commerce, the circuit court held that Congress had sufficient authority under the Commerce Clause to enact the provision.⁷⁵ The Tenth Circuit further held that if the Commerce Clause authorized Congress to ensure equal employment opportunities by prohibiting certain adverse employment decisions, Congress was likewise enabled to prohibit violently injuring or killing a person for the same reasons.⁷⁶ Other circuits have sustained this ruling and held that other sections of the statute were similarly constitutional because Congress has authority under the Commerce Clause to regulate “those activities that substantially affect interstate commerce.”⁷⁷

While the CRA was largely and effectively used to protect African Americans pursuing federally protected activities, it had two key limitations that were fixed by later legislation.⁷⁸ The first deficiency was that federal jurisdiction existed

67. *Id.* at 1096–97.

68. *Id.* at 1097.

69. 883 F.2d 1484 (10th Cir. 1989).

70. See 18 U.S.C.A. § 245(b)(2)(C) (West, Westlaw through Pub. L. No. 118-41) (prohibiting interference with a person’s right to apply for or enjoy employment).

71. *United States v. Lane*, 883 F.2d at 1495–97.

72. *Id.*

73. *Id.* at 1492–93.

74. *Id.* at 1488.

75. *Id.* at 1492–93.

76. *Id.* at 1493.

77. The Ninth Circuit delineated three categories of activities which Congress can properly regulate under the Commerce Clause: (1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce, including persons and things in interstate commerce, even if the threat comes from intrastate commerce; and (3) those activities that substantially affect interstate commerce. Accordingly, 18 U.S.C. § 245(b)(2)(B), which regulates the participation in or enjoyment of any benefit, service, privilege, program, facility, or activity provided or administered by any State, falls within the third category of Congress’ authority. See, e.g., *United States v. Allen*, 341 F.3d 870, 879 (9th Cir. 2003); see also *United States v. Nelson*, 277 F.3d 164, 213 (2d Cir. 2002) (sustaining 18 U.S.C.A. § 245 (B)(2)(b) under Section 2 of the Thirteenth Amendment).

78. *Scotting*, *supra* note 56, at 855.

only when the victim was engaged in federally protected activities.⁷⁹ The Matthew Shepard Act of 2009 extended federal protections to all activities.⁸⁰ The second weakness was that the statute did not cover gender, sexual orientation, or disability.⁸¹ VAWA first expanded hate crimes to include women,⁸² and the Matthew Shepard Act further extended federal protection to hate crimes on the basis of sexual orientation, disability, and gender.⁸³

C. VIOLENCE AGAINST WOMEN ACT

Congress passed VAWA in 1994, which allowed, among other remedies, civil actions against individuals who commit sexual assault and other gendered crimes of violence.⁸⁴ This was the first hate crime legislation that focused specifically on gender.⁸⁵ In 2000, however, the Supreme Court invalidated the part of VAWA that authorized women to seek civil remedies against their attackers.⁸⁶ The Court held in *United States v. Morrison* that Congress lacked the authority to authorize the legislation under either the Commerce Clause or the Fourteenth Amendment.⁸⁷

In *United States v. Morrison*, college student Christy Brzonkala brought a civil action in federal court against two football players at her college for alleged sexual assault, claiming they had assaulted and repeatedly raped her.⁸⁸ Brzonkala argued that VAWA regulated activities substantially affecting interstate commerce and that Congress could thus regulate those activities under the Commerce Clause.⁸⁹ Brzonkala argued alternatively that the legislation was a permissible extension of Congress's enforcement powers under Section 5 of the Fourteenth Amendment.⁹⁰

The Court held that neither the Commerce Clause nor Section 5 of the Fourteenth Amendment gave Congress the authority to enact the legislation.⁹¹ In addressing the Commerce Clause argument, the Court held that the legislation was not part of Congress's limited Commerce Clause powers because Congress

79. 18 U.S.C.A. § 245(b)(1)–(2) (West, Westlaw through Pub. L. No. 118-41).

80. 34 U.S.C.A. § 30503 (West, Westlaw through Pub. L. No. 118-41).

81. See Scotting, *supra* note 56.

82. Violence Against Women Act, 34 U.S.C.A. § 12291 (West, Westlaw through Pub. L. No. 118-41).

83. 34 U.S.C.A. § 30503 (West, Westlaw through Pub. L. No. 118-41).

84. Violence Against Women Act of 1994, 34 U.S.C. § 12361.

85. See 42 U.S.C.A. § 1985(3) (West, Westlaw through Pub. L. No. 118-41); 42 U.S.C.A. § 3631 (West, Westlaw through Pub. L. No. 118-41) (refraining from using the word “gender” and references to gender-motivated violence). Despite the name, VAWA extends to all genders. See *H.R.1585 Myths and Facts*, NAT’L TASK FORCE TO END SEXUAL & DOMESTIC VIOLENCE AGAINST WOMEN, <https://perma.cc/4F2R-J4SU>.

86. *United States v. Morrison*, 529 U.S. 598 (2000) (upholding the dismissal of VAWA claims against the student who allegedly raped the petitioner).

87. *Id.* at 617–619, 627.

88. *Id.* at 602.

89. *Id.* at 607.

90. *Id.* at 619.

91. *Id.* at 627.

failed to show that domestic violence affected interstate commerce.⁹² Congressional findings that gender-motivated violence affects interstate commerce because of its impact on the victims and their families were not sufficient to sustain the constitutionality of commerce clause legislation.⁹³ VAWA covered a “wider, and more purely intrastate, body of violent crime,” rather than commercial activity, and to approve this application of VAWA would be to allow Congress to regulate all violent crime on the basis of their aggregated economic impacts.⁹⁴ As for Section 5 of the Fourteenth Amendment, the Court held that VAWA was still not justified because VAWA did not satisfy the standard that permissible legislation “be corrective in its character, adapted to counteract and redress the operation of such prohibited state laws or proceedings of [s]tate officers.”⁹⁵ The Court declared that there was no “congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”⁹⁶

The 2013 VAWA reauthorization expanded existing VAWA protections to LGBTQIA+, Native American, and immigrant victims of domestic violence,⁹⁷ spurring state law changes such as prohibitions against charging rape survivors for forensic sexual assault examinations and criminalization of stalking by electronic surveillance.⁹⁸ Since 1995, the Office on VAWA has awarded over nine billion dollars in grants,⁹⁹ administering four formula-based programs¹⁰⁰ and fifteen discretionary programs as of 2023.¹⁰¹ Law enforcement has used VAWA to arrest and try thousands of offenders; millions of survivors of domestic violence, sexual assault, stalking, and/or child or elder abuse have been provided services, such as victim advocacy and crisis intervention, through VAWA’s provisions.¹⁰² The most recent reauthorization of VAWA, the Violence Against Women Reauthorization Act of 2022, was signed into law by President Biden on March 15,

92. *United States v. Morrison*, 529 U.S. 598, 613 (2000).

93. *Id.* at 614.

94. *Id.* at 613, 615.

95. *Id.* at 624.

96. *Id.* at 625–26 (quoting *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 639 (1999)).

97. *Id.* (citing Jennifer Bendery, *VAWA Vote: Senate Overwhelmingly Passes Violence Against Women Act*, HUFFPOST (Feb. 18, 2013), <https://perma.cc/R8BV-QLKK>).

98. *History of the Violence Against Women Act*, LEGAL MOMENTUM, <https://perma.cc/R7L5-NF5B>.

99. *FY 2022 Congressional Justification*, U.S. DEP’T OF JUST. OFF. ON VIOLENCE AGAINST WOMEN (May 2021), <https://perma.cc/36K9-938D>.

100. These programs include the STOP Violence Against Women Program, Sexual Assault Services Program (SASP), State and Territorial Sexual Assault and Domestic Violence Coalitions Program, Grants to Tribal Domestic Violence, and Sexual Assault Coalitions Program. See *Formula Grant Programs*, U.S. DEP’T OF JUST. OFF. ON VIOLENCE AGAINST WOMEN, <https://perma.cc/E3JG-E9V5>.

101. See *Discretionary Grant Programs*, U.S. DEP’T OF JUST. OFF. ON VIOLENCE AGAINST WOMEN, <https://perma.cc/TC6B-93ZM>.

102. *2020 Biennial Report to Congress on the Effectiveness of Grant Programs Under the Violence Against Women Act*, U.S. DEP’T OF JUST., OFF. ON VIOLENCE AGAINST WOMEN (2020), <https://perma.cc/HZ8N-LPNC>.

2022.¹⁰³ It seeks to improve criminal justice responses to stalking, domestic violence, dating violence, and sexual assault, as well as to expand legal assistance and culturally specific services for survivors of such crimes.¹⁰⁴

D. VIOLENT CRIME CONTROL AND LAW ENFORCEMENT ACT OF 1994

Congress passed the Direction to the U.S. Sentencing Commission Regarding Sentencing Enhancements for Hate Crimes (the “Hate Crimes Sentencing Act” or “Sentencing Act”) as a part of the Violent Crime Control and Law Enforcement Act of 1994 (the “VCCLEA”).¹⁰⁵ The Hate Crimes Sentencing Act requires the U.S. Sentencing Commission to “promulgate guidelines or amend existing guidelines to provide sentencing enhancement of not less than three offense levels for offenses that the finder of fact at trial determines beyond a reasonable doubt are hate crimes.”¹⁰⁶ The Sentencing Act defines hate crimes as “crime in which the defendant intentionally selects a victim, or in the case of a property crime, the property that is the object of the crime, because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person.”¹⁰⁷ As a result of this mandate, the Sentencing Commission amended the Federal Sentencing Guidelines to include enhanced punishment for crimes motivated by bias.¹⁰⁸ To prevent sentencing disparities between defendants convicted at trial and those who plead guilty or *nolo contendere*, the Guidelines allow the trial court to increase the offender’s sentence if, at the sentencing hearing, it finds beyond a reasonable doubt that the crime was motivated by hate.¹⁰⁹

E. MATTHEW SHEPARD ACT OF 2009

The Matthew Shepard Act went into effect on October 28, 2009.¹¹⁰ The Act modified existing hate crime legislation, such as the Civil Rights Act of 1968, by removing the requirement that the victim be engaging in a federally protected activity in order to be covered.¹¹¹ In other words, there is no longer a requirement to show that the affected party was engaged in public education, employment, jury service, travel, or enjoyment of public activities.¹¹² It also allows the federal

103. VAWA Reauthorization Act of 2022 Signed into Law!, LEGAL MOMENTUM (Mar. 15, 2022), <https://perma.cc/BKQ8-DYKC>.

104. VAWA 2022 Reauthorization: Section-by-Section Summary, U.S. SENATOR FOR ALASKA LISA MURKOWSKI (Feb. 9, 2022), <https://perma.cc/8GYW-ZWA3>.

105. See Violent Crime Control and Law Enforcement (Crime Bill) Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994).

106. *Id.*

107. *Id.*

108. See U.S. Sentencing Guidelines Manual § 3A1.1 (2011), <https://perma.cc/8KTY-PY2D>.

109. See *id.* § 3A1.1(a).

110. Matthew Shepard Act, Pub. L. No. 111-84, Div. E, § 4701, 123 Stat. 2841 (codified at 18 U.S.C.A. § 249) (West, Westlaw through Pub. L. No. 118-41).

111. 18 U.S.C.A. § 249(a)(2)(B) (West, Westlaw through Pub. L. No. 118-41).

112. 18 U.S.C.A. § 245 (West, Westlaw through Pub. L. No. 118-41).

government to prosecute crimes where “the verdict or sentence obtained pursuant to State charges left demonstratively unvindicated the Federal interest in eradicating bias-motivated violence.”¹¹³ The Matthew Shepard Act expanded the scope of federal hate crime protection by including sexual orientation, disability, and gender identity as protected statuses.¹¹⁴ The broadened legislative scope marked the first time that the words “lesbian, gay, bisexual, and transgender” were used in the U.S. Code.¹¹⁵

The Matthew Shepard Act provides federal aid to states, local jurisdictions, and Indian tribes to prosecute hate crimes.¹¹⁶ It allows the Attorney General to provide federal, technical, forensic, prosecutorial, and other assistance to investigate or prosecute any crime of violence that is a state felony motivated by prejudice based on the victim’s race, color, religion, national origin, gender, sexual orientation, or disability, or where the actor violates state hate crime laws.¹¹⁷ Federal assistance includes grants the Attorney General may award for “extraordinary expenses associated with the investigation and prosecution of hate crimes.”¹¹⁸ In the Act, Congress recognized that a preeminent characteristic of a bias-motivated violent crime is that it affects not only the victim and their friends and family, but also causes damage to the entire community that shares the traits for which the perpetrator chose the victim.¹¹⁹

The penalty for crimes motivated by actual or perceived race, color, religion, or national origin is a fine or imprisonment of not more than ten years if bodily injury is attempted through the use of a dangerous weapon.¹²⁰ If death results, or if the offense includes kidnapping, aggravated sexual assault, or attempts at such, then the allowable penalty includes a fine or imprisonment for any term of years or for life.¹²¹ The penalties also apply to crimes motivated by gender, sexual orientation, gender identity, and disability, but only if they affect interstate commerce.¹²² In 2019, the DOJ marked the tenth anniversary of the Matthew Shepard Act by announcing the strengthening of the hate crimes prosecution program and celebrating charging more than 330 defendants with hate crime offenses, including more than 70 during 2017, 2018, and 2019.¹²³ The Department also launched a series of pilot training programs to raise awareness about hate crimes.¹²⁴ Hate

113. 18 U.S.C.A. § 249(b)(1)(C) (West, Westlaw through Pub. L. No. 118-41).

114. *Id.* § 249(a)(2) (West, Westlaw through Pub. L. No. 118-41).

115. Jocelyn Samuels, *Commemorating the Fourth Anniversary of the Shepard-Byrd Hate Crime Prevention Act*, WHITE HOUSE: BLOG (Oct. 28, 2013, 4:15 PM), <https://perma.cc/P6SL-DX9Y>.

116. Matthew Shepard Act, Pub. L. No. 111-84, Div. E, § 4704, 123 Stat. 2841 (codified at 42 U.S.C. A. § 30503) (West, Westlaw through Pub. L. No. 118-41).

117. *Id.* § 4704(a).

118. *Id.* § 4704(b).

119. *Id.* § 4702.

120. *Id.* § 4707.

121. *Id.*

122. *Id.* § 4704.

123. *Justice Department Commemorates the Tenth Anniversary of the Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act*, U.S. DEP’T OF JUST. ARCHIVES, <https://perma.cc/SNT7-PXQV>.

124. *Id.*

crime data from 2017–2019 revealed that LGBT people experienced 6.6 violent hate crime victimizations per 1,000 people, compared to 0.8 victimizations per 1,000 people for non-LGBT people.¹²⁵ There has also been a significant increase in hate crimes perpetrated against transgender people.¹²⁶ There is thus much to be done to increase the efficacy of the Act.

III. PROPOSED LEGISLATION

Homeless individuals are not currently covered under federal hate crime legislation. The impetus to include federal protection for homeless people under a hate crime statute in 2007¹²⁷ arose from data on the number of bias-based attacks on homeless people documented at the time.¹²⁸ Between 1999 and 2007, there were 85 hate-motivated homicides, as defined by the federal government, and 217 deaths as a result of violent acts against homeless people.¹²⁹ Nevertheless, the 2007 legislation failed—possibly because homelessness is neither an immutable characteristic nor of personal relevance to all people. Homelessness is viewed as temporary and thus protection for the homeless under a hate crime statute would not equally protect *all* American citizens.¹³⁰ In 2014, Representative Hakeem S. Jeffries (D-NY) proposed the Hate Crime Reporting Act of 2014 in the House of Representatives.¹³¹ The bill, which would have directed the National Telecommunications and Information Administration to update a report on the role of telecommunications in hate crimes,¹³² was not enacted.¹³³ The same bill was introduced in the Senate but was also not enacted.¹³⁴

125. Rachel Dowd, *LGBT People Nine Times More Likely Than Non-LGBT People to be Victims of Violent Hate Crimes*, UCLA SCH. L. WILLIAMS INST. (Dec. 21, 2022), <https://perma.cc/MD8J-F5FU>.

126. Osman Ahmed & Chai Jindasurat, *A Report from the National Coalition of Anti-Violence Programs: Lesbian, Gay, Bisexual, Transgender, Queer and HIV-Affected Hate Violence in 2014*, N.Y. C. GAY & LESBIAN ANTI-VIOLENCE PROJECT 11 (2015), <https://perma.cc/364S-XU85>.

127. The Hate Crimes Against the Homeless Enforcement Act of 2007, which was not passed by Congress, would have amended the Violent Crime Control and Law Enforcement Act of 1994 to include in the definition of a hate crime homeless status for the purpose of Federal Sentencing Guidelines. Hate Crimes Against the Homeless Enforcement Act of 2007, H.R. 2217, 110th Cong. (2007), <https://perma.cc/5HTV-85WU>.

128. *Homeless Hate Crimes Legislation*, NAT'L COAL. FOR THE HOMELESS (July 30, 2013), <https://perma.cc/9K35-XGS5>.

129. *Id.*

130. See Katherine B. O'Keefe, *Protecting the Homeless Under Vulnerable Victim Sentencing Guidelines: An Alternative to Inclusion in Hate Crime Laws*, 52 WM. & MARY L. REV. 301, 315 (2010).

131. Hate Crime Reporting Act of 2014, H.R. 3878, 113th Cong. (2014), <https://perma.cc/J6S9-R5Q6>.

132. *Id.*

133. *Id.*

134. Hate Crime Reporting Act of 2014, S. 2219, 113th Cong. (2014), <https://perma.cc/S4WH-MYC5>.

IV. STATE HATE CRIME REGULATION

The District of Columbia and all but four states¹³⁵ have hate crime regulations that impose criminal penalties for bias-motivated violence and intimidation.¹³⁶ The majority of states also have legislation providing for civil remedies to hate crimes and the collection of hate crimes statistics, similar to federal law.¹³⁷ Forty-nine states have hate crime legislation regarding crimes motivated by racial, religious, or ethnicity bias;¹³⁸ thirty-four states have legislation regarding crimes

135. Georgia, Indiana, Utah, and Wyoming do not have such statutes. *See State-by-State Hate Crime Laws*, BUREAU OF JUST. STAT., <https://perma.cc/7CF6-XJKT>.

136. “States” in this section will hereinafter include the District of Columbia.

137. *See generally* BUREAU OF JUST. STAT., *supra* note 135; *see also Hate Crime Laws*, MOVEMENT ADVANCEMENT PROJECT, <https://perma.cc/C9RR-T33Y>.

138. ALA. CODE § 13A-5-13 (West, Westlaw through Act 2024-12 of the 2024 Reg. Sess.); ALASKA STAT. ANN. § 12.55.155 (West, Westlaw through amendments received through ch. 26 of the 2023 1st Reg. Sess. of the 33d Legis.); ARIZ. REV. STAT. ANN. § 13-701 (West, Westlaw through the 2d Reg. Sess. of the 56th Legis. (2024)); CAL. PENAL CODE § 422.55 (West, Westlaw with urgency legis. through ch. 1 of 2024 Reg. Sess.); COLO. REV. STAT. ANN. § 18-9-121 (West, Westlaw through the 2d Reg. Sess. of the 74th Gen. Assemb. (2024)); CONN. GEN. STAT. § 53-37a (West, Westlaw through enactments from the 2023 Reg. Sess. & the 2023 Sept. Spec. Sess.); DEL. CODE ANN. tit. 11, § 1304 (West, Westlaw through ch. 254 of the 152d Gen. Assemb. (2023–2024)); D.C. CODE ANN. § 22-3701 (West, Westlaw through Jan. 5, 2024); FLA. STAT. ANN. § 775.085 (West, Westlaw current with laws, joint and concurrent resolutions and memorials in effect from the 2023 Spec. B & C Sess. & the 2023 1st Reg. Sess.); HAW. REV. STAT. ANN. § 706-662 (West, Westlaw through Act 1 of the 2024 Reg. Sess.); IDAHO CODE ANN. § 18-7901 (West, Westlaw through ch. 39 of the 2d Reg. Sess. of the 67th Idaho Legis.; 720 ILL. COMP. STAT. ANN. 5/12-7.1 (West, Westlaw through P.A. 103-585 of the 2024 Reg. Sess.); IND. CODE ANN. § 35-46-2-1 (West, Westlaw through all legis. of the 2023 1st Reg. Sess. of the 123d Gen. Assemb.); IOWA CODE ANN. § 729A.1 (West, Westlaw through the 2024 Reg. Sess.); KAN. STAT. ANN. § 21-6815 (West, Westlaw through laws enacted during the 2024 Reg. Sess.); KY. REV. STAT. ANN. § 532.031 (West, Westlaw through laws effective Feb. 29, 2024 & the Nov. 7, 2023 election); LA. STAT. ANN. § 14:107.2 (West, Westlaw through the 2024 1st Extraordinary Sess.); ME. REV. STAT. ANN. tit. 5, § 4684-A (West, Westlaw through ch. 558 of the 2023 2d Reg. Sess. of the 131st Legis.); MD. CRIM. LAW CODE ANN. § 10-304 (West, Westlaw through the 2023 Reg. Sess. of the Gen. Assemb.); MASS. GEN. LAWS ANN. ch. 265, § 39 (West, Westlaw through 2023 1st Ann. Sess.); MICH. COMP. LAWS ANN. § 750.147b (West, Westlaw through P.A. 2024, No. 19, of the 2024 Reg. Sess., 102d Legis.); MINN. STAT. ANN. § 609.2231 (West, Westlaw with legis. from the 2024 Reg. Sess.); MISS. CODE ANN. §§ 99-19-301 to 307 (West, Westlaw through the 2024 Reg., 1st, and 2d Extraordinary Sess.); MO. STAT. ANN. § 557.035 (West, Westlaw through the end of the 2023 1st Reg. Sess. of the 102d Gen. Assemb.); MONT. CODE ANN. § 45-5-221 (West, Westlaw current through ch. effect. Mar. 1, 2024 of the 2023 Sess.); NEB. REV. STAT. ANN. § 28-110 (West, Westlaw through the end of the 2d Reg. Sess. of the 108th Legis. (2024)); NEV. REV. STAT. ANN. § 193.1675 (West, Westlaw through legis. of the 82d Reg. Sess. (2023) ch. 1 to 535 (end) & the 35th Spec. Sess. (2023) ch. 1 (end)); N.H. REV. STAT. ANN. § 651:6 (West, Westlaw current through ch. 6 of the 2024 Reg. Sess.); N.J. STAT. ANN. § 2C:16-1 (West, Westlaw through L.2023, c. 228 and J.R. No. 15); N. M. STAT. ANN. § 31-18B-3 (West, Westlaw through ch. 6, 7, 11, 16, 28, 64, 65 and 66 of the 2024 2d Reg. Sess. of the 56th Legis. (2023)); N.Y. PENAL LAW § 485.05 (West, Westlaw through L.2024, ch. 1 to 49, 61 to 110; N.C. GEN. STAT. ANN. § 14-3 (West, Westlaw through the end of the 2023 Reg. Sess. of the Gen. Assemb.); N.D. CENT. CODE ANN. § 12.1-14-04 (West, Westlaw through the 2023 Reg. & Spec. Sess.); OHIO REV. CODE ANN. § 2927.12 (West, Westlaw through File 20 of the 135th Gen. Assemb. (2023–2024)); OKLA. STAT. tit. 21, § 850 (West, Westlaw through ch. 3 of the 2d Reg. Sess. of the 59th Legis. (2024)); OR. REV. STAT. ANN. §§ 166.155, 166.165 (West, Westlaw through laws enacted in the 2023 Reg. Sess. of the 82d Legis. Assemb.); 18 PA. STAT. & CONS. STAT. ANN. § 2710 (West, Westlaw through 2023 Reg. Sess.); R.I. GEN. LAWS ANN. § 12-19-38 (West, Westlaw through ch. 6 of the 2024 Reg. Sess. of the R.I. Legis.); S.C. CODE ANN. § 16-5-10 (West, Westlaw through 2024 Act No. 120); S.D.

motivated by sexual orientation bias;¹³⁹ thirty-one states have hate crime legislation on crimes based on gender bias;¹⁴⁰ and thirty-three states have legislation on

CODIFIED LAWS §§ 22-19B-1, 22-19B-2 (West, Westlaw through the laws of the 2024 Reg. Sess. & S. Ct. Rule 24-03); TENN. CODE ANN. §§ 40-35-114, 39-17-309 (West, Westlaw through ch. 554 of the 2024 Reg. Sess. of the 113th Tenn. Gen. Assemb.); TEX. CODE CRIM. PROC. ANN. art. 42.014 (West, Westlaw through the end of the 2023 Reg. 2d, 3d & 4th Called Sess. of the 88th Legis.); UTAH CODE ANN. § 76-3-203.14 (West, Westlaw through the 2023 2d Spec. Sess.); VT. STAT. ANN. tit. 13, § 1455 (West, Westlaw through Acts of the Adjourned Sess. of the 2023–2024 Vt. Gen. Assemb. (2024)); VA. CODE ANN. § 18.2-57 (West, Westlaw through the 2023 Reg. Sess. & 2023 Spec. Sess. I.); WASH. REV. CODE ANN. § 9A.36.078 (West, Westlaw with all laws from the 2023 Reg. Sess. & 1st Spec. Sess. of the Wash. Legis.); W. VA. CODE ANN. § 61-6-21 (West, Westlaw through legis. of the 2024 Reg. Sess.); WIS. STAT. ANN. § 939.645 (West, Westlaw through 2023 Act 101); WYO. STAT. ANN. § 6-9-102 (West, Westlaw through amend. received through Mar. 18, 2024 of the 2024 Budget Sess. of the Wyo. Legis.).

139. See ARIZ. REV. STAT. ANN. § 41-1750 (West, Westlaw through legis. of the 2d Reg. Sess. of the 56th Legis. (2024)); CAL. PENAL CODE § 422.55 (West, Westlaw with urgency legis. through ch. 1 of 2024 Reg. Sess.); COLO. REV. STAT. ANN. § 18-9-121 (West, Westlaw through the 2d Reg. Sess. of the 74th Gen. Assemb. (2024)); CONN. GEN. STAT. § 53-37a (West, Westlaw through enactments from the 2023 Reg. Sess. & the 2023 Sept. Spec. Sess.); DEL. CODE ANN. tit. 11, § 1304 (West, Westlaw through ch. 254 of the 152d Gen. Assemb. (2023–2024)); D.C. CODE ANN. § 22-3701 (West, Westlaw through Jan. 5, 2024); FLA. STAT. ANN. § 775.085 (West, Westlaw through the 2023 Spec. B & C Sess. & the 1st Reg. Sess.); HAW. REV. STAT. ANN. § 706-662 (West, Westlaw through Act 1 of the 2024 Reg. Sess.); 720 ILL. COMP. STAT. ANN. 5/12-7.1 (West, Westlaw through P.A. 103-585 of the 2024 Reg. Sess.); IOWA CODE ANN. § 729A.1 (West, Westlaw through the 2024 Reg. Sess.); KAN. STAT. ANN. § 21-6815 (West, Westlaw through laws enacted during the 2024 Reg. Sess.); KY. REV. STAT. ANN. § 532.031 (West, Westlaw effective Feb. 29, 2024 & the Nov. 7, 2023 election); LA. STAT. ANN. § 14:107.2 (West, Westlaw through the 2024 1st Extraordinary Sess.); ME. REV. STAT. ANN. tit. 5, § 4684-A (West, Westlaw through ch. 558 of the 2023 2d Reg. Sess. of the 131st Legis.); MD. CRIM. LAW CODE ANN. § 10-304 (West, Westlaw through the 2023 Reg. Sess. of the Gen. Assemb.); MASS. GEN. LAWS ANN. ch. 265, § 39 (West, Westlaw through 2023 1st Ann. Sess.); MINN. STAT. ANN. § 609.2231 (West, Westlaw with legis. from the 2024 Reg. Sess.); MO. ANN. STAT. § 557.035 (West, Westlaw through the end of the 2023 1st Reg. Sess. of the 102d Gen. Assemb.); NEB. REV. STAT. ANN. § 28-110 (West, Westlaw through the 2d Reg. Sess. of the 108th Legis. (2024)); NEV. REV. STAT. ANN. § 193.1675 (West, Westlaw through legis. of the 82d Reg. Sess. (2023) ch. 1 to 535 (End) & the 35th Spec. Sess. (2023) ch. 1 (end)); N.H. REV. STAT. ANN. § 651:6 (West, Westlaw current through ch. 6 of the 2024 Reg. Sess.); N.J. STAT. ANN. § 2C:16-1 (West, Westlaw through L.2023, c. 228 and J.R. No. 15); N.M. STAT. ANN. § 31-18B-3 (West, Westlaw through ch. 6, 7, 11, 16, 28, 64, 65 and 66 of the 2024 2d Reg. Sess. of the 56th Legis. (2023)); N.Y. PENAL LAW § 485.05 (West, Westlaw through L.2024, ch. 1 to 49, 61 to 110); OR. REV. STAT. ANN. § 166.155, § 166.165 (West, Westlaw through laws of the 2023 Reg. Sess. of the 82d Legis. Assemb.); R.I. GEN. LAWS ANN. § 12-19-38 (West, Westlaw through ch. 6 of the 2024 Reg. Sess. of the R.I. Legis.); TENN. CODE ANN. § 40-35-114 (West, Westlaw through ch. 554 of the 2024 Reg. Sess. of the 113th Tenn. Gen. Assemb.); TEX. CODE CRIM. PROC. ANN. art. 42.014 (West, Westlaw through the end of the 2023 Reg., 2d, 3d, & 4th Called Sess. of the 88th Legis.); UTAH CODE ANN. § 76-3-203.14 (West, Westlaw through the 2023 2d Spec. Sess.); VT. STAT. ANN. tit. 13, § 1455 (West, Westlaw through Acts of the Adjourned Sess. of the 2023–2024 Vt. Gen. Assemb. (2024)); VA. CODE ANN. § 18.2-57 (West, Westlaw through the 2023 Reg. Sess. & 2023 Spec. Sess.); WASH. REV. CODE ANN. § 9A.36.078 (West, Westlaw with all legis. from the 2023 Reg. Sess. & 1st Spec. Sess. of the Wash. Legis.); WIS. STAT. ANN. § 939.645 (West, Westlaw through 2023 Act 101).

140. See ALASKA STAT. ANN. § 12.55.155 (West, Westlaw through ch. 26 of the 2023 1st Reg. Sess. of the 33d Legis.); CAL. PENAL CODE § 422.55 (West, Westlaw with urgency legis. through ch. 1 of 2024 Reg. Sess.); CONN. GEN. STAT. § 53-37a (West, Westlaw through enactments from the 2023 Reg. Sess. & the 2023 Sept. Spec. Sess.); D.C. CODE ANN. § 22-3701 (West, Westlaw through Jan. 5, 2024); HAW. REV. STAT. ANN. § 706-662 (West, Westlaw through the end of the 2023 Reg. Sess.); 720 ILL. COMP. STAT. ANN. 5/12-7.1 (West, Westlaw through P.A. 103-583 of the 2023 Reg. Sess.); IND. CODE

hate crimes motivated by disability bias.¹⁴¹ Some states have hate crime legislation that covers more types of bias than are covered by federal hate crime

ANN. § 35-46-2-1 (West, Westlaw through the 2023 1st Reg. Sess. of the 123d Gen. Assemb.); IOWA CODE ANN. § 729A.1 (West, Westlaw through the 2023 Reg. Sess. & 1st Extraordinary Sess.); LA. STAT. ANN. § 14:107.2 (West, Westlaw through the 2024 1st Extraordinary Sess.); ME. REV. STAT. ANN. tit. 5, § 4684-A (West, Westlaw through ch. 486, Const. Res. 4, and Initiated Bill 3 of the 131st Legis.); MD. CRIM. LAW CODE ANN. § 10-304 (West, Westlaw through the 2023 Reg. Sess. of the Gen. Assemb.); MICH. COMP. LAWS ANN. § 750.147b (West, Westlaw through P.A. 2024, No. 11, of the 2024 Reg. Sess., 102d Legis.); MINN. STAT. ANN. § 609.2231 (West, Westlaw with legis. from the 2024 Reg. Sess.); MISS. CODE ANN. §§ 99-19-301 to 307 (West, Westlaw through the 2024 1st Extraordinary Sess.); MO. STAT. ANN. § 557.035 (West, Westlaw through the end of the 2023 Reg. Sess. of the 102d Gen. Assemb.); NEB. REV. STAT. ANN. § 28-110 (West, Westlaw through the end of the 2d Reg. Sess. of the 108th Legis. (2022)); N.H. REV. STAT. ANN. § 651:6 (West, Westlaw current through ch. 3 of the 2024 Reg. Sess.); N.J. STAT. ANN. § 2C:16-1 (West, Westlaw through L.2023, c. 194 and J.R. No. 15); N.M. STAT. ANN. § 31-18B-3 (West, Westlaw through the 2023 1st Reg. Sess. of the 56th Legis. (2024)); N.Y. PENAL LAW § 485.05 (West, Westlaw through L.2024, ch. 1 to 49, 61 to 93); N.C. GEN. STAT. ANN. § 99D-1 (West, Westlaw through the end of the 2023 Reg. & Spec. Sess. of the Gen. Assemb.); N.D. CENT. CODE ANN. § 12.1-14-04 (West, Westlaw through the 2023 Reg. & Spec. Sess. 67th Legis. Assemb.); R.I. GEN. LAWS ANN. § 12-19-38 (West, Westlaw through ch. 6 of the 2024 Reg. Sess. of the R.I. Legis.); TENN. CODE ANN. § 40-35-114 (West, Westlaw with ch. 489 to 509 from the 2024 Reg. Sess. of the 113th Tenn. Gen. Assemb.); TEX. CODE CRIM. PROC. ANN. art. 42.014 (West, Westlaw through the end of the 2023 Reg., 1st, 2d, 3d & 4th Called Sess. of the 88th Legis.); UTAH CODE ANN. § 76-3-203.14 (West, Westlaw through the 2023 2d Spec. Sess.); VT. STAT. ANN. tit. 13, § 1455 (West, Westlaw through Acts of the Adjourned Sess. of the 2023–2024 Vt. Gen. Assemb. (2024)); VA. CODE ANN. § 18.2-57 (West, Westlaw through the 2023 Reg. Sess. & 2023 Spec. Sess. I.); WASH. REV. CODE ANN. § 9A.36.078 (West, Westlaw with all legis. from the 2023 Reg. & 1st Spec. Sess. of the Wash. Legis.); W. VA. CODE ANN. § 61-6-21 (West, Westlaw through legis. of the 2024 Reg. Sess.); WYO. STAT. ANN. § 6-9-102 (West, Westlaw through the 2023 Gen. Sess. of Wyo. Legis.).

141. See ALA. CODE § 13A-5-13 (West, Westlaw Act 2024-12 of the 2024 Reg. Sess.); ALASKA STAT. § 12.55.155 (2023); ARIZ. REV. STAT. ANN. § 13-701 (West, Westlaw through the 2d Reg. Sess. of the 56th Legis.); CAL. PENAL CODE § 422.55 (West, Westlaw with urgency legis. through ch. 1 of 2024 Reg. Sess.); COLO. REV. STAT. ANN. § 18-9-121 (West, Westlaw through the 2d Reg. Sess. of the 74th Gen. Assemb. (2024)); CONN. GEN. STAT. § 53-37a (West, Westlaw through enactments from the 2023 Reg. and the 2023 Sept. Spec. Sess.); DEL. CODE ANN. tit. 11, § 1304 (West, Westlaw through ch. 247 of the 152d Gen. Assemb. (2023–2024)); D.C. CODE ANN. § 22-3701 (West, Westlaw through Jan. 5, 2024); HAW. REV. STAT. ANN. § 706-662 (West, Westlaw through the end of the 2023 Reg. Sess.); 720 ILL. COMP. STAT. ANN. 5/12-7.1 (West, Westlaw through P.A. 103-583 of the 2023 Reg. Sess.); IND. CODE ANN. § 35-46-2-1 (West, Westlaw through the 2023 1st Reg. Sess. of the 123d Gen. Assemb.); IOWA CODE ANN. § 729A.1 (West, Westlaw through the 2023 Reg. & Extraordinary Sess.); LA. STAT. ANN. § 14:107.2 (West, Westlaw through the 2023 1st Extraordinary & Reg. Sess.); ME. REV. STAT. ANN. tit. 5, § 4684-A (West, Westlaw through the 2022 2d Reg. Sess. of the 131st Legis.); MD. CRIM. LAW CODE ANN. § 10-304 (West, Westlaw through the 2023 Reg. Sess. of the Gen. Assemb.); MASS. GEN. LAWS ANN. ch. 265, § 39 (West, Westlaw through ch. 125 of the 2022 2d Ann. Sess.); MISS. STAT. ANN. § 99-19-301 (West, Westlaw with legis. from the 2023 1st Ann. Sess.); MO. REV. STAT. ANN. § 557.035 (West, Westlaw through the end of the 2023 1st Reg. Sess. of the 102d Gen. Assemb.); NEB. REV. STAT. ANN. § 28-110 (West, Westlaw through the end of the 2d Reg. Sess. of the 108th Legis. (2022)); NEV. REV. STAT. ANN. § 193.1675 (West, Westlaw through ch. 535 of the 82d Reg. and ch. 1 of the 35th Spec. Sess. (2023)); N.H. REV. STAT. ANN. § 651:6 (West, Westlaw current through ch. 3 of the 2024 Reg. Sess.); N.J. STAT. ANN. § 2C:16-1 (West, Westlaw through L. 2023, c. 194 and J.R. No. 15); N.M. STAT. ANN. § 31-18B-3 (West, Westlaw through the 2023 1st Reg. Sess. of the 56th Legis. (2023)); N.Y. PENAL LAW § 485.05 (West, Westlaw through L. 2024, ch. 1 to 49; 61 to 93); OKLA. STAT. tit. 21, § 850 (West, Westlaw through 2d Reg. Sess. of the 59th Legis. (2024)); OR. REV. STAT. ANN. § 166.155 (West, Westlaw through laws enacted in the 2023 Reg. Sess. of the 82d Legis. Assemb.); R.I. GEN. LAWS ANN. § 12-19-38 (West, Westlaw through ch. 6 of the 2024 Reg. Sess. of the R.I. Legis.); TENN. CODE ANN.

legislation: for example, six states have hate crimes statutes penalizing crimes based on political affiliation,¹⁴² thirteen states have statutes against hate crimes motivated by age bias,¹⁴³ and thirteen states have statutes against hate crimes motivated by transgender or gender identity bias.¹⁴⁴ Because of the difficulty of distinguishing hate crimes from other criminal activity, twenty-four states have enacted hate crime legislation in the form of penalty-enhancement statutes for crimes motivated by hate rather than creating new statutory crimes.¹⁴⁵ There are three types of statutes by

§ 40-35-114 (West, Westlaw through end of the 2024 Reg. Sess. of the 113th Tenn. Gen. Assemb.); TEX. CODE CRIM. PROC. ANN. art. 42.014 (West, Westlaw through the end of the 2023 Reg., 3d, & 4th & Called Sess. of the 88th Legis.); UTAH CODE ANN. § 76-3-203.14 (West, Westlaw through the 2023 2d Spec. Sess.); VT. STAT. ANN. tit. 13, § 1455 (West, Westlaw through Acts of the Adjourned Sess. of the 2023–2024 Vt. Gen. Assemb. (2024)); VA. CODE ANN. § 18.2-57 (West, Westlaw through the 2023 Reg. Sess. & the 2023 Spec. Sess. I); WASH. REV. CODE ANN. § 9A.36.078 (West, Westlaw with all laws from the 2023 Reg. & 1st Spec. Sess. of the Wash. Legis.); WIS. STAT. ANN. § 939.645 (West, Westlaw through 2023 Act 90, except Acts 73, 87, & 88).

142. See CAL. CIV. CODE § 51.7 (West, Westlaw current with urgency legis. through ch. 1 of 2024 Reg. Sess.); D.C. CODE ANN. § 22-3701 (West, Westlaw through Jan. 5, 2024); IOWA CODE ANN. § 729A.1 (West, Westlaw through the 2023 Reg. & Extraordinary Sess.); S.C. CODE ANN. § 16-5-10 (West, Westlaw through 2024 Act. 110); UTAH CODE ANN. § 76-3-203.14 (West, Westlaw through the 2023 2d Spec. Sess.); W. VA. CODE ANN. § 61-6-21 (West, Westlaw through legis. of the 2023 1st Spec. Sess. & Reg. Sess.).

143. CAL. PENAL CODE § 422.55 (West, Westlaw current urgency legis. through ch. 1 of 2024 Reg. Sess.); D.C. CODE ANN. § 22-3701 (West, Westlaw through Jan. 5, 2024); FLA. STAT. ANN. § 775.085 (West, Westlaw through the 2023 Spec. B & C Sess. and 2023 Reg. Sess.); IOWA CODE ANN. § 729A.1 (West, Westlaw through the 2023 Reg. Sess. & 2023 1st Extra. Sess.); LA. STAT. ANN. § 14:107.2 (West, Westlaw through the 2024 1st Extra. Sess.); MISS. STAT. ANN. § 99-19-301 (West, Westlaw with legis. from the 2024 Reg. Sess.); NEB. REV. STAT. ANN. § 28-110 (West, Westlaw through the end of the 2d Reg. Sess. of the 108th Legis. (2024)); N.H. REV. STAT. ANN. § 651:6 (West, Westlaw current through ch. 3 of the 2024 Reg. Sess.); N.M. STAT. ANN. § 31-18B-3 (West, Westlaw through the 2023 1st Reg. Sess. of the 56th Legis. (2023)); N.Y. PENAL LAW § 485.05 (West, Westlaw through L. 2024, ch. 1 to 49; 61 to 93); TEX. CODE CRIM. PROC. ANN. art. 42.014 (West, Westlaw through the end of the 2023 Reg. 2d, 3d, & 4th Called Sess. of the 88th Legis.); UTAH CODE ANN. § 76-3-203.14 (West, Westlaw through the 2023 2d Spec. Sess.); VT. STAT. ANN. tit. 13, § 1455 (West, Westlaw through Acts of the Adjourned Sess. of the 2023–2024 Vermont Gen. Assemb. (2024)).

144. CAL. PENAL CODE § 422.55 (West, Westlaw with urgency legis. through ch. 1 of 2024 Reg. Sess.); COLO. REV. STAT. ANN. § 18-9-121 (West, Westlaw through the 2d Reg. Sess. of the 74th Gen. Assemb. (2024)); D.C. CODE ANN. § 22-3701 (West, Westlaw through Jan 5, 2022); IOWA CODE ANN. § 729A.1 (West, Westlaw through the 2023 Reg. Sess. and 1st Extraordinary Sess.); LA. STAT. ANN. § 14:107.2 (West, Westlaw through the 2024 1st Reg. Sess.); MISS. STAT. ANN. § 99-19-301 (West, Westlaw with legis. from the 2024 1st Extra. Sess.); NEB. REV. STAT. ANN. § 28-110 (West, Westlaw through the end of the 2d Reg. Sess. of the 108th Legis. (2024)); N.H. REV. STAT. ANN. § 651:6 (West, Westlaw current through ch. 3 of the 2024 Reg. Sess.); N.M. STAT. ANN. § 31-18B-3 (West, Westlaw through the 2022 1st Reg. Sess. of the 56th Legis. (2023)); N.Y. PENAL LAW § 485.05 (West, Westlaw through L. 2024, ch. 1 to 49; 61 to 93); TEX. CODE CRIM. PROC. ANN. art. 42.014 (West, Westlaw through the end of the 2021 Reg., 2d, 3d, & 4th Called Sess. of the 88th Legis.); UTAH CODE ANN. § 76-3-203.14 (West, Westlaw with the laws of the 2023 2d Spec. Sess.); VT. STAT. ANN. tit. 13, § 1455 (West, Westlaw through Acts of the Adjourned Sess. of the 2023–2024 Vt Gen. Assemb. (2024)).

145. ALA. CODE § 13A-5-13 (West, Westlaw through Act 2024-12 of the 2024 Reg. Sess.); CONN. GEN. STAT. § 53-37a (West, Westlaw through enactments from the 2023 Reg. Sess. and the 2023 Sept. Spec. Sess.); DEL. CODE ANN. tit. 11, § 1304 (West, Westlaw through ch. 247 of the 152d Gen. Assemb. (2023–2024)); D.C. CODE ANN. § 22-3701 (West, Westlaw through Jan. 5, 2024); FLA. STAT. ANN. § 775.085 (West, Westlaw through the 2023 Spec. B and C Sess. & 2023 1st Reg. Sess.); HAW. REV.

which states enhance existing statutory penalties when bias against a protected class is found to have influenced a criminal act. One type of penalty enhancement adds a specified amount of time to the criminal defendant's sentence when a bias motive is proven as an element of a criminal offense.¹⁴⁶ A second type of enhancement statute—similar to federal specific acts statutes—mandates that a hate crime conviction will automatically change the sentencing range by increasing both the minimum and maximum allowable sentencing periods.¹⁴⁷ The third type of enhancement automatically increases the maximum allowable sentence for a criminal defendant convicted of a hate crime.¹⁴⁸ In regulating specific acts of hate *speech* rather than hate *crimes*, the Illinois Criminal Code made it:

unlawful for any person, firm or corporation to manufacture, sell, or offer for sale, advertise or publish, present or exhibit in any public place in this state any lithograph, moving picture, play, drama or sketch, which publication or exhibition portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion which said publication or exhibition exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots.¹⁴⁹

STAT. ANN. § 706-662 (West, Westlaw through the end of the 2023 Reg. Sess.); IOWA CODE ANN. § 729A.1 (West, Westlaw through the 2023 Reg. & 1st Extra. Sess.); MINN. STAT. ANN. § 609.595 (West, Westlaw with legis. from the 2024 Reg. Sess.); MISS. CODE ANN. §§ 99-19-301 to 307 (West, Westlaw through the 2024 1st Extra. Sess.); MO. ANN. STAT. § 557.035 (West, Westlaw through the end of the 2023 1st Reg. Sess. of the 102d Gen. Assemb.); NEB. REV. STAT. ANN. § 28-110 (West, Westlaw through the end of the 2d Reg. Sess. of the 108th Legis. (2024)); NEV. REV. STAT. ANN. § 193.1675 (West, Westlaw through Legis. of the 82d Reg. Sess. (2023) ch. 1 to 535 (End) & the 35th Spec. Sess. (2023) ch. 1 (End)); N.H. REV. STAT. ANN. § 651:6 (West, Westlaw current through ch. 3 of the 2024 Reg. Sess.); N.J. STAT. ANN. § 2C:16-1 (West, Westlaw through L.2023, c. 194 and J.R. No. 15); N.M. STAT. ANN. § 31-18B-3 (West, Westlaw through the 2023 1st Reg. Sess. of the 56th Legis. (2023)); N.Y. PENAL LAW § 485.05 (West, Westlaw through L.2024, chapters 1 to 49, 61 to 93); N.C. GEN. STAT. ANN. § 14-3 (West, Westlaw through the end of the 2023 Reg. Sess. of the Gen. Assemb.); OHIO REV. CODE ANN. § 2927.12 (West, Westlaw through File 18 of the 135th Gen. Assemb. (2023–2024)); R.I. GEN. LAWS ANN. § 12-19-38 (West, Westlaw through ch. 6 of the 2024 Reg. Sess. of the R.I. Legis.); TENN. CODE ANN. § 40-35-114, § 39-17-309 (West, Westlaw with ch. 489 to 509 from the 2024 Reg. Sess. of the 113th Tenn. Gen. Assemb.); TEX. CODE CRIM. PROC. ANN. art. 42.014 (West, Westlaw through the end of the 2023 Reg., 2d, 3d & 4th Called Sess. of the 88th Legis.); VT. STAT. ANN. tit. 13, § 1455 (West, Westlaw through Acts of the Adjourned Sess. of the 2023–2024 Vt. Gen. Assemb. (2024)); VA. CODE ANN. § 18.2-57 (West, Westlaw through the 2023 Reg. Sess. & 2023 Spec. Sess. I); WIS. STAT. ANN. § 939.645 (West, Westlaw through 2023 Act 30).

146. See David Goldberger, *The Inherent Unfairness of Hate Crime Statutes*, 41 HARV. J. ON LEGIS. 449, 453–54 (2004). See, e.g., ALA. CODE § 13A-5-13 (2024).

147. See Goldberger, *supra* note 146, at 454; see, e.g., N.Y. PENAL LAW § 485.10 (2024).

148. See Goldberger, *supra* note 146, at 454; see, e.g., FLA. STAT. ANN. § 775.085 (2023).

149. *Beauharnais v. Illinois*, 343 U.S. 250, 251 (1952) (quoting Illinois Criminal Code, ILL. REV. STAT. 1949, c. 38, § 471).

A majority of states have hesitated to pass similar legislation without an additional element of threat or violence, so as not to chill First Amendment protection.¹⁵⁰

V. CONCLUSION

Various state legislatures and the U.S. Congress have attempted to address the particular individual and societal harms created by hate crimes by making such acts illegal and subject to specialized or harsher penalties. However, such attempts are often met with opposition. Current federal law creates a separate crime if the defendant, on the basis of race, color, religion or national origin, targets a person who is participating in a federally protected activity. However, other vulnerable classes, such as women and LGBTQIA+ people, are not protected by many of these laws. Although many hate crimes laws as currently written have passed constitutional muster, the Supreme Court's rejection of VAWA in *United States v. Morrison* may foreshadow greater restrictions on future federal hate crimes legislation.

Supreme Court decisions in the field of sentencing have created collateral attacks on sentence enhancement legislation.¹⁵¹ In *Johnson v. United States*, the Court struck down a clause of the Armed Career Criminal Act (the "ACCA"),¹⁵² an enhanced sentence act, for being unconstitutionally vague and in violation of due process.¹⁵³ The residual clause of the ACCA defined a "violent felony" as an "act" that "otherwise involves conduct that presents a serious potential risk of physical injury to another."¹⁵⁴ Justice Scalia wrote in the opinion of the Court that the phrasing of the statute invited "arbitrary enforcement."¹⁵⁵ In *Cunningham v. California*, the Court held that California's Determinate Sentencing Law¹⁵⁶ violated the Sixth Amendment's right to a jury trial, as it permitted "a judge to impose a sentence above the statutory maximum based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant."¹⁵⁷

The Supreme Court and state and federal courts have addressed sentencing procedures since 2000, carving out a narrow area in which the federal government, states and localities can proscribe bias-motivated speech and actions. Under the federal framework, hate crime sentence enhancement is merely advisory, but otherwise the determination of bias motive remains constitutionally sound. At the state level, the Supreme Court has limited the ability of judges to enhance sentences as hate crimes absent a jury's determination of proof beyond a

150. See Eugene Volokh, *No, There's No "Hate Speech" Exception to the First Amendment*, F WASH. POST (May 7, 2015), <https://perma.cc/63SH-KEY8>.

151. See generally *Johnson v. United States*, 576 U.S. 591, 597 (2015).

152. See 18 U.S.C. § 924(e)(2)(B).

153. *Johnson*, 576 U.S. at 593.

154. See 18 U.S.C. § 924(e)(2)(B).

155. *Johnson*, 576 U.S. at 591.

156. CAL. PENAL CODE § 1170 (West, Westlaw through ch. 1 of 2024 Reg. Sess.).

157. *Cunningham v. California*, 549 U.S. 270, 275 (2007).

reasonable doubt.¹⁵⁸ Though federal legislation has not yet been examined by the courts, federal aid toward hate crime regulation has been attempted several times. Such regulations are criticized on the grounds that their negative effects exceed their benefits. However, others view such regulation as necessary to maintain societal order and to protect the safety of individuals in the community. As a result, most states have enacted regulations of hate speech and hate crime.

158. *See* *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000) (A New Jersey hate crime statute allowed trial judges to increase the sentencing of a defendant if, by a preponderance of the evidence, the defendant committed a hate crime. The Court held that under the “Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.”).