S. HRG. 106–517

COMBATING HATE CRIMES: PROMOTING A RESPONSIVE AND RESPONSIBLE ROLE FOR THE FEDERAL GOVERNMENT

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED SIXTH CONGRESS

FIRST SESSION

ON

EXAMINING HOW TO PROMOTE A RESPONSIVE AND RESPONSIBLE ROLE FOR THE FEDERAL GOVERNMENT ON COMBATING HATE CRIMES, FOCUSING ON THE RELATIONSHIP BETWEEN THE FEDERAL GOVERNMENT AND THE STATES IN COMBATING HATE CRIME, ANALYSIS OF STATES' PROSECUTION OF HATE CRIMES, DEVELOPMENT OF A HATE CRIME LEGISLATION MODEL, AND EXISTING FEDERAL HATE CRIME LAW

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COMBATING HATE CRIMES: PROMOTING A RESPONSIVE AND RESPONSIBLE ROLE FOR THE FEDERAL GOVERNMENT

TUESDAY, MAY 11, 1999

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 10:19 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Orrin G. Hatch (chairman of the committee) presiding.

Also present: Senators Specter and Kennedy.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

The CHAIRMAN. Good morning, and welcome to today's hearing. I apologize for being late, but it is one of those times where one of my major bills came up on the floor and I had to start off the debate, and so I apologize for being so late.

It is good to have you here, Mr. Holder, before the committee.

Mr. HOLDER. Good to see you Mr. Chairman.

The CHAIRMAN. Welcome to today's hearing, entitled "Combating Hate Crimes: Promoting a Responsive and Responsible Role for the Federal Government." We are very pleased to have Deputy Attorney General Eric Holder with us today, as well as a panel of other very impressive witnesses whom I will introduce after we hear from Mr. Holder.

But I want to give a special recognition and thanks to Ms. Judy Shepard, to whom I am especially grateful for appearing today. As most of you know, Ms. Shepard suffered a tragedy no mother should have to endure—the loss of her son to an act of brutal violence. It was a small effort for me to support a resolution that passed the Senate last year condemning Matthew's murder in the strongest terms, and pledging action to bring an end to such crimes.

But your appearance today, Ms. Shepard, reflects a great effort, one that will salvage from the tragedy of Matthew's death a nationwide recognition and condemnation of the brutal manifestation of hate that prematurely ended his life and devastated your family.

Today's hearing will involve facts and issues that are at once staggering and difficult. Some of our witnesses will confront us with facts that expose an ugly, bigoted and violent underside of some in our country, facts that rivet our attention and cannot help

but move us to embrace virtually any measure appearing to stem this bigotry.

But the hearing will also bring us face to face with the foundations of our constitutional structure, namely the first principles of federalism that for more than two centuries have vested States with the primary responsibility for prosecuting crimes committed within their boundaries.

Today's hearing brings us to this intersection between our well-intentioned desire to investigate, prosecute, and hopefully end these vicious crimes, and our unequivocal duty to respect the constitutional boundaries governing any legislative action we take. It is my expectation that at today's hearing we will also bring a commitment to do what Congress can do to redress these crimes.

Indeed, the aim of this hearing is not merely to focus attention on the scourge of hate crime, but to consider those efforts that can most effectively be taken to stop hate crimes. Though we will hear a broad array of perspectives from our witnesses today, there is one point about which I think we can all agree, and that is that the actions constituting these hate crimes are wrong in all respects.

Let me state unequivocally that as much as we condemn all crime, hate crime can be more sinister than nonhate 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.

This is in keeping with the longstanding principle of criminal justice as recognized recently by the U.S. Supreme Court in a unanimous decision upholding Wisconsin's sentencing enhancement for hate crimes that the worse a criminal defendant's motive, the worse the crime.

Moreover, hate crimes are more likely to provoke retaliation. They inflict deep, lasting and distinct injuries, some of which will never heal, on victims and their family members. They incite community unrest, and ultimately they are downright un-American. The melting pot of America is, worldwide, the most successful multiethnic, multiracial and multifaith country in all recorded history. This is something to ponder as we consider the atrocities routinely sanctioned in other countries like Serbia today, committed against persons entirely on the basis of their racial, ethnic or religious identity.

So while all of us would agree on the objective of dealing with the problem of hate crimes, our exchange today and throughout this 106th Congress must be largely about the appropriate means to best accomplish that objective. And so it is that the title of today's hearing speaks of, "promoting a responsive and responsible role," for the Federal Government in combating hate crime.

In the face of some of the recent hate crimes that have riveted public attention and have unfortunately made the name James Byrd synonymous with Jasper, TX, and the name Matthew Shepard synonymous with Laramie, WY, I am committed in my view that the Senate must act and speak against hate crimes.

Indeed, I am on record with my view that the Federal Government can play a valuable role in responding to hate crimes, having

sponsored the Hate Crimes Statistics Act of 1990 with my friend, Senator Kennedy. But any Federal response, to be a meaningful one, must 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.

For the primary benefit of the scholars we have brought here today, let me emphasize that I am particularly concerned with the Court's restrictions on Congress' powers to legislate under section 5 of the 14th amendment and under the Commerce Clause: *City of Boerne,* invalidating the Religious Freedom Restoration Act—again, a bill that the two of us have done—under the 14th amendment; *Lopez,* invalidating the Gun-Free School Zones Act under the Commerce Clause; and *Brzonkala,* a fourth circuit decision invalidating one section of the Violence Against Women Act on both grounds.

I have already given a great deal of personal thought to this matter in an effort to arrive at a Federal response to hate crimes that is not only as effective as possible, but that carefully navigate the rocky shoals of these court decisions.

I am going to share with you the four features of an approach that I believe would 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.

First, I would propose creating 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 such crimes. 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 levels. Perhaps, then, before we take the step of making every criminal offense motivated by hatred a Federal offense, we ought to equip the States and localities with the resources necessary so that they can undertake these criminal investigations and prosecutions on their own.

Second, we need to undertake a comprehensive analysis of the raw data that has been collected pursuant to the 1990 Hate Crimes 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. That is a very important issue to me. Are the States doing the job? Will they do the job? Do they have the ability to do the job, even if they are willing to?

Third, my approach would direct 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, the model statute hate crime legislation at the State level.

And, fourth, I would make 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.

Since I know that Deputy Attorney General Eric Holder believes that States and localities should continue to be responsible for prosecuting the overwhelming majority of hate crimes and that no legislation is worthwhile if it is invalidated as unconstitutional, I shall be interested in hearing his thoughts on this approach that I have just outlined.

But, first, let me take note for the record that my colleague from Oregon, Senator Ron Wyden, has submitted written testimony for this hearing and we will place that in an appropriate place in the hearing record.

[The prepared statement of Senator Wyden follows:]

PREPARED STATEMENT OF HON. RON WYDEN, A U.S. SENATOR FROM THE STATE OF OREGON

I appreciate the opportunity to submit testimony for the Committee's hearing on hate crimes prevention, and wish to commend Chairman Hatch and the Committee for your advocacy on behalf of civil rights. No matter how hard we work in this area, however, there is always more to be done. This is especially true for crimes motivated by hate.

Hate crimes are a stain on our national greatness * * * Whether it was the brutal death of James Byrd, Jr. last July in Texas, or the way Matthew Shepard was left strung up on a fence post in Wyoming.

The bipartisan Hate Crimes Prevention Act, of which I am a principal cosponsor, seeks to deter violent crime motivated by bigotry. The bill will close the loopholes in existing Federal hate crimes law and remove the straightjacket from local law enforcement so they can get Federal assistance when they need it. The purpose is to assure prosecution of a hate crime regardless of where it occurred—be it on a public sidewalk or in a private parking lot across the street.

The legislation is carefully aimed at filling in the gaps in the low. It will make sure law enforcement has an extensive array of tools to prosecute these crimes to the fullest extent.

The legislation will not generate a tsunami of Federal hate crimes cases. Local law enforcement would have to seek Federal involvement, and the Attorney General would have to approve that involvement. Since 1990, Federal indictments under current law have averaged 10 a year, and the number of prosecutions has averaged about 6 a year, out of the thousands of hate crimes reported each year. The Justice Department testified last year that it expects only a "modest increase in the number of cases" under our bill.

Our nation has made great strides in civil rights, but there is still a long way to go. We need to put bigots on notice that hate crimes will not be tolerated in America. That's the message of our legislation, and I hope we can send it in a bipartisan way to the American people.

The CHAIRMAN. Now, we will turn to my friend and colleague, Senator Kennedy, for his opening statement.

Senator KENNEDY. Thank you, Mr. Chairman. Thank you for having this hearing. I have a statement here from Senator Smith, as well, and ask consent that it be put in the record.

The CHAIRMAN. We will put that in the record as well.

[The prepared statement of Senator Smith follows:]

PREPARED STATEMENT OF HON. GORDON SMITH, A U.S. SENATOR FROM THE STATE OF OREGON

Today we meet to address a serious problem in America. This problem is not a new one, nor is it unique to the United States. It is the incidence of vicious attacks on individuals motivated by a difference in race, color, religion, ethnicity, gender, disability or sexual orientation. In my role as Chairman of the Foreign Affairs' Subcommittee on European Affairs, I speak out against human rights violations and hate throughout the world; it would be hypocritical of me not to take action within our own border.

I do not stand here with my colleagues today to single out one crime as worse than another. However, there is an undeniable pattern here in the United States—certain groups have historically been singled out as targets of violent crime. In recent years, the United States has made tremendous strides toward equality and civil rights. But there remains much to be done. Hate crimes have a deep impact on our communities. They enrage, they divide.

Federal laws are already in place to protect victims of crimes based on race, color, religion or national origin; however, federal prosecution has been limited to crimes committed within federal jurisdiction. This legislation would simply remove these restrictions and extend the authority of federal prosecution to crimes based on gender, sexual orientation, and disability. We are making current federal law not only more enforceable but are ensuring that this law includes the groups that are victimized by this hate.

The Hate Crimes Prevention Act of 1999 does not interfere with states' rights; rather, it allows federal prosecutors to assist states that do not have the resources to prosecute a case expediently and justly. The act will promote cooperation between the federal government and state governments by removing current federal hurdles and by creating uniformity. Federal prosecutions would be used in only a small number of carefully selected cases.

This act is not about granting special rights. It is about recognizing patterns of hate and ensuring that preexisting federal law is up-to-date and enforceable.

In cosponsoring this legislation, I wanted to add my voice to the growing chorus in this country that violence motivated by prejudice is not acceptable.

STATEMENT OF HON. EDWARD M. KENNEDY, A U.S. SENATOR FROM THE STATE OF MASSACHUSETTS

Senator KENNEDY. Thank you for having these hearings. This is our second hearing on the issue of hate crimes, and we are very hopeful that we will be able to move this legislation forward after we hear from really some excellent witnesses here today.

We commend you for calling this hearing on hate crimes. These vicious crimes continue to shock the conscience of the Nation, and I welcome all the witnesses who are here today. I join you in especially commending Judy Shepard, the mother of Matthew Shepard, for agreeing to appear before the committee. We express our deepest condolences to Ms. Shepard and her family, and words cannot begin to describe the pain of losing a loved one to such a vicious crime. I mentioned to her before the hearing the best way that we can thank her for her presence and testimony today is to pass this legislation.

Clearly, Congress needs to do more to address the issue of hate crimes. We need to give the Federal Government more effective tools to investigate and prosecute these contemptible acts. Last month, it was my privilege to join Senator Specter, Senator Leahy, Senator Wyden, Senator Smith and Senator Schumer in introducing S. 622, the Hate Crimes Prevention Act of 1999. This bill has the support of the Department of Justice, constitutional scholars, law enforcement officials, and many organizations with a long and distinguished history of involvement in combating hate crimes.

Tragically, the silence of Congress on this basic issue has been deafening, and it is unacceptable. We must stop acting like we don't care, that somehow this fundamental issue is just a State and local problem. It isn't. It is a national problem, and for too long Congress has been AWOL.

Few crimes tear more deeply at the fabric of our society than hate crimes. These despicable acts injure the victim, the community and the Nation itself. The brutal murders in Texas, Wyoming, and most recently in Alabama have shocked us all. But, sadly,

these three crimes are only the tip of the hate crime iceberg. We need to do more, much more, to combat them.

I am convinced that if Congress today and President Clinton signed our bill tomorrow, we would have fewer hate crimes in all the days that follow. Current Federal laws are clearly inadequate. It is an embarrassment that we haven't already acted to close the glaring gaps in present law. For too long, the Federal Government has been forced to fight hate crimes with one hand tied behind its back.

Our bill does not undermine the role of the State in investigating and prosecuting hate crimes. States will continue to take the lead, but the full power of Federal law should also be available to investigate, prosecute and punish these crimes.

The Hate Crimes Prevention Act of 1999 addresses two serious deficiencies in the principal Federal hate crime statute, 18 U.S.C. 245, which applies to hate crimes committed on the basis of race, color, religion, or national origin.

First, current law requires the Federal law to prove that the defendant committed the offense not only because of the victim's race, color, religion or national origin, but also because of the victim's participation in one of six narrowly defined federally protected activities enumerated in the statute, such as traveling in interstate commerce, serving as a juror, or attending a public school or college.

Second, the statute provides no coverage for hate crimes based on a victim's sexual orientation, gender, or disability. Together, these limitations prevent the Federal Government from working with State and local enforcement agencies in investigating and prosecuting many of the most vicious hate crimes.

Our legislation addresses each of these limitations. In cases involving race, religion, or ethnic violence, the bill prohibits the intentional infliction of bodily injury without regard to the victim's participation in one of the federally protected activities. In cases involving hate crimes based on a victim's sexual orientation, gender, or disability, the bill prohibits the intentional infliction of bodily injury whenever the act has any connection to interstate commerce. These provisions will permit the Federal Government to work in partnership with State and local officials in the investigation and prosecution of hate crimes.

The Hate Crimes Prevention Act is a needed response to a critical problem facing the Nation. It will make the Federal Government a full partner in the battle against hate crimes. In recognition of State and local efforts, the Act also provides grants to States and local governments to combat hate crimes, including programs to train local enforcement officers in investigating, prosecuting and preventing hate crimes.

I urge the Senate to act quickly on this important legislation, and I look forward to working with my colleagues to bring it to a vote.

The CHAIRMAN. Well, thank you, Senator Kennedy.

Mr. Holder, again, I apologize for being late. I just couldn't be in two places at the same time, and I had to start that bill. So we will turn to you and we look forward to your testimony.

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

Mr. HOLDER. Thank you very much, Mr. Chairman. Mr. Chairman, Senator Kennedy, other 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 preventing and to prosecuting 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 in the forefront of that battle. In 1990 and in 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 S. 622, the Hate Crimes Prevention Act of 1999. The bill enjoys bipartisan support in both the House and in 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. We as a Nation are stunned and horrified at the hatred and brutality of crimes such as the murders of Billy Jack Gaither in Alabama, Matthew Shepard in Wyoming, and James Byrd in Texas. 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 religious institutions, for our civic organizations, and for each one of us as individuals and as Americans. And when we come together to respond to these crimes, we build communities that are stronger, safer, and more tolerant.

There are a number of goals that we must commit ourselves to achieving in order to eradicate hate crimes wherever they occur. First, we must gain a better understanding of the problems. The data that we now have is simply inadequate. In 1977, 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. Eight thousand forty-nine hate crime incidents represents 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 or adequately report hate crimes.

Second, we must learn to teach tolerance and understanding 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 addressing and stopping hate and bias in our schools. I am also very pleased that the Department of Justice 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 on diversity.

Third, we must work together. The centerpiece of the administration's hate crimes initiative is the formation of local working groups in U.S. 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, including training, to respond to the problem. Such cooperative efforts have recently been 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 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.

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, that they are prosecuted swiftly, and that they are punished soundly. Current Federal law, however, is simply inadequate.

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. The current Federal hate crimes law has two serious defects.

First, in even 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 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.

The Hate Crimes Prevention Act of 1999 would amend 18 U.S.C. 245 so that in cases involving race, religious, or ethnic violence, the Federal Government would have jurisdiction to prosecute in cases involving the intentional infliction of bodily injury without regard to the victim's participation in one of six specifically enumerated federally protected activities. This is, I believe, an essential fix.

In my written testimony, I highlight several cases that we have lost because of the federally protected activity, and 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 forensic and laboratory expertise, while the U.S. attorney's 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 second jurisdictional limitation of section 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. Violent hate crimes committed because of the victim's sexual orientation, disability or gender pose a serious problem for our Nation.

From statistics gathered by the Federal Government and by private organizations as well, 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 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.

We also know that a significant number of women are exposed to brutality and even death because of their gender. And Congress, through 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.

Finally, Congress has shown a sustained commitment over the past decade to the protection of persons with disabilities from discrimination based on their disabilities. Indeed, 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.

In cases involving violent hate crimes based on the victim's sexual orientation, gender, or disability, the Hate Crimes Prevention Act of 1999 would prohibit the intentional infliction of bodily injury whenever the incident involved or affected interstate commerce.

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 so that the Federal Government can share its law enforcement resources, forensic expertise and civil rights experience with State and local officials. 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.

We must continue to examine the root causes of hate crime. To move forward as one community, we must work against the stereotypes and prejudices that spawn these actions. 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.

S. 622 would provide this essential tool. The enactment of this statute would significantly increase the ability of State and Federal law enforcement agencies to work together to solve and to 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, I believe, a thoughtful, measured response to a critical problem facing our Nation.

I look forward to answering any questions that any of you might have. Thank you very much.

The CHAIRMAN. Thank you. We appreciate your testimony here today, and we are concerned, naturally, about what best to do.

In your written testimony, you acknowledge that the data we now have under the Hate Crimes Statistics Act are, "inadequate." It is precisely for this reason that I believe that a thorough analysis of additional data, as well as existing data under that Act must be conducted prior to taking the dramatic step of enacting an expansive new Federal law that, under the letter of S. 622, could be used to displace State and local prosecutions of virtually all hate crimes.

Why wouldn't this course of action, together with the other proposals I discussed regarding Federal funding to State and local authorities and development of a model hate crimes statute—why wouldn't that be wiser than adopting a new law based upon what you call inadequate data?

Mr. HOLDER. Mr. Chairman, I think that the proposal that you have made is a very good starting point. I think that 622 goes a little farther, but not inappropriately farther. The purpose of 622 is to try to give us the ability to help State and local authorities in the fight against hate crimes. It is not our intention to displace them. They would still have the primary responsibility in that regard in much the same way that State and local authorities now prosecute gun and drug cases that could be brought into Federal court as well. It is not the intention of 622 or the administration to displace State and local authorities in that regard.

The CHAIRMAN. Well, having said that, I would like to clarify your thinking on when Federal involvement in matters that are traditionally reserved to the States really is warranted, especially in this area, because you have said at various points in your testimony that local law enforcement does, and should continue to have the primary role in prosecuting hate crimes.

Now, those statements would not seem to support enactment of a broad, new Federal hate crime law, since far beyond the conceding the adequacy of State and local authorities, you have praised such authorities as doing, "an enormous job in investigating and prosecuting," hate crimes. So, clarify that for me. When is Federal involvement warranted in these matters that you agree traditionally should be reserved to the States?

Mr. HOLDER. Well, I think Federal involvement is always good in instances where we can help, but I think we would look to find those instances—and it has to be done on a case-by-case basis—where a State or locality would be unable or unwilling to prosecute a case. There are various instances where localities simply do not

have the technical expertise, and we would be able to help in that regard.

There are instances, unfortunately—not very many—where local jurisdictions, for whatever reason, are unwilling to proceed in cases that we think should be prosecuted. And in those rare instances, we think a Federal role is appropriate.

The CHAIRMAN. Mr. Holder, you contend that the enactment of S. 622 would result only in a, "modest increase," if I got it correctly, in the number of Federal prosecutions for hate crimes, which recently has been only about 6 per year, as I understand it——

Mr. HOLDER. That is about right.

The CHAIRMAN [continuing]. But would, "significantly help in our ability to assist local and State prosecutions." Now, my concern is, isn't S. 622 awfully strong medicine for such modest hopes? If all you are after is assistance to State and local authorities, why not advocate a proposal that does precisely that? Now, that is an important question to me because I am looking at these things as broadly as I can, too, and I want to do what is right in this area.

Mr. HOLDER. We not only want to assist, where that is appropriate, and 622 will help us in that regard. We also want to have the ability to prosecute ourselves in those instances where we think there is a basis for Federal involvement, where, as I said before, there is a locality, a State that is unable or unwilling to proceed. Without 622, the Federal Government would not have the ability to enter into those kinds of cases.

The CHAIRMAN. But can you tell me any specific instances in which State law enforcement authorities have deliberately failed to enforce the law against the perpetrator of a crime? I understand that some States do not have hate crime statutes that cover sexual orientation or gender handicap, et cetera, but those States still do, do they not, outlaw the underlying crime? As I understand it, murder and assault are criminalized in every State in the country today.

So the question is can you give me specific instances where the States have failed in their duty? And if they are not failing in their duty, why shouldn't we try to do this in a way that accentuates and augments their ability to do a better job?

Mr. HOLDER. First, I want to emphasize that the vast majority of cases that should be brought are brought by State and local authorities. There are, however, rare instances where that has not occurred. I do not have the ability right now to give any of those cases to you, but I will be more than glad to respond in writing to that question and to outline for you——

The CHAIRMAN. I would like to really put that one to bed, and I think you are in the best position—you and the Attorney General are in the best position to do that because if the States are doing the job, then what is the need for really broad Federal legislation that basically may not be necessary under the circumstances?

So if you will provide that to the committee, I would like to get that sooner rather than later because that is one of the key questions here and one of the key problems that we have to resolve. It is one thing for all of us to decry hate crimes, regardless of what they are. It is another thing to expand Federal jurisdictions in

areas where really we don't need to do so, and probably shouldn't do so.

Authorities in Jasper, TX, secured a death penalty against one of the defendants without using hate crime legislation, while no death penalty is even provided for in S. 622. Isn't it altogether possible, then, that a jurisdiction that does not have a hate crime law might, in actuality, prosecute the same criminal acts more harshly than under a State or Federal hate crimes statute? And if so, how does the prosecution under the hate crimes statute provide a greater deterrent against hate-based criminal conduct?

Mr. HOLDER. Well, again, a determination has to be made on a case-by-case basis. And looking at a particular case, a State penalty might be more appropriate than the Federal penalty that is provided in S. 622. We would look at the fact situations that were presented to us and then determine, in conjunction with our State and local counterparts, where the case could be best brought. We have signed a memorandum of understanding with the National District Attorneys Association to do exactly that kind of thing.

The CHAIRMAN. Would the Department of Justice want to make a determination on every case that comes up as to what to do if you had this bill?

Mr. HOLDER. No, certainly not. I don't think that every case involving hate crimes will be brought to our attention. We would like the ability, however, to use the Federal resources that we have, the expertise that we have developed, the expertise we have in our Civil Rights Division and in our Federal Bureau of Investigation, to bring those to bear in those cases where Federal involvement is appropriate.

The CHAIRMAN. Now, let me ask you about the inclusion of gender in S. 622. Rapists are very seldom indifferent to the gender of their victims. So would you say that all rapists would be covered under S. 622's requirement that the perpetrator of a crime act, "because of," the victim's gender?

Mr. HOLDER. Not all rape cases would be brought in Federal court. Not all assaults on women would be brought in Federal court. Again, we would have to look at the specific facts of a case, see what the State-local response was going to be in that case, and then decide in a very limited number of cases where the Federal Government should take an active prosecutorial role.

Again, if the statute is passed, we would be able to help our State and local counterparts in a technical way with regard, again, to the expertise that we have in the Federal Government.

The CHAIRMAN. Well, despite your claim that the Department of Justice guidelines would limit your prosecution of these cases, is it not true that the statutory language of S. 622 would enable Federal prosecutors to prosecute any rape in which, say, a phone call had first been made by the perpetrator to the victim? Thus, it would meet the instrumentality of the interstate commerce requirement.

Mr. HOLDER. I don't know. I would have to look at that. I mean, there is the interstate commerce connection and that is a very serious thing that has to be proven by the Government beyond a reasonable doubt in connection with gender-based hate crimes. It is possible that if a phone call were made that that might satisfy that element.

That does not mean, however, that there would be the wholesale bringing of rape cases into the Federal system. Again, we will have guidelines within the Justice Department to make sure that we only become involved in those cases where it is appropriate, always looking again to our State and local counterparts to be the primary actors in this regard.

And I would emphasize again that if you look at the way in which our gun laws are constructed, the way our drug laws are constructed, these are cases that could be almost all brought into Federal court. And yet they are not because we exercise discretion in a responsible way and work with our State and local counterparts, and I think that in this regard we would do something very similar.

The CHAIRMAN. Well, thank you. We are holding this hearing in response to my promise last year to hold at least a hearing on hate crimes. But we may need to hold more than this hearing because there are some groups that have felt like they were excluded. Of course, naturally, we only have so much time. We have tried to make sure that people of varying viewpoints have a right to testify. But I appreciate you being here today and your testimony.

We will turn to Senator Kennedy.

Senator KENNEDY. Thank you very much, Mr. Chairman. What we are really talking about are these types of crimes that are so horrific in terms of their nature, they are really not just directed at an individual, but are really directed at a whole community and really the society. I mean, in the case of, as I understand it, the rape, you have obviously got to have the connection in terms of interstate commerce. You have got to have the nexus, but then you have to be able to show the gender animus that is out there.

So this doesn't apply to every rape case. You have got to be able to demonstrate that this is a mind set individuals are going to have on the basis of race or in terms of sexual orientation, or in terms of whatever these criteria are. This was described in an earlier comment today as sort of a modern lynching of a fellow American citizen. I mean, that is the kind of thing that we are talking about, aren't we?

I think the kinds of cases that all come to mind bring that mind set, and it isn't just something that is in a particular location; it is something that scars the Nation. I mean, that is what we are talking about here, it seems to me, and we are setting the criteria by which the Justice Department then will make the judgment in these circumstances that it meets these particular requirements, and in those limited cases is going to demonstrate that it is going to be involved, working with the local community and the State, not superseding them, but it is going to be working with them.

It seems to me that to try to suggest that this is going to just sort of open up—as former Attorney General Ed Meese sort of suggested, look, we have got too many crimes that are up in the Federal jurisdiction; we don't need more. We have got to understand what we are talking about with these circumstances. This goes to the core of our society and what the country is about and whether we are going to take action, whether we are going to permit this. People know what is going on here.

We want to work with our other colleagues here, but this isn't just another issue about jurisdiction on land takings. We are talking about something that reaches the core of our whole society and our values as a society, and constitutionally protected rights in our society as well. I mean, that is what we are talking about, whether we are going to have the full force of our national Government protecting these constitutional rights of our fellow citizens, it seems to me.

But I gather, General, that you don't believe that the number of cases that will be brought will in any way really burden the Federal court system. I mean, as I understand it, the kinds of cases that would be brought would certainly be appropriate that they be brought.

I can remember the testimony we had last year from Lubbock TX, from the district attorney, about three white men and three blacks, and the whites assaulting the blacks and the local district attorney saying this would take nine trials in Lubbock, TX, while the Federal Government could do it all in one and get to the core of what was being really addressed out there.

So I think it is enormously useful for the Justice Department to provide those kinds of cases. Obviously, you won't be able to go back over them and talk to the local people probably about them, but give us those kinds of illustrations. But I gather from what your testimony is, you don't believe that this is an undue burden, or would be, in terms of our Federal judicial system.

Mr. HOLDER. I don't believe so, Senator. The restrictions that are placed in the statute, I think, are appropriate ones. To prove an interstate commerce connection beyond a reasonable doubt is not always a very easy thing to do. I was a Federal prosecutor of public corruption cases, and the Federal extortion statute requires us to prove an interstate commerce connection and that is oftentimes a very difficult thing to prove. There are other checks within the statute—the gender animus that you mentioned with regard to gender-based crimes.

All of these things, I think, in addition to the sound exercise of discretion that we will use in the Justice Department, would minimize the impact on the Federal system. We have also asked for additional resources, not a huge number of prosecutors and agents, but additional resources in order to handle what I think would be a modest increase in the number of cases that we would have to handle.

I would also like to echo one thing that you said, Senator, and that is that we have to view these cases in, it seems to me, the truest context. Matthew Shepard was clearly the victim of a brutal killing. The gay and lesbian community were also victims in that, but we as Americans were diminished by that very act. Our Nation was diminished by that act, and that is why I think a Federal response in these kinds of matters is wholly appropriate.

Senator KENNEDY. Well, I couldn't agree with you more. I firmly believe that this is, as we will hear later from our district attorney from New York, basically a law enforcement issue. This is a criminal issue and it is a constitutional issue, as well as a civil rights issue, and it is one that this country ought to be about.

We always hear around here these marvelous lectures, well, let's just pass another bill; that will really stop everything. And this, we know, will send the message out there that the full resources and commitment in terms of the protection of these constitutional rights and liberties are going to be protected. That is, I think, a core responsibility of the Federal Government; that is a core responsibility. And to deny them, I think we fail our responsibility in this way.

So I would like to submit some questions, too, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Kennedy.

Senator KENNEDY. I thank the General for being up here and for his strong and effective support. Thank you very much, Mr. Holder.

Mr. HOLDER. Thank you, Senator.

The CHAIRMAN. Now, Senator Kennedy raises some important points, and I am very concerned about this. I want to do what is right in this area. I have been led to believe by many in the State and local law enforcement community that they don't need a major new Federal law.

On the other hand, if there is evidence that they are not doing their job or that they are not enforcing the laws that currently exist—see, I happen to think that most people believe that every rape case involves an antigender bias, or mind set, to use Senator Kennedy's words. And that will be argued in every rape case if S. 622 passes.

It may be that 622 is what needs to be done, but the fact of the matter is your providing this information is absolutely critical to me because I don't want any hate crimes to exist in our society, but I also don't want to overdo the law if hate crimes can and are being handled effectively and in good ways by the State and local people, and the Federal Government where it does have laws currently on the books.

I want to thank you for being here. We always appreciate you coming up here and testifying to us, and we will submit additional questions and we will keep the record open for additional questions.

We will turn to Senator Specter and then we will move on to the next panel.

Senator SPECTER. Thank you very much, Mr. Chairman.

We were just conferring. I had gotten a note from Senator Hatch that he had other commitments and asked me to join to pick up on the chairman's——

The CHAIRMAN. I am going to leave in just a few minutes, but I would like to introduce the second panel and at least stay for a couple of the witnesses, if I can. But it is my bill on the floor, so I pretty well have to get back there.

Senator SPECTER. Well, the schedules here, as you know, Mr. Holder, have us in a lot of directions. I have just come from a Defense appropriations subcommittee with Secretary of Defense Cohen and General Shelton trying to figure out how much money to give on the conference on appropriations this afternoon. So there are many, many items which occupy our attention.

I, of course, have missed the testimony so far, and I hope I am not covering old ground, but on the hate crime legislation which I have cosponsored, it seems to me that it is important to have the

backdrop of Federal jurisdiction where it is not limited to show the deprivation of a civil right, which is a highly technical matter which could impede the Federal Government coming in.

And I strongly believe that prosecutions ought to be maintained at the local level, and I have maintained that since my days as district attorney of Philadelphia when I strongly resisted either the State attorney general or the U.S. Department of Justice coming into a field where there was jurisdiction by the local prosecutor.

But when we deal with these hate crimes, we find that they are really hot potatoes, and in many cases the local prosecutors are unwilling to handle them because they involve very highly sensitive issues where there is very strong community feeling against people based on racial grounds, based on sexual orientation, based on other grounds which ought not to be considered where you have a criminal prosecution.

And my question to you would be to what extent the Department of Justice experience which you have seen shows that the local prosecutors do shy away from these very sensitive, hot potato kinds of cases, and that it is an unusual area where you need to have the backdrop of Federal prosecution, which may come not from the local community where these pressures are so intensely felt.

Mr. HOLDER. I actually think it is fairly rare where we have hate crimes where local prosecutors, for inappropriate reasons, decide not to pursue them. I think we see more instances where there is an inability to prosecute in an effective way these kinds of cases, which is not to say, however, as you indicated, that there are sometimes cases, unfortunately, that for a variety of reasons that I would consider inappropriate——

Senator SPECTER. Why an inability, Mr. Holder?

Mr. HOLDER. Well, sometimes not the technical expertise. I mean, if we look, for instance, at what happened in Jasper, and if you talk to the DA down there or the police down there, they will indicate to you that the help of the Federal Bureau of Investigation in doing forensic kinds of things was critical in making that case successful. The ability that we shared with them in the sentencing phase was also, I think they would say, of great assistance to them. There are technical things, there are other resources that we can bring to help State and local prosecutors, who will be the primary actors even after 622 was passed.

Senator SPECTER. To what extent do you find racial animus a limiting factor for local prosecutions in some areas in the country? It is a sad thing that 45 years after *Brown* v. *Board of Education* that the racism is still with us, but I don't think there is any denying it. And we see it in so many activities. We see it in election campaigns, we see it in all levels in our society. We see it in personal relationships, and I think we see it in criminal prosecutions as well. We have these specific incidents of African-Americans being targeted. To what extent is that a factor that limits local prosecutions, in your opinion?

Mr. HOLDER. I think the vast majority of State and local DA's do the right thing, but the passage of this statute will allow us, the Federal Government, to serve as a backdrop in those instances that I think are fairly rare, but in those instances where, for whatever

reason, a State or local prosecutor does not do the right thing, does not prosecute a case where a hate crime is based on race.

We now have an inability to get involved in those instances because we have those federally protected activities that we have to meet. Were those gone, I think we would feel—our Nation would feel fairly confident that at some level, all those kinds of cases would be prosecuted either by State and locals or by the Federal Government. We are prevented at this point from intervening in many of these cases where our intervention would be appropriate.

Senator SPECTER. There has been a special upsurge in violence against individuals because of sexual orientation, really sort of shocking as to what has occurred. To what extent is that a factor? Has that overtaken race as the biggest problem on the so-called hate crimes agenda?

Mr. HOLDER. I am not sure what our statistics show. Senator, I would be more than glad to share information with you. I am sure we have something back in the Department. But I think that the problem of hate crimes based on sexual orientation is one that I think has always been with us, one that I think we have given increasing attention to in recent years, and one that frankly disturbs me a great deal.

Senator SPECTER. You think it has always been with us? I think it is a lot more intense now, perhaps because there is more of a willingness of people who have differing views to step forward. But the intensity of those crimes has stepped up enormously since my days as district attorney in Philadelphia. It was really unheard of, and now it is regrettably very, very frequent.

Mr. HOLDER. I think it has become more frequent, but I am not at all certain that it is something that was, in the past when we did not have the gay rights movement, where people were reluctant to come forward and to report these incidents for a variety of reasons—I mean, I think that is certainly one of the positive aspects of the gay rights movement, people unafraid to say that I was attacked because I was a gay man, I was a gay woman.

I think that is at least one of the reasons why I believe there has always been that kind of violence and why we now see it more widely reported, though I will agree with you that in a lot of ways the intensity of the attacks that we have seen in recent years is different from what perhaps we have seen in the past.

Senator SPECTER. How about other hate crimes? To what extent do we find hate crimes against people because of religious beliefs?

Mr. HOLDER. We still see that. You know, we see too often instances of swastikas and things painted on the houses of Jewish people. I see it on local television here in Washington at least two, three times a year, it seems, things done to schools. We as a Nation have made great progress, and yet some people still engage in that conduct that the vast majority of us find to be reprehensible. So I still think that is a problem for us as a Nation.

Senator SPECTER. When I was a freshman at the University of Oklahoma, member of Pi Lambda Phi, which was a Jewish fraternity, there was a swastika painted on our sidewalk, a sharp reminder. That was the day when Adelo Ascipial tried to get into the University of Oklahoma Law School. They had a separate law school in Oklahoma City and they decided they couldn't afford it,

so they brought her down to Norman, OK. But they wouldn't put her in a classroom. She was African-American. They wouldn't put her in a classroom with white students, so they put her right outside the door so that she could look in but wouldn't be in the room. And then when that didn't work out, they put her inside the room and built a little playpen around her so she would be isolated.

And one of my fraternity brothers, Howard Friedman, went out to the mall at the University of Oklahoma and they burned the Constitution, and had the postman there to send it to President Truman—see, this was a long time ago—because the Constitution didn't exist in Oklahoma. And then they took the little playpen down and Adelo Ascipial went to school with everybody else. So it took some time.

Well, I commend you, Mr. Deputy Attorney General, for your work in this field and for the Department's strong support for this legislation. As soon as we get Senator Hatch on board, we will get it passed. [Laughter.]

Mr. HOLDER. Thank you, Senator.

The CHAIRMAN. Keep working on me.

I want to thank you for being here, Mr. Holder. We appreciate you taking the time.

Mr. HOLDER. Thank you, Mr. Chairman.

[The prepared statement of Mr. Holder follows:]

PREPARED STATEMENT OF ERIC H. HOLDER, JR.

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 S. 622, 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 trail on first-degree murder charges. And last June, the nation was horrified by the dragging death of James Byrd, Jr., an African-American man. 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 religious 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 and 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. Next week, Bill Lann Lee, the Acting Assistant Attorney General for Civil Rights, will attend a conference in Ogden, Utah, entitled "The Changing Faces of Hate." This conference, sponsored by the Utah U.S. Attorney's Office, the Simon Wiesenthal Center, Weber State University and the Utah Task Force for Racial and Ethnic Fairness will explore the ways communities can come together to eradicate these horrendous crimes and educate communities about understanding and tolerance.

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 motivation 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 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 percent arrest rate is more than double the normal 16 percent rate of arrest in all arson cases nationwide, most of which are investigated by local officials without federal assistance. More than 80 percent 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 a 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 v. 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 occurred in April, when the co-chairs of the Church Arson Task Force joined U.S. Attorneys in Indiana and Georgia to announce the indictment of a defendant for ten fires in those two states, 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 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. The investigation continues in many other districts, 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]

S. 622, 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. Earlier this month, 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 S. 622 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.

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,

[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.

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.

Although a number of federal prosecutions under § 245 have been successfully pursued, even those successes highlight the arbitrariness of the coverage of the federal statutes. For example, in 1996, five skinheads were successfully prosecuted under § 245 for brutally assaulting an interracial couple in a city park in Des Moines, Iowa. Had the victims been standing outside the park instead of sitting on a bench inside the park entrance, it is likely that the assault could not have been prosecuted federally.

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.

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.

a. 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 hos-

tile 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.

b. 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

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[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.

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 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.

c. 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 S. 622 and concludes 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

[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.

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 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 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 S. 622, 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 decide) 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 S. 622 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 trainings, we have provided Training and Technical Assistance to a dozen or more national juvenile prevention groups and organizations, including the

[8] See 18 U.S.C. § 245(a)(1).

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 S. 622 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.

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

The CHAIRMAN. We are very pleased to welcome the members of the second panel, and I am very grateful to Senator Specter for being willing to chair the remainder of these hearings because of the pressures I have.

First, we will hear from Ms. Judy Shepard, to whom I have already expressed my heartfelt condolences, as well as my deepest thanks for being willing to appear before us today.

Then we will hear from Jeanine Pirro, who has served for more than 8 years as district attorney of Westchester County, in New York, and who, before that time, sat as a county court judge hearing criminal matters.

We will then hear from Kenneth Brown, who for approximately 10 years has served as a prosecutor in Wyoming's Albany County and whose office is now undertaking the prosecution of the terrible crime against Matthew Shepard.

Mr. Robert Knight will follow. He is the senior director of cultural studies at the Family Research Council. Then we will hear from Prof. Burt Neuborne, of the New York University Law School, and then from Prof. Akhil Amar of Yale Law School.

We are really pleased to welcome all of you here. We appreciate seeing a number of you again and we look forward to hearing every one of your testimonies here today. I particularly would like to stay for you, Ms. Shepard. I should have left a while ago, but I wanted to hear what you have to say, and then we will turn the chair over to Senator Specter.

So we will turn to you, Ms. Shepard, and then maybe I can just make one comment and ask one question.

PANEL CONSISTING OF JUDY SHEPARD, CASPER, WY; JEANINE FERRIS PIRRO, WESTCHESTER COUNTY DISTRICT ATTORNEY, WHITE PLAINS, NY; KENNETH T. BROWN, CHIEF DEPUTY AND PROSECUTING ATTORNEY FOR ALBANY COUNTY, LARAMIE, WY; ROBERT H. KNIGHT, DIRECTOR OF CULTURAL STUDIES, FAMILY RESEARCH COUNCIL, WASHINGTON, DC; BURT NEUBORNE, JOHN NORTON POMEROY PROFESSOR OF LAW, NEW YORK UNIVERSITY SCHOOL OF LAW, NEW YORK, NY; AND AKHIL REED AMAR, PROFESSOR OF LAW, YALE LAW SCHOOL, NEW HAVEN, CT

STATEMENT OF JUDY SHEPARD

Ms. SHEPARD. Thank you, Mr. Chairman, Senator Specter, other members of the committee. My name is Judy Shepard and I am

from Casper, WY. My husband Dennis and I are currently living in Saudi Arabia, where he works for an oil company.

Today, I sit before this committee to urge the passage of the Hate Crimes Prevention Act. My son Matthew was the victim of a brutal hate crime, and I believe this legislation is necessary to make sure no family again has to suffer like mine. I know this measure is not a cure-all and it won't stop all hate violence, but it will send the message that this senseless violence is unacceptable and un-American. It will let perpetrators of hate violence know their actions will be punished.

To help you understand how this event has transformed and impacted our family, I would like to briefly tell you about Matt. You need to see him as we do to try and understand our loss. However, I am not sure we really understand it yet.

Matt would be the first to say he was not a perfect child. He made mistakes, but those mistakes hurt no one but himself. He had such hopes for the future, his future. He was anxious for the next stage of his life to begin. Every new step meant new challenges, new friends, and new experiences. I love him more than I can express in this statement. He was my friend, my confidante, my consistent reminder of how good life can be, and how hurtful.

On October 8, my husband and I were awakened in the middle of the night in Saudi Arabia by a telephone call no parent should ever have to receive. What we heard changed our lives forever. Our son, we were told, was in a coma after having been brutally attacked, in part because he was gay. Dennis and I flew back to the States and met up with our youngest son Logan.

In Matt's room at the hospital, what we found was a motionless, unaware young man with his head swathed in bandages, his face covered with stitches, and tubes everywhere enabling the body to hold on to life. One of his eyes was partially open, but the twinkle of life was there no more.

Logan at first refused to go into the room. He didn't want this picture to be the one that came to mind when he thought of Matt. However, he soon realized this was probably the last opportunity he would have to say goodbye. We could see him talking to Matt and stroking his face while holding his hand.

On October 12, Matt was pronounced dead, and I can assure opponents of this legislation firsthand it was not words or thoughts, but violent actions that killed my son. Matt is no longer with us today because the men who killed him learned to hate. Somehow and somewhere, they received the message that the lives of gay people are not as worthy of respect, dignity and honor as the lives of other people. They were given the impression that society condoned, or at least was indifferent to violence against gay and lesbian Americans.

Today, we have it within our power to send a very different message than the one received by the people who killed my son. It is time to stop living in denial and to address a real problem that is destroying families like mine and James Byrd Jr.'s and Billy Jack Gaither's and many others across America. It is time to pass the Hate Crimes Prevention Act.

Opponents of this bill will say that the men who killed Matt will be punished with life in prison or even the death penalty. What

more could a new law do, they ask. Maybe nothing in this case, but we will never know, will we? Perhaps these murderers would have gotten the message that this country does not tolerate hate-motivated violence. Maybe I would not have to be here today talking about how my son was savagely beaten, tied to a fence and left to die in freezing temperatures.

I want to take a moment to offer my thanks to the dedicated law enforcement officers in Wyoming, in particular in Laramie, who worked so hard to ensure justice for my family. We will never forget your commitment, assistance and compassion in this most difficult time of our lives. But not every family who is victimized by hate violence will be as fortunate as ours. Law enforcement sometimes lacks personnel, resources, or the determination needed to properly investigate and prosecute hate crimes.

The Hate Crimes Prevention Act would serve as a tool for law enforcement, allowing Federal assistance where it is most needed. It is cruel and unjust to tell suffering families who need Federal assistance that there is no place they can turn for help. Contrary to what some people may say, the Hate Crimes Prevention Act does not play one victim's life above another. It is the denial of justice that treats some victims and their families unequally.

The Hate Crimes Prevention Act does not increase punishment, but it can help ensure all crimes are taken seriously, no matter who the victims are, what they look like, or where they live. The Hate Crimes Prevention Act will also expand the circumstances where Federal intervention can occur. Under current law, a hate crime can be federally prosecuted only if it takes place on Federal property or because the victim is exercising a federally protected right, such as enrolling in school or serving as a juror. These limitations can tie the hands of those investigating and prosecuting hate crimes, as well as deny families the assistance they need.

While State and local authorities have, and will continue to play the primary role in the investigation and prosecution of hate violence, Federal jurisdiction would provide an important backstop to ensure that justice is achieved in every case. The Hate Crimes Prevention Act limits the Federal Government's jurisdiction to only the most serious violent crimes against people, not property.

Today, I not only speak for myself, but for all the victims of hate crimes you will never hear about. Since 1991, hate crimes have nearly doubled. In 1997, the FBI's most recent reporting period, race-related hate crimes were by far the most common, representing nearly 60 percent of all cases. Hate crimes based on religion represented 17 percent of all cases. Hate crimes against gay, lesbian and bisexual Americans increased by 8 percent, or 14 percent of all hate crimes reported. We need to decide what kind of Nation we want to be, one that treats all people with dignity and respect or one that allows some people and their family members to be marginalized.

I know personally that there is a hole in my existence. I will never again experience Matt's laugh, his wonderful hugs, his stories. I know Matt would be very disappointed in me if I gave up. He would be disappointed in all of us if we gave up.

Today, we can make a powerful statement and help create a climate that fosters the emergence of a more tolerant America. On be-

half of my family, I call on the Congress of the United States to pass the Hate Crimes Prevention Act without delay. If even one family could avoid getting that phone call in the middle of the night because of this legislation, then it would be well worth it.

Thank you, Senators.

The CHAIRMAN. Well, thank you, Ms. Shepard. I wanted to stay to hear your testimony. I wish I could stay for all of your testimonies, but I will read them and pay strict attention to them.

I want to commend you for your strength and your courage in coming here today. You have endured with such grace and dignity the difficulties you have had. This is a trauma that no mother should ever have to face or to ensure. I can only say that your actions and your words on behalf of your son Matthew do him the greatest honor, so we are grateful to have you here.

I am very concerned about this area, very concerned that we are not doing everything we should do. On the other hand, I am very concerned that we may be doing more than we should do, too; in other words, that the States are capable and do do a good job in these areas, and local governments. So it is a very tough set of questions for me, but I am going to do everything in my power to try and resolve them in the right way for all concerned.

I am just very grateful to Senator Specter for being willing to chair the remainder of this hearing. I want to thank all of you for being here, but above all, you, Ms. Shepard. You have my deepest sympathy.

Ms. SHEPARD. Thank you, Mr. Chairman.

The CHAIRMAN. Before I leave, we will put Senator Leahy's statement in the record at the appropriate place.

[The prepared statement of Senator Leahy follows:]

PREPARED STATEMENT OF HON. PATRICK LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

I commend Senator Kennedy for his leadership on the "Hate Crimes Prevention Act" and I am proud to cosponsor it. This bill would amend the federal hate crimes statute to make it easier for federal law enforcement officials to investigate and prosecute cases of racial and religious violence. It would also focus the attention and resources of the federal government on the problem of hate crimes committed against people because of their sexual preference, gender, or disability.

As the Ranking Member of the Judiciary Committee, I have worked with Senator Kennedy for some time on this issue and on this hearing, which was initially announced in March to be taking place in April. I regret that it was unnecessarily postponed, and I hope that we can make progress today on this important problem.

Violent crime motivated by prejudice demands attention from all of us. It is not a new problem, but recent incidents of hate crimes have shocked the American conscience. The beating death of Matthew Shepard in Wyoming was one of those crimes, the dragging death of James Byrd in Texas was another. The recent murder of Billy Jack Gaither in Alabama appears to be yet another. And the singling out and brutal killing of Isaiah Shoals in Columbine High School in Littleton, Colorado may be another. These are sensational crimes, the ones that focus public attention. But there is a toll we are paying each year in other hate crimes that find less notoriety, but with, no less suffering for the victims and their families.

It remains painfully clear that we as a nation still have serious work to do in protecting all Americans and ensuring equal rights for all our citizens. The answer to hate and bigotry must ultimately be found in increased respect and tolerance. But strengthening our federal hate crimes legislation is a step in the right direction. Bigotry and hatred are corrosive elements in any society, but especially in a country as diverse and open as ours. We need to make clear that a bigoted attack on one or some of us diminishes each of us, and it diminishes our nation. As a nation, we must say loudly and clearly that we will defend ourselves against such violence. We

recently witnessed in the school violence in Colorado what hatred inspired violence can do.

All Americans have the right to live, travel and gather where they choose. In the past we have responded as a nation to deter and to punish violent denials of civil rights. We have enacted federal laws to protect the civil rights of all of our citizens for more than 100 years. This continues that great and honorable tradition.

Several of us come to this issue with backgrounds in local law enforcement. We support local law enforcement and work for initiatives that assist law enforcement. It is in that vein that I support the Hate Crimes Prevention Act, which has received strong bipartisan support from state and local law enforcement organizations across the country.

When the committee takes up the issue of hate crimes, one of the questions that must be addressed is whether the bill as drafted is sufficiently respectful of state and local law enforcement interests. I welcome such questions and believe that Congress should think carefully before federalizing prohibitions that already exist at the state level.

To my mind, there is nothing questionable about the notion that hate crimes warrant federal attention. As evidenced by the national outrage at the Byrd, Shepard, Gaither and Schoals murders, hate crimes have a broader and more injurious impact on our national society than ordinary street crimes. The 1991 murder in the Crown Heights section of Brooklyn, New York, of an Hasidic Jew, Yankel Rosenbaum, by a youth later tried federally for violation of the hate crime law, showed that hate crimes may lead to civil unrest and even riots. This heightens the federal interest in such cases, warranting enhanced federal penalties, particularly if the state declines the case or does not adequately investigate or prosecute it.

Beyond this, hate crimes may be committed by multiple offenders who belong to hate groups that operate across state lines. Criminal activity with substantial multistate or international aspects raises federal interests and warrants federal enforcement attention.

Current law already provides some measure of protection against excessive federalization by requiring the Attorney General to certify all prosecutions under the hate crimes statute as being "in the public interest and necessary to secure substantial justice." We should be confident that this provision is sufficient to ensure restraint at the federal level under the broader hate crimes legislation that we introduce today. I look forward to examining that issue and considering ways to guard against unwarranted federal intrusions under this legislation. In the end, we should work on a bipartisan basis to ensure that the Hate Crimes Prevention Act operates as intended, strengthening federal Jurisdiction over hate crimes as a back-up, but not a substitute, for state and local law enforcement.

Recently the Senate honored Rosa Parks with a medal for her role in the civil rights movement. Ms. Parks is now a resident of Michigan because, as Senator Levin explained, she and her family felt unsafe based on the harassment she experienced in another state. A lasting tribute to Rosa Parks would be not only to honor the past but to work to improve the present and future. The Senate should take action consummate with the great tradition of equality in the nation by passing the Hate Crime Prevention Act of 1999.

The CHAIRMAN. We will turn to you, then, Ms. Pirro. I am sorry I have to leave, but I look forward to reading your testimony anyway.

Senator SPECTER [presiding]. Before District Attorney Pirro starts to testify, just a comment or two, Ms. Shepard. I am very, very sorry to see what happened to your son.

Ms. SHEPARD. Thank you, Senator.

Senator SPECTER. It was a great tragedy, and I compliment you for stepping forward. I know it is very hard for you to come and to testify. That is obvious. But I think that what happened to your son could set an example for the country, really for the world. The brutality and the callousness of it and the tragedy of it has moved a lot of people, and your son's case and others could be a great impetus for getting this legislation passed.

And make no mistake about it, when the Federal Government is involved, it is different, it is different. The Federal Government

brings resources and power and a level of activity which is very, very significant. So we thank you.

Ms. SHEPARD. Thank you, Senator.

Senator SPECTER. District Attorney Pirro, we welcome you here. You have the second best job in government. The best job in government, from my experience, has been being an assistant district attorney.

STATEMENT OF JEANINE FERRIS PIRRO

Ms. PIRRO. Well, I have always believed that I do have the best job in government. Thank you very much, Senator.

Senator SPECTER. We look forward to your testimony. You may proceed.

All statements will be made a part of the record, and we shall limit you to the 5 minutes. Thank you.

Ms. PIRRO. I was invited here today by both Republican and Democratic members of this committee, and I am grateful that Senators from both parties are willing to listen to and consider the perspective of a local prosecutor, albeit it one from a county with almost a million people. I am here as an individual, as a mother of two children, and as a law enforcement officer with a quarter century experience as a prosecutor and a judge.

The vast majority of criminal prosecutions in this country are brought by local prosecutors. That is the way our government is structured and that is the way it should remain. I am pleased to note that counsel on both sides of the aisle indicate that regardless of any congressional action here, State and local officials should retain principal responsibility for hate crime investigations and prosecutions.

As a prosecutor, I am concerned about the proliferation of companion Federal crimes in areas where State criminal statutes are sufficient. As a Republican, I am reluctant to endorse the creation in Washington a bigger, broader bureaucracy. And as an American, I am hesitant to delegate decisions basic to the security of my community to officials who are not directly accountable to that community. However, there are times when States are unable or unwilling to recognize and address fundamental issues vital to our society. And when that time comes, the Federal Government must act.

Hate crime is a civil rights issue, and the proper role of the Federal Government in controlling this menace should mirror Federal action in other areas of civil rights. In the 1960's, there were States that were unwilling to guarantee equal rights to all Americans, and so citizens across our Nation responded by raising their voices in a cry for justice. People marched in small groups and large. They convened in local churches and synagogues, on college campuses, and they gathered on the great Mall here in Washington. Eventually, our Government declared that civil rights cannot be allowed to fall prey to bigotry and intolerance. Senator, we are still marching.

Thirty-five years after Federal civil rights laws were enacted, men and women, young and old, constituents of every walk of life who reside in each of your States and in mine, continue to be targeted by those who breed hatred and dissension because of the color of their skin, their heritage, their religious affiliation, their

disability, their gender, or perceived sexual orientation. And some of our States remain unmoved by this human tragedy.

As district attorney of Westchester County, I have seen far too many violent crimes motivated by hatred and bigotry. I have seen the planting of explosive devices, assaults, and other hideous acts. In an incident police categorized as a hate crime, an African-American man was shot and killed over a parking space in a small community in Westchester.

And I have also prosecuted and convicted those who have stabbed other persons simply because they were Hispanic, because they were Dominican, or because they were a member of a specific minority community. We have prosecuted cases against those who beat victims with a bat, who attack young men with box cutter knives, and who shoot others in the hand only because their victims were African-American.

As president-elect of the New York State District Attorneys Association, together with New York Governor George Pataki, I have crusaded for a New York State law that would enhance the penalty for crimes of hatred. I have marched with local community members 2,000 strong, Christians and Jews, African-Americans and caucasians, men and women of every segment of our society, shoulder to shoulder, to protest acts of hatred that destroy the very foundation of our community.

The statistics on hate crimes are clear. States that have enacted comprehensive hate crime statutes provide prosecutors and police with the tools necessary to confront these criminals. Last year in New York, a State without comprehensive hate crime laws, anti-Semitic incidents were higher than in any other State in the Union. African-Americans remain the target of racially-motivated violence, notably the 38-year-old Albany woman shot in the neck as she stood outside a friend's house by two white youths prowling a black neighborhood looking to shoot an African-American. And as we all know, the torching of traditional black churches, a relic of decades past, is still with us.

And criminal acts targeted at gays and lesbians continue to rise. Last year, a New York City man was verbally abused, chased and severely beaten by three assailants yelling antigay slurs. He was attacked with a bottle and ultimately lost his eye.

There are those who argue that hate crimes legislation provides special rights for select victims. I can assure those naysayers that once a crime of violence takes place, no criminal legislation can restore to the victim what they have lost. We are all entitled to a sense of safety and security, and after a violent act the best that a victim can hope for is justice.

But unlike an assault, an assault motivated by hatred targets and injures not only the intended victim, but also the entire community that has been terrorized by this act.

Senator SPECTER. Ms. Pirro, could you summarize your statement at this point?

Ms. PIRRO. I maintain hope that Federal action on this pressing issue will encourage States like New York to enact legislation of their own in much the same way that States enacted civil rights legislation. And although I have no illusions that hate crime laws will end hatred, I believe that it is important for us to send a mes-

sage that our society is founded on freedom and tolerance, not on violence and divisiveness.

Thank you.

Senator SPECTER. Thank you very much, DA Pirro. We very much appreciate your being here.

We turn now to Kenneth Brown, chief deputy and prosecuting attorney for Albany County, Laramie, WY. Welcome, Mr. Brown, and the floor is yours.

STATEMENT OF KENNETH T. BROWN

Mr. BROWN. Thank you, Senator Specter, fellow witnesses and interested persons. Thank you for allowing me this opportunity. I would like to begin by stating that it is certainly an honor to follow Judy Shepard. She and her husband have had to persevere through an unimaginable tragedy, and have courageously and industriously heightened awareness of the terrible toll which hate crimes exact upon our Nation.

As introduced, I am Ken Brown, chief deputy prosecutor in Laramie, WY. It is our office which has been and currently is involved in the prosecution of the men responsible for Matthew Shepard's death. Laramie is located in southeastern Wyoming and is approximately 25,000 in population. We are not a university town in Wyoming; we are the university town.

I believe it is proper to outline the dynamics of our office. We are three attorneys in number. Two deputies assist the elected county attorney. We are on call 24 hours a day. Each attorney in our office handles felonies, misdemeanors, juvenile matters; provides civil advice to our Board of County Commissioners; and is basically prepared to address any legal situation which may develop in Albany County. There are no separate divisions, no departments, no administrative levels.

We do not second-chair one another's trials because we simply cannot afford the time away from our own caseload. As such, we handle thousands of criminal matters over the course of a term of office. Several have been the focus of national attention, such as the Matthew Shepard case. I am proud to be a prosecutor in Albany County simply because Wyoming's people possess a sound work ethic, an enlightened view of fairness and justice, and truly embrace traditional American values. Hate is not a Wyoming value.

There has been an extremely positive response within the community to the tragic death of Matthew Shepard. Wyoming's single greatest resource, its people, and specifically the citizens of Albany County, have stood solidly behind the prosecution of this matter and will continue to do so until a just disposition is achieved.

However, a case of this magnitude and import puts a financial strain on our county like nothing else we have experienced. It is not extraordinary for a case like the Shepard matter which has a death penalty component to cost $100,000, $150,000, or more. With jury sequestration, huge witness costs and heightened 24-hour security, we easily exceed our annually anticipated budget 10-fold. Our county commissioners are left struggling to approve $80 vouchers. Bills can't be paid. Growth and development are hindered, if not reversed, in our county. The money simply isn't there. Yet, we

cannot and will not compromise justice, given these financial constraints.

As the Shepard matter progressed through stages of growing media focus, our office was contacted by numerous representatives of the Federal Government—the FBI, the U.S. Marshals Office, the Nation's Attorney General, and even our Chief Executive. We were wished well and told that we could count on the Federal Government for support, including financial support. Our county commissioners were told that money would be made available for these inherent trial expenses.

By the fifth day of jury selection in the Russell Henderson trial, we had not received a dime. Federal personnel had stopped contacting our office, and the only thing that we did receive was some advice. The advice Janet Reno's office offered was that we wear blue shirts, as they appeared better on television cameras. We then asked the Federal Government when the money would be there and we were told that someone who had lacked the authority had made these representations to us.

So, Senator, what Albany County needs is not a bill that promises us people or that discusses law enforcement officer training. Albany County has all the capable personnel necessary to successfully prosecute their own criminal offenses. Our local law enforcement agencies have a time-proven ability in providing courthouse security, witness transportation, and in keeping sequestered juries safe and free from outside influence.

We don't need brand new players on our team, unfamiliar with the territory and at a huge additional expense to taxpayers. Our detectives and investigators offer a quality work product that simply cannot be enhanced by outsiders. And our prosecutors are, first and foremost, trial attorneys capable of handling any criminal violation of Wyoming statutes and bringing about successful prosecution of those cases.

So save our taxpayer dollars; keep your teams of Federal bodies; save your education, as we have the ability to recognize statutory offenses. Instead, provide small prosecuting offices like ours with financial assistance. Give us the ability to remain tough in our posture against local crime in those cases where hate rears its insidious head. You can do nothing more to help prosecuting offices, law enforcement agencies, and small, decent communities like Laramie, WY, all across this Nation.

Thank you.

Senator SPECTER. Thank you very much, Mr. Brown.

We turn now to Mr. Robert H. Knight, Senior Director of Cultural Studies, Family Research Council, here in Washington. Thank you for joining us, Mr. Knight, and the floor is yours.

STATEMENT OF ROBERT H. KNIGHT

Mr. KNIGHT. Thank you, Senator Specter. Family Research Council represents more than 450,000 families around the Nation, and I have also been told we speak for many other pro-family groups particularly on this issue.

I would like to point out right off the bat that we believe every violent crime should be prosecuted under the fullest extent of the law. Certainly, Mr. Shepard's crime should have been prosecuted

under the fullest extent of the law, and apparently it was, and that is the way things should be. Mr. Byrd's crime in Texas, the same thing.

I do find troubling that nobody has mentioned Littleton, CO, in this whole proceeding because under this proposed legislation some of the victims of the Littleton shootings would not have been covered because they were targeted because they were athletes. I think every murder is a hate crime. Every crime against a person should be prosecuted as fully as the next crime.

In Wyoming, 8-year-old Kristen Lamb was abducted, raped, murdered and dumped in a landfill last July. Yet, according to Governor Jim Geringer, who appeared on CNN, her death didn't even make a blip in the national press. So we have to ask why. Well, her death was not a politically correct crime, as many crimes are not. Run-of-the-mill crime victims don't have a lobby. They don't have people to speak for them and say this crime is more horrendous than another crime.

I am amazed at Senator Kennedy. He is not here to defend his remark, but he said that—and I think I am correct in saying this—he said that not every rape involves gender animus. You know, I can't imagine, if a woman were here who had been raped, she could take the Senator seriously. Every rape is a crime against all women. It is a crime against the community. It sends communities into sheer panic. When a child is snatched and abducted and molested, which happens thousands of times a year in this country, that is a crime against the whole community. Yet, that wouldn't be covered under this.

The whole concept of hate crimes is flawed because it sets up special classes of victims afforded a higher level of government protection than others victimized by similar crimes. That violates the concept of equal protection. It politicizes criminal prosecutions.

Mr. Holder said that he wanted the option of intervening in cases that he thought were particularly important and that the Federal Government ought to be able to do that. That means there would be great pressure on local law enforcement agencies to do cases that the Federal Government thought were important. That could take resources away from the run-of-the-mill crime victim who doesn't have a lobby behind him or her.

It would vastly expand the power and jurisdiction of the Federal Government to intervene in local law enforcement matters. And, finally, it would have a chilling effect on freedom of speech by making unpopular ideas a basis for harsher treatment in criminal proceedings. Over half of the hate crimes in the last Justice Department report were categorized as simple assault or name calling. This bill basically would make name calling literally a Federal case.

The definition of what constitutes a hate crime, while unclear is some instances, is very clear in others. One of the problems with this whole concept is the matter of blame. Following Family Research Council's ad campaign, which we called the Truth in Love Campaign, which ran with several other pro-family groups, that said that homosexuals are loved by God and have dignity because they are creations of God in his image, and therefore deserve the

truth, the truth that can set them free—that was denounced as hateful rhetoric.

In fact, observers like Katie Couric actually tied poor Mr. Shepard's killing to our ad campaign preaching the gospel of Jesus Christ. This disturbs us greatly. On the one hand, we are told that hate causes crime, and on the other hand we are told that spreading the gospel of Jesus Christ is a form of hate. Now, we are looking at a drive to silence opposition to homosexual activism. That is another reason we oppose this bill.

We are not the only ones. The Washington Post has editorialized against this bill because they think it will create the concept of thought crime, the idea that the attitude of the perpetrator is more important than what actually happens to the victim. The Post is joined by William Raspberry, Clarence Page, Michael Kelly, Nat Hentoff, other liberal columnists who are waking up to the fact that, while well-intentioned, because none of us wants hate crimes, none of us wants people abused, a law like this could be greatly abused. It could lead to charges of incitement against people who merely oppose homosexual activism.

In Canada, it is already illegal to broadcast criticism of homosexuality over the airwaves. Now, they don't have a first amendment as we do, but I think the examples that have occurred in Canada are chilling. A mayor in Hamilton, ON, was told he was committing a hate crime because he wouldn't pronounce Gay Pride Week. He just said, gee, it is a blue-collar town I am the mayor of, and there are a lot of Catholics; they probably wouldn't appreciate it. They threatened him with a $5,000 fine. This is the kind of intimidation that we fear will occur in this country if legislation like this goes forward, because it never stops with one bill.

The first Hate Crimes Act was restricted because the people who put it into effect didn't want the Federal Government to get out of hand. Now, people come back later and say, well, let's expand Federal powers this much more. Let's expand Federal power. That is the mantra, and I think that is something that should send a chill down every American's back.

Finally, I would like to say that I would have liked to have had some victims here. We put them forward as witnesses, people who have been in jurisdictions where there are hate crimes laws and they have been used against those victims themselves. They couldn't be here. They weren't accepted, but if Mr. Hatch is true to his word that he may have more hearings, I hope we can put them forward.

Thank you very much for your time.

Senator SPECTER. Mr. Knight, when you say victims, whom do you have in mind, people who were the objects of hate crimes?

Mr. KNIGHT. Yes; Pastor Ralph Ovadal, in Madison, WI. He was rabbit-punched to the ground by a gay activist because he was holding a sign, "Repent." And the police said, well, that is not a hate crime. After all, it wasn't committed against a homosexual. It was only a Christian pastor who got knocked to the ground.

Another Christian in Madison uttered an epithet. He got in a shouting match with a homosexual activist. He was charged with a hate crime. So, in effect, in Madison they are more worried about

words than actions, and that is how hate crimes can be selectively enforced.

Senator SPECTER. So the victim you are talking about in the Madison case is someone who was charged with a hate crime?

Mr. KNIGHT. Well, two of them, one who was a victim of what you might term a hate crime whose perpetrator was not charged with such a hate crime because he didn't fall into one of the specially protected groups. See, the reason I am bringing that up if what concerns me most is selective enforcement, that we start balkanizing America by creating some groups that have higher levels of government protection than others.

We want to crack down on all crime. We think Mr. Shepard and anyone who is targeted for their sexual orientation or any characteristic ought to have the full power of the law behind them. This bill only targets some groups and not others.

Senator SPECTER. Thank you, Mr. Knight.

[The prepared statement of Mr. Knight follows:]

PREPARED STATEMENT OF ROBERT H. KNIGHT

Thank you for allowing me to testify on behalf of the Family Research Council and the more than 450,000 families we represent. We deplore criminal violence in any form, and believe that acts of violence against any person should be prosecuted to the full extent of the law. We also believe that Americans should continue to work diligently toward racial reconciliation.

However, we strongly oppose S. 622, the Hate Crimes Prevention Act (HCPA), which is fundamentally flawed on numerous counts.

It sets up special classes of victims, who are afforded a higher level of government protection than others victimized by similar crimes, violating the concept of equal protection.

It would politicize criminal prosecutions, pressuring local agencies to devote more of their limited resources to cases that the federal government deems important.

It would add nothing to the prosecution of real crimes of violence, vandalism, or property destruction, which are already covered by statutes in every state, and which should be punished to the full extent of the law.

It would vastly expand the power and jurisdiction of the federal government to intervene in local law enforcement matters.

It would have a chilling effect on free speech by making unpopular ideas a basis for harsher treatment in criminal proceedings. Over half of the so-called "hate crimes" in the last Justice Department report were categorized, by the department, as intimidation or simple assault, which do not necessarily involve anything more than words. This makes name-calling literally a federal case.

The definition of what constitutes a "hate crime," while clear in some instances, is very unclear in others.

In recent weeks we have seen even the mildest statement of traditional sexual morality attacked as "bigotry," "hatred," "gay-bashing," "intolerance," "prejudice," and "ignorance." Homosexual activists have even suggested that statements opposing homosexuality amount to inciting violence. Incitement, as you know, is not constitutionally protected speech. The aim seems to be to silence all opposition to acceptance of homosexuality.

According to FBI statistics, "hate crimes" comprised less than 1/10 of 1 percent of total violent and property crimes in 1997. In 1997, police agencies in 48 states and the District of Columbia reported "hate crimes" at a rate of less than one case per law enforcement agency, the vast majority of which are already covered under existing federal law. The most frequently reported—nearly half—of those incidents (or "crimes") not covered, involve verbal intimidation, some of them no more than name-calling. But the backers of this Act want to give the federal government massive new powers based on the incidence of about a dozen incidents per state in a nation of 270 million citizens.

Leah Farish, an attorney specializing in civil rights issues, points out that "hate crime" statistics vary widely. She notes,

> Advocacy groups consistently overestimate—for their own political purposes—the numbers of hate crime that are reported by law enforcement.

> One such organization, the National Institute Against Prejudice and Violence, estimates the victims of what it terms "ethnoviolence" to be between 800,000 and one million students annually. However, the FBI's own statistics on bias incidents on school campuses show 555 in 1992 and 799 in 1996 [Source: DOJ 1992, p. 26; 1996, p. 27].
>
> The New York City Gay and Lesbian Anti-Violence Project claims that in 1996 there were 18 anti-gay incidents in Cleveland, 176 in El Paso, and 96 in Chicago. However, FBI statistics reported only 2 in Cleveland, 1 in El Paso, and 6 in Chicago [Source: DOJ 1996, pp. 53, 68, 31].

At a press conference in January of 1998, Attorney General Janet Reno said, "I see more anti-bias training and conflict resolution programs than ever before in our schools, in our communities, and I see them working." Miss Reno also admitted that in most cases, local and state agencies already have the authority to act on the problem—and are doing so.

Still, she backs the HCPA, which grants the federal government far-reaching new powers under the Interstate Commerce Clause. If someone calls a homosexual a name while making use of the facilities of interstate commerce, this bill could cover it. It is no wonder that the federal government has grown by leaps and bounds in recent years when the agents of centralized power employ such logic.

The Washington Post has warned of the dangers of focusing on motivation rather than criminal acts. In a December 1, 1997, editorial, *The Post* contended, "[T]he proposal would be largely redundant of state laws, getting federal prosecutors and agents involved in crimes that have only limited interstate dimensions." *The Post* further noted that "[e]xpanding the federal ability to differentiate what are called hate-crime acts from analogous acts committed for other reasons is a mistake that Congress should refrain from making."

The Post's views are echoed by such liberal commentators as William Raspberry, Clarence Page, Michael Kelly and Nat Hentoff, as well as conservative columnists Jeff Jacoby, Maggie Gallagher, Tony Snow, Paul Craig Roberts and others.

Michael Kelly writes,

> Of all the violence that has been done in this great expansion of state authority over, and criminalization of, the private behavior and thoughts of citizens, none is more serious than that perpetuated by the hate-crime laws. Here, we are truly in the realm of thought crimes. Hate-crime laws require the state to treat one physical assault differently from the way it would treat another—solely because the state has decided that one motive for assaulting a person is more heinous than another.

Clarence Page writes,

> As an African-American, I belong to one of the groups currently protected by hate crime legislation. Yet, hate crime laws have not made me sleep better at night. I am more likely to lay awake wondering how I can justify the noble intent of such laws with the violence they inflict on the principles of free speech and equal protection of the law.

In effect, the HCPA creates thought crime, because the criminal acts themselves are already prosecutable. The Family Research Council believes that maintaining good order through swift prosecution and consistent, strict punishment of real crime is imperative. But justice must be impartial, without favored classes of victims or specially censured perpetrators. Creating special classes is inconsistent with the Constitution's l4th Amendment guarantee of equal protection under the law. Should the torture and murder of a child, for example, be prosecuted less vigorously than a similar crime committed against a homosexual?

Furthermore, some in the media and in government have begun to interpret public opposition to normalizing homosexuality as "hate." Homosexual activists have characterized even mild formulations of opposing views as a proximate cause of violence. As football great Reggie White and Senate Majority Leader Trent Lott learned last year, expressing the biblical view that homosexual activity is sinful is scarcely tolerated among some activists and media members, who equate it with yelling "fire" in a crowded theater.

Last year's Truth in Love advertising campaign, in which former homosexuals gave the good news that all people are loved by God and have the hope of salvation and that homosexual behavior can be changed, was blamed for Matthew Shepard's murder, despite zero evidence that the perpetrators had ever seen the ads or been influenced by them in any way. The San Francisco City Supervisors went on record as directly blaming pro-family groups for Mr. Shepard's death. If an undiluted message of love is considered grounds for charges of complicity in a murder, then we

have moved far down the road toward silencing anyone who holds to traditional morality. In Canada, it is already a federal offense to criticize homosexuality over the airwaves. The hate crimes bill paves the way in America for similar throttling of opinion.

Homosexuals, like other citizens, should be protected to the full extent of the law. But that is not what this bill is about. Rather, the HCPA is the centerpiece of an effort to place homosexual behavior above criticism by portraying those who practice it as victims in need of special protections not afforded to other Americans. There simply is no credible evidence that the police and courts are allowing criminals to prey on homosexuals more than on any other citizens.

America has nearly 20,000 homicides each year. In 1997, three of 18,209 homicides were associated with "sexual orientation—less than two-hundredths of 1 percent of total homicides. And this does not count the "gay-on-gay" killings that occur much more frequently.

Family Research Council unequivocally condemns all violent crime, committed for any reason, including the fatal attack on Mr. Shepard in Wyoming. We believe that Matthew Shepard is as important and deserving of attention as any of the thousands of other Americans who are murdered every year. Wyoming does not have a "hate crimes" law, yet one of Mr. Shepard's killers had to cut a deal with state prosecutors to escape the death penalty in exchange for two life terms without the possibility of parole, while the other man charged faces the death penalty in his upcoming trial.

There is evidence that "hate crimes" laws are not enforced equitably. In Madison, Wisconsin, Ralph Ovadal, a pastor and founder of Wisconsin Christians United, was physically attacked in 1996 while protesting a pro-homosexuality photo display at a public school. Ovadal and another man held two large signs—one read, "Homosexuality Is Wrong" and the other, "Homosexuals: Repent or Perish." Another man grabbed one of the signs and hurried away. When Ovadal confronted the man about taking the signs, he punched Ovadal, knocking him to the ground. According to a medical report, the assault caused "abrasions, contusions and an injured ankle." The assailant was never charged with a "hate crime," despite the existence of a strong "hate crime" law on the books of Madison, a liberal college town. The attacker eventually bargained down a misdemeanor battery charge to an ordinance violation, comparable to a traffic ticket.

In San Francisco in 1993, Pastor Chuck McIlhenny, whose home had been firebombed in 1990, called the city hate crimes unit when homosexual activists attacked a church. He was told that the Christians had their point of view, and the homosexual activists had theirs, and that they "cancel each other out." Despite the destruction of property, physical assault of parishioners, and the disruption of a worship service, the police would not come to their aid. Apparently, some hate-crime victims are more important than others.

Back to the national picture: If anti-bias programs are working, and offenses are already being handled adequately at the local and state levels, what real purpose does the Hate Crimes Prevention Act serve? Miss Reno revealed it when she announced that the Justice and Education Departments will distribute manuals to "help teachers get young people to understand that they should celebrate their differences and not fight over them." With the emphasis on sexual "orientation," this means that Jewish, Christian and Muslim children will be taught to "celebrate" homosexuality. President Clinton announced a new nationwide school program as part of his support for the Hate Crimes Prevention Act. This amounts to federal officials interfering in local schools to "re-educate" children that their families' most deeply held beliefs amount to hateful bigotry. Already, in schools across the country, young children—even first graders—are being subjected to homosexual propaganda in the names of "tolerance" education and AIDS education.

If we are to continue as free men and women, able to form opinions and speak our minds without fear, we cannot make attitudes or thoughts the subject of federal intervention and criminal prosecution. Instead, we should strive to ensure that the principle of "equal justice under law" truly applies equally to all Americans. The "Hate Crimes Prevention Act of 1999" may be well-intentioned, but its practical outcome is a step toward thought control, expanded governmental power, and tyranny masquerading as tolerance. We respectfully urge senators not to support S. 622.

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Robert H. Knight, a former Los Angeles Times news editor and writer, is Senior Director for Cultural Studies at the Family Research Council. He is the author of *The Age of Consent: The Rise of Relativism and the Corruption of Popular Culture* (Dallas: Spence Publishing Company, 1998). Mr. Knight also wrote and directed *The Children of Table 34,* a documentary about Alfred C. Kinsey, and *Coming Out of*

Homosexuality: Stories of Hope and Healing, which documents the testimonies of people who have left the homosexual lifestyle and been restored to heterosexuality.

Senator SPECTER. We turn now to Prof. Burt Neuborne, New York University Law School. Welcome, Professor Neuborne. We look forward to your testimony.

STATEMENT OF BURT NEUBORNE

Mr. NEUBORNE. Thank you, Senator, and thank you for this opportunity and the hearing and for the efforts of the members of the committee to deal with this problem.

I am a professor of law at New York University and have practiced constitutional law for the last 35 years. I would like to speak this morning to two issues: one, my support for broadening the existing 245 by repealing the Federal activities requirement, which creates a technical problem to the prosecution of many of these heinous offenses and which, in my opinion, is not needed in order to provide Congress with the appropriate power in this area, and, second, to support the extended protection of Federal hate crimes to gays, women and the disabled who are targets of this type of abuse.

If I could start for a moment by reminding us all about what role hate crimes play in this society and the special role that Federal hate crimes legislation can play, hate crime singles out a type of behavior, which is an attack on an individual solely because that individual belongs to a group, and most of the time a group that has been the subject of traditional prejudice in this society, singles that individual out for special violence solely because of their group activities.

History teaches us that when you link violence to that type of hatred, it is the single most destabilizing threat to a civilized democratic society. And so I think Congress and the States have been quite correct in recognizing that hate crime poses a very special challenge to an effort to create and to maintain a civil society, and that it does three very important things.

It may deter some of these crimes by enhancing the penalty for them, and most importantly enhancing the likelihood of apprehension by putting more resources into the law enforcement aspect of it. It enhances their punishment because it recognizes the enhanced harm and risk to the community that this type of behavior entails, and it is a very important form of public education, reinforcing both to the assailants and to the victims and to the community at large that this type of behavior cannot be tolerated in a civil society.

And it also recognizes the need for special protection that members of despised groups can have. All of us run the risk of random violence, and random violence is a terrible thing that we should do all we can in this society to stamp out. Some people in America bear an additional risk, not simply the risk of random violence, but the risk that their membership in a group will lead a twisted soul to single them out for violence just because of their membership in the group. That is a justification and a need for the special protection that these laws provide.

Now, what is the special role of Federal hate crime statutes? Senator Specter pointed out the traditional role, and if I could, I would characterize that as a role of antagonistic federalism. When

you have local pockets of either bigotry or nonconcern that fail to deal with these issues in an important way, the Federal Government has historically stepped in and provided a backstop that essentially trumped the failure of local law enforcement agencies to take this seriously enough.

I am very pleased to say that I think that in the hate crime area, the era of antagonistic federalism is drawing to an end and that we are entering something much more promising and much more hopeful, and that is an era of cooperative federalism where both the Federal Government and the State and local officials are committed, as Mr. Brown is clearly committed, to enforcing these laws in the most vigorous way.

But that doesn't end the need for Federal action. If anything, it enhances it; it makes it more effective. It is in areas of cooperative federalism that the Federal Government's work in the past in criminal law enforcement has always been most effective. We shouldn't be saying let's not pass this because they are not dealing with antagonistic local units anymore. We should be applauding the fact that we are entering an era where the combined resources of all three levels of government can be brought to bear on this in a way that can finally end this scourge once and for all.

There are four obvious practical things that cooperative federalism allows. First, it allows the creation of joint strike forces. We were able to move against the Mafia and against the drug trade most effectively when we harnessed the force of the Federal Government, the State governments and the local governments working together in joint enforcement and joint prosecution forces which effectively much of that material.

We can deal with the problem of resource scarcity. As Mr. Brown pointed out, many areas in this country simply cannot carry out the type of complex prosecutions that are required in these cases. And in his setting, they knew who did it. In settings where they don't know who did it and you have to assemble not just a prosecution strike force but an arrest and apprehension strike force, that is entirely beyond the means of most small American communities. So this bill is crucial to be able to provide them with the resources in a cooperative way to be able to do the job effectively.

Third, there are areas where there is a priority problem, where there are other things that need doing. This is a situation that would allow the Federal Government to step and say to the States, I know you are not hostile to this, but we have some resources for you that can allow you to do both, what you think is your high priority item and this as well.

And, finally, this is an area where in those rare instances where States prosecute and fail and where a second prosecution appears necessary—this is an exception to the double jeopardy aspect of prosecution. There is some controversiality about it, but it is clearly the law and it allows a second bite at a prosecution apple in an area where the Attorney General says that it is necessary.

It is particularly important to remember that this law can only be used if the Attorney General certifies that it is needed.

Senator SPECTER. Professor Neuborne, could you summarize the balance of your testimony?

Mr. NEUBORNE. Yes. The law can only be used if the Attorney General certifies its necessity. There is a clear Commerce Clause basis for it. The relationship between the Commerce Clause and bigotry is clearly met. If you get to the bottom of almost all prejudice, you find that what is there is a fear and a desire to protect status and a desire to intimidate newcomers, whether it is violence against Jews, whether it is violence against blacks. When you get to the bottom of it, you cannot have a free market in goods and services if people can be beaten because of fear that they are going to become economic competitors.

This statute is clearly within Congress' power and I urge that you pass it as soon as possible.

Senator SPECTER. Thank you very much, Professor Neuborne.

[The prepared statement of Mr. Neuborne follows:]

PREPARED STATEMENT OF BURT NEUBORNE

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE: My name is Burt Neuborne. I am the John Norton Pomeroy Professor of Law at New York University School of Law, where I have taught Constitutional Law, Evidence and Federal Courts for twenty-five years. I have spent much of my career in the active defense of rights guaranteed by the United States Constitution. I served in various capacities on the legal staff of the American Civil Liberties Union for eleven years, most recently as National Legal Director from 1982–86. From 1988–92, I was a member of the New York City Human Rights Commission. I currently serve as Legal Director of the Brennan Center for Justice at NYU, a partnership between and among the family of Justice William Brennan, Jr., many of the law clerks who served Justice Brennan during his historic tenure on the Supreme Court, and the faculty of NYU School of Law, dedicated to honoring Justice Brennan's memory by seeking to protect the rights of the weakest members of society. I appear this morning on behalf of the NOW Legal Defense and Education Fund, the nation's oldest legal advocacy organization committed to protecting and advancing women's rights.

Thank you for this opportunity to express my support for the proposed amendments to 18 U.S.C. 245 that: (1) delete the existing requirement that victims of a hate crime have been engaged in one of six narrowly defined "federally protected activities" in order to receive the protection of the federal hate crimes statute; and (2) extend the protection of the federal hate crimes statute to victims who have been singled out for violent assault because of their sexual orientation, gender, or disability.

The artificial requirement in the current version of sec. 245 that a hate crimes victim must have been engaged in "federally protected activity" in order to qualify for federal hate crimes protection creates an unnecessary obstacle to efforts by local, state, and federal law enforcement agents to provide maximum protection against hate crimes that tear at the fabric of a civilized society. In my opinion, Congress possesses clear legislative authority to prohibit hate crimes generically, regardless of the nature of the victim's activities at the time of the crime.

Moreover, the addition of sexual orientation, gender, and disability as protected categories responds to the sad reality that members of those groups remain at greater risk of violent assault because of their membership in a target group that attracts the hate of twisted individuals whose group hatred drives them to individual violence.

I propose to begin with a brief overview of the role of federal hate crime legislation, especially in an era when many state and local law enforcement agencies appear to share Congress's concerns. I will then discuss Congress's power to enact hate crime legislation. I will conclude with a discussion of the wisdom of eliminating, the "federally protected activity" requirement, and expanding the protected categories to include sexual orientation, gender, and disability.

I. A BRIEF OVERVIEW OF THE ROLE OF FEDERAL HATE CRIME LEGISLATION IN AN ERA OF COOPERATIVE FEDERALISM

Legislation, no matter what the level of government, outlawing violent hate crime is designed to achieve three ends. First, by increasing the penalty associated with a violent hate crime, the criminal law seeks to deter twisted individuals from escalating their hatred of particular groups into violent behavior directed at members

of those groups. By targeting violence motivated by hate, and subjecting it to more intense criminal penalties and a greater likelihood of apprehension and prosecution, the level of deterrence is increased.

Second, by imposing heavier penalties on violence generated by group hate than on random violence, the criminal law recognizes both a higher level of moral revulsion toward violence caused by group hatred, and the increased damage to the fabric of civilized society associated with such violent bigotry. History tells us that the combination of irrational hatred of groups with violence directed at members of those groups is the single most destabilizing event in the erosion of democratic societies.

Finally, by singling out individual violence caused by group hatred, and subjecting it to more intense criminal penalties, and a higher likelihood of arrest and prosecution, the criminal law serves its third function—that of educator. A critical function of the criminal law is to identify and reinforce the crucial moral judgments of the community. Hate crime legislation educates the general community, prospective assailants, and the victim communities, by asserting in the strongest terms known to our culture that hate crimes are profoundly abhorrent.

In the years since numerous state and local governments have enacted variants of hate crime legislation, the statutes have fulfilled all three purposes. Law enforcement officials are virtually unanimous in supporting the increased deterrence, more precise moral condemnation, and more effective public education made possible by singling out individual violence caused by group hatred for special criminal consideration.

If, as is the case, many state and local communities have enacted hated crimes legislation and, even in the absence of hate crimes legislation, appear to be committed to prosecuting hate crimes in an even-handed manner, what role does federal hate crimes legislation play in a regime of cooperative federalism? It is true, of course, that much of our federal criminal legislation in the civil rights area dates from an unfortunate era in our history when certain state and local officials were highly unlikely to invoke the criminal law against criminal behavior directed against despised minorities. In the absence of federal legislation, members of victim groups often lacked protection from criminal predators precisely because local law enforcement authorities were subject to the same bigotry as the perpetrators themselves. To the extent that pockets of bigotry remain ensconced in certain localities today, state or local law enforcement may, occasionally, be paralyzed by the same hatred that generated the hate crime. In those settings, federal hate crime legislation acts as a crucial backstop insuring that effective criminal protection is available to all, regardless of local prejudice.

It would, however, be grossly unfair to local law enforcement officials to suggest that widespread reluctance exists in today's America to prosecute hate crimes. In fact, in my experience, while pockets of bigotry persist, state and local law enforcement officials generally share the revulsion to hate crime felt by every member of the Senate. What, then, is the role of federal hate crime legislation in such a regime of cooperative federalism? Unlike the role of federal legislation during an era of antagonistic federalism, when federal power is unleashed to compel local government to respect national values, today's federal hate crime statutes should be designed to reinforce the states and localities in carrying out a joint mission to prevent hatred directed at target groups from escalating into individual violence. Thus, for example, when inadequate local resources make it difficult, if not impossible, to deploy the substantial resources needed to investigate, arrest and prosecute a serious hate crime, the existence of a back-stop federal statute permits federal law enforcement authorities to reinforce state and local officials by offering the assistance of the FBI, or the resources of the United States Attorneys offices, to the beleaguered local officials. In settings where a pattern of hate crime is present, back-stop federal legislation makes possible the formation of Joint Strike Forces made up of local, state and federal officials designed to place maximum pressure on criminal offenders. In settings where state or local law fails to provide adequate criminal penalties, or where flaws in the local legal position render prosecution difficult, the existence of federal back-up legislation provides a valuable, perhaps crucial, additional law enforcement tool. Finally, in those rare settings where state prosecution has failed because of inadequate resources, or questionable effectiveness, the existence of back-up federal legislation provides the option of prosecution in a federal forum on the federal charges without violating the double jeopardy clause.

In fact, when one views the sweep of federal criminal jurisprudence, federal criminal statutes work best, not in those unfortunate settings of antagonistic federalism, where the federal government is attempting to trump a local judgment, but in the context of cooperative federalism, where both the state and federal governments deploy their combined resources to achieve a common goal. It is precisely because we

are in an era of cooperative federalism with respect to hate crime that it is such a good idea to fine-tune the federal backstop to assure that the full resources of every level of government can be brought to bear on the scourge of violence engendered by group hatred.

The recent federal criminal legislation outlawing arson directed at churches is an excellent example of cooperative federalism at its best. Every level of government abhors the idea of arson directed at a house of worship. By enacting federal legislation in the area, Congress authorized federal officials to join in an inter-governmental effort to end church bombings once and for all. Every law enforcement official in the area, regardless of the level of the governmental employer, applauds the partnership made possible by the Congressional legislation, which has permitted the full resources of the nation to be directed to the elimination of a criminal threat to one of the most basic freedoms—freedom of worship. The same cooperative model is made possible by sec. 245 when criminals threaten the enjoyment of the right to be free from violence motivated by the race, color, religion, national origin, sexual orientation, gender, or disability of the victim.

II. CONGRESS POSSESSES AMPLE POWER TO ENACT LEGISLATION MAKING IT A FEDERAL CRIME TO INFLICT VIOLENCE ON A VICTIM BECAUSE OF THE VICTIM'S MEMBERSHIP IN A DESPISED GROUP

Congress possesses ample power to enact a federal hate crime statute. In an excess of caution, the current version of sec. 245 limits federal hate crimes to settings in which the victim was engaged in one of six "federally protected activities" But such a narrow formulation creates a technical loophole into which an important prosecution can disappear. For example, is walking on the sidewalk free from harassment because of race participating in a federally protected activity ("freedom to travel")? In fact, Congress's power in this area stems from two sources, neither of which, depend upon the victim's precise behavior at the time of the offense.

Most traditionally, Congress possesses power under the Commerce Clause to regulate behavior that has a substantial and harmful effect on interstate commerce. Eg. *Heart of Atlanta Motel, Inc.* v. *United States,* 379 U.S. 241, 258 (1964).[1] Of course, in settings where the regulated behavior does not obviously impact on interstate commerce, Congress is obliged to make specific findings explaining the link between the regulated behavior and interstate commerce. In the absence of such explicit Congressional findings, the Supreme Court has invalidated Congressional legislation when the regulated behavior (possessing firearms in school) did not appear, on its face, to exercise a substantial impact on interstate commerce. *United States* v. *Lopez,* 514 U.S. 549 (1995). Where, however, as here, the regulated behavior has an obvious link to interstate commerce, the decision whether to regulate remains solely within the discretion of Congress.

As to the existing categories of victim currently listed in sec. 245, it is clear beyond doubt that protecting their members from violence motivated by group hatred has a profound impact on interstate commerce. A nation committed to a national free market in goods and services cannot tolerate hatred-motivated violence that targets particular groups and impedes their ability to function in the workforce. In *Edwards* v. *California,* 314 U.S. 160 (1941), the Supreme Court recognized that the Commerce Clause assures the right of migration in search of a better life. Violence directed to members of a despised group threatens the Commerce Clause's guaranty of free migration in two ways. Violence directed against hated newcomers is often designed to impede the migration of groups seeking a better life, precisely because their migration threatens the economic interests of entrenched residents. Conversely, violence directed at hated minorities is often designed to force them to move, or to leave the workforce, precisely because their presence is a threat to the economic status of the entrenched majority. Given the historic link between violence directed against hated groups and economic status, Congress is undoubtedly well within its power in recognizing such hatred-motivated violence as a threat to the free market in goods and services that is the fundamental goal of the Commerce Clause. Nothing in *Lopez* interferes with Congress's important responsibility under the Commerce Clause to preserve the free flow of goods and services by acting to regulate private criminal behavior that threatens to single out members of hated groups and to remove them from the free market in labor by subjecting them to violence based on their membership in a hated group.

As to the new categories of victims that are proposed to be added to sec. 245—sexual orientation, gender, and disability—Congress's power is even more clearly

[1] See generally *Wickard* v. *Filburn,* 317 U.S. 111, 125 (1942); *NLRB* v. *Jones & Laughlin Steel Corp.,* 301 U.S. 1, 36–37 (1937).

present, since an element of the crime requires proof of a Commerce Clause nexus. The nexus provision is similar to the link required in the prosecution of many federal crimes, such as unlawful possession of weapons, drugs, and gambling material. Indeed, if the provisions of the new version of sec. 245 fail to pass muster under the Commerce Clause, most of the federal criminal code is probably unconstitutional. Only an ideologue would attempt to stretch *Lopez* into a general repeal of virtually all federal crimes.[2]

Second, although it is not necessary to discuss the issue at length because power under the Commerce Clause clearly exists, I believe that Congress possesses power under section 5 of the 14th Amendment to enact legislation designed to deter private persons from preventing members of persecuted groups from enjoying the equal status guaranteed by section 1 of the 14th Amendment. It is, of course true, that section 1 talks in term of protection against "state action". But section 5's authorization is broader than section 1's self-executing scope. Otherwise, section 5 would be a mere redundancy. The Supreme Court has never been required to pass on the ultimate scope of Congress's power under section 5, since most exercises of Congress's power are also supported by the Commerce Clause. I believe that, at a minimum, section 5 authorizes Congress to identify violent behavior that would make it impossible for the beneficiaries of section 1 to enjoy its benefits, and to take necessary steps to prevent the violent behavior. In any event, given the clear Commerce Clause power, I believe that no serious question of Congressional power is raised by the proposed amendments to sec. 245.[3]

III. NO SERIOUS QUESTIONS OF POLICY ARGUE AGAINST THE PROPOSED EXPANSION OF THE FEDERAL HATE CRIMES STATUTE

The policy arguments leveled against the proposed amendments to sec. 245 do not appear persuasive.

As an initial matter, no serious First Amendment issue is raised by the proposed amendments. *Wisconsin* v. *Mitchell,* 508 U.S. 476 (1993), makes it clear that the First Amendment does not protect violence merely because it is motivated by hatred. No principle of First Amendment law shields a violent offender against increased punishment because the crime was motivated by group hatred. In proving that group hatred motivated the attack, I believe that a trial court should be sensitive to issues of relevance in deciding whether to admit evidence concerning a defendant's First Amendment activities. In the brief that I authored in *Wisconsin* v. *Mitchell,* I urged the Supreme Court to recognize a First Amendment evidentiary privilege in hate crimes cases. The Court, instead, has relied upon a rule of relevance, and the good sense of the trial courts. In the years since *Wisconsin* v. *Mitchell,* the trial courts appear to have developed rules of relevance in hate crime cases that do not appear to pose serious First Amendment issues. There are, of course, occasional evidentiary mistakes, but, by and large, I am not persuaded that Congress can forge a better evidentiary standard that the case-by-case work of the trial courts.

Nor would the proposed amendments federalize large categories of state criminal practice. The amendments include an important provision requiring certification by the Attorney General or her designee that "a prosecution by the United States is in the public interest and necessary to secure substantial justice." Such a provision assures that the back-stop federal legislation will play its appropriate role in a regime of cooperative federalism. The statute permits federal law enforcement resources to be immediately available at the local level, but assures that the actual prosecution will be the responsibility of state and local officials unless, after full consultation, the Attorney General believes that the back-stop federal statute is necessary. Far from posing a threat of federalization, the proposed amendments strengthen the ability of state and local authorities to deal effectively with hate crimes by making federal resources available to them, while holding federal prosecutions in reserve for those few situations where "substantial justice" requires them.

Moreover, expansion of the protected categories to sexual orientation, gender and disability make eminently good sense. The ugly spectacle of gays being beaten be-

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[2] The recent divided (7–4) en banc decision of Fourth Circuit in *Brzonkala* v. *Virginia Polytechnic and State University* invalidating the Violence Against Women Act does not affect the power of Congress to enact the amended version of sec. 245. Unlike the Violence Against Women Act, the current legislation requires proof of an interstate commerce nexus as an element of the offense. I do not believe that a serious argument exists that Congress lacks the power to regulate conduct, when the conduct must be shown to affect interstate commerce.

[3] Moreover, I believe that the Fourth Circuit majority seriously misread *Lopez* in striking down the Violence Against Women Act. I note that eleven district courts have unanimously agreed with the four Fourth Circuit dissenters in upholding the Act's constitutionality.

cause of homophobia must sicken any civilized human being. Given the lack of protection for gays in many communities, providing federal protection under the federal statute against violence motivated by homophobia is not merely a good idea—it is required by basic human decency.

Although attacks against the disabled are less numerous, the legacy of the Nazi horror make clear that twisted souls can and do view disabled people as sub-human, and, therefore, fair game for violent abuse. Providing the disabled with an additional federal shield against violent abuse, to be used to assist local officials in providing protection, and as a back-stop when the Attorney General certifies that "substantial justice" requires its use, appears to be a welcome step toward protection of an extremely vulnerable minority, with virtually no costs.

Finally, a degree of federal criminal protection against gender-motivated violence is long overdue. We know that a portion of the epidemic of violence aimed at women is traceable to hatred of women as a group. In many settings, state and local officials have also recognized the need to protect women against hate crime. In those settings, the amended federal statute will permit local officials to draw on federal law enforcement resources, and will create a back-stop federal statute for use in those settings where the Attorney General certifies its necessity. In many settings, however, local officials have not yet realized that violence against women is not merely a matter of personal aberration, but is often the result of a deep hatred of women as a group. In those settings, the federal statute will provide an invaluable protection for women who are targets of gender-motivated violence.

It is occasionally argued that recognition of a federal hate crime directed at gender motivated violence would sweep all assaults against women into the federal arena. But such an argument ignores the experience of the 22 states that have enacted gender-based hate crime statutes. In those states, every rape is not prosecuted as a hate crime. In order to evolve from an assault involving a woman to a hate crime, it is necessary to develop significant evidence that the defendant was motivated by hatred of women as a group. Where such evidence does not exist, assaults do not become hate crimes. Where, however, substantial evidence exists that a violent assault against a woman was caused by hatred of women as a group, it is crucial to deploy the criminal law in an effort to deter such violent behavior by singling it out for special attention. It would, I believe, be a callous act of indifference to refuse to grant women the extra protection that a federal hate crime statute might provide when we know that the mere existence of a federal statute (with an enhanced penalty and the greater likelihood of arrest and prosecution) might deter an act of violence by a twisted soul whose hatred of all women leads him to contemplate violence.

Senator SPECTER. We turn now to our final witness, Professor Amar, of the Yale Law School. A very brief personal note. Over the entry of the Yale Law School, there are two stone etchings, two classrooms. In one depiction, there is a professor standing, gesturing, and obviously very vocal, and all the students are sleeping. And in the other stone etching, there is a professor who has his hand on his head, obviously very thoughtful, and all the students are up and very animated.

Before you start your testimony, Professor Amar, which category are you in? [Laughter.]

STATEMENT OF AKHIL REED AMAR

Mr. AMAR. Can I take the fifth, Senator? [Laughter.]

Senator SPECTER. You can, but there is another jurisdiction to prosecute you, I understand.

Mr. AMAR. Thank you very much, Senator, for allowing me to speak. I have obviously submitted some written testimony. I will just try to summarize very quickly.

Senator SPECTER. We would appreciate that. Your full statement will be made a part of the record.

Mr. AMAR. I admire the symbolic aims of this statute, which are to affirm the equality of all American citizens regardless of race or religious or sexual orientation or gender or disability. I admire the

biggest, I think, substantive idea of the statute, which is to create a State-Federal partnership, what my friend Burt Neuborne called cooperative federalism.

I have some specific questions and concerns about some of the details and the strategy of the bill, and I would just invite the committee to think about whether there might be ways of accomplishing those goals even better than the current version. And this is, I think, very much in the spirit of what Chairman Hatch said in his opening remarks. So let me just identify the questions and concerns.

First is a data question. There are at least three different ways of having an antihate crime strategy. One is vigorous, even-handed enforcement of ordinary rules of assault, murder, rape, and so on. An advantage of that is it doesn't generate any backlash about special rights for special victims and disadvantages that may not symbolically affirm the real importance to the larger community of certain disadvantaged groups.

A second strategy is sentence enhancement, where you have ordinary laws of murder, rape and robbery, but then at the sentencing stage we take into account bigotry and say that makes the crime much more reprehensible, creates more harm, and so we sanction it more severely.

A third is an explicit hate crime statute where that bigotry isn't a specific element of the offense. That has got the advantage of heightened symbolism, but possibly the disadvantage of having to prove bigotry beyond reasonable doubt to a jury, which you don't have in the sentence enhancement model.

So you have at least three different models at the State level, and one data question to ask is what is the experience of the States with those three different approaches. I am not sure that we have analyzed that data in order to figure out what strategy actually will work the best.

Furthermore, in addition to figuring out what strategy might work the best at the State level, if we were trying to come up with a model statute for States to adopt, I think it is relevant to see where the States are failing to identify the precise size and shape of possible Federal intervention, given that many thoughtful citizens and Senators have, in general, a preference for decentralized solutions where possible.

And, again, an analysis of this data might be very helpful. If there really are systematic areas where States are falling down, we could have an even broader consensus, I would hope, in support of Federal crimes and have 95 Senators rather than maybe 60 Senators on board, and that is a more emphatic symbolic statement about what we as Americans hold in common—the equality of all, regardless of race, religion, sexual orientation, sex, disability, and so on.

So one set of questions is how we analyze the data at the State level, and a concern that if we rush in too quickly sometimes we can make a problem worse. Some people think that that might have been the case with the crack/powder distinction and what this Congress did a decade ago.

Then there are some constitutional concerns, and they are created by court doctrine. I don't want to suggest that courts would

clearly invalidate this. I just want to suggest that there are some risks, and the risk, even if some judges vote against it, not a majority even, is it weakens some of the symbolic force of a statute.

One set of problems is created by the recent Supreme Court decision in *City of Boerne,* invalidating a law that this Senate passed, 97 to 3, the Religious Freedom Restoration Act, that signals a narrower understanding of Congress' power under the Reconstruction amendments. I myself am a critic of the *Boerne* decision. I think it wrongly restricted the broad powers that this Congress is supposed to have under the Reconstruction amendments. But you need to take that into account, I think.

That betokens at least a possible concern about the religion language in that prong of the statute that doesn't have a Commerce Clause trigger which goes beyond cases like *Jones* v. *Alfred Mayer,* and I don't know whether the Court is going to go beyond that.

As to the Commerce Clause, of course, there is the *Lopez* case, invalidating another recent statute that this Congress passed. Senator Kennedy's bill, S. 622, has a Commerce Clause trigger, and so I think it is much stronger than the statute in *Lopez.* But I think there are still some possible concerns about the precise nexus between interstate commerce and what the statute targets.

Some possible fairness concerns, double jeopardy concerns. If the State and Federal governments really are working cooperatively and as a team, and if the States prosecute and there is an acquittal, some possible fairness concerns if the Federal Government, which were teammates in the whole process, then comes and tries to whack the defendant a second time.

So, in a nutshell, my suggestions are the following as possible additions or alternatives. Commission a careful analysis of the existing hate crime data. Consider adoption of a model State statute that States should be encouraged to adopt, and you could even have some pilot programs that States would be involved in to see which ones work better.

Think about a Federal civil right of action, in addition to or instead of the Federal criminal right of action. That might solve some of the double jeopardy fairness concerns, and even commerce concerns. Make more explicit findings about the link to interstate commerce. Invoke the Citizenship Clause of the 14th amendment, as well as the 13th amendment. What you are trying to do is affirm the equal citizenship of all citizens.

And here I conclude. I have even suggested some ways of strengthening the symbolic language of the statute, which is about the Federal role in affirming the equal citizenship of all. So distinctions based on birth, like sex or sexual orientation or race, should play no role in American citizenship.

Thank you, Senator.

[The prepared statement of Mr. Amar follows:]

PREPARED STATEMENT OF AKHIL REED AMAR

My name is Akhil Reed Amar. I hold the Southmayd Chair at Yale Law School, where I teach and write on constitutional law, federal jurisdiction, and criminal procedure. I am grateful to be here to discuss how this Congress can help prevent hate crimes, and thereby affirm the equality of all Americans, regardless of race, religion, sex, sexual orientation, or disability. In analyzing this important topic—which implicates myriad issues of both constitutional law and public policy—I have organized

my thoughts around Senator Kennedy's Bill, S. 622. I admire the goals of the Bill, and I share its vision of equality. I do, however, have some questions and concerns about some of its specific provisions, and about its general strategy. Also, I will try to identify some other legislative strategies that this Committee might consider to better implement the aims of the Bill.

I admire the aims of the Bill. The Bill seeks to prevent hate crimes when possible and to punish them when they nonetheless occur. The Bill tries to achieve these aims via a close state-federal "partnership" in which federal jurisdiction "supplements" state prosecutions, and the federal government offers "assistance to States." (Sec. 2, paras. 10, 11.) The Bill appropriately acknowledges that states "are now and will continue to be responsible for the prosecuting the overwhelming majority of violent crimes in the United States, including violent crimes motivated by bias." (Sec. 2, para. 9, emphasis added.) Symbolically, I understand the Bill as an effort to stand with the victims of hate crime and against those who perpetrate or pooh-pooh these crimes. I see the Bill as a noble effort to affirm the national government's commitment to equality, and to express its emphatic disapproval of those who harm others simply because of who the victims are—because, that is, of the victims' race, religion, sex, orientation, or disability.

Given that most of the fight against hate crimes will be waged by states, an important part of the Bill is its symbolism, placing the federal government firmly on record against those who, for example, kill homosexuals or Jews and those who apologize for such unspeakable conduct by blaming the victims—"they asked for it." And substantively, the most important part of the Bill is the federal assistance it promises to states; the federal crimes it creates are likely to be less important substantively because—as the Bill itself admits—the vast majority of prosecutions will continue to be at the state level. With this understanding of the Bill, I now turn to my questions and concerns.

I. THE DATA QUESTION

Substantively, what particular strategy is most likely to work in actually preventing violent hate crimes? One strategy is simply to vigorously prosecute hate criminals using ordinary laws of murder, assault, and so on. This is indeed an anti-hate crimes strategy; it stands against a look-the-other way world where prosecutors and judges do not take hate crime as seriously as other crime. In a look-the-other-way world, bigotry becomes a kind of excuse or mitigation: a "queer-basher" is treated more leniently than other thugs because "he couldn't help being repulsed" or because "the victim asked for it by flaunting his identity." A second strategy is to use ordinary laws of murder, assault, and so on, but to treat bigotry as a sentencing enhancer justifying more severe punishment because the bigotry in effect compounds the crime and makes it more reprehensible. A third strategy is to enact laws specifying bigotry as a specific offense element that must be charged in the indictment and proved beyond reasonable doubt to the jury.

Which of these strategies is most likely to be effective? This question implicates federalism—one obvious way to try to answer this question would be to analyze the actual practices of different states that have pursued different strategies. I believe that state data have been collected pursuant to the Hate Crime Statistics Act. Has this data been systematically analyzed? I have not yet seen any detailed analysis, and, in keeping with Chairman Hatch's remarks, I think careful analysis would be useful. Suppose the data suggests that sentencing enhancement actually works better at preventing hate crimes than specific new hate crime offenses (perhaps because bigotry need not be formally charged and proved)? Suppose simple vigorous and even-handed enforcement worked best of all (perhaps because it avoids the backlash generated by the perception of "special rights" for special classes)?

Data collection is desirable for a second reason. Analyzing state data will not only help each individual state figure out how best to combat hate crimes, it will also help illuminate whether and to what extent there is a need to add a new *federal* crime to the books. For example, suppose the data suggest that the real problem is not state bigotry or indifference but rather inadequate resources to deal with certain special problems raised by hate crimes (say, because the average hate criminal has plotted his crime with more care and is harder to catch than the average nonhate criminal). In this case, the best solution might be increased federal assistance rather than enhanced federal jurisdiction that might reduce the sense of accountability of local authorities.

In addition, many Senators and citizens of good faith ordinarily start with a presumption in favor of state as opposed to federal solutions. Such Americans could well be brought to support new federal crimes if the data actually shows that states are not doing their job. Data here could thus help forge a broader consensus than

might currently exist. Part of the goal of the Bill, I think, should be to muster an overwhelming majority of Senators to demonstrate to those who hate just how wide and deep is the consensus against them.

One objection to data collection is that people are dying now, and this Congress needs to do something. But surely, this Congress needs to do the right thing, and new federal crimes are not always the best answer. A decade ago, inner cities were being ravaged by crack, and this Congress decided it had to do something. It dramatically increased the federal penalty for crack compared to powder cocaine. Many leaders of the Black Caucus supported this effort to do something to save black inner city children from the crack plague. Today, many of these same leaders now think that this Congressional approach was mistaken-and indeed, may have made racial problems worse. Another objection to data collection is that—substantive efficacy aside—America needs a strong symbolic statement from Congress now, and this symbolic statement can't wait. I agree, and would propose that the Committee consider an even stronger symbolic statement than S. 622 currently contains. In addition, a strong commitment of federal assistance today will put the federal government's money where its mouth is, and thus send a very strong signal.

II. CONSTITUTIONAL CONCERNS

The final reason for care before defining new federal crimes is that such new crimes might face tough sledding in the federal courts. If these crimes were to be invalidated by courts, it would be a big symbolic defeat for the equality vision-even if the grounds for invalidation were rooted in "technical" federalism objections. Even if these new crimes survived court challenge, they might not do so easily and unanimously. The very fact of judicial dissent—or of a large bloc Congressional votes against the Bill itself—might weaken the symbolic strength of the Bill, as compared with a Bill that virtually all Senators and judges could easily accept as a strong affirmation of our common ground as Americans. This takes me to my next set of questions involving judicial doctrines of federalism and general constitutional concerns.

A. The Boerne *problem*

Section 4 creates a new federal crime for violent hate crimes based on "race, color, religion, or national origin." This part of Section 4(c)(1) has no explicit requirement that the crime be linked to interstate commerce, and it regulates criminal activity that is not itself commercial. Under the Supreme Court's 1995 Lopez [1] decision, this prong of Section 4 will be hard to defend in court under Congress's commerce clause power. The most sturdy argument to uphold this prong in court derives from Congress's power under Section 2 of the Thirteenth Amendment. Section 2, paragraph 8 of S. 622 pointedly invokes this authority, by finding that "violence motivated by bias that is a relic of slavery can constitute badges and incidents of slavery." I applaud Congress's explicit effort to invoke the Thirteenth Amendment. Indeed, in an article on hate crime that I published eight years ago in the *Harvard Law Review,* I suggested that drafters of anti-hate crimes statutes should "state explicitly that the ordinance is designed to implement the Thirteenth Amendment by eliminating various badges and incidents of slavery and caste-based subordination.[2]

But there are problems. First, as that article mentioned,[3] it might be difficult to bring religious as opposed to racial bigotry under the canopy of the Thirteenth Amendment. In the landmark 1968 case of *Jones* v. *Alfred Mayer,* the Supreme Court upheld a law regulating private race discrimination under the Thirteenth Amendment but pointedly noted that. "the statute in this case deals only with racial discrimination and does not address itself to discrimination on grounds of religion or national origin."[4] It gets worse. Two years ago, the Supreme Court decided the *City of Boerne* v. *Flores*[5] *case, and invalidated the Religious Freedom Restoration Act, which this Senate passed by a 97 to 3 vote in 1993. Boerne* offered a narrow reading—in my view, an inappropriately narrow reading—of this Congress's power under Section 5 of the Fourteenth Amendment. *Boerne* said that under Section 5 of the Fourteenth Amendment, Congress could only "enforce" rights that judges would recognize under Section 1 of the Fourteenth Amendment. Although the Court

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[1] *United States* v. *Lopez,* 115 S.Ct. 1624 (1995) (striking down a federal criminal offense created by the Gun-Free Schools Act of 1990 as beyond the proper reach of Congressional power under the commerce clause).

[2] Akhil Reed Amar, The Case of the Missing Amendments: *R.A.V.* v. *City of St. Paul,* 106 Harv. L. Rev. 124, 160 n. 187 (199 1).

[3] See id. at 159.

[4] *Jones* v. *Alfred H. Mayer Co.,* 392 U.S. 409,413 (1968).

[5] 117 S. Ct. 2157 (1997).

said very little about the Thirteenth Amendment, and not a word about the *Jones* case, the logic of *Boerne* is ominous. If Section 5 of the Fourteenth is to be strictly construed, why not Section 2 of the Thirteenth, which is written in almost identical language? Although *Boerne* did not address this issue in detail, it does suggest that the current Court may be disinclined to extend *Jones* even an inch more. (It further suggests that this Court is not particularly deferential to this Congress, a point confirmed by the very great number of recent Congressional statutes that the Court has invalidated in the last decade.)

I am a critic of the Court's decision in *Boerne,* and indeed have assailed it in print (in the February, 1999 issue of the *Harvard Law Review*).[6] I think the *Boerne* Court clearly misconstrued the letter and spirit of the Reconstruction Amendments, which were designed to give this body—the Congress of the United States—broad power to protect the rights of all Americans to liberty and equality. I further think that this Congress should have power to reach certain private action under the first sentence of the Fourteenth Amendment—the citizenship clause, which has no state action requirement. *But the current Court seems to think otherwise.* Thus it is unclear whether the religion language of proposed section (c)(1) would pass judicial muster.

B. The Lopez *problem*

Perhaps in anticipation of this problem, Section (c)(2) follows a different strategy, defining a new federal hate crime involving both violence on the basis of "religion, gender, sexual orientation, or disability" and also a link to interstate or foreign commerce. The idea here is that even if the Thirteenth and Fourteenth Amendments are not enough to uphold federal power, the commerce clause is broad enough. (I also note that "religion" appears in both (c)(1) and (c)(2).)

But once again, there are problems. Unlike the statute struck down by the 1995 *Lopez* case, Section (c)(2) has an explicit commerce trigger. But it seeks to regulate criminal conduct that is not itself particularly commercial. And the *Lopez* decision signals a stricter understanding of the commerce clause than was once dominant. How much stricter is uncertain. *Lopez* was a 5–4 case, and Justices Kennedy and O'Connor seemed to suggest in a concurrence that careful Congressional findings about impact on interstate commerce could make a difference.[7] At this point, S. 622 makes some findings about commercial impact (Sec. 2, paras. 4–7), but in rather conclusory terms, a court might think. Is there specific data about how often bias targets actually move across state lines to avoid their stalkers, or how often these stalkers actually cross state lines in search of their prey?

But the more Congress tries to stress that it is really concerned about interstate commerce the more the symbolic message of an anti-hate Bill is blunted. Is this really a Bill about using a telephone or travelling on a highway, or is it instead simply about hate?

The combination of *Lopez* and *Boerne* is more powerful than each case in isolation. In tandem, these two cases are like two claws of a pincer squeezing Congressional power—and anyone who doubts the strength of this one-two combination should consult a recent Fourth Circuit case, *Brzonkala* v. *Virginia Polytechnic Institute,* invalidating a portion of the 1994 Violence Against Women Act on the basis of *Boerne* and *Lopez.*[8] This Fourth Circuit opinion may or may not be upheld if and when the Supreme Court reaches the issue involved in that case. But it is a straw in the wind suggesting some of the judicial difficulties the current version of S. 622 might face.

C. The double jeopardy problem

Even if courts were to dismiss these possible constitutional objections and uphold the new federal crimes defined by Section 4, a final problem would arise. Is it really fair to subject a private citizen to federal prosecution after, say, he has been acquitted in a state prosecution? Court doctrine allows for prosecution by dual sovereigns,[9] but this doctrine is hard to explain in situations where both governments are working in close partnership to investigate and prosecute a given crime. If the state cannot get two bites at the apple, and neither can the feds, why should the two governments acting as a team get two bites?[10]

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[6] See Akhil Reed Amar, Intratextualism, 112 Harv. L. Rev. 747, 821–27 (1999).

[7] *United States* v. *Lopez,* 115 S.Ct. 1624, 1642 (1995) (Kennedy, J. concurring, joined by O'Connor, J.) (calling for "a stronger connection or identification with commercial concerns") (emphasis added).

[8] See *Brzonkala* v. *Virginia Polytechnic Institute,* 169 F.3d 820 (4th Cir. 1999) (en banc).

[9] See, e.g., *Bartkus* v. *Illinois,* 359 U.S. 121 (1959) (upholding state prosecution for bank robbery following a federal acquittal for robbing the same federally insured bank).

[10] See generally Daniel A. Braun, Praying to False Sovereigns: The Rule Permitting Successive Prosecutions in the Age of Cooperative Federalism, 20 Am. J. Crim. L. 1 (1992).

In a 1995 *Columbia Law Review* article on the Double Jeopardy issues raised by the Rodney King case,[11] Jon Marcus (now a federal prosecutor) and I argued that from a civil liberties perspective, it makes a good deal of sense to allow federal prosecution of state officials who abuse the rights of private citizens. Even after state officials have been acquitted in state court on state criminal charges—as were the Los Angeles officers in the *Rodney King* case—federal criminal prosecution in federal court for federal offenses might well appropriate, we argued. State courts and state prosecutors might predictably go easy on state officials, and these officials wield special and awesome powers over the rest of us. To protect the rights of ordinary citizens, it seems fair to hold abusive officials to a very high standard. But private citizens, we argued, were very different, and double prosecution of them in situations where state and federal governments are acting as a team seems unfair. (A separation of powers analogy is that a federal officer who wields special power over fellow citizens is subject to impeachment and ordinary criminal prosecution, but private citizens are not subject to this kind of double-whacking.)

S. 622 thus poses a dilemma. It seeks to both strengthen the partnership between state and federal governments and yet deny that partnership when it comes to fundamental principles underlying double jeopardy and collateral estoppel. If the two governments really are one team in investigating and prosecuting, as contemplated by S. 622, then when a defendant is prosecuted by teammate and wins an acquittal, is it fair for the other teammate to ignore that verdict?

III. ALTERNATIVES

Here are some alternative solutions this Committee should consider:

1. Commission a careful analysis of existing hate crime data.

2. Consider adoption of a "model" state statute that states should be encouraged to adopt. This proposal symbolically affirms a strong national commitment without any arguable federal overreaching. This model statute might even follow the development of two or three different federal antihate pilot programs, whereby the federal government would invite cooperating states to implement these different pilot programs for, say, 5 years. If, say, Minnesota follows program A and Wisconsin follows program B, we can see in the field the comparative strengths and weaknesses of each strategy. And of course state cooperation can be induced by federal funds. This pilot program/model statute approach takes advantage of the virtues of a federal system and state laboratories, and showcases cooperative federalism.

3. Consider creating a federal civil right of action instead of a federal criminal law. The proposed federal criminal law is likely to be a mere "feelgood" law that will rarely be used, as a practical matter, given the predominance of state prosecution, and the provisions of the Justice Department's "Petite Policy."[12] And it raises double jeopardy concerns that civil causes of action avoid. Further, a civil cause of action is even better at symbolically affirming victims, since it tries to compensate them, and gives them control of litigation. Because civil litigation seeks compensation for past injury rather than criminal punishment, it might be easier to link to the commerce clause as an arguably commercial regulation.

4. Make more explicit findings about the link to interstate commerce. Of course, this may require more careful analysis of actual hate crime data.

5. Consider explicitly invoking the citizenship clause of the Fourteenth Amendment in addition to the Thirteenth Amendment. (I am not hugely optimistic that the current Court would accept this basis for Congressional power; but such an assertion is well supported by the letter and spirit and original intent of the Fourteenth Amendment.)

6. Counterbalance any perceived "weakening" of the Act that would result from omitting or trimming Section 4 by an even stronger statement of principle. In its findings (Section 2) Congress should say something like this: "Acting under our powers to protect the rights of every American citizen to freedom and equality, as contemplated by the Fourteenth Amendment, this Congress declares that all Americans are equal citizens, regardless of race, color, religion, national origin, gender, sexual orientation, or disability." [Alternative version: "We hold these truths to be self evident, that all persons-regardless of race, color, religion, na-

[11] See Akhil Reed Amar and Jonathan L. Marcus, Double Jeopardy Law After Rodney King, 95 Colum. L. Rev. 1, 4–27 (1995).

[12] Under this policy, the Justice Department will generally refrain from prosecuting an individual after a state prosecution for the same crime, unless there are compelling reasons for a second trial. The policy is set forth in the United States Attorneys' Manual, Sec. 9–2.142.

tional origin, gender, sexual orientation, or disability—are created equal; that they are endowed by their Creator with certain unalienable rights; that among these rights are life, liberty, and the pursuit of happiness; that to secure these rights, governments are instituted; and that it is the duty of government to protect these rights from those who seek to cause bodily injury to any person on account of that person's actual or perceived race, color, national origin, religion, sexual orientation, gender, or disability."]

Thank you, Mr. Chair and members of the Committee.

Senator SPECTER. Well, we thank you all. I regret that other Senators were not here, but this is not atypical.

Mr. NEUBORNE. Senator, one moment, because the notion about data I think is terribly important.

Senator SPECTER. You may proceed.

Mr. NEUBORNE. There was something in the Attorney General's testimony that I would like to just highlight, and that is the extraordinary success of the recent statute dealing with church bombings, 247. The usual apprehension rate in arson—it is a very hard crime to solve, as you well know—is only about 16 percent.

Once that statute was passed and they were able to create the kind of joint Federal-State task forces, the apprehension rate for church bombings has gone up to 34 percent. So they have more than doubled the apprehension rate in the short time that that statute has been in effect. I suggest to the Senate that that is a very powerful piece of data pressing in favor of enacting this legislation.

Senator SPECTER. Well, thank you very much, Professor Neuborne, for that observation.

We do have staff here noting the testimony, and it is part of the record and it is very helpful. I think that all of the views have been very forcefully expressed. I frankly wish we had time for extended questioning, but we do not. So, again, I thank you for your participation.

[Whereupon, at 12:00 p.m., the committee was adjourned.]

APPENDIX

ADDITIONAL SUBMISSIONS FOR THE RECORD

PREPARED STATEMENT OF AMERICAN CIVIL LIBERTIES UNION

I. INTRODUCTION

The American Civil Liberties Union respectfully submits this statement to urge the Senate 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 amend S. 622, the Hate Crimes Prevention Act of 1999, to limit its 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 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 passage of S. 622 if the Committee adds the evidentiary restriction and avoids any changes to S. 622'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 percent 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,O16 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 victims 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 re-

ports 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 S. 622 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 S. 622 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, S. 622 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, S. 622, 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. *Dunnaway,* 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 S. 622 is that we will see even more such evidence admitted in section 245 prosecutions if S. 622 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 S. 622 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 S. 622 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 amend S. 622 to limit its potential chilling effect on constitutionally protected speech, but also to use the legislation to expand federal jurisdiction to address the problem of an inadequate state and local response to criminal civil rights violations. The ACLU appreciates this opportunity to present our concerns.

PREPARED STATEMENT OF THE CENTER FOR WOMEN POLICY STUDIES

The Center for Women Policy Studies strongly supports S. 622, the *Hate Crimes Prevention Act of 1999* (S. 622), introduced by Senators Kennedy, Schumer, Smith, Specter, and Wyden. It is one of the key priority women's issues confronting the 106th Congress.

We would like to make several key points about the inclusion of gender in federal legislation that addresses hate crimes.

First, S. 622 provides uniformity to federal criminal hate statutes. The Hate Crimes Sentencing Enhancement Act, included in the Violent Crime Control and Law Enforcement Act of 1994, already defines a hate crime as "a crime in which the defendant intentionally selects a victim * * * because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability or sexual orientation of any person" (italics added).

Second, S. 622 provides an important tool to protect battered and sexually assaulted women and girls when state or local authorities are unable or unwilling to respond adequately. Less than half of the states have bias-motivated criminal hate

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[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).

crimes statutes that cover crimes based on gender. The federal law ensures that all women have a full set of legal remedies, and also allows federal resources to assist with investigation and prosecution, particularly when the violence is of the most heinous nature. The Center believes that states must take a leadership role in ending bias-motivated hate crimes against women by expanding their criminal statutes and prosecuting these cases.

Third, violence against women clearly can meet the requirements of widely accepted definitions of hate crimes, as demonstrated in the Center's 1991 report Violence Against Women as Bias Motivated Hate Crime: Defining the Issues. Hate crimes are acts of terrorism directed not only at the individual victims but at their entire community. Its purpose is to intimidate and frighten all women and girls, and to put them "in their place." Further, hate crimes are directed toward groups of people that suffer discrimination in other arenas, and that do not have full access to institutions meant to remedy social, political and economic injustice. The sad truth is that women are such a group of people, and acts of violence against women—from threatening obscene telephone calls to street harassment, from battering to rape to serial murders with mutilation to mass murders in schools—clearly meet the definition of hate crimes. Acts of violence against women—from threatening obscene telephone calls to street harassment, from battering to rape to serial murders to mutilation to mass murders in schools—are crimes committed by one group—men—who by violence attempt to intimidate, control and dominate another group—women. And the settings for these violent acts are the home, the workplace, the schools, and the streets—because the "boundaries" women cross are not the lines of segregated neighborhoods but the lines of appropriate behavior and submission to male authority.

Fourth, the law and its enforcement must focus on the crime itself and its motivation rather than perpetuate misconceptions about the nature of violence against women. Hate crimes based on race, ethnicity, religion, sexual orientation and disability all have their own particular qualities and the victims are identified by the perpetrators in different ways and may or may not involve victims and perpetrators who are acquainted. Gender-motivated hate crimes, however, are sometimes arbitrarily distinguished from other hate crimes because they are the most likely to involve a perpetrator and victim who are intimately related. *Neither the intimacy of the relationship between the victim and the attacker, nor the prevalence of violence against women perpetuated by men should deter us from looking honestly at why the violence occurs.*

Fifth, as with all hate crimes, the prosecutor will face the challenge to establish gender-bias motivation through evidence such as the use of hate language, nature and severity of the attack, lack of provocation, absence of other motives, and a previous history of similar incidents of violence and intimidation of the victim and other women. This requirement will limit the number of acts of violence against women which will be charged and successfully prosecuted as a hate crime.

We believe that members of Congress support protecting women's human rights and are dedicated to ending Violence against women and all people. We urge the members of the Senate Judiciary Committee to support S. 622 as a critical part of a comprehensive national strategy for accomplishing these goals.

PREPARED STATEMENT OF MRS. CATRINA DURR'S LAW STUDENTS, THORNTON TOWNSHIP HIGH SCHOOL, HARVEY, IL

We the students of Ms. Catrina Durr's law classes at Thornton Township High School in Harvey, Illinois, strongly agree that if the Federal government imposes legislation that it will help prevent the problem of hate crimes. Hate crimes across the nation are increasing more than ever before. Hate crimes are any act of discrimination committed against a person or a group due to their race, religion, sexual preference, and other prejudices. The federal government needs to make a clear definition for the phrase HATE CRIME. They must also find a way to increase hate crime report so that the criminal perpetrator can be fully prosecuted. The government needs to make stiffer punishments for these acts because they threatened the authority of our government to enforce our most serious mores.

Hate crimes root from a persons, environment. Children must be taught how to respect differences. They also need to learn right from wrong. It is also the responsibility of government to insure the safety of all Americans not just the dominant class. Ethnocentric ideas have protection under the bill of rights of our constitution, but those rights are limited when peoples actions violate others rights and safety. We must also control all ethnocentric attitudes that harm the integrity of our nation. People must be educated about ethnic differences; and destroy ignorance. Only

the government as a whole can address this problem of hate crimes because this is a worldwide problem. For example, in the fifties and sixties there were no hate crime laws. And during this time African Americans were being lynched more than ever before. After states instituted hate crime legislation the amount of hate crimes significantly decreased. Therefore we strongly want you to consider making a federal hate crime law.

PREPARED STATEMENT OF MRS. LINDA FRANKLIN'S THIRD PERIOD STUDENTS, THORNTON TOWNSHIP HIGH SCHOOL HARVEY, IL

Mrs. Linda Franklin's third period social studies class at Thornton Township High School of Harvey, IL strongly believe the Federal government must impose legislation in an attempt to prevent the growing problem of HATE CRIMES. Those who have become aware of hate crimes, should know them to be any act of hate of discrimination committed against a person or group of persons due to their race, religion, sexual preferences, etc. Thus the Federal government must erect a definite and clear definition for the phrase "hate crime". The people and government must find a way to ensure that hate crimes are reported, so that those that commit them may be fully prosecuted. It is also important for the Federal government to increase the punishment for committing an act of racial discrimination. People must have the largest and most logical negative incentive not to commit a hate crime. Hate crimes should be considered felonies, and dealt with as felonies. The time must be made to fit the crime.

However, it is important to understand that the problem of hate crime has its roots in a person's environment. People must be taught at a young age, that despite our differences, we are very much alike. They must learn right from wrong at an early age. People who commit hate crimes obtain their views of other people, or groups at an early age. it is also important that we as a community get rid of the ethnocentric attitude that is pulling us apart and become one nation. Furthermore, people must be educated about ethnic differences to destroy the ignorance that is the driving force behind hate crimes.

PREPARED STATEMENT OF TIMOTHY LYNCH

MR. CHAIRMAN, DISTINGUISHED MEMBERS OF THE COMMITTEE: My name is Timothy Lynch. I am associate director of the Cato Institute's Center for Constitutional Studies.

I want to thank the committee for inviting me to submit written testimony on the question of whether Congress should enact the "Hate Crimes Prevention Act of 1999."

I believe the proponents of hate crimes legislation have good and honorable intentions. They would like to see less bigotry and more good will in American society. While I share that goal, I believe Congress should decline the invitation to enact hate crimes legislation for both constitutional and practical reasons.

A. CONSTITUTIONAL OBJECTION

The U.S. Constitution created a federal government of *limited* powers. As James Madison noted in the Federalist no. 45, "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." Most of the federal government's "delegated powers" are specifically set forth in article I, section 8. The Tenth Amendment was appended to the Constitution to make it clear that the powers not delegated to the federal government "are reserved to the States respectively, or to the people."

Crime is serious problem, but under the U.S. Constitution it is a matter to be handled by state and local government. In *Cohens* v. *Virginia,* 6 Wheat (19 U.S.) 264 (1821), Chief Justice John Marshall observed that Congress had "no general right to punish murder committed within any of the States" and that it was "clear that congress cannot punish felonies generally." Unfortunately, as the years passed, Congress eventually assumed the power to enact a vast number of criminal laws pursuant to its power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." [1]

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[1] See Kathleen F. Brickey, "Criminal Mischief: The Federalization of American Criminal Law," 46 *Hastings Law Journal* 1135 (1995); Edwin Meese III, "Big Brother on the Beat: The Expand-

In recent years, Congress has federalized the crimes of gun possession within a school zone, carjacking, wife beating, and female genital cutting. All of that and more has been rationalized under the Commerce Clause.[2] In *United States* v. *Lopez,* 514 U.S. 549 (1995), the Supreme Court finally struck down a federal criminal law, the Gun-Free School Zone Act of 1990, because the connection between handgun possession and interstate commerce was simply too tenuous. In a concurring opinion, Justice Clarence Thomas noted that if Congress had been given authority over matters that simply affect interstate commerce, much if not all of the enumerated powers set forth in article I, section 8 would be surplusage. Indeed, it is difficult to dispute Justice Thomas, conclusion that an interpretation of the commerce power that "makes the rest of § 8 surplusage simply cannot be correct."

This Congress should not exacerbate the errors of past Congresses by federalizing more criminal offenses. The Commerce Clause is not a blank check for Congress to enact whatever legislation it deems to be "good and proper for America." The proposed Hate Crimes Prevention Act is simply beyond the powers that are delegated to Congress.

B. POLICY OBJECTIONS

Beyond the threshold constitutional problem, there are several other reasons why Congress should decline the invitation to enact hate crimes legislation.

First, all of the violent acts that would be prohibited under the proposed bill are *already* crimes under state law. Over the last two years, there has been a great deal of publicity surrounding the brutal killings of James Byrd in Texas and Matthew Shepard in Wyoming. The individuals suspected of committing those murders were quickly apprehended and prosecuted by state and local authorities. Those incidents do not show the necessity for congressional action; to the contrary, they show that federal legislation is unnecessary.[3]

Second, the so-called "Hate Crimes Prevention Act" is not going to prevent anything. Any thug that is already inclined to hurt another human being is not going to lay down the gun or knife because of some new law passed by Congress. The culprits involved in the killings of James Byrd and Matthew Shepard, for example, made a conscious decision to disregard basic homicide statutes. And those murders took place in states that have the most drastic legal sanction available under the law—the death penalty. The notion that any federal hate crime law could have prevented those brutal killings is preposterous.

Third, it is important to note that the whole concept of "hate crimes" is fraught with definitional difficulties. Hate crimes generally refer to criminal conduct motivated by prejudice. Should all prejudices be included in the hate crime definition—or only a select few? The recent school shooting in Colorado illustrates this problem. According to news reports, one of the groups targeted by the deceased teenage suspects was athletes.[4] If the athletes had been the sole targets of the school shooting, such a crime would not have been considered a hate crime in any jurisdiction (federal or state). And yet we can be fairly certain that the perpetrators of the Colorado rampage were filled with hatred toward "jocks."

For the proponents of hate crime laws, the dilemma is this: if some groups (women, gays, vegetarians, golfers, whatever) are left out of the "hate crime" definition, they will resent the selective depreciation of their victimization. On the other hand, if all victim groups are included, the hate crime category will be no different than "ordinary" criminal law.[5]

Fourth, proponents of hate crime legislation believe that such laws will increase tolerance in our society and reduce intergroup conflict. I believe hate crime laws may well have the opposite effect. That's because the men and women who will be administering the hate crime laws (e.g. police, prosecutors) will likely encounter a never-ending series of complaints with respect to their official decisions. When a U.S. Attorney declines to prosecute a certain offense as a hate crime, some will complain that he is favoring the groups to which the accused belongs (e.g. hispanic

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ing Federalization of Crime," 1 *Texas Review of Law and Politics* 1 (1997). See also Richard A. Epstein, "The Proper Scope of the Commerce Power," 73 *Virginia Law Review* 1387 (1987).

[2] See Timothy Lynch, "Dereliction of Duty: The Constitutional Record of President Clinton," *Cato Institute Policy Analysis* No. 271, March 31, 1997, pp. 37–43.

[3] If convincing evidence were presented to Congress that state officials were enforcing the local criminal law in an uneven manner so that certain citizens were being deprived of the equal protection of the law, Congress can (and should) invoke its legislative power under section 5 of the Fourteenth Amendment. I hasten to add, however, that a federal "hate crimes" law would be an inappropriate response to such a situation—for all of the other reasons outlined herein.

[4] See Eric Pooley, "Portrait of a Deadly Bond," *Time,* May 10, 1999, p. 26.

[5] See generally James B. Jacobs and Kimberly Potter, *Hate Crimes: Criminal Law and Identity Politics* (Oxford University Press, 1998).

males). And when a U.S. Attorney does prosecute an offense as a hate crime, some will complain that the decision was based upon politics and that the government is favoring the groups to which the victim belongs (e.g. Asian Americans).

This is already happening in the jurisdictions that have enacted hate crime laws at the local level. For example, when then New York City Mayor David Dinkins characterized the beating of a black man by white Jewish men as a hate crime in 1992, the Jewish community was outraged.[6] Jewish community leaders said the black man was a burglar and that some men were attempting to hold him until the police could take him into custody. The black man did not want to go to jail, so he resisted—and the Jewish men fought back. Incidents such as that illustrate that actual and perceived bias in the enforcement of hate crime laws can exacerbate intergroup relations.

Fifth, hate crimes legislation will take our law too close to the notion of thought crimes. It is, of course, true that the hate crime laws that presently exist cover acts, not just thoughts. But once hate crime laws are on the books, the law enforcement apparatus of the state will be delving into the accused's life and thoughts in order to show that he or she was motivated by bigotry. What kind of books and magazines were found in the home? What internet sites were bookmarked in the computer? Friends and co-workers will be interviewed to discern the accused's politics and worldview. The point here is that such chilling examples of state intrusion are avoidable because, as noted above, hate crime laws are unnecessary in the first place.

The claim will doubtless be made that such problems can be avoided by "sound prosecutorial discretion" with respect to the application of hate crimes legislation. Congress should not accept that bland assurance. Consider, for example, a hate crime prosecution from Ohio. The case involved an interracial altercation at a campground and here is how the prosecutor questioned the white person accused of a hate crime:

Q. And you lived next door * * * for nine years and you don't even know her first name?
A. No.
Q. Never had dinner with her?
A. No.
Q. Never gone out and had a beer with her?
A. No. * * *
Q. You don't even associate with her, do you?
A. I talk to her when I can, whenever I see her out.
Q. All these black people that you have described as your friends, I want you to give me one person, just one who was a really good friend of yours.[7]

This passage highlights the sort of inquisitorial cross-examination that may soon become common whenever an accused person takes the witness stand to deny a bias or hate charge that has been lodged against him or her.

In *People* v. *Lampkin,* 457 N.E.2d 50 (1983), the prosecution presented as evidence racist statements that the defendant had uttered six-years before the crime for which he was on trial. This case raises the question of whether there is going to be statute of limitations for such behavior? For example, it is not uncommon for teenagers to entertain various prejudices for brief periods and then discard them as they mature into adulthood. Is a stupid remark uttered by a 16 year-old on an athletic field going to follow that person around the rest of his or her life? Shouldn't our law make room for the possibility that people can exhibit some variation of bigotry in life—but then change?

The good news for Congress is this: all of the problems outlined above are avoidable because hate crime legislation is unnecessary in the first place.

C. CONCLUSION

For all of the above stated reasons, I would urge Congress not only to decline the invitation to pass the Hate Crimes Prevention Act of 1999, but to repeal all existing federal hate crime laws.

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[6] See Mary B.W. Tabor, "Black is Victim of Beating By Hasidim in Crown Heights," *New York Times,* December 2, 1992, p. B3; Jane Fritsch, "Police Dept. Vows Caution in Labeling Crimes as Bias Cases," *New York Times,* December 22, 1992, p. A1.

[7] See Richard Dooling, "Good Politics, Bad Law," *New York Times,* July 26, 1998 (quoting *State* v. *Wyant,* 597 N.E.2d 450 (1992), vacated and remanded, 113 S.Ct. 2954 (1993), reversed, 624 N.E.2d 722 (1994)).

PREPARED STATEMENT OF NATIONAL GAY AND LESBIAN TASK FORCE

The National Gay and Lesbian Task Force (NGLTF) commends Chairman Hatch for holding a hearing on the vital issue of hate crimes in the United States. The problem of bias-motivated violence against gay, lesbian, bisexual and transgender (GLBT) people is unquestioned. The recent series of murders of GLBT people across the country has electrified the nation and focused attention on the realities of homophobia and the dangers of homophobic rhetoric.

The National Coalition of Anti-Violence Programs (NCAVP) documented 2,552 anti-GLBT crimes in 1998 through their network of 26 community-based organizations across the country. The most striking aspect of anti-GLBT crimes in 1998 was the increased level of violence of these crimes. The number of anti-GLBT murders more than doubled from 14 in 1997 to 33 in 1998. The number of assaults which required hospitalization of the victim increased by 108 percent. The number of anti-GLBT crimes which involved weapons increased 25 percent. The use of firearms in these crimes increased 71 percent and the use of knives and sharp objects increased 13 percent.

The FBI, which monitors hate crimes statistics under the Hate Crimes Statistics Act, documented 1,375 hate crimes based on sexual orientation in 1997, the most recent year for which statistics are available. Hate crimes against people based on sexual orientation are the third highest category of hate crimes, according to the FBI, constituting 14 percent of all hate crimes reported to the FBI.

These extreme levels of violence are proven anecdotally by several murders of gay men which have received national attention. In October of 1998, Matthew Shepard, a 21-year-old, gay University of Wyoming student was abducted, beaten unconscious, tied to a fence and left to die in Laramie, Wyoming. In February, Billy Jack Gaither, a 39-year-old resident of Sylacauga, Alabama, a town 40 miles south of Birmingham, was taken to a remote location, bludgeoned to death with an ax handle and set on fire. In March, Henry Edward Northington, a 39-year-old homeless man was murdered and beheaded. His severed head was placed on a walkway known to be a gay meeting place.

Unfortunately, these high profile cases are the exception, not the norm. Of the 2,552 anti-GLBT crimes reported to NCAVP, only 1,010 were reported to the police. Many GLBT people are reluctant to go to the police when they have been a victim of bias-motivated violence. Frequently they fear being outed to their friends, families and co-workers. The risk of losing jobs and the love of family and friends is too great and too real. This fear compels the silence of many in the GLBT community.

Studies have shown that victims of hate crimes suffer two to three times more symptoms of trauma than victims of other crimes. Research indicates that because assailants select victims of hate crimes on the basis of the victims' gender, sexual orientation, disability, race, religion or national origin, victims often link their vulnerability to their personal, cultural or spiritual identity. As a result, victims of bias crimes suffer greater emotional trauma than victims of other crimes. Criminal activity based on bias terrorizes not only the victim, but also the entire community of which the victim is a part.

Furthermore, police personnel often victimize the victims again. In approximately 15 percent of the GLBT hate crimes reported to the police, the police refused to take the victim's complaint at all. In 67 percent of cases the police took the complaint but made no arrests. Finally, in 13 percent of cases, the police took the victim's complaint but failed to classify the crime as a bias crime. A shocking example of this practice can be found in St. Louis, Missouri. A 31 year-old white gay man was assaulted by his neighbor. The neighbor entered the victim's garage, hit the victim 12 times with a baseball bat while saying "You are a faggot * * * who needs to move [out of this neighborhood]. If you don't move you're gonna die." The victim required 20 stitches and sustained permanent head injury. This incident still has not been classified as bias-related.

Regrettably, many states do not have a mechanism by which gay, lesbian, bisexual and transgender people can even report their bias crimes. Only 21 states and the District of Columbia have enacted hate crimes laws which include sexual orientation. (These states are Arizona, California, Connecticut, Delaware, Florida, Iowa, Illinois, Kentucky, Louisiana, Maine, Massachusetts, Minnesota, Nebraska, New Hampshire, New Jersey, Nevada, Oregon, Rhode Island, Vermont, Washington, and Wisconsin.) Nine states do not have any hate crimes laws at all.

Existing federal hate crimes legislation does not cover actual or perceived gender, sexual orientation and disability. Current federal hate crimes laws also require victims to demonstrate that they were singled out for attack because they were enjoying a federally protected right, such as voting. This jurisdictional maze allows a de-

fendant to argue that he attacked a victim because of his perceived sexual orientation, not because of his race.[1]

Expanding federal legislation would accomplish several goals. First it would provide consistency throughout the country. In all 50 states, violence against GLBT people would be illegal and prosecutable. Federal prosecution would continue to be limited by the requirement that the Attorney General certify cases for federal prosecution. Certification will continue to be limited to cases where state and local authorities cannot or will not prosecute assailants or where there exists some interstate characteristic to the crime.

Expanded federal legislation will not stop all hate crimes. No law could achieve that goal. But, expanded federal legislation will send a clear, national message to the country that all hate crimes, including hate crimes based on sexual orientation, disability and gender, are unacceptable and will be punished.

Second, a federal hate crimes law could help address the problem of violence against people with HIV/AIDS. NCAVP documented 153 instances of violence against people living with HIV disease in 1998. While this represents a 43 percent drop in reported incidents from the previous year the numbers still indicate an underlying fear of the disease. In 1988 the Presidential Commission on the Human Immune Deficiency Epidemic observed "Increasingly, violence against those perceived to carry HIV, so called 'hate crimes,' are a serious problem * * * and are indicative of a society that is not reacting rationally to the epidemic." The Commission called for appropriate legislation to stem the tide of violence. By including disability as a protected category, the federal government finally will be addressing these acts of violence.

Finally, expanded federal legislation which included actual or perceived gender would address the problem of violence directed at transgender people. Violence against transgender people soared 49 percent in 1998, according to NCAVP. Protection against violence based on perceived gender is essential to comprehensive hate crimes legislation.

Our nation needs a strong statement from the federal government that it is committing its full resources and attention to combating this epidemic of violence.

PREPARED STATEMENT OF 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 litigate to help women enforce their rights under the VAWA Civil Rights Remedy. The Hate Crimes Prevention Act is essential to fulfilling our country's constitutionally guaranteed promise of equality.

INTRODUCTION

We want to thank Senator Hatch for holding these hearings and giving us the opportunity to submit testimony in support of the Hate Crimes Prevention Act of 1999 (HCPA) for the Senate Judiciary Committee. Hate crime 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

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[1] *See United States* v. *Bledsoe,* 728 F.2d 1094, 1098 (8th Cir. 1984) (rejecting defendant's arguments that he selected the victim on the basis of his sexual orientation, not race).

[1] Center for Women Policy Studies, *Violence Against Women as Bias Motivated Hat 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).

crime laws are critical because they provide uniform protection in every state from 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:

- A serial batterer had a pattern of assaulting, terrorizing, and demeaning women. Although convicted five times for assaulting the same woman, the 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 bias 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 "* * *" as they raped her. They apparently 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

[3] *See* 18 U.S.C. § 2261 (1998); 18 U.S.C. § 2262 (1998).
[4] *See* 42 U.S.C. § 13981 (1997).

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 * * *"; "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 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

[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 Rap 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 Marla Hanson).

[6] For 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").

[7] *A 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).

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 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

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[8] *Id.* at 1208.

[9] Letter 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).

[11] S. 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.

[13] "*See, e.g., Soto* v. *Flore,* 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 the 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).

[14] International 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 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 Recommendation 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).

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 harassment;[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

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[16] *See Libertad* v. *Welch,* 53 F.3d 428, 449 (1st Cir. 1995).

[17] *See, 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 ground,* 1999 U.S. App. LEXIS 3457, No. 96–1814 (4th Cir. *en banc* Mar. 5, 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. 111. 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., Oncale* 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 environment); *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 "* * *").

[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).

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 evidence 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]

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[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 (9 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. *Shambur* , 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, 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. *Dunnaw,* 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. *Bledso,* 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").

[34] 18 U.S.C. § 245(a)(1).

[35] *See* S. 622 (4)(2)(B); H.R. 1082 (4)(2)(B).

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]

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.

REAL-LIFE GENDER BIAS CRIMES

The following are all true stories of violence against real women summarized from newspaper articles and court cases. These examples have been identified as gender-bias crimes by using the widely accepted FBI guidelines for identifying bias crimes. Under these guidelines, analysts use common sense and look at a range of factors, including whether there is: *a history of misogynistic behavior, a pattern of assault-*

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[36] *See, e.g., United States* v. *Lane,* 883 F.2d 1484 (10th Cir. 1989) (Commerce Clause); *United States* v. *Bledso ,* 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. *Lope,* 514 U.S. 549, 558–59 (1995).

[39] *See Lope,* 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. *Well,* 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).

ing women, sexual violence, bias language, epithets, extreme brutality, mutilation and seemingly motiveless cruelty that characterizes bias crimes.[1] While a few of these examples demonstrate that states with gender bias crime laws are able to identify violence motivated by gender bias, others demonstrate why federal jurisdiction over these crimes is imperative.

Arkansas: A woman's badly mutilated body was discovered just two days after her second wedding anniversary. She had been stabbed approximately 130 times in the breasts, vagina, buttocks, eyes and forehead. Her husband was ultimately charged with the murder.[2]

California: On November 3, 1998, a man was arrested after walking into the Humboldt County Sheriff's Department and admitting that he had "hurt a lot of people." He pulled a woman's severed breast from his coat pocket, saying the evidence was "the tip of the iceberg." The man confessed to killing four women, describing how he picked up one woman as she walked near a shopping mall. He decapitated her, severed her arms and breasts and cooked one breast in the oven. He burned the woman's clothing and disposed of her body parts in various locations. Her nude torso was discovered 12 days later in a slough. The man admitted to authorities that he often picked up prostitutes and other women and that it was not uncommon for women to stop breathing while they were having sex with him.[3]

Connecticut: Two police officers have been charged with having coerced sexual favors from women under threat of arrest. While in uniform and on duty, Officer Rivera is alleged to have repeatedly coerced five different women to engage in sexual acts under threat of arrest. He forced one woman into his police vehicle and took her to a remote location, ordered her to pose nude while lewd photos were taken and forced her to engage in fellatio. He forced another to lie on the seat of the vehicle while he masturbated over her face and chest, forced her to masturbate with the police baton, and to engage in fellatio. He coerced another into engaging in sexual acts in exchanged for promises that his official actions would be influenced thereby. He grabbed another woman who was walking with her minor daughter, forced her into his patrol car, and told her: "* * *, you are going to jail." "You * * *. One of these days you are going to suck my * * * and my * * *" and forcibly ejected her from the car. Officer Basile is alleged to have: forced a woman into his vehicle, driven her to a remote location and coerced her to engage in fellatio with him, under threat of arrest; coerced another to engage in fellatio with him, under threat of arrest; and coerced yet another woman to engage in fellatio with him on numerous occasions, also under threat of arrest. While these two officers have pleaded innocent to these charges, a third officer who was present and did not intervene in the incidents has pleaded guilty to aiding and abetting the officers, and a fourth man, a former officer, pleaded guilty to providing the camera that was used to take the lewd photos of the first victim.[4]

Illinois: Upon his confession, a man was convicted for the horrific murder of a 21 year old woman who was abducted on her way to work and whose mutilated body was later found in a cemetery. Authorities believe the man belonged to a cult blamed for the kidnappings, rapes, and mutilation murders of 18 Chicago-area women in the early 80's.[5]

Florida: The media reported that a serial murderer "has a taste for petite brunettes." One by one, the bodies of his women victims were discovered horribly mutilated. Women in the community slept in groups with guns. According to USA Today, women left the college town by the hundreds, many refusing to return. The murderer was eventually identified when his DNA matched semen from the crime scenes.[6]

Florida: A woman ran from a fraternity house, naked and crying. She called the police, alleging that she had been raped and that it had been videotaped. The police found the video tape in which at least one man assaulted the woman while several of his fraternity "brothers" commentate for the video, stating "This is what you call

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[1] *See* U.S. Dep't of Justice Federal Bureau of Investigation, *Hate Crimes Data Collection Guidelines* 1–4; Northwest Women's Law Center *et al., Gender Bias Crimes: A Legislative Resource Manual* 12–14 (1994); Center for Women Policy Studies, *Violence Against Women as Bias Motivated Hate Crimes: Defining the Issues* 8–12 (1991). Decisions analyzing other civil rights laws, such as Title VII or 42 U.S.C. § 1985 (3) also demonstrate how circumstantial evidence can establish bias motivation underlying violent acts.

[2] Suzanne Pharr, "Hate Violence Against Women: A Long Killing Season," Violence Against Women (National Network of Women's Funds, Spring 1991).

[3] Trucker Describes Slaying to Jury," The Eureka Times-Standard (April 8, 1999).

[4] *U.S.* v. *River* No. 3:99CR63AWT (D. Conn. Apr. 8, 1999) (Grand Jury Indictment); *U.S.* v. *Basile* No.3:99CR64AWT (D. Conn. Apr. 8, 1999) (Grand Jury Indictment).

[5] "IL Executes Man for 1982 Murder," The Associated Press (March 17, 1999).

[6] Deborah Sharp, "Trial begins in college slayings," USA TODAY, p. 3A (February 14, 1994).

* * * Rape, Rape, Rape, Rape white trash," "The night we rape a white-trash crackhead * * *," "It is Rape-thirty in the morning," and "Notice the struggle of the hands." After viewing the video, local police claimed the video clearly demonstrated consent and arrested the woman for making a false report. The men 7 have not been arrested.[7]

Maine: A serial batterer was found to have violated that state's civil bias law for his bias crimes against women. Two former girlfriends and his ex-wife recounted his abuse, including severe physical battering, death threats, assault on his wife while she was pregnant, constant slurs and profanities, calling the women "* * *," "* * *," and "* * *," and telling them that they made him sick. He was ordered to stay away from the three women and to refrain from violence against other women.[8]

Massachusetts: A Massachusetts state court found a serial batterer's abuse constituted bias crimes against women under the state's bias crime law. Four women testified that his abuse included severe physical battering, rape, death threats, unlawful restraint and constant verbal abuse. He called the women "* * *," "* * *", and "* * *", and made derogatory comments that they and all women are weaker than men, and not as smart as men.[9]

Michigan: A young woman was severely and repeatedly beaten by her husband. He kicked her with steel-toed boots, broke her arm, and repeatedly penetrated her vagina with the barrel of a loaded handgun, all the while threatening to kill her. After she left him he stalked, harassed, threatened, and assaulted her. She filed for divorce and got an order of protection, but the police refused to enforce the order. One day as she was on her way to work, he abducted her in public at gun point. He battered her, raped her repeatedly, and attempted to take her across state lines. She escaped and her testimony got him convicted. Four and one-half years later he was released from prison. Two weeks after that, he was back stalking, threatening, and harassing her. Perhaps realizing that the law does not protect her and those like her, the commission granted her an unrestricted license to carry a concealed weapon.[10]

Nevada: A woman befriended a man on the internet and agreed to meet him, but for security reasons 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, kidnapped, raped and assaulted her. They then drove her home telling her that no one would believe her. When she reported the assault, local police 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 case was not pursued until months later after a second victim, a seventeen year old girl, was lured to the same man's apartment, raped and escaped half naked. After learning how the case was handled, four other women in the community reported similar treatment by the local authorities.[11]

New Hampshire: Although convicted on five occasions for assaulting one woman, a batterer never served time for the assaults. Upon his next misdemeanor assault conviction, a trial court judge held that the batterer had a pattern of assaulting, terrorizing, and demeaning women and that his actions were motivated by gender bias. The judge used the state hate crime law to impose a sentence of more than double the jail time that would have otherwise been given for a misdemeanor assault conviction. As a result, the man will now serve two to five years in jail.[12]

Washington: Raped, restrained, battered, disfigured, threatened with a loaded shotgun, and verbally threatened and harassed upon attempting to leave, a Washington woman sought justice from the legal system. She sued her ex-husband under the VAWA civil rights remedy. The federal court judge found that the allegations of rape and sexual violence were sufficient to conclude that the violence was gender motivated. These allegations included gender-specific epithets, acts that perpetuated stereotypes of a woman's submissive role, severe and excessive attacks, especially during pregnancy, and acts of violence committed without provocation and at times when the plaintiff asserted her independence.[13]

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[7] *See* Statement of UF/SFCC Campus NOW (April 1, 1999) (on file with NOW LDEF); Brian Geller, "Videotape a Focus of Controversy," Gainesville Sun (April 2,1999).

[8] *Maine* v. *Cabana No.* CV–98–034 (Maine Sup. Ct. Feb. 9, 1998).

[9] *Massachusetts* v. *Aboulez* No. 94–0984H (Mass. Sup. Ct. Mar. 14, 1994).

[10] Pam Maples, "Domestic Violence: Old Problem, New Attitudes; Attacks on Women are a Form of Hate Crime, Many Feminists Argue," p4B St. Louis Dispatch (June 13, 1993).

[11] The Associated Press, "Woman: Nev. Cops Called Me a Liar," Newsday, p. A24 (March 24,1999).

[12] Laura Kiernan, "N.H. Judge Applies Hate-Crimes Law in Case of Man's Assault on Woman," The Boston Globe, p.38 (June 13, 1993).

[13] *Ziegler* v. *Ziegler* No. CS–97–0467–WFN (E.D. Wa. Sept. 24, 1998).

Virginia: A college student was raped in her dorm three times by two men within minutes of first meeting them. During a college disciplinary hearing, one of the men conceded that she twice told him "no" before he raped her. The young woman eventually dropped out of school and returned home after the school permitted one of the alleged assailants to return on a full athletic scholarship with no discipline other than being required to attend a one-hour educational session. Although her VAWA civil rights case against the men was eventually dismissed on other grounds, each court to analyze the facts found evidence of gender bias. Indeed, one judge said the case had "all the earmarks of a hate crime."[14]

PREPARED STATEMENT OF RIKI ANNE WITCHINS

My name is Riki Anne Wilchins, and I serve as the Executive Director of the Gender Public Advocacy Coalition ("GenderPAC"), which is an association of groups that share the goal of eliminating discrimination based upon gender, race and affectional preference. On behalf of GenderPAC, I want to thank Senator Hatch for holding this hearing on the subject of S. 622, the Hate Crimes Prevention Act (the "HCPA"), and for providing GenderPAC and other interested parties an opportunity to submit written testimony concerning the HCPA. GenderPAC strongly supports the HCPA, and we wish to thank Senator Kennedy and his colleagues in the Senate who are sponsoring this important legislation.

GenderPAC collects reports of apparent hate crimes directed against persons whose physical appearance and/or manner of self-expression do not conform to our culture's bimodal (*i.e.,* male or female) heterosexual norms and racial/ethnic stereotypes. The at-risk population to which I am referring includes not only mannish-appearing heterosexual women and feminine-appearing heterosexual men, but also persons who identify as gay, lesbian, bisexual, transgendered and/or intersexed, particularly those who are economically marginalized and/or persons of color. Millions of Americans fall within this group.

Recently we have noted an increase in the frequency and viciousness of incidents directed against this population. For example, in January 1999, 18-year old Donald Scott Fuller, who also was known as "Lauryn Paige," was brutally stabbed to death in Austin, Texas. Among the multiple stab wounds on Fuller's body was a cut across his throat nine inches long and three inches wide. In October, 1998, Matthew Shepard, a young gay man, died in Laramie, Wyoming after he was beaten nearly to death with a pistol and crucified on a fence.

Matthew's case illuminates the complexity of these incidents. His murder was portrayed as a hate crime directed against sexual orientation. Yet Matthew, like so many gay hate crime victims, also was small, blond, and slight in stature. That is, Matthew may have been targeted not only because of his sexual orientation, but also because of his "feminine" gender characteristics.

These incidents and the many others like them merely are the most recent in a long and distressing stream of murders apparently directed against gender, affectional and/or racial difference. Unfortunately, local law enforcement authorities often share common stereotypes about this population, and sometimes cannot be counted upon to discharge their investigatory and prosecutorial duties in a fair and unbiased manner.

An incident that occurred in 1994 illustrates this problem. Brandon Teena was an anatomically female person who self-identified and lived as a man in Falls City, Nebraska. Brandon was raped by two men, presumably to "put her in her place," *i.e.,* to demonstrate that he was a woman, not a man. The local sheriff, referring to Brandon as "it," refused to apprehend the rapists, and they murdered Brandon several days later, as they had threatened to do if he told anyone about the rape.

Because they are members of a stigmatized population, people like Brandon Teena may encounter difficulties in obtaining the aid of local law enforcement authorities. Consequently it is important that alternative sources of assistance be available. The HCPA could provide one such alternative, because it would provide the Department of Justice with investigative and prosecutorial jurisdiction under 18 U.S.C. § 245 when bias against a victim's "actual or perceived * * * gender [or] sexual orientation" appears to motivate an incident involving willfull bodily injury, in which an appropriate connection with or affect upon interstate commerce is present.

Although I am not sufficiently acquainted with the details of Brandon's case to understand whether it would have presented a sufficient connection to interstate commerce, it certainly appears to have been an incident motivated by bias against

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[14] *Brzonkala* v. *Virginia Polytechnic and State Univ.* 132 F.3d 949, 963 (4th Cir. 1997), *rev'd on other grounds,* 169 F.3d 820 (4th Cir. *en—banc* 1999).

Brandon's perceived gender (*i.e.,* the murderers perceived Brandon as a woman transgressing norms of gender expression and affectional preference, and apparently killed Brandon to teach him and—from the killers' point of view—other women like him, an object lesson about the penalty for nonconformity).

Many of us see diversity as a source of strength and adaptability which is inextricably connected with the ideals that are central to the American experience. To put it another way, freedom means other people get to do what you don't like. Still, we recognize that this is a view not shared by all Americans. Some perceive diversity as a threat, and react to it hatefully and violently. We encourage the Senate to support the Hate Crimes Prevention Act as a reasonable, limited, and sadly, sometimes necessary federal response to such incidents.

Respectfully submitted,

RIKI WILCHINS,
Executive Director, Gender Public Advocacy Coalition.

CRIMINAL JUSTICE LEGAL FOUNDATION,
Sacramento, CA, May 7, 1999.

Senator ORRIN HATCH,
Chairman, Senate Judiciary Committee
Dirkseon Office Building, Washington, DC.

DEAR SENATOR HATCH: The Criminal Justice Legal Foundation submits these comments regarding S. 622, the Hate Crimes Prevention Act of 1999.

As part of its mission to support the interests of victims of crime and the law-abiding public, CJLF has supported hate-crime laws. In particular, we filed a "friend of the court" brief in *Wisconsin* v. *Mitchell,* 508 U.S. 476 (1993), supporting the constitutionality of the Wisconsin hate-crime penalty enhancement statute and providing the argument which appears on pages 489–490 of the opinion. However, the bill presently before the committee raises concerns very different from those involved in the Wisconsin case.

Crimes which one individual commits against another, with no claim or exercise of government authority and no commercial character, are generally matters for state and local authority. This is an essential part of America's federal system. The matters that touch people most closely are generally handled by the level of government closest to them, by officials more responsive to local concerns. See The Federalist Nos. 45 and 46 (Madison).

Exceptions to the general rule require a compelling justification. When the local government itself deprives people of their rights or when, by systemic failure to prosecute crimes against disfavored groups, it deprives them of the equal protection of the laws, a strong case can be made for federal action. No such justification exists for the present bill, as section 2(9) effectively acknowledges.

S. 622 seeks to prevent hate crimes through deterrence. To have a deterrent effect, the penalties must be significantly greater than those which would otherwise be imposed, and those greater penalties must be substantially likely to be imposed. This bill does not satisfy the first requirement in the most egregious cases, and it does not satisfy the second in any case.

The new 18 U.S.C. § 245(c)(1), as added by section 4 of the bill, is almost certainly unconstitutional. It has no state action or interstate commerce requirements at all. If cases prosecuted under this section are not dismissed in the trial court, any convictions obtained will be reversed eventually under *United States* v. *Lopez,* 514 U.S. 549 (1995). Those cases would then have to be reprosecuted on stale evidence by state or local prosecutors, with all the difficulties that entails. The federal law would thus have the effect of decreasing rather than increasing the swiftness and certainty of punishment.

The most egregious hate crimes are, of course, those in which the victim is killed. This bill punishes such crimes by life in prison. In most cases, that will be no increase at all, as murder is generally punished by life in prison. In some cases, it may be a decrease in punishment.

Hate-crime murder is a capital offense in several states. See Cal. Pen. Code § 190.2(a)(16); Del. Code, Tit. 11, § 4209(e)(1)(v), Nev. Rev. Stat. § 200.033(11). In many other states, torture murder or an equivalent is a capital offense. *See, e.g.,* Wyo. Stat. 6–2–102(h)(vii). For atrocious crimes such as the notorious cases in Wyoming and Texas, this bill provides a lower penalty.

In states which have rejected the "dual sovereignty" doctrine, *see, e.g.,* Cal. Pen. Code § 656, a federal prosecution will preclude a state prosecution for the same offense. About half the states are in this category. See 3 W. LaFave and J. Israel, Criminal Procedure § 24.5 (1984). Suppose, hypothetically, a case like the Jasper,

Texas case were to occur in California after enactment of S. 622. This would be a capital offense under state law. See Cal. Pen. Code § 190.2(a) (16) and (18). Yet if the United States Attorney chose to prosecute the case under the new 18 U.S.C. § 245(c)(1), the maximum penalty would be life in prison, and the state prosecution would be precluded. In that event, this bill would have the effect of reducing rather than increasing the penalty for hate-crime murder and torture murder.

This hypothetical is not idle speculation. This is essentially what happened in the notorious Unabomber case. The case fell under the overlapping jurisdiction of state and federal courts and was prosecuted in federal court. The United States Attorney accepted a plea bargain of life imprisonment over the strong objection of the Sacramento District Attorney. The Unabomber has permanently escaped the full measure of punishment for his cowardly campaign of terror as a result of the exercise of federal jurisdiction.

This bill is clearly drafted with good intentions in an attempt to address a matter of grave concern. Good intentions, however, are not enough. The measure adopted should substantially contribute to redressing the problem. Simply transferring cases from the state to the federal system would accomplish little, and changing capital offenses to noncapital ones would be counterproductive.

The beginnings of a better approach lie in sections 6 and 7 of the bill. Crimes of this type can and should continue to be prosecuted in state court. The federal government can assist by cooperation with local agencies, sharing information, and financial assistance. Drafting a model statute and finding research to determine what kinds of measures are most effective in reducing crimes of this type would also be appropriate avenues of federal involvement.

I hope these thoughts are helpful to the committee. If I can be of any further assistance, please do not hesitate to call.

Very truly yours,

GEORGE DEUKMEJIAN,
Vice Chairman.

MICHIGAN CITIZENS WITH DISABILITIES CAUCUS,
Detroit, MI, May 7, 1999.

Re: Our testimony before the Senate judiciary committee Hearing on the Hate Crime Prevention Act of 1999

The Honorable SENATOR ORRIN HATCH,
Chairman, Senate judiciary Committee,
Senate of the United States, Washington, DC.

DEAR SENATOR HATCH: Please include this as testimony in the record of the hearing on Hate Crimes on May 111 1999.

The Michigan Citizens With Disabilities Caucus asks you to place additional wording in the Hate Crimes Prevention Act of 1999.

> Intentionally causing death or injury of patients without their consent or discriminatory denial of care or treatment by doctors, health care providers, administrators or staff of health care facilities will also be considered hate crimes, when such acts are motivated by prejudice against a patient's race, religion, ethnicity, sexual orientation, gender, or disability.

We believe that so far as those with disabilities are concerned and to a great extent for other groups it is supposed to protect, the bill will be woefully incomplete,, unless it deals with hate crimes in health care facilities, including the violence of involuntary euthanasia (both active and passive).

First, it is essential to say that we support the idea of special federal action against crimes of prejudice on the basis of disability, gender, and sexual orientation.

Some good and intelligent people that we know argue that making a special category of crimes for those victimized because of prejudice, is actually a form of special treatment, because it gives them more protection than the rest of the population. Under this argument, it would be unfair to create a law giving a member of a racial lynch mob a higher sentence than a common murderer. We feel this misses two points.

(1) Under our constitution, America has undertaken a commitment to assure our citizens equal protection of the law, or in the words of our Pledge of Allegiance "liberty and justice for all." Victims of intense and continuous prejudice are more vulnerable than the rest if the population, more threatened. We have seen what has happened in the old Yugoslavia. Those who are in particular Jeopardy, because of prejudice need extra safeguards to ensure their lives and security, if they

are truly to have equal protection of the law. If our society can give special protection to endangered species of animals, it can certainly give special protection to endangered groups of our citizens.

(2) Crimes of prejudice represent attempts to undermine and subvert equal Protection of the law. They represent a special danger not only to the individual victims, but the basic values most Americans believe in and passionately want to live up to.

Hate crime legislation has also been criticized, because it penalizes someone not simply for criminal acts, but for the emotions that motivated the crime. This is far from new in our legal system. The difference between first and second degree murder is "Premeditation," involving not only the motivation, but when the idea of committing the crime came into someone else's mind. I know of no one claiming under this system someone killed in a well planned out murder receives more consideration than a victim killed spontaneously in a crime of passion.

The same thing is true of the definition of treason in our constitution. Under this, an act of sabotage with the intent of threatening the United States is treated much more severely than malicious destruction of property. It seems clear to us that acts of violence aimed at subverting equality under law and basic human rights ought to be punished more severely.

Because of this, we do support the Hate Crimes Prevention Act of 1999.

Having said this, though, we must repeat there is one glaring defect in dealing with citizens who have disabilities. It does not apply to health care institutions or health care workers, doctors, nurses, or administrators. This would make the bill far less relevant to the lives of those with disabilities and the conditions that threaten them.

If a group of neo-Nazi skinheads beat up a man in a wheel chair on the street, (as some have done all too recently in Germany), this would be a hate crime under the Hate Crimes Prevention Act and they could be prosecuted under it. If, on the other hand, the same group of neo-Nazi skinheads had the shrewdness to get employed in the staff of a nursing home and beat up patients there, this would not be considered a hate crime and they could not be prosecuted for violating the Hate Crimes Act. If a skinhead shot someone in a wheel chair, because he believed in the teachings of Hitler that people had no right to live, he could be prosecuted under this law. If, however, this particular skinhead had the patience to go through medical school, become a doctor, and administer involuntary euthanasia, this would not be applicable under this law.

If the Congress of the United States determines in its wisdom to protect those with disabilities from crimes based on prejudice, it ought to consider where they are most threatened. Someone attacked on the street has an easier time getting away than Someone in a nursing home. Staff members and administrators in an institutional setting are likely to have more power over their patients than bigoted punks on the street. Brutality in an institution, which is suppose to provide health care, is a violation of trust, which strikes at the heart of society in a way no street attack or lynch mob possibly could.

One congressional aide I spoke with argued that the hate crimes act deals with attacks on people using public facilities, because such attacks restrict the ability of certain groups to use such facilities. It is necessary, he noted, for a federal law to stop attacks on gays in college, because such attacks may make gays reluctant to go to college. He meant this as an argument for excluding health care institutions, but it is actually a compelling argument for getting them included. Health care institutions are public facilities. Attacks in health care institutions do indeed make people reluctant to use them. One woman told me if she got a certain illness, she would "see Dr. Kevorkian," because she did not want to experience the brutality of a nursing home. Columnist Nat Hentoff noted one of his elderly relatives was afraid to go to the hospital and suggested that with attitudes in hospitals today, this may have had some justification.

One must add that since most hospitals do receive federal funding, they are engaged in interstate commerce.

Currently one of the most profound dangers those with disabilities are facing is that of involuntary passive euthanasia—denial of effective lifesaving treatment, not because of lack of funds, I might add, but because of pure, prejudice.

Over 25 years ago, a young woman named Sondra Diamond wrote of how she was rushed to a hospital with third degree burns. Because she was born with cerebral palsy and was severely paralyzed, the doctors did not want to give her the routine treatment they gave to other patients. They claimed she was incapable of living "a normal life."

Her parents made heroic efforts to convince the physicians she was already leading a normal life. They patiently showed them photos of her swimming and playing the piano and explained she was a junior in college.

The doctors were still not convinced and finally treated her only because her parents insisted. Sondra recovered and lived a "normal" enough life to finish college and become a consulting psychologist. What is even more amazing, she was able to keep her sense of humor. However, as she ominously noted, hers was not "an unusual case."

In December, 1996, in its policy on "futile care," the American Medical Association noted some doctors wanted to withhold lifesaving treatment, which was both effective and long lasting, even when the patients and their families wanted it, because they felt the patients did not have a "worth-the-effort quality of life." If they had their wishes, patients in the position of Sondra Diamond would be allowed to die, no matter how much she and her parents insisted on routine care. In short, to use star Trek terminology, patient freedom of choice is irrelevant. The wishes of the family are irrelevant. Care is futile and the patient's life is futile. End of discussion. what is most horrifying about these attitudes is the reaction of the AMA to them, The AMA, the Major medical organization in this country, declared it wanted to "accommodate" these views. It urged hospitals, nursing homes and other health care institutions to set up policies to determine who had a not "worth the effort quality of life." In order to demonstrate its sense of fairness, the AMA also urged the establishment of in-house procedures where patients and their families could appeal such determinations. Under the AMA system, Sondra Diamond and her family would be magnanimously granted the opportunity to run through a special maze of administrators, directors, and duly appointed "ethical boards" in order to justify her existence.

The AMA policy statement also noted that patients should be allowed to transfer to another institution (if one would accept them). However, the AMA policy statement makes it clear that under its guidelines, if administrators remain unconvinced of the value of a patient's life and transfer is impossible, the institutions would not have to provide treatment. In such circumstances, the patient's only recourse would be to die quietly.

According to Wesley L. Smith, attorney for the International Anti-Euthanasia Task Force, hospitals are already using such procedures to "browbeat patients and their families." Smith also states that hospitals are convincing the courts to permit the values of doctors and medical ethicists to "prevail over patient and family decision making."

Let us look again at the phrase "worth the effort quality of life." in general conversation, the term "quality of life" usually refers to an individual's capacity to enjoy life or to benefit from life. Obviously, though, this is something the individual patient can decide better than anyone else. In the context of the AMA policy statement, it is obvious that by "quality of life," the AMA means a judgment about the value of a patient's life. The AMA wants health care facilities to take it upon themselves to decide that some lives are not created equal, that some individuals have inferior "quality" second or third class, Grade B, C, and D lives, which it is not "worth the effort" to save.

This is a direct assault on the principle of human equality, which Abraham Lincoln noted our nation was "dedicated to" from the very moment our forefathers "founded" it "upon this continent." Allowing such policies to go unchallenged would strike at the heart of our constitution's commitment to equal Protection under the law.

There is also a question of the laws of nations. Last year at a press conference on prison conditions, I asked an official of Amnesty international, whether it would be against international law to deprive a prisoner of health care, because the prison authorities were shocked at the crimes he committed. The Amnesty International representative declared it certainly would be. If it is against international law for physicians to judge a mass murderer or serial killer as an inferior quality life, which it is not worth the effort to save, then it should be equally reprehensible for health care workers, staff, administrators, bureaucrats or ethical boards to make the same, determination about people who have never violated the law or harmed another human being.

In this now system, how will quality of life be determined? More to the point, whose life will be secure? Who will be recognized as a first class human being with a full quality of life?

The AMA, policy statement is hauntingly vague. It states that this will be defined by each health care facility on the basis of "subjective" values, "institutional values" and community values" on a "case by case basis." Obviously a patient who is treated in one hospital may be left to die in another. If things are done on a "case by case

basis," the health care facilities may be operating without any real consistency. If things are done under "subjective values," it seems likely the facilities may be operating according to emotional prejudice. Can we trust anyone—even doctors—with such powers? Is it likely to result in enlightened decisions by philosopher kings?

One answer may come from examining what has happened in the past. I have a copy of a 1984 letter by Dr. Richard Yerian, then chief medical officer for the Michigan Health Department, stating that the medical profession considered giving treatment to a "malformed infant" to be an "ethical question," not standard procedure. This suggests some doctors considered it justifiable to let babies dies, because society did not like the way they looked. Our caucus chairperson, Tommy Meadows, notes the same thing has been done with adults. Meadows recalled that when his own wife had a stroke, doctors questioned whether it was worth while preserving her life, because she had been born with spina bifida and seemed to them "deformed."

In the October, 1983 issue of the official organ of the American Academy of Pediatrics, doctors from the University of Oklahoma Health Services Center, wrote they actually used a pseudo mathematical formula to "measure" an infant's quality of life. The American Civil Liberties Union charged this formula allowed babies to die on the basis of race and class.

What is more to the point, according to the International Anti Euthanasia Task Force newsletter for January–March 1999, a recent study by Georgetown University found that both the race and sex of patients influenced whether doctors recommend state-of-the-art cardiac testing for chest pain. The data showed that women and Black people were only 60 percent as likely to receive cardiac testing for chest pain than white men. Under the test, Black women were recommended for the test 40 percent as often. Under the test 720 doctors were presented a computer program and video interviews with patients complaining about chest pains, describing identical pain symptoms, identical health insurance coverage, the same professions and the same stress test results, identical ages, clothing and even hand movements. Lead researcher Dr. Kevin Schulman suggested that the findings indicated that doctors' racial and sexual bias affects the type and degree of care patients receive. As the international Anti Euthanasia Task Force puts it, this also suggests that physicians may view some patients as being "more worthy" of high-tech or expensive treatment than others, only because of their race and gender.

In addition to this, Elizabeth Bauer, Director of the Michigan Protection And Advocacy Service, personally told me her agency found that gays and lesbians face discrimination in hospitals.

Involuntary euthanasia through policies that define some lives as being of inferior "quality" and "not worth saving" would not only directly involve direct denial of equality on the basis of disability, but at the very least a de facto denial of equality on the basis of race, gender, and sexual orientation. This would affect most of the groups in the Hate Crimes Prevention Act.

Our Chairperson, Tommy Meadows, had once warned other prosecuted minorities, "Don't say this [situation with health care discrimination] is our problem. Our problem may become your problem."

That has come true with a vengeance.

Several questions remain what is the reason for such prejudice against those with disabilities?

Part of this undoubtedly comes from economic pressures to cut medical care by hospital administrators and HMOs.

To be honest, though, this can not be the whole answer. I must ask why have so relatively few people working for civil rights been ready to speak out about the denial of our basic right to live, including those who have been most vociferous in their opposition to capital punishment? Indeed, to be perfectly honest, I have felt indications that some who consider themselves liberal and in the forefront of the struggle for equality actually accept the idea that those with disabilities are inferior quality lives.

To be fair, we have been very grateful to find in the last few months, that our amendment has the pledged support of several civil rights organizations, associated with two pioneers of the civil rights movement, who put their lives on the line in the 60s, and names will live in history.

However, I have to fear that on a psychological level, there is a growing Handicap Phobia. To some, the presence or even the existence of those with handicaps may represent unpleasant reminders of traits in themselves they want to repress or deny. Psychotherapist Alice Miller has noted that children who are valued only for their accomplishments or the reflected glory they give their parents may grow up feeling that without superior qualities, a person is "worthless" and can never be loved. To super achievers who push themselves toward success in medicine, those

with disabilities may trigger uneasiness about "imperfections" they were unable to accept as children. It may remind them of the child within them, the part of themselves which is incapable, dependent, and helpless. Sexual stereotypes are involved too. A person with a disability is often labeled "less than a full man" or "losing feminine attractiveness." In these different ways, those with disabilities symbolize weakness and trigger other's fears of being weak.

Miller suggests that once an individual associates a group of people with qualities he wants to kill in himself, it becomes, natural to wish such people dead. I must add that aversion can be easily disguised as pity. Someone takes for granted a group of People is without dignity and comes to believe the only way they can regain their dignity is in death. From there it is easy for him to convince himself that they are "better off dead." After all, he notes, "I would not want to live like that," which essentially means I would not accept myself, if I were like that."

Such prejudices will flourish unless they are confronted. it has been my goal today to try to confront them. The reason for the length of this testimony is that the fear that it may not be easy to do so.

One final piece of speculation. Such attitudes are aggravated by the growing acceptance and glamorization of violence in society and serves to accelerate the process. Looking over the Littleton, Colorado tragedies, I cannot help but feel that the young killers in Colorado, who destroyed others in revenge for insults and taunts, and the perpetrators of teenage violence in many other areas of this country, who have killed to preserve their "respect" or sense of "manhood," were reacting out of fear of weakness. Is it possible that the acceptance by society of the idea that weakness merits death in our institutions of healing, helped send a subliminal message that creating death was a way to avoid feelings of weakness and gain a sense of strength. How can we teach our youngsters respect for human life, when respected adults—adults in the foremost positions of the most prominent organization in the profession of healing, declare that some lives are "futile," of inferior "quality," and not worth the effort to save.

When voting on this issue, I ask all of you on this committee to follow your duty to assure all citizens equal protection of the law.

I ask those on the conservative side of the fence not to deny equal protection to citizens, you disapprove of on moral or religious grounds, such as gays or lesbians.

I ask those on the liberal side of the fence not to deny equal protection of the law to citizens, like those with disabilities, just because it is not considered fashionable to fight for them. I ask you not to be swayed by the influence of medical elitists and their pretensions of creating a brave new world.

As a representative of the Michigan Citizens with Disabilities Caucus, I ask you to approve the Hate Crimes Prevention Act of 1999 with our proposed amendment.

Enclosed are some articles on this subject. For further information, please feel free to call me. Thank you for allowing us to give this testimony and your patience in going through it.

Sincerely,

RONALD SEIGEL,
FIRST VICE CHAIRPERSON,
Michigan Citizens With Disabilities Caucus.

RIPPLE EFFECTS,
San Francisco, CA, May 7, 1999.

Senator ORRIN HATCH,
Chair, Senate Judiciary Committee,
Senator Dirksen Office Building, Washington, DC.

DEAR SENATOR HATCH: Columbine has made clear that we need to take action to prevent violence and hate, and promote tolerance throughout our society.

I am writing to express my support for the hate crimes legislation before your committee, and to let you know of a private sector initiative that is making a difference.

For the past decade, I have developed and disseminated groundbreaking and clinically validated youth violence prevention programs, now used in over 60,000 US classrooms. My contributions to children's safety and health education have been recognized with a host of national awards, and eight regional Emmys. I have been a keynote speaker in 15 states, headed a national nonprofit, and have lectured widely on how to prevent youth violence.

Two years ago I turned to technology as the best platform to create the next generation of prevention materials. I started a software company called Ripple Effects,

and last fall we released *Relate for Teens,* an interactive CD-ROM that effectively prevents violence and hate, and promotes positive, prosocial behavior.

Backed by ten years of research, Relate integrates best practices in prevention, intervention, and social learning into an easy-to-use, engaging, and media-rich database of social topics and life skill training. Leaders call the program a "breakthrough," and it has won national acclaim and awards since its release.

The day after the Columbine tragedy, policeman Jim Hernandez, a former gang member who now teaches life skills to teens in Concord, California high schools, asked his students: Could it happen here? Fearfully, students answered: Yes.

"The way you can prevent this," Hernandez told them, "is to change the way you treat people. We need to move from mean-crude-and-rude, to nice-kind-and-polite." Hernandez has been working with *Relate for Teens* to do just that. "This program is helping to make nice-kind-and-polite cool."

The United States is more diverse than almost any society in the world. With that diversity comes conflict and the need for skills to resolve it. In addition, a sea of change in the nature of families, work patterns, cultural imagery and sexual values have all contributed to a drastically different social-emotional landscape for today's youth, with higher incidences of social conflict than at any time in the past.

In an era where many teens trust their computers more than they trust their parents, this program creates a much needed bridge between young people and the parents, teachers, friends, and community that surround them. I believe that this innovative product can have an impact on the lives of young people across the nation, preventing violence and prejudice, and promoting tolerance.

This legislation expands federal jurisdiction to reach serious, violent hate crimes, and authorize grants to state and local prosecutors for combating hate crimes committed by juveniles. Ideally this should go even further to secure funds that support prevention programs in our schools.

All sectors of society need to take action on this important and vexing issue. I urge you to vote in favor of this legislation.

Yours truly,

ALICE RAY,
President and CEO.

VICTIM SERVICES,
New York, NY, May 11, 1999.

Senator ORRIN G. HATCH, Chairman,
Senator PATRICK J. LEAHY, Ranking Minority Member,
U.S. Senate Judiciary Committee, Dirksen Senate Office Building, Washington, DC.

DEAR SENATORS HATCH AND LEAHY: I write to set out Victim Service's support of S. 622, The Hate Crimes Prevention Act, and ask that this letter be included in the record of the Judiciary Committee's hearing on that bill.

Victim Services is the nation's largest victim assistance agency. Our mission is to heal the wounds of violence and prevent victimization. We run over 100 programs in courts, police precincts, domestic violence shelters, schools, and community offices. We assist over 200,000 clients in the City of New York each year. Our positions on policy and legislation derive directly from what we learn from our clients about their experiences of victimization and their needs for justice and healing.

Victims of hate crimes reach out to Victim Services for help through many of our programs including our city-wide 24-hour crime victim hotline. We have been funded by the U.S. Department of Justice to develop a model community response to bias crime through a neighborhood-based working group comprised of activists from one of the most diverse communities in the nation—Jackson Heights, Queens. We know from our work against hate crimes that, when a bias attack occurs, it visits two traumas on the victim. First is the physical violence itself. Second is the crisis of recognizing that one's personhood has been stripped away; not one's wallet or car, but one's identity and very notion of self. This experience is devastating to the victim. Bias crimes are not only a criminal assault on the individual victim, but carry an additional message of hate to the entire community to which the victim belonged or was *perceived* to belong. The implications of this for each and every one of us are chilling.

Numerous recent bias-related crimes, including the killings of James Byrd and Matthew Shepard and here in New York the crime-by shooting of Sonya Thompson in Albany, have raised our nation's awareness of the culture of hate and the violence to which it leads. While violent crime has deceased in general, bias crimes are on the rise. According to New York City Police Department statistics, for example, anti-gay attacks in 1998 were up approximately 83 percent over 1997 figures.

We urge the Senate Judiciary Committee to vote in favor of S. 622, which would strengthen the federal weapons against hate crimes send a powerful message that hate and the violence it breeds will not be tolerated as part of our American culture. It is essential that the federal criminal hate crimes law be expanded to acknowledge the reality that people are victimized because of their gender, disability, and sexual orientation. S. 622 would provide encouragement to individual state, like New York, that need to strengthen their own bias crime laws, and would allow the federal government to partner with states and localities in investigating and prosecuting hate crimes.

On behalf of Victim Services, I thank you for considering our support of S. 622.

Sincerely,

GORDON J. CAMPBELL.