A CRITIQUE OF THE HATE CRIMES PREVENTION ACT REGARDING ITS PROTECTION OF GAYS AND LESBIANS (AND HOW A PRIVATE RIGHT COULD FIX IT)

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ABSTRACT

In 2009, Congress enacted the Hate Crimes Prevention Act to include sexual orientation as a protected class, marking the first major federal protection for victims of crimes or acts of bias due to an individual’s sexual orientation. Even with the Act, however, crimes against protected classes—especially the protected class of sexual orientation—have continued. According to the FBI, hate crimes based on sexual orientation have not seen a credible drop in hate crimes since sexual orientation was included as a protected class. This Note proves a critique of the Act, analyzing its different weaknesses to show why it is not as effective as it could be in preventing hate crimes. This Note emphasizes the Act’s particular failure with regard to crimes based on sexual orientation. It focuses its critique on three main areas: prosecutorial discretion in charging hate crimes; the unique impact the high burden of proof required
to prove a bias-motivated crime imposes; and possible jury bias regarding convicting defendants charged with hate crimes. This Note then proposes one alternative to alleviate some of these problems: a private right of action. It addresses the constitutionality, scope, and possible implications of a private right of action, and predicts that such a right would improve the effectiveness of the Hate Crimes Prevention Act and alleviate some of the current hardships faced by its delineated protected groups.

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I. INTRODUCTION

In any given day in the United States, almost fifty people lose their life to homicides.\(^1\) Annually, this amounts to thousands of lives,\(^2\) and every now and then, one of them receives widespread media coverage and hits an emotional chord with members of the public.\(^3\) High profile trials can highlight heinous acts,\(^4\) celebrity defendants,\(^5\) or perceived prejudicial crimes.\(^6\) A 1998 murder of a gay Wyoming student became one of those media-grabbing cases that drew attention to hate-motivated crimes against gays and lesbians.\(^7\) On October 7, 1998, two men pretending to be gay abducted Matthew Shepard, a gay college student, tied him to a fence, beat him with a pistol, and left him for dead.\(^8\) He was found almost eighteen

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\(^1\) See Fatal Injury Reports, National and Regional, 1999–2010, CENTERS FOR DISEASE CONTROL & PREVENTION, http://webappa.cdc.gov/sasweb/ncipc/mortrate10_us.html (select “Homicide” for “Report Options: 1”; then select “All injury” for “Report Options: 2”; then select “2000” to “2010” for “Report Options: 3”; then follow “Submit Request” hyperlink) (resulting in a daily average of 48.7 homicides, when the total number of homicides is divided by the number of days during the 2000 to 2010 period).

\(^2\) See id.


\(^6\) E.g., Mirkinson, supra note 3.


\(^8\) Matthew’s Story, MATTHEW SHEPARD FOUND., http://www.matthewshepard.org/our-story/matthews-story (last visited Feb. 15, 2014). But see Aaron Hicklin, Have We Got Matthew Shepard All Wrong?, ADVOCATE (Sept. 13, 2013, 4:00 AM), http://www.advocate.com/print-issue/current-issue/2013/09/13/have-we-got-matthew-shepard-all-wrong?page=full, for a different portrayal of Matthew’s murder. Though Shepard’s killers admitted to attacking him because he “came onto them,” an alternative theory of the murder has arisen implicating drug use and sexual relations between Shepard and one of his killers as motivating factors. Id.
hours after the attack and died five days later. The murder, which garnered extensive media coverage, eventually led to the enactment of the Hate Crimes Prevention Act (HCPA), which expanded the federal hate crime law to include crimes motivated by sexual orientation.

Shepard’s case brought much needed attention to hate crimes. While detestable, Shepard’s case was not the only crime seemingly motivated by ill will toward a minority member. Other gay individuals, such as Jack Price, have been targets of hate crimes based on sexual orientation. Two men punched, kicked, and stomped on Price and left him with two collapsed lungs, a fractured jaw and ribs, and a ruptured spleen. Hate crimes do not stop with sexual orientation either; individuals have been targeted for their minority status in other regards. For example, two men beat and sodomized David Ritcheson, a Hispanic teenager, with an umbrella pole while yelling anti-Hispanic slurs; they targeted him presumably for his race. Perpetrators of these crimes are motivated by bias, and as such, Congress has defined them as hate crimes. The HCPA allows the government to prosecute certain violent crimes motivated by bias against a victim’s race, religion, disability, ethnic origin, or sexual orientation. No private right of action exists for victims to bring their own suit under the HCPA. While the HCPA does not provide

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9 Matthew’s Story, supra note 8.
10 Hicklin, supra note 8 (discussing in part how there was extensive media coverage of the murder).
13 Id.
17 Id.
a private right, other federally prohibited bias acts under different statutes allow civil actions against perpetrators, such as terminating an individual’s employment because of his or her race in violation of Title VII.\footnote{42 U.S.C. § 2000e-2(m) (2006) (creating a private right of action for specific employment-related discriminatory policies when combined with civil actions brought under \textit{id.} § 1983).}

Though limited in its scope, the HCPA is the only federal statutory protection against hate crimes available to almost all minority groups. Yet, as a criminal-only statute without a private right of action, it often cannot effectively protect minorities, especially LGBT individuals,\footnote{Though using the term LGBT, the primary focus of this Note is on gay and lesbian individuals. While bisexual and transgender individuals also face discrimination, this Note limits its discussion to gays and lesbians due to space constraints, simpler juxtapositions, and the general population’s familiarity with the topic. This scope limitation is not meant to discount or condone the hardships that other groups encounter in society or the law, and in fact, one could find that many of the arguments addressed in this Note also apply to those groups.} due to a number of factors, including: prosecutorial discretion, a high burden of proof, and jury bias. Other anti-discrimination measures, such as one available in the employment context, minimize many of the effectiveness concerns associated with the criminal-only applicability of the HCPA by permitting civil litigation initiated by the victims. Providing a private right of action under the HCPA would allow plaintiffs to bring civil suits against perpetrators of hate crimes, which can mitigate institutional impediments, result in greater deterrence for would-be violators, and provide additional compensation and closure to victims. LGBT individuals are especially in need of a private right of action under the HCPA because other anti-discrimination protections available to other minority groups are not available to them.

This Note analyzes the current HCPA with a focus on its protections for victims targeted based on their sexual orientation and proposes the addition of a private right of action. It emphasizes how a number of factors prevent the HCPA from being as effective as possible and addresses how each factor can be mitigated by implementing a private civil remedy. Part II provides a brief history of the current HCPA and other anti-discrimination laws in the United States as a point of comparison. Part III discusses the shortcomings of the HCPA, including institutional problems that inhibit the effectiveness of the law. Part IV addresses the hardships faced under the current legal framework, including legal, familial, and physical hardships. Part V proposes a private right of action, claiming that

\textit{July 16, 2010).}
it could solve many of the problems discussed in Parts III and IV. Part VI then addresses certain constitutional concerns related to a private right of action and presents and rebuts critics’ arguments against a private right of action and hate crimes generally. Part VII compares the solution proposed in this Note to different European models and their success to illustrate the likelihood of positive change. Last, Part VIII provides some concluding thoughts on the topic.

II. FEDERAL HATE CRIME LEGISLATION AND OTHER ANTI-DISCRIMINATION LAWS

The HCPA allows for criminal prosecutions and penalty enhancements for violent crimes—such as assault, kidnapping, rape, and murder—perpetrated through the means of interstate commerce if the crime is motivated by certain defined characteristics of the victim. The HCPA criminalizes targeting victims based upon their association with a delineated minority group. Congress passed the HCPA because of the unique impact these crimes create: an environment of fear and intimidation. When victims are targeted because of their perceived or actual identification with a minority group, both the victim and the group as a whole suffer: the victim suffers from physical injury, and the group suffers from fear of victimization. While the first affects a community—for violence never affects just the victim, there are friends, family, and others who suffer alongside—the latter assaults the legitimacy of the community. Hate crimes send a message to the entire community that as members of a particular race, gender, sexual orientation, or religion, they should fear for

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21 Matthew Shepard and James Byrd, Jr, Hate Crimes Prevention Act, Pub. L. No. 111-84, § 4707, 123 Stat. 2835, 2838–2841 (2009) (codified as amended at 18 U.S.C. § 249 (Supp. 2012)). A hate crime statute does not require an additional actus reus (“criminal act”) element; instead it adds a mens rea (“criminal mind”) element: a bias-based motivation. If this additional element is met, a court can enhance a sentence. Also, there may be instances where a federal hate crime can occur outside the context of interstate commerce, such as when the victim is targeted for his or her race or religion; however, these are outside the scope of this Note.

22 Id.


their safety. To counter such a message, Congress and many state legislatures sought to criminalize the act of selecting victims based upon their minority status.

A. A BRIEF HISTORY OF FEDERAL HATE CRIME LEGISLATION

Hate crime laws have existed in the United States for well over a century, beginning with the passage of the Enforcement Act of 1871. This Act, referred to as the Ku Klux Klan Act (KKK Act), sought to curb racially motivated violence. Coming just after the conclusion of the Civil War, the KKK Act was a response to the “surge of racially motivated violence in the American South after reconstruction.”

Nearly a century later, spurred by racially motivated crimes against civil rights workers in the American South, Congress passed an amendment to the KKK Act in the Civil Rights Act of 1968. In its effort to combat racial violence during the 1960s civil rights era, Congress enhanced the punishment of violent crimes targeting victims because of their association with a specific race, color, religion, or national origin while attempting to engage in specific protected activities, such as voting or attending school.

High crime rates in the 1980s prompted Congress to pass the Federal Hate Crime Statistics Act of 1990, and well-publicized murders in the late 1990s prompted further revisions leading to the 2009 passage of the HCPA. Congress also revised the United States Sentencing Guidelines to


26 See Hate Crime Laws: The ADL Approach, supra note 23 (explaining why hate crime legislation is needed).


29 Id.


provide for sentence enhancements for hate crimes in 1994. Then, in 1998, Congress reexamined hate crime legislation after the brutal deaths of James Byrd Jr. and Matthew Shepard. The Byrd murder involved white individuals dragging Byrd, an African American, behind a truck until he died, and the Shepard murder involved assaulting Shepard for his sexual orientation. Both crimes, which were highly publicized, "made the limitations of federal hate crime regulation abundantly clear." In 2009, Congress passed the HCPA, which "expanded federally protected classes to include . . . sexual orientation" as a protected class. The HCPA makes it a federal offense to injure or attempt to injure by means of fire, a firearm, a dangerous weapon, or an explosive or incendiary devise any person because of their race, color, religion, or national origin. It also criminalizes the same acts motivated by bias against a person's actual or perceived gender, sexual orientation, gender identity, or disability, as long as those acts are perpetrated within the confines of interstate commerce, meaning that the perpetrator or victim was either traveling across a state or national border or using an instrument, channel, or facility of interstate or international commerce. However, the HCPA, as interpreted by federal courts, does not give a private right of action under which a victim could sue the attacker; rather, the statute is limited to criminal prosecutions. Any prosecution under this statute must be conducted according to the Attorney General’s, or his or her designee’s, guidelines.

B. HATE CRIMES AGAINST GAYS AND LESBIANS BY THE NUMBERS

According the Federal Bureau of Investigation (FBI), the incidences of hate crimes have fallen in almost every category during the first decade

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33 Id. at 471.
34 See id. at 469-71.
35 Id. at 472.
36 Id.
37 Id.
39 Id. § 249(a)(2).
of the twenty-first century.\textsuperscript{42} One exception, however, is hate crimes against LGBT individuals. Since 2000, the number of hate crimes against LGBT individuals has remained relatively constant with slight increases toward the later half of the decade.\textsuperscript{43} Throughout the decade, racially motivated crimes occurred most frequently.\textsuperscript{44} By percentage of the population from 1995 to 2012, however, gay males were at a greater risk for being the victim of hate crimes than any other minority group, including racial groups.\textsuperscript{45} While hate crimes motivated by racial bias dropped 6.5 percent from 2000 to 2010, crimes motivated by bias based on sexual orientation increased by 3.2 percent.\textsuperscript{46}

Moreover, in the years since the HCPA was enacted, the number of crimes motivated by bias against a person's sexual orientation remained fairly constant with over a thousand incidents of reported violence per year,\textsuperscript{47} with the highest percentage of incidents effecting gay men, based on percentage of the population.\textsuperscript{48} For example, a comparison of the number of hate crimes committed against African Americans with the number of hate crimes committed against LGBT individuals demonstrates the extreme hardship experienced by the LGBT community. According to the 2010 U.S. Census, 13.6 percent of the population identified as African Americans, either alone or with another race.\textsuperscript{49} In 2010, 33.8 percent of all hate crimes were anti-black.\textsuperscript{50} That same year, 18.4 percent of all hate

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\textsuperscript{43} \textit{Id.}

\textsuperscript{44} \textit{Id.}


\textsuperscript{46} \textit{Comparison of FBI Hate Crime Statistics (2000–2010)}, supra note 42.


\textsuperscript{48} See \textit{Percentage of Hate Crimes by Bias Type}, supra note 45.


crimes were anti-homosexual.\textsuperscript{51} But, because only 3.4 percent of the population identified as LGBT,\textsuperscript{52} as a percent of the total population, LGBT individuals were more than twice as likely to be the victims of bias motivated crimes than African Americans.\textsuperscript{53} These statistics are not intended to diminish the seriousness of the crimes against other minority groups, but rather to show the animosity that gays and lesbians face. At least in its immediate aftermath, the inclusion of sexual orientation as a protected class under the HCPA did not seem to affect the number of hate crimes against gays and lesbians.\textsuperscript{54}

C. LIMITED OTHER DISCRIMINATION PROTECTIONS IN FEDERAL LAW

Though different from hate crime legislation, the federal code contains other protections against certain bias motivated acts, but many of them are not available to gays and lesbians. For example, Title VII protects employees from discriminatory acts based on their race, color, religion, sex, or national origin,\textsuperscript{55} and Title IX protects against gender discrimination in education.\textsuperscript{56} Congress has, in certain contexts, also prohibited employers from discriminating on the basis of age,\textsuperscript{57} disability,\textsuperscript{58} or genetics.\textsuperscript{59} However, none of these protections include sexual orientation as a protected class.

Congress did expand one non-hate crime discrimination protection to gays and lesbians in 2013 by allowing victims of same-sex domestic abuse

\textsuperscript{51} Id.

\textsuperscript{52} Gary J. Gates & Frank Newport, Special Report: 3.4% of U.S. Adults Identify as LGBT, GALLUP (Oct. 18, 2012), http://www.gallup.com/poll/158066/special-report-adults-identify-lgbt.aspx. Note that this 3.4 percent number includes bisexual and transgender individuals, who are not accounted for in the above hate crime numbers or covered broadly in this Note.

\textsuperscript{53} This is established by taking the total number of hate crimes against the group and dividing it by the total number of hate crimes reported in a year. Compare this percentage of hate crimes committed against a group with that group's total representation in the U.S. population during that year. Here it was 2600/7690 = 33.8 percent of all hate crimes were against African Americans. Since the total number of African Americans in society is 13 percent, members of that group are 2.6 times more discriminated against per their representation in society. For gays and lesbians, it was 1421/7690 = 18.5 percent. Their representation is 3.4 percent nationwide, yielding an average 5.4 times more likely to be attacked.

\textsuperscript{54} See Comparison of FBI Hate Crime Statistics (2000–2010), supra note 42.


\textsuperscript{59} Id. § 2000ff-1 (2006).
the same protections and resources heterosexual victims receive under the Violence Against Women Act (VAWA). Prosecutors and victims are able to receive financial assistance to prosecute and recover from sexual assault and domestic abuse, but victims cannot bring a civil suit under VAWA.

With the exception of the new anti-discrimination rules in VAWA and the addition of sexual orientation as a protected class under the HCPA, gays and lesbians have little federal protection. Undoubtedly, the HCPA was a proud moment for the advancement of LGBT rights; however, it did little to shelter gays and lesbians from hate crimes because of its limited applicability and usage.

Gays and lesbians fair better on the state level: thirty states have hate crime laws that cover crimes based on sexual orientation. But, since many state laws do not have protections based on sexual orientation, new federal laws would be the best option to address this lack of protection since they would apply nationwide.

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61 Id.

62 See United States v. Morrison, 529 U.S. 598, 627 (2000) (invalidating 42 U.S.C. § 13981, the provision establishing a private right of action, based on a finding that Congress did not have the authority to enact it under either the Commerce Clause or the Fourteenth Amendment).


III. SHORTCOMINGS OF THE CURRENT HCPA

According to the FBI, thousands of hate crimes are committed every year, and the U.S. Department of Justice’s Bureau of Justice Statistics reports that this represents only thirty-five percent of the hate crimes that actually occur. With hate crime statistics so high—especially against gay and lesbian individuals—the HCPA seems to be ineffective. This may be, at least partially, because the HCPA applies only to criminal actions. Enforcement of the solely criminal HCPA suffers from three potential shortcomings: prosecutorial discretion, a high burden of proof, and jury bias.

A. PROSECUTORIAL DISCRETION

Prosecutorial discretion limits the impact of hate crime legislation. Because hate crime statutes only apply to criminal acts, prosecutors have full discretion to decide when to attach hate crime enhancements to indictments. In Inmates of Attica Correctional Facility v. Rockefeller, the Second Circuit Court of Appeals held that both law and tradition restrict courts from compelling prosecuting agencies to initiate investigations or influencing prosecutors’ discretion to bring charges against an individual; thus, courts cannot review a prosecutor's decision to prosecute or refrain from prosecuting a hate crime enhancement. The court held that prosecutors should maintain their discretion free from judicial intervention even when "serious questions are raised as to the protection of civil rights and physical security of a definable class of victims of crime and as to the fair administration of the criminal justice system." Without judicial compulsion, short of an executive order or a legislative act, victims are without recourse under the HCPA if prosecutors decline to investigate or

71 Id. at 379.
72 See id.
prosecute hate crimes.

The Supreme Court has subsequently held that "a citizen lacks standing to contest the policies of a prosecuting authority when he himself is neither prosecuted nor threatened with prosecution," meaning the victim of a crime cannot challenge a prosecutor's decision. The inability to compel prosecution creates an almost monarch-like prosecuting power with which government attorneys determine who goes to trial and who does not. Also, prosecutors are either elected or appointed, and as such, their decision making can be driven by future ambition and public approval. If prosecutors choose not to investigate or prosecute hate crimes, the HCPA begins to lose its effectiveness.

Evidence suggests that many federal and state prosecutors tend not to utilize hate crime statutes. For instance, it took three years for federal prosecutors to bring their first criminal charge under the HCPA for a hate crime based on sexual orientation, though the FBI reported that thousands of hate crimes had been reported to authorities over those same years. State prosecutors also seem unwilling to utilize state hate crime statutes. For example, Texas prosecutors convicted only ten hate crime perpetrators, nine of whom entered plea deals, in a ten-year period. While hundreds of hate crimes are reported in Texas each year, the state averages one conviction per year. This abysmal record is made worse by the fact that Texas provides funds specifically for investigating hate crimes, yet, according to the Governor's office, "no state money has ever


74 See U.S. Issues First Anti-Gay Hate Crime Indictment in Kentucky Attack Case, supra note 65.


77 Id.
been spent on hate crime prosecutions because no one has ever asked."\(^7\)

New York, though statistically better than Texas, averages only about a dozen convictions per year.\(^7\) On the other side of the spectrum, California seems to prosecute more, with 230 hate crime filings in 2010.\(^8\) However, with 1331 hate crimes reported in California in 2010,\(^9\) the number amounts to only 17 percent of reported hate crimes. These numbers illustrate the lack of prosecutorial zeal for pursuing hate crimes. While prosecutors can use the threat of a hate crime charge as leverage during plea deals,\(^8\) the low rate of actual charges and convictions seem to thwart their effectiveness and indicate that prosecutors are wary or unwilling to pursue hate crimes.

**B. BURDEN OF PROOF**

The second problem of the HCPA is the high burden of proof required to validate a criminal conviction.\(^8\) In criminal cases, all alleged crimes must be proved beyond a reasonable doubt, while in civil cases, the plaintiff only has to prove his or her case by a preponderance of the evidence, which is a lower threshold.\(^8\) To prove an action beyond a reasonable doubt, a prosecutor must alleviate any sufficient doubt that the defendant committed the crime,\(^8\) and make the jury "so firmly convinced of the defendant's guilt that [they] have no reasonable doubt of the existence of any element of the crime or the defendant's identity."\(^8\) This

\(^{7}\) Id.

\(^{7}\) Id.

\(^{7}\) Id.

\(^{8}\) Id.


\(^{8}\) Id.


\(^{8}\) E.g., Reasonable Doubt, supra note 84.

is a high burden to meet, as the jury must be almost certain that the
defendant committed the crime. On the other hand, the preponderance of
evidence standard in civil cases requires only that the jury believe that the
plaintiff’s claim is more likely true than not true. The difference is that
the preponderance of evidence standard simply requires showing what
“probably happened,” while the reasonable doubt standard requires
showing “what almost certainly has happened.”

Since the HCPA is a criminal statute, any conviction under the statute
must meet the reasonable doubt standard. However, this standard is
especially hard to meet when prosecuting a hate crime because the
prosecution needs to prove beyond a reasonable doubt that the defendant
targeted the victim because of an actual or perceived bias. This involves
the jury deciding what motivated the defendant, but short of a confession,
it is hard to lift all doubt as to the defendant’s motivation. If, however,
the HCPA has a private right of action, a victim could sue the perpetrator
in a civil court where the burden of proof is only a preponderance of the
evidence. Since it is outside the criminal context, the defendant would
not face jail time, but the plaintiff would only have to prove enough facts
to convince the jury that it is more likely than not that the defendant was
motivated by a bias in targeting the victim. While evidence of a hate
crime could be insufficient to eliminate all sufficient doubt, it may well
be able to establish that it was likely—but not certainly—a bias that
motivated the crime, and thus earn a favorable judgment in a civil court.

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88 Id. at 247.
89 Id. at 246.
92 See Preponderance, supra note 84.
93 See id.
94 See Scharffs, supra note 91.
C. JURY BIAS

Jury bias is another problem that limits the HCPA’s effectiveness, especially when coupled with the high burden of proof. In weighing evidence, juries sometimes fail to convict a defendant when the evidence appears overwhelmingly one sided. For instance, take the murder of fifteen-year-old Larry King, a gay middle school student killed by classmate Brandon McInerney. The murder occurred in the middle of class; both King’s teacher and classmates saw McInerney shoot King “execution style” in the back of the head, repeatedly. King was known for his effeminate persona and became the target of constant teasing for his sexual orientation and gender identity, especially by McInerney. McInerney’s friends described that he was “disgusted” with King’s “flamboyant behavior” and embarrassed about King’s attempt to flirt with him. Shortly after McInerney shot King in front of the witnesses, he was caught with a copy of Adolf Hitler’s Mein Kampf, a book written by a man who murdered people for, among other reasons, their sexual orientation. However, when McInerney was prosecuted under state hate crime laws, the jury refused to find the killing a hate crime and even hung on the murder conviction. The evidence seemingly supported a hate crime conviction. McInerney was “disgusted” by King’s sexual orientation, claimed that he would hurt King, carried anti-gay literature, and shot King execution style repeatedly in class, yet the jury decided that no hate crime occurred. In their decision not to find a hate crime, many of the jurors cited the defendant’s age as a reason for why he should not have been tried as an adult. This, however, goes...
straight to their bias. The jury was not supposed to adjudicate based on the defendant’s age, but they let their opinion about youth influence their verdict. Further, in the subsequent wrongful-death civil lawsuit against McInerney and others, where the burden of proof was lower, the case quickly settled.

The McInerney trial is not a lone instance when an ostensibly easy conviction went array possibly due to jury bias. In 2012, the Chad Pennington assault trial, the first known instance of a prosecution under the HCPA, seemed plagued by jury bias. Two men and two women lured and kidnapped a gay male, Kevin Pennington, when he met them for a supposed drug deal. They took Pennington to a rural area, threatened to rape him, and severely beat him while they yelled gay slurs. Pennington escaped by jumping over the side of a mountain and breaking into a ranger station to call police. During trial, instead of denying the threatening statements and unwanted sexual advances, the defense referred to the HCPA as President Obama’s bow to special interest and argued that the defendants were too drunk to have targeted Pennington for his sexual orientation, though they were cognizant enough to yell homophobic slurs as they beat him. One of the conspirators in the crime acknowledged that the two men planned to beat and kill Pennington. In a state skeptical of the President, the defense played on the jurors’ bias and political antagonism toward the President, and by extension, on hate

104 Dubreuil & Martinez-Ramundo, supra note 96.


107 See id.

108 Id.


111 Estep, Hate Crimes Trial, supra note 106.

crime protection of gays and lesbians. The two defendants were acquitted of the hate crime charge, but found guilty of kidnapping.\textsuperscript{113}

These two illustrations are not intended to suggest that but for the jurors' hatred toward gays, they would have convicted. It does, however, show that strong evidence of motive can be undermined by jury bias, such as their preconceived notion about youth\textsuperscript{114} or their political affiliations.\textsuperscript{115} This risk of jury bias coupled with prosecutorial reluctance and the high burden of proof makes the HCPA an ineffective tool to combat hate crimes.

IV. HARDSHIPS FACED BY GAYS, LESBIANS, AND OTHERS UNDER CURRENT LAW

Besides the ineffectiveness of the HCPA, gays, lesbians, and other minority groups face other hardships and have little protection provided by the government. Many of these hardships do not correspond directly with hate crime legislation, but the general lack of protection by the federal and state governments contributes to their plight.

A. LEGAL HARDSHIPS

The HCPA's effectiveness is stymied by prosecutorial inaction, a high criminal burden of proof, and potential jury bias. Although a private right of action would address, at least in part, each of these concerns, courts have established that the HCPA does not provide a private right of action.\textsuperscript{116} It is not just hate crime laws, however, that create obstacles for minorities to use legal means to alleviate acts of bias against them. Both the selectivity of current laws and the administrative remedy requirements hamper other anti-discrimination efforts.

First, some of the existing anti-discrimination statutes selectively protect certain minority groups. For example, employment discrimination based on race, color, religion, sex, or national origin is federally


\textsuperscript{114} Dubreuil & Martinez-Ramundo, supra note 96.


prohibited, but employment discrimination based on sexual orientation and gender is not federally prohibited. The different genders are guaranteed equal treatment in education, but no such provision exists to protect discrimination based on sexual orientation. On the state level, only twenty-one states prohibit employment discrimination based on sexual orientation, which means that an employee can be fired just for being gay in twenty-nine states.

The lack of anti-discrimination statutes for sexual orientation in these states has real world consequences. Up to forty-three percent of people identifying as gay claim to have faced discrimination in the workplace, and up to seventeen percent claim that they were either fired or passed over for promotion because of their sexual orientation. The same states without employment protection for sexual orientation do not protect gays and lesbians in housing arrangements.

Second, all minority individuals, including gays and lesbians, filing civil claims are often burdened by strict administrative remedy exhaustion requirements. For example, the federal register requires that all employment discrimination claims go through an administrative remedy exhaustion requirement before a claimant can sue his or her employer. These requirements can be complicated: potential plaintiffs must either hire a lawyer or go through the federal register themselves, navigating through numerous deadlines, notice requirements, and meetings with government officers all prior to filing a claim.

While the administrative remedy requirements may provide a means

123 Id.
124 Id.
to conduct a preliminary investigation and reach possible settlement, they have also become a tool that limits legitimate claims. For example, a prisoner suing for alleged religious discrimination was barred from bringing his claim in federal court because he had not followed the administrative remedy requirements. Likewise, another prisoner could not have his prisoner abuse claim proceed on the merits due to his failure to exhaust all administrative remedies, though facially the alleged facts, if proven to be true, would constitute a severe assault and discrimination. This could become a concern in the discrimination context if the administrative remedy becomes a means of limiting access to courts.

B. FAMILIAL HARDSHIPS

The high frequency of reported hate crimes and the general lack of anti-discrimination protections are not the only hardships LGBT individuals face. Unlike other minorities, LGBT individuals often encounter hostility and rejection not only from society, but also from their families. Youth who are rejected by their families are 8.5 times more likely to attempt suicide than those who are accepted by their families. Gay and lesbian youth are also four times more likely to attempt suicide, almost six times more likely to suffer from depression, and about three times more likely to use illegal drugs than heterosexual youth. While grassroots organizations, such as the Trevor Project and

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126 See Woodford v. Ngo, 548 U.S. 81, 83–84 (2006) (detailing that a goal of the administrative remedy requirement in federal prison litigation is to reduce the quantity of suits).
127 See id. at 85.
130 Id.
132 Shapiro, supra note 130.
the It Gets Better Project, try to reach out to these youth, many still fall victim to intense bullying and harassment. As recent surveys show, gay youth are the most likely group to be bullied, and almost eighty percent of gay youths claim they have experienced bullying.

C. PHYSICAL HARDSHIPS

Gays and lesbians also face an ever-increasing threat of violence. The It Gets Better Project details a myriad of stories in which gays and lesbians recount the fear, intimidation, and violence they faced in their youth. One man in particular was punched and shot at by schoolmates who were uncomfortable with his sexual orientation. Though these stories end in hope and perseverance, they exemplify the violence that gays and lesbians face.

Despite the HCPA, the number of anti-gay crimes occurring each year continues to rise. The highest number of anti-gay murders reported since the National Coalition of Anti-Violence Programs began collecting data was in 2011. For example, lesbian women reported "gang rapes," gay men were murdered, and transgender individuals were beaten to death as a result of their perceived identification. Gay youth suffer more frequently from depression than their heterosexual peers. This contributes to the high suicide attempts of gay youths, which is far greater

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138 It Gets Better Project, supra note 135.
140 Comparison of FBI Hate Crime Statistics (2000–2010), supra note 42.
142 See Hate Crimes Against Lesbian, Gay, Bisexual, and Transgender Individuals, supra note 25.
than the number of suicide attempts by their straight classmates.\textsuperscript{144}

Despite the legal, familial, and physical hardships, gays and lesbians have little recourse. Adding a private right of action to the HCPA could help to alleviate some of the violence and intimidation that gays, lesbians, and other minorities face, and to make the HCPA more effective.

V. A PRIVATE RIGHT OF ACTION AS A REMEDY

Though a private right of action would not cover every hate crime, it would cover some of the most deplorable crimes, like the ones committed against Matthew Shepard and Kevin Pennington. A private right can mitigate the problems inherent in the existing criminal-only statute. This part discusses some of the strengths of adding a private right of action, including: (1) reducing the lack of enforcement problem, (2) lowering the burden of proof, (3) allowing for compensatory relief, (4) side-stepping the administrative exhaustion requirement, (5) shifting some of the financial burden away from the federal government, and (6) promoting equality throughout the states.

First, the lack of enforcement problem vanishes because prosecutors would no longer have the sole discretion with regard to bringing a case. Victims, their estate, or their successors-in-interest could bring a civil suit by privately going after the perpetrators. The addition of a hate crime allegation would impact a civil case in two ways. Primarily, it would provide a remedy for the fear and emotional impact of hate crimes separate and apart from the underlying violent offense. While some victims of violent crimes can remove themselves from the circumstances that prompted the attack, hate crime victims cannot: their identities cannot be altered. This makes the fear of hate crimes pervasive; people become afraid to leave their home or go outside. This fear affects every member of a minority group. For example, Candace Nichols became afraid to even use an elevator or a restroom alone as a result of the increase in hate crimes against the LGBT community in her area.\textsuperscript{145} That added fear should be accounted for by a civil remedy.

Further, perpetrators would be socially labeled as hate criminals. The social stigma associated with this label goes a long way in deterring

\textsuperscript{144} See id.
\textsuperscript{145} See Hate Crimes Against Lesbian, Gay, Bisexual, and Transgender Individuals, supra note 25.
crimes. A well-known example is that of O.J. Simpson. Though acquitted in the criminal murder trial of his wife and another man, Simpson was subsequently found liable for the deaths in a civil trial brought by the victims’ family and “branded a killer.” The civil trial allowed the victims to bring their own case and establish that Simpson was the killer by a preponderance of the evidence. The defense attorneys claimed that the lower standard of proof could have been the reason for the conflicting verdicts.

Also, claimants would be immune from political influence. Because most prosecutors are elected or appointed, political considerations may influence what crimes are prosecuted. Not only do prosecutors decide which cases to prosecute, they also influence police activity and investigations. A private right of action would allow victims to circumvent the political pressure of the prosecuting government agency and bring suits privately.

Second, a private right of action would lower the burden of proof. Hate crimes warrant this lower burden of proof because juries evaluating hate crimes must wrestle with the defendant’s motivation and reasons behind the targeting of the victim, which involves inquiries into intent, an element that does not lend itself as easily to concrete facts as other elements. The lower burden of proof associated with a civil trial would seemingly allow for more verdicts finding a hate crime occurred, while still maintaining the values of the justice system—requiring proof of a crime beyond a reasonable doubt for incarceration—wherein a defendant would only be subject to civil penalties if brought privately. In turn, this

146 Cf. Sex Offender Registry Websites, FED. BUREAU INVESTIGATION, http://www.fbi.gov/scams-safety/registry (last visited Feb. 15, 2014). The social stigma of being a hate criminal would be comparable to the social stigma of being a registered sex offender.
148 Id.
149 See id.
151 Id.
permits victims to recover damages and, hopefully, deters would-be criminals.

Similar private rights of action have worked in the past. In recent years, federal courts adjudicated over three hundred employment discrimination claims on average. In 2011, for example, employers paid out over ninety million dollars to resolve such claims, and this only accounted for the claims that were “filed and resolved” in federal courts. Employers paid similar amounts in other recent years, as well. Given that more than half of all discrimination suits settle, probably many more victims have prevailed and recovered in discrimination suits than these numbers indicate. There is no reason to assume similar success would not be realized if the HCPA added a private right of action. The current anti-discrimination statutes, though under-inclusive by their exclusion of sexual orientation, allow some victims to recover with the preponderance of evidence standard. A similar scheme could be implemented with a private right under the HCPA.

Third, a private right of action would allow hate crime victims to recover monetary damages. Though money is not a cure-all for the non-economic damages (emotional and psychological harms), victims could use it to start their lives again, possibly relocating or seeking counseling. Compensation should account for the additional suffering that hate crime victims may experience, and a private right of action would allow this. Further, a private right of action may bring some closure to a victim because it allows for the public acknowledgement that a hate crime occurred.

Fourth, a private right of action in the hate crimes context could free victims of the burdensome administrative remedy exhaustion

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155 See id. (calculating the ninety million dollar figure by totaling the five categories of recovery in 2011).

156 Id.


requirements. Because a private right would—or should—be exempt from the administrative exhaustion requirements, claims would not be unduly delayed by months or years while an agency processed it.\textsuperscript{159} Also, if Congress introduces a private right of action, a jury or a judge would evaluate a claim’s merit, rather than an agency, board, or commission. Currently, either a federal agency, such as the Equal Employment Opportunity Commission (EEOC), or the very entity that a claimant alleges discrimination against leads the administrative investigation.\textsuperscript{160} An impartial jury and court proceeding could more fairly determine whether a claim has merit than the organization named as the defendant. The private right would allow for victims of hate crimes to circumvent this lengthy and biased process and obtain a judgment more quickly.

Fifth, a private right of action would shift some of the financial burden from the federal government to the private sector. The HCPA allows local and federal prosecutors to use federal money for investigating and prosecuting hate crimes.\textsuperscript{161} While this would not change with the addition of a private right of action, allowing a private right of action could help prosecutors save time and money by allowing private attorneys and investigators do some or all of their work. The government gains from the process because investigations performed by private attorneys would not be federally funded and the privately obtained information could be shared with the victim’s consent. Consequently, prosecutors could bring more cases with the saved time and money. On the other hand, if a prosecutor did not see the value in bringing a hate crime charge, a private attorney could still be hired to investigate and bring a civil action on behalf of the victim.

\textsuperscript{159} For example, with the EEOC complaint of discrimination in the workplace, an individual must contact an EEO counselor and participate in either counseling or alternative dispute resolution. If this is unsuccessful, the individual must file a formal complaint and give the EEOC 180 days to investigate and to draw a conclusion regarding the claim. Once this is done, the individual must either petition for a hearing or a final decision, which can be appealed. Once filed, federal complaints take years to adjudicate. An individual in this process usually needs compensation or an injunction immediately, not years after the termination or harassment occurred. See \textit{Overview of Federal Sector EEO Complaint Process}, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, http://www.eeoc.gov/federal/fed_employees/complaint_overview.cfm (last visited Feb. 15, 2014).

\textsuperscript{160} A federal employee must file separate documents registering a complaint before he or she can even file with the EEOC. See \textit{Filing Claims with Government Agencies}, WORKPLACE FAIRNESS, http://www.workplacefairness.org/filinggovtclaim#9 (last visited Feb. 15, 2014).

Last, a private right of action would promote equality throughout the states. As of 2013, five states still do not have hate crime laws, and fifteen additional states exclude sexual orientation from their hate crime laws. Recovery should depend on facts, not jurisdiction: it should not matter whether a criminal attacked a man for being gay in Los Angeles or in Atlanta. Since many state legislators object to such legislation, Congress should act to protect the public with a national law.

The benefits of a private right of action are desperately needed. A private right of action would help to deter hate crimes motivated by sexual orientation, while providing an alternative remedy to victims for their suffering.

VI. DETRACTER’S RESERVATIONS ABOUT EXPANDING HATE CRIME STATUTES

A. CONSTITUTIONAL CONCERNS

Providing a private right of action under the HCAP would be constitutional. However, critics claim otherwise, pointing to its similarities to a private right of action under VAWA. This is incorrect.

VAWA’s private right of action failed because Congress lacked the authority to enact it. In United States v. Lopez, the Court established three categories of activity that Congress could constitutionally regulate under its commerce power: the channels of interstate commerce (roads, waterways, etc.), instrumentalities of interstate commerce (firearms, widgets, etc.), and “activities that substantially affect interstate commerce” (growing wheat, marijuana, etc.). However, while Congress could regulate the first two categories without limit, the Lopez Court further divided the third category into economic versus non-economic means.

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162 Hate Crime Laws in the U.S., supra note 66.
163 See id. (illustrating that California has hate crime protections, but Georgia does not).
164 See Miller, supra note 66 (noting that even right after Shepard’s murder, during the time when public outcry for hate crime legislation was at its peak, some legislators blocked a hate crime bill from passing).
168 Id. at 567–68.
In doing so, the Court established that while economic commerce could be aggregated as to affect interstate commerce, non-economic activity could not; therefore, Congress could not regulate non-economic activity, such as possessing a gun within a school zone. Following this rational, in *United States v. Morrison*, the Supreme Court struck down part of VAWA, citing that gender motivated violence is not a channel, instrumentality, or economic function, and thus cannot be subject to federal regulation.

However, Congress crafted the HCPA with *Morrison* in mind, making sure to limit the enforcement of the Act to the channels or instrumentalities of commerce. This encasement of the Act hampered its scope, but sheltered it from the non-economic substance attack, ensuring that it stayed in one of the first two *Lopez* categories. Upon challenge, this technique worked; the constitutionality of the HCPA was upheld in its entirety.

Therefore, the addition of a private right of action would pass constitutional muster. With the Act limited to kidnappings, assaults or threatened assaults with deadly weapons, killings, and actual or threatened sexual abuse using either a channel or instrumentality of interstate commerce, the Act only applies when the crime “interferes with commercial or other economic activity...or...otherwise affects interstate or foreign commerce.” If the HCPA were amended to include a clause such as, “perpetrators of said crimes may face civil liability,” the addition would be constitutional.

First Amendment issues also frequently arise. The argument is that expressing a view will become illegal, which violates one’s freedom of speech. Some critics, including prominent politicians and nationally-syndicated radio hosts, go so far as to advocate that passing hate crime

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169 Id.
170 *Morrison*, 529 U.S. at 608–09, 613.
176 About Alex Jones, INFOWARS.COM, http://www.infowars.com/about-alex-jones/ (last
legislation will make public reading of the Bible or other speech-related activities illegal during protests or counter-protests.\textsuperscript{177} However, these arguments are without merit. If such actions are criminalized, then constitutional protections\textsuperscript{178} would invalidate the law. The HCPA only regulates specific, delineated, and violent or threatened use of force in the narrow context of the channels or instrumentalities of interstate commerce. A private right of action will not regulate speech, criminalize Bible readings, or even address hate crimes that do not involve interstate commerce. A private right of action would not expand the types of crimes covered by the HCPA.

B. INSTRUMENTALISM FEARS

A second concern considers hate crime legislation as an overbroad utilitarian approach to criminality. These critics raise a fairness argument: a murder is a murder, no matter who the victim happened to be.\textsuperscript{179} Critics argue that making a subjective element necessary to a prima facie case creates a fairness problem where juries are more likely to convict, and defendants are given harsher sentences because of their motivation, rather than an extra action, which would ordinarily warrant such enhanced punishment.\textsuperscript{180} Again, some go so far as to argue that the subjective nature punishes speech or thought.\textsuperscript{181} Commonly, critics argue that hate crime statutes violate the First and Fourteenth Amendments, and that it is a slippery slope between punishing motive and punishing belief, wherein the inquiry of the prior feigns as cover for punishment of the latter.\textsuperscript{182} These arguments, which collectively but loosely create a ‘subjective culpability’
defense, attack the inclusion of subjective factors in a culpability standard as a point of contention with the rest of American law. These contentions lack strength, however, because considering motive and bias are not regarded as unfair under current law, and because hate crime laws do not punish people for their thoughts. While some critics claim that hate crime laws erode the culpability requirement, consideration of motive is neither unique nor unconstitutional.

First, hate crime statutes do not punish thoughts, but rather prohibit the act of choosing a particular victim based on a bias. Individuals can expound his or her disdain for a minority group all they want without being criminalized. Similarly, a violent crime can be committed against a member of a protected minority group for reasons other than their association and thus not qualify as a hate crime. However, when a person targets a victim because of their association with a protected group, that act of choosing the particular victim qualifies for the hate crime enhancement and has been upheld as constitutional. The Supreme Court weighed in on this issue and distinguished the impermissible punishment of thoughts—the “legislature cannot criminalize bigoted thought with which it disagrees”—from the constitutionally acceptable punishment of bias motivation—that punishes “only the conduct of intentional victim selection.” Instead of criminalizing thoughts, hate crime legislation penalizes the selecting of victims, making the crime’s culpability requirement similar to other criminal statutes. Viewing hate crime enhancements as a victim-selection punishment, the subjective culpability argument flounders; perpetrators are not punished more for acting out of hate, but rather for selecting a person because of hate and then acting out

\[183\] The term “subjective culpability” has no singular definition, rather it is derived from the collection of arguments discussing a motive requirement, in which the subjective mindset of an individual is considered as part of punishment.

\[184\] See Phillips & Grattet, supra note 181, at 579–81 nn.20–24.

\[185\] See Civil Rights: Hate Crime—Overview, supra note 16 (establishing that hate itself is not punishable, but only choosing a victim out of hate to attack is punishable).

\[186\] See Wisconsin v. Mitchell, 508 U.S. 476, 485 (1994) (“A defendant’s abstract beliefs, however obnoxious to most people,” may not be taken into consideration by a sentencing judge.).

\[187\] Id. at 487 (affirming the Court’s prior approval of bias or motive as a constitutionally permitted element of a crime).

\[188\] Id. at 482 (citing R.V.A. v. City of St. Paul, 505 U.S. 377 (1992)).

\[189\] Id. at 476.

\[190\] See id.
against him or her, making it two different actions.

Hate crime laws are not the only laws that punish the act of targeting of the victim as well as the underlying violent act or threat. For example, California enhances a criminal charge if a criminal act was perpetrated in an effort to "promote, further, or assist" gang members. As with hate crimes, the criminal is not additionally punished for the same crime just because it happened to be gang related. Instead, the criminal is punished for the underlying crime and for selecting his victim based upon his or her allegiance to a prohibited activity—gang participation. The anti-gang statute requires the jury to inquire into the intent of the defendant to determine if the accused targeted the victim to further gang conduct separate from a determination of guilt of the underlying violent or threatened act.

Other circumstances surrounding a crime also affect the charges brought and the sentence sought in the criminal code. The use of a bomb to kill a person can lead to a "Use of a Weapon of Mass Destruction" charge in addition to a murder charge, while use of a shotgun to perpetrate that same murder does not. The underlying crime could be the same—a homicide, for instance—but the use of a specific weapon as opposed to another warrants more punishment according to the state. The same is true with hate crime charges; a hate-based murder can yield more punishment than a simple murder charge because of the targeting of the victim, as the law criminalizes both the action of targeting and the action of violence.

VII. SUCCESS IN EUROPE

The European Union leads the United States in victim-recovery anti-
discrimination legislation.\textsuperscript{196} Though it varies by nation and is different than straight hate crime legislation,\textsuperscript{197} many European countries have stricter and more inclusive anti-discrimination legislation, and some provide a private right of action.\textsuperscript{198} At least ten European nations provide some version of a civil remedy for discrimination.\textsuperscript{199} Details are limited due to the lack of any formal reporting system, yet according to the European Union, victims routinely recover compensation from perpetrators of discriminatory actions on top of any criminal sanction the attacker faces.\textsuperscript{200}

Many European countries have recently taken steps to combat hate crimes and other crimes of bias,\textsuperscript{201} and the amount of private claims filed under anti-discrimination legislation continues rise.\textsuperscript{202} The increased usage of these anti-discrimination statutes shows the popularity of such laws; possibly indicating that once victims see actual recovery by others, they begin using the system. Another consequence of these new provisions is mediation; since claims are now actionable, many would-be defendants decide to mediate any claim and pay the victim through a quiet settlement.\textsuperscript{203} This rewards the victim with quick money without the hassle or uncertainty of court, keeps cases off the dockets, and allows defendants to acknowledge their wrong and change their actions.


\textsuperscript{197} The European legislation discussed often covers more acts and crimes than just the acts covered in the HCPA. However, since many aspects of European anti-discrimination legislation have a private right of action for bias-based actions, it can provide a point of comparison to a potential private right of action in the HCPA.

\textsuperscript{198} See CHAHROKH, KLUG \& BILGER, supra note 196, at 105–08.


\textsuperscript{200} CHAHROKH, KLUG \& BILGER, supra note 196, at 105–08.


\textsuperscript{202} CHAHROKH, KLUG \& BILGER, supra note 196, at 104–06 (acknowledging the increase in claims filed in Portugal, Sweden, Austria, and Ireland).

\textsuperscript{203} CHAHROKH, KLUG \& BILGER, supra note 196, at 102.
The European system is not without flaws. It too is burdened by pre-actionable administrative procedures, limited recovery, and lack of some protections. However, the European model should encourage the United States because the United States can use Europe's successes of victim compensation and real deterrence, while avoiding its hardships. The increase in popularity both within independent nation-states and around the European Union as a whole proves that victims of extreme acts of discrimination can use a private remedy to improve their situation. This can easily translate to the United States, even if restricted to the crimes delineated in the HCPA.

Many of the problems the European Union faces are Europe-specific. Unlike the European Union, the U.S. Constitution is the "supreme law of the land," meaning the federal government can pass legislation binding all 50 states. Thus, there would be universal equality throughout the United States, which Europe lacks. Also, many of the European laws require an administrative process before a claim could be filed; this parallels the administrative exhaustion problem faced in the United States. A private right of action in the HCPA should remove any administrative remedy requirement, allowing claims to be filed in court immediately. Lastly, the cost issue that plagues Europe should not hinder American victims. Since many plaintiffs' attorneys assume cases on contingency basis, victims only pay if they recover.

VIII. CONCLUSION

Hate crime legislation is a marque civil rights advancement of the twenty-first century. American society has made great strides in the promotion of equality and tolerance by simultaneously punishing those who intimidate through violence while recognizing minority groups as equal under the law. However noble the laws, perverse are the enforcers: prosecutors who will not indict and juries that will not convict. A private right of action is one way to traverse around the enforcement problem without risking a constitutional or financial fight. Gays and lesbians are

204 See id. at 108.
205 U.S. CONST. art. VI.
one of the most discriminated against groups, but have some of the fewest legal protections.

Adding a private right of action to the HCPA is one means to deter the worst violent acts against minorities. It would allow civil cases to be brought even when prosecutors refuse to charge perpetrators. It would remove partisanship from crimes against marginalized groups. It would provide a lower burden of proof to combat juror bias. It would label more perpetrators as hate crime offenders. It would compensate victims. It would shift some of the financial burden of prosecution. It would remove some administrative burden. And, it would allow for a more equitable and just remedy.

If the purpose of hate crime legislation is to deter hate crimes, the current system is failing. Thirty witnesses saw McInerney kill King execution style in the middle of class, yet the jury did not find a hate crime.\textsuperscript{207} The Jenkins' cousins screamed "You're gonna die, you ... faggot!" as they beat Kevin Pennington,\textsuperscript{208} yet the jury found no hate crime.\textsuperscript{209} Texas alone reports thousands of hate crimes because of sexual orientation bias, yet prosecutors fail to bring them to trial.\textsuperscript{210} The United States must answer the calls of injustice. The United States could utilize a private right of action for hate crime violations to continue to encourage equality, tolerance, and security. This private right can punish perpetrators, protect victims, and preserve the constitutional rights of all citizens.

\textsuperscript{207} Mistrial Declared in CA Gay Student Killing Trial, supra note 95.

\textsuperscript{208} Estep, Hate Crime Trial, supra note 106.


\textsuperscript{210} Dexheimer, supra note 76.