

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

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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

¹ See *Fatal Injury Reports, National and Regional, 1999–2010*, CENTERS FOR DISEASE CONTROL & PREVENTION, http://webappa.cdc.gov/sasweb/ncipe/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.*

³ See, e.g., Greg Braxton, *THE O.J. SIMPSON MURDER TRIAL: Coverage Will Run From Serious to Offbeat, All the Time to Sometimes*, L.A. TIMES (Jan. 23, 1995), http://articles.latimes.com/1995-01-23/news/mn-23442_1_o-j-simpson-murder-trial; Jack Mirkinson, *George Zimmerman Verdict Leads To Inevitable Media Circus*, HUFFINGTON POST (July 16, 2013, 9:40 AM), http://www.huffingtonpost.com/2013/07/16/george-zimmerman-media-circus_n_3604350.html; T. L. Stanley, *Casey Anthony Murder Trial Garner Extensive Media Coverage*, L.A. TIMES (July 6, 2011), <http://articles.latimes.com/2011/jul/06/entertainment/la-et-casey-anthony-trial-sidebar-20110706>.

⁴ E.g., CNN Library, *Manson Family Murders Fast Facts*, CNN (Oct. 3, 2013, 1:40 PM), <http://www.cnn.com/2013/09/30/us/manson-family-murders-fast-facts/>.

⁵ E.g., *The O.J. Verdict: Rating the Media's Performance*, FRONTLINE (Oct. 4, 2005), <http://www.pbs.org/wgbh/pages/frontline/oj/themes/media.html>.

⁶ E.g., Mirkinson, *supra* note 3.

⁷ Cheryl Wetzstein, *Shepard Murder Became Gay ‘Hate Crime,’ Not Drug Deal, As Result of Public Narrative: Author*, WASH. TIMES (Sept. 23, 2013), <http://www.washingtontimes.com/news/2013/sep/23/author-shepard-murder-case-became-hate-crime-not-d/?page=all> (claiming that the story “became a galvanizing event in a national movement against violence targeting gays”).

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.⁹ The murder, which garnered extensive media coverage,¹⁰ 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.¹¹

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.¹² Two men punched, kicked, and stomped on Price and left him with two collapsed lungs, a fractured jaw and ribs, and a ruptured spleen.¹³ Hate crimes do not stop with sexual orientation either; individuals have been targeted for their minority status in other regards.¹⁴ 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.¹⁵ Perpetrators of these crimes are motivated by bias, and as such, Congress has defined them as hate crimes.¹⁶

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.¹⁷ No private right of action exists for victims to bring their own suit under the HCPA.¹⁸ While the HCPA does not provide

⁹ *Matthew's Story*, *supra* note 8.

¹⁰ Hicklin, *supra* note 8 (discussing in part how there was extensive media coverage of the murder).

¹¹ 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)).

¹² Joe Kemp & Rich Schapiro, 'I Thought I Died': Gay Man Jack Price, Beaten in Queens, Talks About Attack, *DAILY NEWS* (Oct. 16, 2009, 10:09 PM), <http://www.nydailynews.com/news/crime/thought-died-gay-man-jack-price-beaten-queens-talks-attack-article-1.385241>.

¹³ *Id.*

¹⁴ *2012 Hate Crime Statistics: Incidents and Offenses*, FED. BUREAU OF INVESTIGATION, http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2012/topic-pages/incidents-and-offenses/incidentsandoffenses_final (last visited Feb. 15, 2014).

¹⁵ *Hate Crime Victim Testifies Before House Judiciary Committee*, ANTI-DEFAMATION LEAGUE (Apr. 19, 2007), http://archive.adl.org/civil_rights/ritcheson.html.

¹⁶ *Civil Rights: Hate Crime—Overview*, FED. BUREAU OF INVESTIGATION, http://www.fbi.gov/about-us/investigate/civilrights/hate_crimes/overview (last visited Feb. 15, 2014).

¹⁷ *Id.*

¹⁸ *Wiley v. California*, No. 1:11-cv-00866-LJO-JLT, 2011 WL 6012423, at *4 (E.D. Cal. Nov. 30, 2011); *Perry v. Garcia*, No. 09cv622-LAB (RBB), 2010 WL 3633042, at *12 (S.D. Cal.

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.¹⁹

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,²⁰ 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

July 16, 2010).

¹⁹ 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 *Id.* § 1983).

²⁰ 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.

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.²¹ The HCPA criminalizes targeting victims based upon their association with a delineated minority group.²² Congress passed the HCPA because of the unique impact these crimes create: an environment of fear and intimidation.²³ 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.²⁴ 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

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.*

²³ Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, HUM. RTS. CAMPAIGN (June 28, 2010), <http://www.hrc.org/laws-and-legislation/federal-laws/matthew-shepard-and-james-byrd-jr.-hate-crimes-prevention-act>; see also *Hate Crime Laws: The ADL Approach*, ANTI-DEFAMATION LEAGUE (2012), <http://www.adl.org/assets/pdf/combating-hate/Hate-Crimes-Law-The-ADL-Approach.pdf>.

²⁴ *Hate Crime Laws: The ADL Approach*, *supra* note 23.

their safety.²⁵ To counter such a message, Congress and many state legislatures sought to criminalize the act of selecting victims based upon their minority status.²⁶

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 1871.²⁷ This Act, referred to as the Ku Klux Klan Act (KKK Act), sought to curb racially motivated violence.²⁸ 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.”²⁹

Nearly a century later, spurned 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 1968.³⁰ 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.³¹

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.³² Congress also revised the United States Sentencing Guidelines to

²⁵ See *Hate Crimes Against Lesbian, Gay, Bisexual, and Transgender Individuals*, LEADERSHIP CONF., <http://civilrights.org/publications/hatecrimes/lgbt.html> (last visited Feb. 15, 2014) (“The result of [the] increase in hate crimes based on sexual orientation is heightened fear and security among LGBT individuals.”).

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

²⁷ Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13 (codified at 18 U.S.C. § 241 (2006), 42 U.S.C. §§ 1983, 1985(3) (2006)).

²⁸ Daniel Aisaka & Rachel Clune, *Hate Crime Regulation and Challenges*, 14 GEO. J. GENDER & L. 469, 470–71 (2013).

²⁹ *Id.*

³⁰ Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (1968) (current version at 18 U.S.C. § 245 (2006)); Aisaka & Clune, *supra* note 28.

³¹ Kevin Ivers, *Hate Crimes and the Federal Role—Part 1*, LIBERTY EDUC. FOUND., http://ftp.libertyeducationforum.org/docs/whitepapers/1h_hatecrime7_21_1.pdf (last visited Feb. 15, 2014).

³² Aisaka & Clune, *supra* note 28, at 471–72.

provide for sentence enhancements for hate crimes in 1994.³³ Then, in 1998, Congress reexamined hate crime legislation after the brutal deaths of James Byrd Jr. and Matthew Shepard.³⁴ 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.³⁵ Both crimes, which were highly publicized, “made the limitations of federal hate crime regulation abundantly clear.”³⁶ In 2009, Congress passed the HCPA, which “expanded federally protected classes to include . . . sexual orientation” as a protected class.³⁷ 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 device any person because of their race, color, religion, or national origin.³⁸ 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.³⁹ 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.⁴⁰ Any prosecution under this statute must be conducted according to the Attorney General’s, or his or her designee’s, guidelines.⁴¹

B. HATE CRIMES AGAINST GAYS AND LESBIANS BY THE NUMBERS

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

³³ *Id.* at 471.

³⁴ *See id.* at 469–71.

³⁵ *Id.* at 472.

³⁶ *Id.*

³⁷ *Id.*

³⁸ 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(a)(1) (Supp. 2012)).

³⁹ *Id.* § 249(a)(2).

⁴⁰ *See* Wiley v. California, No. 1:11-cv-00866-LJO-JLT, 2011 WL 6012423, at *4 (E.D. Cal. Nov. 30, 2011); Perry v. Garcia, No. 09cv622-LAB (RBB), 2010 WL 3633042, at *12 (S.D. Cal. July 16, 2010).

⁴¹ 18 U.S.C. § 249(a)(3).

of the twenty-first century.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.⁴³ Throughout the decade, racially motivated crimes occurred most frequently.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.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.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,⁴⁷ with the highest percentage of incidents effecting gay men, based on percentage of the population.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.⁴⁹ In 2010, 33.8 percent of all hate crimes were anti-black.⁵⁰ That same year, 18.4 percent of all hate

⁴² *Comparison of FBI Hate Crime Statistics (2000–2010)*, ANTI-DEFAMATION LEAGUE, <http://www.adl.org/assets/pdf/combating-hate/Hate-Crimes-Statistics-2000-2010.pdf> (last visited Feb. 15, 2014).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Percentage of Hate Crimes by Bias Type*, TRENDS IN HATE, <http://trendsinhate.com/trends/hatecrimes/changebybias.html> (last visited Feb. 15, 2014) (citing FBI statistical information).

⁴⁶ *Comparison of FBI Hate Crime Statistics (2000–2010)*, *supra* note 42.

⁴⁷ *Id.*; *Hate Crime Statistics: 2011—Incidents and Offenses*, FED. BUREAU INVESTIGATION, <http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2011/narratives/incidents-and-offenses> (last visited Feb. 15, 2014) (reporting 1508 incidents in 2011); *2012 Hate Crime Statistics: Incidents and Offenses*, *supra* note 14 (reporting 1318 incidents in 2012, the last year for data).

⁴⁸ *See Percentage of Hate Crimes by Bias Type*, *supra* note 45.

⁴⁹ *The Black Population: 2010*, U.S. CENSUS BUREAU, <http://www.census.gov/prod/cen2010/briefs/c2010br-06.pdf> (last visited Feb. 15, 2014).

⁵⁰ *Hate Crime Statistics—Table 4: Offense Type by Bias Motivation, 2010*, FED. BUREAU INVESTIGATION, <http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2010/tables/table-4-offenses-offense-type-by-bias-motivation-2010.xls> (last visited Feb. 15, 2014).

crimes were anti-homosexual.⁵¹ But, because only 3.4 percent of the population identified as LGBT,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.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.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,⁵⁵ and Title IX protects against gender discrimination in education.⁵⁶ Congress has, in certain contexts, also prohibited employers from discriminating on the basis of age,⁵⁷ disability,⁵⁸ or genetics.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

⁵¹ *Id.*

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.

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.

⁵⁴ See *Comparison of FBI Hate Crime Statistics (2000–2010)*, *supra* note 42.

⁵⁵ 42 U.S.C. § 2000e-2 (2006).

⁵⁶ 20 U.S.C. § 1681 (2006).

⁵⁷ 29 U.S.C. § 623 (2006).

⁵⁸ 42 U.S.C. § 12112 (2006).

⁵⁹ *Id.* § 2000ff-1 (2006).

the same protections and resources heterosexual victims receive under the Violence Against Women Act (VAWA).⁶⁰ Prosecutors and victims are able to receive financial assistance to prosecute and recover from sexual assault and domestic abuse,⁶¹ but victims cannot bring a civil suit under VAWA.⁶²

With the exception of the new anti-discrimination rules in VAWA⁶³ and the addition of sexual orientation as a protected class under the HCPA,⁶⁴ 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.⁶⁵

Gays and lesbians fair better on the state level: thirty states have hate crime laws that cover crimes based on sexual orientation.⁶⁶ 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.

⁶⁰ Diana Duel, *Violence Against Women Act Renewed by Congress Now Includes Same-Sex Couples*, EXAMINER.COM (Mar. 1, 2013), <http://www.examiner.com/article/violence-against-women-act-renewed-by-congress-now-includes-same-sex-couples>.

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).

⁶³ Violence Against Women Reauthorization Act of 2013, S. 47, 113th Cong. (1st Sess. 2013).

⁶⁴ 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(a)(2) (Supp. 2012)).

⁶⁵ See *U.S. Issues First Anti-Gay Hate Crime Indictment in Kentucky Attack Case*, HUFFINGTON POST (Apr. 12, 2012, 3:21 PM), http://www.huffingtonpost.com/2012/04/12/us-first-anti-gay-hate-crime-indictment_n_1421630.html. Though the HCPA became law in 2009, it took federal prosecutors three years to bring the first hate crime charge under it for a crime motivated by a victim's sexual orientation.

⁶⁶ *Hate Crime Laws in the U.S.*, NAT'L GAY & LESBIAN TASK FORCE, http://www.thetaskforce.org/downloads/reports/issue_maps/hate_crimes_06_13_color.pdf (last visited Feb. 15, 2014). See generally Jared Miller, *State Avoids Hate Crime Legislation*, CASPER STAR TRIBUTE (Oct. 11, 2008, 12:00 AM), http://trib.com/news/state-and-regional/state-avoids-hate-crime-legislation/article_d636eb76-665b-5593-b186-f69a96d32a37.html (noting that even in Wyoming, the very state in which Matthew Shepard faced that brutal beating, the legislature failed to pass a bill protecting gays and lesbians from brutal attacks).

III. SHORTCOMINGS OF THE CURRENT HCPA

According to the FBI, thousands of hate crimes are committed every year,⁶⁷ 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.⁶⁸ 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.⁶⁹ 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.⁷⁰ 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.⁷¹ 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."⁷² 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

⁶⁷ *Hate Crimes Accounting: Annual Report Released*, FED. BUREAU INVESTIGATION, <http://www.fbi.gov/news/stories/2012/december/annual-hate-crimes-report-released/annual-hate-crimes-report-released> (last visited Feb. 15, 2014).

⁶⁸ Nathan Sandholtz, Lynn Langton & Michael Planty, *Hate Crime Victimization, 2003–2011*, U.S. DEPARTMENT JUST., <http://www.bjs.gov/content/pub/pdf/hcv0311.pdf> (last visited Feb. 15, 2014).

⁶⁹ *Wiley v. California*, No. 1:11-cv-00866-LJO-JLT, 2011 WL 6012423, at *4 (E.D. Cal. Nov. 30, 2011); *Perry v. Garcia*, No. 09cv622-LAB (RBB), 2010 WL 3633042, at *12 (S.D. Cal. July 16, 2010) (purporting no private right of action).

⁷⁰ See *Inmates of Attica Corr. Facility v. Rockefeller*, 477 F.2d 375, 379–82 (2d Cir. 1973).

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.⁷³ 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,⁷⁴ though the FBI reported that thousands of hate crimes had been reported to authorities over those same years.⁷⁵ 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.⁷⁶ While hundreds of hate crimes are reported in Texas each year, the state averages one conviction per year.⁷⁷ 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

⁷³ *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973) (citing *Younger v. Harris*, 401 U.S. 37, 42 (1971); *Bailey v. Patterson*, 369 U.S. 31, 33 (1962); *Poe v. Ullman*, 367 U.S. 497, 501 (1961)).

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

⁷⁵ *Hate Crime Statistics, 2009: Incidents and Offenses*, FED. BUREAU INVESTIGATION, <http://www2.fbi.gov/ucr/hc2009/incidents.html> (last visited Feb. 15, 2014) (reporting 1436 reported sexual orientation hate crimes in 2009); *Hate Crime Statistics, 2010: Incidents and Offenses*, FED. BUREAU INVESTIGATION, <http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2010/narratives/hate-crime-2010-incidents-and-offenses> (last visited Feb. 15, 2014) (reporting 1470 sexual orientation hate crimes in 2010); *Hate Crime Statistics: 2011—Incidents and Offenses*, *supra* note 47 (reporting 1508 sexual orientation hate crimes in 2011); *2012 Hate Crime Statistics: Incidents and Offenses*, *supra* note 14 (reporting 1318 sexual orientation hate crimes in 2012).

⁷⁶ Eric Dexheimer, *Texas Hate Crime Law Has Little Effect*, AUSTIN-AM. STATESMAN (Jan. 24, 2012, 9:56 AM), <http://www.statesman.com/news/special-reports/texas-hate-crime-law-has-little-effect/nRjsf/>.

⁷⁷ *Id.*

been spent on hate crime prosecutions because no one has ever asked.”⁷⁸ New York, though statistically better than Texas, averages only about a dozen convictions per year.⁷⁹ On the other side of the spectrum, California seems to prosecute more, with 230 hate crime filings in 2010.⁸⁰ However, with 1331 hate crimes reported in California in 2010,⁸¹ 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,⁸² 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.⁸³ 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.⁸⁴ To prove an action beyond a reasonable doubt, a prosecutor must alleviate any sufficient doubt that the defendant committed the crime,⁸⁵ 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.”⁸⁶ This

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Hate Crime Statistics—Table 11: Offense Type by Participating State, 2010*, FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2010/tables/table-11-offenses-offense-type-by-participating-state-2010.xls> (last visited Feb. 15, 2014).

⁸² Dexheimer, *supra* note 76.

⁸³ *Wiley v. California*, No. 1:11-cv-00866-LJO-JLT, 2011 WL 6012423, at *4 (E.D. Cal. Nov. 30, 2011); *Perry v. Garcia*, No. 09cv622-LAB (RBB), 2010 WL 3633042, at *12 (S.D. Cal. July 16, 2010) (purporting no private right of action).

⁸⁴ *Compare Preponderance*, CORNELL UNIV. LAW SCH., <http://www.law.cornell.edu/wex/preponderance> (last visited Feb. 15, 2014) (defining preponderance of the evidence), *with Reasonable Doubt*, CORNELL UNIV. LAW SCH., http://www.law.cornell.edu/wex/reasonable_doubt (last visited Feb. 15, 2014) (defining beyond a reasonable doubt).

⁸⁵ *E.g., Reasonable Doubt*, *supra* note 84.

⁸⁶ *Criminal Jury Instructions: Reasonable Doubt*, N.Y. ST. UNIFIED CT. SYS., http://www.nycourts.gov/judges/cji/1-General/CJ12d.Presumption.Burden.Reasonable_Doubt.pdf (last visited Feb. 15, 2014).

is a high burden to meet, as the jury must be almost certain that the defendant committed the crime.⁸⁷ 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.⁸⁸ 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."⁸⁹

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.⁹⁰ 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.⁹¹ 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.⁹² 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.⁹³ While evidence of a hate crime could be insufficient to eliminate all sufficient doubt,⁹⁴ 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.

⁸⁷ J.P. McBaine, *Burden of Proof: Degrees of Belief*, 32 CALIF. L. REV. 242, 255 (1944), available at <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=3613&context=californialawreview>.

⁸⁸ *Id.* at 247.

⁸⁹ *Id.* at 246.

⁹⁰ See 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(a)(2) (Supp. 2012)) (requiring that a hate crime be motivated by "the actual or perceived religion, national origin, gender, sexual orientation, gender, or disability" of the victim).

⁹¹ Brett G. Scharffs, *Security, Religious Autonomy, and the Good Society*, 5 REV. FAITH & INT'L AFF. 3, 5 (2007), available at <http://www.tandfonline.com/doi/abs/10.1080/15570274.2007.9523296>.

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.⁹⁵ 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.⁹⁶ King was known for his effeminate persona and became the target of constant teasing for his sexual orientation and gender identity, especially by McInerney.⁹⁷ McInerney's friends described that he was "disgusted" with King's "flamboyant behavior" and embarrassed about King's attempt to flirt with him.⁹⁸ Shortly after McInerney shot King in front of the witnesses, he was caught with a copy of Adolf Hitler's *Mein Kampf*,⁹⁹ a book written by a man who murdered people for, among other reasons, their sexual orientation.¹⁰⁰ 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.¹⁰¹ 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.¹⁰² 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.¹⁰³ This, however, goes

⁹⁵ *Mistrial Declared in CA Gay Student Killing Trial*, VENTURA COUNTY STAR (Sept. 1, 2011, 1:38 PM), <http://www.vcstar.com/news/2011/sep/01/jury-stuck-in-calif-gay-student-killing-trial/>.

⁹⁶ Jim Dubreuil & Denise Martinez-Ramundo, *Boy who Shot Classmate at Age 14 will be Retried as Adult*, ABC News (Oct. 5, 2011), <http://abcnews.go.com/US/eighth-grade-shooting-larry-king-brandon-mcinerney-boys/story?id=14666577>.

⁹⁷ *8th Grade Shooting: Jurors Speak Out*, ABC NEWS (Oct. 4, 2011, 6:30 AM), <http://abcnews.go.com/Nightline/video/execution-style-killing-classroom-14669728>.

⁹⁸ *Id.*

⁹⁹ *Id.* (claiming, as a defense, that McInerney had rented *Mein Kampf* for an assignment).

¹⁰⁰ *Holocaust Encyclopedia: Persecution of Homosexuals in the Third Reich*, U.S. HOLOCAUST MEMORIAL MUSEUM, <http://www.ushmm.org/wlc/en/article.php?ModuleId=10005261> (last visited Feb. 15, 2014).

¹⁰¹ See *supra* notes 96–97 (both the news article and the video report on the same issue).

¹⁰² *8th Grade Shooting: Jurors Speak Out*, *supra* note 97.

¹⁰³ *Id.*

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.¹⁰⁴ Further, in the subsequent wrongful-death civil lawsuit against McNerney and others, where the burden of proof was lower, the case quickly settled.¹⁰⁵

The McNerney 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.¹⁰⁶ They took Pennington to a rural area, threatened to rape him, and severely beat him while they yelled gay slurs.¹⁰⁷ Pennington escaped by jumping over the side of a mountain and breaking into a ranger station to call police.¹⁰⁸ 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,¹⁰⁹ though they were cognizant enough to yell homophobic slurs as they beat him.¹¹⁰ One of the conspirators in the crime acknowledged that the two men planned to beat and kill Pennington.¹¹¹ In a state skeptical of the President,¹¹² 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.

¹⁰⁵ Zeke Barlow, *Wrongful-death Settlement Detailed in Larry King Killing*, VENTURA COUNTY STAR (Sept. 2, 2011, 3:29 PM), <http://www.vcstar.com/news/2011/sep/02/wrongful-death-suit-in-larry-king-case-settled/>. Also note that the burden of proof in a wrongful death suit is preponderance of the evidence.

¹⁰⁶ Bill Estep, *Hate Crime Trial: Victim Tells of Beating, Anti-Gay Slurs*, LEXINGTON HERALD-LEADER (Oct. 17, 2012), <http://www.kentucky.com/2012/10/17/2374726/trial-begins-in-eastern-kentucky.html> [hereinafter Estep, *Hate Crimes Trial*].

¹⁰⁷ *See id.*

¹⁰⁸ *Id.*

¹⁰⁹ 2 Ky. *Men Acquitted Under New U.S. Gay Hate Crime Law*, CBS CLEVELAND (Oct. 25, 2012, 6:51 AM), <http://cleveland.cbslocal.com/2012/10/25/2-ky-men-acquitted-under-new-u-s-gay-hate-crime-law/>.

¹¹⁰ Bill Estep, *Judge Upholds Gay Hate Crime Law, Allows Kentucky Case to Proceed*, LEXINGTON HERALD-LEADER (Oct. 16, 2012), <http://www.kentucky.com/2012/10/16/2373628/judge-upholds-gay-hate-crime-law.html>.

¹¹¹ Estep, *Hate Crimes Trial*, *supra* note 106.

¹¹² Jeffrey M. Jones, *Obama Gets Highest 2012 Job Approval in Hawaii, D.C.*, GALLUP (Jan. 28, 2013), <http://www.gallup.com/poll/160133/obama-gets-highest-2012-job-approval-hawaii.aspx>. President Obama's approval rate in Kentucky in 2011 was 36.5 percent.

crime protection of gays and lesbians. The two defendants were acquitted of the hate crime charge, but found guilty of kidnapping.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 youth¹¹⁴ or their political affiliations.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.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

¹¹³ 2 Ky. *Men Acquitted Under New U.S. Gay Hate Crime Law*, *supra* note 109.

¹¹⁴ Dubreuil & Martinez-Ramundo, *supra* note 96.

¹¹⁵ 2 Ky. *Men Acquitted Under New U.S. Gay Hate Crime Law*, *supra* note 109.

¹¹⁶ Wiley v. California, No. 1:11-cv-00866-LJO-JLT, 2011 WL 6012423 (E.D. Cal. Nov. 30, 2011); Lorenz v. Managing Dir., St. Luke's Hosp., No. 09 Civ. 8898(DAB)(JCF), 2010 WL 4922267 (S.D.N.Y. Nov. 5, 2010); Lee v. Lewis, No. 2:10-CV-55-F, 2010 WL 5125327 (E.D.N.C. Oct. 28, 2010); Perry v. Garcia, No. 09cv622-LAB (RBB), 2010 WL 3633042 (S.D. Cal. July 16, 2010).

prohibited, but employment discrimination based on sexual orientation and gender is not federally prohibited.¹¹⁷ The different genders are guaranteed equal treatment in education, but no such provision exists to protect discrimination based on sexual orientation.¹¹⁸ 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.¹¹⁹

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.¹²⁰ The same states without employment protection for sexual orientation do not protect gays and lesbians in housing arrangements.¹²¹

Second, all minority individuals, including gays and lesbians, filing civil claims are often burdened by strict administrative remedy exhaustion requirements.¹²² 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.¹²³ 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.¹²⁴

While the administrative remedy requirements may provide a means

¹¹⁷ 42 U.S.C. § 2000e-2 (2006).

¹¹⁸ 20 U.S.C. § 1681 (2006).

¹¹⁹ *An Important Step Toward Workplace Equality: An Executive Order on Federal Contractors*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/entry/an-important-step-toward-workplace-equality-an-executive-order-on-federal-c> (last visited Feb. 15, 2014).

¹²⁰ Crosby Burns & Jeff Krehely, *Gay and Transgender People Face High Rates of Workplace Discrimination and Harassment*, CENTER FOR AM. PROGRESS (June 2, 2011), <http://www.americanprogress.org/issues/lgbt/news/2011/06/02/9872/gay-and-transgender-people-face-high-rates-of-workplace-discrimination-and-harassment/>.

¹²¹ Deidre Swesnik, *Housing Discrimination Against Gays, Lesbians, and Poor Still Legal in Most States*, NAT'L FAIR HOUSING ALLIANCE (April 11, 2013), <http://www.nationalfairhousing.org/Portals/33/trends2013nr.pdf>.

¹²² 29 C.F.R. § 1614.105 (2009).

¹²³ *Id.*

¹²⁴ *Id.*

to conduct a preliminary investigation and reach possible settlement,¹²⁵ they have also become a tool that limits legitimate claims.¹²⁶ 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.¹²⁷ 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.¹²⁸ 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 crimes¹²⁹ 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.¹³⁰ Youth who are rejected by their families are 8.5 times more likely to attempt suicide than those who are accepted by their families.¹³¹ Gay and lesbian youth are also four times more likely to attempt suicide,¹³² almost six times more likely to suffer from depression, and about three times more likely to use illegal drugs than heterosexual youth.¹³³ While grassroots organizations, such as the Trevor Project¹³⁴ and

¹²⁵ See generally *About EEOC: Overview*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <http://www.eeoc.gov/eeoc/index.cfm> (last visited Feb. 15, 2014).

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.

¹²⁸ *Perry v. Garcia*, No. 09cv622-LAB (RBB), 2010 WL 3633042, at *6–9 (S.D. Cal. July 16, 2010).

¹²⁹ *Comparison of FBI Hate Crime Statistics (2000–2010)*, *supra* note 42.

¹³⁰ See Joseph Shapiro, *Study: Tolerance Can Lower Gay Kids' Suicide Risk*, NAT'L PUB. RADIO (Dec. 29, 2008, 10:02 AM), <http://www.npr.org/templates/story/story.php?storyId=98782569>.

¹³¹ *Id.*

¹³² *Facts About Suicide*, TREVOR PROJECT, <http://www.thetrevorproject.org/pages/facts-about-suicide> (last visited Feb. 15, 2014).

¹³³ Shapiro, *supra* note 130.

¹³⁴ *The Trevor Project*, TREVOR PROJECT, <http://www.thetrevorproject.org> (last visited Feb. 15, 2014).

the It Gets Better Project,¹³⁵ 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.¹³⁶

C. PHYSICAL HARDSHIPS

Gays and lesbians also face an ever-increasing threat of violence.¹³⁷ 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.¹³⁸ One man in particular was punched and shot at by schoolmates who were uncomfortable with his sexual orientation.¹³⁹ 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.¹⁴⁰ The highest number of anti-gay murders reported since the National Coalition of Anti-Violence Programs began collecting data was in 2011.¹⁴¹ 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.¹⁴² Gay youth suffer more frequently from depression than their heterosexual peers.¹⁴³ This contributes to the high suicide attempts of gay youths, which is far greater

¹³⁵ *It Gets Better Project*, IT GETS BETTER PROJECT, <http://www.itgetsbetter.org/> (last visited Feb. 15, 2014).

¹³⁶ Jane Riese, *Youth Who Are Bullied Based upon Perceptions About Their Sexual Orientation*, VIOLENCE PREVENTION WORKS, http://www.violencepreventionworks.org/public/bullying_sexual_orientation.page (last visited Feb. 15, 2014).

¹³⁷ See generally Paul Harris, *US Shaken by Sudden Surge of Violence Against Gay People*, GUARDIAN (Oct. 16, 2010), <http://www.theguardian.com/world/2010/oct/17/increase-homophobia-violence-new-york>.

¹³⁸ *It Gets Better Project*, *supra* note 135.

¹³⁹ Davis Woods-Morse, *It Gets Better—Dan Savage Response*, IT GETS BETTER PROJECT (Sept. 26, 2010), <http://www.itgetsbetter.org/video/entry/1190/>.

¹⁴⁰ *Comparison of FBI Hate Crime Statistics (2000–2010)*, *supra* note 42.

¹⁴¹ Lila Shapiro, *Highest Number of Anti-Gay Murders Ever Reported in 2011: The National Coalition of Anti-Violence Programs*, HUFFINGTON POST (June 2, 2012, 1:10 PM), http://www.huffingtonpost.com/2012/06/02/anti-gay-hate-crimes-murders-national-coalition-of-anti-violence-programs_n_1564885.html.

¹⁴² See *Hate Crimes Against Lesbian, Gay, Bisexual, and Transgender Individuals*, *supra* note 25.

¹⁴³ *Lesbian, Gay, Bisexual and Transgender Health*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/lgbthealth/youth.htm> (last visited Feb. 15, 2014).

than the number of suicide attempts by their straight classmates.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.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

¹⁴⁴ See *id.*

¹⁴⁵ See *Hate Crimes Against Lesbian, Gay, Bisexual, and Transgender Individuals*, *supra* note 25.

crimes.¹⁴⁶ A well-known example is that of O.J. Simpson.¹⁴⁷ 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."¹⁴⁸ 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.¹⁴⁹

Also, claimants would be immune from political influence. Because most prosecutors are elected or appointed, political considerations may influence what crimes are prosecuted.¹⁵⁰ Not only do prosecutors decide which cases to prosecute, they also influence police activity and investigations.¹⁵¹ 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.¹⁵² 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.¹⁵³ 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.

¹⁴⁷ David Bloom, *O.J. Simpson Found Liable for Murder in Civil Trial*, NBC NIGHTLY NEWS (Feb. 5, 1997), <http://archives.nbclearn.com/portal/site/k-12/flatview?cuccard=867>.

¹⁴⁸ *Id.*

¹⁴⁹ *See id.*

¹⁵⁰ John L. Worrall, *Prosecution in America: A Historical and Comparative Account*, in *THE CHANGING ROLE OF THE AMERICAN PROSECUTOR* 3, 4 (John L. Worrall & M. Elaine Nugent-Borakove eds., 2008).

¹⁵¹ *Id.*

¹⁵² *See generally Civil Cases*, U.S. CTS., <http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/HowCourtsWork/CivilCases.aspx> (last visited Feb. 15, 2014).

¹⁵³ *See Hate Crimes Data Collection and Prosecutions FAQ*, ANTI-DEFAMATION LEAGUE, http://www.adl.org/combating_hate/hatecrimes_qa/hatecrime_qa2.asp (last visited Feb. 15, 2014).

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.¹⁵⁴ 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.¹⁵⁵ Employers paid similar amounts in other recent years, as well.¹⁵⁶ Given that more than half of all discrimination suits settle,¹⁵⁷ 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.¹⁵⁸ 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

¹⁵⁴ *Employment Discrimination Lawsuit Statistics*, STATISTIC BRAIN, <http://www.statisticbrain.com/employment-discrimination-lawsuit-statistics/> (last visited Feb. 15, 2014).

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

¹⁵⁶ *Id.*

¹⁵⁷ Laura Beth Nielsen, Robert L. Nelson & Ryon Lancaster, *Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post-Civil Rights United States*, 7 J. EMPIRICAL LEGAL STUD. 175 (2010), available at http://www.americanbarfoundation.org/uploads/cms/documents/jels_final.pdf.

¹⁵⁸ *University Counseling & Testing Center: The Psychology of Hate Crimes*, UNIV. OR., <http://counseling.uoregon.edu/DNN/LinkClick.aspx?fileticket=Y6V365uld4w%3d&tabid=420> (last visited Feb. 15, 2014).

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.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.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.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.

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 *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).

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

¹⁶¹ 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)).

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.¹⁶² 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.¹⁶³ Since many state legislators object to such legislation, Congress should act to protect the public with a national law.¹⁶⁴

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. DETRACTOR'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.¹⁶⁵ This is incorrect.

VAWA's private right of action failed because Congress lacked the authority to enact it.¹⁶⁶ 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.).¹⁶⁷ 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.¹⁶⁸

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).

¹⁶⁵ Brian W. Walsh, *Federal Hate Crimes Statute: An Unconstitutional Exercise of Legislative Power*, HERITAGE FOUND. (Apr. 29, 2009), <http://www.heritage.org/research/reports/2009/04/federal-hate-crimes-statute-an-unconstitutional-exercise-of-legislative-power>.

¹⁶⁶ *United States v. Morrison*, 529 U.S. 598, 609 (2000).

¹⁶⁷ *United States v. Lopez*, 514 U.S. 549, 558–59 (1995).

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.¹⁶⁹ Following this rationale, 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.¹⁷⁰

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.¹⁷¹ 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.¹⁷²

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.”¹⁷³ 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.¹⁷⁴ Some critics, including prominent politicians¹⁷⁵ and nationally-syndicated radio hosts,¹⁷⁶ go so far as to advocate that passing hate crime

¹⁶⁹ *Id.*

¹⁷⁰ *Morrison*, 529 U.S. at 608–09, 613.

¹⁷¹ See 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)).

¹⁷² *United States v. Jenkins*, 909 F. Supp. 2d 758 (E.D. Ky. 2012).

¹⁷³ 18 U.S.C. § 249(a)(2)(B).

¹⁷⁴ Steve Watson, *Hate Crime Laws: Criminalizing Free Speech*, INFOWARS.NET (Oct. 31, 2005), <http://www.infowars.net/articles/october2005/311005hatebill.htm>.

¹⁷⁵ Ron Paul, *Unconstitutional Legislation Threatens Freedoms*, RONPAUL.COM (May 7, 2007), <http://www.ronpaul.com/2007-05-07/unconstitutional-legislation-threatens-freedoms/>.

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.¹⁷⁷ However, these arguments are without merit. If such actions are criminalized, then constitutional protections¹⁷⁸ 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.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.¹⁸⁰ Again, some go so far as to argue that the subjective nature punishes speech or thought.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.¹⁸² These arguments, which collectively but loosely create a 'subjective culpability'

visited Feb. 15, 2014).

¹⁷⁷ *Hate Crime Bill is a Trojan Horse Against Free Speech*, INFOWARS.COM (Oct. 23, 2009, 10:56 AM), <http://www.infowars.com/hate-crime-bill-is-a-trojan-horse-against-free-speech/>.

¹⁷⁸ U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

¹⁷⁹ Michael S. Rozeff, *The Case Against Hate-Crime Laws*, LEWROCKWELL.COM (Aug. 18, 2006), <http://www.lewrockwell.com/2006/08/michael-s-rozeff/the-case-against-hate-crimes-laws/>.

¹⁸⁰ See David Goldberger, *The Inherent Unfairness of Hate Crime Statutes*, 41 HARV. J. ON LEGIS. 449, 462 (2004).

¹⁸¹ Scott Phillips & Ryken Grattet, *Judicial Rhetoric, Meaning-Making, and the Institutionalization of Hate Crime Law*, 34 LAW & SOC'Y REV. 567, 578–80 (2000).

¹⁸² See *id.* at 576.

defense, attack the inclusion of subjective factors in a culpability standard as a point of contention with the rest of American law.¹⁸³ 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.¹⁸⁴

First, hate crime statutes do not punish thoughts, but rather prohibit the act of choosing a particular victim based on a bias.¹⁸⁵ Individuals can expound his or her disdain for a minority group all they want without being criminalized.¹⁸⁶ 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.¹⁸⁷ 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”¹⁸⁸—from the constitutionally acceptable punishment of bias motivation—that punishes “only the conduct of intentional victim selection.”¹⁸⁹ Instead of criminalizing thoughts, hate crime legislation penalizes the selecting of victims, making the crime’s culpability requirement similar to other criminal statutes.¹⁹⁰ 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.¹⁹¹ 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.¹⁹²

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.¹⁹³ 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.¹⁹⁴ 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.¹⁹⁵

VII. SUCCESS IN EUROPE

The European Union leads the United States in victim-recovery anti-

¹⁹¹ CAL. PENAL CODE § 186.22 (West 2013).

¹⁹² Charles F.A. Carbone, *Enhancements in California Criminal Law: Making Sense of Tacking on More Time*, CHARLES CARBONE—PRISONER RIGHTS LAWYER, http://www.charlescarbone.com/pdf/Sentencing_Enhancement_Article.pdf (last visited Feb. 15, 2014).

¹⁹³ 18 U.S.C. § 2332(a) (2006); see 18 U.S.C. § 921.

¹⁹⁴ See *id.* § 2332(a) (codifying how the state created a specific statute to punish the use of specific weapons during already illegal acts).

¹⁹⁵ See 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(a)(2) (Supp. 2012)).

discrimination legislation.¹⁹⁶ Though it varies by nation and is different than straight hate crime legislation,¹⁹⁷ many European countries have stricter and more inclusive anti-discrimination legislation, and some provide a private right of action.¹⁹⁸ At least ten European nations provide some version of a civil remedy for discrimination.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.²⁰⁰

Many European countries have recently taken steps to combat hate crimes and other crimes of bias,²⁰¹ and the amount of private claims filed under anti-discrimination legislation continues rise.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.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.

¹⁹⁶ HALEH CHAHROKH, WOLFGANG KLUG & VERONIKA BILGER, INT'L CENTER FOR MIGRATION POL'Y DEV., MIGRANTS, MINORITIES AND LEGISLATION: DOCUMENTING LEGAL MEASURES AND REMEDIES AGAINST DISCRIMINATION IN 15 MEMBER STATES OF THE EUROPEAN UNION 87–90 (2004), *available at* <http://edz.bib.uni-mannheim.de/daten/edz-b/ebt/05/CS-Legislation-en.pdf>.

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.

¹⁹⁸ *See* CHAHROKH, KLUG & BILGER, *supra* note 196, at 105–08.

¹⁹⁹ LILLA FARKAS, EURO. COMMISSION, HOW TO PRESENT A DISCRIMINATION CLAIM: HANDBOOK ON SEEKING REMEDIES UNDER THE EU NON-DISCRIMINATION DIRECTIVES (2011), *available at* http://ec.europa.eu/justice/discrimination/files/present_a_discrimination_claim_handbook_en.pdf.

²⁰⁰ CHAHROKH, KLUG & BILGER, *supra* note 196, at 105–08.

²⁰¹ EURO. UNION AGENCY FOR FUNDAMENTAL RTS., HATE CRIME IN THE EUROPEAN UNION, *available at* http://fra.europa.eu/sites/default/files/fra-factsheet_hatecrime_en_final_0.pdf.

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

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.²⁰⁴ 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.²⁰⁵ 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.²⁰⁶

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.

²⁰⁶ Stephen Daniels, Book Review, 15 LAW & POL. BOOK REV. 250 (2005) (reviewing HERBERT M. KRITZER, RISK, REPUTATIONS, AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES (2004)), available at <http://www.gvpt.umd.edu/lpbr/subpages/reviews/kritzer305.htm>.

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.²⁰⁷ The Jenkins' cousins screamed "You're gonna die, you . . . faggot!" as they beat Kevin Pennington,²⁰⁸ yet the jury found no hate crime.²⁰⁹ Texas alone reports thousands of hate crimes because of sexual orientation bias, yet prosecutors fail to bring them to trial.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.

²⁰⁷ *Mistrial Declared in CA Gay Student Killing Trial*, *supra* note 95.

²⁰⁸ *Estep, Hate Crime Trial*, *supra* note 106.

²⁰⁹ *2 Ky. Men Acquitted Under New U.S. Gay Hate Crime Law*, *supra* note 109.

²¹⁰ *Dexheimer*, *supra* note 76.