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Ten Years Fighting Hate

David A. Hall

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Ten Years Fighting Hate

David A. Hall[†]

On October 28, 2009, President Barack Obama signed into law the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act (“the Act”). One of the goals of the Act was to broaden protections against crimes motivated by hatred for a person’s group membership (her perceived race, national origin, gender or gender identity, sexual orientation, disability, or religion). The Act intends to address the need for US law to recognize the particularly destructive and virulent nature of crimes motivated by this kind of animus toward minority groups. Such crimes can often have an outsized effect, because they are intended to terrorize not only the victim, but entire populations.

As we approach the tenth anniversary of the Act, this Article undertakes an endorsement of the Act in three Parts. The first Part examines the history and logic underlying the Act and considers challenges—both legal and philosophical—to the Act’s passage and enforcement. The second Part reviews prosecutions under the Act over the ten-year period from its enactment in 2009 through 2019, with consideration of variations in application among the federal Circuits, and the types of crimes most-often prosecuted under the Act. Finally, Part Three of this Article looks ahead to ways in which the Act may be amended, improved, and implemented over the next ten years—and beyond.

[†] J.D. Candidate, University of Tennessee College of Law, 2020. I would like to express my deep gratitude to Professors Dean Rivkin, Michael Higdon, Valorie Vojdik, Doug Blaze, and Dean Melanie Wilson for their wise insights, practical suggestions, and invaluable support through the writing and editing of this Article. I owe particularly special thanks to Cynthia Deitle of the Matthew Shepard Foundation for trusting me with this project, pointing me in the right direction, and talking me through the whole endeavor.

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INTRODUCTION

Despite how the current American climate may make some of us *feel*, given that there are children being held in cages on our southern border,¹ transgender people told they're so unwelcome they cannot even serve our country in the military,² Muslim American citizens living in fear in their own communities,³ and on⁴ and on⁵ and on,⁶ Donald Trump didn't actually invent hate. He has perhaps capitalized on it to a more successful degree than any American ever has, but it's nevertheless a fact of our history that animus has been with us since long before this President has. So, while it is undeniable that a treatment of the efforts to combat hate in American society is particularly timely today,⁷ there hasn't been a point in our history when it *wasn't* timely. Hatred of "the other" is of course at the root of what many have called this country's original sin.⁸ Hate killed

¹ See, e.g., Caitlin Dickerson, *'There Is a Stench': Soiled Clothes and No Baths for Migrant Children at a Texas Center*, N.Y. TIMES (June 21, 2019), <https://www.nytimes.com/2019/06/21/us/migrant-children-border-soap.html?auth=login-email&login=email>.

² See, e.g., Andrew Chung & Jonathan Stempel, *U.S. Court Lets Trump Transgender Military Ban Stand, Orders New Review*, REUTERS (June 14, 2019), <https://www.reuters.com/article/us-usa-trump-transgender/us-court-lets-trump-transgender-military-banstand-orders-new-review-idUSKCN1TF1ZM>.

³ See, e.g., *FBI: Spike in US Hate Crimes for Third Year in a Row*, BBC (Nov. 13, 2018), <https://www.bbc.com/news/world-us-canada-46189391>; John N. Mitchell, *American Muslims Deal With Being Targets of Hate*, WHYY (Mar. 16, 2019), <https://whyy.org/articles/american-muslims-deal-with-being-targets-of-hate/>; Michelle Chen, *Trump's 'Muslim Ban' Doesn't Just Target Eight Countries. It's Stoking Hatred Against Muslims In America*, NBC NEWS (Apr. 25, 2018), <https://www.nbcnews.com/think/opinion/trump-s-muslim-ban-doesn-t-just-target-eight-countries-ncna868971>.

⁴ See, e.g., Amber Phillips, *'They're Rapists.' President Trump's Campaign Launch Speech Two Years Later, Annotated*, WASH. POST (June 16, 2017), <https://www.washingtonpost.com/news/the-fix/wp/2017/06/16/theyre-rapists-presidents-trump-campaign-launch-speech-two-years-later-annotated/>.

⁵ See, e.g., Peter Baker, *Trump Fans the Flames of a Racial Fire*, N.Y. TIMES (July 14, 2019), <https://www.nytimes.com/2019/07/14/us/politics/trump-twitter-race.html?module=inline>.

⁶ See, e.g., Rick Sobey, *Activists: Trump's 'Hateful, Racist' Speech Leading to Mass Shootings*, BOS. HERALD (August 4, 2019), <https://www.bostonherald.com/2019/08/04/activists-trumps-hateful-racist-speech-leading-to-mass-shootings/>.

⁷ For just one example of the timeliness of a discussion of hate crime, consider the recent increase in crimes against transgender people. HUMAN RIGHTS CAMPAIGN, *Violence Against the Transgender Community in 2019*, <https://www.hrc.org/resources/violence-against-the-transgender-community-in-2019> (counting twenty-two bias-motivated murders of transgender people in the US in 2018, and an increase in that rate in 2019, to nineteen murders over the first eight and a half months of the year).

⁸ See, e.g., Annette Gordon-Reed, *America's Original Sin: Slavery and the Legacy of White Supremacy*, 97 FOREIGN AFF. 2 (2018); Ta-Nehisi Coates, *The Case for Reparations*, THE ATLANTIC (June 2014), <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/>.

Lincoln and Dr. King and Alan Berg and Heather Heyer and James Byrd, Jr. and Matthew Shepard. And it is hate, of course, that inspires terrorism in all its forms; from aiming planes at buildings, to burning crosses in lawns, to opening fire on night clubs, churches, and latinx-frequented Wal Mart stores.

But as long as hate has been around, so too has reason. And it is logic—more, even, than love—that is hate’s true opposite number: Where hate is witless and irrational, logic is reflective and restrained. Where hate creates at best only calculated outbursts and designed tantrums, logic produces sound judgment and good sense. Where hate is benighted, feral, frantic, vacant, logic is circumspect, thoughtful, measured, compassionate.

Logic is at the core of the law. The law must serve a variety of needs: Good law makes better citizens. It also helps law enforcement do its job dispassionately and fairly. The law informs our actions and helps us understand the extent both of our liberties and also our obligations to one another as part of a functional social compact. Reason is required to accomplish these aims, and good law is therefore inherently well-reasoned.

Consider, for example, the noncontroversial law against burglary (usually defined as breaking into another person’s home uninvited in order to commit a crime⁹). It accomplishes at least four goals: First, it helps delineate my liberty—I can enjoy the expectation of freedom from unwanted visitors while I’m in my home. Second, it helps establish our obligations towards others—the law makes it clear that I have to respect the boundaries of my neighbor’s property, even if I’d really like to make off with his new 4K TV while he’s away. Third, clear and cogent law aids legitimate law enforcement efforts; burglary statutes, for example, give police objective criteria for determining whether my actions constitute a crime, and prosecutors can develop standard lines of argument for prosecuting cases. Fourth, good law encourages good behavior—in my day-to-day life, I choose not to burgle, in part because I know I risk punishment if I do. The law may not be able to change what’s in my heart, but we need not ask that of it. Much more important is the fact that good law is capable, in ways large and small, of changing my *behavior*. In this way, good laws help make better communities.

In keeping with this line of argument, then, the first Part of this Article examines the logic underlying the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act (the “Shepard–Byrd Act” or “the Act”). In Part One, I give special attention to the reasons the Act was necessary, and

⁹ See, e.g., TEX. PENAL CODE ANN. § 30.02 (defining burglary in part as “enter[ing] a habitation, or a building (or any portion of a building) not then open to the public, with intent to commit a felony, theft, or an assault.”)

carefully consider opposition to the Act, in the form of both legal challenges and also what might be considered challenges of philosophy.

In Part Two, I closely review application of the Act over the past ten years, with attention both to broad trends—for example, variations in enforcement among the various federal Circuits—and to narrow questions of law—among them, how prosecutors have proved that charged crimes “affected interstate commerce”—while also taking stock of the types of crimes that are most-commonly prosecuted under the Act.

In Part Three, after having considered the Act’s past and present—its origin and current application—I turn to the future and consider how the Act might change our country over the coming decade, and how it might itself be changed.

I. THE HISTORY AND LOGIC OF THE ACT

This Article seeks to present a global review of the past ten years of the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act in order to broaden understanding of the Act and its origins and outcomes, and to commemorate its achievements as a legal, philosophical, and social phenomenon. To present the clearest possible picture, it’s helpful to consider first the factual and political background out of which the Act was created.

A. *The Factual and Political History*

On the afternoon of June 7, 1998, as he was walking home from his niece’s bridal shower in rural Jasper County, Texas, forty-nine year old James Byrd, Jr. was kidnapped by three men who beat him and then chained him to the back of their pickup truck and dragged him for approximately one and a half miles before he was decapitated,¹⁰ then dragged his lifeless body another mile and a half farther,¹¹ because of their “intense dislike of blacks.”¹²

Exactly four months later and over a thousand miles north of Jasper, in the early morning hours of October 7, 1998, in Laramie, Wyoming, a University of Wyoming college student named Matthew Shepard was tied

¹⁰ Forensic evidence suggests that Mr. Byrd was alive and conscious throughout the ordeal, until he hit the culvert that sheared off his head and right arm. *Closing Arguments Today in Texas Dragging-Death Trial*, CNN (Feb. 22, 1999), <http://www.cnn.com/US/9902/22/dragging.death.03/>.

¹¹ *3 Whites Indicted in Dragging Death of Black Man in Texas*, CNN (July 6, 1998), <http://www.cnn.com/US/9807/06/dragging.death.02/index.html>.

¹² CNN, *supra* note 10.

to a rail fence and beaten to death¹³ because his attackers wanted to show him “how [they felt] about gays.”¹⁴

These two attacks were particularly brutal, but were otherwise unconnected save for one strand, the same thread that connects both crimes to other atrocities: lynchings in the American south, for example, and the concentration camps at Auschwitz and Buchenwald, and the thousands of reported (though not nationally infamous) attacks on LGBT victims,¹⁵ and the likely thousands more that are never reported.¹⁶ They were, all of them, crimes motivated by hate.

While the soul-numbing barbarity of these two crimes sets them apart, their cruelty was not the only—nor perhaps the chief—reason that the memories of their victims still animate the national conversation about hate crimes. Nor was the cruelty of these crimes the only—or even the main—reason that the expansion of federal hate crime legislation bears the names of their victims. Rather, these crimes stuck in the national consciousness long after the publicity and the trials, long after the names of the attackers have been rightfully forgotten, because the relentless efforts of the families of the victims *made* them stick.

It was the family and community of those who survived Mr. Byrd’s and Mr. Shepard’s murders that most contributed to the lasting impact those crimes ended up having on American law and society. In recognition of their dedication, focus, and will, President Obama eventually credited Mr. Shepard’s and Mr. Byrd’s families as “the spearheads of th[e] effort” to enact the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act.¹⁷ The tenacity and bravery of Matthew Shepard’s and James Byrd, Jr.’s families eventually bore fruit in the form of national legislation that for many years had been sought—and eluded—by figures no less luminary than Senator Ted Kennedy and President Bill Clinton.¹⁸

¹³ Mr. Shepard was beaten and tortured shortly after midnight on October 7, and died of his injuries on October 12 in a hospital in Fort Collins, Colorado, where he had been airlifted after being found by a passing cyclist, some eighteen hours after the attack. *About Us*, MATTHEW SHEPARD FOUND., <https://www.matthewshepard.org/about-us/>.

¹⁴ James Brooke, *Witnesses Trace Brutal Killing of Gay Student*, N.Y. TIMES (Nov. 21, 1998), <https://www.nytimes.com/1998/11/21/us/witnesses-trace-brutal-killing-of-gay-student.html?pagewanted=all>.

¹⁵ Michelle A. Marzullo and Alyn J. Libman, *Hate Crimes and Violence Against Lesbian, Gay, Bisexual and Transgender People*, RESEARCH OVERVIEW (Hum. Rts. Campaign Found., Wash. D.C.), May 2009, at 2.

¹⁶ *Id.*

¹⁷ Barack Obama, President, U.S., Remarks Commemorating the Enactment of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act (Oct. 28, 2009).

¹⁸ *Clinton Urges Expansion of Hate Crime Law*, CNN (April 6, 1999), <http://www.cnn.com/ALLPOLITICS/stories/1999/04/06/hate.crimes/>.

While the Shepard–Byrd Act is the first robust piece of federal hate crime legislation, it is not the sole federal law on the issue of bias–motivated crime. The first federal hate crime statute, Title I of the Civil Rights Act of 1968, was signed into law by President Johnson as the third of his “major” civil rights initiatives as President.¹⁹ That statute mandated fines and imprisonment as punishment for any person who “willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with . . . any person because of his race, color, religion or national origin”²⁰ However, Title I never offered a particularly muscular set of protections, and even at its passage, it was overshadowed by other provisions of the Civil Rights Act (particularly by Title VIII, the “Fair Housing Act”).²¹

Title I was styled as the “Federally Protected Activities” act, and its name gave an indication of the first of its major deficiencies as a piece of hate crime legislation. Rather than seeking to deter hate crimes *per se*, the Federally Protected Activities portion of the 1968 Civil Rights Act instead barred bad actors from committing one narrow strain of hate: it operated solely against crimes aimed expressly at keeping protected classes *from engaging in specified activities*.²² That is, Title I didn’t apply to hate crimes carried out on the basis of animus alone. It only applied if the animus was intended to stop a person or group from voting, attending school, or engaging in another protected activity; as the name indicates, the Federally Protected Activities act sought to protect *actions*, not necessarily the people who might be targets of hate.

The second significant deficiency of the Federally Protected Activities act was its narrow class of protected persons. Not only did Title I apply to a limited number of enumerated activities, but also it only banned crimes against a narrowly drawn set of classes. As enacted, the Federally Protected Activities act prohibited crimes of animus against a person based on her “race, color, religion or national origin.”²³ It offered no protection against crimes committed out of bias for a person’s gender, sexual

¹⁹ Steven R. Goldzwig, *LBJ, the Rhetoric of Transcendence, and the Civil Rights Act of 1968*, 6 RHETORIC & PUB. AFF. 25, 26 (2003).

²⁰ 18 U.S.C. § 245 (imprisonment for not more than one year, but up to ten years if the offense causes bodily injury or includes dangerous weapons, and no maximum sentence if the offense causes the victim’s death or includes kidnapping, sexual abuse, or an attempt to kill).

²¹ The trend has continued among academics. For example, a Google Scholar search for “18 U.S.C. § 245”—the Title I statute—returns 532 results. A search in the same location for “25 U.S.C. § 1301” (the classification for Title II, the “Indian Civil Rights Act”), shows nearly three times as many results, with 1,400 articles, and one for “42 U.S.C. § 3601”—Title VIII, the “Fair Housing Act”—returns 3,620 results.

²² 18 U.S.C. § 245(b)(1).

²³ 18 U.S.C. § 245(b)(2).

orientation, gender identity or disability, regardless of the victim's participation in a "protected activity."

The Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act was not the first attempt to address either one or both of the major shortcomings in Title I of the 1968 Civil Rights Act. In fact, no fewer than twenty-six proposed hate crimes bills were introduced in the House and Senate in the seventeen years preceding the enactment of the Shepard-Byrd Act in 2009.²⁴ Most of these bills died in committee, even some that enjoyed significant support in one (or both) chambers.²⁵ Most of those bills were identical—or very nearly so—to the measure that eventually became the Shepard-Byrd Act. So, what changed? What new forces came to bear that pushed *this* bill over the tipping point into law? Almost certainly, it was the addition of two factors: first, a canny bit of political tactics and second, a mother who turned immense grief into meaningful action.

²⁴ These include: (1) S. 2522, 102d Cong. (1992), the Hate Crimes Sentencing Enhancement Act of 1992; (2) H.R. 4797, 102d Cong. (1992), likewise called the Hate Crimes Sentencing Enhancement Act of 1992; (3) H.R. 1152, 103d Cong. (1993), the Hate Crimes Sentencing Enhancement Act of 1993; (4) H.R. 3081, 105th Cong. (1997), the Hate Crimes Prevention Act of 1997; (5) S. 1529, 105th Cong. (1997), the Hate Crimes Prevention Act of 1998; (6) H.R. 77, 106th Cong. (1999), the Hate Crimes Prevention Act of 1999; (7) H.R. 1082, 106th Cong. (1999), also denominated the Hate Crimes Prevention Act of 1999; (8) S. 622, 106th Cong. (1999), additionally titled the Hate Crimes Prevention Act of 1999; (9) S. 1406, 106th Cong. (1999), A bill to combat hate crimes; (10) H.R. 74, 107th Cong. (2001), the Hate Crimes Prevention Act of 2001; (11) H.R. 1164, 107th Cong. (2001), the Native American Hate Crimes and Criminal Justice Grant Program Act; (12) H.R. 1343, 107th Cong. (2001), the Local Law Enforcement Hate Crimes Prevention Act of 2001; (13) H.R. 80, 108th Cong. (2003), the Hate Crimes Prevention Act of 2003; (14) H.R. 4204, 108th Cong. (2004), the Local Law Enforcement Hate Crimes Prevention Act of 2004; (15) H.R. 259, 109th Cong. (2005), the Hate Crimes Prevention Act of 2005; (16) H.R. 2662, 109th Cong. (2005), the Local Law Enforcement Hate Crimes Prevention Act of 2005; (17) H.R. 254, 110th Cong. (2007), David's Law; (18) H.R. 1592, 110th Cong. (2007), the Local Law Enforcement Hate Crimes Prevention Act of 2007; (19) S. 1105, 110th Cong. (2007), the Matthew Shepard Local Law Enforcement Hate Crimes Prevention Act of 2007; (20) H.R. 2217, 110th Cong. (2008), the Hate Crimes Against the Homeless Enforcement Act; (21) H.R. 6776, the David Ray Ritcheson Hate Crime Prevention Act; (22) H.R. 6777, 110th Cong. (2008), the Noose Hate Crime Act of 2008; (23) H.R. 70, 111th Cong. (2009), the Noose Hate Crime Act of 2009; (24) H.R. 256, 111th Cong. (2009), the David Ray Hate Crimes Prevention Act of 2009; (25) H.R. 262, 111th Cong. (2009), the David Ray Ritcheson Hate Crime Prevention Act; and (26) H.R. 1913, 111th Cong. (2009), the Local Law Enforcement Hate Crimes Prevention Act of 2009.

²⁵ See, e.g., H.R. 1152, 103d Cong. (1993), the Hate Crimes Sentencing Enhancement Act of 1993 (this bill was introduced by then-Representative Chuck Schumer with 75 co-sponsors, then passed a House vote, only to die in the Senate Subcommittee on Constitution).

To succeed, federal hate crimes legislation must overcome significant Republican opposition in Congress.²⁶ The Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act would almost certainly have failed without a Democratic majority in both houses in 2009. But a Democratic majority in Congress was not sufficient to realize hate crime law; Democrats held both houses from 1991–1994, when at least three versions of hate crimes legislation were attempted and failed.²⁷ Success almost certainly also depended on a Democratic President to sign any bill.²⁸ Yet in the first year of President Bill Clinton’s first term, even Democratic control of both Congress and the Presidency proved insufficient to pass a 1993 attempt at hate crime legislation.

By 2009, though, the political climate in the country was changing, due in no small part to the efforts of Judy and Dennis Shepard and the Matthew Shepard Foundation they started in 1998.²⁹ Democrats in Congress who supported hate crimes legislation that included protection for the LGBT community were no longer just the vanguard of a movement toward full equality and protections of a vulnerable minority; by 2009 they were riding a wave of public opinion that had recently witnessed the end of discriminatory “sodomy laws”³⁰ and the ordination of the first openly

²⁶ For example, during debate over what would become the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act, then-Senator Saxby Chambliss (R) of Georgia offered a typical Republican response, insisting that hate crimes legislation was not only “unnecessary” but that it was “irresponsible.” 155 CONG. REC. 10,671 (2009) (statement of Sen. Chambliss).

²⁷ S. 2522, 102d Cong. (1992), the Hate Crimes Sentencing Enhancement Act of 1992; its companion bill in the House, H.R. 4797, 102d Cong. (1992); and H.R. 1152, 103d Cong. (1993), the Hate Crimes Sentencing Enhancement Act of 1993.

²⁸ After the House passed a hate crime bill in 2007, the George W. Bush White House issued a statement threatening to veto any hate crime bill that might also pass a Senate vote, calling such legislation “unnecessary and constitutionally questionable.” Richard Simon, *Hate Crime Bill Veto Is Vowed*, L.A. TIMES (May 4, 2007), <https://www.latimes.com/archives/la-xpm-2007-may-04-na-hate4-story.html>.

²⁹ Some evidence of the enormous role the Matthew Shepard Foundation has played in fighting hate in the U.S. is found in the fact that in October of 2018, twenty years after his death, Mr. Shepard’s remains were interred in the Washington, D.C. National Cathedral alongside other nation-changing figures such as Helen Keller and President Woodrow Wilson. Michelle Boorstein, *Matthew Shepard, Whose 1998 Murder Became a Symbol for the Gay Rights Movement, Will Be Interred at Washington National Cathedral*, WASH. POST (Oct. 11, 2018), <https://www.washingtonpost.com/religion/2018/10/11/matthew-shepard-whose-murder-became-symbol-gay-rights-movement-will-be-interred-washington-national-cathedral/>.

³⁰ *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding that “when homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.”).

gay Episcopal bishop in the country,³¹ and that would soon lead to the end of Don't Ask, Don't Tell³² and the invalidation of the Defense of Marriage Act³³ and the birth of marriage equality.

The Matthew Shepard Foundation played a large role in convincing American society that the community of LGBT people was just that—a part of the American community made up of *people* who deserve the full measure of protections and liberties afforded to all Americans. Mr. Shepard's death was unspeakably cruel, unbearably unfair. But through the Foundation, his parents helped a nation see a common bond where his attackers had seen something other, and to see humanity where his murderers had seen less than.

But the tide of public opinion, influenced in part by the Matthew Shepard Foundation, was not sufficient for success; after all, the Foundation was doing its work throughout the preceding decade while Congress tried—and failed—on numerous occasions to pass a hate crimes bill. Success required a Democratic majority in Congress, a Democratic President, the ceaseless efforts of a dedicated family of survivors, and a groundswell of support for the cause, and yet all those together were not enough. The final factor that turned the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act into law was a bit of shrewd political maneuvering: introducing the bill to a vote as part of the 2010 Defense authorization bill.³⁴

As then-Senator John McCain of Arizona noted during debate, this was not the first time an unrelated piece of legislation was introduced as part of a defense-spending bill.³⁵ But the tactic was effective; despite a majority of Congressional Republicans voting against the measure,³⁶ the authorization act, along with the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act, passed a House vote on October 8th by a nearly two-to-one margin,³⁷ passed the Senate by an even larger margin on October 22nd,³⁸ and was signed into law six days later by President Barack Obama on October 28, 2009. The Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act had become law. Having outlined

³¹ Laurie Goodstein, *Openly Gay Man Is Made A Bishop*, N.Y. TIMES (Nov. 3, 2003), <https://www.nytimes.com/2003/11/03/us/openly-gay-man-is-made-a-bishop.html>.

³² 10 U.S.C. § 654 (repealed, 2010).

³³ 1 U.S.C. § 7, *invalidated by* United States v. Windsor, 570 U.S. 744 (2013); and Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

³⁴ Defense Authorization Act of 2010, PUB. L. NO. 111-84.

³⁵ Saying “there have been other times where provisions have been added to [the Defense authorization bill].” 155 CONG. REC. 10,666 (2009) (statement of Sen. McCain).

³⁶ 131 of 177 House Republicans and 29 of 41 Senate Republicans voted against the bill.

³⁷ The House tally was 281 - 146.

³⁸ The Senate vote was 68 - 29.

how the Act came about, we turn now to *why* it was both necessary and sensible.

B. *The Need for an Expanded Hate Crimes Law*

Before passage of the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act in 2009, there was no federal statute offering robust protection from bias-motivated violent crime to anyone, not even the people who were the most likely to be victims of such crime.³⁹ The closest any federal statute came to hate crime legislation was Title I of the Civil Rights Act of 1968 (the “Federally Protected Activities Act”), and it only protected a narrow class of persons, and then *only if they were targeted for engaging in a narrow, enumerated list of activities*. In other words, under that law a person could be convicted of a “hate crime” only if he had violently victimized another person *because of* that person’s perceived race, color, religion, or national origin, and then only if the victimizer acted *because*—not simply *while*—the victim was attempting to engage in a protected activity (e.g., enrolling in public school, or serving as a juror).⁴⁰

This restrictive structure meant that, for example, if a group of Klansmen intended to pressure all black people to leave town by using the terrorist tactic of beating a black woman to death on the street, they would not be subject to prosecution under the Federally Protected Activities Act if the woman was simply walking home, rather than, say, attempting to enroll in a state college at the time of her attack.⁴¹ It also meant that a gay man had no protection at any time under this law, even if his attackers specifically acted in order to keep him from, for example, serving on a jury.⁴²

According to the FBI, there are at least many thousands of bias crimes committed each year in the US⁴³ (and likely many more; there’s no way of precisely tabulating the number of hate crimes that go unreported,⁴⁴ and

³⁹ Racial minorities. FBI, *Incidents, Offenses, Victims, and Known Offenders by Bias Motivation*, 2017, <https://ucr.fbi.gov/hate-crime/2017/topic-pages/tables/table-1.xls> (The FBI has tracked hate crimes committed against people on the basis of “race, religion, sexual orientation, or ethnicity” since 1990, in accordance with the Hate Crime Statistics Act of 1990 (28 U.S.C. § 534)).

⁴⁰ 18 U.S.C. § 245.

⁴¹ Though hypothetical, this situation tracks closely with many of the thousands of hate crimes perpetrated in the US each year. See, e.g., U.S. DEP’T JUST. *Hate Crimes Case Examples*, <https://www.justice.gov/hatecrimes/hate-crimes-case-examples>.

⁴² 18 U.S.C. § 245.

⁴³ Over 7,100 such crimes were counted in 2017 alone, the most recent year for which statistics are available. FBI, *supra* note 39.

⁴⁴ Although the U.S. Department of Justice estimates that the full figure amounts to more than half of all hate crimes. Madeline Masucci and Lynn Langton, *Hate Crime*

good reason to believe that many people do not report incidents of hate crime to police⁴⁵). Of those, between 20% and 23% are committed against persons who had no federal protection at all under the Federally Protected Activities Act.⁴⁶ Thus, before the Shepard–Byrd Act, about four in five victims had federal protection against hate crimes only in specific, narrowly–drawn circumstances, and another one in five victims enjoyed no federal protection whatsoever.

The available evidence therefore demonstrates that over the last half of the twentieth century, there was in fact a large group of Americans who had no—or very limited—protection from hate crimes under federal law. Perhaps a very natural next question, then, is this one: should they have?

C. *The Logical Basis for the Act*

There are at least two equally compelling logical foundations for robust hate crimes protections: the pro–Democracy approach, and the anti–terrorism one. The former proceeds from the proposition that any democracy worth the name must take seriously its obligation to protect its minority members from the ever–present threat of a tyrannical majority.⁴⁷ Part of that protection must include physical safety, so if any minority group is being specifically targeted for physical harm, a functional democratic government must take steps to address that specific harm.

The manner in which any democratic government protects its citizens is via the law; thus, in a nation in which minority groups are routinely targeted for violence, in order to maintain a properly–functioning

Victimization, 2004-2015, U.S. DEP’T JUST. (June 2017), <https://www.bjs.gov/content/pub/pdf/hcv0415.pdf> (hereinafter *Victimization*).

⁴⁵ See, e.g., Radley Balko, *There’s Overwhelming Evidence That the Criminal-Justice System Is Racist. Here’s the Proof*, WASH. POST (Sept. 18, 2018), <https://www.washingtonpost.com/news/opinions/wp/2018/09/18/theres-overwhelming-evidence-that-the-criminal-justice-system-is-racist-heres-the-proof/>; Katie Gagliano and Emma Keith, *Lack of Trust in Law Enforcement Hinders Reporting of LGBTQ Crimes*, NEWS21 (Aug. 15, 2018), <https://hateinamerica.news21.com/lack-of-trust-in-law-enforcement-hinders-reporting-LGBTQ-crimes/>.

⁴⁶ FBI, *Hate Crime Statistics*, <https://www.fbi.gov/services/cjis/ucr/publications#Hate-Crime%20Statistics>. These percentages are calculated over the five-year span from 2013 to 2017, and include crimes committed on the basis of sexual orientation, gender, gender identity, and disability, none of which groups were protected by the Federally Protected Activities Act (in 2009, the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act mandated additional tracking of crimes motivated by bias against juveniles, and against any person on the basis of actual or perceived gender, gender identity, or disability. Those statistics first became available via the FBI’s hate crime database in 2013. PUB. L. 111-84, 123 Stat. 2190 § 4708).

⁴⁷ See, e.g., Donna Lee Van Cott, *Building Inclusive Democracies: Indigenous Peoples and Ethnic Minorities in Latin America*, 12 J. DEMOCRATIZATION 820 (2005); Steven Wheatley, *Deliberative Democracy and Minorities*, 14 EUR. J. INT’L L. 507 (2003).

democracy such a nation must enact laws that protect the targeted groups from that violence. This type of legislation is what the US refers to as “hate crime laws.” Such laws flow logically from the purposes of democratic government and are indeed essential to the proper functioning of such a government. This is the substance of the pro–democracy justification for hate crime legislation.

The second main justification might usefully be called the anti–terrorism position. It runs as follows: It is axiomatic that acts of terrorism ought to be deplored by any legitimate government. The meaning of “terrorist action” is to refer to crimes “of force and violence against persons or property *to intimidate or coerce*.”⁴⁸ This definition makes explicit that terrorism includes acts that are already legally prohibited *per se* (the unlawful use of “force and violence”). Nevertheless, crimes of terrorism demand special consideration because of their special nature.

Thus, for example, the charges against Zacarias Moussaoui for his role in the 9/11 attacks included not only conspiracy to commit aircraft piracy, conspiracy to murder, and conspiracy to destroy property (all crimes, whether or not done with terrorist intent), but *also* conspiracy to commit acts of terrorism. The especially heinous nature of crimes intended to cause terror merits special charges and enhanced penalties. Such special charges and enhanced penalties are therefore appropriate when—for example—an individual takes actions calculated to “be particularly intimidating” to a young girl and her family because they’re black.⁴⁹ These appropriate special charges and enhanced penalties are achieved through the use of hate crime laws.

The full run of the anti–terrorism stance is therefore: it is a legitimate purpose of government to fight terrorism; terrorism means acting violently to intimidate or coerce; intimidation and coercion are at the heart of bias–motivated crime; government fights crime via legislation; thus it is a legitimate purpose of government to enact legislation specifically barring bias–motivated crime.

Many thousands—perhaps millions⁵⁰—of Americans are victims of hate crimes, and for the purposes of promoting democratic ideals and of fighting terror, hate crime laws are a natural and logical extension of the proper role of the federal government. Hate crime law, in other words, is a logically necessary response to a significant problem. Yet it is

⁴⁸ 28 C.F.R. § 0.85 (emphasis added).

⁴⁹ Press Release, Dep’t Just., Grapevine Texas Man Pleads Guilty to Federal Hate Crime Against an African-American Family (July 12, 2018) (<https://www.justice.gov/opa/pr/grapevine-texas-man-pleads-guilty-federal-hate-crime-against-african-american-family>).

⁵⁰ Three million hate crimes victims between 2004 and 2015, according to U.S. Department of Justice estimates. *Victimization*, *supra* note 44.

nevertheless not without its detractors. Those can be divided into two main camps: the philosophical opponents, and the legal challengers.

D. *Opposition to the Act*

Opponents of hate crime legislation on theoretical or political grounds (those who might be called philosophical opponents) typically structure their opposition in one of four main ways: (1) hate crime law is duplicative and therefore unnecessary; (2) it is arbitrary in its selection of protected groups; (3) it is ineffective as a deterrent; and (4) it amounts to codification of an overreaching government attempt at “thought-crime” legislation. None of these arguments stands up to serious scrutiny.

Writing in the *New York Times*, self-described gay activist and civil libertarian Bill Dobbs neatly sums up the position that hate crime law is not necessary, arguing that “existing criminal laws cover every victim, revered or reviled alike,” and for this reason, “hate crime laws selectively recriminalize acts that are already crimes.”⁵¹ This view is perhaps the most facially plausible of the main arguments against hate crime laws, but it fails because it does not take into account the measurable difference between crimes motivated by bias and those motivated by greed or passion or other nondiscriminatory intent: their impact on a broader community.

Hate crime law is not duplicative, because hate crimes are *different from* other types of crime. For much the same reason that additional terrorism charges supplemented the indictment against Zacarias Moussaoui after the events of 9/11, hate crime charges reflect the penumbra of larger harms done by acts of bias when compared to nonbiased crime. Chief among those larger harms is the effect that hate crime has on the victim’s community. In his meticulously researched book *Punishing Hate*, Frederick Lawrence takes note of this phenomenon, finding that hate crimes make people *other than* the immediate victim feel personally victimized, afraid, and under attack.⁵²

In this way, hate crimes are fundamentally different from similar crimes: they cause greater harm than “parallel” crimes that aren’t bias-motivated.⁵³ Hate crimes are intended to send a message to a targeted group: you are different, lesser, unwelcome, and you should be afraid. And as Lawrence notes, they work. It is precisely because of that fact that hate crime law is a necessary tool. Hate crimes have outsized effects that ripple

⁵¹ Bill Dobbs, *Justice, Not Vengeance, for Hate Crimes*, N.Y. TIMES (Apr. 16, 2012), <https://www.nytimes.com/roomfordebate/2012/03/07/are-hate-crime-laws-necessary/justice-not-vengeance-for-hate-crimes>.

⁵² Frederick M. Lawrence, *Punishing Hate* 41 (1999).

⁵³ *Id.* at 41–2 (“This additional harm of a personalized threat felt by persons other than the immediate victims of the bias crime differentiates a bias crime from a parallel crime and makes the former more harmful to society.”)

across communities, and for that reason enhanced sentencing measures aren't unneeded: they are essential.

A second major philosophical argument tendered against hate crime law is that it is idiosyncratic or arbitrary in its selection of protected groups. This argument is typified (albeit with perhaps a dash more rhetorical spin than other thinkers might employ) by columnist Tish Durkin's contention that "the whole concept of hate crimes is absurd," because it amounts to "codify[ing] the idea that certain kinds of human life have greater value than other kinds."⁵⁴ However, this line of argument fails to take note of the fact that there is an evidence-based approach a society can take (and one which ours has taken) toward determining which groups merit special protection: it's the ones that *need* protecting.⁵⁵

The Shepard-Byrd Act does not arbitrarily or randomly offer protection to the LGBT community. The Act protects the LGBT community *because that community is under attack*. The argument that laws aimed at protecting specific groups are unfairly exclusive thus finds a neat parallel in the image of a homeowner complaining that the firefighters pouring water on his neighbor's burning home are showing the neighbor "special treatment." Well, sure. But it's just because your house isn't the one on fire. If hate crime laws are underinclusive (leaving out groups that need protection), that's an argument for *broadening* them, not doing away with them. And if they are overinclusive (and there's no evidence to suggest that current legislation protects groups who are *not* specially targeted for bias crimes), then they ought to be properly calibrated. But the bare fact that hate crime laws protect certain groups is a simple mathematical reflection of the fact that hate crimes target certain groups.

A third philosophical critique of hate crime laws opposes them by arguing that they are ineffective, presumably because even after the enactment of the Shepard-Byrd Act (and similar state laws against hate crimes), hate and its attendant bias-motivated crimes still exist.⁵⁶ This

⁵⁴ Tish Durkin, *Focus on the Crime, Not the Victim*, N.Y. TIMES (Mar. 7, 2012), <https://www.nytimes.com/roomfordebate/2012/03/07/are-hate-crime-laws-necessary/focus-on-the-crime-not-the-victim>.

⁵⁵ One minor branch of the "arbitrary protection" strand of criticism is the contention that by "singling out" specific groups for protection, hate crime laws further marginalize those groups. It seems self-evident that the proper response to this contention is to point out that it is the perpetrators of violent bias-motivated crime who are doing the marginalizing, and not the law that seeks to punish such behavior.

⁵⁶ The Wall Street Journal published a representative sample of this line of argument, in which the author proposes the notion that hate crime laws are "a bad idea" because "such statutes don't seem to deter much." Holman W. Jenkins, Jr., *Are Hate-Crime Laws Helping?*, WALL STREET J. (Feb. 22, 2019), <https://www.wsj.com/articles/are-hate-crime-laws-helping-11550878156>.

argument merits little more attention than to note that state and federal laws against murder, theft, and assault, for example, have likewise failed (even after centuries of effort) to fully eliminate those crimes from American life.

In other words, the fact that a law has not eradicated a prohibited behavior presents simply no argument at all against it. However, it should be further noted that there is some evidence to suggest that, rather than being ineffective, hate crime laws in fact may reduce the overall rate of violent crime.⁵⁷ Data from the FBI's crime statistics database showed that as recently as 2014, states that had enacted hate crime legislation had lower rates of violent crime overall, including lower murder, assault, and even property crime rates.⁵⁸ This relationship of course doesn't demonstrate the existence (or direction) of a causal link. It doesn't prove that the enactment of hate crime laws *causes* a decrease in other crimes. But it needn't do that to be compelling; indeed, the most plausible alternate explanation for the correlation—that the kind of society that enacts hate crime laws is the kind of society that produces fewer overall crimes—still functions as an argument for, rather than against, pushing society toward more robust hate crime legislation.

The final main philosophical argument against hate crime laws takes the position that such laws, in seeking to punish the *motivation* for a behavior and not only the behavior itself, constitute the creation of an intolerable category of “thought crimes.” An early and representative articulation of this line of thinking from The National Review declared support for hate crime laws to be an “odd view,” because such laws seek “to punish *the motive for* the crime as well as the crime itself.”⁵⁹ As though motive had not been a component of criminal law for as long as the common law has existed! As though intent were not already the basis for enhanced charges throughout state and federal law!

There is an illustrative example alluded to earlier in this Article: If a man breaks into a Texas home without permission, he has committed a misdemeanor punishable by up to 180 days in jail.⁶⁰ If he does so *intending* to steal the homeowner's new 4K TV, he has committed a felony punishable by up to twenty years in prison—*whether or not he actually steals anything*.⁶¹ If there's any valid argument against enhanced sentencing based on the criminal's motive, calling it an “odd view” isn't

⁵⁷ John A. Tures, *How Hate Crimes Laws May Help Reduce All Crimes*, OBSERVER (Mar. 14, 2019), <https://observer.com/2019/03/hate-crimes-laws-reduce-all-crimes-data/>.

⁵⁸ *Id.*

⁵⁹ James Q. Wilson, *Hate and Punishment*, THE NAT'L REV. (Sept. 13, 1999), archived at <https://www.nationalreview.com/2003/07/hate-and-punishment/> (emphasis added).

⁶⁰ Tex. Penal Code Ann. §§ 12.22 and 30.05.

⁶¹ Tex. Penal Code Ann. §§ 12.33 and 30.02.

it. The contention that hate crime legislation is tantamount to an unacceptable governmental intrusion into people's inner minds carries with it more than a whiff of the straw man argument; the observable evidence shows that hate crime laws make no more attempt to dive into the criminal's thoughts than do other laws relying crucially on intent.

It's worth returning for a moment to the extra "conspiracy to commit terrorism" charge in the Moussaoui case, to note that the enhanced punishment attendant to that charge is only sustained by an appeal to what Moussaoui was thinking.⁶² Indeed, the same can be said of *every* federal conspiracy charge. Hate crime laws are not "thought crime" laws, any more than conspiracy charges or heightened punishments for intent are thought crime laws.

In addition to the preceding theoretical arguments, opponents of the Shepard–Byrd Act have mounted constitutional challenges against it, running along three main lines: (1) that the Act violates First Amendment free speech protections; (2) that it exceeds Congress' authority under the Thirteenth Amendment; and (3) that it violates the Equal Protection Clause. These challenges warrant only brief consideration here, because these issues appear to be well–settled at this point.

Two cases from the Sixth Circuit present a consistent position on the First Amendment question. In both, Defendants' challenges against the Shepard–Byrd Act on free speech grounds were denied.⁶³ In a case arising in the Eastern District of Michigan in 2012, the Sixth Circuit began by noting that "the legislative history [of the Shepard–Byrd Act] shows that the term 'violent acts' . . . is not intended to include 'violent thoughts,' 'expressions of hatred toward any group,' or 'the lawful expression of one's deeply held religious or personal beliefs.'"⁶⁴ With those facts in mind, the court dispensed with the First Amendment issue in plain language, holding that "the [Shepard–Byrd] Act does not prohibit . . . speech."⁶⁵

In a more recent case in which defendants did raise a successful appeal of their Shepard–Byrd convictions,⁶⁶ their convictions were reversed on the narrower ground that the lower court had committed non–harmless error.⁶⁷ In that case, the appellate court made explicit the lack of any First

⁶² 18 U.S. Code § 371 (making it an offense to *plan to* commit an offense, even if the other planner was the only one who actually *committed* the offense).

⁶³ See U.S. v. Miller, 767 F.3d 585 (6th Cir. 2014); Glenn v. Holder, 690 F.3d 417 (6th Cir. 2012).

⁶⁴ Glenn, 690 F.3d at 421.

⁶⁵ *Id.*

⁶⁶ Miller, 767 F.3d 585.

⁶⁷ *Id.* at 591 (holding that the jury instruction at the lower court inadequately conveyed the nature of the causal element required to convict under the Shepard–Byrd Act).

Amendment defect in Shepard–Byrd, holding that “the government may punish ‘bias–inspired conduct’ without offending the First Amendment”⁶⁸ This articulation of the constitutional propriety of the Shepard–Byrd Act seems particularly weighty because, having reversed defendants’ convictions on other grounds, the court did not need to reach the constitutional question. That it took pains to articulate a cogent defense of the Act’s constitutionality suggests there is no serious argument left to the contrary.

Similarly, a recent Tenth Circuit case in which the defendant raised Thirteenth Amendment and Equal Protection challenges illustrates the propriety of Shepard–Byrd on both counts.⁶⁹ On appeal, the defendant argued that the Act was unconstitutional because Congress had exceeded its Thirteenth Amendment authority in passing it.⁷⁰ The court demurred, ruling that in passing the Shepard–Byrd Act, Congress had “met the Jones test in rationally determining racially motivated violence to be a badge or incident of slavery,” and was therefore “authorized [under the Thirteenth Amendment] to enact the racial violence provision of the Hate Crimes Act.”⁷¹ This holding is consistent with Fifth and Eighth Circuit jurisprudence on the question.⁷² The Shepard–Byrd Act is well within congressional purview under the Thirteenth Amendment.

Finally, when deciding *Hatch*, the Tenth Circuit considered a challenge on Equal Protection grounds and found no Fifth Amendment deficiencies in the Act. On appeal in that case, the defendant argued that the Shepard–Byrd Act violated the Equal Protection Clause by “mak[ing] distinctions on the basis of race.”⁷³ The court needed only four paragraphs to dispose of the question, holding that “Hatch’s argument does not raise an equal protection problem” because “Congress is authorized under the Enforcement Clause of the Thirteenth Amendment to legislate in regard to every race and individual.”⁷⁴ The court further reasoned that the Act “does not limit its reach to members of formerly enslaved races, but explicitly protects ‘any person’,” and for that reason, too, it “does not run afoul of equal protection principles.”⁷⁵ Thus the Shepard–Byrd Act is properly

⁶⁸ *Id.* at 592.

⁶⁹ *United States v. Hatch*, 722 F.3d 1193 (10th Cir. 2013).

⁷⁰ *Id.* at 1196.

⁷¹ *Id.* at 1206.

⁷² *See United States v. Cannon*, 750 F.3d 492, 505 (5th Cir. 2014) (holding that the Shepard–Byrd Act is “is a valid exercise of congressional power” under the Thirteenth Amendment); *United States v. Maybee*, 687 F.3d 1026, 1031 (8th Cir. 2012) (holding that Defendant’s Thirteenth Amendment challenge provided “no substantial argument as to why the particular scope of [the Shepard–Byrd Act] renders it constitutionally infirm.”).

⁷³ *Hatch* at 1209.

⁷⁴ *Id.* at 1208.

⁷⁵ *Id.* at 1209.

within constitutional parameters on every point of contention. It is precisely through these challenges that the strength of a law is revealed: in this way, the Act's constitutionality has thus been clarified beyond any serious question.

Ten years of history now demonstrate the utility and propriety of the Shepard–Byrd Act. It is necessary, it is logically coherent, and it is legally sound. For these reasons, it has survived political, philosophical, and constitutional challenges.

II. APPLICATION OF THE ACT

The Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act has been used only sparingly in the ten years following its enactment. According to data culled from Department of Justice press releases and records of cases that went to trial,⁷⁶ the Act has been used in fifty–six prosecutions since 2009.⁷⁷ In those cases, thirty–four indictments resulted in guilty pleas, thirteen led to a trial on the merits, and the remaining nine cases currently await trial.⁷⁸ What follows is an overview of the types of crimes that are most–commonly charged under the Act, the variations in application of the Act among the federal Circuits, and an examination of some legal issues involved in prosecuting cases under the act.

A. Prosecutions by Type

The Shepard–Byrd Act bars bias–motivated crimes against persons on the basis of six signals of group membership: race or national origin,⁷⁹

⁷⁶ Appendix I, HCPA Prosecutions by Disposition.

⁷⁷ This number may not represent the entire universe of prosecutions under the Act. For example, using data culled on a case-by-case basis “from the internal administrative information recorded by each U.S. Attorney’s Office,” the Transactional Records Access Clearinghouse (a data-collection website sponsored by Syracuse University) counts eighty-five prosecutions under Shepard-Byrd. TRAC, *Few Federal Hate Crime Referrals Result in Prosecution*, <https://trac.syr.edu/tracreports/crim/569/>.

However, in a phone conversation, Cynthia Deitle, former FBI Civil Rights Unit Chief responsible for managing the FBI’s national Hate Crimes Program, raised questions about the accuracy of the Syracuse data. Given these questions and the near impossibility of reaching a fully accurate dataset (*see* Part III, Section A, *infra*), this Article will proceed with a treatment of those prosecutions that have been publicly verified by the Justice Department.

⁷⁸ Appendix I.

⁷⁹ These are presented in the statute as three separate classes: race, color, and national origin. As a practical matter, though, they are usually folded together as a single category. For example, the FBI denominates “Race/Ethnicity/Ancestry” as a single group in its compilation of hate crime statistics. *See, e.g.*, FBI, *Incidents, Offenses, Victims, and Known Offenders by Bias Motivation, 2017*, <https://ucr.fbi.gov/hate-crime/2017/topic-pages/tables/table-1.xls>.

religion, sexual orientation, disability, gender, and gender identity.⁸⁰ An investigation into the application of the Shepard–Byrd Act in prosecutions shows that it has been used most commonly in cases involving crimes of bias against people on the basis of race.⁸¹ This tracks with the larger picture on bias–motivated crime: race or national origin is consistently and by far the largest motivation for hate crimes in the US, comprising—as a recent example—58% of all such crimes counted by the FBI in 2017.⁸² Some examples of recent cases may help fill in the picture of the current state of hate crime and its prosecution in America.

The most–recent indictment under the Act for violent crime on the basis of race or national origin alleges that on Nov. 27, 2018, one Alan D. Covington of Salt Lake City, Utah, entered a tire store brandishing a metal pole and shouting that he wanted to “kill Mexicans.”⁸³ The indictment alleges that Covington then struck one victim in the head in an unsuccessful attempt to kill him, then struck and injured another victim and attempted to strike a third, who evaded the blow.⁸⁴ The case is currently awaiting trial.⁸⁵ In the sweep of its facts, it is fairly typical of the brutality and animus at work in crimes prosecuted under the Act.

For example, the indictment in another case now awaiting trial—this one from Jeffersonton, Kentucky—alleges that Gregory A. Bush, “after substantial planning and premeditation,” brought a firearm to a Kroger grocery store, where he shot two men to death and attempted to shoot a third “because of their race.”⁸⁶ Other recent prosecutions have made national headlines, such as that of James Alex Fields, Jr., who pled guilty earlier this year to charges that included killing Heather Heyer in 2017 by accelerating his car into a crowd of pedestrian protesters at the Charlottesville, West Virginia “Unite the Right” rally,⁸⁷ and that of Dylann Roof, who was sentenced to death in 2017 for killing nine people by opening fire on an historically black church in Charlotte, South Carolina.⁸⁸

⁸⁰ 18 U.S.C. § 249.

⁸¹ Exactly half of prosecutions—28 of 56—were for crimes motivated by bias against the victim’s race or national origin. Appendix II, HCPA Prosecutions by Motivating Bias.

⁸² FBI *supra* note 79.

⁸³ Press Release, Dep’t Just., Utah Man Charged With Hate Crimes For Attacking Three Men With a Metal Pole, <https://www.justice.gov/opa/pr/utah-man-charged-hate-crimes-attacking-three-men-metal-pole>.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Press Release, Dep’t Just., Kroger Shooting Suspect Charged with Federal Hate Crimes and Firearm Offenses, <https://www.justice.gov/opa/pr/kroger-shooting-suspect-charged-federal-hate-crimes-and-firearm-offenses>.

⁸⁷ Press Release, Dep’t Just., Ohio Man Pleads Guilty to 29 Federal Hate Crimes for August 2017 Car Attack at Rally in Charlottesville <https://www.justice.gov/opa/pr/ohio-man-pleads-guilty-29-federal-hate-crimes-august-2017-car-attack-rally-charlottesville>.

⁸⁸ *See* United States v. Roof, 225 F. Supp. 3d 413 (D.S.C. 2016).

The foregoing are all typical of race-based crimes of animus⁸⁹ in that they involve attacks on victims that were previously unknown to their assailants: one of the features of bias is that it tends to be directed toward persons perceived as “other,” and this sort of “otherization” can function as an assailant’s mental defensive precursor to cruelty.⁹⁰

That sort of cruelty is on high display in cases involving animus against a person for his sexual orientation,⁹¹ which comprise the second-largest type of animating bias among charges filed under the Shepard–Byrd Act.⁹² These crimes often present as particularly brutal, because they often involve luring a victim into a violent trap by the attacker’s feigned romantic or sexual interest in the victim. A recent indictment out of Dallas is typical: Daniel Jenkins and Michael Atkinson are charged with a string of assaults on a number of gay men after luring them to an apartment complex by posing as potential dates on the social media platform Grindr.⁹³

⁸⁹ See also Press Release, Dep’t Just., Two Biddeford, Maine, Men Indicted for Hate Crime Assault, <https://www.justice.gov/opa/pr/two-biddeford-maine-men-indicted-hate-crime-assault> (indictment alleging two assailants attacked a man they did not know in a 7-Eleven parking lot; defendants are now awaiting trial); Press Release, Dep’t Just., Kansas Man Pleads Guilty to Hate Crime and Firearm Offenses in Shooting of Two Indian Nationals and Third Man at a Bar, <https://www.justice.gov/opa/pr/kansas-man-pleads-guilty-hate-crime-and-firearm-offenses-shooting-two-indian-nationals-and> (defendant pleaded guilty to shooting and attempting to kill two men he’d never met “because of their race, color, religion, and national origin”); Press Release, Dep’t Just., Suburban Pittsburgh Man Pleads Guilty to Hate Crime, <https://www.justice.gov/usao-wdpa/pr/suburban-pittsburgh-man-pleads-guilty-hate-crime> (defendant pleaded guilty to willfully causing bodily injury because of his victim’s “perceived race, color, and national origin”); Press Release, Dep’t Just., Ohio Men Sentenced to Prison for Racially Motivated Attack on Stranger, <https://www.justice.gov/opa/pr/ohio-men-sentenced-prison-racially-motivated-attack-stranger> (both defendants pleaded guilty after attacking a man they saw on the street “in the name of the White Race.”); Press Release, Dep’t Just., Kansas Men Sentenced for Roles in Federal Hate Crime Against Black Somali Men, <https://www.justice.gov/opa/pr/kansas-men-sentenced-roles-federal-hate-crime-against-black-somali-men> (defendants both pleaded guilty to attacks “because of [their victim]’s race and national origin,” and “without any justification”).

⁹⁰ Taylor N. West, Leah Savery & Robert J. Goodman, *Sometimes I Get So Mad I Could . . . : The Neuroscience of Cruelty*, in *THE NEUROSCIENCE OF EMPATHY, COMPASSION, AND SELF-COMPASSION*, 121, 123 (Larry Charles Stevens & C. Chad Woodruff eds., 2018).

⁹¹ The victims are almost always men. For example, so far every victim of a crime charged under the Act as motivated by bias toward sexual orientation has been a man, save one.

⁹² Almost a quarter of prosecutions—13 of 56—were for crimes motivated by bias against the victim’s actual or perceived sexual orientation. Appendix II, HCPA Prosecutions by Motivating Bias.

⁹³ Press Release, Dep’t Just., Dallas Men Indicted for Hate Crimes for Targeting Gay Men on Grindr, <https://www.justice.gov/usao-ndtx/pr/dallas-men-indicted-hate-crimes-targeting-gay-men-grindr>.

In a similar crime, also in Texas, two Corpus Christi assailants pleaded guilty to having invited a man to an apartment, where they “assaulted him while calling him racial and homophobic epithets . . . [o]ver the course of approximately three hours.”⁹⁴ In another case, again in Texas, Brice Johnson pleaded guilty to beating his victim sufficiently severely to cause “multiple skull and facial fractures” after luring him to his home by telling the victim “that he was interested in engaging in sexual activity with [him].”⁹⁵

In yet another similar offense, yet again in Texas, three men pleaded guilty to using Grindr to arrange a meeting with their victim in his home, where they tied up, assaulted, and robbed him.⁹⁶ These types of bias crimes aren’t *all* committed in Texas, but they do share the animating hatred of difference, and many of them also involve the tactic of luring the victim by making a false offer of companionship, then doling out brutality.

The third-largest group of prosecutions under Shepard–Byrd are crimes motivated by animus against a victim on the basis of his or her perceived religion. Unlike race and sexual orientation motivated crimes, crimes committed out of bias against the victim’s religion tend to be larger scale, often involving multiple victims. This is in large part due to the fact that such crimes frequently involve attacks on places of worship, where they can maximize damage on faith communities.⁹⁷ The mass shooting at the Tree of Life Synagogue in Pittsburgh is a prototypical example of this kind of crime. A forty–four–count indictment in that case charges Robert Bowers with the deaths of eleven congregants who were engaged in

⁹⁴ Press Release, Off. U.S. Att’y, Two Texas Men Indicted for Federal Hate Crime Against Gay, African-American Man, <https://www.fbi.gov/contact-us/field-offices/houston/news/press-releases/two-texas-men-indicted-for-federal-hate-crime-against-gay-african-american-man>.

⁹⁵ Press Release, Dep’t Just., Texas Man Pleads Guilty to Violent Kidnapping of Gay Man, <https://www.fbi.gov/contact-us/field-offices/dallas/news/press-releases/texas-man-pleads-guilty-to-violent-kidnapping-of-gay-man>.

⁹⁶ Press Release, Dep’t Just., Two Texas Men Plead Guilty to Federal Hate Crime for Assaults Based on Victim’s Sexual Orientation, <https://www.justice.gov/opa/pr/two-texas-men-plead-guilty-federal-hate-crime-assaults-based-victim-s-sexual-orientation>.

⁹⁷ See, e.g., Press Release, Dep’t Just., Ohio Man Indicted for Attempting to Provide Material Support to ISIS and Attempting to Commit a Violent Hate Crime Attack Against a Toledo Synagogue <https://www.justice.gov/opa/pr/ohio-man-indicted-attempting-provide-material-support-isis-and-attempting-commit-violent-hate> [hereinafter *Toledo*] (indictment alleging that Damon M. Joseph planned to carry out a mass shooting on a synagogue (which plan was interrupted by FBI involvement), and that he had chosen “the types of weapons he believed would be able to inflict mass casualties”); Press Release, Dep’t Just., Jury Convicts Texas Man of Hate Crime in the Burning of Victoria, Texas, Mosque, <https://www.justice.gov/opa/pr/jury-convicts-texas-man-hate-crime-burning-victoria-texas-mosque> (Defendant was convicted of burning a mosque with the aim of “instilling fear into entire communities with violence.”).

religious worship on October 27, 2018.⁹⁸ According to the indictment, Bowers opened fire on the synagogue during services because of his stated desire to “kill Jews.”⁹⁹ Bowers is currently awaiting trial.¹⁰⁰

While the Tree of Life Case is both prototype and paradigm for other such crimes,¹⁰¹ it is not the sole representative of crimes committed on the basis of animus against a person’s religion or perceived religion; that is, not all such crimes are carried out at the remove afforded by explosive devices or assault weapons. For example, last year in Nashville, Tennessee, one Christopher Beckham was indicted on charges of violating the Shepard–Byrd Act after he allegedly brandished a knife and punched a man in the street, yelling “Allahu Akbar!” and “Go back to your country!”¹⁰²

It merits at least cursory mention that the mixed messages allegedly shouted by Beckham in the course of this attack are typical of the blind and unthinking nature of these crimes: the attacker may not be sure if he hates his victims because of their religion, or their national origin, but he definitely knows he hates them. Bias crimes motivated by religious animus have formed the basis for eleven prosecutions under Shepard–Byrd since 2009.

There have been so far only two prosecutions under Shepard–Byrd of crimes motivated by bias against persons with disabilities. The first was in Pennsylvania, where five co–conspirators were charged with kidnapping multiple persons with mental disabilities, and “subject[ing them] to subhuman conditions of captivity,” including beating them, “[keeping] them captive in locked closets, basements and attics, depriv[ing] them of adequate food and medical care,” and shuttling them between locations in four states in order to avoid detection.¹⁰³

⁹⁸ Press Release, Dep’t Just., Pennsylvania Man Charged with Federal Hate Crimes for Tree Of Life Synagogue Shooting, <https://www.justice.gov/opa/pr/pennsylvania-man-charged-federal-hate-crimes-tree-life-synagogue-shooting>.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ For example, it served as an exemplar for the planning of a similar attack in Ohio that was foiled by FBI before it could be realized. *Toledo, supra* note 97 (Joseph, who planned an assault weapon shooting on a synagogue in Toledo, said of the Tree of Life shooter “I admire what the guy did with the shooting actually . . . I can see myself carrying out this type of operation”).

¹⁰² Press Release, Dep’t Just., Nashville Man Indicted For Hate Crime And Lying To The FBI, <https://www.justice.gov/usao-mdtn/pr/nashville-man-indicted-hate-crime-and-lying-fbi> (Beckham was also indicted on charges of lying to the FBI after he falsely claimed that the daughters of the man he is alleged to have attacked began the altercation by striking him).

¹⁰³ Press Release, Dep’t Just., Federal Charges Allege Captors Held Adults with Disabilities in Subhuman Conditions to Carry out Social Security Fraud,

The second case alleges perhaps the most brutal and cruel of all the cases prosecuted under the Act, charging abuse that included locking the victim in a cage, hitting her with a hammer and with a board, holding her under water and burning her, along with multiple other atrocities.¹⁰⁴ The five charged defendants currently await trial in Amite, Louisiana.¹⁰⁵

The final case meriting special mention here is particularly noteworthy for two reasons: First, it's the only case of a bias crime involving animus against a person's actual or perceived gender identity that's been prosecuted to date under the Shepard–Byrd Act. Second, it involves a hate crime that *could* only have been prosecuted under Shepard–Byrd, because it occurred in Mississippi, a state that has no hate crime statute protecting against bias directed toward a person's gender identity. In another exceptionally brutal set of charges, Joshua Vallum was indicted for murdering his ex–girlfriend, a young woman whom Vallum knew to be transgender.¹⁰⁶ Vallum pleaded guilty to stabbing her multiple times, shocking her with a stun gun, and finally beating her to death with a hammer.¹⁰⁷

In discussing the case later, US Attorney General Loretta Lynch offered a concise recapitulation of one central justification for the existence and application of hate crime law: “Our nation’s hate crime statutes advance one of our fundamental beliefs: that no one should have to live in fear because of who they are. By holding accountable the perpetrator of this heinous deed, we reinforce our commitment to ensuring justice for all Americans.”¹⁰⁸

<https://www.justice.gov/opa/pr/federal-charges-allege-captors-held-adults-disabilities-sub-human-conditions-carry-out-social>.

¹⁰⁴ Emma Discher, *5 Charged for Holding Autistic Amite Woman in Cage, Accused of Beating Her Among Other Heinous Acts*, THE ADVOCATE (July 26, 2018), https://www.theadvocate.com/baton_rouge/news/crime_police/article_f1a5395a-9122-11e8-b819-33860076b559.html; Caroline Grueskin, *Alleged Ringleaders Plead Guilty in Abuse of Autistic Woman; Was Kept in Cage, Fed Mother’s Ashes*, THE ADVOCATE (May 20, 2019), https://www.theadvocate.com/baton_rouge/news/communities/livingston_tangipahoa/article_9fabde80-7b35-11e9-9fc5-236d748f322e.html.

¹⁰⁵ Press Release, Dep’t Just., Amite Residents Charged with Civil Rights Crimes for Abusing Family Member with Disabilities, <https://www.justice.gov/usao-edla/pr/amite-residents-charged-civil-rights-crimes-abusing-family-member-disabilities>.

¹⁰⁶ Press Release, Dep’t Just., Mississippi Man Pleads Guilty to Hate Crime for Murdering Transgender Victim Because of Her Gender Identity, <https://www.justice.gov/opa/pr/mississippi-man-pleads-guilty-hate-crime-murdering-transgender-victim-because-her-gender>.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

B. Prosecutions by Federal Circuit

There is a fairly significant disparity in federal prosecutions under the Shepard–Byrd Act among the federal circuits. Data from US Justice Department press releases and from those cases that have proceeded to trial show that the Act has been used in successful prosecutions in twenty–eight states throughout each of the federal circuits (except for the D.C. Circuit).¹⁰⁹ However, the Act has been used far more often in some circuits than in others, and for different types of bias–motivated crime.

Prosecutors in the Fifth Circuit have brought more charges under the Act than those in any other circuit.¹¹⁰ The Ninth Circuit has seen the next–highest number of charges, followed by the Sixth.¹¹¹ None of the other circuits have been home to more than five prosecutions under Shepard–Byrd.¹¹²

The predomination of charges brought in the Fifth and Ninth Circuits is largely due to the higher number of race–motivated crimes prosecuted in those circuits.¹¹³ However, those circuits account together for only two prosecutions of religious–motivated crimes, while over one–third of such charges were brought in the Sixth Circuit.¹¹⁴

The large number of sexual orientation motivated prosecutions in Texas is the main reason that the Fifth Circuit is the largest prosecutor of such crimes by a fairly wide margin (it is home to over a third of all prosecutions under the Shepard–Byrd Act for crimes committed on the basis of bias against a person’s actual or perceived sexual orientation).¹¹⁵

At the other end of the spectrum, three circuits have been home to only a single Shepard–Byrd prosecution each: the First, Second, and Seventh.¹¹⁶ In the First Circuit, the sole indictment came in Arkansas for a race–based case.¹¹⁷ The lone charge within the Second Circuit was for a crime based on religious animus in New York, and the only indictment in the Seventh Circuit came from Wisconsin, and was also a case motivated by religious bias.¹¹⁸

¹⁰⁹ Appendix I.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

C. *Establishing the Elements*

The Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act prohibits two central crimes: (1) bias-motivated violent crimes committed on the basis of animus against a person's actual or perceived race or religion;¹¹⁹ and (2) bias-motivated violent crimes committed on the basis of animus toward a person's actual or perceived sexual orientation, gender, gender identity, or disability *while* the defendant or victim is engaged in interstate commerce.¹²⁰

Since 2009, thirteen cases including charges under Shepard-Byrd have gone to trial. Of those, twelve have resulted in convictions (though in two of those convictions, the federal hate crime charges were later dismissed and the defendants were convicted on other charges,¹²¹ and in a third, the defendant was convicted of some charges but acquitted of the Shepard-Byrd charge¹²²) and one defendant was acquitted.¹²³ Among the nine Shepard-Byrd convictions, six were for race-based crimes, two were religious-bias-based, and one was sexual-orientation-based.

The first six convictions fall into the first class of crime prohibited by the Act; proving up the elements requires prosecutors to show that the defendant "willfully cause[d] bodily injury to any person or, through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, attempt[ed] to cause bodily injury to any person, *because of* the actual or perceived race, color, religion, or national origin."¹²⁴ No elements within that list have proved controversial in prosecutions on the basis of race-based animus.¹²⁵

However, it must be noted that the relative ease of demonstrating bias within successful prosecutions most likely appears only via hindsight: that is to say, it's much more likely that charges are brought—and convictions obtained—in cases where the motivating animus was clear and evident. As with other crimes relying crucially on proving *mens rea*,¹²⁶ difficulties are necessarily bound up in demonstrating the bias that motivates hate

¹¹⁹ 18 U.S.C. § 249(a)(1).

¹²⁰ 18 U.S.C. § 249(a)(2).

¹²¹ U.S. v. Miller, 767 F.3d 585 (6th Cir. 2014); U.S. v. Mason, Helen Jung, *Pink Poodle Case: Federal Hate Crime Count Dropped as Defendant Pleads Guilty to Oregon Charge*, THE OREGONIAN (May 16, 2014), https://www.oregonlive.com/portland/2014/05/pink_poodle_case_federal_hate.html.

¹²² United States v. Jenkins, 909 F. Supp. 2d 758 (E.D. Ky. 2012).

¹²³ United States v. Henery, Case No. 1:14-cr-00088-BLW (D. Idaho Feb. 14, 2014).

¹²⁴ 18 U.S.C. § 249(a)(1) (emphasis added).

¹²⁵ Though it should be noted (and will be discussed further in Section D, *infra*) that the phrase "because of," as used in 18 U.S.C. § 249(a)(2)(A) became the hook on which the Sixth Circuit reversed federal hate crime charges in *Miller*. *Miller*, *supra* note 121.

¹²⁶ See generally Jeremy M. Miller, *Mens Rea Quagmire: The Conscience or Consciousness of the Criminal Law?*, 29 W. ST. U. L. REV. 21 (2001).

crimes. In successful prosecutions, prosecutors have met this challenge by demonstrating that the victim was previously unknown to the assailant¹²⁷ and that the defendant used racial epithets before, during, and after the crime,¹²⁸ or that the defendant displayed insignia that demonstrated racist intent (e.g., having racist or white supremacist tattoos¹²⁹).

There have been three appeals in cases involving Shepard–Byrd charges for race–based crimes.¹³⁰ All three appeals resulted in affirmations of the lower courts’ convictions.¹³¹ The appeal in *United States v. Hatch* did not propose any question as to the charged elements, instead resting entirely on constitutional challenges, all of which the court found meritless.¹³² The other two cases—from the Fifth and Eighth Circuits—are of more interest, particularly in light of subsequent and contrary Sixth Circuit reasoning.¹³³

In *United States v. Cannon*, Defendants argued that there was insufficient evidence to demonstrate that they had caused injuries to their victims *because of* racial animus.¹³⁴ The appellate court held that Defendants’ use of racial epithets gave indication of their motivation, and that the use of language cues to infer intent did not offend the First Amendment.¹³⁵ In its opinion, the court held that “speech–based evidence [is allowable] to support a finding that a crime was motivated by racial hatred.”¹³⁶ The court did not propose a test for determining whether an action was taken “because of” racial bias, holding only that in the present case, “a rational trier of fact could have found the essential element of racial motivation beyond a reasonable doubt based on the evidence presented.”¹³⁷

The appeal in *United States v. Maybee* likewise challenged the sufficiency of the evidence, and on the same ground: that there was insufficient proof that Maybee had attacked his victims *because of* their actual or perceived race.¹³⁸ Here, the Eighth Circuit rejected Maybee’s

¹²⁷ See, e.g., *United States v. Cannon*, 750 F.3d 492 (5th Cir. 2014); *United States v. Maybee*, 687 F.3d 1026 (8th Cir. 2012).

¹²⁸ See, e.g., *Maybee*.

¹²⁹ See, e.g., *Cannon*.

¹³⁰ *United States v. Cannon*, 750 F.3d 492 (5th Cir. 2014); *United States v. Hatch*, 722 F.3d 1193 (10th Cir. 2013); *United States v. Maybee*, 687 F.3d 1026 (8th Cir. 2012).

¹³¹ *Id.*

¹³² *Hatch* at 1196 (“The sole question before us is whether the portion of the Hate Crimes Act under which Hatch was convicted . . . is a constitutional exercise of Congress’s power . . .”).

¹³³ To be discussed further in Section D, *infra*.

¹³⁴ *Cannon* at 505.

¹³⁵ *Id.* at 508.

¹³⁶ *Id.*

¹³⁷ *Id.* at 506.

¹³⁸ *Maybee* at 1031.

claim by applying what might be called a “substantial factor” test.¹³⁹ The court held that the racial epithets Maybee hurled at his victims constituted sufficient evidence for a reasonable jury to find that race-based animus formed “a substantial motivating factor in Maybee’s decision” to terrorize his victims.¹⁴⁰ This test is of particular note, because it rubs against the test used by the Sixth Circuit in a later case involving the “because of” component in the second offense defined in the Act.¹⁴¹

The second offense defined by the Shepard–Byrd Act prohibits violence (1) on the basis of gender, sexual orientation, gender identity, or disability, and (2) when that violence is connected to interstate commerce. Prosecutors in the four cases have satisfied the second condition despite some controversy,¹⁴² and the Eastern District of Kentucky offers a plausible explanation for their success in its detailed, eight–page analysis of the question in denying Defendants’ motion to dismiss *United States v. Jenkins*.¹⁴³ That analysis concludes that the deciding factor in proving that a violation of the Act has a sufficient connection to interstate commerce is accomplished straightforwardly, thanks to the presence of a “jurisdictional element” within the statute.¹⁴⁴ The court here is referring to Section 249(a)(2)(B), which defines the circumstances that would “trigger” a relation to interstate commerce: most importantly, when a defendant makes use of “a channel, facility, or instrumentality of interstate or foreign commerce.”¹⁴⁵ According to the *Jenkins* court, this interstate commerce element can be met if the assailant only uses a car in the course of the crime: “cars are themselves instrumentalities of commerce, which Congress may protect.”¹⁴⁶

Recent jurisprudence from the Fourth Circuit provides additional support for this expansive view of interstate commerce. After a trial in which a defendant admitted to having violently assaulted an Amazon coworker at their workplace and “because of the coworker’s sexual orientation”—and was subsequently convicted by the jury—the district court overturned the conviction, holding that Shepard–Byrd “exceeds Congress’s authority under the Commerce Clause.”¹⁴⁷ The Fourth Circuit

¹³⁹ *Id.* at 1032.

¹⁴⁰ *Id.*

¹⁴¹ Section D, *infra*.

¹⁴² Two of the four cases involved appellate review. However, the first was resolved on other grounds, without reaching the interstate commerce question, and the more recent case saw the Fourth Circuit affirm the Act’s constitutionality. *United States v. Hill*, 927 F.3d 188 (4th Cir. 2019); *U.S. v. Miller*, 767 F.3d 585 (6th Cir. 2014).

¹⁴³ *United States v. Jenkins*, 909 F. Supp. 2d 758, 766–73 (E.D. Ky. 2012).

¹⁴⁴ *Id.* at 770.

¹⁴⁵ 18 U.S.C. § 249(a)(2)(B)(i)(II).

¹⁴⁶ *Id.* at 771.

¹⁴⁷ *United States v. Hill*, 927 F.3d 188, 193 (4th Cir. 2019).

reversed, holding that rather than exceeding congressional purview, the Act in fact “easily falls under Congress’s broad authority to regulate interstate commerce.”¹⁴⁸ In the same line of thought as the one employed by the *Jenkins* court, the Fourth Circuit reached its decision relying in part on the presence of a “jurisdictional element” within the Act¹⁴⁹ (the Fourth Circuit found additional support for the constitutionality of the conviction in the specific facts of the case, holding that the defendant’s assault on his victim while the latter “was preparing packages for interstate sale and shipment—amounts to a “substantial effect” on interstate commerce,” because of the “aggregate effect” such assaults would have on commerce¹⁵⁰).

Taken together, the available evidence suggests that the “interstate commerce” condition has been sufficiently well-defined within the Act (using the hook of a “jurisdictional element”) to avoid significant controversy in application, while creating an element for proving a hate crime that prosecutors have been able to demonstrate when appropriate and on a case-by-case basis.

D. *Acquittals and Dismissals*

Of the one hundred nine individuals indicted over the fifty-six Shepard-Byrd cases since 2009, defendants in four cases have mounted successful defenses against their hate crime charges. Those cases included two not-guilty verdicts on hate crime charges¹⁵¹ and two cases in which defendants’ hate crime convictions were subsequently dismissed (though in both of those the defendants were convicted on other charges).¹⁵²

The earlier of the two not-guilty verdicts came in *United States v. Jenkins*, and is perhaps explained by the simple fact that it was “the country’s first prosecution of a hate crime on the basis of sexual orientation.”¹⁵³ The charges stemmed from two male defendants using two female codefendants to lure a man whom the four believed to be gay into their pickup truck, in order to kidnap and assault him.¹⁵⁴ The case is curious, because the two female codefendants pleaded guilty to the

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 204.

¹⁵⁰ *Id.* at 203–04.

¹⁵¹ *United States v. Henery*, Case No. 1:14-cr-00088-BLW (D. Idaho Feb. 14, 2014); *United States v. Jenkins*, 122 F. Supp. 3d 639 (E.D. Ky. 2013).

¹⁵² *U.S. v. Miller*, 767 F.3d 585 (6th Cir. 2014); *U.S. v. Mason, Helen Jung, Pink Poodle Case: Federal Hate Crime Count Dropped as Defendant Pleads Guilty to Oregon Charge*, THE OREGONIAN (May 16, 2014), https://www.oregonlive.com/portland/2014/05/pink_poodle_case_federal_hate.html.

¹⁵³ *Jenkins* at 642.

¹⁵⁴ *Id.*

Shepard–Byrd charges, thereby becoming the first defendants convicted under the Act for a crime motivated by sexual orientation bias.¹⁵⁵ However, the male defendants pleaded not guilty and were acquitted of the hate crime charge (though convicted of all other charges).¹⁵⁶

Perhaps the most curious detail of the case is that although the two male defendants were *not* convicted of having attacked their victim as a result of hate, the court held during sentencing that “For these four, the consequences of their choices were violent decisions *filled with hate . . .*.”¹⁵⁷ That is, two of the defendants admitted having—and the court evidently also found—a motivation for the violent attack that the members of the jury did not find.

The second not guilty verdict came in a case in which the Shepard–Byrd charge (that the attack was motivated by racial bias) was the only charge.¹⁵⁸ In that case, two white men were involved in a fight with a black man inside a strip club.¹⁵⁹ After hearing evidence from “several” eyewitnesses that the defendants had used racial slurs before and during the fight (and hearing, too, the contrasting testimony of the two defendants themselves, who both testified) an all–white jury found the pair not guilty of a hate crime.¹⁶⁰ Given the acquittal, the precise nature of the defense’s success can only be guessed at, though a contemporaneous description indicates that the central defense strategy was to argue that the altercation amounted to no more than a bar fight, with no component of racial animus.¹⁶¹

In two other cases, defendants had charges against them under the Act dismissed. In the first of the two, *United States v. Mason*, a mistrial was declared after the jury hung on the question of whether the defendant’s attack on his victims had been motivated by bias toward their perceived sexual orientation.¹⁶² In that case, the defendant was driving when he saw a pair of men walking on the sidewalk.¹⁶³ He stopped his car, yelled an

¹⁵⁵ *Id.* at 644.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 668 (emphasis added).

¹⁵⁸ Press Release, Dep’t Just., Two Idaho Men Indicted for Hate Crime, <https://www.justice.gov/opa/pr/two-idaho-men-indicted-hate-crime>.

¹⁵⁹ John Sowell, *Jury: Pair Not Guilty in Alleged Hate Crime at Boise Strip Club*, IDAHO STATESMAN (Feb 13, 2015), https://magicvalley.com/news/local/crime-and-courts/jury-pair-not-guilty-in-alleged-hate-crime-at-boise/article_c6b06df6-b3d5-11e4-b6ed-a39e3ea055bc.html.

¹⁶⁰ *Id.*

¹⁶¹ *United States v. Henery*, Case No. 1:14-cr-00088-BLW (D. Idaho Feb. 14, 2014).

¹⁶² Helen Jung, *Pink-Poodle Case: Jury Deadlocks Over Whether Attack on Gay Man Was Hate Crime*, THE OREGONIAN (Feb 4, 2014), https://www.oregonlive.com/portland/2014/02/pink-poodle_case_jury_deadlock.html.

¹⁶³ *Id.*

epithet at the pair, then assaulted them.¹⁶⁴ Speaking to reporters after the mistrial, the presiding juror said that testimony from a linguistics professor at Brigham Young University who testified as an expert in the case was key to jurors' doubts about the defendant's motivation.¹⁶⁵ Before a second trial could commence, the defendant pleaded guilty to second degree assault, and the court dismissed the Shepard–Byrd charge.¹⁶⁶

The second dismissal is the more interesting and carries the greater likelihood of continuing legal impact. It came on appeal to the Sixth Circuit in the case that became *United States v. Miller*.¹⁶⁷ In their appeal, Defendants challenged the sufficiency of the evidence against them, arguing that there were not in the record enough facts to show that they had shaved the beards and heads of a group of Amish men and women *because of* religious animus.¹⁶⁸ The Sixth Circuit agreed, holding that the proper test for determining whether a crime was committed “because of” bias, as the term is used in the second prong of the Shepard–Byrd Act, is to ask whether the bias was a “but for cause” of the defendant's action.¹⁶⁹ This test raises the bar considerably for proving this element when compared against the Eighth Circuit's “substantial factor” standard: under the Sixth Circuit test, bias must be a *necessary* component of the motivation for the action, where the Eighth Circuit test requires only that bias be *a* motivation for the action.

In the *Miller* case, this heightened standard resulted in a reversal of the hate crime convictions.¹⁷⁰ The appellate court held that the lower court had committed non-harmless error when it gave a jury instruction that did not indicate that a guilty verdict required the jury to find that religious animus was a “but for” cause of the assaults.¹⁷¹ That is, the Sixth Circuit held that unless a jury is persuaded that an attack *would not have occurred* without an animating bias, then no hate crime charge can be sustained.

It is difficult as yet to gauge the future impact of this holding. The facts in *Miller* lend themselves in a particular fashion to this holding; after all, the defendants and the victims belonged to the same religion.¹⁷² The

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* (“William Eggington, a linguistics professor at Brigham Young University, testified that the slur [that Defendant used] is often used among boys or by a coach to challenge someone's masculinity as opposed to conveying an anti-gay sentiment.”).

¹⁶⁶ Helen Jung, *Pink Poodle Case: Federal Hate Crime Count Dropped as Defendant Pleads Guilty To Oregon Charge*, THE OREGONIAN (May 16, 2014), https://www.oregonlive.com/portland/2014/05/pink_poodle_case_federal_hate.html.

¹⁶⁷ *U.S. v. Miller*, 767 F.3d 585 (6th Cir. 2014).

¹⁶⁸ *Id.* at 589.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 594.

¹⁷¹ *Id.*

¹⁷² *Id.* at 589.

first post-*Miller* Sixth Circuit case to be prosecuted on religious-animus grounds appears to have adequately demonstrated “but for” cause; it ended in a conviction.¹⁷³ There may be no significant wait to see how the Sixth Circuit’s current thinking on causation affects other cases: there are currently three more Shepard-Byrd cases (two of them alleging religious animus, and the third alleging racial bias) awaiting trial in Ohio, Kentucky, and Tennessee.¹⁷⁴ All of those states, of course, are in the Sixth Circuit.

III. LOOKING AHEAD

Federal legislation that touches social issues¹⁷⁵ often inhabits a symbiotic relationship with national social mores, pulling the country into a national dialog that can result in changes both to the legislation and to the nation’s character. Consider, for example, the way that President Franklin Roosevelt’s New Deal led to a widespread belief that caring for the welfare of its citizens was a legitimate role of the federal government,¹⁷⁶ or the way that President Reagan’s restructuring of the tax code led to a socio-economic realignment along the divide between the 1% and the 99%.¹⁷⁷ The Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act similarly touches an American social nerve, and as Jenny Pizer, of LGBT-rights group Lambda Legal put it, although the social effect of hate crime laws is not to “transform attitudes overnight,”

¹⁷³ Press Release, Dep’t Just., Ohio Man Convicted of Hate Crime in Attack Outside Cincinnati Restaurant, <https://www.justice.gov/opa/pr/ohio-man-convicted-hate-crime-attack-outside-cincinnati-restaurant>.

¹⁷⁴ Press Release, Dep’t Just., Kroger Shooting Suspect Charged with Federal Hate Crimes and Firearm Offenses, <https://www.justice.gov/opa/pr/kroger-shooting-suspect-charged-federal-hate-crimes-and-firearm-offenses>; Press Release, Dep’t Just., Ohio Man Indicted for Attempting to Provide Material Support to ISIS and Attempting to Commit a Violent Hate Crime Attack Against a Toledo Synagogue, <https://www.justice.gov/opa/pr/ohio-man-indicted-attempting-provide-material-support-isis-and-attempting-commit-violent-hate>; Press Release, Dep’t Just., ;

¹⁷⁵ For example, education initiatives, “social compact” issues (e.g., Medicaid and Social Security), drug scheduling, and hate crime legislation.

¹⁷⁶ See, e.g., Tom W. Smith, *General Liberalism And Social Change in Post World War II America: A Summary Of Trends*, 10 SOC. INDICATORS RES. 1, 1 (“The main causes of the general liberalism trend were modernization and liberal idealism assisted by the New Deal Realignment and institutional leadership.”)

¹⁷⁷ See generally JOSEPH STIGLITZ, *THE GREAT DIVIDE: UNEQUAL SOCIETIES AND WHAT WE CAN DO ABOUT THEM* (2015) (Arguing that the great divide in America—between “the 1 percent” and the rest of the country—is the outcome of political policies, including President Reagan’s “supply-side” economics)

nevertheless such measures “do help, and that matters.”¹⁷⁸ As the Shepard–Byrd Act begins its second decade, it’s worth considering how the Act and the country it seeks to serve may evolve.

A. *Changes to the Code*

Some current thinking on federal hate crime legislation suggests two major modes of possible future change, one through amendment to the Shepard–Byrd Act, and a second via additional legislation: (1) the addition to the Act of a mandatory reporting requirement; and (2) the creation of a new private right of action against the sorts of bias–motivated misdeeds that are currently only addressed within hate crime law.

Advocates for the addition to the Act of a new and mandatory requirement for law enforcement to report instances of hate crimes point to the divide between data on the actual incidents of hate crime (as compiled by the National Crime Victimization Survey) and those counted by the FBI’s Uniform Crime Report.¹⁷⁹ They also note that participation in the Uniform Crime Report is currently voluntary, and for this reason many states only report data from a small percentage of law enforcement agencies.¹⁸⁰ Thus, advocates for mandatory reporting argue that currently “there is simply no reliable national data on hate crimes.”¹⁸¹

This underreporting is deeply problematic for national efforts aimed at fighting and preventing hate crime. It minimizes the true scope of the problem while inculcating divisions in the way states approach solutions. Accurate reporting would not, of course, solve anything in its own right. But it does appear to be a crucial step toward building and implementing an effective set of solutions, in much the same way that before any doctor prescribes a remedy, she first gathers an accurate diagnosis. After all, how can we possibly fix a problem when we don’t even know fully where and to what extent it *exists*?

Requiring law enforcement to report incidents would function as an important part of a national approach to a national problem. Current data demonstrate that hate crimes affect many thousands of people. But what if

¹⁷⁸ David Crary, *Views Are Mixed On Hate Crime Law Named For Matthew Shepard*, AP NEWS (Oct. 12, 2018), <https://www.apnews.com/a6d811ece9254facbc68df40d20e931a>.

¹⁷⁹ See, e.g., THE MATTHEW SHEPARD FOUND., *Hate Crimes Reporting and Prevention Initiative*, <https://www.matthewshepard.org/hate-crimes-reporting/> (concluding that “Statistics published by the FBI’s Hate Crimes Report are likely not catching a majority of estimated actual hate crimes.”)

¹⁸⁰ In 2015, for example, Hawaii sent no data at all, Florida only reported data from 5% of law enforcement agencies, and just 14% of agencies sent any data from New Mexico. *Id.*

¹⁸¹ PROPUBLICA, *Documenting Hate*, <https://projects.propublica.org/graphics/hatecrimes>.

the actual number is many *hundreds of thousands*? An accurate count would allow for the creation of rational, full-scope solutions based on evidence. As it currently stands, federal law (in the Shepard–Byrd Act) improves protections for victims but may not yet go far enough. Getting better numbers would be a useful step toward creating an even better law.

Improving existing law is not the only way to fight hate crimes. Another avenue is through the creation of a new federal private right of action against attackers. Proponents of this addition argue that a civil avenue by which victims could seek redress would carry with it several benefits, among them (1) immunizing prosecutions from political influence; (2) lowering the burden of proof for holding perpetrators accountable; and (3) deterring future crimes.¹⁸²

The argument runs in part that prosecutorial discretion leaves some crimes unpunished, in part for political reasons.¹⁸³ Allowing victims to seek their own redress through civil court would circumvent this potential problem; rather than rely solely on an intermediary (the state), victims could take up their own cause directly and seek a measure of justice from civil court. Additionally, a civil right of action would likely lead to increased accountability from perpetrators, since instead of prosecutors' need to prove guilt beyond a reasonable doubt, civil claimants need only show liability by a preponderance of evidence. Further, the argument goes, a civil judgment could act as a sort of brand, in much the same way that a sex offender registry marks sexual predator. Fear of being labeled as a hate crime offender, together with the increased likelihood of being found liable in a civil suit, may prove to be an increased deterrent for people who might otherwise be inclined to commit crimes motivated by their bias. Taken together, these factors constitute a cogent argument for creating a new weapon in the fight against hate crime.

B. *Changes to the Country*

Although equitable federal legislation that reflects the cultural primacy of the rule of law can have an effect on the so-called “national character,” it is by no means the only—nor the strongest—force acting on

¹⁸² See, e.g., Samuel Duimovich, Note, *A Critique of The Hate Crimes Prevention Act Regarding its Protection of Gays and Lesbians (And How a Private Right Could Fix It)*, 23 S. CAL. REV. L. & SOC. JUST. 295 (2014).

¹⁸³ See, e.g., Charles E. MacLean and Stephen Wilks, *Keeping Arrows in the Quiver: Mapping the Contours of Prosecutorial Discretion*, 52 Washburn L.J. 59, 62 (2012) (arguing that “prosecutors [do] not simply prosecute ‘all known criminal conduct’ but considered factors such as cost, each proceeding’s impact on the defendant, the defendant’s social standing, [and] political pressures”)

the country's prevailing disposition on social questions.¹⁸⁴ Nevertheless, it is without doubt that the law is both colored by and colors our national identity, as evidenced by the rapid change in the national perception of such disparate issues as same-sex marriage¹⁸⁵ and gun control.¹⁸⁶

Hate crime legislation also has the power to change the country and not only to be changed by it. A recent poll by POLITICO and Harvard T.H. Chan School of Public Health showed that Americans' fourth-highest priority for its federal government—higher than addressing the opioid epidemic and increasing funding for K–12 public education—was for Congress to “increase[e] efforts to reduce the number of hate crimes.”¹⁸⁷ Clearly, this disposition isn't informed solely by the presence of federal hate crime law; it's much more likely that the current existence of such law simply creates a baseline notional possibility for a federal solution, and that the recurring—and widely reported—instances of hate crimes do more to move the needle. But that's really the point; if there weren't hate crimes, there'd be no need to strengthen hate crime laws, nor to sway public opinion.

However, the current wave of sentiment prioritizing stronger federal hate crime law suggests the future may be better. After all, we tend not to solve the problems that we do not really want to solve; deciding together that hate crime is an important problem is an indicator that we may indeed take further steps to eradicate it. And in much the same way that changes to federal law helped change American minds on other social issues, it is likely that a deeper commitment to, and strengthening of, the Matthew

¹⁸⁴ A 2016 poll conducted by the University of Chicago found that over 90% of Americans credit our legal system, our constitutional liberties, the constellation of factors that inform and allow the “American dream,” our shared language, our government institutions, our status as a safe haven for those fleeing persecution elsewhere, and our shared values as all being moderately to extremely important factors shaping the national character. THE ASSOCIATED PRESS-NORC CENTER FOR PUBLIC AFFAIRS RESEARCH, *The American Identity: Points of Pride, Conflicting Views, and a Distinct Culture*, <http://apnorc.org/projects/Pages/HTML%20Reports/points-of-pride-conflicting-views-and-a-distinct-culture.aspx>.

¹⁸⁵ In 2004, eleven years before *Obergefell*, 60% of Americans opposed same-sex marriage. Five years after that decision, 61% support it. PEW RESEARCH CENTER, *Attitudes on Same-Sex Marriage* (May 14, 2019), <https://www.pewforum.org/fact-sheet/changing-attitudes-on-gay-marriage/>.

¹⁸⁶ In 1993, fifteen years before *Heller*, 57% of Americans thought gun control was more important than gun rights. Four years after that decision, 52% thought gun rights were more important. PEW RESEARCH CENTER, *Public Views About Guns* (June 22, 2017), <https://www.people-press.org/2017/06/22/public-views-about-guns/#total>.

¹⁸⁷ POLITICO/HARVARD T.H. CHAN SCHOOL OF PUBLIC HEALTH, *Americans' Priorities for the New Congress in 2019* (Dec. 9, 2018), <https://www.politico.com/f/?id=00000168-1450-da94-ad6d-1ffa86630001>.

Shepard and James Byrd, Jr., Hate Crimes Prevention Act may lead to stronger denunciations of hate crime, and fewer instances of it.

CONCLUSION

Like any good law, the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act is practical, logical, and necessary. Its origin and application reflect the reality of the times and culture in which we live. While it's been used only sparingly, it has been used successfully, and its very existence signals the importance to American society of affording special protection to those among us who need it. This is, after all, the work required of a functioning democratic government, and doing it strengthens our communities and our democracy. In coming years, as the culture that the Act responds to and reflects undergoes inevitable change (and, one hopes, growth), wisdom urges that the Act ought to change with it, in modulated and appropriate ways. Such is the nature and substance of good law.