Summary of Statement by Frederick M. Lawrence
Dean and Robert Kramer Research Professor of Law,
George Washington University Law School
Committee on the Judiciary House of Representatives
Subcommittee on Crime, Terrorism, and Homeland Security
Concerning H.R. 1592
April 17, 2007

The time for a strong federal hate crime law is long overdue, a law that will demonstrate a national commitment to the eradication of a kind of violence that threatens not only our physical safety but our core value of equality. The Local Law Enforcement Hate Crime Prevention Act of 2007, H.R. 1592, will take its place in the evolving Federal statutory response to bias-motivated violence; by some measures this will be the most important piece of Federal criminal civil rights legislation in nearly forty years, and, in some ways, the most important such legislation since Reconstruction. The proposed legislation raises many significant questions that implicate fundamental American values. I will focus on four inter-related questions:

(i) is it appropriate for a criminal law to punish on the basis of a perpetrator's motivation?
(ii) should gender, sexual orientation, gender identity, and disability be included in a federal bias crime law?
(iii) are bias crime laws consonant with principles of free expression? and
(iv) is a prominent federal role in the prosecution and punishment of bias crimes consistent with the proper division of authority between state (and local) government and the federal government in our political system?

I offer a firm answer in the affirmative as to each of these questions. Bias motivation is the key reason that bias crimes cause the harm they do. The resulting harm of a bias crime exceeds that of a similar crime lacking bias motivation on each of three levels: the nature of the injury sustained by the immediate victim of a bias crime; the palpable harm inflicted on the broader target community of the crime; and the harm to society at large. Gender-motivated violence and crimes targeting victims on the basis of sexual orientation, gender identity and disability are as much bias crimes as racially- and ethnically-motivated crimes. A broadened federal bias crime statute is warranted as a matter of constitutional law and public policy. As a matter of free expression, bias crime laws punish not the holding of beliefs or the expression of ideas but the extension of these beliefs and ideas into violent behavior intended to cause harm to its victims. Moreover, there is Constitutional authority for Congress to enact the law and it is part of our commitment to the equality ideal. Not all will agree on what exactly "the equality ideal" means. But none can deny that the commitment to equality is a core American principal. Bias crimes thus violate the national social contract, and not only that of the local or state community, and require a federal response.

The punishment of hate crimes alone will not end bigotry in our society. That great goal requires the work not only of the criminal justice system but of all aspects of civil life, public and private. Criminal punishment is indeed a crude tool and a blunt

instrument. But our inability to solve the entire problem should not dissuade us from dealing with parts of the problem. If we are to be staunch defenders of the right to be the same or different in a diverse society, we cannot desist from this task.

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Mr. Chairman and Members of the Committee:

I am honored by the opportunity to testify today on the issue of bias-motivated violence, more commonly known as hate crimes, and in support of H.R. 1592, the Local Law Enforcement Hate Crimes Prevention Act of 2007 ("Hate Crime Prevention Act"). My name is Frederick M. Lawrence. I am the Dean of The George Washington University Law School where I am the Robert Kramer Research Professor of Law. Before joining The George Washington University faculty in 2005, I was Professor of Law at Boston University School of Law where I was a member of the faculty since 1988. Prior to joining the Boston University faculty I served for five years as an Assistant United States Attorney for the Southern District of New York. From 1986-88 I was the Chief of the Civil Rights Unit of that office. A key focus of my career has been federal civil rights enforcement and civil rights crimes. My book on the subject of bias crimes, Punishing Hate: Bias Crimes Under American Law, was published by Harvard University Press.

I would like to express today my strong support for the proposed legislation to enact 18 U.S.C. §249 to augment the current federal law in 18 U.S.C. §245 that reaches crimes in which bias crime victims have engaged in one of six narrowly defined "federal protected activities." The proposed legislation will also extend the protection of federal law to bias crimes motivated by the victim's sexual orientation, gender, gender identity or disability. This legislation is not only permitted by doctrines of criminal and constitutional law but I believe it is mandated by our societal commitment to equality.

Bias crimes are a scourge on our society. Is there a more terrifying image in the mind's eye than that of the burning cross? Crimes that are motivated by racial hatred have a special and compelling call on our conscience. When predominantly Black churches were in flames across the South during the summer of 1996, it took only a matter of weeks for Congress to enact and the President to sign the Church Arson Prevention Act of 1996.[1] The Hate Crime Prevention Act will take its place in the evolving Federal statutory response to bias-motivated violence; by some measures it will be the most important piece of Federal criminal civil rights legislation in nearly forty years, and, in some ways, the most important such legislation since Reconstruction. The proposed legislation raises many significant questions that implicate fundamental American values, including free expression, and federalism. I will focus on four inter-related questions:

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[1] Church Arson Prevention Act of 1996, Pub. L. No. 104-155, 110 Stat. 1392, amending 18 U.S.C. §247.

(i) is it appropriate for a criminal law to punish on the basis of a perpetrator's motivation?
(ii) should gender, sexual orientation, gender identity, and disability be included in a federal bias crime law?
(iii) are bias crime laws consonant with principles of free expression? and
(iv) is a prominent federal role in the prosecution and punishment of bias crimes consistent with the proper division of authority between state (and local) government and the federal government in our political system?

I offer a firm answer in the affirmative to each of these questions. The punishment of bias crimes, with a substantial federal enforcement role, is not only permitted by doctrines of criminal law and constitutional law, it is mandated by our societal commitment to the equality ideal.

I. Motivation as an Element of Bias Crimes

Bias crimes are distinguished from "parallel crimes" (similar crimes lacking bias motivation) by the bias motivation of the perpetrator. A "gay bashing" is the parallel crime of assault with bias-motivated on the basis of sexual orientation. A cross burning on the lawn of a Black family is the parallel crime of vandalism or criminal menacing with racial motivation. Ordinarily, the criminal law is far more concerned with the perpetrator's culpability -- did he, for example, act purposely, recklessly, negligently, or only accidentally -- rather than the actor's motivation for his criminal acts. In the case of bias crimes, however, as with a select group of crimes where motivation is deemed relevant -- motivation is a critical and valid part of the definition of a crime.

Motivation is a critical part of the definition of bias crimes because it is the bias motivation of the perpetrator that caused the unique harm of the bias crime. I will first address the way in which the resulting harm of a bias crime exceeds that of a parallel crime on each of three levels: the nature of the injury sustained by the immediate victim of a bias crime; the palpable harm inflicted on the broader target community of the crime; and the harm to society at large. I will then turn to the question of whether motivation may be punished. This question is distinct from the related question of whether punishment of bias crimes is consonant with the First Amendment right to free expression which I shall address below.

Motivation and the Harm Caused by Bias Crimes

Impact of Bias Crimes on the Immediate Victims

Bias crimes may be distinguished from parallel crimes on the basis of their particular emotional and psychological impact on the victim. The victim of a bias crime is not attacked for a random reason -- as is the person injured during a shooting spree in a public place -- nor is he attacked for an impersonal reason -- as is the victim of a mugging for money. He is attacked for a specific, personal reason. Moreover, the bias

crime victim cannot reasonably minimize the risks of future attacks because he is unable to change the characteristic that made him a victim.

Bias crimes thus attack the victim not only physically but at the very core of his identify. It is an attack from which there is no escape. It is one thing to avoid the park at night because it is not safe. It is quite another to avoid certain neighborhoods because of, for example, one's race or religion. This heightened sense of vulnerability caused by bias crimes is beyond that normally found in crime victims. Bias crime victims have been compared to rape victims in that the physical harm associated with the crime, however great, is less significant than the powerful accompanying sense of violation.[2] The victims of bias crimes thus tend to experience psychological symptoms such as depression or withdrawal, as well as anxiety, feelings of helplessness and a profound sense of isolation.[3] One study of violence in the work-place found that victims of bias-motivated violence reported a significantly greater level of negative psycho-physiological symptoms than did victims of non-bias motivated violence.[4]

The marked increase in symptomatology among bias crime victims is true regardless of the race of the victim. The psychological trauma of being singled out because of one's race exists for white victims as well as members of minority groups.[5] This is not to suggest, however, that there is no difference between bias crimes committed by white perpetrators against people of color and those bias crimes in which the victim is white. A difference exists between Black and Hispanic victims and white victims concerning a second set of factors -- that is, defensive behavioral changes. Although bias crimes directed at minority victims do not produce a greater level of psychological damage than those aimed at white victims, they do cause minority bias crime victims to adopt a relatively more defensive behavioral posture than white bias crime victims typically adopt.[6]

The additional impact of a bias-motivated attack on a minority victim is not due solely to the fact that the victim was selected because of an immutable characteristic. This much is true for all victims of bias crimes. Rather, the very nature of the bias motivation, when directed against minority victims, triggers the history and social

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2 Joan Weiss, "Ethnoviolence: Impact Upon the Response of Victims and the Community," in Bias Crime: American Law Enforcement and Legal Response, 174, 182 (1993).

3 *See, e.g., See also* Training Guide for Hate Crime Data Collection: http://www.fbi.gov/ucr/traingd99.pdf; Weiss, Bias Crime, 182-183; Melinda Henneberger, "For Bias Crimes, a Double Trauma," Newsday, Jan. 9, 1992, at 113; N. R. Kleinfield, "Bias Crimes Hold Steady, But Leave Many Scars," New York Times, Jan. 27, 1992, at A1.

4 Joan C. Weiss, Howard J. Ehrlich, Barbara E. K. Larcom, "Ethnoviolence at Work," 18 Journal of Intergroup Relations, 28-29 (Winter 1991-92).

5 *Id.* The data collected for the study of bias-motivated violence at work was analyzed by ethnicity. There was no statistically significant difference among whites, blacks, and Hispanics in the average number of psychological symptoms experienced as a result of being the victim of bias-motivated violence. *Id.*, 29. Moreover, the rates of "ethnoviolent victimization" among whites and blacks in the study were approximately the same. *Id.*, 23.

6 *Id.*, 29. The defensive behavior changes included such items as staying home at night more often, watching children more closely, trying to be "less visible," or moving to another neighborhood. *Id.*, 27-28.

context of prejudice and prejudicial violence against the victim and his group. The bias component of crimes committed against minority group members is not merely prejudice per se but prejudice against a member of a historically oppressed group. In a similar vein, Charles Lawrence, in distinguishing racist speech from otherwise offensive words, described racist speech as words that "evoke in you all of the millions of cultural lessons regarding your inferiority that you have so painstakingly repressed, and imprint upon you a badge of servitude and subservience for all the world to see."[7] Minority victims of bias crimes therefore experience the attack as a form of violence that manifests racial stigmatization and its resulting harms.

Stigmatization has been shown to bring about humiliation, isolation and self-hatred.[8] A individual who has been racially stigmatized will often be hypersensitive in anticipation of contact with other members of society whom he sees as "normal" and will even suffer a kind of self-doubt that negatively affects his relationships with members of his own group.[9] The stigmatized individual may experience clinical symptoms such as high blood pressure[10] or increased use of narcotics and alcohol.[11] In addition, stigmatization may present itself in such social symptoms as an approach to parenting which undercuts the child's self-esteem and perpetuates an expectation of social failure.[12] All of these symptoms may result from the stigmatization that results from non-violent prejudice. Non-violent prejudice carries with it the clear message that the target and his group are of marginal value and could be subjected to even greater indignities, such as violence that is motivated by the prejudice. An even more serious presentation of these harms results when the potential for physical harm is realized in the form of the violent prejudice represented by bias crimes.[13]

The Impact of Bias Crimes on the Target Community

The impact of bias crimes reaches beyond the harm done to the immediate victim or victims of the criminal behavior. There is a more wide-spread impact on the "target community" -- that is, the community that shares the race, religion or ethnicity of the victim -- and an even broader based harm to the general society. Members of the target

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7 *See* Charles R. Lawrence III, "If He Hollers Let Him Go: Regulating Racist Speech on Campus," 1990 Duke Law Journal, 431, 461 (1990).

8 *See* Richard Delgado, "Words That Wound: A Tort Action for Racial Insults, Epithets, and Name Calling," 17 Harvard Civil Rights Civil Liberties Law Review, 133, 136-137 (1982).

9 *See, e.g.*, Gordon Allport, Nature of Prejudice, 148-149 (1954); Erving Goffman, Stigma: Notes on the Management of Spoiled Identity, 7-17, 130-135 (1963); Robert M. Page, Stigma, 1 (1984); Stevenson & Stewart, "A Developmental Study of Racial Awareness in Young Children," 9 Child Development, 399 (1958).

10 *See, e.g.*, Harburg, Erfurt, Havenstein, Chape, Schull & Schork, "Socio-Ecological Stress, Suppressed Hostility, Skin Color, and Black-White Male Blood Pressure: Detroit," 35 Psychosomatic Medicine, 276, 292-294 (1973).

11 *See, e.g.*, Kenneth Clark, Dark Ghetto: Dilemmas of Social Power, 82-90 (1965).

12 *See, e.g.*, Irwin Katz, Stigma: A Social Psychological Analysis, (1981); Harry H. L. Kitano, Race Relations, 125-126 (1974); Kiev, "Psychiatric Disorders in Minority Groups," Psychology and Race, 416, 420-424 (P. Watson, ed., 1973).

13 Allport, Nature of Prejudice, 56-59 (discussing the degrees of prejudicial action from "antilocution," to discrimination, to violence).

community of a bias crime experience that crime in a manner that has no equivalent in the public response to a parallel crime. Not only does the reaction of the target community go beyond mere sympathy with the immediate bias crime victim, it exceeds empathy as well.[14] Members of the target community of a bias crime perceive that crime as if it were an attack on themselves directly and individually. Consider the burning of a cross on the lawn of an African-American family or the spray-painting of swastikas and hateful graffiti on the home of a Jewish family. Others might associate themselves with the injuries done to these families, having feelings of anger or hurt, and thus sympathize with the victims. Still others might find that these crimes triggered within them feelings similar to the sense of victimization and attack felt by these families, and thus empathize with the victims. The reactions of members of the target community, however, will transcend both empathy and sympathy. The cross-burning and the swastika-scrawling will not just call up similar feelings on the part of other Blacks and Jews respectively. Rather, members of these target communities may experience reactions of actual threat and attack from this very event. Bias crimes may spread fear and intimidation beyond the immediate victims and their friends and families to those who share only racial characteristics with the victims.[15] 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.

This sense of victimization on the part of the target community leads to yet another social harm uniquely caused by bias crimes. Not only may the target community respond to the bias crime with fear, apprehension and anger, but this response may be directed at the group with which the immediate offenders are, either rightfully or, even more troubling, wrongfully, identified. Collective guilt always raises complicated questions of blaming the group for the acts of certain individuals. But it is one thing when groups are rightfully identified with the immediate offenders, for example, the association of a bias crime offender who is a member of a skinhead organization with other members of that organization. It is quite another when groups are wrongfully identified with the immediate offenders. Consider, for example, the association of those individuals who killed Yankel Rosenbaum with the Crown Heights Black community generally, or of those who killed Yousef Hawkins with the Bensonhurst white community generally. In addition to generating the generalized concern and anger over lawlessness and the perceived ineffectuality of law enforcement that often follows a parallel crime, therefore, a single bias crime may ignite inter-community tensions that may be of high intensity and of long-standing duration.[16]

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14 *See, e.g.*, Martha Minow, Making All the Difference: Inclusion, Exclusion, and American Law, 221 (1990) (stating the importance of empathy in combating discrimination in the United States).

15 *See , e.g.*, Robert Elias, The Politics of Victimization, 116 (1986); A. Karmen, Crime Victims: An Introduction to Victimology, 262-263 (2d ed., 1990); Levin & McDevitt, Hate Crimes; Mari J. Matsuda, "Public Response to Racist Speech: Considering the Victim's Story," 87 Michigan Law Review, 2320, 2330 (1989).

16 *See* Robert Kelly, Jess Maghan & Woodrow Tennant, "Hate Crimes: Victimizing the Stigmatized," in Bias Crime: American Law Enforcement Responses, 26 (Robert Kelly, ed., 1993). The Crown Heights Riots exemplify how the mere perception of a bias crime can lead to violence between racial groups. See, e.g., Lynne Duke, "Racial Violence Flares for 3rd Day in Brooklyn," Washington Post, Aug. 22, 1991, at A04 (describing how racial tensions from the vehicular killing of a black child led to riots in Crown Heights between African-Americans and Jews); "Crown Heights the Voices of Hate Must

The Impact of Bias Crimes on Society as a Whole

Finally, the impact of bias crimes may spread well beyond the immediate victims and the target community to the general society. This effect includes a large array of harms from the very concrete to the most abstract. On the most mundane level -- but by no means least damaging -- the isolation effects discussed above have a cumulative effect throughout a community. Consider a family, victimized by an act of bias-motivated vandalism, which then begins to withdraw from society generally; the family members seek safety from an unknown assailant who, having sought them out for identifiable reasons, might well do so again. Members of the community, even those who are sympathetic to the plight of the victim family and who have been supportive to them, may be reluctant to place themselves in harm's way and will shy away from socializing with these victims or having their children do so. The isolation of this family will not be solely their act of withdrawal; there is a societal act of isolation as well that injures both the family that is cut off and the community at large.

Bias crimes cause an even broader injury to the general community. Such crimes violate not only society's general concern for the security of its members and their property but also the shared value of equality among its citizens and racial and religious harmony in a heterogeneous society. A bias crime is therefore a profound violation of the egalitarian ideal and the anti-discrimination principle that have become fundamental not only to the American legal system but to American culture as well.[17]

This harm is, of course, highly contextual. We could imagine a society in which racial motivation for a crime would implicate no greater value in society than the values violated by a criminal act motivated solely by the perpetrator's dislike of the victim. But it is not ours, with our legal and social history. Bias crimes implicate a social history of prejudice, discrimination, and even oppression. As such, they cause a greater harm than parallel crimes to the immediate victim of the crime, the target community of the crime, and to the general society.

Motivation as an Element of the Crime

The fact that bias motivation is a key element of bias crimes has drawn criticism from some who have argued that bias crime laws impermissibly stray beyond the punishment of act and purposeful intent and go on to punish motivation. This concern was well stated by the Wisconsin Supreme Court, later overruled by the United States Supreme Court, in *Wisconsin v. Mitchell*:

> Because all of the [parallel] crimes are already punishable, all that remains is an additional punishment for the defendant's motive in selecting the victim. The

Not Prevail," Detroit Free Press, Aug. 25, 1991, at 2F (stating that violence erupted between the African-American and Jewish community after the accidental killing of a black child by a Hasidic Jew).

[17] *See , e.g.,* Delgado, *supra* note 8, at 140-141. *See generally* Paul Brest, "The Supreme Court, 1975 Term - Forward: In Defense of the Antidiscrimination Principle," 90 Harvard Law Review 1 (1976).

punishment of the defendant's bigoted motive by the hate crimes statute directly implicates and encroaches upon First Amendment rights.[18]

This holding, however, is not required by a careful analysis of the relevant doctrines. Purely as a matter of positive law, concern with the punishment of motivation is misplaced. Motive often determines punishment. In those states with capital punishment, the defendant's motivation for the homicide stands prominent among the recognized aggravating factors that may contribute to the imposition of the death sentence. For instance, the motivation of profit in murder cases is a significant aggravating factor adopted in most capital sentencing schemes.[19]

Bias motivation itself may serve as an aggravating circumstance. In *Barclay v. Florida*,[20] the Supreme Court explicitly upheld the use of racial bias as an aggravating factor in the sentencing phase of a capital case. The Court reaffirmed *Barclay* in 1992 in *Dawson v. Delaware*.[21] The prosecution in *Dawson* sought to use the defendant's membership in the Aryan Brotherhood as an aggravating circumstance. The Court rejected the prosecution argument but only because the defendant had been convicted of a same race murder, not a bias-motivated murder, and because the prosecution did not argue that the defendant's relationship with the Aryan Brotherhood indicated a propensity for future violence. In this case, therefore, the evidence was deemed irrelevant and thus inadmissible. But in reaching that holding, the Court reaffirmed the holding in *Barclay* that evidence of racial intolerance and subversive advocacy were admissible where such evidence was relevant to the issues involved in sentencing. [22] Moreover, several federal civil rights crimes statutes explicitly make racial motivation an element of criminal liability.[23]

Finally, racial motivation is the *sine qua non* for a vast set of civil anti-discrimination laws governing discrimination in employment[24] and housing[25] among

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18 State v. Mitchell, 485 N. W. 2d 807, 812 (Wis. 1992), *rev'd*, 508 U.S. 476 (1993). *See* State v. Wyant,, 597 N. E. 2d 450 (Ohio 1992), *vacated* 508 U.S. 969 (1993).

19 *See, e.g.*, Model Penal Code § 210.6(3)(g) (Official Draft 1985) (among aggravating circumstances to be considered is whether the "murder was committed for pecuniary gain"); Conn. Gen. Stat. Ann. § 53a-46a (West 2001); Del. Code Ann. Tit. 11, §4209 (2001); N.H. Rev. Stat. Ann. § 630:5 (1996).

20 Barclay v. Florida, 463 U.S. 939, 940 (1983) ("U. S. Constitution does not prohibit a trial judge from taking into account the elements of racial hatred," provided it is relevant to the aggravating factors).

21 Dawson v. Delaware, 503 U.S. 159 (1992).

22 *Id*., 163.

23 *See* 18 U.S.C. §245(b)(2) (2000) (proscribing force or intimidation against a victim because of the victim's race and because the victim is engaged in one of certain enumerated activities); 18 U.S.C. §242 (2000) (proscribing, inter alia, disparate punishment of persons based on race or national origin); 42 U.S.C. §3631 (2000) (proscribing racially-motivated interference with right of access to housing by intimidation and the threat of force). See also Church Arson Prevention Act of 1996, Pub. L. No. 104-555, 110 Stat. 1392, amending 18 U.S.C. §247.

24 *See, e.g.*, Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, 78 Stat. 253 (codified as amended at 42 U.S.C. §§2000e (2000)). *See also* Wards Cove Packing Co. v. Atonio, 490 U. S. 642

others. In most states, for example, unless an employment contract or collective bargaining agreement provides otherwise, an employer may fire an employee for any reason at all or for no reason whatsoever. Under Federal (and often State) civil rights laws, however, this same firing becomes illegal if it is motivated by the employee's race or a number of other protected characteristics. Thus, the only way to determine whether such a firing is legal or not is to inquire at some level into the motivation of the employer. If bias crime laws unconstitutionally punish motivation as a matter of First Amendment doctrine, then this argument should apply with equal weight to those statutory schemes that authorize civil damage awards for otherwise permissible actions such as discharging an at-will employee. No one has seriously challenged civil anti-discrimination laws on this basis nor would any court uphold such a challenge. Bias crime laws do not raise a different issue in any relevant manner.

The second flaw with the argument that motive may not be a basis for punishment is somewhat more abstract. The argument against the punishment of motive is necessarily premised on the assertion that motive can be distinguished from *mens rea*, that is, that motive can be distinguished from intent. Plainly, an actor's intent is a permissible basis for punishment. Indeed, intent serves as the organizing mechanism of modern theories of criminal punishment. Specifically, intent concerns the mental state provided in the definition of an offense in order for assessing the actor's culpability with respect to the elements of the offense.[26] Motive, on the other hand, concerns the cause that drives the actor to commit the offense.[27] On this formal level, motive and intent may be distinguished.

The distinction between intent and motive does not hold the weight that some would place upon it because the decision as to what constitutes motive and what constitutes intent depends on what is being criminalized. Criminal statutes define the elements of the crime and a mental state applies to each element. The mental state that applies to an element of the crime we will call "intent" whereas any mental states that are extrinsic to the elements we will call "motivation." The formal distinction, therefore, turns entirely on what are considered to be the elements of the crime. What is a matter of intent in one context may be a matter of motive in another. Consider the bias crime of a racially-motivated assault upon an African-American. There are two equally accurate descriptions of this crime, that is, two different ways in which a state might define the elements of this bias crime: one describes the bias as a matter of *intent*; the other, as a separate matter of *motive*. The perpetrator of this crime could be seen as either:

(i) possessing a *mens rea* of purpose with respect to the assault along with a *motivation* of racial bias; or

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(1989); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981) (disparate treatment claims require showing of intentional discrimination by the defendant).

25 *See* Fair Housing Act of 1968, Pub. L. No. 90-284, tit. VIII, 82 Stat. 83 (codified as amended at 42 U.S.C. §3601 (2000)).

26 Joshua Dressler, Understanding Criminal Law 96-97 (1987). *See also* Model Penal Code §2.02(2)(a)(i) (Official Draft 1985) (defining the mental state of "purpose" as a person's conscious object to engage in certain conduct or cause a certain result).

27 *See* Wayne R. LaFave & Austin W. Scott, Criminal Law §3.6, 227-228 (2d ed., 1986).

(ii) possessing a first-tier *mens rea* of purpose with respect to the parallel crime of assault and a second-tier *mens rea* of purpose with respect to assaulting *this* victim because of his race.

Either description accurately states that which a bias crime law could criminalize. The defendant in description (i) "intends" to assault his victim and does so *because* the defendant is a racist. The defendant in description (ii) "intends" to assault an African American and does so with both an intent to assault and a discriminatory or animus-driven intent as to the selection of the victim.

Because both descriptions are accurate, the formal distinction between intent and motive fails. Whether bias crime laws punish motivation or intent is not inherent in those prohibitions. Rather the distinction simply mirrors the way in which we choose to describe them. In punishing bias-motivated violence, therefore, the Hate Crimes Prevention Act raises neither pragmatic nor doctrinal problems concerning a punishment of motivation. Properly understood, bias crime laws punish motivation no more than do criminal proscriptions generally.

II. Should Gender, Sexual Orientation, Gender Identity and Disability be Included in a Federal Criminal Civil Rights Statute?

A bias crime is a crime committed as an act of prejudice. Prejudice, in this context, is not strictly a personal predilection of the perpetrator. A prejudiced person usually exhibits antipathy towards members of a group based on false stereotypical views of that group. But in order for this to be the kind of prejudice of which we speak here, this antipathy must exist in a social context, that is, it must be an animus that is shared by others in the culture and that is a recognizable social pathology within the culture.

Gender, sexual orientation, gender identity and disability ought to be included in a federal bias crime law as they are in the Hate Crimes Prevention Act. The violence involved in each case arises from a social context of animus. Opponents to including gender generally do not argue that women as a class are unsuitable for bias crime protection. Sex is generally an immutable characteristic, and no one seriously argues that women are not victimized as a result of their gender. Instead, opponents argue that crimes against women are not *real* bias crimes, that is, that they do not fit the bias crime model. The argument against including sexual orientation and gender identity instead looks to the qualities of the characteristic itself. Some opponents, either because they view sexual orientation and gender identity as a choice and not as an immutable characteristic, or because they are wary of giving special rights to gays and lesbians, argue that homosexuals do not deserve inclusion in bias crime statutes.[28] Both sets of arguments, however, are ultimately flawed. Finally, including disability in a federal bias crime law

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28 *See, e.g.*, comments by Rep. Woody Burton of the Indiana House, arguing that gays and lesbians choose homosexuality and do not deserve protection under the state's hate crimes bill. "Gay Protection Stays in Hate Crimes Bill," Chicago Tribune, February 2, 1994 at 3; comments by Sen. John Hilgert of the Nebraska State Legislature arguing that gays and lesbians do not need protection under the state's a bias crimes bill because they are an "affluent, powerful class." "State Hate Crimes Law Urged Nebraska Legislators hear from Police, Civil Rights Officials," The Omaha World-Herald, February 14, 1997.

would be an appropriate extension of the Congressional commitment to the rights of the disabled.

Should Gender be Included in Bias Crime Laws

Those who argue that gender should not be a bias crime category assert that gender-related crimes do not fit the standard bias crime model. The chief factor in bias crimes is that the victim is attacked because he possesses the group characteristic. From this chief factor, two things follow:

(i) victims are interchangeable, so long as they share the characteristic; and

(ii) victims generally have little or no pre-existing relationship with the perpetrator that might give rise to some motive for the crime other than bias toward the group.

Those who oppose the inclusion of gender in bias crime laws argue, among other things, that victims of many gender-related crimes are not interchangeable,[29] and that victims often have a prior relationship with their attackers.[30] Because assailants are acquainted with their victims in many gender-related cases, the argument goes, the victims are not interchangeable and the crime does not fit into the bias crime category. Particularly in cases of acquaintance rape and domestic violence, the prior personal relationship between victim and assailant makes it difficult to prove that gender animus, and not some other component of the relationship, is the motivation for the crime.

Gender-motivated violence, however, should be included in bias crime statutes.[31] This is not to say that all crimes where the perpetrator is a man and the victim is a woman are bias crimes. But where the violence is motivated by gender, this is a classic bias crime. This is most obviously true in cases of stranger rape or random violence against women. The recent case of Charles Carl Roberts IV makes the point powerfully. On October 2, 2006, in Nickel Mines, Pennsylvania, Roberts finished his milk route, dropped his children off at school and drove to an Amish school. Roberts entered the school with gun in hand and calmly dismissed three women with infants and fifteen boys, barricading himself in with the ten remaining girls. Roberts then bound the girls together at the head of the classroom, called 911 and calmly told police to leave, and then shot each girl and then himself. The aftermath left five young girls and Roberts dead, with the other five girls injured. Before the assault, Roberts had left suicide notes and called his wife to let her know he was not coming home. He told his wife he had molested three and five-year old female relatives twenty years ago and was dreaming of molesting children again.

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29 *See* Lois Copeland & Leslie R. Wolfe, Violence Against Women as Bias Motivated Hate Crime: Defining the Issues, 32 (1991); Steven Bennett Weisburd & Brian Levin, "'On the Basis of Sex': Recognizing Gender-Based Bias Crimes," 5 Stanford Law and Policy Review 21, 36 (Spring 1994).

30 Weisburd and Levin, 5 Stanford Law and Policy Review at 38 (discussing the personal relationship dynamic and arguing that the existence of such a relationship should not preclude bias crime classification where there is also evidence of a group component, that is, evidence that victimization is due at least in part to bias against the victim's gender).

31 Congress did include gender as a category in the legislation that enhances the penalties for federal crimes committed with bias-motivation. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 60003(a)(14), 108 Stat. 1796 (1994) (codified at 42 U.S.C. § 13701 (1994)). See 42 U.S.C. §994 (hereinafter 42 U.S.C. §994).

Police said he may have targeted the school for its female students and may have intended to molest them.

Robert's crime plainly fits the model of classic bias crimes: his victims were shot solely because they were female and, from his point of view, could well have been a different group of individuals, so long as they were female. An attacker's acquaintance with his victim would not make a race or religion-based crime any less a bias crime. Motive can be difficult to prove in a gender-related crime. Nonetheless, proof of discriminatory motive is difficult for any bias crime, and this has not and should not preclude the enactment of bias crime laws.[32] Bias crimes should include only gender-*motivated* violence and not all crimes that happen to have female victims. But those crimes where gender-motivation can be proved clearly share all the characteristics of bias crimes, and should be punished as such.

Inclusion of gender in the Hate Crimes Prevention Act will not, as some fear, lead to the federalization of all cases of rape, sexual assault, and domestic violence. As will be discussed below in Part IV of this Statement, the legislation is clearly designed such that federal law enforcement will come into play only in those cases in which there is a strong federal interest and an essential federal role to be played. As suggested by the strong support that this legislation has drawn from local law enforcement groups, there is no realistic concern that the Hate Crimes Prevention Act will lead to an excessive role of federal law enforcement in what are essentially state law matters.

Sexual Orientation and Gender Identity

It is difficult to make a strong argument that crime motivated by bias, on the basis of sexual orientation -- "gay bashing" -- does not fit the bias crime model. The factors that make some gender-related crimes so problematic, existence of a personal relationship or the lack of victim interchangeability, are not present in most crimes against homosexuals on the basis of their sexual orientation. Many crimes against homosexuals share all of the characteristics of bias crimes.[33] If one of the purposes of bias crime statutes is to protect frequently victimized groups, sexual orientation is particularly worthy of inclusion. Some surveys indicate that over fifty percent of homosexuals in the United States have been the victims of attacks motivated by sexual orientation.[34] A Department of Justice report noted that "homosexuals are probably the most frequent victims of hate crimes."[35] Several legislators who have supported the

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[32] Marguerite Angelari, "Hate Crime Statutes: A Promising Tool for Fighting Violence Against Women," 2 American University Journal of Gender and Law 63, 98-99 (1994).

[33] Anthony S. Winer, "Hate Crimes, Homosexuals, and the Constitution," 29 Harvard Civil Rights - Civil Liberties Law Review 387 (1994).

[34] Gary D. Comstock, Violence Against Lesbians and Gay Men 36 (1991).

[35] National Institute of Justice, United States Department of Justice, The Response of the Criminal Justice System to Bias Crime: An Exploratory Review (1987). *See also* FBI 2005 Hate Crimes Statistics Act report: http://www.fbi.gov/ucr/hc2005/index.html (reporting 1,017 crimes directed at gays and lesbians -- 14.2% of all crimes -- making them the third most frequent victims of hate violence, behind race and religion).

addition of sexual orientation to state and local bias crime laws did so at least partly in response to an increase, or at least an increase in reported bias-motivated crimes against homosexuals.[36]

The debate over the inclusion of sexual orientation in bias crime laws has turned primarily on a different factor: whether homosexuality as a category deserves bias crime protection. At times, this argument has been couched in terms of whether homosexuality is an immutable characteristic in the way that race, color, ethnicity, or national origin are.

The argument for exclusion of sexual orientation from bias crime laws because of the non-immutability of homosexuality is weak for two sets of reasons. First, there is much evidence that sexual orientation is indeed immutable, whether for genetic reasons alone, or some combination of genetic and environmental reasons.[37] Even if this evidence is not conclusive, there is certainly no scientific basis to conclude that sexual orientation is a matter of personal choice.

Second, immutability turns out to be a multi-layered concept. Even if we were to assume that homosexuality is indeed chosen behavior, sexual orientation would be appropriate for a bias crime law. After all, this same argument could be made with respect to religion, one of the classic bias crime characteristics. The choice not to remain Jewish or Catholic is certainly more real than the choice not to remain Black. The reason that religion, along with race, color, ethnicity, and national origin, is protected by virtually all bias crime statutes, is that we deem it unreasonable to suggest that a Jew or Catholic might just choose to avoid discrimination by giving up her religion. Indeed, we deem it outrageous. Understood in this light, the question of immutability collapses into a basic value-driven question: are homosexuals somehow deserving of less protection than other groups? The Supreme Court has already answered this question in *Romer v. Evans*,[38] In *Romer*, the Court struck down Colorado's "Amendment 2," a state constitutional amendment that prohibited any governmental action designed to protect the civil rights of homosexuals. An explicit denial of rights to gays and lesbians is irrational and thus unconstitutional.

The inclusion of sexual orientation and gender identity in the Hate Crimes Prevention Act fills an important gap in federal bias crime law enforcement. First, although in 1994, Congress directed the United States Sentencing Commission to enhance penalties for federal crimes committed with bias, including sexual orientation,[39] this provision is limited to those acts of violence that are already federal crimes. Thus its reach is quite limited, failing to cover, for example, assault and vandalism, the two most common forms of bias crimes. Second, 18 U.S.C. §245 does not cover bias crimes based

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36 *See* "Hate Crimes May Affect Legislation," Charleston Daily Mail, Mar. 13, 1997; "Panel Hears Harassment Bill Testimony," Portland Oregonian, Feb. 10, 1993 at D8; Jo-Ann Armao, "Hate-Crime Bill Voted To Aid Gays," The Washington Post, Sept. 20, 1989 at B1; "Lawyers Tell Legislators: Strengthen, Broaden 'Hate Crimes' Law," AIDS Weekly, May 5, 1992.

37 *See* John Travis, "X Chromosome Again Linked to Homosexuality," Science News, Nov. 4, 1995 at 295; Eliot Marshall, "NIH's 'Gay Gene' Study Questioned," Science, June 30, 1995 at 1841.

38 Romer v. Evans, 517 U.S. 620 (1996)

39 *See* Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. §994.

on sexual orientation unless there is some independent basis for federal jurisdiction, such as racial bias. Finally, gender identity, although plausibly covered by the inclusion of gender and sexual orientation, is not clearly covered. Instances of bias motivated violence based on the actual or perceived gender identity of the victim represents another assault on the right to be different and to exist safely in a diverse society such as ours.

Disability

Congressional commitment to the rights of disabled Americans is best exemplified by the landmark Americans with Disabilities Act of 1990. This commitment has already been extended into the area of bias-motivated violence directed at the disabled by the inclusion of disability in the Hate Crimes Statistics Act in 1994 and the Violent Crime Control and Law Enforcement Act of 1994, However, disability-driven violence is not covered by 18 U.S.C §245 such that today federal law enforcement has authority neither to investigate nor prosecute, nor even help in the investigation or prosecution of such crimes. By including disability as a category, the Hate Crime Prevention Act at long last fills this significant gap in the law.

III. Bias Crime Laws and the Right to Free Expression

Bias crime laws have caused us to focus more on the relationship between First Amendment rights and civil rights than at any time since Nazis threatened to march in Skokie, Illinois in the late 1970s.[40] To be sure there is a tension here. On the one hand, we have crimes that are worse exactly because of their bias motivation. On the other hand, we have a fundamental constitutional principle: the right to free expression of ideas, even if distasteful or hateful. The right to free expression, based in the First Amendment to the Constitution, lies at the heart of our legal culture.

I believe that the purported conflict between the punishment of bias crimes and the protection of free expression is an *apparent* conflict because the so-called paradox of seeking to punish the perpetrators of bias motivated violence while being committed to protecting the bigot's rights to express racism is a false paradox. We can in fact do both and the Hate Crime Prevention Act is consistent with the First Amendment precisely because it does do both.

Bias Crime Laws are Consonant with the First Amendment and Principles of Free Expression

Well over a decade ago, the Supreme Court in *Wisconsin v. Mitchell*[41] held that bias crime laws are constitutional. The Hate Crime Prevention Act thus breaks no new ground where the First Amendment is concerned and, as will be discussed shortly, to the

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[40] *See generally* Donald A. Downs, Nazis in Skokie: Freedom, Community, and the First Amendment (1985); James L. Gibson & Richard D. Bingham, Civil Liberties & Nazis: The Skokie Free Speech Controversy (1985); David Hamlin, The Nazi Skokie Conflict: A Civil Liberties Battle (1982).

[41] Wisconsin v. Mitchell, 508 U.S. 476 (1993).

extent it does, it provides *greater* protection for the right of free expression that hate crime laws such as that upheld in the *Mitchell* case.

In *Wisconsin v. Mitchell*, the Supreme Court considered the Constitutionality of the Wisconsin bias crime statute. The statute provided for penalty enhancement for crimes of violence in which the defendant "intentionally selects the person against whom the crime [is committed] because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person." The defendant in the case was Todd *Mitchell*, a nineteen-year old Black man, convicted of aggravated battery for his role in the severe beating of Gregory Riddick a fourteen-year old white male. Under Wisconsin law, this crime carries a maximum sentence of two years.[42] Wisconsin's penalty enhancement law, however, provided that the possible maximum penalty for a bias motivated aggravated battery is seven years.[43] In addition to his conviction for battery, Mitchell was found to have acted out of racial bias in the selection of the victim. Facing a possible seven-year sentence, he was sentenced to four years incarceration.[44]

The defendant challenged his sentence on the grounds that the bias crime statute amounted to punishment of his thoughts. The Supreme Court unanimously rejected this argument and upheld both the sentence and the statute, noting that "[t]raditionally, sentencing judges have considered a wide variety of factors in addition to evidence bearing on guilt in determining what sentence to impose on a convicted defendant," The Court held that the statute was directed at a defendant's conduct -- committing the crime of assault – and not his thoughts. The Court then held that, because the bias motivation would have to have a close nexus with a specific criminal act, there was little risk that the

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[42] Wis. Stat. Ann. §§939.05, 939.50(3)(e), 940.19 (1m) (West 2005) (sentence for complicity in aggravated battery is two years).

[43] Wis. Stat. Ann. §939.645 (West 2005) provides:

(1) If a person does all of the following, the penalties for the underlying crimes are increased as provided in sub. (2):

(a) Commits a crime under chs. 939 to 948.

(b) Intentionally selects the person against whom the crime under par. (a) is committed or selects the property which is damaged or otherwise affected by the crime under par. (a) in whole or in part because of the actor's belief or perception regarding the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property, whether or not the actor's belief or perception was correct.

(2)(a) If the crime committed under sub. (1) is ordinarily a misdemeanor other than a Class A misdemeanor, the revised maximum fine is $10,000 and the revised maximum period of imprisonment is one year in the county jail.

(b)If the crime committed under sub. (1) is ordinarily a Class A misdemeanor, the penalty increase under this section changes the status of the crime to a felony and the revised maximum fine is $10,000 and the revised maximum period of imprisonment is 2 years.

(c)If the crime committed under sub. (1) is ordinarily a felony, the maximum fine prescribed by law for the crime may be increased by not more than $5,000 and the maximum term of imprisonment prescribed by law for the crime may be increased by not more than 5 years.

(3) This section provides for the enhancement of the penalties applicable for the underlying crime. The court shall direct that the trier of fact find a special verdict as to all of the issues specified in sub. (1).

(4)This section does not apply to any crime if proof of race, religion, color, disability, sexual orientation, national origin or ancestry or proof of any person's perception or belief regarding another's race, religion, color, disability, sexual orientation, national origin, or ancestry is required for a conviction for that crime.

[44] Mitchell, 485 N.W. 2d at 807.

statute would chill protected bigoted speech. The statute focused not on the defendant's bigoted ideas, but rather on his actions based upon those ideas. Finally, the Court made clear that "the First Amendment . . . does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent."

The Supreme Court considered and rejected a similar challenge to a law aimed at bias-motivated violence based on its alleged interference with free expression when it upheld a conviction under Virginia's cross-burning statute in *Virginia v. Black.*[45] The cross-burning statute provided in pertinent part as follows:

> It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place. Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.[46]

Virginia v. Black arose out of two separate cases involving three defendants. Like textbook examples, the two cases represent the two poles of cross burnings – criminal domestic terrorism and constitutionally protected expression of White supremacy. Barry Black led a Ku Klux Klan rally on private property, at the conclusion of which a twenty-five to thirty-foot cross was burned. At his trial, the jury was instructed that they were required to find an "intent to intimidate" and that "the burning of a cross by itself is sufficient evidence from which you may infer the required intent."[47] The cross burning for which Richard Elliott and Jonathan O'Mara were prosecuted was quite different. They attempted to burn a cross on the lawn of an African-American, James Jubilee, who had recently moved next door, to "get back" at Jubilee.[48] At the trial, the jury was instructed that they could infer the requisite intent for the crime of cross burning from the act of burning the cross itself. The judge went on to instruct the jury that the Commonwealth was required to prove, among other things, that "the defendant had the intent of intimidating any person or group of persons."[49]

All three defendants appealed to the Supreme Court of Virginia. That court struck down the cross-burning statute, relying heavily on *R.A.V. v. City of St. Paul*[50], the 1992 case in which the Court struck down a cross-burning ordinance as a content-related proscription in violation of the First Amendment.[51] The United States Supreme Court granted certiorari on two related issues: whether the cross-burning statute violated the First Amendment as interpreted in *R.A.V.* (the *R.A.V.* issue), and whether the statutory

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[45] Virginia v. Black, 538 U.S. 343 (2003).

[46] Va. Code. Ann. §18.2-423 (2004) (enacted in 1950). The prima facie provision was added to the statute in 1968.

[47] Black, 538 U.S. at 349.

[48] Id. at 350.

[49] Id.

[50] R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

[51] Black v. Commonwealth, 553 S.E. 2d 738 (2001), aff'd in part and vacated in part, 538 U.S. 343 (2003).

presumption that cross burning itself is "prima facie evidence" of the defendant's intent to intimate was unconstitutionally overbroad (the overbreadth issue). In an opinion by Justice O'Connor, the majority of the Court upheld the statute on the *R.A.V.* issue. Although there was no majority opinion on the overbreadth issue, a majority of the Court was of the view that the statutory presumption was constitutionally invalid.[52]

A blueprint for a constitutional cross-burning statute emerges from a consideration of the Court's treatment of the two issues. The *R.A.V.* issue concerned the holding in that case that the St. Paul cross-burning ordinance was an unconstitutional content-based prohibition, proscribing only that conduct that will cause "anger, alarm or resentment in others on the basis of race, color, creed, religion or gender" and not on any other basis. The Court in *Black* upheld the Virginia statute as a law aimed at *all* cross burnings that are intended to intimidate, regardless of the race or ethnicity of the victim.[53] The overbreadth issue concerned the "prima facie evidence" clause of the cross-burning statute. Intimidation would have to be proved, not presumed, unless is an easily rebuttable presumption.[54] The decision in *Black* thus represents a significant refinement to the holding in *R.A.V.*, and one that is ultimately supportive of a view that bias crime laws are consistent with concerns of free expression, both constitutional and philosophical.

The balance between protecting speech and enforcing bias crimes may be illustrated by considering the specific facts at issue in *Black*. Wholly consistent with the values of free expression, Virginia might punish Richard Elliott and Jonathan O'Mara, and these same values preclude Virginia from punishing Barry Black. Moreover, Virginia could prosecute Elliott and O'Mara for a bias-motivated crime of cross burning. Virginia could punish Elliot and O'Mara not only for intending to terrorize Jubilee but also for doing so with a further intent ("motivation" if you like) to terrorize Jubilee because of his race and to cause fear and harm to other African-Americans.[55] They would receive an enhanced punishment for committing a crime with a heightened level of intent, one that is intended to cause a great and more pervasive level of harm.

The Hate Crimes Prevention Act is Consonant with the First Amendment

Under the Supreme Court's jurisprudence established in *Wisconsin v. Mitchell* and *Virginia v. Black*, bias crime statutes generally are constitutional. In it noteworthy that the Hate Crimes Prevention Act provides even great protection for the rights of free expression that was present in the statutes upheld in *Mitchell* and *Black*.

Under Section 7 of the proposed legislation, §249(d) shall provide as follows:

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52 See Black, 538 U.S. at 364-67 (O'Connor, J., plurality); 538 U.S. at 384-87 (Souter, J., concurring in judgment and dissenting in part).

53 Id. at 362-63.

54 Id. at 366 (O'Connor, J.); Id. at 385 (Souter, J.); Id. at 368-71 (Scalia, J., concurring in part, concurring in the judgment in part, and dissenting in part).

55 See Frederick M. Lawrence, Punishing Hate: Bias Crimes Under American Law, 106-109 (1999).

> Rule of Evidence – In a prosecution for the offense under this section, evidence of expression or associations of the defendant may not be introduced as substantive evidence at trial, unless the evidence specifically related to that offense. However nothing in this section affects the rules of evidence governing impeachment of a witness.

It does not appear that such a rule excluding evidence of expression is required by the First Amendment under the *Mitchell* holding. But the protections provided by Section 7 of the Hate Crimes Prevention Act further address any concerns that this law will infringe on rights of free expression or free thought. The Hate Crime Prevention Act, as is true of bias crime laws adopted by states throughout the country, is aimed at criminal acts, not expression or thoughts.

The second, and somewhat more complex, way of considering this question, allows us to situate this discussion in a broader context of the "fighting words" doctrine and again, permits a criminal law that reaches bias-motivated violence without reaching protected aspects of hate speech.

IV. The Federal Role and the State Role in the Punishment of Bias Crimes

Because bias crimes are distinguished from ordinary state law crimes solely by the actor's bias motivation toward the victim, we confront three sets of questions concerning a *federal* bias crime law such as the Hate Crimes Prevention Act.

> (i) the constitutional question -- is there a constitutional basis for federal criminal jurisdiction over bias crimes?
> (ii) the prudential question -- assuming a constitutional basis for federal criminal jurisdiction over bias crimes, is there a sufficient federal interest here to warrant such legislation?
> (iii) the pragmatic question -- assuming both a constitutional basis and prudential need for federal bias crime laws, how ought federal and state jurisdiction over these crimes work together?

The constitutional question -- is there a constitutional basis for federal criminal jurisdiction over bias crimes?

In my opinion, Congressional authority to enact the Hate Crimes Prevention Act is found in the Thirteenth Amendment and in the Commerce Clause of the Constitution.

The Thirteenth Amendment states that "[n]either slavery nor involuntary servitude . . . shall exist within the United States" and further provides Congress with the

power to enforce the amendment "by appropriate legislation."[56] Nineteenth and early Twentieth Century judicial interpretation of the amendment interpreted its scope and purpose narrowly, viewing it as a formal statement of emancipation which was largely already accomplished. For example, in *Hodges v. United States*, the Court dismissed an indictment that had charged a group of white defendants with conspiring to deprive Black workers of the right to make contracts, because the violation of the right to make a contract was not an incident of slavery.[57] The modern view of the Thirteenth Amendment is much broader. In a series of cases, the Supreme Court has articulated a theory of the Thirteenth Amendment as a source of broad proscription of all the "badges and incidents" of slavery. Moreover, this proscription applied to the conduct of private individuals, not just to state actions.

The path-breaking case was *Jones v. Alfred Mayer Co.*[58] in which the Court held that private racial discrimination in the sale of property violated section 1982, a First Reconstruction civil statute that guarantees to all citizens the "same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold and convey real and personal property."[59] In this regard, *Jones* expressly overruled *Hodges*. Several years later, in *Runyon v. McCrary*,[60] the Court similarly held that section 1981, a statute of the same period providing all persons with "the same right . . . to make and enforce contracts. . . as is enjoyed by white citizens. . . "[61] prohibited private racial discrimination in any contractual arrangements. *Runyon* itself involved discrimination in education. In *Jones* and *Runyon*, the Court held that the Thirteenth Amendment provided the constitutional authority for the regulation of private discriminatory conduct. Just as the first section of the Amendment had abolished slavery and all "badges and incidents" of slavery, so the second section empowered Congress to make any rational determination as to that conduct which constitutes a badge or incident of slavery and to ban, whether from public or private sources.

The abolition of slavery in the Thirteenth Amendment, although clearly grounded in the enslavement of African-Americans has always been understood to apply beyond the context of race. As early as the *Slaughter House Cases*, Justice Miller saw the Thirteenth Amendment as a prohibition not only against slavery of Black citizens but "Mexican peonage" and "Chinese coolie labor systems" as well.[62] Modern cases have extended the protection of the amendment to religious and ethnic groups as well.[63]

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56 U.S. Const. amend. XIII, §1, 2.

57 Hodges v. United States, 203 U.S. 1 (1906). See also discussion in Part B of Chapter 5 of the Thirteenth Amendment and the judicial interpretation of the Amendment in *Slaughter House Cases* and *Civil Right Cases*.

58 Jones v. Alfred H. Mayer Co., 392 U. S. 409 (1968).

59 42 U.S.C. §1982 (2000).

60 Runyon v. McCrary, 427 U. S. 160 (1976).

61 42 U.S.C. §1981 (2000).

62 Slaughter-House Cases, 83 U.S. 36, 72 (1873).

63 St. Francis College v. Al-Khazraji, 481 U. S. 604 (1987); Shaare Tefila Congregation v. Cobb, 481 U. S. 615 (1987).

As a matter of constitutional authority, Congress may enact a federal bias crime law so long as it is rational to determine that racially-motivated violence is as much a "badge" or "incident" of slavery as is discrimination in contractual or property matters. This determination is surely rational. Racially-motivated violence, from the First Reconstruction on, was in large part a means of maintaining the subjugation of Blacks that had existed under slavery. Violence was an integral part of the institution of slavery, and post-Thirteenth Amendment racial violence was designed to continue *de facto* what was constitutionally no longer permitted *de jure*.

The broad reach of the Thirteenth Amendment as understood today goes beyond a prohibition of re-enslavement of those who have been previously enslaved. By protecting ethnic, religious and national origin and other groups whose victimization is based on their gender, sexual orientation, gender identity or disability, the Thirteenth Amendment is more consonant with a positive guarantee of freedom and equal participation in civil society.[64] Violence, directed against an individual out of motive of group bias, violates this concept of freedom.

Perhaps out of concern that the Thirteenth Amendment may provide a surer constitutional footing for bias crimes based on race or ethnicity than against members of other groups, the proposed legislation seeks to ground bias crimes based on religion, gender, sexual orientation, gender identity and disability in the Commerce Clause. I agree that the Commerce Clause provides additional constitutional support for inclusion of these bias crimes in a Federal statute. Bias crimes affect the decisions of target group members as to where they might work and where they might live. Indeed, bias crimes are often directed at forcing their victims to leave the area where they have settled. The impact of bias crimes on the national economy thus brings the punishment of these crimes within the Commerce Clause power. Even as restricted by the decision in *United States v. Lopez*, in which the Supreme Court struck down the Federal Gun-Free Zones Act,[65] the Commerce Clause is broad enough to reach such activities as bias-motivated violence. *Lopez* did not overturn the well-established doctrine that upheld numerous federal criminal statutes on the basis of the Commerce Clause, such as a federal loan-shark statute without any showing of a specific interstate nexus,[66] and such federal crimes as arson,[67] disruption of a rodeo,[68], sale or receipt of stolen livestock[69], and wrongful disclosure of video tape rentals.[70] Moreover, since *Lopez*, numerous lower courts have upheld such federal criminal laws as the 1992 Federal Carjacking Act, the Child Support Act of 1992, the Freedom of Access to Clinic Entrances Act, and the Migratory Bird

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64 *See* Charles H. Jones, Jr. "An Argument for Federal Protection Against Racially Motivated Crimes: 18 U.S.C. §241 and the Thirteenth Amendment," 21 Harvard Civil Rights - Civil Liberties Law Review 689 (1986); Arthur Kinoy, "The Constitutional Right of Negro Freedom," 21 Rutgers Law Review 387 (1967).

65 United States v. Lopez, 514 U. S. 549 (1995).

66 Perez v. United States, 402 U.S. 146 (1971).

67 18 U.S.C. §844 (2000).

68 18 U.S.C. §43 (2000).

69 18 U.S.C. §2317 (2000).

70 18 U.S.C. §2710 (2000).

Treaty Act in the face of challenges that, under *Lopez*, these laws exceeded federal jurisdiction.[71]

Morrison v. United States,[72] in which the Supreme Court struck down a section of the Violence Against Woman Act (VAWA),[73] requires no contrary conclusion concerning the constitutional authority underpinning the Hate Crime Prevention Act. In *Morrison*, the Court, applying *Lopez*, found the civil remedy in VAWA unconstitutional because it lacked a requirement of a close connection between the specific conduct prohibited by the statute and interstate commerce. The Court emphasized, as it had in *Lopez*, a concern that the statute at issue did not include an "express jurisdictional element." The Hate Crime Prevention Act directly addresses this jurisdictional concern from *Morrison and Lopez*. Under the proposed legislation, section 249(2)(B) expressly requires an jurisdictional allegation that requires the Government to establish the nexus between interstate or foreign commerce and the bias crime at issue in order to bring a case under the Hate Crime Prevention Act. The concerns of federalism raised by the Court in *Morrison* are thus fully addressed in the proposed legislation.

The prudential question -- is there a sufficient federal interest to warrant federal bias crime legislation?

There are two sources of strong federal interest in support of such legislation. The first source arises out of the problem of state default in bias crime prosecution. State default was the prime justification for the original creation of federal criminal civil rights. During the Nineteenth and the early Twentieth Century, state governments, particularly in the south, could not be relied upon to investigate and prosecute bias crimes within their jurisdiction. Even through the middle part of this century, state default had remained a critical factor warranting a federal role in bias crimes. But for federal intervention, criminal charges would never have been brought in cases such as *Screws v. United States*,[74], *United States v. Guest*,[75] *United States v. Price*,[76] (the case arising out of the murder of three civil rights workers, Michael Schwerner, James Chaney, and Andrew Goodman).

This crudest form of state default, present for a full century after the Civil War -- of virtual or even literal state complicity in bias crimes -- is far less true today. Nonetheless, a less pernicious form of state default continues to exist in some circumstances, and calls for a federal role in these crimes. The contemporary form of state default arises more from systemic factors than from volitional wrong-doing on the part of state actors. For example, cases involving racially-motivated violence are likely to

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71 United States v. Mussari, 95 F. 3d 787, (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1567 (1997); United States v. Oliver, 60 F. 3rd 547 (9th Cir. 1995), *rev'd on other grounds sub nom.* Jones v. United States, 526 U.S. 227 (1999); Cheffer v. Reno, 55 F. 3rd 1517 (11th Cir. 1995); United States v. Bramble, 894 F. Supp. 1384 (D. Hawaii 1995), *aff'd* 103 F.3d 1475 (1996)..

72 Morrison v. United States, 529 U.S. 598 (2000).

73 42 U.S.C. §13981 (1998)

74 Screws v. United States, 325 U.S. 91 (1945).

75 United States v. Guest, 383 U. S. 745 (1966).

76 United States v. Price, 383 U. S. 787 (1966).

be ones of great local notoriety and to be politically charged. In most states, these cases would have to be prosecuted by an elected District Attorney and decided by a jury from the county in which the event took place. Federal prosecutions would be brought by an appointed United States Attorney who, although not necessarily altogether isolated from the political process, is nonetheless largely immune from politics. It is highly unusual for United States Attorneys to serve more than a single four-year appointed term whereas local District Attorneys are never more than four years (and often less) from the next election. Moreover, federal juries are drawn from federal judicial districts that encompass a far broader cross-section of the population than the community in which a racially-charged event took place.

Consider, for example, the tragic events that occurred in Chattanooga, Tennessee in April, 1980. A group of Ku Klux Klansman fired on five elderly Black women after a cross-burning. State criminal charges were brought against three defendants. Two of these defendants were acquitted. The one who was convicted received only a twenty-month sentence, and was paroled after four months. A federal jury, however, in a civil action, awarded the victims $535,000.[77] It is arguable, therefore, that a federal criminal jury might well have returned a guilty verdict had the defendants been charged with a federal bias crime.[78]

The second source of federal interest to support federal bias crime legislation applies even in the absence of state default. Although parallel crimes are generally state law crimes, bias crimes are not, or at least not exclusively state law crimes. Racial motivation implicates the commitment to equality that is one of the highest values of our national social contract. Bias crimes affect not only the immediate individual victims and the target victim community but the general community as well. Racial equality was at the center of the Civil War and the constitutional amendments that marked the end of that war and permitted the reintegration of the southern states. Needless to say, equality has not always been observed in deed in the United States and not all would agree on what exactly "the equality ideal" means. But none can deny that the commitment to equality is a core American principal. Bias crimes thus violate the national social contract, and not only that of the local or state community. Even if there were no issue of state default whatsoever, there is a firm prudential basis for a federal role in the investigation and prosecution of bias crimes.

A final aspect of the prudential question concerning a federal bias crime law concerns the need for new legislation. Existing federal criminal civil rights legislation is inadequate to address bias crimes fully. The federal sentencing enhancement legislation applies only to federal crimes that are committed with bias-motivation. Because the parallel crime must be a federal crime itself, this law misses the most common bias crimes which have as their parallel crimes the state law offenses of assault or vandalism.

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77 Increasing Violence Against Minorities: Hearing Before the Subcommittee on Crime of the Committee on the Judiciary, 96th Congress, 2nd Session (1980), 26; Seltzer, "Survey Finds Extensive Klan Sympathy," Poverty Law Reporter , May/June 1982, at 7.

78 See Geoffrey Padgett, Comment, "Racially-Motivated Violence and Intimidation: Inadequate State Enforcement and Federal Civil Rights Remedies," 75 Journal of Criminal Law and Criminology 103, 114-118 (1984)

Nor is this problem appreciably solved by section 245. In order to obtain a conviction under section 245(b)(2), the prosecution must prove two elements. The first element requires that the perpetrator committed the act with bias motivation. The second requires either that the perpetrator intended to interfere with certain of the victim's state rights, for example, use of public highways or public accommodations such as a restaurant or a hotel. This second element is too often an insurmountable burden that precludes federal involvement in the prosecution of a serious bias crime. Two cases make the point well.

In California, federal prosecutors decided not to prosecute a racist skinhead gang under section 245, even though evidence pointed to a conspiracy to bomb a Black church and assassinate some of its members. Instead, the gang members were prosecuted under weapons and explosive charges. The United States Attorney, Mark R. Greenberg, explained that "charging a civil rights violation would have made a very difficult case . . . because of the requirement that a specific 'protected right' be the purpose of the planned attacks."[79]

In the Crown Heights section of Brooklyn, New York, calls for federal action intensified after a Brooklyn jury acquitted Lemrick Nelson of murdering Yankel Rosenbaum, a Hasidic scholar who was stabbed during the Crown Heights rioting in August 1991. United States Attorney General Janet Reno expressed reluctance even to commence a grand jury investigation of the incident because of a lack of evidence. In particular, Reno stated that federal civil rights laws make it more difficult to successfully prosecute the case than state law.[80] Not only would federal prosecutors need to prove that Nelson committed the crime and that he did so out of religious motivation, but they would also need to show that the victim was chosen because of his use of public facilities. This last element would be extremely difficult to prove. Indeed, in all likelihood it simply was not true. Despite these evidentiary problems, the Federal government in August of 1994, indicted Nelson on federal charges that he violated Yankel Rosenbaum's civil rights. Two years later, the government obtained the indictment of Charles Price on similar charges.[81] The Hate Crimes Prevention Act would have permitted the cases against Nelson and Paster to go forward on issues of religious motivation. Although both men were convicted, these cases were cluttered with the issue of the use of public facilities. The need for federal intervention in this case and the federal interest in the killing would have been the same had Rosenbaum been killed with religious motivation in a private building, well off of a public street. But for the seemingly unimportant fact that this bias-motivated murder took place in a street, under current federal law there would have been no convictions in the Crown Heights case.

Former Deputy Attorney General Eric Holder summarized the case for the federal role in bias crime enforcement in a compelling way:

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79 Brian Levin, "A Matter of National Concern: The Federal Law's Failure to Protect Individuals from Discriminatory Violence," 3 Journal of Intergroup Relations 4 (1994).

80 "Reno's Doubt on Heights Persists," Newsday, Jan. 27, 1994, at 28.

81 Jim Carnes, Us and Them: A History of Intolerance in America, 127 (1995); New York Times, Aug. 22, 1996, at B1.

> Federal prosecutors have been precluded from prosecuting many incidents of brutal, hate-motivated violence because of the current statutory requirement that a defendant be proved to have acted not only because of the victim's race, color, religion, or national origin, but also because of the victim's participation in one of the six federally protected activities enumerated in the statute. This statutory requirement also has led to acquittals in several prominent federal prosecutions.[82]

The Hate Crimes Protection Act will address these limitations on current law in a manner that is consistent with the proper allocation of authority between federal and state law enforcement.

The pragmatic question -- how ought federal and state jurisdiction over bias crimes work together?

The best starting point for considering how concurrent federal and state jurisdiction over bias crimes would proceed is to look to the way in which concurrent federal and state jurisdiction over other civil rights crimes, specifically police brutality, has proceeded. Federal law enforcement has adopted a deferential posture toward state enforcement of civil rights crimes. According to Department of Justice policy, once state or local charges have been filed, federal civil rights investigations are suspended. Although the FBI may conduct an investigation of a civil rights crime at the same time as local authorities, the end-point of this investigation must still be a referral to the Department of Justice, which will defer to any local charges.[83]

The limited federal role is driven by prudential, not constitutional factors. As a matter of constitutional law, not only does the federal government have the authority to conduct concurrent investigations to state proceedings, federal prosecutors may proceed even after a full-blown state investigation, trial, and acquittal. This is the scenario that took place in the Rodney King beating case. Ordinarily, dual prosecutions that arise out of the same set of events are barred by the constitution's double jeopardy clause.[84] There is an exception, however, to acts that violate both federal and state law. Such an act is deemed to violate the law of two sovereigns and, under the "dual sovereignty doctrine," is two separate offenses for double jeopardy purposes.[85] The dual sovereignty doctrine has been severely criticized over the years and indeed, it is not easy to defend a doctrine that allows a defendant to be tried twice for what is in reality the same crime.[86]

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82 See Statement of Deputy Attorney General Eric H. Holder, Jr. before the Senate Judiciary Committee, July 8, 1998: http://judiciary.senate.gov/oldsite/erichold.htm.

83 Laurie L. Levenson, "The Future of State and Federal Civil Rights Prosecutions: The Lessons of the Rodney King Trial," 41 UCLA Law Review 539-540 (1994); United States Attorney's Manual, 8-3.340 (vol. 8, July 1, 1992); Ronald Kessler, The FBI 209 (1993).

84 U.S. Const. amend. V. The double jeopardy clause state: ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life, or limb."

85 Heath v. Alabama, 474 U. S. 82 (1985); Bartkus v. Illinois, 359 U. S. 121 (1959); United States v. Lanza, 260 U. S. 377 (1922).

86 See, e. g., Walter T. Fisher, "Double Jeopardy, Two Sovereignties and the Intruding Constitution," 28 University of Chicago Law Review 591 (1961); Lawrence Newman, "Double Jeopardy

There is not space here for a full examination of the merits of the dual sovereignty doctrine; this has been done well elsewhere.[87] Moreover, that is not my purpose. The goal here is, working within existing constitutional doctrine, to devise the best means of facilitating the enforcement of bias crime laws with overlapping federal and state authority. I should note, however, that even though there is federal constitutional *authority* to engage in dual prosecutions, as a matter of *practice* these are very rare. Pursuant to an internal policy known as the "Petite Policy," after a case of the same name, the Department of Justice had adopted its own version of a double jeopardy bar to federal prosecutions following state trials for the same criminal acts, whether those trials resulted in conviction or acquittal. The Petite Policy restricts federal prosecution following a state trial to instances in which compelling reasons exist to prosecute, such as cases in which there remain "substantial federal interests demonstrably unvindicated" by the state procedures.[88] The Rodney King case, where such compelling reasons were deemed to exist, is thus the exceptional case that proves the rule.[89] Interestingly, in the appeal of Stacey Koon's federal sentence for his role in beating King, the Supreme Court ruled that the trial judge had not abused his discretion in making a downward departure from the federal sentencing guidelines because of the burden of successive prosecutions.[90]

The Petite Policy uses some of the right reasons to draw the wrong conclusions. Dual prosecutions are surely to be avoided whenever possible and not only due to concern for the defendant but also because of resulting problems for the prosecution. Assume that the state court prosecution ended in an acquittal. Were there a conviction, the argument for a subsequent federal trial would be weak indeed. The testimony of any witness at the state trial would be available for use by the defendant in its cross-examination of that witness if called by the prosecution in the federal trial. Problems in the state case cannot go away merely by trying again. Moreover, there is the risk that federal prosecutors in a subsequent action may be seen, even by a federal jury, as

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and the Problem of Successive Prosecutions," 34 Southern California Law Review 252 (1961); Harlan R. Harrison, "Federalism and Double Jeopardy: A Study in the Frustration of Human Rights," 17 University of Miami Law Review 306 (1963); Dominic T. Holzhaus, "Double Jeopardy and Incremental Culpability: A Unitary Alternative to the Dual Sovereignty Doctrine," 86 Columbia Law Review 1697 (1986); Susan Herman, "Double Jeopardy All Over Again: Dual Sovereignty, Rodney King, and the A.C.L.U.," 41 UCLA Law Review 609 (1994).

87 There are, roughly speaking, three positions on the Dual Sovereignty doctrine: (i) opposition to the doctrine in all cases because it violates the defendant's constitutional rights; (ii) support of the doctrine as a recognition of the duality of governmental power in a federal system; and (iii) opposition to the doctrine in most cases, but supporting the doctrine in certain exceptional cases, particularly the enforcement of criminal civil rights laws, as was at issue in the Rodney King case. *See* Herman, "Double Jeopardy All Over Again;" Paul Hoffman, "Double Jeopardy Wars: The Case for a Civil Rights 'Exception,'" 41 UCLA Law Review 649 (1994); and Paul G. Cassell, "The Rodney King Trials and the Double Jeopardy Clause: Some Observations on Original meaning and the ACLU's Schizophrenic Views of the Dual Sovereign Doctrine," 41 UCLA Law Review 693 (1994).

88 Executive Office for United States Attorneys, United States Department of Justice, United States Attorney's Manual, 21-25 (Vol. 9, 1985).

89 *See* United States Commission on Civil Rights, Who is Guarding the Guardians? 112, 116 (1981); United States v. Davis, 906 F. 2d 829, 832 (2nd Cir. 1990).

90 Koon v. United States, 518 U.S. 81 (1996).

officious intermeddlers and outsiders. In the federal Rodney King trial, the trial judge agreed with a prosecution request that defense counsel would not be permitted to refer to Department of Justice lawyers as "Washington lawyers" during the trail, and issued the following startling ruling: "There will be no reference to 'lawyers from Washington,' . . . That's a stigma that cannot be tolerated."[91]

The Petite Policy is thus correct to try to avoid dual prosecutions as often as possible. It is wrong, however, to assume that the single prosecution that is brought must be a state court prosecution. If, as I have proposed, there were concurrent federal and state criminal jurisdiction over racially-motivated crimes, then bias crimes would join numerous others instances of concurrent criminal jurisdiction -- narcotics and organized crime just to mention two. In these areas there is no notion of federal deference to state law enforcement. Indeed, in many instances the presumption is exactly to the contrary. For our purposes, however, the better analogy is to those areas in which federal and state law enforcement work together, particularly at the investigatory stage, and then, when it comes time to determine what criminal charges are to be brought, the merits of each is weighed. At its best, this process produces a careful evaluation of whether relevant federal or state law is the best vehicle for law enforcement in order to right the criminal wrong that was committed. Admittedly, at its worst, this process can degenerate into political squabbling about which office will win a "turf battle" and whether the United States Attorney or the District Attorney will receive the credit for bringing the case. In determining the best means by which to punish bias crimes, however, we need not assume the worst of law enforcement.

A federal bias crime statute should give federal investigators and prosecutors the authority and incentive to pursue bias-motivated violence as vigorously as they might drug cartels or organized crime. Local authorities should do so as well. In cooperation, each may enhance the other's abilities. In states with strong bias crime statutes, and in municipalities with well organized and well trained bias investigation units, federal authorities may well decide to defer to state law enforcement. In states that lack these capabilities, federal authorities should, as they historically were charged to do in cases of outright state default, take the lead.

Despite all of the protections – doctrine and prudential – that are built into the risk of federal law enforcement overreaching in the context of the Hate Crimes Prevention Act, there will still be those who will fear that the statute holds just such a risk. To them there are two additional responses. First, it is highly noteworthy that this proposed legislation, and its predecessors going back a decade, have enjoyed broad support precisely from local law enforcement officials who understand the benefits to be gained by expanding upon the federal-state partnership that already exists in the investigation and prosecution of bias crimes. Second, under the proposed legislation, section 249(b)(2) will build in a strict set of certification requirements that limit the use of the Hate Crimes Prevention Act to cases in which the Attorney General or his direct designee has certified that:

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91 Laurie L. Levenson, "The Future of State and Federal Civil Rights Prosecutions: The Lessons of the Rodney King Trial," 41 UCLA Law Review, 509, 560 (1994); Jim Newton, "Judge Rejects Talk of New Riots, Refuses to Delay Trial of Officers," Los Angeles Times, Feb. 3, 1993, at B4.

(A) The State does not have jurisdiction or does not intent to excise jurisdiction;
(B) The state has requested that the Federal Government assume jurisdiction;
(C) The State does not object to the Federal Government assuming jurisdiction; or
(D) The verdict or sentence obtained pursuant to State charges left demonstratively unvindicated the Federal interest in eradicating bias-motivated violence."

The safeguards required by section 249(b)(2), along with the other safeguards discussed in this Statement that are based in long-established principles of federal-state cooperation in the important task of law enforcement more than meet any concerns about the pragmatic issues raised by the limited federal role in the investigation and prosecution of bias crimes contemplated by the Hate Crimes Prevention Act.

Conclusion

The punishment of bias crimes by the Federal government will not end bigotry in our society. That great goal requires the work not only of the criminal justice system but of all aspects of civil life, public and private. Criminal punishment is indeed a crude tool and a blunt instrument. But our inability to solve the entire problem should not dissuade us from dealing with parts of the problem. If we are to be staunch defenders of the right to be the same or different in a diverse society such as ours, we cannot desist from this task.