HATE: AN EXAMINATION AND DEFENSE OF THE MATTHEW SHEPARD & JAMES BYRD, JR. HATE CRIMES PREVENTION ACT

By Jennifer Johnson

You must not kill your neighbor, whom perhaps you genuinely hate, but by a little propaganda this hate can be transferred to some foreign nation, against whom all your murderous impulses become patriotic heroism.

Bertrand Russell

Introduction

As a teenager, I sat at Matthew Shepard’s memorial service in Saudi Arabia, where the Shepards and I resided. The phrase kept running through my head, ‘Who are we?’ We are all humans, yet violent hatred of someone because of that person’s innate characteristic is considered acceptable behavior to some. President Obama’s signing of the Matthew Shepard & James Byrd, Jr. Hate Crimes Prevention Act (HCPA) put America’s seal on the statement that hateful behavior is unacceptable and the federal government will not sit by while minority groups, including lesbian, gay, bisexual, and transgender (LGBT) individuals, are physically targeted because of their sexual identity and orientation. This statement, for the first time, meaningfully moves the queer community into a governmentally protected status. When Stanley Milgram studied the atrocities and success of Nazi hate in the 1960s, his experiments evidenced that the power of a leader and group motivation can persuade ordinary people to do extraordinarily evil things. Similarly, maybe the opposite is true. Perhaps the power of this statement, this legislation, can persuade ordinary people to extraordinarily look past a long history of deep-rooted hate, or at the very least, signal the depths of hatred’s wrong.

Hatred motivates murder and other forms of violence every day. But at what point does hatred become a hate crime? The term hate crime encompasses broad ideas such as “prejudice,” “bias,” “bigotry,” “sexism” and “homophobia,” and reaches its zenith when

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2 Matthew Shepard was a University of Wyoming student who was brutally tortured and murdered near Laramie, Wyoming in 1998. His murder brought national attention to hate crimes legislation due to the fact that an officer and an attacker’s girlfriend knew the crime to be motivated by hate due to sexual orientation.
3 JACK LEVIN, THE VIOLENCE OF HATE: CONFRONTING RACISM, ANTI-SEMITISM AND OTHER FORMS OF BIGOTRY 100 (Jeff Lasser et al. eds., 2nd ed. 2007).
4 Id. at 1.
those ideas are turned into action. A hate crime’s effect does not stop with the victim, but rather speaks a message into the targeted community that fear should and will be a part of that community’s everyday reality. Hate crimes are about sending a message to intimidate and terrorize a minority group that may not even be directly involved in the actual crime itself. As the Republican Georgia Representative Dan Ponder, Jr. stated during one of the early hearings on the expansion of hate crimes legislation, “the gay person that is bashed walking down the sidewalk in midtown is a message to gay people.” Hate crimes legislation provides protection for individuals who are reached by these heinous acts without encroaching upon each individual’s personal beliefs and violating First Amendment protections.

This paper examines the background and perspectives of hate crimes legislation, the difficulties in prosecuting and reporting hate crimes, and the necessity for the HCPA. It also examines domestic, and international methods of combating hate crimes. Further, it squares the current legislation with the First Amendment and the Commerce Clause, as well as refutes criticisms and explores where the HCPA may provide future protections for the LGBT community. The HCPA successfully balances the First Amendment with minority protections and skirts any constitutional challenges.

I. Definitions & Explanations

Following the assassination of Martin Luther King, Jr., the first hate crimes legislation was enacted in 1968. If the victim was a participant in at least one of six federally protected activities, such as serving as a juror or attending public school, the law authorized federal authorities to investigate and punish crimes motivated by race, religion, and national origin. Retrospectively, the reach of the first hate crimes legislation was very limited in scope because the victim had to be participating in one of the defined, politically protected activities when targeted by a perpetrator for her minority status. Further, an early step towards providing sufficient data for the HCPA was the Hate Crimes Statistics Act, which was passed in 1990. This required the Department of Justice to report crimes that manifested prejudice based on several factors, including sexual orientation. These steps were laudable movements towards the implementation of the HCPA and provided a necessary protection to various minorities.

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8 Id. at § 245(b)(2)(A) & (D).

9 These include race, color, religion, and national origin.

The HPCA defines a hate crime as “whoever . . . willfully causes bodily injury to any person . . . or . . . attempts to cause bodily injury to any person, because of the actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability of any person.”\(^{11}\) This language greatly expands the definition of protected groups to include individuals targeted because of their sexual orientation. Additionally, a preceding section of the HCPA includes race and skin color as protected from hateful criminal targeting. The HCPA also copiously broadens hate crime coverage by omitting the requirement that the victim be a participant engaged in at least one of a limited set of political activities during the actus rea of the perpetrator. The previous hate crimes legislation was a toothless attempt to protect racial minorities, whereas the current legislation provides the actual ability for the federal government to protect a greater number of minority individuals. The HCPA provides the federal government, through the Department of Justice (DOJ), the funding and authority to investigate and prosecute hate crimes or bias-motivated crimes and provides the DOJ the ability to aid state and local authorities for such investigations.\(^{12}\)

II. Necessity for the HCPA

Fueled by the constant innovation of hate-driven groups and the further realization that the protection of LGBT persons is necessary to spur forward equality and recognition in American society, the HCPA fills a void in the criminal justice system. The HCPA is necessary for three reasons: 1) to combat excessively harsh and planned group violence; 2) to prompt local law enforcement to fulfill its duties or have federal investigations take place; and 3) to provide a necessary assertion that violence because of someone’s identity is criminal on a higher level.

The most dangerous type of hate crime is one that is fueled by ideological perspectives, such as the case of skinhead violence.\(^{13}\) This type of violence is smart (not intelligent) and purpose-driven. It is premeditated violence carried out to further perceived racial dominance and purity, and is frighteningly rationalized based upon the radical beliefs of the perpetrators.\(^{14}\) Hate crimes legislation is necessary to counter these rationalized and organized hate crimes, which become even more dangerous in a group setting due to the “mob mentality.”\(^{15}\) The goals of this powerful breed of hate are not only to inflict suffering on the designated minority, but also to impassion the followers, inflict permanent harm on the opposition group, and eventually conquer the victim.\(^{16}\)

The HCPA has and will continue to provide a national legislative language against bias crimes, as well as a gap-filler when local laws and law enforcement fail to curtail or punish hate crimes.\(^{17}\) For example, what eventually became the nationally covered Jena 6 incident


\(^{13}\) HATE CRIME: INTERNATIONAL PERSPECTIVES ON CAUSES AND CONTROL 176 (Mark S. Hamm ed., 1994).

\(^{14}\) Id.

\(^{15}\) Id.

\(^{16}\) Whillock, supra note 5, at 32.

began as a smaller bias crime that, if prosecuted, may not have escalated into attempted murder.

The Jena 6 debacle began with white students hanging nooses under a tree where African-American students had asked to sit. The school district committee foolishly opted to label the incident a prank, and suspended the perpetrating students for three days. Shortly after, six African-American students attacked one of the students involved in the noose hanging. The young man who was attacked sustained minor injuries. However, all six African-American students were charged with attempted murder. This is an instance where local law enforcement failed to take action regarding a hate crime, thereby escalating the situation to a point of greater violence between the students. Had the HCPA been enacted, the initially targeted students, though their actions are not excusable or acceptable, would have had federal legal recourse as an option instead of resorting to violence. Unfortunately, the hate crimes legislation in effect only was applicable to certain federally protected activities.

The Jena 6 incident is a situation that escalated as a direct result of the lack of an adequate investigation into a perceived bias-crime by local law enforcement and by the school officials. Hate crimes legislation not only provides funding to local law enforcement, but also gives jurisdiction to the Department of Justice so that it may step in when local law enforcement is not effectively investigating crimes. Prior to this legislation, when a hate crime was brought to the attention of federal authorities, it was beyond federal jurisdiction to investigate, and there was nothing the federal government could do about the lack of accountability and effort on the part of state law enforcement. Bias crimes, particularly those that take place in schools where children are forming behavioral modes based upon perceived societal norms, need the scrutiny of the HCPA. Students need to be shown that hate crimes and scare tactics that provoke fear in others are both unacceptable and illegal.

The HCPA is essential for two reasons: 1) to benefit society by punishing offenders and thereby lessening the chance of violent escalation that feeds the culture of hatred; and 2) not to criminalize acts for the simple sake of criminalization, but rather to educate society on functioning as responsible and respectful citizens. One of the roles of criminal law should be to guide citizens, through this educative function, in the proper mode of societal values. Allowing hate crimes to go unpunished sends the wrong message to society. It sends a message that one group of citizens is less important than another, that these citizens are not worth governmental and legislative protection, or even worse, that the government tolerates, supports, and even endorses, these hateful actions.

III. Statistics

In recent decades, studies have shown that bigotry, in general, has been on the decline and current socio-cultural momentum favors increased LGBT rights. This may be directly

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18 Id. at 226.
19 Id. at 227.
20 Id. at 228.
22 LEVIN, supra note 3, at 12.
23 J. Brady Brammer, Religious Groups and the Gay Rights Movement: Recognizing Common Ground,
due to the inclusion of race, religion, and national origin as protected under previous hate crimes legislation, the landmark of the Civil Rights Act of 1964\textsuperscript{24}, or general political activism to protect minorities. Regardless of the source, a marked improvement in the fight against bigotry has undoubtedly followed the inception of hate crimes legislation in 1968.

Hate based on race and religion has plummeted in recent decades,\textsuperscript{25} practically ostracizing hateful disposition from the general mainstream society. A 1966 survey showed that 50\% of white Americans held the bigoted view that African Americans were lazy, while in 2001 only 4\% held this view.\textsuperscript{26} Between 1942 and 1968, a sizable amount of white Americans began to support the integration of schools,\textsuperscript{27} spurred forward by the 1954 decision of \textit{Brown v. Board of Education}'s\textsuperscript{28} forced integration and dramatic shift in the Supreme Court’s equal protection policy. Historically, the innovation of judicial decisions, launched forward by activist organizations, have served as a catalyst, bringing about advances away from bigotry.

Hate and bias regarding sexual orientation have also appeared to decrease. The number of Americans who believe that homosexuals should have equal job opportunities has risen by more than 50\% since 1977.\textsuperscript{29} These figures are undeniably attributable to the laudable activism of LGBT groups and the awareness that followed the onset of the AIDS epidemic in the United States.\textsuperscript{30} The percentage of Americans who believe that homosexuality is an acceptable “alternative” lifestyle increased from 34\% in 1982 to 50\% in 1999.\textsuperscript{31} From 1982 to 2005, the percentage of Americans who viewed the gay lifestyle as an acceptable lifestyle rose from 34\% to 51\%. Inversely, from 1982 to 2005, the percentage of Americans who thought a gay lifestyle was altogether unacceptable fell from 51\% to 45\%.\textsuperscript{32} One potential explanation for this is the significant public attention drawn to, and education about, the gay community during the onset of the AIDS epidemic of the 1980s. Aside from practical aspects of freedom of choice in lifestyle opinions of Americans, is the moralist, somewhat more internal, change in opinion. More than half of Americans previously polled said that homosexual relationships were morally wrong,\textsuperscript{33} but for the first time, in 2010, the number dipped to 43\%, showing a significant decrease in the number of Americans believing homosexual relationships are morally wrong.\textsuperscript{34} Following the HCPA’s enactment and the

\begin{footnotes}
\item \textsuperscript{25}Levin, supra note 3, at 12; Roy L. Brooks, Racial Justice in the Age of Obama 90 (2009) (looking at overt discrimination and not taking into account latent bigotry seen as subordination as noted by critical race theorists).
\item \textsuperscript{26}Levin, supra note 3, at 11.
\item \textsuperscript{27}Id.
\item \textsuperscript{28}Brown v. Bd. of Educ., 347 U.S. 483 (1954).
\item \textsuperscript{29}Polls show that the percentage of Americans believing that homosexuals should be given equal job opportunities increased from 56\% in 1977 to 74\% in 1992 and 88\% in 2003.
\item \textsuperscript{30}Levin, supra note 3, at 12.
\item \textsuperscript{31}Id.
\item \textsuperscript{32}Id.
\item \textsuperscript{33}Id.
\item \textsuperscript{34}Lydia Saad, Americans’ Acceptance of Gay Relations Crosses 50\% Threshold: Increased Acceptance by Men Driving Change, GALLUP POL. (May 25, 2010), http://www.gallup.com/poll/135764/americans-acceptance-gay-relations-crosses-threshold.aspx.
\end{footnotes}
media coverage of the ‘Prop 8’ trial it is likely these statistics have or will change positively, as more citizens become aware of the issues and facts.

Following the visibility and progress of Lawrence v. Texas in 2003, scandals involving sexual abuse by Catholic priests may have caused a decrease in the percentage of Americans who thought that homosexuals should be allowed to be clergy or elementary school teachers. Additionally, between 2003 and 2005, those scandals may have caused a decrease in the percentage of Americans who support the legality of homosexual relationships from 60% to 52%. Significantly little has changed since 1977 when only 43% of Americans supported homosexual relations being legal; nonetheless, any improvement is notable and, as of 2009, the Gallup polls showed that 58% of Americans believed that relations between consenting adults should be legal.

The statistics above show a marked improvement in the status of LGBT individuals in the eyes of Americans and with the advent of the HCPA, this could potentially be amplified. The queer community has never been protected by hate crimes legislation before the enactment of the HCPA, and such legislation is not expected to eliminate the problem of bias entirely. Stereotyping and bigotry aimed at other minorities, however, has declined following the social motif behind prior hate crimes legislation. Should history serve as an indicator for the future, the LGBT community should be optimistic.

IV. Difficulties

One of the most elephantine problems is classifying hate and measuring hate when it becomes violent action. Over the past century, it has become more difficult to quantify hate due to technological innovations, cross-culturalization, and the blurring of traditional bigotry lines.

One of the marked difficulties in classifying “hate” stems from the technological changes that have taken place in the past decades. Where hateful rhetoric used to be secluded to masked horsemen, bulletins, pamphlets, and church sermons, the internet has taken their place as a major communication tool for the dissemination of hatred. It has made hatred easier. Now, hateful information can be posted anonymously without anyone having to do anything more than press a few buttons. While an inactive speech, this method of bigotry does fuel hateful action. However, the internet is also a major information tool for equality groups. Additionally, visibility of the LGBT community on mainstream television has increased as the media has begun to respect queer civil rights. Hate is not en vogue. For example, in 2001 when Jerry Falwell blamed the 9/11 attacks on gays, lesbians, feminists, and abortionists, virtually every media outlet publicly denounced him. As idealist critical race theorists point out, it is necessary to change the social narrative through

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35 Perry v. Schwarzenegger, 591 F.3d 1147 (9th Cir. 2010), cert. dismissed, 130 S. Ct. 2432 (2010).
37 LEVIN, supra note 3, at 13.
38 Id.
41 Id.
42 Id.
visibility in order to change a repressive structure of society. The HCPA is a progressive step in changing the queer narrative.

A further difficulty in classifying bigotry is that hate is no longer restricted to white-on-minority or vice versa, but rather crosses minority lines, which often blurs the perception of hate crimes. For example, in 1994, when prompted by the statement that Asian Americans were unscrupulous, a survey found that 27% of White Americans agreed; however, 46% of Latinos and 42% of African Americans did as well. Therefore, America’s historical “white” bigotry is no longer the norm, and the issue requires further analysis.

Another difficulty is the reporting of hate crimes. As a benefit of the recent legislation, the HCPA mandates and funds the FBI to compile data regarding hate crimes, including those of gender, gender identity, and sexual orientation of the victim. Previously, only the status of the victim was reported. However, victims are often too afraid to report these crimes. This fear stems from a number of sources: 1) fear of potential retaliation by the violator; 2) fear, for some homosexuals, of being ‘outed’ if the process does not remain confidential; 3) fear of not being accepted or supported by local law enforcement; and 4) in the case of immigrants who come from backgrounds under repressive regimes, distrust of authorities. These factors, and undoubtedly others, lead to a significant reporting problem.

In 2005, for example, the FBI officially labeled 9,000 offenses as hate crimes. However, the FBI still acknowledges that the numbers are vastly underreported. Furthermore, in 2007, the Department of Justice’s Uniform Crime Reporting Program reported 7,624 incidents of hate crimes distributed over 15.3% of the reporting agencies; 84.7% of the agencies reported no hate crimes. Some states have been more cooperative than others. In 2004, Alabama only claimed five hate crimes and Mississippi only claimed two. Either there is very little hate in those states or, more likely, there is a reporting problem.

Technological classification and dissemination, cross-culturalization, and reporting issues are only a few of the problems with addressing hate crimes. The HCPA works against some of the difficulties in classification as it provides for funding to report hate crime incidents, which may provide a greater incentive to report accurate information since it is not coming out of the state budget. Further, evidence reported of internet dissemination of hateful material provides an estimate of the purpose behind the violent acts. This, however, is merely a positive effect of a difficulty brought about by technological changes. Therefore, the HCPA serves to reduce some of the difficulties associated with quantifying hatred and hate crimes.

V. International Perspective

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43 BROOKS, supra note 25, at 96.
44 LEVIN, supra note 3, at 13.
46 Id.
47 LEVIN, supra note 3, at 16.
48 Id.
50 LEVIN, supra note 3, at 16.
To deny the countless deaths of a known event of genocide is to celebrate the deaths of the same victims and to intimate cynically that the doctrine of power which brought about their destruction is still in force, to be used when opportunity permits.

Dr. Israel Charny

Though the international arena does not share the same heightened protections on freedoms of speech and expression as provided by the United States via the First Amendment, the regulation by other countries of certain hate-filled speech that might lead to violence is instructive because this international perspective sometimes influences the Supreme Court. If foreign governments are regulating the arena when the hate or offensive idea is verbally expressed, and not yet at the point of action, a heightened punishment for physical action is certainly justified.

The European Union’s restrictive nature regarding hateful speech largely stems from the undoubted influence of the remnant wounds of WWII, and the gross atrocities that manifested from such vocalization and propaganda by the Nazis. The Nazis were devastatingly effective at instilling hatred because they dehumanized the targeted peoples and so openly instilled fear in the minority communities that were persecuted. A 1996 opinion issued by the Human Rights Committee upheld a French statute criminalizing the refutation of the Holocaust, stating that this restriction did not violate the human rights of the expresser, because those ideas were not necessary when compared to the right of the Jewish community to live in a society with “full human dignity and free from an atmosphere of anti-Semitism.” While the terror of skinhead violence stemming from such hate-speech resonates more harshly in post-WWII Europe, the message and its effects reach every culture and minority group.

As a means for coping with the global crisis of bias violence, Mark Hamm ponders a global definition of hate crimes because it is defined so variously across borders and is a global phenomenon that reaches every continent, regardless of culture. Creating solutions under the macro approach produces a more unified and effective result than allowing broad terms for solutions in the micro setting. Working simply in the micro setting could create greater errors in social control than are already presented. The misrepresentation of the AIDS epidemic serves as an example of the dangers of the restrictive nature of micro-scale labels. It evidences that erroneous doctrine can lead to damage on a larger scale, such as the millions of lives lost to a disease originally thought to solely affect homosexuals. Germany has gone so far as to ban organizations that question the democratic principles of the German Republic, specifically skinhead groups. In the United States, this ban would

51 Israel W. Charny, A Contribution to the Psychology of Denial of Genocide: Denial as a Celebration of Destructiveness, an Attempt to Dominate the Minds of Men, and a 'Killing' of History, in GENOCIDE & HUMAN RIGHTS: LESSONS FROM THE ARMENIAN EXPERIENCE 4 J. ARMENIAN STUD. (SPECIAL ISSUE) 289, 300 (1992).
52 Lawrence v. Texas, 539 U.S. 558, 573 (2003) (discussing the persuasive authority of the Wolfenden report which advised the repeal of punishment for homosexual acts and the ECHR case of Dudgeon v. United Kingdom, which held proscriptions on homosexuality invalid).
54 HATE CRIME: INTERNATIONAL PERSPECTIVES ON CAUSES AND CONTROL, supra note 13, at 174-75.
55 Id. at 186.
56 Id. at 177.
categorically violate the freedoms of association and expression. In 1991 alone, skinhead youth gangs perpetrated over 200 assaults against homosexuals in the United States as reported by Klanwatch.\(^{57}\)

Not all foreign countries are more protective than the United States in guarding citizens from hate. Contrarily, several foreign States flail in comparison to the United States’ record of protecting citizens from hate crimes. As mentioned above, a global language combating LGBT violence is necessary, especially given the recent Ugandan attempt to further codify violence into law. Though homosexuality was already illegal in Uganda and most of Africa, the new law was intended as an extension of the current law.\(^{58}\) Under the new law, not only are homosexuals doomed to life imprisonment, but those who test positive for HIV can be executed.\(^{59}\) Further, the law also would punish anyone who fails to report a homosexual to the government. This continues to take away the privacy of homosexuals and further isolates individuals because they will fear exposing themselves to their friends and family.\(^{60}\) Hopefully, with the United States’ condemnation of violence upon LGBT individuals and other countries and non-governmental organizations protesting this piece of legislature, its strength will be debunked. In the Ugandan instance, not only are the personal freedoms from hate and of security of person infringed upon, but also LGBT individuals’ freedoms of expression and association are completely restricted. Recently, human rights groups have been highly alarmed over the state of free speech and press rights in the country; along with greater suppression of homosexuals, new laws limiting the rights of the press come on the heels of the suspicious deaths of two journalists.\(^{61}\) Where the government of Uganda is restricting both sides of freedom, the HCPA conserves both aspects of freedom in the United States. The HCPA provides punishment that lends to freedom from hate, while also ensuring that the punishment does not infringe upon freedoms of expression and association. It is the job of the government to protect and assure these rights, and the HCPA in the United States is assuring these goals. Hopefully, these assurances will spread to other nations through diplomacy, such as the recent speech given by Secretary of State Hillary Clinton recognizing that LGBT rights are human rights.\(^{62}\)

It is necessary to strike a precarious balance between the freedoms from hate and the freedom of expression. The restrictions on rights vary depending on the era and subject matter of the restriction;\(^{63}\) however, the HCPA does not sway too far and errs on the side of protecting expression rights. In Sweden’s Supreme Court Åke Green Case, under the

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57 Id. at 174.
63 Robert L. Tsai, ELOQUENCE & REASON: CREATING A FIRST AMENDMENT CULTURE (2008) (discussing the relativity and evolution of the First Amendment as it applies to various rights and how it has been used for social change).
standard of the European Convention on Human Rights, a pastor’s condemnation of homosexuality narrowly escaped prosecution. The pastor was only reprieved after his actions were balanced against the right to freedom of religion, and his religious freedom tipped the scales. Further, a 1994 opinion of the European Court of Human Rights went so far to determine, after a journalist reported on a xenophobic group, that regardless of the import of circulating the news, allowing a hateful message to be disseminated was unnecessary televising of hateful propaganda and the journalist’s conviction was upheld. Is usurping the freedom of the press too hefty of a price tag for eliminating hate? While it would certainly step on toes in the American system, it is instructive as to just how far other governments will go to prohibit xenophobic groups from spreading their propaganda, and just how seriously the matter is taken in other countries.

The juxtaposition of *American Booksellers Association, Inc. v. William Hudnut, III* and *Regina v. Butler* further highlights the dramatic difference between speech protection in the United States and in other countries. In *American Booksellers*, the Seventh Circuit struck down a statute that restricted violent pornography because the purpose was not neutral, but rather intended to only allow the treatment of women in an approved non-violent manner. While the fragility of women was set aside as an issue, the government’s ability to take a stance on this form of expression violated the First Amendment’s mandate of neutrality regarding the content of speech. The government is not allowed to look at the content of the speech, therefore, the effects on women was not an issue eligible for decision under the First Amendment. Neutrality towards the content of the speech means that a court cannot examine the content of the speech to see whether it is beneficial. Meanwhile, in *Butler*, the Supreme Court of Canada upheld a similar statute, finding that the harm caused by the seriously offensive materials denigrating women was more objectionable in society than this particular impairment of the right to freedom of expression. These distinct outcomes illustrate how deeply the United States values protection of speech, even against the harms of pornography, so heinously objectionable to women. Is the United States wrong to have such slack reins on speech at the direct expense of its citizens? Regardless, the legislation of the HCPA falls well outside the bounds of speech protected by the First Amendment.

The international community has a diverse array of approaches to hate crimes and freedoms of speech, ranging from strict protection of victims against speech rights, to absolute status criminalization of homosexuals. The United States’ approach creates protections without infringing on First Amendment freedoms, which still provides for protections of both sets of rights.

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65 Id.
67 American Booksellers Ass’n, Inc. v. Hudnut, 771 F.2d 323, 325 (7th Cir. 1985).
69 Bell, supra note 5, at 976.
70 American Booksellers Ass’n, 771 F.2d at 325.
72 It is debatable whether this is at the expense of the citizens, because it is almost as objectionable in a sexist manner to make something illegal purely because it is a woman that is being objectified in a seedy manner.
VI. Squaring Hate Crimes Legislation with the First Amendment

When the legislature purports to add the personal bigotry of the perpetrator as an element of a crime, it is merely recognizing punishment allotted for a greater harm inflicted than for a simple crime with no bias motive. The HCPA’s integration of personal bias into the motivation of the perpetrator does not breach the general proscription upon regulation of expressive conduct or intruding into the personal beliefs of the perpetrator, but rather, criminalizes selective conduct. Thought is not criminalized, and the American people are free to hate. However, the American people are not free to assault someone because of that hateful bias they freely hold. The legislature had a fine balance to strike between the personal liberties of free speech and the inability to regulate against Orwellian-thought crimes. Unlike its international counterparts, the HCPA strikes this balance. As long as the freedoms granted by the First Amendment do not allow the physical harm of a person because of their status, the HCPA does not come within the vicinity of freedoms of speech and expression.

To begin, the First Amendment, as stated by Martha Merrill Umphrey, requires neutrality in all government decisions related to religion. This neutrality should not extend merely from religion to religion, but also ‘avoid preferring religion to nonbelief’ and vice versa. This necessary avoidance of preferring religion to ‘nonbelief’ extends to avoidance of preferring certain religious ideas over activities that may conflict with segments of religious belief, even though they are not per se ideas of ‘nonbelief.’ Therefore, when a law protects a group that does not particularly align itself with all religious belief and also protects individuals because of religious belief, it is merely placing both groups on even footing. In the instant case, the HCPA includes violence against religious groups, as well as violence against individuals because of sexual identity.

The HCPA passes the standard established in R.A.V. v. City of St. Paul. It does not inappropriately amount to the government choosing one side of a bias-motivated crime of expression, but punishes a bias-motivated crime of action. In R.A.V., several teenagers were prosecuted under the St. Paul Bias-Motivated Crime Ordinance for burning a cross in the yard of an African-American family. This statute was held unconstitutional because it discriminated on the basis of the content of the perceived message. The statute, while criminalizing an act of

“plac[ing] on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor,”

74 Martha Merrill Umphrey et al., The Sacred in Law: An Introduction, in LAW AND THE SACRED 1, 12-15 (Austin Sarat et al. eds., 2007). This discussion of religion versus nonbelief in relation to the First Amendment is set against the backdrop of an exploration and various theories regarding the sacred nature of the Constitution.
75 Id.
77 Id. at 381.
also regulated the use of expression based on the underlying message of the action, rather
than the action alone.\textsuperscript{78} Where there is some neutral reasoning for banning cross-burning or
swastika burning, such as prevention of fires and safety concerns, this ordinance was
explicitly directed towards the offender’s message instead of the action, thus failing the First
Amendment’s general prohibition against governmental speech banning due to disapproval
of the content.\textsuperscript{79} The ordinance applied only to certain words based on beliefs exclusive to
“racial, religious, or gender-specific symbols”\textsuperscript{80} and not to other words, regardless of how
offensive they may be. For example, the ordinance would not reach someone drawing
graffiti that said “all racists should burn” but would reach someone saying that “all African-
Americans should burn.” Instead of including all hateful expressive conduct, the selectivity
of the ordinance brought its demise.

Some restrictions on speech are allowed in specific, limited areas where the interest in
public morality outweighs the necessity of a kind of speech, which is not characterized as
expressive speech; these areas include things such as libel,\textsuperscript{81} child pornography,\textsuperscript{82} and
certain nonverbal expressive activity\textsuperscript{83} such as “fighting words.”\textsuperscript{84} The Court distinguished
these instances from the facts of \textit{R.A.V.} because speech that produces particular secondary
effects that are swept up within a statute directed at an action, rather than speech, is a
legitimate form for regulating “speech.”\textsuperscript{85} The Court used Title VII’s prohibition on sex
discrimination in employment as an example of an instance where sexually derogatory
words may be used as evidence of discrimination.\textsuperscript{86} The Court emphasized that “acts are not
shielded from regulation merely because they express a discriminatory idea or
philosophy.”\textsuperscript{87}

The Court in \textit{Wisconsin v. Mitchell} reaffirmed this message,\textsuperscript{88} while also slightly
stepping back from its extreme anti-regulation position.\textsuperscript{89} In \textit{Mitchell}, the Court upheld a
Wisconsin statute that provided for an enhanced sentencing penalty if the offender selected
the victim based on the “race, religion, color, disability, sexual orientation, national origin or
ancestry of that person.”\textsuperscript{90} Further, the Wisconsin statute enhanced the penalty for bias
crimes specifically because these crimes inflict a greater harm on society and the
individual.\textsuperscript{91} The Court rejected the view that conduct can be labeled speech because it
merely expresses an idea.\textsuperscript{92} In \textit{Mitchell}, the defendant argued that because the statute

\textsuperscript{78} \textit{Id.} at 380, 385.
\textsuperscript{79} \textit{Id.} at 382, 385.
\textsuperscript{80} \textit{Id.} at 393.
\textsuperscript{81} \textit{Id.} at 384 (excluding, most likely, proscription of content only libelous of the government).
\textsuperscript{82} \textit{Id.} (suppressing child pornography does not amount to suppression of communication of particular ideas
but rather censors a particular theme due to its harmful nature).
\textsuperscript{83} \textit{Id.} at 385 (prohibiting burning a flag may be permissible because of a desire to prevent fires, but not
because of a ban on dishonoring the flag).
\textsuperscript{84} \textit{Id.} at 384 (criminalizing words based on the non-speech elements of inciting violence is permissible and
the Court analogized this to the sound of a noisy truck that merely creates nuisance; however, the government
may not regulate that nuisance based on favoritism or disfavor towards a certain message).
\textsuperscript{85} \textit{Id.} at 389.
\textsuperscript{86} \textit{Id.}
\textsuperscript{87} \textit{Id.} at 390.
\textsuperscript{89} \textit{Bell, supra} note 5, at 972.
\textsuperscript{90} \textit{Mitchell,} 508 U.S. at 480.
\textsuperscript{91} \textit{Id.} at 487-88.
\textsuperscript{92} \textit{Id.} at 484 (citing United States v. O'Brien, 391 U.S. 367, 376 (1968)).
enhances the penalty for conduct based on bigoted beliefs more severely than the conduct without those beliefs, the First Amendment was violated.\textsuperscript{93} However, the Court noted that the motive of the defendant is often an important factor in criminal matters and sentencing and also upheld investigation into motive regarding antidiscrimination laws.\textsuperscript{94} Further, the defendant argued that evidence of prior speech and associations could be used as proof of intent and thus was overbroad and restrictive of free speech.\textsuperscript{95} The Court did not support the argument that someone would suppress bigoted opinions for fear of later committing a violent offense covered by the statute and therefore concluded that evidence of a person’s speech has long been used to prove motive or intent.\textsuperscript{96} This has occasionally been misinterpreted, as some scholars perceive the decision as holding that bigoted speech is not protected under the First Amendment.\textsuperscript{97} The speech is still protected and people are still allowed to opine, however, violence is never protected. Therefore, the perpetrator’s bigoted motive can be considered in a criminal prosecution.

The Court went further in \textit{Virginia v. Black} to clarify when cross-burning is protected “speech.”\textsuperscript{98} The Court held that it was lawful to ban cross-burning where the action had the intent to intimidate.\textsuperscript{99} Similarly, the HCPA targets the action, while considering the intent of the perpetrator. Because most criminal prosecutions consider the perpetrator’s intent in evaluating the crime, this consideration by hate crimes legislation is not novel.

Allowing punishment for action motivated by status animus is thus set out as a permissible government action. Laurence Tribe, in a Supreme Court Review article, artfully sets out four hypothetical statutes and analyzes them accordingly.\textsuperscript{100} Ordinance A would punish all assaults as felonies equally; Ordinance B would double the punishment for a felony motivated by racial hatred; Ordinance C would double the punishment based on the defendant’s beliefs; and Ordinance D would double the punishment based on the defendant’s attempt to communicate a racist message.\textsuperscript{101} Under Tribe’s analysis, the HCPA would fit under the hypothetical Ordinance B, which outlines a constitutionally acceptable punishment for action motivated by status animus. The HCPA punishes those who are motivated to harm a victim because of that victim’s status. The government must not punish beliefs that give rise to the act or the communication of beliefs, but as in Ordinance B, the government is allowed to legitimately punish the “facts” that were perceived by the perpetrator in committing the acts. This does not mean that the government is punishing the perpetrator’s beliefs about those facts, but rather the action motivated by those facts. In Ordinance B, the race of the victim is merely one of the facts perceived by the perpetrator in commission of the crime and is therefore punishable.\textsuperscript{102} Further, Ordinance B does not

\textsuperscript{93} Id. at 485.
\textsuperscript{94} Id. at 485, 487.
\textsuperscript{95} Id. at 488.
\textsuperscript{96} Id. at 489.
\textsuperscript{97} Bell, supra note 5, at 973.
\textsuperscript{98} Virginia v. Black, 538 U.S. 343, 368 (2003).
\textsuperscript{99} Bell, supra note 5, at 975.
\textsuperscript{101} Id. at 1-2.
\textsuperscript{102} Id. at 13.
violate the Equal Protection Clause because perpetrators of hate crimes are justifiably in a different circumstance than those who act for non-bias-motivated reasons.\textsuperscript{103}

The HCPA differs greatly from the legislation struck down in \textit{R.A.V.}, and while it is somewhat similar to the circumstances in \textit{Mitchell}, significant differences can still be found. Here, as the Court stated in \textit{R.A.V.}, “the subclass happens to be associated with particular ‘secondary effects’ of the speech, so that the regulation is ‘justified without reference to the content of the . . . speech.’”\textsuperscript{104} Therefore, though the speech happens to be used as a means to determine whether an act was motivated by the status of the subclass, the legislation is not regulating the speech, but the action. Similarly, if speech happens to prove a treasonous act, the treason is punishable and not the speech.\textsuperscript{105} As was noted in \textit{Mitchell}, bias-motivated crimes have the intended effect of provoking retaliation, emotionally harming the victim, and further intimidating the community surrounding the victim.\textsuperscript{106} In contrast to the situation in \textit{Mitchell}, the HCPA punishes the crime rather than merely adding a sentence enhancement. Therefore, as the HCPA does not address sentencing, the fear of potential Fifth Amendment double jeopardy is obsolete,\textsuperscript{107} and a single punishment is given for a single act.

Accordingly, because the HCPA does not specifically encourage the suppression of expression and rather criminalizes conduct, the legislation merely has to survive a rather lenient test: (1) it is within the power of the government; (2) it furthers important governmental interests; (3) the governmental interest is unrelated to suppression of free expression; and (4) any incidental restriction is no greater of a restraint on speech than is absolutely necessary to obtain the goal set forth by the proposed legislation.\textsuperscript{108} The HCPA easily passes this test, as the government’s Commerce Clause power to enact this legislation serves the important interest of protecting citizens from violence in interstate travel, specifically when citizens are targeted because of status.

\section*{VII. Criticisms}

\textit{There are six admonishments in the Bible concerning homosexual activity and our enemies are always throwing them up to us usually in a vicious way and very much out of context. What they don't want us to remember is that there are 362 admonishments in the Bible concerning heterosexual activity. I don't mean to imply by this that God doesn't love straight people, only that they seem to require a great deal more supervision.}

\textbf{Lynn Lavner}\textsuperscript{109}

While there are copious criticisms resounding in bigotry, there are several reasoned, though fallacious, criticisms of hate crimes legislation. Given the heightened nature of a criminal prosecution, in contrast to what is in large part the very civil nature of LGBT

\begin{thebibliography}{99}
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\bibitem{103} Id. at 30.
\bibitem{105} Id.
\bibitem{109} L\textsc{ynn} L\textsc{avner}, \textsc{Butch Fatale} (Bent Records 1992).
\end{thebibliography}
activism, several more procedural concerns arise. These criticisms range from jurisdictional upset to stifled First Amendment rights, and each holds very little water when weighed against the actuality of the HCPA. Some critics even assert potentially unfair implementation of prosecutions; however, the HCPA asserts that the Attorney General must use neutral and objective criteria to assess hate crimes and in decisions to prosecute.\footnote{National Defense Authorization Act for Fiscal Year 2010, Matthew Shepard & James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, § 4711(4), 123 Stat. 2190, 2841-42 (2009).}

Conservative religious leader and founder of the group Focus on the Family, Dr. James Dobson, and Andrea Lafferty of the Traditional Values Coalition, as well as others similarly situated, criticized the HCPA in its formative stages as they argued it would “muzzle” religious condemnation of homosexuality and was tantamount to calling religious sermons a hate crime.\footnote{David Stout, \textit{House Votes to Expand Hate-Crime Protection}, \textit{N.Y. Times} (May 4, 2007), http://www.nytimes.com/2007/05/04/washington/04hate.html; Ryan Bymes, \textit{Hate Crimes Legislation Draws Criticism from Christian Groups}, CNSNEWS (Apr. 22, 2009), http://cnsnews.com/news/article/hate-crimes-legislation-draws-criticism-christian-groups.} Lafferty further said that those religious sermons could later be used as motive to prove a hate crime if the speaker committed a crime.\footnote{Bymes, supra note 111.} This critique is flawed.

First, the Act includes specific limiting language that “[n]othing in this division shall be construed to allow prosecution based solely upon an individual’s expression of racial, religious, political, or other beliefs or solely upon an individual’s membership in a group advocating or espousing such beliefs.”\footnote{National Defense Authorization Act § 4710(4), 123 Stat. at 2842.} Therefore, since the HCPA excludes beliefs or expression, that fear is null and void. Unless the expression is in the form of a violent act towards another person, it falls outside of the scope of the HCPA. Second, the idea that sermons and religious ideas could be used to formulate motive is firmly grounded in evidentiary procedure. It is not a novel idea that a perpetrator’s words or actions prior to committing a crime can be used to prove motive. It would be cowardice for an individual that commits a crime to hide behind religion as a shield for hateful motive. The Court in \textit{Mitchell} addressed this issue against the argument that free speech is suppressed for fear of later use at a criminal trial, stating that “[t]he First Amendment, moreover, does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent.”\footnote{Wisconsin v. Mitchell, 508 U.S. 476 (1993).}

The HCPA specifically addresses the spiritual facet of the legislation, stating that:

\begin{quote}
[n]othing in this division . . . shall be construed . . . in a manner that substantially burdens a person’s exercise of religion . . . speech, expression, or association . . . if such exercise of religion, speech, expression, or association was not intended to— (A) plan or prepare for an act of physical violence; or (B) incite an imminent act of physical violence against another.\footnote{National Defense Authorization Act § 4710(3), 123 Stat. at 2841.}
\end{quote}

Therefore, religious and other spiritual groups have nothing to fear as long as they are not planning to act with or incite violence.\footnote{Nearpass, supra note 107, at 559, 561-62. Another argument concerns the Fifth Amendment double jeopardy clause for hate crime penalty enhancements, but does not address the situation in the context of the HCPA. The argument suggests that penalty enhancement at the sentencing phase does not give the defendant}
Though not necessarily a criticism, a very real concern is the potential criminalization of speech, as a consequence of hate crimes legislation taken too far. However, the HCPA intentionally omits and expressly excludes any expression from its scope. This fear of overreaching largely stems from Adolf Hitler’s use of the Weimar Republic’s hate-speech law to publicize his cause and draw attention to his political strife, and it is exactly this type of inability to speak out against such unrighteous indignation that should be avoided and observed carefully when avoiding a moral panic. It is a fine balance to strike between allowing speech and criminalizing conduct, but the HCPA has successfully found such a balance.

VIII. Jurisdiction

America, where thanks to Congress, there are forty million laws to enforce the Ten Commandments.

Anatole France

In February of 2010, the Thomas More Law Center filed Glenn v. Holder in the Eastern District of Michigan on behalf of a group of pastors, stating that the HCPA violated the Constitution’s First, Fifth, and Tenth Amendments and the Commerce Clause. Though most of the claims had no merit and suffered from a lack of standing for most of the complaint, the Commerce Clause jurisdictional argument was the strongest argument toward striking down the HCPA. In September of 2010, the district court held that the plaintiffs had neither standing to challenge the Act nor claim ripeness.
The complaint’s jurisdictional claims questioned the power the legislature has to pass such hate crimes legislation. However, the legislature’s Commerce Clause power, as a mechanism to end racial bigotry, is as old as black and white seating sections; Congress was found to act within its Commerce Clause power when it enacted legislation forbidding restaurants’ racial discrimination, as it burdened interstate commerce. For many of the same reasons, an LGBT person may fear or avoid going to a state where hate crimes are more prevalent, which arguably affects the interstate travel and commerce of citizens. If the inability to serve individuals in a restaurant interferes with the flow of merchandise in interstate commerce, then direct criminal violence against status victims could have the chilling effect of bringing it altogether to a halt. As part of the Congressional findings for the HCPA, Congress noted that hate-crime violence affects interstate commerce by affecting movement of those forced to flee such violence. Also, select members or groups are prevented from purchasing goods or sustaining employment in various areas due to violence. Further, violent offenders cross state lines to commit acts further victimizing the group, and channels of interstate commerce are used to perpetrate the acts. Finally, the violence is often committed using articles sold within the scope of interstate commerce.

Two Supreme Court decisions pose some challenges to this seemingly obvious Commerce Clause rationale. Under the not-so-distant Rehnquist Court decisions, the Court held, in United States v. Morrison and United States v. Lopez, that there are specifically granted state rights in regards to discriminatory action and criminal action. These cases, therefore, question the validity of the HCPA. In United States v. Morrison, the Violence Against Women Act was struck down as being outside of the scope of Congress’s Commerce Clause power because it was a criminal statute that “had nothing to do with commerce.” The statute contained no jurisdictional limit that had an explicit connection to interstate commerce, and there were no express congressional findings regarding the effects

Plaintiffs contend; rather, more individuals are affected by hate crimes which leads to greater punishment. Also, one of the pastors argues that the HCPA was aligning homosexuals with the civil rights movement for African Americans; in no way does this compare to the civil rights movement, but this pastor also cannot deny the significant violence and bigotry that the LGBT community has faced throughout history. Complaint at 6, 743 F. Supp. 2d 718 (No. 1:10cv10429). Further, the complaint focuses on homosexuals being the sole beneficiaries of the HCPA and insultingly overlooks the HCPA, which broadly names sexual orientation as only one of several groups that could be potential targets; specifically, the HCPA was named for the violence suffered by James Byrd, Jr., an African-American male dragged to his death by white perpetrators in Texas. National Defense Authorization Act § 4702(1), 123 Stat. at 2835.


Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.
on interstate commerce. Further, the dissent in *Morrison* seems to flow towards the *Gonzales* decision, stating that criminal activity can lead to economic repercussions, which makes it difficult to follow a strict test of only allowing economic activity to fall under Congressional Commerce Clause jurisdiction. The reasoning in the *Morrison* dissent, which is not controlling, that is strongly in line with *Gonzales*, which is controlling, would likely validate the HCPA. Further, unlike the initial Violence Against Women Act legislation, Congress has presented voluminous evidence of the economic damage that stems from hate crimes.

In both *Morrison* and *Lopez*, the Court made the distinction between economic and criminal regulation. In *United States v. Lopez*, the Court emphasized the fact that virtually everything could be extrapolated to reach some economic effect in order to be labeled an economic activity. However, unlike the HCPA, which regulates human action, in *Lopez* a regulation was placed on an isolated item—a gun—at an isolated location—a school. Like the dissent’s discussion in *Morrison*, a class of persons not subject to heightened scrutiny is protected under the HCPA from intrastate activity. However, the HCPA deals with a criminal remedy rather than the civil remedy of the Violence Against Women Act. It is somewhat difficult to see the economic relation to intrastate violence; however, the court in *Lopez* emphasized the importance of evaluating evidence of interstate economic effects to understand the underlying economic effects of intrastate violence. Through this evaluation, it is evident that there has been a plethora of evidence regarding hate crimes and its economic effects. Also, it is likely that the older reasoning of *Heart of Atlanta Motel, Inc. v. United States* where the Civil Rights Act of 1964 was upheld against a Commerce Clause challenge to regulate the intrastate activity of discriminatory hotel businesses, will have controlling effects on a court’s view of the HCPA. However, the HCPA deals with criminal punishment and *Heart of Atlanta Motel* dealt with public accommodations. Regardless, the Civil Rights Act was written with somewhat broad language that can be extended to privately-owned public accommodations. The HCPA deals with interstate commerce somewhat more broadly, recognizing that criminal activity stills citizen travel and productivity in interstate commerce.

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135 *Morrison*, 529 U.S. at 610-12. Though not the focus of the *Morrison* opinion, the statute dealt with a class of persons given only intermediate scrutiny protection in Supreme Court decisions. The HCPA however deals with various classes of individuals that are treated differently by Supreme Court decisions from the strict scrutiny level provided to various races to the lowest rational scrutiny applied to homosexuals. See Brown v. Bd. of Educ., 347 U.S. 483 (1954); see also *Lawrence v. Texas*, 539 U.S. 558 (2003).


137 *Morrison*, 529 U.S. at 656-57.


139 *Lopez*, 514 U.S. at 560.

140 *Id.* at 563.


142 *Id.* at 258-61. The distinction the Court has made between public and private actions in regards to discrimination cases can be found in some of the original civil rights litigation such as Justice Harlan’s dissent in *Plessy v. Ferguson*. 163 U.S. 537 (1896); *Justice Harlan* was no racial equality martyr, but rather focused on public rights of citizens. Just as riding a public mode of transportation is a public service of the government, so too is the police power of the state to protect citizens.

143 *Heart of Atlanta Motel*, 379 U.S. at 270.
The jurisdictional threat is eased with the more recent decision in the Commerce Clause line of cases, *Gonzales v. Raich*. This case pulled away from the states’ vast regulation rights. However, the *Gonzales* decision changed the focus to the economic nature of the illegal action. In *Gonzales*, the Court found the Controlled Substances Act to be a constitutional use of Congress’s Commerce Clause power. The Court emphasized that only a rational basis test was necessary for concluding that the illegal traffic of marijuana affected interstate commerce; this rationale follows *Wickard v. Filburn*, where it was held that even the smallest amount of local farming could be regulated by Congress because it eventually entered or had some, though perhaps miniscule, effect on interstate commerce in the aggregate. Therefore, if it can be upheld when Congress extrapolates that a small, medically useful size of an illegal substance affects interstate commerce enough to trigger the Commerce Clause jurisdiction, then it is rational to conclude that the great economic effects that hate crimes present also trigger Commerce Clause jurisdiction. Further, and most important, there is clear and monumental evidence of hate crimes affecting interstate commerce. On the other hand, there is little documentation of the actual effects that someone’s personal consumption for a medically documented illness swarming into the drug trade of interstate commerce, such as was the alleged fear of intrusion into interstate commerce in *Gonzales*.

While the Commerce Clause attack seems to be the strongest argument against the HCPA, a reasonable protection of citizen safety should certainly come under a necessary Commerce Clause use. Applying *Gonzales* to the HCPA requires a focus not on the economic or non-economic nature of the HCPA, but rather a look at the aggregate effect of the activity. This aggregate effect on interstate commerce need only be proven by whether a rational basis exists for concluding that the activity affects commerce. Therefore, given this low standard, it is rational to conclude that hate crimes that spread into the community affect commerce in the aggregate scale. The aggregate effect on nationwide commerce leads to a restriction on various groups’ travel to and from areas where there is a fear of violence. Further, Congress is explicitly authorized to protect persons in interstate travel, and if someone is restricted or forced into interstate travel because of fear it is within Congress’s power to protect citizens.

Therefore, while the Commerce Clause is the strongest argument against the HCPA, given the great weight of evidence presented to Congress regarding the impact on commerce coupled with the recent *Gonzales* decision and historical decisions, the HCPA is a reasonable use of Congress’s Commerce Clause power.

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144 *Gonzales v. Raich*, 545 U.S. 1, 1 (2005).
145 *Id.*
146 *Id.* at 9.
147 *Id.* at 22.
149 *Id.* at 125.
150 *Gonzales*, compared to the decision in *Emp’l Div. v. Smith*, 494 U.S. 872 (1990), seems reasonable, because in *Gonzales*, the interest of the Controlled Substances Act was up against medical use. While this is important, the interests of religious freedom, a sacred First Amendment right, were ignored against the Controlled Substances Act in the decision of *Smith*.
151 *Gonzales*, 545 U.S. at 22.
152 *Id.* at 19.
IX. From Lawrence to the HCPA: Criminalization to Protection

We are women and men who, from the time of our earliest memories, have been in revolt against the sex-role structure and nuclear family structure.

Martha Shelley  

In 2003, Lawrence v. Texas  was decided and was the first step toward alleviating the restrictions on travel for homosexuals. Though homosexuals were able to travel without the fear of criminal prosecution in these states, the fear of private personal persecution persisted. With the inception of the HCPA, though these fears are not eliminated, protections are afforded to victims. The HCPA provides enormous benefit to those who are persecuted based on their sexual orientation, as hate crimes will no longer be overlooked when the victim is homosexual. Further, there are several arguments based in criminal theory that justify the necessity for hate crimes legislation. A crime targeting homosexuals is one ultimately focused on instilling hate and intimidation in the community at large, and that goal is deserving of criminal recognition and sanctions.

Given the nullity of the criticisms of the HCPA, there is, in actuality, an array of benefits to the LGBT community. Several groups, such as the Human Rights Campaign and the National Gay and Lesbian Task Force, assert the expressive and retributive justifications that punishing teaches the lesson that hate is wrong and therefore beneficially adjusts the moral compass of the community. However, this assertion leads to some analytical disjunction with the argument that the law should not legislate morality. Nevertheless, all criminal law is, in some manner, based upon the morality of societal norms. In focusing on morality, the argument might be made clearer if it was stated that such a moral compass should not be one guided by the ideals of only one group’s faith.

Further, Lambda Legal asserts hope that the HCPA will open the door for further legislative protections in other areas, such as employment. With the potential of the Employment Non-Discrimination Act, increased visibility and protection for sexual

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157 LAMBDA LEGAL, http://www.lambdalegal.org/about-us, (last visited Jan. 13, 2012) (Lambda Legal is the oldest and largest national LGBT legal organization whose primary mission is to advance the civil rights of LGBT individuals).
orientation’ status is a step in the right direction. This benefit follows the change in the social narrative of critical race theory and the slow evolution of social normalization of homosexuality.\textsuperscript{161} To extrapolate, the bounds of the social narrative will hopefully progress to one day categorize sexual orientation as a protected class requiring heightened scrutiny in judicial decisions.

Zylan points out various theories that reveal the benefits and justifications for hate crimes legislation.\textsuperscript{162} Additionally, justifications based on utilitarian theory, which perceive punishment as an evil that must be outweighed by social good, leads to the conclusion that the punishment of hate crimes leads to the social good of the possibility of minimizing anti-gay hatred; this necessitates the change in social norms that leads to the change in the emotion of hatred.\textsuperscript{163} The societal good of eliminating or even lessening hatred and protecting citizens is substantial given the dark past and present of violent hate crimes directed at LGBT individuals. Next, the expressivist justification, which highlights the symbolic importance of laws in setting an example for societal values, concludes that the HCPA provides the societal norm that this conduct is particularly disfavored in society for the community target and that the victims are valued members of society.\textsuperscript{164} The expressivist justification works in tandem with retributivist theory.

The retributivist theory requires that the punishment “fit the crime.”\textsuperscript{165} Expressivist justification is specifically enlightening for hate crimes legislation in light of retributivist theory\textsuperscript{166} and leads to the conclusion that the goals of expressivism fit the punishment of hate crimes. In other words, given the communal target of hate crimes and importance of societal norms espoused by expressivists, the retributivist theory of the punishment fitting the crime is fulfilled. One problem with expressivist theory in relation to sexual-orientation targeting is the criminal law modus of determining the crime.\textsuperscript{167} The objective elements of criminal enforcement are often feared to lead to categorical stereotyping, which gives rise to the ‘homosexual panic defense.’\textsuperscript{168} However, this concern regarding application of the legislation is largely outweighed by its function.

The benefits of the visibility that the HCPA gave to the communal strife of LGBT citizens to fight against violence and victimization can already be seen.\textsuperscript{169} In In re E.P.L., the court used the fact that violence based on gender identity is so prevalent that it has been codified into a protective law, as a motivating factor for providing privacy to a transgender individual when faced with publication requirements for name changes.\textsuperscript{170} Prior to the signing of the HCPA, there was no affirmative stamp of government recognition that LGBT individuals were targeted due to status. Though the individual could not state any specific violent acts against himself, the HCPA recognizes the potential for targeting individuals

\textsuperscript{161} BROOKS, supra note 25, at 96.
\textsuperscript{162} Yvonne Zylan, Passions We Like...And Those We Don’t: Anti-Gay Hate Crime Laws And The Discursive Construction of Sex, Gender, and The Body, 16 MICH. J. GENDER & L. 1, 25 (2009).
\textsuperscript{163} Id. at 34-35.
\textsuperscript{164} Id. at 34-35.
\textsuperscript{165} Id. at 35.
\textsuperscript{166} Id. at 35-38.
\textsuperscript{167} Id. at 43.
\textsuperscript{168} Id. at 43-44. The homosexual panic defense was used during the trial of the perpetrators of Matthew Shepard’s death to say that they went temporarily insane, because they panicked at the fear of homosexual advances.
\textsuperscript{169} In re E.P.L., 891 N.Y.S.2d 619, 620-21 (Sup. Ct. 2009).
\textsuperscript{170} Id. at 621.
because of their sexual orientation to intimidate the community.\textsuperscript{171} Therefore, the court found this individual’s fears to be well-founded given the history of violence towards transgender individuals.\textsuperscript{172}

Given the HCPA’s broad range of benefits and potential boon to society, it is impressive that only seven years ago consensual homosexual sodomy was criminal in some states, and now violence against homosexuals is criminal. The long-fought battle of activists, and specifically the work of the Shepards, has made significant strides in developing the social narrative to include LGBT minorities in the nation’s story.

X. Conclusion

\textit{Dennis and I keep promising each other that there will come a time when the Matthew Shepard Foundation will become irrelevant, when it’s inconceivable that gay people were ever considered anything other than vital to what makes our world wonderful. When I really think about it, that’s the future I’m focused on.}

Judy Shepard, from \textit{The Meaning of Matthew}\textsuperscript{173}

In conclusion, the passage of the HCPA was an important step taken by our nation’s leadership towards erasing hate, without encroaching within the bounds of First Amendment liberties. Further, Congress was well within the Commerce Clause power to enact this necessary legislation to prevent crimes that evolve into much more than a mere act, but rather reaches lives beyond the victim. Therefore, it successfully skirts the criticisms based upon First Amendment and Commerce Clause arguments. The HCPA follows the precedent set by fellow nations devoted to protecting all citizens, without going quite as far in reach. Finally, this legislation puts a face with a name. Hate crimes are committed because of intolerant, misguided perceptions of an individual, not because of knowledge of the person. It is said that it is easier to harm a stranger than a friend, and the visibility of the HCPA marks a companion for those who have suffered.

\textsuperscript{171} \textit{Id.}
\textsuperscript{172} \textit{Id.}
\textsuperscript{173} JUDY SHEPARD \& JOHN BARRETT, \textit{THE MEANING OF MATTHEW: MY SON’S MURDER IN LARAMIE, AND A WORLD TRANSFORMED} 272 (2009).