Hope-Fulfilling or Effectively Chilling? Reconciling the Hate Crimes Prevention Act With the First Amendment

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I. INTRODUCTION

Living on a meager disability pension and without means of transportation, forty-nine-year-old African American James Byrd, Jr. of Jasper, Texas thought he had caught a break when three white men offered him a ride home on June 6, 1998.[1] The following morning, police found Byrd's torso in the middle of the road, his head and arm in a ditch a mile away, and a three-mile trail of blood staining the road.[2] That racial animus was the motivation for Byrd's torture, dragging, and death was hardly in dispute. Two of the three perpetrators were members of white supremacist organizations and bore tattoos of swastikas and black men in nooses, and one perpetrator allegedly made a number of racial slurs both before and during the murder.[3]

As gruesome as this crime was, prosecutors were unable to seek enhanced sentences for the perpetrators due to inadequacies in existing state and federal hate crime law.[4] Federal hate crime law applied only if victims were engaging in "federally protected activities" when attacked, and Texas laws enhancing sentences for hate crimes were not useful in this case.[5] Later that year, Wyoming lawyers were precluded from seeking an enhanced sentence in the case of Matthew Shepard, a college student who was tortured and murdered because of his homosexuality, because Wyoming was one of the few states at the time with no hate crime laws.[6]

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1. For general details of the crime, see Claudia Kolker, *Trial Opens in Black Man's Savage Dragging Death*, L.A. TIMES, Feb. 17, 1999, at A1; Richard Stewart, *Trio Charged in Jasper Slaying*, HOUS. CHRON., June 10, 1998, at A1.

2. Richard Stewart, *Dragged into Infamy*, HOUS. CHRON., Jan. 24, 1999, at A1.

3. *Id.*

4. *See* Kathleen Kenna, *Victims' Families Demand Hate Crime Crackdown*, TORONTO STAR, Mar. 24, 1999, at 1 ("Current federal law is inadequate because it's linked to specific acts, such as being preventing [sic] from voting or attending school because of one's race . . . ."). However, all three perpetrators were convicted of capital murder; two were sentenced to death and one received life in prison. *Third Defendant is Convicted in Dragging Death in Texas*, N.Y. TIMES, Nov. 19, 1999, at A33.

5. Erin Kelly, *Victim's Daughter Pleads for Stronger Hate-Crime Laws*, USA TODAY, July 9, 1998, at 6A; *see also supra* note 4 and accompanying text (noting that all of the Byrd defendants received either death or life in prison). Prosecutors did not utilize Texas's "broadly worded" hate crimes law, which failed to specify which groups were covered under the statute, because they were already seeking capital punishment. Rick Lyman, *Hate Laws Don't Matter, Except When They Do*, N.Y. TIMES, Oct. 18, 1998, § 4, at 6.

6. Editorial, *Hate Crimes and Wyoming Justice*, TAMPA TRIB., Nov. 6, 1999, at 16; Michael Janofsky, *A Year After a Gay Man's Killing, Laramie Braces for a Second Trial*, N.Y. TIMES, Oct. 11, 1999, at A10. Unlike the men who killed James Byrd, Matthew Shepard's murderers were each sentenced to two consecutive life terms. Julie Cart, *Killer of Gay Student Is Spared Death Penalty*, L.A. TIMES, Nov. 5, 1999, at A1.

In the decade since these crimes occurred, there has been little decline in the number of hate crimes reported each year.[7] In fact, while crimes against African Americans continue to account for almost a third of hate crimes nationwide, crimes against Muslims, Hispanics, and persons of various sexual orientations are on the rise.[8] In November 2010, the FBI reported that 6,604 incidents of hate crimes involving 8,336 victims were committed in 2009.[9] An intensive three-year study conducted by the Department of Justice suggests that the real number of hate crimes is between nineteen and thirty-one times higher than reported by FBI statistics.[10]

On October 28, 2009, "[a]fter more than a decade of opposition and delay," President Barack Obama signed into law the first bill expanding the parameters of federal hate crime law in over forty years.[11] The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act ("HCPA") broadens federal hate crime law to incorporate "violence motivated by the . . . gender, sexual orientation, gender identity, or disability of the victim."[12] It also significantly expands federal jurisdiction over hate crimes by eliminating the requirement that victims engage in "federally protected activities" and increases federal funding for the investigation and prosecution of these crimes.[13]

Unsurprisingly, not everyone is pleased with what Obama and civil rights advocacy groups deem "long-awaited" legislation.[14] In addition to arguments that the law violates the Commerce Clause, the

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7. *Compare* FBI, HATE CRIME STATISTICS 2009, tbl.1 (2010) [hereinafter HATE CRIME 2009], http://www2.fbi.gov/ucr/hc2009/incidents.html (last visited Nov. 26, 2010) (6,604 incidents), *with* FBI, HATE CRIME STATISTICS 1998, at 3 (1999), *available at* http://www.fbi.gov/about-us/cjis/ucr/hate-crime/1998 (7,755 incidents).

8. *See supra* note 7.

9. HATE CRIME 2009, *supra* note 7.

10. S. Poverty Law Ctr., *FBI Hate Crime Statistics Vastly Understate Problem*, INTELLIGENCE REP., Winter 2005, *available at* http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2005/winter/hate-crime; *see also* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, HATE CRIMES REPORTED BY VICTIMS AND POLICE (2005), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/hcrvp.pdf (containing raw data indicating that actual hate crimes are more numerous than annual FBI reports).

11. Barack Obama, Remarks at the Signing of the National Defense Authorization Act for Fiscal Year 2010 (Oct. 28, 2009), *available at* http://www.whitehouse.gov/the-press-office/remarks-president-signing-national-defense-authorization-act-fiscal-year-2010. For a discussion of three laws passed in the early- to mid-1990s that were indirectly related to the prosecution of federal hate crime laws, see *infra* Part II.B.

12. Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act of 2009, Pub. L. No. 111–84, §§ 4701–4713, 123 Stat. 2835 (2009) (codified as amended in scatted sections of 18, 28, and 42 U.S.C.).

13. *Id.*

14. Obama, *supra* note 11.

Fourteenth Amendment, and the Double Jeopardy Clause, opponents of the HCPA argue that it stifles freedom of speech and association.[15] Because it permits consideration of perpetrators' words, beliefs, and associations when determining their underlying biased motives, the bill has reinvigorated a decades-old argument over whether the values of the First Amendment are in irresolvable conflict with the anti-hate crime agenda. In fact, federal courts are already seeing constitutional challenges to the HCPA on the grounds that it deters, inhibits, and chills the exercise of First Amendment rights.[16]

This Note examines the ongoing debate over whether the First Amendment hopelessly conflicts with the HCPA. Part II chronicles hate crime legislation and jurisprudence from its roots in the Civil Rights era, through the relevant Supreme Court rulings of the late 1990s and early 2000s, to the three-year legislative battle over the bill, culminating with its passage in October 2009. Part III examines the arguments for and against the legislation and highlights the merits and defects of both sides of the debate. Part IV concludes that the new law's rules of construction render its consideration of speech, thought, and association constitutionally permissible. However, it urges that the Department of Justice set forth procedural and evidentiary guidelines to ensure that the HCPA, as applied, does not unjustly infringe on First Amendment freedoms.

II. POLICY BASES FOR AND HISTORICAL DEVELOPMENT OF HATE CRIME LEGISLATION

Federal law defines a hate crime, also referred to as a "bias crime," as "a crime in which the defendant intentionally selects a victim . . . because of the [victim's] actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual

15. *See, e.g.*, JAMES B. JACOBS & KIMBERLY POTTER, HATE CRIMES: CRIMINAL LAW AND IDENTITY POLITICS (1998) (Commerce Clause, Fourteenth Amendment, and First Amendment); David Hong, *Hate Crime Regulation and Challenges*, 10 GEO. J. GENDER & L. 279, 287–94 (2009) (same); Christopher Chorba, Note, *The Danger of Federalizing Hate Crimes: Congressional Misconceptions and the Unintended Consequences of the Hate Crimes Prevention Act*, 87 VA. L. REV. 319, 348, 355 (2001) (Commerce Clause and Double Jeopardy Clause); Christopher DiPompeo, Comment, *Federal Hate Crime Laws and* United States v. Lopez*: On a Collision Course to Clarify Jurisdictional-Element Analysis*, 157 U. PA. L. REV. PENNUMBRA 617, 649–68 (2008) (Commerce Clause); Gregory R. Nearpass, Comment, *The Overlooked Constitutional Objection and Practical Concerns to Penalty-Enhancement Provisions of Hate Crime Legislation*, 66 ALB. L. REV. 547, 561–69 (2003) (Double Jeopardy Clause).

16. Complaint ¶¶ 102–08, at 22–23, Glenn v. Holder, No. 2:10–cv–10429–TLL–CEB (E.D. Mich. Feb. 2, 2010), *available at* http://www.thomasmore.org/downloads/sb_thomasmore/Complaint-HateCrimes2010.pdf.

orientation."[17] Such crimes are "the criminal manifestation of prejudice."[18] The constitutional dilemma arises from the fact that one of the most direct means of determining the accused's motive—and often the only evidence available—is his or her speech before, during, and after the crime.[19] First Amendment concerns are implicated whenever police and prosecutors seek to use evidence of perpetrators' speech, expressive actions, or membership in organizations to prove the requisite animus.

A. Why the Government Regulates Hate Crimes

No chronology of hate crime legislation would be complete without a brief explanation of why such legislation is appropriate. First, the detrimental effect of hate crimes on their victims is typically much worse than that of parallel crimes. Not only are hate crimes more likely to involve physical assaults and result in serious physical injury to the victim, but their emotional and psychological impact on victims is also more severe, as such crimes attack the "core of [victims'] identity."[20] The powerful sense of violation that hate crime victims experience is comparable only to that of rape victims.[21] In both situations, victims "tend to experience psychological symptoms such as depression or withdrawal, as well as anxiety, feelings of helplessness, and a profound sense of isolation."[22] This is particularly true for minority victims, for whom such bias "evoke[s] . . . all of the millions of cultural lessons regarding your inferiority that you have so painstakingly repressed, and imprint upon you a badge of servitude

17. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103–322, § 280003(a), 108 Stat. 1796 (1994) (codified in part as amended at 28 U.S.C. § 994 (2006)). The FBI similarly defines bias crimes as any "criminal offense committed against a person or property which is motivated, in whole or in part, by the offender's bias against a race, religion, disability, sexual orientation or ethnicity/national origin." U.S. DEP'T OF JUSTICE, HATE CRIME DATA COLLECTION GUIDELINES 2 (1999), *available at* http://www.fbi.gov/about-us/cjis/ucr/hate-crime/hcguidelinesdc99.pdf.

18. Frederick M. Lawrence, *The Hate Crime Project and Its Limitations: Evaluating the Societal Gains and Risks in Bias Crime Law Enforcement*, *in* SOCIAL CONSCIOUSNESS IN LEGAL DECISION MAKING: PSYCHOLOGICAL PERSPECTIVES 210 (Richard L. Wiener et al. eds., 2007).

19. AnnJanette Rosga, *Bias Before the Law: The Rearticulation of Hate Crimes in* Wisconsin v. Mitchell, 25 N.Y.U. REV. L. & SOC. CHANGE 29, 46 (1999).

20. FREDERICK M. LAWRENCE, PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW 40 (1999).

21. *Id.* (citing Joan Weiss, *Ethnoviolence: Impact upon the Response of Victims and the Community*, *in* BIAS CRIME: AMERICAN LAW ENFORCEMENT AND LEGAL RESPONSE 174, 182–83 (Robert J. Kelly ed., 1993); N.R. Kleinfield, *Bias Crimes Hold Steady, but Leave Many Scars*, N.Y. TIMES, Jan. 27, 1992, at A1; Melina Henneberger, *For Bias Crimes, a Double Trauma*, NEWSDAY, Jan. 9, 1992, at 113).

22. *Id.*

and subservience for all the world to see."[23] Of further concern is the immutable nature of most characteristics that inspire hate crimes: gender, race, national origin, ethnicity, disability, and sexuality. As Professor Frederick Lawrence aptly notes, "the bias crime victim cannot reasonably minimize the risk of future attacks because he is unable to change the characteristic that made him a victim."[24]

Moreover, hate crimes have a unique systemic impact on "target communities"—those people sharing the victim's distinguishing characteristics. Because hate crimes are often intended "to not just harm the victim, but to send a message of intimidation to an entire community of people,"[25] target communities experience hate crimes "in a manner that has no equivalent in the public response to a parallel crime."[26] Instead of merely feeling sympathy for the victim, target communities feel directly threatened and attacked by bias-motivated crimes.[27] Hate crimes thus trigger widespread feelings of isolation, hurt, and fear, and as evidenced time and again, the mere mention of a hate crime can inflame intercommunity tensions.[28] The Supreme Court has found the systemic effects of hate crimes substantial enough to justify the imposition of enhanced sentences.[29]

Finally, enhanced punishment for hate crimes can be justified on symbolic grounds, as such laws send a "message to society that criminal acts based upon hatred will not be tolerated."[30] Particularly

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23. Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 461 (1990).

24. LAWRENCE, *supra* note 20, at 40.

25. 134 CONG. REC. H3373–02 (daily ed. May 18, 1988) (statement of Rep. Conyers).

26. LAWRENCE, *supra* note 20, at 41–42; *see also* VALERIE JENNESS & RYKEN GRATTET, MAKING HATE A CRIME: FROM SOCIAL MOVEMENT TO LAW ENFORCEMENT 3 (2001) ("In effect, hate crimes have two kinds of victims, individuals and their communities. This broadening of the parameters of victimization associated with hate crime serves to justify enhanced penalties and other governmental policy responses.").

27. LAWRENCE, *supra* note 20, at 42 (citing JACK LEVIN & JACK MCDEVITT, HATE CRIMES REVISITED (2002); A. KARMEN, CRIME VICTIMS: AN INTRODUCTION TO VICTIMOLOGY 262–63 (2d ed. 1990); ROBERT ELIAS, THE POLITICS OF VICTIMIZATION 116 (1986); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2330–31 (1989)).

28. For example, the alleged rape of a female African American resident of Durham, North Carolina by members of the Duke University lacrosse team heightened community tensions immediately after the crime was reported. *See* Thomas Fitzgerald, *Allegation at Duke Shaded by Race, Class*, PHILA. INQUIRER, Apr. 2, 2006, at A1; Juliet Macur, *With City on Edge, Duke Students Retreat*, N.Y. TIMES, Apr. 2, 2006, § 8, at 4. For an account of the heightened racial tensions in Jasper, Texas in the wake of James Byrd, Jr.'s murder, see TWO TOWNS OF JASPER (Two Tone Productions, Inc. 2002).

29. Wisconsin v. Mitchell, 508 U.S. 476, 487–88 (1993) (finding adequate a state's concern that "bias-motivated crimes are more likely to provoke retaliatory crimes . . . and incite community unrest").

30. JENNESS & GRATTET, *supra* note 26, at 3.

poignant for a country stolen from a native population, built by an enslaved race, and constantly struggling to achieve the equality that is constitutionally guaranteed to its citizenry, hate crime laws are both preventative and reconciliatory. During a discussion of an early draft of the HCPA, Representative Dick Gephardt emphasized that the law "sends a message to the world that crimes committed against people because of who they are . . . are particularly evil, particularly offensive. It says that these crimes are committed, not just against individuals, not just against a single person, but against our very society, against America."[31] Our legal system penalizes bias crimes with the aforementioned warnings and policies in mind.

B. A Brief History of Hate Crime Legislation

1. Early Developments in Hate Crime Law: 1968–1994

Federal hate crime legislation did not exist until the mid-twentieth century.[32] The Civil Rights Act of 1968 created a federal cause of action for crimes motivated by the victim's race, color, religion, or national origin that were committed against people engaging in federally protected activities, such as voting, serving as a juror, traveling between states, or attending public school.[33] Under this statute, prosecutors had to allege federal civil rights violations to get enhanced penalties for hate crimes. For this reason, and also because of the increase in hate crimes (or the attention brought thereto) during the following few decades, states began to develop

31. 146 CONG. REC. H7532 (daily ed. Sept. 13, 2000) (statement of Rep. Gephardt); *see also* 153 CONG. REC. H4421 (daily ed. May 3, 2007) (statement of Rep. Holt) ("By making our Nation's hate crimes statutes more comprehensive, we will take a needed step in favor of tolerance and against prejudice and hate-based crime in all its forms. This legislation sends a strong message that hate-based crime cannot be tolerated and will be vigorously prosecuted.").

32. Some argue that the Civil Rights Act of 1871, which provided criminal sanctions and a civil damages action for offenses depriving any person of equal rights, privileges, or immunities under the law, provided the basis for modern hate crime laws. Hong, *supra* note 15, at 280–81; *see also* 18 U.S.C. § 242 (2006) (a recent federal statute, based on a statute enacted in 1909, establishing criminal penalties for individuals acting under color of law who willfully deprive another of their constitutional rights on the basis of color, race, or alienage); 42 U.S.C. §§ 1983, 1985 (federal provisions originally enacted as part of the Civil Rights Act of 1871 that provide a civil cause of action for the deprivation of constitutional rights).

33. Hong, *supra* note 15, at 281 (citing 18 U.S.C. § 245(b)).

their own hate crime laws in the early 1980s.[34] By 1992, forty-six states and the District of Columbia had enacted hate crime statutes.[35]

However, the benefits of state hate crime laws were discounted by their flaws, including problems of selective enforcement, underenforcement, underfunding, and lack of uniformity.[36] Heightened public awareness of hate crimes and strengthened advocacy for regulation in the federal arena culminated in the passage of three influential—though ultimately insufficient—federal laws in the early 1990s.[37] First, the Hate Crimes Statistics Act of 1990, which was the first federal law to use the term "hate crime," required the Attorney General to collect and publish data on crimes motivated by discriminatory animus.[38] Second, the Violence Against Women Act of 1994 created a civil remedy for victims of crimes motivated by gender.[39] Finally, the Hate Crimes Sentencing Enhancement Act of 1994 specified eight predicate crimes for which judges could impose enhanced penalties if a factfinder determined beyond a reasonable doubt that the crimes were hate crimes.[40] However, this legislation was subject to an important limitation: it applied only to federal crimes and crimes committed on federal property.[41] While each of these early federal laws represented a step in the right direction, they did not provide sufficient legal recourse for most hate crime victims.

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34. *See generally* JENNESS & GRATTET, *supra* note 26, at 73–101 (chronicling and characterizing state hate crime laws during the last two decades of the twentieth century); Terry A. Maroney, *The Struggle Against Hate Crime: Movement at a Crossroads*, 73 N.Y.U. L. REV. 564, 589–91 (1998) (discussing the emergence and current variation of state hate crime laws).

35. Maroney, *supra* note 34, at 585 n.125 (citing ANTI-DEFAMATION LEAGUE & U.S. CONFERENCE OF MAYORS, ADDRESSING RACIAL AND ETHNIC TENSIONS: COMBATING HATE CRIMES IN AMERICA'S CITIES 1 (1992)).

36. *See id.* at 599–616; *see also* H.R. REP. NO. 111–86, at 6–7 (2009) (describing the "limited . . . ability of Federal law enforcement officials to work with State and local officials in the investigation and prosecution of many incidents of brutality and violence motivated by prejudice"); Frederick M. Lawrence, *The Evolving Federal Role in Bias Crime Law Enforcement and the Hate Crime Prevention Act of 2007*, 19 STAN. L. & POL'Y. REV. 251, 273–74 (2008) (describing the problem of state default in bias crime prosecution).

37. For a comprehensive account of the rise of the crime victim movement, see generally FRANK J. WEED, CERTAINTY OF JUSTICE: REFORM IN THE CRIME VICTIM MOVEMENT (1995).

38. *See* Hate Crime Statistics Act, Pub. L. No. 101–275, 104 Stat. 140 (1990) (codified in part at 28 U.S.C. § 534).

39. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103–322, 108 Stat. 1796 (1994) (codified as amended in scattered sections of 8, 18, 28, 42 U.S.C.). *But see* United States v. Morrison, 529 U.S. 598, 613–14 (2000) (invalidating the part of VAWA that authorizes women to seek civil remedies against their attackers due to lack of Congressional authority under the Commerce Clause).

40. Hate Crimes Sentencing Enhancement Act of 1994, Pub. L. No. 103–322, § 280003 (1994) (codified as 28 U.S.C. 994).

41. *Id.*

2. Free Speech and Hate Crimes Jurisprudence

Though challenges to federal hate crime laws only emerged with the passage of the HCPA in October 2009, constitutional challenges to state hate crime laws have taken many forms over the years, including claims under the Due Process, Equal Protection, Commerce, and Double Jeopardy Clauses. This Note concentrates on the cases that deal with First Amendment challenges in which plaintiffs often allege overbreadth and "chilling effects," direct punishment of speech, and content and viewpoint discrimination.

The First Amendment prohibits Congress from making any law "abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble."[42] It gives an individual the right to associate with others who share similar beliefs, and prevents the government from proscribing speech or expressive conduct because of disapproval with the ideas expressed.[43] However, these freedoms "[are] not absolute at all times and in all circumstances."[44] In *United States v. O'Brien*, the Court found that a law criminalizing the burning of draft cards did not violate the First Amendment, even if the act was a symbolic gesture, because the law was limited to the "noncommunicative aspect" of the conduct.[45] The Court held that when "speech" and "nonspeech" elements are combined in a criminal statute, an important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.[46] Such laws are justified if (1) they are within the government's constitutional power, (2) they further an important governmental interest unrelated to the suppression of free expression, and (3) the incidental restriction on First Amendment freedoms is no greater than is essential to further that interest.[47]

Two Supreme Court cases, *R.A.V. v. St. Paul* and *Wisconsin v. Mitchell*, shaped the hate crime law debate in the early 1990s. In

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42. U.S. CONST. amend. I.

43. *See* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958) ("It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."); *see also* Virginia v. Black, 538 U.S. 343, 358 (2003) ("The hallmark of the protection of free speech is to allow 'free trade in ideas'—even ideas that the overwhelming majority of people might find distasteful or discomforting.") (citing Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)). *But see* Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) (noting that there are several "well-defined and narrowly limited classes of speech" that are not constitutionally protected).

44. *Chaplinsky*, 315 U.S. at 571.

45. United States v. O'Brien, 391 U.S. 367, 381–82 (1968).

46. *Id.* at 376.

47. *Id.* at 377.

R.A.V. v. St. Paul, the Court found that an anti-cross burning ordinance constituted "content discrimination" under the First Amendment, which bars government officials from discriminating based on disfavor with the content of a person's speech.[48] The Minnesota ordinance at issue prohibited cross burning when the perpetrator intended to arouse anger, alarm, or resentment "on the basis of race, color, creed, religion, or gender."[49] Precedent dictated that the act of cross burning was "nonverbal expressive conduct" entitled to protection under the First Amendment.[50] Thus, the ordinance specified five topics—race, color, creed, religion, and gender—that rendered biased expression criminally actionable. "Selectivity of this sort," the Court held, "creates the possibility that the city is seeking to handicap the expression of particular ideas."[51] Though *R.A.V.* applied to hate speech laws, some courts believed it marked a final blow to the proscription of hate crimes as well.[52]

Months later, the Court addressed hate crime laws head-on in *Wisconsin v. Mitchell*. In *Mitchell*, the Court found that a statute enhancing a defendant's sentence for intentionally selecting a victim based on the victim's race did not violate the defendant's free speech rights.[53] The Court upheld the statute because it punished those people who engaged in violent conduct based on their biases rather than punishing expression or bias itself.[54] The Court analogized the role of a defendant's motive in hate crime statutes with the role motive plays in federal and state anti-discrimination laws, which were previously upheld against First Amendment challenges.[55] The Court also rejected arguments about the chilling effects of hate crime laws:

> The sort of chill envisioned here is far more attenuated and unlikely than that contemplated in traditional "overbreadth" cases. We must conjure up a vision of a . . . citizen suppressing his unpopular bigoted opinions for fear that if he later commits an offense covered by the statute, these opinions will be offered at trial to . . . qualify[] him for penalty enhancement. . . . This is simply too speculative a hypothesis to support [an] overbreadth claim.[56]

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48. R.A.V. v. St. Paul, 505 U.S. 377, 387 (1992).

49. *Id.* at 380 (citing ST. PAUL, MINN., LEGIS. CODE § 292.02 (1990)).

50. *See id.* at 385 (citing Texas v. Johnson, 491 U.S. 397, 406–07 (1989)).

51. *Id.* at 394.

52. State v. Mitchell, 485 N.W.2d 807, 814–16 (Wis. 1992) (relying on *R.A.V.* to find that a hate crimes statute unconstitutionally punished bigoted thought and had a chilling effect on speech), *rev'd*, Wisconsin v. Mitchell, 508 U.S. 476 (1993).

53. Wisconsin v. Mitchell, 508 U.S. 476, 490 (1993).

54. *Id.* at 485–87 (distinguishing *R.A.V.*).

55. *Id.* at 487 (citing Hishon v. King & Spaulding, 467 U.S. 69, 78 (1984); Roberts v. U.S. Jaycees, 468 U.S. 609, 628 (1984); Runyon v. McCrary, 427 U.S. 160, 176 (1976)).

56. *Id.* at 488–89.

However, *Mitchell* did not put an end to the debate. While *Mitchell* ensured that hate crime laws can be consistent with the First Amendment, anti-hate crime law advocates maintain that *Mitchell* merely upheld the constitutionality of the Wisconsin statute at issue and did not preclude facial or as-applied constitutional challenges to other hate crime laws.[57]

Many of the facial attacks questioned whether and to what extent prosecutors can use speech, association, and expression as direct or circumstantial evidence of hate crimes, and the Court has issued several rulings addressing these evidentiary concerns. The First Amendment does not prohibit the use of speech to establish the elements of a crime or to prove motive or intent.[58] Over a decade before the term "hate crime" became widely used, the Court held in *Barclay v. Florida* that the Constitution does not prohibit a trial judge from taking into account elements of racial hatred in a murder.[59] Several years later, the Court clarified in *Dawson v. Delaware* that the Constitution "does not erect a *per se* barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment."[60]

This rule is, however, subject to limitations. In *Dawson*, the Court prohibited the introduction in a capital sentencing proceeding of evidence that the defendant was a member of the Aryan Brotherhood because this evidence had no relevance to the issues of the case.[61] Biased intent must be relevant to the crime and proven to the factfinder beyond a reasonable doubt.[62]

Recently, the courts have shifted their focus to more peripheral issues of the hate crime debate, such as what kind of evidence is legitimate enough to prove the existence of bias beyond a reasonable doubt; whether victim pre-selection is necessary for a crime to qualify as a hate crime;[63] what kinds of expressive conduct can be regulated

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57. *See infra* notes 73, 76–86 and accompanying text.

58. *Mitchell*, 508 U.S. at 489 (citing Haupt v. United States, 330 U.S. 631, 642 (1947)).

59. 463 U.S. 939, 949–50 (1983).

60. 503 U.S. 159, 165 (1992).

61. *Id.* at 166–68.

62. Ring v. Arizona, 536 U.S. 584, 609 (2002); Apprendi v. New Jersey, 530 U.S. 466, 476–77 (2000); *Barclay*, 463 U.S. at 950.

63. State v. Johnson, 64 P.3d 88, 90 (Wash. Ct. App. 2003) ("A person may not be convicted of uttering biased remarks during the commission of another crime without proof that the victim was selected on an impermissible basis . . . . Statements and actions are circumstantial evidence of victim selection."); State v. Pollard, 906 P.2d 976, 981 (Wash. Ct. App. 1995) (holding that a hate crime law need not require a finding about the perpetrator's planning and forethought).

under a hate crime statute;[64] and what proportion of the motivation needs to be biased in order for an act to qualify as a hate crime.[65] Most likely as a result of *Mitchell*, plaintiffs have shifted their concern away from the "central preoccupation with whether the entire statute represents an infringement on speech" to whether individual laws' construction renders them unconstitutional.[66]

3. The Decade-Long Journey of the HCPA

The debate in Congress over the constitutionality of the HCPA waged for over a decade. Representative John Conyers first introduced the HCPA to the 106th Congress in 1999 as part of that year's Department of Defense authorization bill.[67] Despite bipartisan support in both the House and Senate at the turn of the century, the Senate Armed Services Committee stripped the HCPA from the Defense authorization bill in 2000. Similar drafts failed to advance in committee in 2001, 2004, and 2005, primarily because of opposition to the entire bill by antiwar democrats and opposition to the HCPA in the conservative-led House.[68] In 2007, the HCPA passed both chambers of Congress but was ultimately defeated by President George W. Bush's threat to veto the entire Defense authorization bill if hate crimes legislation was attached.[69] Not until Representative Conyers and Senator Ted Kennedy introduced the bill in April 2009 did it move quickly through the House and Senate Armed Services

64. *In re* M.S., 896 P.2d 1365, 1371 (Cal. 1995) (holding that verbal acts are punishable only if the perceived threats constitute "true threats," that is, that the speaker has the ability to carry out the threat and is likely to do so); *see also* Virginia v. Black, 538 U.S. 343, 359 (2003) (same); Ward v. Utah, 398 F.3d 1239, 1249 (10th Cir. 2005) (same).

65. People v. Lindberg, 190 P.3d 664, 691 (Cal. 2008) (bias should be a "substantial factor" in the selection of the victim) (citing *In re* M.S., 896 P.2d at 1377); People v. Superior Court, 19 Cal. Rptr. 2d 444, 452 (1993) (same); City of Wichita v. Edwards, 939 P.2d 942, 947 (Kan. Ct. App. 1997) (same). For an account of several jurisdictions that use a "but-for" analysis—requiring that the crime would not have taken place but for the victim's distinguishing characteristics, see JENNESS & GRATTET, *supra* note 26, at 117–18.

66. JENNESS & GRATTET, *supra* note 26, at 111.

67. Hate Crimes Prevention Act of 1999, H.R. 1082, 106th Cong. (1999); Hate Crimes Prevention Act of 1999, S. 622, 106th Cong. (1999).

68. Local Law Enforcement HCPA of 2005, H.R. 2662, S. 1145, 109th Cong. (2005); Local Law Enforcement HCPA of 2004, S. 2400, 108th Cong. (2004); Local Law Enforcement HCPA of 2001, H.R. 1343, 107th Cong. (2001); Local Law Enforcement HCPA of 2001, S. 625, 107th Cong. (2001).

69. Local Law Enforcement Hate Crimes Prevention Act of 2007, H.R. 1592, 110th Cong. (2007); Local Law Enforcement Hate Crimes Prevention Act of 2007, S. 1105, 110th Cong. (2007). For a statement of the Bush Administration's reasons for resisting the legislation, see Office of Mgmt & Budget, Statement of Administration Policy: H.R. 1592: Local Law Enforcement Hate Crimes Prevention Act of 2007 (May 3, 2007), *available at* www2.nationalreview.com/dest /2007/05/03/saponhr1592.pdf (calling the bill "unnecessary and constitutionally questionable").

Committees. On October 22, 2009, the bill reached President Obama's desk for review; it was signed into law on the afternoon of October 28, 2009.[70]

III. THE HCPA'S PURPORTED VIOLATIONS OF THE FIRST AMENDMENT

The HCPA contains numerous constitutional safeguards and closely parallels state hate crime laws that have been found constitutional. Nevertheless, it has reawakened constitutional questions and provoked heated discourse from academics, the media, and many independent writers and bloggers.[71] Opponents of the HCPA typically fall into three categories: (1) those who argue that, despite the Court's holding in *Mitchell*, hate crime laws unconstitutionally chill First Amendment freedoms;[72] (2) those who argue that specific provisions of the HCPA render the statute unconstitutional;[73] and (3) those who argue that there are inadequate safeguards to ensure that the HCPA will be implemented and enforced

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70. Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act of 2009, Pub. L. No. 111–84, §§ 4701–4713, 123 Stat. 2835 (2009) (codified as amended in scatted sections of 18, 28, and 42 U.S.C.).

71. *See infra* notes 73–75.

72. *See, e.g.*, JACOBS & POTTER, *supra* note 15, at 21 ("Creating a hate crime jurisprudence forces us to proclaim which prejudices are worse than others, itself an exercise in prejudice."); Steven G. Gey, *What if* Wisconsin v. Mitchell *Had Involved Martin Luther King Jr.? The Constitutional Flaws of Hate Crime Enhancement Statutes*, 65 GEO. WASH. L. REV. 1014, 1070 (1997) (explaining that "the Court blinked" in *Mitchell*, despite its good record for using "liberal principles on behalf of an illiberal and reviled defendant"); Joshua S. Geller, Note, *A Dangerous Mix: Mandatory Sentence Enhancements and the Use of Motive*, 32 FORDHAM URBAN L.J. 623, 626 (2005) (emphasizing the "irrelevance of motive" in the criminal justice system); Richard Cohen, *The Folly of Hate Crime Laws*, WASH. POST, Aug. 4, 2009, at A17 (asserting that "[t]he real purpose of hate-crime laws is to reassure politically significant groups" and emphasizing that the result is the punishment of "thought or speech").

73. *See, e.g.*, Tim Townsend, *Conservative Pastors Fear New Hate Crime Law May Crimp Freedom of Speech*, ST. LOUIS POST-DISPATCH, Oct. 31, 2009, at A10 ("Conservative Christians have warned that the long-debated expansion of current hate crime law is a threat to the free speech rights of preachers who believe that homosexuality is a sin."); Hans Bader, *Congressional Conference Committee Tries to Turn Hate-Crimes Law into a Speech Code*, D.C. SCOTUS EXAMINER (Oct. 14, 2009, 1:21 PM EDT), http://www.examiner.com/x-7812-DC-SCOTUS-Examiner~y2009m10d14-Congressional-conference-committee-tries-to-turn-hatecrimes-law-into-a-speech-code (explaining that the conference committee's reconciliation of the bill aims to "snare people who do not intend to incite a hate crime in hate-crimes prosecutions"); Richard Beattie, *War of the Words Part 3—How Hate is Being Redefined*, DENVER EVANGELICAL EXAMINER (June 16, 2009, 7:06 PM MDT), http://www.examiner.com/x-4048-Denver-Evangelical-Examiner~y2009m6d16-War-of-the-words-part-3How-hate-is-being-redefined (stating that the bill "would criminalize preaching the Gospel and put preachers in the crosshairs").

in a way that protects perpetrators' constitutional rights.[74] This Part addresses each argument in turn.

*A. The Post-*Mitchell *Constitutional Debate Over Hate Crimes*

Mitchell did not put an end to First Amendment challenges to hate crime laws on the basis that they unconstitutionally punish speech, discriminate based on content, and are overbroad. Professors James B. Jacobs and Kimberly Potter summarize the case for unconstitutionality as follows:

> Generic criminal laws already punish injurious conduct; so recriminalization or sentence enhancement for the same injurious conduct when it is motivated by prejudice amounts to extra punishment for values, beliefs, and opinions that the government deems abhorrent.[75]

Regulation of constitutionally protected expression, in turn, has a chilling effect on free speech.[76] Jacobs and Potter contend that the Court has not adequately distinguished between the unconstitutional law that punished expression in *R.A.V.* and the constitutional law that punished expression linked to criminal conduct in *Mitchell*.[77] Both, they believe, abrogate First Amendment rights to free expression and association.

Hate crime laws are constitutionally questionable not only because they enhance punishment for motivation and thought, but also because they potentially constitute content-based discrimination

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74. *See, e.g.*, Jeannine Bell, *Deciding When Hate Is a Crime: The First Amendment, Police Detectives, and the Identification of Hate Crime*, 4 RUTG. RACE & L. REV. 33, 34 (2002) (citing Phyllis B. Gerstenfeld, *Smile When You Call Me That!: The Problems With Punishing Hate Motivated Behavior*, 10 BEHAV. SCI. & L. 259, 278 (1992)) (explaining that one of the most serious objections is "the problem of controlling hateful behavior without offending the First Amendment by silencing speech").

75. JACOBS & POTTER, *supra* note 15, at 121; *see also* Gey, *supra* note 72, at 1069 ("Permitting the regulation of speech simply because it is in some way associated with criminal activity would permit the government to regulate an entire range of speech that is now beyond government control because of the strong political speech protections incorporated into the *Brandenburg* standard.").

76. *See, e.g.*, 155 CONG. REC. 10,513 (daily ed. Oct. 6, 2009) (statement of Sen. Gohmert) ([I]t's going to have a chilling effect. There's no question about it. And in every country where Federal law has adopted laws like this, this has an extremely chilling effect."); 155 CONG. REC. 4,929 (daily ed. Apr. 29, 2009) (statement of Sen. Foxx) ("[I]n all the debate over criminal acts, a larger and forgotten debate is often left unspoken, and that is the debate over the role of free expression in our society. If this bill becomes law, it will have a chilling effect on many law-abiding Americans' freedom of expression.").

77. JACOBS & POTTER, *supra* note 15, at 129. Regulation or restriction of speech alone, however, is insufficient to prove unconstitutionality. The government can restrict speech (even based on its content) if the law is the least restrictive means available of serving a compelling governmental interest. Republican Party of Minn. v. White, 536 U.S. 765, 772 (2002). I discuss whether the HCPA satisfies this strict-scrutiny test *infra* Part IV.B.

against free speech. A content-based regulation of speech is any limitation placed on speech dependent on its subject matter.[78] Such regulations are presumptively invalid and are subject to the highest level of scrutiny.[79] Jacobs and Potter highlight the unique nature of bias motivations in this context: "Unlike greed, jealousy, or simply cold-bloodedness, bigotry is often connected to a system of political beliefs and is never content neutral. The concepts of . . . bigotry are political to the core."[80] The Court felt similarly in *R.A.V.* when it ruled that the government could not regulate fighting words on the basis of viewpoint:

> [The city] has not singled out an especially offensive mode of expression . . . . Rather, it has proscribed fighting words . . . that communicate messages of racial, gender or religious intolerance. Selectivity of this sort creates the possibility that the city is seeking to handicap the expression of particular ideas.[81]

Thus, even though the city had a compelling interest sufficient to justify the regulation of fighting words, the law was unconstitutional because it specified which topics of fighting words were prohibited.

By the same token, the HCPA specifies eight categories of crimes that justify heightened sentences: those based on race, color, religion, national origin, gender, sexual orientation, gender identity, or disability.[82] Because the HCPA penalizes crimes against certain, but not all, groups, some lawmakers believe it unconstitutionally penalizes only those biases that legislators feel are morally repugnant.[83] Representative Tom Akin has insisted that the HCPA

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78. R.A.V. v. City of St. Paul, 505 U.S. 377, 381 (1992).

79. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 46–47 (1986); Police Dep't v. Mosley, 408 U.S. 92, 96 (1972).

80. JACOBS & POTTER, *supra* note 15, at 127.

81. 505 U.S. at 393–94.

82. Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act of 2009 § 4702, 18 U.S.C. § 249 note (2009).

83. Indeed, there are strong arguments for expanding hate crimes legislation to encompass crimes committed against veterans and homeless people. *See Rep. John Conyers Jr. Holds a Markup of Pending Legislation Before the House Committee on the Judiciary*, 111th Cong. (Apr. 22, 2009) (transcript by Congressional Quarterly) (statement of Sen. Rooney) (stating the Local Law Enforcement Hate Crimes Prevention Act as amended would "dissuade future hate crimes against military members motivated by that mixed message by our government, referenced earlier"); NAT'L COALITION FOR THE HOMELESS, HATE, VIOLENCE AND DEATH ON MAIN STREET USA: A REPORT ON HATE CRIMES AND VIOLENCE AGAINST PEOPLE EXPERIENCING HOMELESSNESS 2008, at 9 (2009), *available at* http://www.nationalhomeless.org/publications /hatecrimes/hate_report_2008.pdf (highlighting the "trend of violence towards the homeless" and noting that "[p]eople who are homeless are more vulnerable to attacks because they live outside in public spaces"); Raegan Joern, *Mean Streets: Violence Against the Homeless and the Makings of a Hate Crime*, 6 HASTINGS RACE & POVERTY L.J. 305, 331 (2009) ("Protecting homeless status,

"violates the most basic principle of law. Lady Justice is always supposed to have a blindfold across her face . . . regardless of who you are. . . . This bill violates that basic principle. It creates animosity by elevating one group over another group; thus, it creates hatred."[84]

Opponents of hate crime laws also claim that advocates confuse intent with motivation when they argue that hate crime laws are constitutional because courts often take into account criminal motives. Criminal law almost always requires consideration of intent, or *mens rea*, to assess a crime; it does not "concern itself with motivations."[85] Professor Lawrence distinguishes the two: "[I]ntent concerns the mental state provided in the definition of an offense for assessing the actor's culpability with respect to the elements of the offense. Motive, by contrast, concerns the cause that drives the actor to commit the offense."[86]

Proponents of the HCPA, citing *Barclay* and *Dawson*, respond that motive often plays a role in determining punishment and, in states with capital punishment, "stands prominent among the recognized aggravating factors that may contribute to the imposition of the death sentence."[87] However, employing the term "may" is detrimental to this argument. Given that any criminal convicted under the HCPA "shall be imprisoned" for increased terms, the fact that sentencing factors are advisory guidelines severely weakens the analogy.[88] Moreover, the analogy in *Mitchell* between hate crime laws and anti-discrimination laws has a fatal flaw. The crimes underlying hate crime laws are already punishable under criminal law, whereas discrimination crimes need the element of racial motivation in order to be actionable at all.[89]

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as an enumerated characteristic under bias crime law, is a necessary means of deterring future bias crime against the homeless and preventing the harm caused by bias crime.").

84. 155 CONG. REC. H4940 (daily ed. Apr. 29, 2009) (statement of Rep. Akin).

85. *Rep. John Conyers Jr. Holds a Markup of Pending Legislation Before the House Committee on the Judiciary*, 111th Cong. (2009) (Statement of Sen. Franks). Congressman Gohmert stated, "[i]f someone intended to harm a person, no motive makes them more or less culpable for that conduct." *Id.* (statement of Rep. Gohmert); *see also* Geller, *supra* note 72, at 626.

86. LAWRENCE, *supra* note 20, at 108.

87. *Id.* at 107.

88. Furthermore, Jacobs and Potter distinguish hate crimes laws from other sentence enhancement laws (for those whose motive was pecuniary gain, or those who murder police officers) because the latter "do not have the same free speech implications as hate crime enhancements because they are content or viewpoint neutral." JACOBS & POTTER, *supra* note 15, at 122.

89. *Id.* at 128 ("It would appear that the only additional purpose in punishing more severely those who commit a bias crime is to provide extra punishment based on the offender's politically incorrect opinions and viewpoints.").

Finally, hate crime laws may constitute a slippery slope toward the regulation of hate speech.[90] Professors Jacobs and Potter argue that they are merely "a second best option for proponents of hate speech laws who recognize that the First Amendment poses an insurmountable barrier to the latter."[91] Professor Lee Bollinger's "fortress model," which calls for protection of *all* speech in order to protect the core, valuable speech from eventual censorship, is poignant in the context of hate crimes:

> [T]he difficulty is that [a law] cannot be severed from the First Amendment body without risking a spreading of constitutional gangrene. . . . [The] legislatures will come forward with this and that proposal for further exceptions, and in the end good and valuable speech, speech covered by traditional First Amendment rationales, will be the victim. Courts cannot be counted on to stem this tide of retrenchment, and in time we will have lost more than we would have gained.[92]

However, the Court is wary to find a slippery slope dispositive of unconstitutionality, and makes sure to "distinguish between a real threat and a mere shadow" in such cases.[93] But while not a persuasive reason to find a hate crime law unconstitutional, the slippery slope contention is one of the anti-hate crime law movement's most compelling arguments. It will likely arise as a policy concern should the Supreme Court consider the constitutionality of the HCPA.[94]

Even if the Court takes a second look at its constitutional analysis in *Mitchell*, and decides that hate crimes actually do constitute regulation of, and restriction on, free speech, the HCPA withstands strict scrutiny constitutional review. The Court has repeatedly affirmed the government's compelling interest in "vindicating the right to be free from invidious discrimination."[95] Hate

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90. *Id.* at 121.

91. *Id.*

92. Lee Bollinger, *Rethinking Group Libel*, *in* GROUP DEFAMATION AND FREEDOM OF SPEECH: THE RELATIONSHIP BETWEEN LANGUAGE AND VIOLENCE 243, 244 (Monroe H. Freedman & Eric M. Freeman eds., 1995).

93. Van Orden v. Perry, 545 U.S. 677, 704 (2005) (Breyer, J., concurring); *see also* Washington v. Glucksberg, 521 U.S. 702, 733 n.23 (1997) (recognizing the reasonableness of "widely expressed skepticism about the lack of a principled basis for confining [a] right" based on a slippery slope argument).

94. 115 CONG. REC. H4943, H4945 (daily ed. Apr. 29, 2009) (statements of Reps. Sensenbrenner and McClintock) ("[I]f we place in the hands of government the ability to define what opinions it likes and doesn't like, and then to punish those opinions on top of the acts themselves, then we've started down a very dangerous and slippery slope."); *see also* Cohen, *supra* note 72 (calling hate crime laws "the real McCoy" in terms of laying a precedent for punishing belief or speech).

95. *See, e.g.*, Apprendi v. New Jersey, 530 U.S. 466, 473 (2000). And as discussed in Part II.A, *supra*, hate crimes (1) are more physically and emotionally detrimental to individual victims; (2) tend to effectuate fear and hostility in the targeted community; and (3) play a significant role in our national consciousness.

crimes also continue to pervade our criminal justice system.[96] And hate crime laws are the least restrictive means of achieving the government's compelling interest in deterring hate crimes, as they require that bias motivation be a cause in fact of the criminal offense.[97] This requirement restricts hate crime convictions to only those defendants (1) who would not have committed the act but for the victim's defining characteristics or (2) who had several motives, but for whom the racial motive by itself would have been enough to trigger the act.[98] As Professor Lawrence notes, "[o]nly where behavior is accompanied by a culpability to do harm, that is, *mens rea*, does the behavior cross the line into that which may be, both as a matter of constitutional law and criminal law doctrine, proscribed."[99] Bias motivation must be proved beyond a reasonable doubt, which ensures that hate crime laws are narrowly tailored to criminalize only those acts that are directly motivated by animus.

B. The Controversial Provisions of the HCPA

1. Freedom of Speech and Culpability for Inducing Criminal Acts

Because the Supreme Court is unlikely to overrule its holding in *Mitchell* and because hate crime laws are therefore prima facie constitutional, most opponents attack the specific language of the HCPA that they believe renders it unconstitutional. One prevalent concern is that the HCPA will be used to prosecute people for aiding and abetting hate crimes through provocative speech.[100] The federal

96. According to an FBI report in November 2009, such crimes continue to increase in number each year, particularly for religious and sexuality biases. Matthew E. Berger, *Report Finds Religion-Based Hate Crimes on the Rise*, HOUS. CHRON., Nov. 27, 2009, Belief section, at 5 (reporting that in 2008 hate crime incidents targeting people based on their religion were at their highest frequency since 2001); Marisol Bello, *FBI Report Shows More Hate-Motivated Crime*, USA TODAY, Nov. 24, 2009, at 3A. These reports are susceptible to the argument that heightened awareness and data recordation produces higher numbers.

97. State v. Hennings, No. 08–1845, 2009 WL 2960616, at *8 (Iowa Ct. App. Sept. 2, 2009) (finding that it was reasonable for a jury to conclude that racial hostility was a but-for cause of the defendant's offense); People v. Lindberg, 190 P.3d 664, 693 (Cal. 2008); *In re* M.S., 896 P.2d 1365, 1375 (Cal. 1995). However, I propose in Part IV that the Department of Justice should supplement the HCPA's statutory protections of First Amendment rights with specific guidelines regarding the evidentiary standards of hate crime laws.

98. *See Hennings*, 2009 WL 2960616, at *7 (reviewing the but-for cause approach taken by the California Supreme Court in *In re M.S.*, and electing to follow it).

99. Lawrence, *supra* note 18, at 214.

100. This concern is particularly prevalent in the context of religious speech. *See infra* note 109; *see also* 155 CONG. REC. 11,115 (daily ed. Oct. 8, 2009) (statement of Sen. Pence) ("[A]ny pastor, preacher, priest, rabbi, or imam who may give a sermon out of their moral traditions about sexual practices could presumably, under this legislation, be found to have aided, abetted

aiding and abetting statute, the violation of which with a biased motive would be a hate crime, punishes any person who "aids, abets, counsels, commands, *induces* or procures [a crime's] commission . . . ."[101] However, HCPA section 4710(3) somewhat ominously provides that the absence of the *intent* to incite a crime will not protect a speaker from punishment if the government can show a compelling interest in prohibiting the speech.[102] Thus, the statute covers a speaker "even if his 'exercise of religion, speech, expression, or association was not intended to plan or prepare for an act of physical violence or incite an imminent act of physical violence against another.' "[103] Critics maintain that such convictions would be unconstitutional.

The Supreme Court held in *Brandenburg v. Ohio* that a state may not forbid "advocacy of the use of force or of law violation, except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[104] However, there is an exception for workplace sexual harassment and discrimination cases, where the government can restrict otherwise protected speech because it is incidentally "swept up" in a larger ban on discrimination.[105] Most courts refuse to extend this exception

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or induced in the commission of a federal crime. This will have a chilling effect on religious expression from the pulpits, in our temples, in our mosques and in our churches; and it must be undone.").

101. 18 U.S.C. § 2 (2008) (emphasis added). Todd Mitchell, whose hate crime conviction was upheld in *Wisconsin v. Mitchell*, 508 U.S. 476, 480, 490 (1993), fell into a similar state law category; while he did not personally commit murder, his comments and instructions to a crowd of people ("Do you all feel hyped up to move on some white people? . . . There goes a white boy, go get him.") made him culpable as an inciter.

102. Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act of 2009 § 4710(3), 18 U.S.C. § 249 note (2009) ("Nor shall anything in this division, or an amendment made by this division, be construed or applied in a manner that substantially burdens a person's [First Amendment rights] . . . unless the Government demonstrates that application of the burden to the person is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest, 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.").

103. Bader, *supra* note 73 (quoting Byron York, *Dems Undermine Free Speech in Hate Crimes Ploy*, WASH. EXAMINER, Oct. 13, 2009, at 14, *available at* http://www.washingtonexaminer.com/politics/Dems-undermine-free-speech-in-hate-crimes-ploy-8371517-64046162.html).

104. 395 U.S. 444, 447 (1969); *see also* Gey, *supra* note 72, at 1018 (explaining the *Brandenburg* holding, and how it reaffirms the principle that one cannot be criminally liable for repugnant thought or speech).

105. *See* Jenson v. Eveleth Taconite Co., 824 F. Supp. 847, 884 n.89 (D. Minn. 1993) (citing R.A.V. v. City of St. Paul, 505 U.S. 377, 389 (1992) ("[A] particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech.")); Robinson v. Jacksonville Shipyards, 760 F. Supp. 1486, 1491,

outside the workplace.[106] Section 2701(3) of the HCPA mirrors this aspect of workplace harassment and discrimination laws by authorizing prosecution for inducing and inciting hate crimes. Critics of the HCPA urge that punishing speech that is not intended to incite an imminent act of physical violence, but which does in fact incite such violence, is an overly broad and speech-hostile regulation of constitutionally protected expression.[107]

Journalists and academics warn that liability for inducing hate crimes will profoundly impact religious and political speech, which we afford the highest level of First Amendment protection.[108] They fear that religious leaders will be held liable for unintentionally inciting members of their congregations to commit crimes against people, such as homosexuals, who are often rebuked in religious teachings.[109] In June 2009, more than sixty conservative leaders sent letters to every member of the Senate imploring each member to join a filibuster of the HCPA. They warned that the legislation would "silence the moral voice of the church" and "be a savage and perhaps fatal blow to First Amendment freedom of expression."[110]

These arguments persist despite reassurances in the HCPA's rules of construction that (1) the rule should not be construed in a matter that substantially burdens a person's exercise of religion; (2) prosecution cannot be based solely upon evidence of expression; and (3) the law should not be construed to prohibit any constitutionally protected speech, including the freedom of religion.[111] That the HCPA contains more constitutional protections than did the Wisconsin statute upheld in *Mitchell* has not diminished opponents' aversion to

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1535 (M.D. Fla. 1991) (finding employer liable for letting employees read pornographic materials, which indirectly resulted in sexual harassment).

106. Bader, *supra* note 73; *see, e.g.*, White v. Lee, 227 F.3d 1214, 1230 (9th Cir. 2000) (holding that public speech against housing projects for minority groups, like recovering drug users and the mentally ill, cannot be prohibited by the Fair Housing Act unless such speech "is directed to inciting or producing imminent violence and is likely in fact to do so.").

107. *E.g.*, Bader, *supra* note 73.

108. *See, e.g.*, U.S. v. Rahman, 189 F.3d 88, 117 (2d Cir. 1999) (noting that political and religious free speech are "among the activities most zealously guarded by the First Amendment"); George W. Dent, Jr., *Civil Rights for Whom?: Gay Rights Versus Religious Freedom*, 95 KY. L.J. 553, 619 (2006–07) ("[T]he law could still have a serious chilling effect since few people are willing to endure a criminal prosecution even if they feel confident of final exoneration."); Townsend, *supra* note 73 (reporting on conservative Christians' concerns that the legislation would chill preachers' freedom to denounce homosexuality).

109. *See* Townsend, *supra* note 73 ("[S]ome church leaders worry that parts of the new law will introduce a chilling effect on pastors who may feel that they are in danger of breaking the law by preaching against homosexuality.").

110. Beattie, *supra* note 73.

111. Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act of 2009 § 4710(3)–(4), (6), 18 U.S.C. § 249 note (2009).

the statute.[112] In fact, on February 2, 2010, four pastors who often condemn homosexuality in their sermons filed a lawsuit directly challenging the HCPA on the grounds that it deters, inhibits, and chills their rights to free speech, expressive association, and religious exercise.[113] Their primary contention is that because the HCPA extends to those who counsel, command, and induce violent acts against homosexuals, it will chill the speech of those who speak out in opposition to the "homosexual agenda."[114]

There is some factual support for their argument. In 1999, Islamic scholar and cleric Sheik Omar Abdel Rahman was convicted of seditious conspiracy for acts surrounding a bomb attempt in New York City.[115] Rahman had made numerous statements to the perpetrators exhibiting a specific intent to invite violence, including: "Carry out this operation. It does not require a fatwa . . . . You are ready in training, but do it. Go ahead."[116] He also counseled listeners as they planned violent bombings against the United States and described such violence as a "duty."[117] Affirming Rahman's conviction, the Second Circuit found that, while the element of speech inherent in the conviction required that it be given close First Amendment scrutiny, it "did not impermissibly burden the expression of protected speech, as it was properly 'directed at advocacy, not discussion.' "[118]

While it proves that religious leaders may be liable for inciting or inducting a crime, *Rahman* also exemplifies the overwhelming evidence necessary to connect a political or religious leader to a crime. Indeed, Rahman's statements to his followers more closely mirror those of the perpetrator in *Mitchell* ("Do you all feel hyped up to move on some white people? . . . There goes a white boy; go get him.") than of the teachings of a religious leader.[119] The FBI has stated that such convictions should be sought only "where adequate evidence exists to support the conclusion that the speech is more than ideological or rhetorical because it is communicated such that followers would

112. *Id.*

113. Complaint, *supra* note 16, ¶¶ 102–08, at 22–23.

114. *Id.* ¶ 70, at 16.

115. U.S. v. Rahman, 189 F.3d 88, 160 (2d Cir. 1999).

116. *Id.* at 117.

117. *Id.* at 124.

118. *Id.* at 115 (internal alteration omitted) (quoting Dennis v. United States, 341 U.S. 494, 502 (1951) and noting that the statute at issue was less constitutionally tenuous than the one in *Dennis* because it required conspiracy to use force, rather than only advocacy in order to be liable); *see also id.* (citing Yates v. United States, 354 U.S. 298, 318 (1957)) (noting that the law proscribes only the advocacy of concrete violent action, not "advocacy and teaching of forcible overthrow as an abstract principle, divorced from any effort to instigate action to that end").

119. *Mitchell*, 508 U.S. at 480.

perceive a serious intent to carry out the violent criminal activity urged upon them."[120] The enormously high burden of proof required for a conviction under this provision protects free speech, even if hateful, as long as it does not directly advocate violence.

2. The Adequacy of the HCPA's Evidentiary Safeguards

Opponents of the HCPA also take issue with the evidentiary safeguards in the final version of the law. The version of the bill that passed in the House in early 2009 contained what even opponents admitted was strong protection for free speech.[121] It explicitly ensured that "evidence of expression or associations of the defendant may not be introduced as substantive evidence at trial, unless the evidence *specifically relates to that offense*."[122] However, the conference committee stripped this clause from the bill, in part because of forceful lobbying from the Department of Justice against the speech and association protections.[123] The version passed in October 2009 merely said that it should not be construed to allow courts "to admit evidence of speech, beliefs, association, group membership, or expressive conduct unless that evidence is *relevant and admissible under the Federal Rules of Evidence*."[124]

Thus, the HCPA shifted from having a default exclusionary rule against admitting evidence of expression and association (with the burden on the prosecutor to prove relation to the offense) to a mere clarification that evidence must be admissible under the Federal Rules of Evidence. The difference is of great consequence for both prosecutors and criminals. For example, the fact that a defendant made racist remarks in the past about a group to which the victim belonged would be admissible under the Federal Rules' low relevance standard.[125] However, the HCPA as approved in April 2009, which

120. Martin J. King, *Criminal Speech: Inducement and the First Amendment*, 77 FBI LAW ENFORCEMENT BULL. 23, 29 (2008), *available at* http://www.fbi.gov/stats-services/publications/law-enforcement-bulletin/2008-pdfs/april08leb.pdf.

121. *See* Letter from the American Civil Liberties Union, Hate Crime Provision in the National Defense Authorization Act for FY-10 May Chill Constitutionally Protected Speech and Association; Should Be Amended to Include House-Passed Provision on Speech and Association, at 2 (July 14, 2009), *available at* http://www.aclu.org/files/images/asset_upload_file480_40302.pdf (urging the Senate to restore the House-passed version of the bill's evidentiary provision).

122. Local Law Enforcement HCPA of 2009, H.R. 1913, 111th Cong. (2009) (emphasis added).

123. Letter from the American Civil Liberties Union, *supra* note 121, at 3.

124. Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act of 2009 § 4710(1), 18 U.S.C. § 249 note (2009) (emphasis added).

125. FED R. EVID. 401 (" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable

necessitated "specific[] relat[ion] to th[e] offense," and provided extra safeguards for evidence protected by the First Amendment, would likely require a more direct connection between the evidence and the crime.[126]

The American Civil Liberties Union ("ACLU") reversed its longstanding opposition to the hate crimes bill based on the April 2009 version but renewed its anti-hate crime law stance in July 2009 when this change was implemented. The ACLU lamented that the evidentiary rule omitted would have "reduce[d] or eliminate[d] the possibility that the federal government could obtain a criminal conviction on the basis of evidence of speech that had no role in the chain of events that led to any alleged violent act proscribed by the statute."[127] The ACLU warned that the bill now constituted a significant danger to First Amendment freedoms and asked the Senate to reinstate specific prohibitions on the admissibility of evidence protected by the First Amendment.[128] It asked that speech only be admissible if it is "directly related to the underlying crime and probative of discriminatory intent."[129] The ACLU also urged that "any speech . . . that is not contemporaneous with the crime must be part of the chain of events that led to the crime. Generalized evidence concerning the defendant's racial views does not satisfy this test."[130]

The HCPA could have a chilling effect on speech if mere words or association "could be used to turn an otherwise unremarkable act of violence into a federal hate crime."[131] But insofar as the evidentiary

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or less probable than it would be without the evidence."); FED. R. EVID. 402 ("All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority.").

126. *See* Local Law Enforcement HCPA of 2009, H.R. 1913, 111th Cong. (2009) ("In a prosecution for an 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 relates to that offense.").

127. Letter from American Civil Liberties Union, *supra* note 121, at 2.

128. *Id.* at 4.

129. *Id.* at 3.

130. *Id.* Moreover, even verbal comments made during the crime are not *prima facie* evidence of discriminatory intent. In her essay on the psychological relationship between involuntary, inherent biases and hate crimes, Margaret Bull Kovera says that "the psychological research does not tell us when slurs hurled in the context of assaults are evidence that the perpetrator consciously chose the target based on group membership. . . . It is indeed possible that in the heat of an argument people might be primed to use hateful language based on group membership because of automatically activated stereotypes" rather than conscious discrimination. Margaret Bull Kovera, *Implications of Automatic and Controlled Processes in Stereotyping for Hate Crime Perpetration and Litigation*, *in* SOCIAL CONSCIOUSNESS IN LEGAL DECISION MAKING: PSYCHOLOGICAL PERSPECTIVES, *supra* note 18, at 227, 238.

131. Letter from American Civil Liberties Union, *supra* note 121, at 4.

standards lack guidelines regarding the admissibility of evidence related to speech and associations, the Supreme Court has ruled that the chilling effect of these low evidentiary standards is far too "attenuated[,] . . . unlikely[, and] . . . speculative."[132] To the extent that hate crime laws do change how people express their biases, the chilling effects doctrine is subject to the same constitutional analysis discussed in Part III.A. The government's compelling interest in deterring hate crimes justifies the regulation of free speech, provided that such regulations are the least restrictive means of achieving its interest. Part IV will address how the Department of Justice can provide guidelines to reinforce that the HCPA satisfies the "least restrictive means" element of this analysis.

C. Implementation and Enforcement of the HCPA

The HCPA provision increasing federal assistance in and funding of criminal investigations or prosecutions also raises potential constitutional concerns. Critics claim that the task of investigating and proving motivation in the context of hate crimes is complex, if not impossible, and is "fraught with grave First Amendment difficulties."[133] They question whether hate crime laws can be enforced by those charged with enforcement, most of whom have little to no familiarity with First Amendment law.[134]

However, in her article on the enforcement of hate crime laws, Professor Jeannine Bell bemoans the fact that "neither supporters nor critics ground their arguments in empirical evidence of how hate crime laws actually work in practice."[135] Bell conducted interviews and collected empirical data on those people responsible for hate crime enforcement and showed that enforcers recognized the difference between hate speech and hate crime, and knew that past speech and association alone are not sufficient to prove bias.[136] Bell found that investigators

> . . . adopted a complex series of routines that helped them identify bias motivation. The process involved an initial screening, followed by a series of filtering mechanisms that required detectives to remove the whole categories of cases likely motivated by a variety of other emotions—anger, resentment and jealousy—before conducting a detailed examination of the perpetrator's motivation. Rather than focusing on the defendant's

132. Wisconsin v. Mitchell, 508 U.S. 476, 488–89 (1993).

133. Bell, *supra* note 74, at 34 (citing Phyllis B. Gerstenfeld, *supra* note 74, at 278–80).

134. *Id.* at 34–35.

135. *Id.* at 34.

136. *Id.* at 63.

> abstract beliefs and association, the detectives' inquiry was generally restricted to contextual clues regarding the crimes.[137]

She also found that police officers had a remarkable familiarity with the tenets of the First Amendment. One detective explained his precinct's approach to hate crimes: "We look to the totality of the circumstances, criminal action, and the words, and also at the incident . . . . Language alerts us to the possibility of bias, but it's just the possibility."[138] Though Bell's study is geographically limited and somewhat outdated, its comprehensive look at the investigative process makes the possibility of persistent as-applied constitutional violations much less likely.

IV. THE HCPA AS A CONSTITUTIONAL REGULATION OF BIAS-MOTIVATED CRIMES

Given the amount of backlash provoked by the HCPA and the fact that lower courts are already seeing suits against it, the Court should expect a challenge to the new law in the near future.[139] If presented with a facial challenge, the Court should find that the HCPA, like the statute at issue in *Mitchell*, punishes only those defendants who impermissibly turn their biased thoughts into action. Though the statute permits consideration of evidence that is deserving of First Amendment protection, such evidence is not dispositive, and the HCPA does not facially infringe on free speech, association, or religion.

A. Constitutionality Under Mitchell *and the First Amendment*

The Court should follow the canon of constitutional avoidance, construing the ambiguous statutory language of the HCPA so as to avoid serious constitutional doubts. The HCPA is the result of more than a decade of compromise, research, advocacy, and statutory crafting. Application of the doctrine of constitutional avoidance would uphold the principle of deference to the legislature. Because it can be interpreted to either merely use speech as evidence of motive, or solely punish speech because the underlying act is already criminalized, the Court should adopt the former interpretation so as not to deliberately create a constitutional question.

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137. *Id.* at 71.

138. *Id.* at 63.

139. Carl Hulse, *House Passes Expanded Hate Crimes Bill*, N.Y. TIMES: THE CAUCUS (Oct. 8, 2009, 3:37 PM), http://thecaucus.blogs.nytimes.com/2009/10/08/house-passes-expanded-hate-crimes-bill/.

However, the Court may still directly address the constitutional question. Regardless of whether it affirms *Mitchell*'s holding that hate crime laws do not regulate free speech, or subjects the HCPA to strict scrutiny for considering free speech to determine motive, the law is constitutional. Section 4701(5) expressly provides that "[n]othing in this division, or an amendment made to this division, shall be construed to diminish any rights under the [F]irst [A]mendment to the Constitution of the United States."[140] The HCPA contains more constitutional protections than did the Wisconsin statute upheld in *Mitchell*, and is narrowly tailored to be the least restrictive means possible of achieving the government's compelling interest in deterring and punishing hate crimes.[141]

B. Necessity of Guidelines Regarding Implementation and Enforcement

Several vulnerabilities mandate that the Department of Justice set forth guidelines to ensure the constitutional implementation and enforcement of the HCPA. Neither the high burden of proof in criminal law, nor HCPA section 4710(1)'s relevancy requirement, guarantees that prosecutors, juries, or law enforcement officials will not rely too heavily on evidence of speech and associations. *Mitchell* did not specify what constitutes evidence of motivation, clarify how far back one might go in seeking such evidence, or address whether it is acceptable to charge persons when words are the only evidence of motivation.[142] In addition, not all police officers are as well versed in the contours of First Amendment law as those interviewed in Jeannine Bell's article. Particularly in areas with a strong history of racial (or other) discrimination, there is a high possibility that hate crime laws will be discriminatorily or inappropriately enforced.

There are already a number of manuals and training programs available to enable law enforcement officers to investigate potential hate crimes in a way that is not overly burdensome on and does not

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140. Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act of 2009 § 4710(5), 18 U.S.C. § 249 note (2009); *see also id.* §§ 4710(3)–(4), (6) (underscoring that nothing in the bill should be construed to infringe on constitutional rights).

141. *See supra* note 112 and accompanying text.

142. Professor Susan Gellman notes the difficulty of treating such evidence as dispositive. "[B]ecause of our social consensus that bigots are ignorant, boorish, and even dangerous, it may well be that prosecutors would anticipate an easier time persuading a jury to convict on the more serious charge of ethnic intimidation than they would on the conduct-oriented underlying offense." Susan Gellman, *Sticks and Stones Can Put You in Jail, but Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, 39 UCLA L. REV. 333, 362 (1991).

effectively chill First Amendment rights.[143] In its manual *Responding to Hate Crime*, the National Center for Hate Crime Prevention explains,

> [J]udgment and experience is needed to determine whether speech or writings constitute a criminal threat. . . . Prior to arresting or prosecuting a suspect for a bias crime for a written or verbal statement, . . . officials and prosecutors need to carefully examine the context in which the statement was made.[144]

It also warns that "words alone are usually not enough to constitute a violation of law," teaches law enforcement officials to distinguish "First Amendment-protected language versus actual threats," and contains a long fact pattern to help explain the distinction.[145] Organizations like the Southern Poverty Law Center, the Anti-Defamation League, and the Federal Law Enforcement Training Center offer specialized, hands-on training for the investigation and prosecution of hate crimes.[146] Finally, the Department of Justice's *United States Attorneys' Manual* contains a provision instructing government officials not to make their prosecutorial decisions regarding hate crimes based solely on speech, expressive conduct, or affiliation with a particular group.[147]

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143. *See, e.g.*, NAT'L CTR. FOR HATE CRIME PREVENTION, RESPONDING TO HATE CRIME: A MULTIDISCIPLINARY CURRICULUM FOR LAW ENFORCEMENT AND VICTIM ASSISTANCE PROFESSIONALS, 77–79 (2000) [hereinafter RESPONDING TO HATE CRIME], *available at* http://www.ncjrs.gov/ovc_archives/reports/responding/files/sessionD.pdf (noting types of speech that do and do not enjoy First Amendment protection); OFFICE FOR VICTIMS OF CRIMES, NATIONAL BIAS CRIMES TRAINING FOR LAW ENFORCEMENT AND VICTIM ASSISTANCE PROFESSIONALS (1995) *available at* http://www.ncjrs.gov/ovc_archives/reports/responding/guide.html (providing a means for satisfying law enforcement officers' "growing desire to better respond to victims of bias crime").

144. RESPONDING TO HATE CRIME, *supra* note 143, at 79.

145. *Id.* at 80–81, 87.

146. *See Hate Crimes Training*, ANTI-DEFAMATION LEAGUE, http://www.adl.org/learn/learn_main_training/Hate_Crimes_Training.asp?LEARN_Cat=Training&LEARN_SubCat=Hate_Crimes_Training (last visited Nov. 12, 2010) (listing the valuable elements of "Hate Crimes Training"); *Law Enforcement Training*, S. POVERTY LAW CTR., http://www.splcenter.org/what-we-do/hate-and-extremism/law-enforcement-training (last visited Feb. 29, 2010) (detailing the goals of the training and providing additional training resources). Until the spring of 2010, the Federal Law Enforcement Training Center offered a Domestic Terrorism and Hate Crimes Training Program.

147. U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 8–3.300 (2009) [hereinafter UNITED STATES ATTORNEYS' MANUAL], *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/index.html ("No attorney for the government may make prosecution or declination decisions based solely upon the speech or expressive conduct of a subject, victim, or witness. Nor shall any attorney for the government make such prosecution or declination decisions based solely upon a such person's affiliation with any group advocating for or against rights of persons with the characteristic identified by statute. Such factors may be considered only to the extent that they inform a reasoned, neutral decision about whether [the HCPA]—or any other criminal statute—has been violated.").

More safeguards can and should be implemented to ensure that investigation and prosecution of hate crimes does not effectively chill First Amendment freedoms. The Department of Justice, for example, could require law enforcement officials to request special permission from chiefs of police or other politically accountable officials before investigating hate crimes.[148] Additional requirements for investigating certain parties—such as members of the clergy—are already mandated in other areas of criminal law, and would not be out of place in the hate crimes context.[149] Several types of investigation, such as entrapment and undercover operations, require the approval of a nonpartisan review committee before prosecution begins.[150] A reviewing body would add expertise, accountability, and consistency to the investigation and prosecution processes.

Finally, the Department of Justice should supplement its singular protective provision in the *United States Attorneys' Manual* with additional non-exclusive guidelines to consider when prosecuting hate crimes and examples of misapplication versus appropriate enforcement of hate crime laws. The following five factors, all of which are included in West's treatises on prosecutorial and police misconduct, merit consideration:

> (1) Whether the state interests are compelling and sufficiently important to outweigh the possibility of infringement;
>
> (2) Whether a substantial relationship exists between the governmental interest and the information required to be disclosed;
>
> (3) Whether the governmental goals sought to be achieved are unduly broad, i.e. have an unnecessary impact on the rights of speech, press, or association;
>
> (4) Whether the party whose speech or associations will be considered is the specific target of the investigation; and

148. For example, the guidelines on undercover operations divide operations into two types: those that can be approved by an agent in the field, and those that require prior authorization. U.S. ATTORNEYS' MANUAL, TIT. 9: CRIMINAL RESOURCE MANUAL § 1903(5)(A) (2006) [hereinafter CRIMINAL RESOURCE MANUAL], *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00000.htm; CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: REGULATION OF POLICE INVESTIGATION 528 (4th ed. 2007). Prosecutions in seeking the death penalty require similar authorization. UNITED STATES ATTORNEYS' MANUAL, *supra* note 147, § 9–10.010.

149. UNITED STATES ATTORNEYS' MANUAL, *supra* note 147, § 9–19.220; *id.* §§ 9–19.240, 661 (citing 42 U.S.C. § 2000aa–11(a)(3) (2006)); CRIMINAL RESOURCE MANUAL, *supra* note 148, § 1903(5)(A)(11)–(12).

150. CRIMINAL RESOURCE MANUAL, *supra* note 148, § 1905(7)(C) (describing the procedures of and criteria considered by the Undercover Operations Review Committee).

> (5) Whether the party was subject to any compulsion, affirmative obligation, or denial of entitlements as a result of exercising their First Amendment rights.[151]

In addition, the government should consider the timing of statements (in proximity to the crime), the amount of non-expressive or non-associational direct evidence of biased intent, and the nature of the crime (whether it is similar in nature to traditional bias-based crimes that involve torture and humiliation). The manual could also add a provision similar to one in the solicitation section, which clarifies that the law punishes "legitimately proscribable criminal activity, not advocacy of ideas that is protected by the First Amendment right of free speech."[152]

V. CONCLUSION

The HCPA is one of the most important pieces of civil rights legislation passed in the twenty-first century. It represents a jewel in the crown of President Obama's first year in office. Prosecutors are no longer forced to seek justice for most hate crimes in state courts, law enforcement officials are entitled to federal assistance in combating these crimes, and new classes of victims finally have a means of achieving retribution and deterrence. It is essential that the Court guarantee the HCPA's endurance by interpreting it to comport with First Amendment freedoms.

However, the HCPA is not without its flaws. As its opponents argue, it permits the government to consider perpetrators' speech, expression, and associations. Courts, law enforcement officials, and prosecutors should remain wary of the distinction between the constitutional regulation of hate crimes and the unconstitutional regulation of speech. Additionally, the Department of Justice should put forth guidelines, and perhaps impose limits, on the ways in which the HCPA should be enforced. In so doing, it will ensure that the law strikes the fine balance between respecting the personal beliefs of U.S. citizens and punishing the people who act on their biases.

Carter T. Coker[*]

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151. POLICE MISCONDUCT: LAW & LITIGATION § 15:17 (West 2009); PROSECUTORIAL MISCONDUCT § 2:21 (West 2d ed. 2009).

152. CRIMINAL RESOURCE MANUAL, *supra* note 148, § 1089 (quoting S. REP. NO. 98–225, at 309 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3488).

* Candidate for Doctor of Jurisprudence, May 2011, Vanderbilt University Law School. Many thanks to Professor David Hudson and the staff of the VANDERBILT LAW REVIEW for their work on this Note. I am also grateful to my parents and sisters for their unyielding love and support.