

Engendering Hate Crime Policy: Gender, the “Dilemma of Difference,” and the Creation of Legal Subjects

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I. INTRODUCTION

Nearly six years after two women were bound and gagged and had their throats slit while camping and hiking in Shenandoah National Park, U.S. Attorney General John D. Ashcroft held a historic nationally televised press conference on April 11, 2002 to announce that the U.S. Justice Department invoked the federal hate crimes statute for the first time to charge the alleged murderer with hate crime. In announcing the indictment, Ashcroft spoke at length about his meeting with the parents of the victims and about the lives and characters of the young women: two Midwesterners who migrated to New England, met and became lovers, and shared the love of science and the outdoors. Justifying the invocation of federal hate crime law, which carries with it enhanced penalties, Ashcroft said, “Criminal acts of hate run counter to what is best in America,

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our belief in equality and freedom. The Department of Justice will aggressively investigate, prosecute, and punish criminal acts of violence and vigilantism motivated by hate and intolerance."¹ Moreover, he said, "We will pursue, prosecute, and punish those who attack law-abiding Americans out of hatred for who they are," and "Hatred is the enemy of justice, regardless of its source."²

In this case, evidence suggests the "source of hatred" is twofold: sexuality and gender. According to prosecutors, Darrell David Rice, a computer programmer from Columbia, Maryland, is, by his own account, a man who hates lesbians and enjoys intimidating and assaulting women. According to law enforcement officials, sometime after being arrested, Rice told law enforcement officials that he intentionally selected women to assault "because they are more vulnerable than men," that he "hates gays," and that the victims in this case "deserved to die because they were lesbian whores."³ Accordingly, lead Assistant U.S. Attorney Tom Bondurant, Jr. plans to argue that Rice chose to slit the throats of the two young women because of their gender and because of their "actual or perceived sexual orientation."⁴ According to court documents, Bondurant will introduce evidence of the defendant's numerous physical and verbal assaults upon randomly selected women, including acts of road rage, physical assaults, demeaning sexual comments, and threats of injury or death. The U.S. Assistant Attorney plans to argue in court "that the defendant's killing of the two women was part of an ongoing plan, scheme, or modus operandi to assault, intimidate, and injure and kill women because of their gender."⁵

As the first federal prosecution of a hate crime based on gender, this case raises a plethora of questions about the status, meaning, and workings of gender in hate crime policy in the U.S. Although there is a growing body of literature on the ways in which public policy associated with crime control is gendered,⁶ the literature is surprisingly silent when it comes to understanding the ways in which gender—as a central axis of differentiation around which violence and discrimination manifest—has been constructed, positioned, and reacted to via the emergence, content, and evolution of public policy on bias-motivated violence, especially legal reform and law. Most notably, an examination of gender as a feature of policy connected to hate crime has been notably absent in recent journal publications devoted specifically to the study of hate crime in the U.S. and abroad. For example, neither the recent special issue of *The American Behavioral Scientist* devoted to "Hate Crimes and Ethnic Conflict: A Comparative Perspective"⁷ nor the recent special issue of *Law and Critique* on "Hate Crime: Critical Reflections"⁸ contains an article that focuses specifically on gender and hate crime policy, including law.⁹

To fill this gap, this article provides an overview of the status of gender in hate crime policy in the U.S. To do so, it first introduces the concept of "hate crime" as a politically determined and legislatively defined subset of criminal behavior. This section treats "hate crime" as a recently developed term that is now commonly used to signify age-old forms of conduct. With this in mind, it then inventories the ways in which gender has—and more notably, has not—

loomed large in state and federal lawmakers' most institutionalized response to bias-motivated violence in the U.S. (that is, the law). This section reveals that gender is best envisioned as a "second-class citizen" in social, political, and legal discourse in the U.S. which speaks directly to the larger problem of violence motivated by bigotry and manifest as discrimination (that is, bias-motivated violence). Thereafter, this article offers a discussion of what feminist legal scholars refer to as "the dilemma of difference"¹⁰ inherent in hate crime policy in the U.S. Here, the focus is on how the dilemma of difference has been attended to in the formulation of hate crime policy in the U.S., which simultaneously recognizes the ways in which gender is both distinct from and similar to other status provisions that anchor hate crime law in the U.S. (that is, race, religion, ethnicity, sexual orientation, disabilities, and so on).

II. HATE CRIME (LOOSELY CONSTRUED) IN THE U.S.

In the latter part of the twentieth century, the term "hate crime" and the legal logic it implies diffused across the globe as civil rights groups and criminal justice systems responded to an age-old form of violence—that which is organized around axes of social differentiation and targets minorities—in new-found ways. Thus, it is appropriate to conceptualize hate crime as part of a larger complex process of legal and cultural regulation of violence directed toward minorities in the U.S., and recently, across the globe.¹¹

A. *The Emergence of Hate Crime in the U.S.*

The concept "hate crime" first emerged in the United States in the late 1970s and has since been institutionalized in social, political, and legislative discourse in the U.S. and abroad.¹² Although it remains an empirical question whether the U.S. and other countries that use the term to reference a subset of crime are experiencing greater levels of hate- or bias-motivated violence than in the past,¹³ it is beyond dispute that the term "hate crime" has found a home in various spheres of social and institutional life. From the introduction and politicization of the term in the late 1970s to the continued enforcement of hate crime law at the beginning of the twenty-first century, modern civil rights movements constructed the problem of bias-motivated violence in ways that distinguish it from other forms of violent crime;¹⁴ state and federal politicians made legislation that defines the parameters of hate crime in ways that distinguish it from other types of violent crime;¹⁵ judicial-decision makers elaborated and enriched the meaning of hate crime as they determined the constitutionality of "hate crime" as a legal concept that distinguishes types of violence based on the motivation of the perpetrator;¹⁶ and law enforcement officials continue to investigate and prosecute bias-motivated incidents as a special type of crime that warrants enhanced penalties.¹⁷

As a result of these changes, violence born of bigotry and manifest as discrimination has been resignified and reacted to in ways that result in the reconfiguration of violence directed toward minorities.¹⁸ The result is twofold. First, in the U.S. it is increasingly understood that criminal conduct takes on a new meaning when it involves an act motivated by bigotry. Second, people of color, Jews, immigrants, and gays and lesbians are recognized routinely as victims of hate crime, while other vulnerable victims—for example, union members, octogenarians, the elderly, children, and police officers—are not. As this article will reveal, girls and women fall somewhere in between. This classification reflects the unique politics of hate crime in the U.S.¹⁹ In the U.S. the use of the term “hate crime” is now commonplace in settings as diverse as prime time television, the evening news, academic conferences, presidential proclamations, and all levels of lawmaking. In the last decade alone, a steady stream of seemingly disparate incidents has been presented to the public as hate crime, including repeated attacks on African Americans who moved into a predominantly white neighborhood in Philadelphia; attacks by neighborhood youths on families of Cambodian refugees who fled to Brooklyn; the beating to death of a Chinese-American because he was presumed to be Japanese; the harassment of Laotian fishermen in Texas; the brutal attack on two men in Manhattan by a group of knife- and bat-wielding teenage boys shouting “homos!” and “fags!”; the assault on three women in Portland, Maine, after their assailant yelled anti-lesbian epithets at them; the gang rape, with bottles, lighted matches, and other implements, of a gay man who was repeatedly told “what faggots deserve”; the stabbing to death of a heterosexual man in San Francisco because he was presumed to be gay; and the gang rapes of a female jogger in Central Park and a mentally handicapped teenager in Glen Ridge, New Jersey.²⁰

B. *Considering Three High-Profile Cases*

In the latter part of the 1990s, three highly publicized cases of homicide occurred in which the victims were chosen because of a social characteristic. The first was the murder of James Byrd in Jasper, Texas in June of 1998. This event, covered extensively in the national media, presented the murder as a “hate crime” after it was revealed that Byrd, a 49-year-old black man, had been beaten and then dragged to his death behind a truck by three white men known to be affiliated with a white supremacist group.²¹ Shortly thereafter, the murder of Matthew Shepard, a young gay man who was pistol-whipped, tied to a fence, and left to die, was treated as a hate crime by the national news media.²² In contrast to these two incidents, the murder of four young girls in a Jonesboro, Arkansas schoolyard in March of 1998 generally has not been viewed as a hate crime, despite the revelation that the young boys in custody for the killings sought to shoot girls because it was girls that angered them. That is, they selected their victims on the basis of gender. Nonetheless, *Time* referred to it as a “youth crime”²³ and *Newsweek* called it “schoolyard crime.”²⁴ Because of

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this framing, the incident triggered a different set of legal and policy discussions, most often expressed in terms of school violence and the debate over gun control.

Despite the empirical dissimilarities in the details of these three high profile cases, they nonetheless share an underlying parameter: In each of these cases the victims were apparently chosen by the perpetrators not because of *who* they were, but because of *what* they were. The fact that the events in Jasper, Texas and Laramie, Wyoming were interpreted as hate crimes and the event in Jonesboro, Arkansas was not reveals a key aspect of the contested terrain of hate crime: Who and what is included is a matter of interpretation, legal and otherwise. Clearly, then, if one were to rely upon media portrayals, gender would not be constitutive of “the hate crime problem in the U.S.” That is, it does not loom large in the most highly visible and widely discussed events that fall under the rubric of hate crime. However, it is important to note that the media does not define *crime*, at least not in a technical sense. It is the state that defines crime through the passage of law. Therefore, as most criminologists would agree, it is appropriate to define crime, including hate *crime*, with reference to statutes. Accordingly, the next section examines the standing of “gender” in both state and federal hate crime law in the U.S.

III. THE ENGENDERING OF HATE CRIME (LEGALLY DEFINED) IN THE U.S.

As others have documented, in the latter part of the twentieth century the law became the primary institution charged with defining and curbing hate- or bias-motivated violence.²⁵ During a Congressional debate on hate crime, U.S. Representative Mario Biaggi said it most succinctly when he argued: “The obvious point is that we are dealing with a national problem and we must look to our laws for remedies.”²⁶ Concurring, U.S. Representative John Conyers, Jr., the ranking member of the Judiciary Committee, explained that the enactment of hate crime legislation “will carry to offenders, to victims, and to society at large an important message, that the Nation is committed to battling the violent manifestations of bigotry.”²⁷ Consistent with these views, in the late 1970s and early 1980s, lawmakers throughout the U.S. began to respond to what they perceived to be an escalation of violence directed at minorities with a novel legal strategy: the criminalization of discriminatory violence, now commonly referred to as “hate crime.” As a result, by the turn of the century, “in seemingly no time at all, a ‘hate crimes jurisprudence’ had sprung up.”²⁸

A. *Defining the Parameters of Hate Crime Law*

With considerable variation in wording and content, *criminal* hate crime statutes are laws that criminalize, or further criminalize, activities motivated by bias toward individuals or groups because of their real or imagined characteris-

tics. Drawn from Grattet, Jenness, and Curry,²⁹ this definition consists of three elements. First, the law provides a new state policy action by creating a new criminal category, altering an existing law, or enhancing penalties for select extant crimes when they are committed for bias reasons. Second, hate crime laws contain an intent standard.³⁰ In other words, statutes contain wording that refers to the subjective intention of the perpetrator rather than relying solely on the basis of objective behavior. Finally, hate crime laws specify a list of protected social statuses, such as race, religion, ethnicity, sexual orientation, gender, disabilities, and so on.³¹ These elements of the definition of hate crime law capture the spirit and essence of hate crime legislation designed to punish bias-motivated *conduct*.

B. *The Content of State Hate Crime Law*

At the state level, in the last two decades almost every state in the U.S. has adopted at least one hate crime statute that simultaneously recognizes, defines, and responds to discriminatory violence. Hate crime statutes have taken many forms throughout the U.S., including: statutes proscribing criminal penalties for civil rights violations; specific “ethnic intimidation” and “malicious harassment” statutes; and provisions in previously enacted statutes for enhanced penalties if an extant crime is committed for bias or prejudicial reasons. These laws specify provisions for race, religion, color, ethnicity, ancestry, national origin, sexual orientation, gender, age, disability, creed, marital status, political affiliation, age, marital status, involvement in civil or human rights, and armed service personnel. In addition, a few states have adopted statutes that require authorities to collect data on hate- or bias-motivated crimes; mandate law enforcement training; prohibit the undertaking of paramilitary training; specify parental liability; and provide for victim compensation. Finally, many states have statutes that prohibit institutional vandalism and the desecration or the defacement of religious objects, the interference with or disturbance of religious worship, cross burning, the wearing of hoods or masks, the formation of secret societies, and the distribution of publications and advertisements designed to harass select groups of individuals. This last group of laws references a previous generation of what, in retrospect, could be termed “hate crime” law.³²

More importantly, hate crime statutes vary in terms of the specific status provisions recognized by law. Status provisions such as race, religion, ethnicity, ancestry, sexual orientation, gender, disability, and so on, implicitly reference what Soul and Earl refer to as “target groups.”³³ That is, race is a proxy for non-Whites, religion is a proxy for non-Christians, sexual orientation is a proxy for gays and lesbians, gender is a proxy for girls and women, and so forth. Given this, status provisions clearly single out some minorities and axes of oppression as worthy of legislative attention and attendant legal intervention,

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while rendering invisible other axes of oppression around which violence is organized and attendant vulnerable victims.

In other words, status provisions contained in hate crime law define who does and does not count as a hate crime victim; likewise, status provisions in hate crime law delineate who does and does not qualify as a hate crime perpetrator. This determination and attendant differentiation is important insofar as it affects the types of people protected by hate crime law, as well as the types of perpetrators prosecutors can pursue using hate crime law. For example, if gender is included in a hate crime law, a person victimized because of her gender qualifies as a victim of hate crime; if, on the other hand, gender is not included in a hate crime law, the crime is not charged as a hate crime.

As lawmakers drafted, revised, and adopted hate crime law, especially early on in the process of thinking about the parameters of hate crime in the U.S., which types of distinctions should be written into law was an open-ended question. Activists and policymakers alike had to ponder a series of related questions, such as, "Who should be represented in hate crime law? Why? On what grounds?" To emphasize the political, rather than legal nature of this question, Laurence Tribe, Professor of Constitutional Law at Harvard University, informed lawmakers that the question of which status provisions to include in hate crime law presents no constitutional problem. As he explained in U.S. Congressional hearings on hate crime:

Nothing in the U.S. Constitution prevents the Government from penalizing with added severity those crimes directed against people or their property because of their race, color, religion, national origin, ethnicity, gender or sexual orientation, and nothing in the Constitution requires that this list be infinitely expanded.³⁴

If, as Tribe suggests, legislators had considerable latitude, how did they proceed to demarcate status provisions in hate crime law? In particular, how did gender fare in the process, both in absolute terms and in comparative terms?

C. *The Status of Gender in State Hate Crime Law*

Some state lawmakers and attendant legislatures have ensured that "gender" found a home in state hate crime law. When it appears in hate crime law, the status provision for gender is articulated in different ways. First, it often is coded as "sex" in the legal definition of a hate crime. For example, in 1999 North Dakota passed a law that says:

A person is guilty of a class B misdemeanor if, whether acting under the color of law, he by force, or threat of force or by economic coercion, intentionally: 1) Injures, intimidates, or interferes with another because of his sex, race, color, religion, or national origin and because he is or has

been exercising or attempting to exercise his right to full and equal enjoyment of any facility open to the public. 2) Injures, intimidates, or interferes with another because of his sex, race, color, religion, or national origin in order to intimidate him or any other person from exercising or attempting to exercise his right to full and equal enjoyment of any facility open to the public.³⁵

Similarly, West Virginia hate crime law declares the following:

All persons within the boundaries of the state of West Virginia have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property because of their race, color, religion, ancestry, national origin, political affiliation, or sex. If any person does by force or threat of force, willfully injure, intimidate or interfere with, or attempt to interfere with, or oppress or threaten any other person in the free exercise or enjoyment of any right or privilege secured to him or her by the Constitution or laws of the state of West Virginia or by the Constitution or laws of the United States, because of such other person's race, color, religion, ancestry, national origin, political affiliation, or sex, he or she shall be guilty of a felony, and, upon conviction, shall be fined not more than five thousand dollars or imprisoned not more than ten years, or both.³⁶

Second, consistent with the example in the introduction to this article, gender often appears alongside sexual orientation. For example, in 1991 Illinois passed a law that included both gender and sexual orientation as factors that shall be accorded weight as reasons to impose a more severe sanction (that is, enhanced penalty). This law defines a hate crime as a crime in which

the defendant committed the offense against a person or person's property because of such person's race, color, creed, religion, ancestry, gender, sexual orientation, physical or mental disability, or national origin. For the purposes of this section, "sexual orientation means heterosexuality, homosexuality, or bisexuality."³⁷

Similarly, Rhode Island's "Hate Crime Sentencing Act" specifies the following:

[I]f any person has been convicted of a crime charged by complaint, information, or indictment, in which he or she intentionally selected the person against whom the offense is committed or selected the property that is damaged or otherwise affected by the offense because of the actor's hatred or animus toward the actual or perceived disability, religion, color, race, national origin or ancestry, sexual orientation, or gender of that person or the owner or occupant of that property, he or she shall be subject to the [enhanced] penalties provided in this section.³⁸

Finally, in some cases the status provision for gender was included in hate crime law as an amendment to a previously articulated hate crime law. For example, in 1987 California adopted an “Interference with Exercise of Civil Rights” law. It stated that:

No person, whether or not acting under color of law, shall by force or threat of force, willfully injure, intimidate, interfere with, oppress, or threaten any other person in the free exercise or enjoyment of any right or privilege secured to him or her by the Constitution or laws of this state or by the Constitution or the laws of the United States because of the other person’s race, color, religion, ancestry, national origin, or sexual orientation.³⁹

Thereafter, the California State legislature amended the law in two ways. First, in 1991 it amended the law to include “disability” and “gender.” Then, in 1994 it amended the law to include “or because he or she perceives that the person has one or more of those characteristics.” The law now reads:

No person, whether or not acting under color of law, shall by force or threat of force, willfully injure, intimidate, interfere with, oppress, or threaten any other person in the free exercise or enjoyment of any right or privilege secured to him or her by the Constitution or laws of this state or by the Constitution or the laws of the United States because of the other person’s race, color, religion, ancestry, national origin, disability, gender, or sexual orientation or because he or she perceives that the other person has one or more of these characteristics.⁴⁰

Clearly, then, “gender” has been recognized as a source of bias-motivated violence by some legislators and legislatures. Nonetheless, it is fair to ask, how *much* has it been recognized as part and parcel of a larger hate crime problem in the U.S.? How does it compare with other axes of inequality and attendant discriminatory violence?

Figure 1 presents the total number of status provisions, by type, in the U.S. The most common status provisions are for race, religion, color, and national origin. These status provisions are associated with the most visible, recognizable, and stereotypical kinds of discriminatory behavior in U.S. history and in the current era.⁴¹ For example, in the U.S. the stereotypical hate crime involves violence toward or harassment of blacks, immigrants, or Jews. Accordingly, these status provisions can be referred to as “core” hate crime provisions in state hate crime law. In terms of frequency counts, a second tier of provisions includes sexual orientation, disability, ancestry, gender, creed, and ethnicity. Given that legislators, like the population at large, tend to conflate ancestry, creed, and ethnicity with race, religion, color, and national origins, at least at the level of terminology and attendant identity politics, these status provisions also arguably can be classified as core provisions. As a result, sexual orienta-

tion, disability, and gender stand alone as “second tier” provisions insofar as they appear with comparable frequency and less frequently than core provisions. Finally, there are some comparatively anomalous status provisions, including age, political affiliation, marital status, involvement in civil or human rights, and involvement in armed services personnel. These status provisions can be classified as anomalous insofar as they appear in state hate crime law comparatively infrequently. They have failed to gain a foothold as a key component of hate crime law.⁴²

FIGURE 1

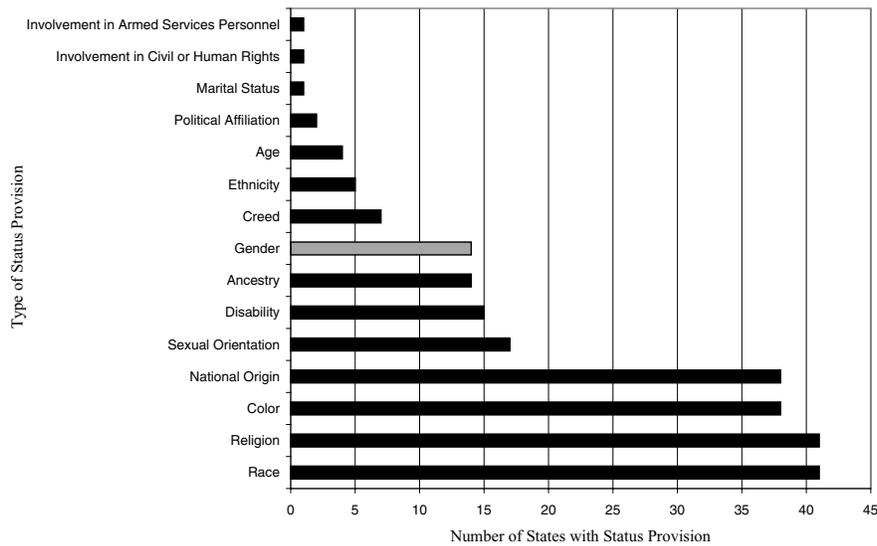
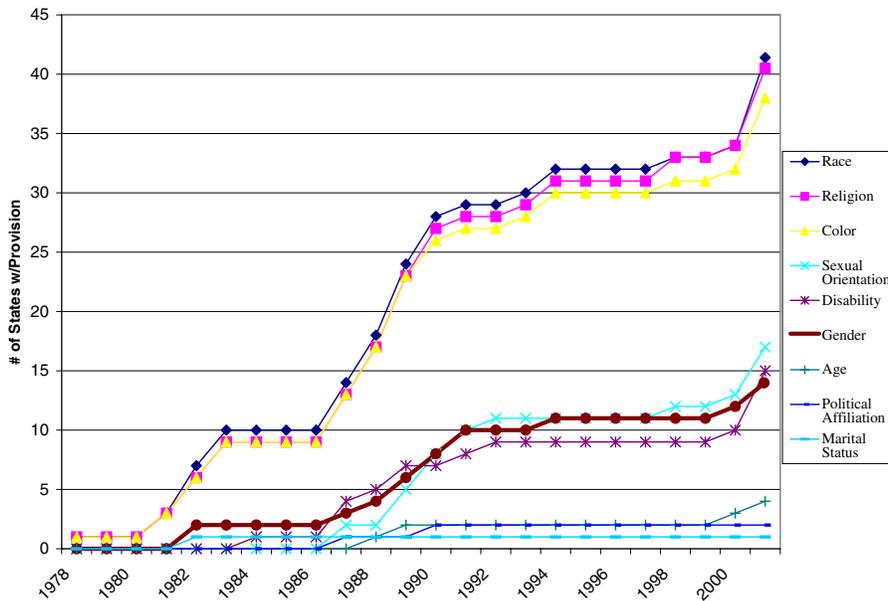


Figure 2 reveals the *cumulative* frequency of the status provisions included in state hate crime laws from 1978, the year the first state hate crime law was passed, until 2001, the last year for which systematic data on hate crime law are available. The respective unfolding of these clusters of status provisions—the core, the second tier, and the anomalous provisions—reveals that although the idea of including gender in hate crime policy was introduced very early on in the process of making hate crime policy, it did not find a secure home in hate crime law until about halfway through a larger process of legal reform designed to curb bias-motivated violence.⁴³ Moreover, once it gained legitimacy and subsequent inclusion in law, gender nonetheless remained a less accepted provision in hate crime policy than those identified as core provisions.

The ways in which gender has been demoted in the politics of hate crime lawmaking are revealed in Jenness’s work on the politics of hate crime.⁴⁴ Namely, early on in federal lawmaking the Coalition on Hate Crime,⁴⁵ the primary group responsible for defining the parameters of proposed hate crime leg-

isolation, contemplated recommending including gender as a protected status in legislation, but eventually decided against it for a variety of reasons. First, some members of the Coalition believed that the inclusion of gender would delay, if not completely impede, the timely passage of the law. Second, some members of the Coalition argued that including gender would open the door for age, disability, position in a labor dispute, party affiliation, and/or membership in the armed forces provisions. This, at the time, was seen as an undesirable outcome. Third, some believed that including gender would make enactment of the law too cumbersome, if not entirely impossible, since violent crimes against women are so pervasive and, arguably, caused by factors other than bigotry or discrimination. Fourth, and related, others argued that not all acts of violence against women fit (what was then) the working definition of a hate crime. Fifth, some members of the Coalition argued that expanding the categories of officially recognized hate crimes to include gender would not improve upon current efforts to collect official data on rape and domestic violence, two categories of gender-based violence deemed most worthy of special concern. Focusing on feasibility, opponents feared that adding gender as a victim category would simply overwhelm the data collection efforts of law enforcement agencies and human rights organizations that track hate crimes. Related, the large number of crimes against women would overshadow statistics on hate crimes against members of other groups.⁴⁶

FIGURE 2



These patterns revealed in Figure 1 and Figure 2 are consistent with the history of various post-1960s civil rights movements in the U.S.⁴⁷ Race, religion, color, national origin, ancestry, creed, and ethnicity reflect the early legal contestation of minorities' status and rights. Thus, there is a more developed history of invoking and then deploying the law, especially civil rights law, to protect and enhance the status of blacks, Jews, and immigrants. In contrast, the gay/lesbian movement, the women's movement, and the disability movement reflect a "second wave" of civil rights activism and "identity politics" in the U.S.⁴⁸ Accordingly, sexual orientation, gender, and disability only recently have been recognized as status provisions in hate crime law in the U.S. As Jenness⁴⁹ has shown in her work on the U.S. Congressional hearings on hate crime, these are also more heavily contested protected statuses than the "first wave" (that is, core) categories. Not surprisingly, they remain less embedded in hate crime law. Finally, marital status, creed, age, armed service personnel, and political affiliation are not visibly connected to issues of discrimination and victimization by any particular mass movement; and, they are fairly anomalous status provisions in hate crime law in the U.S.

D. *The Content of Federal Hate Crime Law*

Following the states' lead, the U.S. Congress has passed three laws specifically designed to address bias-motivated violence, only two of which reference gender as an element of hate crime. In 1990 President Bush signed the Hate Crimes Statistics Act, which requires the U.S. Attorney General to collect statistical data on "crimes that manifest evidence of prejudice based on race, religion, sexual orientation, or ethnicity, including where appropriate the crimes of murder; non-negligent manslaughter; forcible rape; aggravated assault; simple assault; intimidation; arson; and destruction, damage or vandalism of property."⁵⁰ As a data collection law, the Hate Crimes Statistics Act merely requires the Attorney General to gather and make available to the public data on bias-motivated crime, which has been accomplished every year since 1991. It does not stipulate new penalties for bias-motivated crimes, nor does it provide legal recourse for victims of bias-motivated crime. Most importantly, it does not include a provision for "gender"; thus gender-based bias-motivated crime is not visible in official hate crime statistics in the U.S. produced by Uniform Crime Report on Hate Crime in the U.S.

In 1994, Congress passed two more hate crime laws. The Violence Against Women Act specifies that "all persons within the United States shall have the right to be free from crimes of violence motivated by gender."⁵¹ The Violence Against Women Act allocated over 1.6 billion dollars for education, rape crisis hotlines, training of justice personnel, victim services (especially shelters for victims of battery), and special units of police and prosecutors to deal with crimes against women. The heart of the legislation, Title III, provides

a civil remedy for “gender crimes.” The justification for such a remedy is as follows:

Congress finds that (1) crimes motivated by the victim’s gender constitute bias crimes in violation of the victim’s right to be free from discrimination on the basis of gender; (2) current law provides a civil remedy for crimes committed in the workplace, but not for gender crimes committed on the street and in the home; and (3) State and Federal laws do not adequately protect against the bias element of gender crimes, which separates these crimes from acts of random violence, nor do they adequately provide victims the opportunity to vindicate their interests.⁵²

In essence, Title III entitles victims to compensatory and punitive damages through the federal courts for a crime of violence if it is motivated, at least in part, by animus toward the victim’s gender. This allowance implicitly acknowledges that some, if not most, violence against women is not gender-neutral; instead, it establishes the possibility that violence motivated by gender animus is a proper subject for civil rights action. In so doing, it affixed the term hate crime to “a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to animus based on the victim’s gender.”⁵³ Although this law was recently ruled unconstitutional,⁵⁴ it was predicated upon and promoted the inclusion of gender in the concept of a hate crime.

Also in 1994, Congress passed the Hate Crimes Sentencing Enhancement Act. This law identifies eight predicate crimes—murder; non-negligent manslaughter; forcible rape; aggravated assault; simple assault; intimidation; arson; and destruction, damage, or vandalism of property—for which judges are allowed to enhance penalties of “not less than three offense levels for offenses that finder of fact at trial determines beyond a reasonable doubt are hate crimes.”⁵⁵ For the purposes of this law, hate crime is defined as criminal conduct wherein “the defendant intentionally selected any victim or property as the object of the offense because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person.”⁵⁶ Although broad in form, this law addresses only those hate crimes that take place on federal lands and properties. It is this law that U.S. Attorney General Ashcroft invoked in the case described in the opening paragraphs of this article.

E. *The Enforcement of Gender Provisions in Hate Crime Law*

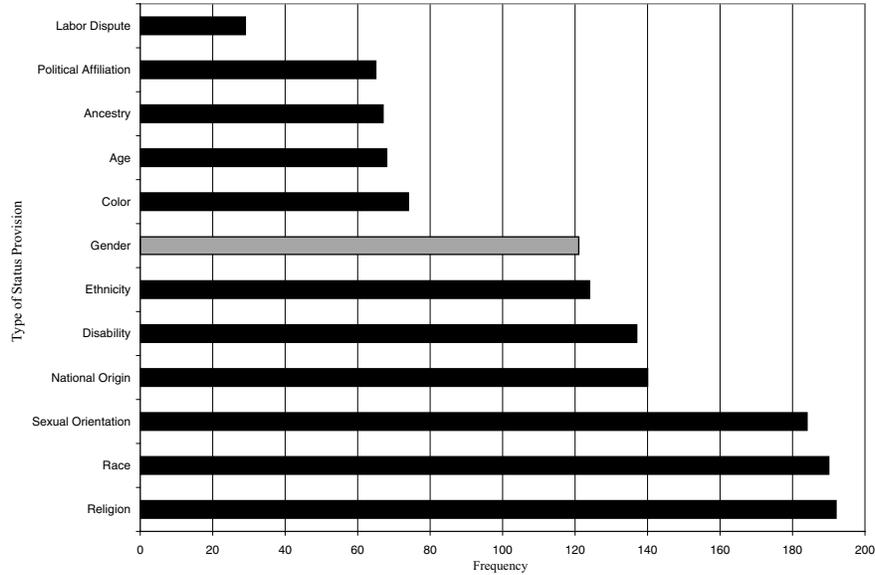
The state and federal laws described above suggest that in the contemporary era, many lawmakers and other policymakers share a commitment to using the law, law enforcement, and the criminal justice system as a vehicle to enhance the status and welfare of minority constituencies deemed differentially vulnerable to violence motivated by bigotry. However, the place of gender in

this commitment is distinct in empirically identifiable ways. First, gender is present in hate crime law, but only a second-class citizen in larger legal efforts to respond to bias-motivated violence. As described above and summarized in Figures 1 and 2, the distribution of provisions for gender in state and federal hate crime law reveals that gender has found a home in legal discourse on hate crime legislation, but it remains in the guest house of that home.

Second, connected to the location of gender in hate crime law, both federal and state efforts to collect data on bias crimes directed at people because of their gender have lagged behind efforts to collect data on the other types of bias crimes. For example, The Hate Crime Statistics Act⁵⁷ does not mandate the Federal Bureau of Investigation (FBI) to collect data on bias crimes based on gender as part of the Uniform Crime Report (UCR); thus, gender-based violence is not referenced in official statistics on hate crime in the U.S. Similarly, at the state level, efforts to gather reports on gender-based hate crime have been delayed. For example, California, one of the largest and most heterogeneous states in the U.S., reports very few hate crimes based on gender. In 2001 California's Attorney General's Civil Rights Commission on Hate Crime published a report on the Attorney General's webpage, which reported "hate crimes based on gender are not reported generally."⁵⁸ Accordingly, the report recommended that "the California Commission on Peace Officer Standards and Training (POST) revise its training and guidelines to provide special emphasis on gender-based crimes."⁵⁹

Third, consistent with reporting practices, police training publications and curriculum at federal, state, and local levels tend to discuss gender-based hate crime only infrequently, if at all. For example, the word "gender" does not appear in the major national bias-crime training manual for law enforcement and victim assistance professionals, *Training Guide for Hate Crime Data Collection*, published by the U.S. Department of Justice.⁶⁰ Moreover, gender often does not appear in the law enforcement hate crime policies. For example, as Figure 3 reveals, in a large, heterogeneous, and progressive state like California, which has had a gender provision in its state hate crime law since 1991, gender appears in law enforcement hate crime policy less than one-third of the time. Specifically, only 121 law enforcement agencies, out of 397 law enforcement agencies, direct their officers to attend to gender-based hate crime. As a result, gender-based hate crime remains largely invisible to front line law enforcers, who tend to focus mostly on race, religion, sexual orientation, and nationality. A lack of emphasis on gender in law enforcement curriculum and policies leads to a lack of recognition among law enforcement officers, which, in turn, results in an underreporting of bias-motivated crimes based on gender.

FIGURE 3



Fourth and finally, when law enforcement personnel attempt to enforce gender provisions in hate crime law, they do so with added complications. For example, in Massachusetts the Attorney General has instituted a policy whereby gender-based hate crimes require at least two previous restraining orders issued to protect two different domestic partners.⁶¹ Over the past ten years there have been fewer than ten cases in which these criteria have been met.⁶² Restrictive policies such as these ensure that hate crimes based on gender are extremely difficult to prosecute.

Moving beyond the question of enforceability, as with any policy reform that directs attention to any minority constituency, the inclusion/exclusion of gender in hate crime law raises the larger question of how best to resolve the dilemma of difference in policy/lawmaking. This question is addressed in the next section.

IV. GENDER, HATE CRIME LAW, AND THE DILEMMA OF DIFFERENCE

For legal scholars the “dilemma of difference” can best be stated as a question: Should those interested in enhancing the status and welfare of minority groups pursue policies that provide “special” treatment for minorities, including women; or, alternatively, should they pursue policies that ignore the unique social location, special qualities, and socially structured obstacles faced by minorities, including women, and work solely toward improving “equality” for all members of society? With regard to crime control policies in particular,

should the law recognize the “special” needs of minorities, including women, or should the same social and legal resources be made available to all victims of crime, regardless of their social characteristics or group membership? Stated more succinctly, should all victims of crime be treated the same, or should some victims of crime, namely “vulnerable victims” and people who face unique barriers when accessing the criminal justice system and pursuing justice, be distinguished and treated differently? Historically and in the current era, advocates for minorities, feminists and other critical legal scholars, and policymakers of all stripes have had to respond to this question. This section addresses this familiar, yet pressing, concern by examining the contours of and justifications for status provisions, especially “gender,” in American hate crime law. In so doing, this section concludes this article by arguing that the inclusion of gender in hate crime policy allows the “sameness/difference” debate to be solved in a way that both 1) treats girls and women as a special category of crime victim and, at the same time, the same as other hate crime victims; and 2) treats perpetrators of gender-based crime as a special category of offender and, at the same time, the same as other types of bias-motivated offenders. How does it do this?

A. *Gender and the Dilemma of Difference Historically*

In the latter part of the twentieth century, feminist legal scholars debated how best to invoke and position gender when using the law to advocate on behalf of girls and women in the pursuit of their full participation in U.S. society. Early on, scholars split over the following, seemingly simple, question: How should the law attend to institutionalized gender inequality? The so-called “equal treatment” advocates argue that gender equality requires identical treatment of the sexes, without regard to pregnancy, differential vulnerability to crime, underrepresentation in the workplace, and so forth.⁶³ As Williams argued in her often cited article, “Equality’s Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate,” “an anti-discrimination provision is a device for telling legislators, governments and designated others what they may not do, thus setting parameters within which they must operate. It does not, and cannot, do the basic work of readjusting the social order.”⁶⁴ In contrast, the so-called “special treatment” camp rejects the equal treatment model in favor of an equal opportunity model, often labeled a “special treatment” or a “positive action” approach.⁶⁵ Here, the idea is that the law must treat classes of persons, for example girls and women, differently insofar as they are differently situated in society. Still others advanced an approach that tried to “split the difference,” as it were, between the poles represented by the “sameness/difference” positions. For example, in her classic work on “Equality and Difference: The Case of Pregnancy,” Herma Hill Kay put forth an “episodic analysis” for dealing with pregnancy (or any other gender related difference).⁶⁶ Kay argues that the law should treat biologically derived sex differences as legally significant *only*

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when they are being utilized for reproductive purpose—that is, only when the differences matter in the context under legal scrutiny.⁶⁷

More recently, the choice between whether to emphasize and delineate social difference(s) in social policy, especially law, has been astutely characterized by Harvard Law Professor Martha Minow as the “dilemma of difference.”⁶⁸ As Minow (1991) details in her book *Making All the Difference: Inclusion, Exclusion, and American Law*, the dilemma of difference is a philosophical, legal, and strategic issue that has implications for an array of social issues ranging from affirmative action to maternal leave policies to gay marriage to discrimination in the workplace against persons with disabilities.⁶⁹ As Minow writes,

The stigma of difference may be recreated both by ignoring and by focusing on it. Decisions about education, employment, benefits, and other opportunities in society should not turn on an individual’s ethnicity, disability, race, gender, religion, or membership in any other group about which some have deprecating or hostile attitudes. Yet refusing to acknowledge these differences may make them continue to matter in a world constructed with some groups, but not others, in mind. These problems of inequality can be exacerbated both by treating members of minority groups the same as members of the majority and by treating the two groups differently.⁷⁰

Often summarized as a tension between “same” versus “different” treatment policies, “the dilemma of difference may be posed as a choice between integration and separation, as a choice between similar treatment and special treatment, or as a choice between neutrality and accommodation.”⁷¹ As such, it obviously evokes questions about how to treat social differences, such as those loosely referenced under the rubric of “gender,” in public policy, especially lawmaking, as there are costs and benefits associated with both choices to policymaking.

Policies that emphasize gender as a significant axis of social differentiation by focusing on the “special” needs of women, such as pregnancy leave and affirmative action policies, risk reinforcing cultural distinctions between women and men. Such policies can construct women as different from men, underscore their incapacities and special needs as the defining feature of their social identities and, ultimately, place them in subordinate positions within both public and private spheres of social life. Arguably, one of the unintended consequences of social policies that single out women for “special” protections and treatment is the reinforcement of the idea that women are more vulnerable members of society and are less capable of responding to real and perceived vulnerabilities.⁷² And so it is with the *presence* of gender in hate crime law, which clearly treats girls and women as “target groups”⁷³ in need of special treatment.⁷⁴

In contrast, policies that ignore differences between types of victims risk being insensitive to the increasingly well-documented institutional, organizational, and interactional disadvantages faced by women, including those who find themselves confronting a criminal justice system with ideologies and structures that were enacted with men in mind.⁷⁵ Treating women the same as other crime victims does little to challenge the biases and stereotypes with which criminal justice officials often operate. A sizeable body of evidence suggests that ignoring social difference seldom is enough to produce equality, especially in the criminal justice system. Indeed, failing to acknowledge the differences around which systematic injustices revolve allows state officials to continue to do business as usual and does little to remedy systematic inequality. And so it is with the *absence* of gender in hate crime law, which clearly ignores girls and women as “target groups”⁷⁶ in need of special treatment.⁷⁷

B. *Resolving the Dilemma of Difference*

As described in the previous section, the presence *and* absence of gender is evident in the introduction, adoption, and enforcement of a body of law properly called “hate crime law.” This situation speaks to both the positive and the negative consequences of including gender in hate crime law. On the negative side, the inclusion of gender in hate crime law often is perceived to be creating “special” treatment where such treatment directly or indirectly reproduces stereotypes about women as vulnerable victims in need of state protection. On the positive side, the inclusion of gender in hate crime law serves to acknowledge the drawbacks of ignoring girls’ and women’s differential vulnerability to violence. Clearly, at this point in history, both the negative side and the positive side of the dilemma of difference remain evident in the in/exclusion of provisions for gender in hate crime law.

To the degree that gender has been recognized as a component of hate crime in the U.S., violence directed at girls and women because they are girls and women is segregated from other types of violence, and perpetrators of gender-based violence are deemed different from other types of perpetrators. Consistent with the spirit of hate crime law,⁷⁸ when a crime involves a “gender bias” it receives different treatment and evokes segregated practices. Such is the case with the high profile crime introduced at the beginning of this article. In this case, U.S. Attorney General Ashcroft did something historic: He called the double murder a hate crime, invoked the relevant law to legitimate this definition, and treated the double murder as a “special” case of murder—one that deserves enhanced penalties. In this unique case, this criminal category hate crime evokes special prosecutorial concerns and harsher penalties, as well as immense media coverage of heretofore unheard-of state action. This is no small result of decades of legal reform around bias-motivated violence.

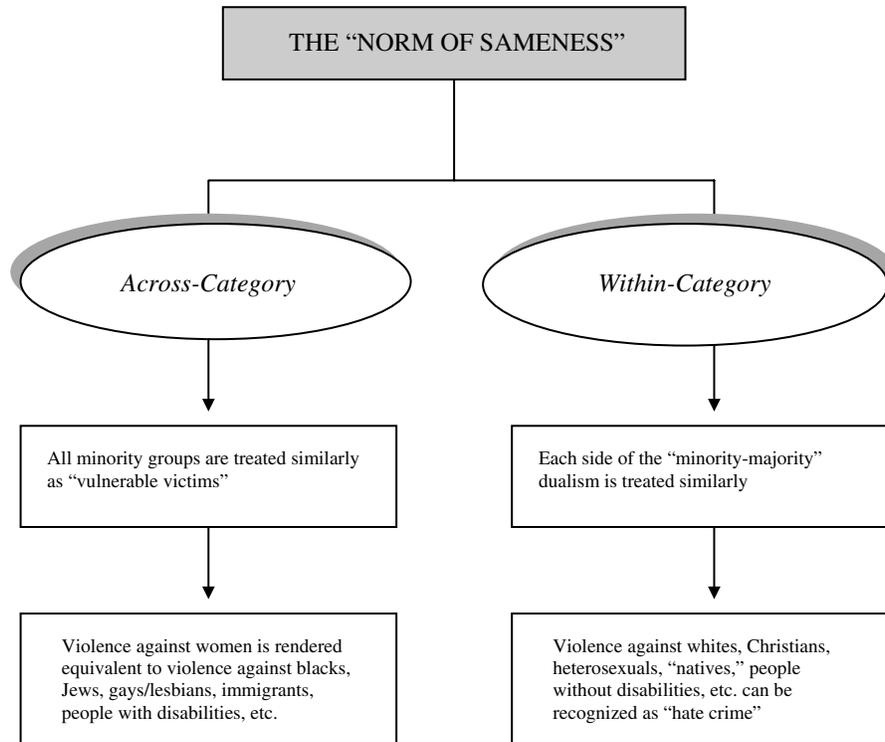
Paradoxically, the same legal reform that resulted in the U.S. Attorney General’s distinguishing the murder described in the opening paragraph of this

article as a hate crime also embraced the “norm of sameness.” As a basic assumption of American law and thus lawmaking, the “norm of sameness” is best expressed in the equal protection clause of the U.S. Constitution and is echoed in innumerable other locations. Simply put, the “norm of sameness” stipulates that laws must apply equally to all groups and individuals in society. As a journalist recently observed and questioned with regard to the proliferation of hate crime law, “A large stone in the foundation of the American dream is the idea that every person is equal in citizenship and that every life should be equally valued and protected. No one should accept less, but is anyone entitled to more?”⁷⁹ For the most part, “equal treatment” historically has meant “sameness.” That is, a law must not give one group benefits or protections that it does not extend to others; all groups must be treated the same.⁸⁰

C. *Applying the “Norm of Sameness”*

In the case of hate crime law the norm of sameness is evident in two outcomes: “across-category sameness” and “within-category sameness” (see Figure 4). With regard to the former, violence against girls and women is rendered equivalent to other types of “crimes against minorities.” The institutionalization of gender provisions in hate crime law serves to include girls and women in the coalition of status groups already covered under the law, ensuring there is nothing “special” or “different” about girls and women when compared with blacks, Jews, persons with disabilities, immigrants, and so forth. That is, “girls and women” are extended the “same” treatment accorded to other similarly situated (minority) groups deemed “vulnerable victims,” in this case other “target groups” recognized in hate crime law. As a result, hate crimes against women are rendered equivalent to hate crimes against immigrants, just as hate crimes against persons with disabilities are rendered equivalent to hate crimes against Muslims.⁸¹

FIGURE 4



The second way in which the “norm of sameness” has been manifested in legal reform related to hate crime is through what might best be called “within-category sameness.” Although the spirit of hate crime law is to protect minorities, each side of the minority/majority dualism is—technically speaking—equally protected by law. Like the other anti-discrimination laws that preceded them, hate crime laws are written in a way that eludes the historical basis and meaning of specific forms of bias-motivated violence by translating specific categories of persons (for example, blacks, Jews, gays and lesbians, Mexicans, and so on) into all-encompassing and seemingly neutral categories (for example, race, religion, sexual orientation, national origin). In doing so, the laws do not offer any remedies or protections to members of minority groups that are not simultaneously available to all other races, religions, genders, sexual orientations, nationalities, and so forth. Minorities are treated the same as their counterparts. With regard to gender provisions in particular, violence against girls and women is rendered equivalent to violence against boys and men when the violence occurs because of gender.

V. CONCLUSION

At the end of the day, members *within* and *across* socially recognized minority and majority groups have equal standing before the law. Although hate crime law can, at a glance, appear to identify, demarcate, and promote attentiveness to social differences and the social disadvantages that accrue around them, the way it is written and enforced promotes sameness overriding differences. Thus, in the case of gender, hate crime law, and the dilemma of difference, it is possible that state and federal hate crime law manages to increase the public awareness of criminal victimization of women as gendered beings, without defining them as “different” from other minorities—or from men, for that matter. As a result, in the case described in the opening paragraph of this article, the U.S. Attorney General, a Republican appointee, is able to simultaneously treat the murder of Julianne Marie Williams and Laura Winans, two women who happened to be lesbians, as significantly *different* from most murders that occurred in the U.S. in 1996 and basically the *same* as other hate crimes perpetrated against other minorities in the U.S. That is no small feat. It is as much a historic moment as it is a paradoxical expression.

NOTES

1. John Ashcroft, “Department of Justice to Indict Darrell David Rice,” *2002 Speeches*, 10 April 2002, <<http://www.usdoj.gov/ag/speeches/2002/041002newsconferenceindictment.htm>> (30 November 2002).

2. *Ibid.*

3. *Ibid.*

4. *Ibid.*

5. *Ibid.*

6. Kathryn Farr, “Fetal Abuse and Criminalization of Behavior During Pregnancy,” *Crime and Delinquency* 41 (1995): 235; Laura Gomez, *Misconceiving Mothers: Legislators, Prosecutors, and the Politics of Prenatal Drug Exposure* (Philadelphia: Temple University Press, 1997).

7. *American Behavioral Scientist* (2001).

8. *Law and Critique* (2001).

9. The one article that does directly address gender as a key component of hate crime examines the “ways in which gender forces us to revisit the meaning of violence through the sins of omission as well as commission, through a deepening of the understanding of public and private spheres of life, and to expand what we mean by victims, survivors, and resisters.” See Debra J. Kaufman, “Renaming Violence,” *American Behavioral Scientist* 45 (2001): 654-654.

10. Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* (Cornell University Press, 1990).

11. James Jacobs & Kimberly Potter, *Hate Crimes: Criminal Law and Identity Politics* (New York: Oxford University Press, 1998); Valerie Jenness, “Hate Crime in the U.S. and Abroad,” in *The Encyclopedia Britannica* (in press); Valerie Jenness & Ryken Grattet, *Making Hate a Crime: From Social Movement to Law Enforcement* (New York: Russell

Sage Foundation, 2001); Leslie Moran, "Affairs of the Heart: Hate Crimes and the Politics of Crime Control," *Law and Critique* 12 (2001): 331.

12. Ibid.

13. Jacobs & Potter, *Hate Crimes*; Jack Levin & Jack McDevitt, *Hate Crimes Revisited: America's War on Those Who Are Different* (Perseus Books Group, 2002).

14. Kendal Broad & Valerie Jenness, "The Institutionalizing Work of Contemporary Anti-Violence Against Women Campaigns in the U.S.: Mesolevel Social Movement Activism and the Production of Cultural Forms," *Research in Social Movements, Conflicts and Change* 19 (1996): 75; Valerie Jenness & Kendal Broad, *Hate Crimes: New Social Movements and the Politics of Violence* (New York: Aldine de Gruyter, 1997).

15. Valerie Jenness, "Managing Differences and Making Legislation: Social Movements and the Racialization, Sexualization, and Gendering of Hate Crime Law in the U.S., 1985-1998," *Social Problems* 46 (1998): 548; Valerie Jenness & Ryken Grattet, "The Criminalization of Hate: A Comparison of Structural and Polity Influences on the Passage of Bias-Crime Legislation in the United States," *Sociological Perspectives* 39 (1996): 129; Ryken Grattet, Valerie Jenness & Theodore Curry, "The Homogenization and Differentiation of Hate Crime Law in the United States: Innovation and Diffusion in the Criminalization of Bigotry," *American Sociological Review* 63 (1998): 286.

16. Jenness & Grattet, *Making Hate a Crime*; Scott Phillips & Ryken Grattet, "Judicial Rhetoric, Meaning-Making, and the Institutionalization of Hate Crime Law," *Law & Society Review* 34 (2000): 567.

17. Elizabeth Boyd, Richard Berk & Karl Hamner, "Motivated by Hatred or Prejudice: Categorization of Hate-Motivated Crimes in Two Police Divisions," *Law & Society Review* 30 (1996): 819; Jenness & Grattet, *Making Hate a Crime*; Susan Martin, "A Cross-Burning is Not Just an Arson: Police Social Construction of Hate in Baltimore County," *Criminology* 33 (1995): 303; Susan Martin, "Investigating Hate Crimes: Case Characteristics and Law Enforcement Responses," *Justice Quarterly* 13 (1996): 455; Chuck Wexler & Gary T. Marx, "When Law and Order Works: Boston's Innovative Approach to the Problem of Racial Violence," *Crime and Delinquency* 32 (1986): 205.

18. Jenness & Grattet, *Making Hate a Crime*; Moran, "Affairs of the Heart"; Barbara Perry, *In the Name of Hate: Understanding Hate Crimes* (New York: Routledge, 2001).

19. For a complete review of the emergence and evolution of the concept in the U.S., see Jenness & Grattet, *Making Hate a Crime*; Valerie Jenness, "The Hate Crime Canon and Beyond: A Critical Assessment," *Law and Critique* 12 (2001): 279. More recently, the U.S.-born concept of hate crime has diffused across international borders as various Western countries, especially those sharing a predominantly English-speaking culture, appropriate and deploy the concept to reference bias-motivated conduct in their respective legal and cultural milieu. See Jenness, "Hate Crime in the U.S. and Abroad." Australia, for example, has outlawed at the federal, state, and territory levels words and images that incite hatred toward particular groups of people. Relying on discrimination law, Australian legislators have outlawed conduct that constitutes "vilification" or "racial hatred." Britain and Canada also have passed a series of laws designed to curb racial-ethnic violence. Finally, Germany has passed laws that forbid "public incitement" and "instigation of racial hatred," including the distribution of Nazi propaganda or literature liable to corrupt the youth. Unlike the U.S., other countries have adopted a fairly limited view of hate crime, focusing primarily on racial, ethnic, and religious violence, and still other countries—mostly in the non-western world—have not adopted the term to reference racial, ethnic, religious, and other forms of intergroup conflict.

20. Carole Sheffield, "Hate Violence," in *Race, Class, and Gender in the United States*, ed. Paula Rothenberg (New York: St. Martin's Press, 1992), 388-397.

21. Despite this media portrayal of the incident, the case was not prosecuted under the Texas hate crime law. While publicly understood as a hate crime, in legal terms the incident

was defined as aggravated homicide. The maximum penalty for the murder could not have been enhanced because aggravated homicide is a capital crime.

22. Like the Byrd case, this case was not prosecuted as a hate crime.

23. Nadyi Labi, "The Hunter and the Choirboy," *Time* 6 April 1998, 28.

24. John McCormick, "The Schoolyard Killers," *Newsweek* 6 April 1998, 21-27.

25. Jacobs & Potter, *Hate Crimes*; Jenness & Grattet, *Making Hate a Crime*; Frederick M. Lawrence, *Punishing Hate: Bias Crime Under American Law* (Cambridge: Harvard University Press, 1999); Brian Levin, "The Vindication of Hate Violence Victims via Criminal and Civil Adjudications," *Journal of Hate Studies* 1 (2001): 133; Perry, *In the Name of Hate*.

26. 130 *Congressional Record* 19844 (daily ed. July 22, 1985) (statement of Rep. Biaggi).

27. 134 *Congressional Record* 11393 (daily ed. May 18, 1988) (statement of Rep. Conyers).

28. Terry A. Maroney, "The Struggle Against Hate Crime: Movement at a Crossroads," 73 *N.Y.U. Law Review* 73 (1998): 564, 567-68.

29. Grattet, Jenness & Curry, "Homogenization and Differentiation."

30. Jenness & Grattet, *Making Hate a Crime*; Lawrence, *Punishing Hate*.

31. Jenness, "Managing Differences."

32. These laws appeared as early as the late 1800s in response to perceived escalation of Klan activity. They are distinct from the contemporary hate crime laws insofar as they are considerably older, do not contain a bias "intent standard," do not specify protected statuses, and most notably, were not introduced under the rubric of "hate crimes legislation."

33. Sarah Soule & Jennifer Earl, "The Differential Protection of Minority Groups: The Inclusion of Sexual Orientation, Gender, and Disability in State Hate Crime Laws, 1976-1995," *Research in Political Sociology* 9 (2001): 3.

34. Hate Crimes Sentencing Enhancement Act of 1992, Hearings before the Sen. Comm. on the Judiciary, 102d Congress 7 (1992) (statement by Laurence Tribe).

35. N.D. Cent Code § 12.1-14-04 (1999).

36. WV ST § 61-6-21 (1982).

37. 730 ILCS § 5/5-5-3.2 (1991).

38. R.I. Gen. Laws § 12-19-38 (1998).

39. California Penal Code § 422.7.

40. *Ibid.*

41. Levin & McDevitt, *Hate Crimes Revisited*; Perry, *In the Name of Hate*.

42. Anomalous status provisions continue to be introduced in states. For example, in 2001 a bill was introduced in Portland, Oregon that calls for an additional five years in prison for an offender whose crime is motivated by "a hatred of people who subscribe to a set of political beliefs that support capitalism and the needs of people with respect to their balance with nature." See the *Oregonian*, 11 February 2001, sec. D, p. 1. According to the local press, if passed, this legislation would "expand the definition of hate crimes in a novel direction: to include the actions of eco-terrorists and critics of capitalism." See the *Oregonian*, 11 February 2001, sec. D, p. 1. Interpreted by the national press, this bill would "make it a hate crime to smash a Starbucks window or sabotage a timber company." See the *Associated Press*, 10 February 2001.

43. For a larger discussion along these lines, see Broad & Jenness, "Institutionalizing Work."

44. Jenness, "Managing Differences"; Jenness & Broad, *Hate Crimes: New Social Movements*.

45. The Coalition on Hate Crimes was comprised of civil rights, religious, ethnic, and law enforcement groups, as well as a diverse array of professional organizations, including: the ADL, the American Bar Association, thirty Attorneys General, the National Institute Against Prejudice and Violence, the National Gay and Lesbian Task Force, the American

Psychological Association, the American Psychiatric Association, the Center for Democratic Renewal, the American Civil Liberties Union, the American Jewish Congress, People for the American Way, the National Organization of Black Law Enforcement Executives, the U.S. Civil Rights Commission, the Police Executives Research Forum, the Criminal Justice Statistics Administration, the International Association of Police Chiefs, the National Council of Churches, the National Coalition of American Nuns, and the American Arab Anti-Discrimination Committee.

46. For a more detailed discussion of the debates around whether to include gender in hate crime law, see Jenness and Broad's work on the topic. Jenness, "Managing Differences"; Jenness & Broad, *Hate Crimes: New Social Movements*.

47. Robert A. Goldberg, *Grassroots Resistance: Social Movements in the Twentieth Century* (Belmont, CA: Wadsworth Publishing, 1991); Jenness & Broad, *Hate Crimes: New Social Movements*.

48. Barry Adam, *The Rise of a Gay and Lesbian Movement* (Boston: Twayne Publishers, 1987); Urvashi Vaid, *Virtual Equality: The Mainstreaming of Gay & Lesbian Liberation* (New York: Anchor Books, 1995); Myra Marx Ferree & Beth Hess, *Controversy and Coalition: The New Feminist Movement* (Gale Group, 1985); Richard Scotch, *From Good Will to Civil Rights: Transforming Federal Disability Policy* (Philadelphia: Temple University Press, 1984); Joseph Shapiro, *No Pity: People with Disabilities Forging a New Civil Rights Movement* (New York: Times Books, 1993); Goldberg, *Grassroots Resistance*.

49. Jenness, "Managing Differences."

50. Hate Crime Statistics Act of 1990, Pub. L. No. 101-275 (1990).

51. Violence Against Women Act of 1994, Pub. L. No. 103-322 (1994).

52. U.S. Congress, The Violence Against Women Act of 1991 (1990).

53. Violence Against Women Act of 1994, see note 54.

54. United States v. Antonio J. Morrison, et al.; and Christy Brzonkala v. Antonio J. Morrison, et al. 529 U.S. 598; 120 S. Ct. 1740; 146 L. Ed. 2d 658; 2000 U.S. LEXIS 4322; 68 U.S.L.W. 4351; 82 Fair Empl. Prac. Cas (BNA) 1313; 77 Empl. Prac. Dec. (CCH) P46,376; 2000 Cal. Daily Op. Services 3788; 2000 Daily Journal DAR 5061; 2000 Colo. J. C.A.R. 2583; 13 Fla. L. Weekly Fed. S 287.

55. Hate Crime Sentence Enhancement Act of 1994, Pub. L. No. 103-322 (1994).

56. *Ibid.*

57. Hate Crimes Statistics Act of 1990, see note 53.

58. Attorney General's Civil Rights Commission on Hate Crimes, *Reporting Hate Crimes*, 2001, <<http://caag.state.ca.us/publications/civilrights/reportingHC.pdf>> (31 November 2002).

59. *Ibid.*

60. U.S. Department of Justice, *Training Guide for Hate Crime Data Collection* (1996).

61. Levin & McDevitt, *Hate Crimes Revisited*, 21.

62. *Ibid.*

63. D. Kelly Weisberg, ed., *Feminist Legal Theory: Foundations* (Philadelphia: Temple University Press, 1993).

64. Weisberg, *Feminist Legal Theory: Foundations*, 151.

65. Linda J. Kreiger and Patricia N. Cooney, "The Miller-Wohl Controversy: Equal Treatment, Positive Action, and the Meaning of Women's Equality," *Golden Gate University Law Review* 13 (1983): 513.

66. Herma Hill Kay, "Equality and Difference: The Case of Pregnancy," *Berkeley Women's Law Journal* 1 (1985): 38.

67. *Ibid.*

68. Minow, *Making All the Difference*.

69. *Ibid.*

70. Minow, *Making All the Difference*, 20.

71. Minow, *Making All the Difference*, 20-21.

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72. Minow, *Making All the Difference*; Frances Olsen, *Feminist Legal Theory I: Foundations and Outlooks* (1995); Weisbeg, *Feminist Legal Theory: Foundations*.

73. Soule & Earl, "Differential Protection."

74. Jana Bufkin, "Bias Crime as Gendered Behavior," *Social Justice* 26 (1999): 155.

75. Minow, *Making All the Difference*; Olsen, *Feminist Theory I*; Weisberg, *Feminist Legal Theory: Foundations*."

76. Soule & Earl, "Differential Protection."

77. Bufkin, "Bias Crime as Gendered Behavior."

78. Jenness & Broad, *Hate Crimes: New Social Movements*; Jenness, "Hate Crime Canon."

79. Fred Dickey, "Of Course Hate Crimes Are Wrong: But So Are the Laws Against Them," *Los Angeles Times Magazine*, 22 October 2000, 10.

80. Minow, *Making All the Difference*.

81. It is important to emphasize, of course, that the history and content of violence organized around gender is not equivalent to other forms of discriminatory violence, such as those organized around race, religion, nationality, disabilities, sexual orientation, political affiliation, and so on. Each axis of social differentiation carries with it a different context for bias-motivated violence, as well as different causes, manifestations, and consequences of bias-motivated violence.

