

STUDENT VOICES

Reconceptualizing Anti-LGBT Hate Crimes as Burdening Expression and Association: A Case for Expanding Federal Hate Crime Legislation to Include Gender Identity and Sexual Orientation

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INTRODUCTION

In 1968, Congress enacted Title 18 U.S.C. § 245, the first piece of federal hate crime legislation. This bill granted federal officers the authority to investigate and prosecute crimes motivated by race, color, religion, or national origin if the victims were engaging in certain federally protected activities when the crime was committed.² The legislative history of 18 U.S.C. § 245 supports that the purpose of the bill was to combat violence intended to prevent racial and ethnic minorities from exercising their constitutional and federal statutory rights, and more specifically their civil rights.³ Title 18 U.S.C. § 245 did not grant the U.S. federal government the authority to investigate or prosecute crimes motivated by sexual orientation or gender identity (S. Rep. No. 90-721, 1967).

During the 1980s, states began to enact their own legislation to address hate-motivated violence. Today, virtually every state has a law addressing hate-motivated violence (Levin & McDevitt, 1993, p. 186). However, the National Gay and Lesbian Task Force (2008) and other prominent gay, lesbian, bisexual, and transgender (LGBT) advocacy groups stress that many of these laws exclude sexual orientation and gender identity as protected characteristics. Due to hate crime law exclusions, many LGBT hate crime victims are often unable to obtain legal compensation after being victimized on the basis of sexual orientation or gender identity. Their assailants also receive more lenient sentences than other hate crime perpetrators receive for committing crimes targeting other characteristics that are regularly included in federal, state, and local hate crime laws, such as race, religion, and national origin.

In reaction to the prevalence and seriousness of hate crimes against lesbian, gay, bisexual, and transgender (LGBT) individuals and communities, citizens and advocacy groups have placed pressure on the federal gov-

ernment, as well as state and local governments, to view violence motivated by sexual orientation and gender identity as a social pandemic that warrants a legislative response.⁴ Despite numerous previous unsuccessful attempts to expand federal hate crime legislation,⁵ the U.S. House of Representatives and U.S. Senate recently passed the Local Law Enforcement Hate Crimes Prevention Act of 2007 (“The Matthew Shepard Act”). The Act modifies 18 U.S.C. § 245 by expanding the protected characteristics of federal hate crimes law to include sexual orientation, gender identity, gender, and disability. The Act also allows the federal government to assist local and state authorities in investigating and prosecuting hate crimes regardless of whether the victims were engaging in federally protected activities when the crimes occurred.⁶

The Matthew Shepard Act was the first piece of legislation which aimed to expand the definition of hate crime to include sexual orientation and gender identity to pass through both the U.S. House of Representatives and U.S. Senate. Despite this great feat, on December 6, 2007, Congressional Democrats unexpectedly dropped the Act from the Department of Defense authorization bill (365Gay.com news center staff, “Shepard Hate Crime Bill to Be Dropped,” <http://www.365gay.com>, 2007). However, prior statements from President Bush indicated that he would have likely vetoed the Act anyway (Human Rights Campaign, 2007). After announcing that the Matthew Shepard Act had been dropped, House Speaker Nancy Pelosi publicly affirmed that she was “strongly committed” to the Act (Flaherty, 2007). Consequently, the Act will likely be reintroduced during a subsequent congressional session, giving politicians and advocates a new opportunity to consider the justifications for expanding federal hate crime legislation to include sexual orientation and gender identity.

The purpose of this article is to bring to the attention of researchers, scholars, and politicians an important point about the harms to LGBT victims resulting from hate crimes—one that, in my view, is ignored and is critical to the justifications for allowing bias crime victims to obtain legal compensation for being victimized on the basis of sexual orientation and gender identity. More specifically, this article critiques the current framing of anti-LGBT hate crimes in scholarship and empirical research and reconceptualizes these crimes as systemic inhibitors to expressive and associative opportunities on the basis of gender identity and sexual orientation (this argument will be developed in Part IV). Although my position may be useful to efforts to expand hate crimes protection to include gender identity and sexual orientation at all levels of government, this essay focuses specifically on the U.S. federal government. In it, I argue that federal government should expand hate crime laws to include gender identity and sexual orientation in order to address current inadequacies in state and local hate

crime laws that cannot account for these inequitable expressive and associative opportunities.

It is undeniably difficult to justify legally a federal remedy based on inequitable expressive and associative opportunities. The First Amendment to the U.S. Constitution only *prevents* government and state actors from curtailing expression and association; there is no affirmative constitutional or federal statutory *right* to expression or association.⁷ Regardless of whether hate crimes perpetrated on the basis of sexual orientation and gender identity burden a constitutional or federal right, the expressive and associative harms created by hate crimes are salient harms that the law should address. In fact, I contend that specifically reconceptualizing anti-LGBT hate crimes as burdening LGBT expression and association increases the federal government's support for invoking its power under the Commerce Clause of the U.S. Constitution⁸ to expand federal hate crime law to include gender identity and expression. I argue that it is politically desirable for the federal government to be involved in rectifying the inequitable expressive and associative opportunities created by anti-LGBT hate crimes because expression and association are vital democratic tools of self-governance, truth-discovery, and autonomy.

Before engaging in this analysis, I feel compelled to contextualize my argument. The difficulty in legally accounting for inequitable expressive and associative opportunities created by anti-LGBT hate crimes highlights a few problems. It illustrates the complexity of ensuring that the law responds adequately, or responds at all, to the salient harms of anti-LGBT hate crimes. It also highlights the broader and more systemic problem of the law's current inability to address fully the needs and concerns of LGBT individuals and communities. Therefore, the difficulty in making this article's legal argument should not be quickly dismissed; the failure of current legal parameters to include or recognize LGBT needs and concerns warrants critical discussion.

Part II provides the history and legal background of hate crime legislation within the United States. Part III discusses the how hate crime consequences, and in particular anti-LGBT hate crime consequences, have been framed in scholarly and empirical research. Part IV conceptualizes anti-LGBT hate crimes as inhibitors to associative and expressive opportunities on the basis of gender identity and sexual orientation. Part V argues that the federal government has the constitutional authority under the Commerce Clause of the U.S. Constitution to expand federal hate crime laws to cover gender identity and expression. I focus specifically on the locations of anti-LGBT hate crimes and posit that a significant proportion of anti-LGBT hate crimes occur in or near public travel spaces and LGBT-identified commercial establishments. Part VI illustrates that expanding federal hate crime

legislation to include gender identity and sexual orientation is politically desirable because expression and association are vital instruments for democratic self-governance, truth-discovery, and autonomy.

II. HISTORICAL AND LEGAL BACKGROUND OF U.S. HATE CRIME LEGISLATION

A. *Early Federal Laws Criminalizing Racial and Ethnic Violence: The Historical Origins of 18 U.S.C. § 245*

Even though hate crimes are not recent phenomena, it was not until the second half of the twentieth century that legislation was created to address them. (A significant majority of hate crime legislation was enacted during and after the 1980s. Part II subsection B will develop this point in more detail.) In 1968, Congress passed 18 U.S.C. § 245, the first piece of federal hate crime legislation. With the enactment of this piece of legislation, federal officers were granted the authority to investigate and prosecute crimes motivated by race, religion, color, and national origin if the victims were engaged in certain federally protected activities (see note 2) when the crimes were committed.

This legislation emerged from three waves of hate-motivated violence that served to prevent racial and ethnic minorities from exercising their constitutional and federal statutory rights during the Reconstruction Era, World War I, and the 1960s Civil Rights Movement respectively. After the Civil War ended in April 1865, Congress enacted the Thirteenth, Fourteenth, and Fifteenth Amendments to the U.S. Constitution, granting new rights to former slaves.⁹ These amendments explicitly affirmed the federal government's commitment to combat racial discrimination in the Constitution and inspired a violent backlash which served to prevent African-Americans from exercising their constitutional rights.¹⁰ The most prominent group that committed such violence was the Ku Klux Klan (KKK) (Jacobs & Potter, 1998, p. 6).

During the Reconstruction Era, many local law enforcement agencies in the South refused to prosecute whites who committed crimes against African-Americans (Jacobs & Potter, 1998). Many local law enforcement and government officials also directly inhibited newly freed slaves from exercising their constitutional rights (18 U.S.C. §§ 241-242). In response to incidents of racial and ethnic violence and constitutional deprivations, Congress enacted Title 18 U.S.C. § 241 and § 242. These early federal statutes punished private individuals and governmental officials who threatened to deprive, or actually deprived, citizens from exercising their constitutional

However, decisions from the Supreme Court and lower courts undercut the potential for 18 U.S.C. § 241 and § 242 to adequately address failures to prosecute perpetrators who committed racial and ethnic violence (Levin, 2002). For example, in *Blyew v. United States*, the Supreme Court restricted the federal government's ability to assert jurisdiction in cases involving racial and ethnic violence (80 U.S. 581 [1871]; Levin, 2002, p. 138). Other court decisions undercut the full equalizing potential of the Thirteenth, Fourteenth, and Fifteenth Amendments (Levin, 2002). As Leon Higginbotham (1973) puts it, "Tragically by the 1880s it was apparent that the 'original understanding' of these amendments was being steadily emasculated by a hostile Supreme Court" (p. 16). For example, in *Plessy v. Ferguson* (163 U.S. 537 [1896]), the Supreme Court upheld the constitutionality of "separate but equal" facilities, "solidifying de jure discrimination as a part of the American experience for decades to come" (Levin, 2002, p. 140). Although the Supreme Court's endorsement of "separate but equal" facilities influenced white supremacist groups to disband in the early 1870s, thousands of African-Americans continued to be brutally victimized by mob lynchings (p. 141).

The second wave of hate-motivated violence was inspired by an immigration surge during World War I. During this period, white supremacist groups, including the KKK, were at their organizational peaks (Schaefer, 1971, p. 149). For example, from 1915-1925, approximately three to six million Americans, including many local, state, and national politicians, joined the KKK (McVeigh, 1999; see also Goldberg, 1981). Many people, including an unprecedented number of women, joined white supremacist organizations to maintain their social and political dominance, fearing the rise of free market capitalism and the need for unskilled labor (Blee, 1991). White supremacist organizations not only targeted African-Americans, but also violently targeted Catholics, Jews, and new immigrants (Levin, 2002, p. 142). However, African-Americans were still disproportionately brutalized by lynchings (p. 142).

In response to the lynching pandemic, sixteen states passed anti-lynching laws from the 1890s to the 1930s (Levin, 2002, pp. 141-142). These state statutes were the earliest criminal laws to address a specific mode of hate-motivated violence. Unfortunately, they were rarely enforced because all-white juries were hesitant to convict white perpetrators (p. 142). The National Association for the Advancement of Colored People (NAACP) led the fight to outlaw lynching through federal prohibition and argued that the adoption of a federal law was necessary given that the local enforcement authorities from many Southern states refused to prosecute lynching crimes (p. 142). The Constitutional Rights Foundation's article "'At the Hands of Persons Unknown': Lynching in America" (<http://www.crf-usa.org/bria/>

bria10_3.html#lynching, 2008) notes that although a federal lynching law never passed, the NAACP's efforts raised awareness about the need to address specific modes of hate-motivated violence through federal legislation.

The 1960s Civil Rights Movement inspired a third wave of racial and ethnic violence, which influenced Congress to take additional action to address racial violence through legislation. After the Great Depression, the Supreme Court took on a leading role in the movement for African-Americans to obtain equal civil rights by affirming the unconstitutionality of segregation in numerous contexts, including voting, serving on juries, and going to public school. Despite these decisions, the lack of enforcement at the state level prevented African-Americans from fully exercising their civil rights. In the 1960s, demonstrators led by Martin Luther King, Jr. and other legendary leaders and groups protested segregation in the United States through boycotts, rallies, black voter registrations, and marches (Meier & Bracey, 1993). Many demonstrators were subjected to violence for openly advocating for equal civil rights (Levin, 2002, p. 143). However, the demonstrations were critical in influencing Congress to pass new legislation to ensure equal civil rights (Burstein, 1979).

Violence serving to prevent African-Americans from exercising their civil rights prompted Congress to enact Title 18 U.S.C. § 245, the first piece of federal hate crime legislation, in 1968. The legislative history of Title 18 U.S.C. § 245 supports that Congress intended to counteract racial and ethnic violence, which had often gone unpunished and deterred citizens from freely exercising their constitutional and statutory rights (S. Rep. No. 90-721, 1837). In explaining the need for the bill, the Senate Committee on the Judiciary posited that many local and state law enforcement agencies were unable or simply unwilling to address violence serving to prevent racial and ethnic minorities from exercising their civil rights (S. Rep. No. 90-721, 1837). The Committee also proclaimed that it was the federal government's obligation to address criminal acts that burdened affirmative federal rights:

Federal legislation against racial violence is not required solely because of the sometimes inadequate workings of State or local criminal processes. Too often, in recent years, racial violence has been used to deny affirmative Federal rights; this action reflects a purpose to flout the clearly expressed will of the Congress . . . Such lawless acts are distinctly Federal crimes and it is, therefore, appropriate that responsibility for vindication of the rights infringed should be committed to the Federal courts. (S. Rep. No. 90-721 [1840])

The federal government's authority to address constitutional and federal

statutory rights deprivations stands as the current basis for the federal government's involvement in the prosecution and investigation of hate crimes (see S. Rep. No. 90-721 [1841-1843]).

B. *Summary of Current Legislation Addressing Hate Crimes Motivated by Sexual Orientation and Gender Identity*

1. Enacted State Hate Crime Legislation

In the 1980s, state and local legislatures responded to hate-motivated violence by enacting hate crime penalty-enhancement statutes, which increase sentences for underlying offenses if they are motivated by hate (Jacobs & Potter, 1998).¹² California was the first state to criminalize hate-motivated intimidation and violence (Cogan, 2002, p. 173). Besides enhancing the punishment for those who commit hate crimes, many state laws also allocate resources to collect hate crime data and train law enforcement personnel to properly handle hate-motivated violence (Cogan, p. 176; Anti-Defamation League, "Map: State Hate Crime Statutory Provisions," www.adl.org/99hatecrime/provisions.asp). Today, according to Partners Against Hate, nearly every state has a hate crime law that either enhances punishment for hate crimes or allocates resources for data and statistical gathering ("Hate Crime Laws Around the Country," www.partnersagainsthate.org/hate_response_database/laws.html).

LGBT advocacy organizations, such as the National Gay and Lesbian Task Force (NGLTF), had central roles in pressuring states and localities to include sexual orientation and gender identity in state and local hate crime laws.¹³ As of May 2007, eleven states—California, Colorado, Connecticut, Hawaii, Maryland, Minnesota, Missouri, New Mexico, Oregon, Pennsylvania, and Vermont—included both sexual orientation and gender identity in their hate crime statutes. Twenty-one states and the District of Columbia include only sexual orientation in their hate crime statutes (Michigan and Indiana's data collection laws include sexual orientation, but their hate crime penalty-enhancement statutes do not). Of the states that have hate crime laws, thirteen do not include sexual orientation or gender identity as protected characteristics (one state, Utah, has hate crime law that addresses only offenses committed with the intent to "intimidate or terrorize" and with the intent to interfere with a state, federal, or constitutional right) (National Gay and Lesbian Task Force, http://thetaskforce.org/downloads/reports/issue_maps/hate_crimes_5_07.pdf, 2007). LGBT exclusion from state and local hate crime laws and resource constraints that prevent state and local authorities from prosecuting hate crimes are common reasons posited by proponents for the necessity of the federal government's

involvement in the prosecution and investigation of anti-LGBT hate crimes.¹⁴

2. Enacted Federal Hate Crime Legislation

The Hate Crime Statistics Act of 1990 (HCSA) was the first piece of federal hate crime legislation enacted after Title 18 U.S.C. § 245. The Act mandated the Attorney General to gather data about hate crimes on the basis of race, religion, sexual orientation, and religion.¹⁵ The bill also required the Attorney General to “establish guidelines for the collection of such data, including the necessary evidence and criteria for a finding of manifest prejudice.”¹⁶ Since its enactment in 1990, the U.S. Federal Bureau of Investigation has gathered and published hate crime statistics every year (Rubenstein, 2004). Despite embracing Congress’s intentions for passing HCSA, some scholars have highlighted the Act’s limitations. Cogan (2002), supported by Rubenstein (2004), notes:

Although this law was highly important in that it helped recognize hate crimes as a phenomenon that needs federal attention, to date, it has been imperfect in providing meaningful data. This is partly because police agencies were not required to report hate crime data for their jurisdictions but rather did so voluntarily. As a result, many police departments did not offer any hate crime data for the first few years and have pressed for more comprehensive hate crime statistical gathering requirements. (p. 174)

Congress also enacted the Hate Crimes Sentencing Enhancement Act in 1994 (HCSEA).¹⁷ The HCSEA requires the United States Commission to increase the penalties for crimes committed on the basis of actual or perceived race, color, religion, national origin, ethnicity, gender, disability or sexual orientation. However, the HCSEA applies only to cases tried in federal courts where federal jurisdiction is proper. This jurisdictional requirement raises difficulties because 18 U.S.C. § 245 does not grant jurisdiction for the federal government to prosecute crimes motivated by a victim’s gender identity or sexual orientation (Gilbert & Marchand, 1999). Therefore, the HCSEA has not applied to anti-LGBT hate crime victims in a meaningful way.

C. *The Supreme Court’s Constitutional Assessments of Hate Crime Statutes*

The two prominent Supreme Court decisions, *R.A.V. v. City of St. Paul* (505 U.S. 377 [1992]) and *Wisconsin v. Mitchell* (508 U.S. 476 [1993]),

specifically assess the constitutionality of hate crime penalty-enhancement statutes.¹⁸ In *R.A.V.*, the Supreme Court invalidated a local hate crime ordinance which prohibited specific modes of expression. The statute provided:

Whoever places on public or private property, a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor. (St. Paul Bias-Motivated Crime Ordinance, St. Paul. Minn. Legis. Code §292.02, [1990])

In *R.A.V.*, the Court held that hate crime ordinances criminalizing particular expressive acts unconstitutionally infringe upon the First Amendment (p. 391). However, in *Mitchell*, the Court reached the opposite conclusion and upheld the constitutionality of Wisconsin's hate crime penalty-enhancement statute (pp. 482-483). The Court argued that unlike the ordinance at issue in *R.A.V.* that criminalized expressive acts, the Wisconsin statute targeted violent conduct,¹⁹ which is not afforded First Amendment protection (508 U.S., p. 484). *Mitchell* remains the last substantive insight by the Supreme Court into the constitutionality of hate crime penalty-enhancement statutes under the First Amendment (Lawrence, 1999).

Since *R.A.V.* and *Mitchell* involved a local hate crime ordinance and a state hate crime law, the Supreme Court did not address the federal government's authority to become involved in hate crime investigations and prosecutions by means of federal legislation. However, some of the analysis in *Mitchell* is instructive on this issue. Although the Supreme Court in *Mitchell* never linked hate crime consequences to the expression and association of victims or their respective communities, the Court emphasized the relationship between hate crime consequences and the purpose of the Wisconsin penalty-enhancement statute.²⁰ The Court stated that the "Wisconsin statute singles out for enhancement bias-inspired conduct because this conduct is thought to inflict greater individual and societal harm. . . [and is] more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims and incite community unrest" (*Mitchell*, 1993, pp. 478-479). The Court further reasoned that "the State's desire to redress these perceived harms provides an adequate explanation for its penalty-enhancement provision over and above mere disagreement with the offenders' biases and beliefs" (*Mitchell*, pp. 478-479). Although short, this discussion is important because it illustrates the Court's recognition that hate crime consequences are relevant to the underlying justifications of hate crime laws. This perspective is particularly useful when assessing why federal

hate crime laws should be expanded in light of the consequences that hate crimes have upon LGBT victims and communities.

III. TREATMENTS OF ANTI-LGBT HATE CRIMES IN SCHOLARSHIP AND EMPIRICAL RESEARCH

Generally, legal scholars and empirical researchers have focused on three types of hate crime consequences which distinguish hate crimes from parallel crimes. These proponents of hate crime laws posit that (1) hate crimes are more likely to produce greater physical injury to their victims; (2) hate crimes are more likely to produce greater psychological harm to their victims; and (3) hate crimes are more likely to produce greater harm to targeted communities.²¹ Scholars and researchers have reached similar conclusions regarding the effects of hate crimes on LGBT victims and communities. The application of these categories to LGBT victims and communities will be discussed within each subsection.

A. *Greater Physical Injury*

Proponents of hate crime laws posit that hate crimes can be distinguished from parallel crimes because they are more likely to cause greater physical injury to their victims. Frederick Lawrence, a prominent advocate of hate crime legislation, has stated that “crimes committed with bias motivation are dramatically more likely to involve an assault than is a parallel crime” and such assaults are “between two to three times more likely than other assaults to cause physical injury to the victim” (Lawrence, 1994). Sociologists Jack Levin and Jack McDevitt (1993) found that based on a sample of 452 hate crimes recorded by the Boston police from 1983 to 1987, half of the reported crimes were assaults. From this finding, Levin and McDevitt concluded that hate crimes tend to be “excessively brutal” (p. 100). Later studies concluded that hate crimes are four times more likely to involve assaultive behavior than are crimes generally (Levin, 1992), twice as likely to involve injury to the victim, and four times as likely to require hospitalization (McDevitt, 1989).

Although there is a need for further studies on the topic, researchers have reached similar conclusions regarding the violent nature of hate crimes against LGBT victims. For instance, researchers have found that crimes motivated by sexual orientation are more likely to be committed by two or more perpetrators (46%) compared with non-bias crimes (17%) (Herek, Cogan, & Gillis, 2001, pp. 89-90). In another study focusing on transgender experiences of violence and discrimination, over half of the subjects endured some form of harassment or violence within their lifetime, with a

quarter experiencing a violent incident (Lombardi, Wilchins, Priesing, & Malouf, 2001). In another study, the National Coalition of Anti-Violence Programs (NCAVP) found that while transgender individuals made up only 2% of the entire sample, they constituted 16% of murder victims (p. 91).

Notable critics, such as James B. Jacobs and Kimberly Potter (1998), have challenged the empirical support of the claim that hate crimes result in greater physical injury to their victims (p. 82). Some proponents of hate crime legislation, for example Harel and Parchomovsky (1999), also doubt the greater physical injury claim, and have argued that justifications for hate crime laws cannot be based solely on these questionably greater physical injuries. Critics have also conceptually challenged whether greater physical injury associated with a crime justifies increasing the punishment for individuals who commit them. They argue that if hate crimes produce greater physical injuries, then such injuries should be addressed within the framework of aggravated assault; the defendant's motive is an improper proxy for a victim's greater physical injury (Hurd & Moore, 2004, p. 1086).

B. *Greater Psychological Injury*

Scholars and researchers have also argued that hate crimes can be distinguished from parallel crimes because they are more likely to cause greater psychological injury to immediate victims. Studies support the claim that hate crime victims suffer greater psychological distress than do victims of parallel crimes. In a 2001 study, McDevitt, Balboni, Garcia, and Gu found that hate crime victims feel significantly less safe after their attack than do victims of non-bias crimes. They also concluded that hate crime victims have greater fears about being subjected to similar violence in the future and are more likely to feel unsafe returning to the area of the incident and to their homes alone at night (p. 710). Lawrence explains that hate crimes result in increased psychological trauma because of their personal nature:

[T]he bias crime victim cannot reasonably minimize the risks of future attacks because he is unable to change the characteristic that made him a victim. Bias crimes thus not only attack the victim physically, but also strike at the very core of his identity. It is an attack from which there is no escape. It is one thing to avoid the park at night because it is not safe. It is quite another to avoid certain neighborhoods because of . . . one's race or religion. (1999, pp. 150-151.)

Scholars have also concluded that the psychological effects of hate crimes influence victims to change their behavior to avoid future violence (Wang, 1997; Butler, 2004; Lawrence, 2007). For instance, studies confirm that

hate crime victims adopt greater defensive behavioral strategies to avoid further victimization (Barnes & Ephross, 1994). This view will be developed in LGBT-specific contexts in Part IV.

Studies also support the claim that greater psychological injury is prominent among LGBT victims of hate crimes. For instance, one study compared the psychological trauma suffered by gays and lesbians after being victims of hate crimes with the distress that other gays and lesbians suffered after being victimized by non-bias crimes with comparable violence (Herek & Cogan, 1999). The study concluded that after 5 years, gays and lesbians who had experienced a hate crime assault reported significantly greater levels of depression, anger, anxiety, and posttraumatic stress than did subjects who experienced non-bias motivated assaults (Herek & Cogan; D'Augelli & Grossman, 2001). Consequently, hate crimes can cause a person's sexual orientation to "be experienced as a source of pain and punishment rather than intimacy, love, and community. Internalized homophobia may reappear or be intensified. . . Such characterological self-blame can lead to feelings of depression and helplessness, even in individuals who are comfortable with their sexual orientation" (Garnets, Herek, & Levy, 1999, p. 370). Studies also confirm that gay men who are subjected to violence based on their sexual orientation are two times as likely to report suicidal ideation as those who aren't (Huebner, Rebchook, & Kegeles, 2004). These findings support the claim that "experiencing a hate crime links the victim's post-crime feelings of vulnerability and powerlessness with his or her sexual orientation and personal identity" (Herek, Gilles, & Cogan, 1999, p. 950). Although the current research on the psychological effects that hate crimes have on transgender victims is sparse, researchers posit that transgender individuals also experience greater psychological trauma when they are victimized based on their gender identity or expression (Wilchins, Priesing, & Malouf, 2001).

Similar to the greater physical injury claim, critics of hate crime laws have dismissed the greater psychological injury claim as empirically unsound. Some critics (e.g. Jacobs & Potter, 1998) have also dismissed the empirical evidence offered as support for this claim as inconclusive. Other studies have found that hate crime victims suffer from the same psychological consequences as do non-hate crime victims. For example, Barnes, Arnold, and Ephross (1994) reported:

In comparing the emotional and behavioral responses of victims of hate violence with those of victims of personal crimes such as assault and rape, several similarities were identified. Investigators have reported intense rage or anger; fear of injury, death, and future victimization; and depression as elements of victims' potential reactions to crime. Thus, to some extent, the predominant emotional responses of hate violence vic-

tims appear similar to those of victims of other types of personal crime. (p. 250; internal citations omitted)

Critics have also rejected the conceptual legitimacy of enhancing the punishment for hate crimes because they result in greater psychological injury. For instance, Heidi Hurd and Michael Moore (2004) argue that the defendant's hateful motive in committing a hate crime is an improper proxy for a victim's psychological trauma because the psychological effects derive from the victim's perceptions rather than the defendant's motives.

C. *Additional Harm to Targeted Communities*

Scholars and researchers have also distinguished hate crimes from parallel crimes based on the additional harm that targeted communities suffer after an individual member of their community is attacked. In a 2007 statement regarding the Matthew Shepard Act, Frederick Lawrence and Robert Kramer explained how hate crimes affect targeted communities:

Members of the target community of a bias crime perceive that crime as an attack on themselves directly and individually. . . Members of these targeted communities may experience reactions of actual threat and attack. . . Bias crimes may spread fear and intimidation beyond the immediate victims and their friends and families to those who share only racial characteristics with victims. This additional harm of a personalized threat felt by persons other than the immediate victims of the bias crimes differentiates a bias crime from a parallel crime and makes the former more harmful to society.²²

In *Undoing Gender*, Judith Butler explains that the constant fear of victimization shapes individual subjectivities of LGBT people and communities:

We are, as a community, subjected to violence, even if some of us individually have not been. And this means that we are constituted politically in part by virtue of the social vulnerabilities of our bodies; we are constituted as fields of desire and physical vulnerability, at once publicly assertive and vulnerable. (2004, p. 18)

Therefore, the widespread terror created by hate crimes affects how people within targeted communities view themselves.

Scholars also posit that hate crimes have inter-communal effects which generate strife between members of targeted communities. For instance, sociologists Linda Garnets, Gregory Herek, and Barrie Levy explain how this works in regard to sexual orientation: "Needing to reduce their own feelings of vulnerability, some members of the community are likely to

blame the victims of violence, often focusing on ‘obvious’ behavior, gestures, or clothing” (1990, p. 374). Proponents therefore argue that in addition to creating widespread feelings of vulnerability and fear, hate crimes affect how members of targeted communities interact with one another.

Opponents of hate crime laws have attacked the claim that targeted communities suffer additional injury from hate crimes by arguing that current data is inconclusive. Critics have also questioned whether the alleged additional communal injury is legally relevant. For instance, Jacobs and Potter claim, “Many crimes, whatever their motivation, have repercussions beyond the immediate victim and his or her family and friends” (1998, p. 87). These critics claim that because the alleged communal harm resulting from hate crimes is indistinguishable from communal harms caused by other crimes, it is unjust to increase the punishment for hate crimes on these grounds.

IV. RECONCEPTUALIZING ANTI-LGBT VIOLENCE AS INHIBITING EXPRESSION AND ASSOCIATION ON THE BASIS OF GENDER IDENTITY AND SEXUAL ORIENTATION

Few legal scholars and researchers have connected hate crime consequences with the expression and association of LGBT victims and communities. However, two research findings support the concept that hate crimes against LGBT people directly target expression and association on the basis of sexual orientation and gender identity. It is important to preface these findings by noting that hate crimes are severely underreported (Rubenstein, 2004) and that many LGBT victims decide not to report hate crimes in fear of secondary victimization by law enforcement (Nolan & Akiyama, 1999).

First, a significant proportion of anti-LGBT hate crimes occur near or in LGBT-identified settings, such as bars or establishments (Herek, Cogan & Gillis, 2002; Comstock, 1991). Herek et al. note that often such crimes are committed by strangers who have no personal connections to their victims. Studies confirm that 9-12% percent of hate crimes perpetrated on the basis of sexual orientation occur near or inside LGBT-identified locations and establishments (Herek et al; Herek, Gillis, Cogan, & Glunt, 1997). Another study found that as much as 27% of anti-LGBT violence occurs outside lesbian or gay bars or establishments (Comstock, 1991). Statistics also indicate that over one-third (36.4%) of hate crimes reported to the U.S. Federal Bureau of Investigation that occur at bars or nightclubs involve attacks against individuals who are gay or lesbian (McDevitt & Williamson, 2003). These findings demonstrate that LGBT victims are being specifically targeted when they associate with others in LGBT-identified establishments, venues, and locations.²³

Second, research supports that a significant proportion of LGBT hate crimes occur after victims personally make their sexual orientation or gender identity known to perpetrators. Therefore, there is a direct relationship between LGBT expression and hate crime victimization (see Garnets, Herek, & Levy, 1990; and D'Augelli & Grossman, 2001). For instance, one study found that 15% of gay and lesbian victims of hate crimes found that the attack occurred immediately after the person (or others with the individual) had behaved in ways that made his or her sexual orientation known (Herek et al., 1997). Another study confirmed that over 10% of hate crimes perpetrated on the basis of sexual orientation occurred after the victim made his or her sexual orientation visible (Herek, Cogan, & Gillis, 2002). The same study found that common visible cues that influenced victimization were holding hands with a same-sex partner, affixing a gay bumper sticker to a vehicle, and displaying a rainbow flag outside the home (p. 331). These empirical findings support the notion that there is a direct relationship between LGBT expression and hate crime victimization (Garnets, Herek, & Levy, 1999; D'Augelli & Grossman, 2001).

Consequently, anti-LGBT hate crimes should be conceptualized as direct attacks upon LGBT expression and association. Some characteristics, such as race, often have an involuntary visible component that makes it virtually impossible for individuals possessing those characteristics to hide them from others (Lawrence, 1999). Other characteristics, such as sexual orientation, do not have as great of an involuntary visible component, allowing individuals to choose when and when not to reveal these characteristics to others (Yoshino, 2002). Jack McDevitt and Jennifer Williamson explain how sexual orientation's greater involuntary visible component influences the commission of anti-LGBT hate crimes:

One reason for this concentration of attacks around bars and nightclubs involves the offender's ability to target potential victims. If the offender or group of offenders are looking to attack a black man they could drive around until they encounter a potential victim, however if these offenders are intending to attack a gay man, they have no way of identifying who on the street is gay. They can, however, wait outside a bar or nightclub and assume that all who enter or leave the establishment are gay. (2003, pp. 805-806)

Consequently, perpetrators seeking to commit anti-LGBT hate crimes must look for expressive and associative cues to determine that their victims are LGBT. These visual cues include dressing or acting in non-stereotypically-gendered ways or inhabiting establishments known to cater to LGBT individuals and communities.

Perpetrators' increased likelihood to target the expression and associa-

tion of LGBT individuals provides a stronger imperative to take expressive and associative consequences that arise from anti-LGBT hate crimes more seriously.

Critical theorists posit that systemic cultural violence is one of the vehicles through which individuals may be inhibited from privately or publicly communicating their feelings and perspectives on social life in democracy (Young, 1990; Herek, 1992). One way in which hate crimes inhibit expression or communication is by influencing individuals to modify their own behaviors to avoid violence:

[T]he fear of crime motivated by group identity leads these nonvictims to engage in defensive behavior similar to that seen in crime victims, including withdrawing from or avoiding particular activities or otherwise adjusting their lives in an effort to avoid drawing attention to themselves. Persons who consider themselves potential targets will take into consideration the potential for unprovoked violence against them in making important life decisions. (Wang, 1997, p. 121)

Research on the hate crimes committed against LGBT people support the concept that hate crimes influence LGBT victims to modify their behavior to adhere to rigid gender and sexual norms. In one study, sociologists Linda Garnets, Gregory M. Herek, and Barry Levy found that

hate crimes create a climate of fear that pressures gays and lesbians to hide their sexual orientation. Needing to reduce their own feelings of vulnerability, some members of the community are likely to blame the victims of violence, often focusing on "obvious" behavior, gestures, or clothing. Such victim blaming reinforces key aspects of the cultural ideology of heterosexism, such as the prescription that men and women should conform to highly restrictive norms of gender-appropriate behavior and the belief that being gay is wrong and deserves punishment. (1999, p. 374)

LGBT people may refrain from certain behaviors or gestures, or avoid certain clothing styles, in fear of being victimized and labeled as LGBT (Herek, 1989; Von Schulthess, 1992). Fearing violence, LGBT individuals may never reveal their sexual orientations or gender identities at all. The invisible aspect of sexual orientation makes these findings especially troublesome because the visible presence of nonconforming sexual orientations and gender identities is contingent upon the open association and expression of LGBT individuals and communities (Part V will develop this point in more detail).²⁴

V. THE FEDERAL GOVERNMENT'S ROLE IN COMBATING ANTI-LGBT
VIOLENCE BURDENING EXPRESSION AND ASSOCIATION

The First Amendment to the U.S. Constitution only prevents governmental and state actors from curtailing expression and association; it does not provide individuals with an affirmative constitutional right to express or associate. Since 18 U.S.C. § 245 was enacted to redress civil rights violations, proponents must develop alternative justifications to defend a federal remedy to redress the inequitable expressive and associative opportunities created by hate crimes on the basis of sexual orientation and gender identity. Regardless of whether hate crimes perpetrated on the basis of sexual orientation or gender identity implicate a constitutional or a federal statutory right, I argue that Congress should have the ability to assist in investigating and prosecuting hate crimes on the basis of sexual orientation and gender identity by invoking its power under the Commerce Clause. Moreover, since expression and association are vital to democratic self governance, truth-discovery, and autonomy, I contend that it is politically desirable for the federal government to have a role in rectifying social conditions that inhibit LGBT individuals from expressing themselves or associating with others on the basis of sexual orientation or gender identity.

A. *Distinguishing the Matthew Shepard Act from the Violence Against Women Act (VAWA): Invoking the Commerce Clause to Address Anti-LGBT Violence*

Article I, Section 8 of the U.S. Constitution provides that “Congress shall have the power. . . to regulate Commerce with respect to foreign Nations, and among the several States, and within the Indian Tribes.” Congress has historically invoked this constitutional provision to enact federal legislation ranging from criminal to environmental laws (Levinson, 2006; Posner & Reif, 2000). The Supreme Court’s treatment of the limits of Congress’s commerce power has evolved over time. However, the current judicial treatment of Congress’s commerce power is shaped predominantly by the Supreme Court’s decision in *United States v. Lopez* (514 U.S. 549 [1995]). In *Lopez*, the Supreme Court limited the scope of permissible regulated activities under the Commerce Clause by declaring the Gun-Free School Zones Act of 1990 unconstitutional (514 U.S. 549 [1995]; see also Chemerinsky, 2006, p. 1361). In its analysis, the Court articulated three categories of activities that Congress can permissibly regulate under its commerce power. First, Congress can “regulate the use of the channels of interstate commerce” (*Lopez*, 514 U.S., p. 558). Second, Congress may legislate “to regulate and protect the instrumentalities of interstate com-

merce” (p. 558). Third, Congress may legislate to “regulate those activities having a substantial relation to interstate commerce” (pp. 558-559).

In *United States v. Morrison*, the Supreme Court addressed whether a federal civil remedy for victims of gender-motivated violence under the Violence Against Women Act (VAWA) was constitutional (42 U.S.C. § 13981). The plaintiff defended the law under the third category of activities as announced in *Lopez*, and argued that violence against women had a substantial effect on the U.S. national economy (*Morrison*, 529 U.S., p. 598). Congress presented congressional findings supporting that gender-motivated violence costs the American economy billions of dollars a year and is a substantial constraint to freedom of travel by women throughout the country.²⁵ Despite these congressional findings, the Court rejected the federal government’s authority to regulate non-economic violent criminal conduct based on cumulative effects on interstate commerce (*Morrison*, 529 U.S., p. 617). The Court maintained that to rule otherwise would eliminate boundaries between truly local and federal affairs (p. 617). Therefore, *Morrison* restricted what activities Congress could regulate in the third category under *Lopez*.²⁶

In adopting the Matthew Shepard Act, the House of Representatives explicitly stated that the Act was drafted “to comport with Supreme Court guidance in *Lopez* and *U.S. v. Morrison*” (H.R. Conf. Rep., pp. 110-113). However, in light of the similarities between the Violence Against Women Act (VAWA) and the Matthew Shepard Act, critics have posited that federal hate crime laws may exceed the bounds of legitimate commerce power after *Morrison* (Varona & Layton, 2001; Baker, 2000).²⁷ More specifically, they emphasize that the Supreme Court invalidated VAWA’s federal civil remedy because it addressed gender-motivated violence, which the Court characterized as purely private, non-economic activity (*Morrison*, 529 U.S. pp. 598, 613 [2000]). They contend that similar to VAWA’s federal civil remedy, the Matthew Shepard Act contains a provision that enhances the punishment of bias crimes motivated by sexual orientation, gender identity, gender, and disability. They characterize these categories of violence as purely private, non-economic activity, similar to the gender-motivated violence illegitimately targeted by the federal government in passing VAWA.

It is unquestionable that domestic violence and sexual assaults against women are deplorable.²⁸ However, whether VAWA can be meaningfully distinguished from the Matthew Shepard Act remains an unsettled legal question. I contend that reconceptualizing anti-LGBT hate crimes as threats to expression and association may highlight some of these key differences to defend the Matthew Shepard Act against constitutional defeat. One approach highlights the differences between the nature of the regulated activity in *Morrison* and anti-LGBT hate crimes. As mentioned in Part III,

empirical research supports the contention that a disproportionate number of anti-LGBT hate crimes occur near or within LGBT-identified establishments and venues (Herek et al., 2002; Herek et al., 1997). For instance, some studies report that as many as 27% of attacks against LGBT individuals occur outside a lesbian or gay bar or establishment (Comstock, 1991, p. 49). Other findings support the claim that over one-third (36.4%) of hate crimes reported to the FBI that occurred at bars or nightclubs involved attacks on individuals who were gay or lesbian (McDevitt & Williamson, 2003, p. 805). In a 2005 statistical summary report entitled “Hate Crime Statistics 2005,” the U.S. Federal Bureau of Investigation found that of the 1,017 hate crime incidents stemming from sexual orientation-bias in 2005, 25% occurred on highways, roads, alleys, or streets, and 6.8% occurred in parking lots or garages (www.fbi.gov/ucr/hc2005/index.html). In “Hate Crime Statistics 2004,” the Federal Bureau of Investigation similarly found that out of the 1,197 bias incidents motivated by sexual orientation in 2004, 24.9% happened on highways, roads, alleys, or streets (www.fbi.gov/ucr/hc2005/index.html). These conceptualizations of anti-LGBT violence make it possible to characterize them as affecting instrumentalities or channels of interstate commerce (Haggerty, 2001; Willis, 2004)—the first two categories of violence that Congress may regulate after *Lopez*.

Another approach reconceptualizes anti-LGBT hate crimes as having a substantial effect on interstate commerce, justifying the Matthew Shepard Act as a permissible exercise of Congress’ commerce power under the third category of activities Congress may regulate after *Lopez*. In *Morrison*, the Supreme Court considered three factors to determine whether gender-motivated violence had a substantial effect on interstate commerce. First, the Court considered whether the activity was economic in nature (*Morrison*, 529 U.S., p. 613). The Court held that “gender-motivated crimes of violence are not, in any sense of the phrase, economic activity” (p. 613). Second, the Court considered whether the text of the statute contained a jurisdictional element establishing that the statute was enacted in pursuance of Congress’ power to regulate interstate commerce (p. 613). The federal civil remedy contained no such jurisdictional element, which the Court viewed as granting Congress the authority to regulate too broad of a range of criminal activity that was traditionally regulated by the States (p. 613). Third, the Court considered whether Congress presented findings indicating that gender-motivated violence had a substantial effect on interstate commerce (p. 613). Although the Court agreed Congress’s findings were more than extensive, it held that “the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation” (p. 614).

Reconceptualizing anti-LGBT hate crimes as burdening expression

and association helps to distinguish the relevant differences between the Matthew Shepard Act and the federal civil remedy of the Violence Against Women Act in terms of regulating activity that has a substantial effect on interstate commerce. First, studies support the contention that a substantial proportion of anti-LGBT hate crimes occur when perpetrators target LGBT individuals who choose to inhabit LGBT-identified establishments, venues, and locations. These findings dispel the notion that anti-LGBT hate crimes are purely non-economic in nature. Rather, they support the contention that there is a strong connection between anti-LGBT hate crimes and economic activity.

Second, unlike VAWA's federal civil remedy, an entire subsection of the Matthew Shepard Act contains jurisdictional language referencing the connection between anti-LGBT hate crimes and interstate commerce.²⁹ The Act also contains a certification requirement that substantially limits the federal government's authority to investigate and prosecute anti-LGBT hate crimes (Section 249(b), Matthew Shepard Act, 2007). The certification requirement forces the Federal government to communicate with the state and local authorities to determine whether its involvement is warranted. The federal government may become involved in hate crime investigation and prosecution only if (1) the state does not have or intend to exercise jurisdiction; (2) the state has requested or does not object to the federal government to assuming jurisdiction; or (3) the verdict or sentence obtained by state charges leaves the federal government's interest in eradicating bias-motivated violence demonstratively unaddressed (Section 249(b)). To further quell federalism concerns upon enacting the Matthew Shepard Act, Congress conceded that "[s]tate and local authorities currently investigate and prosecute the overwhelming majority of hate crimes and will continue to do so under this legislation" (H.R. Rep., pp. 110-113).

Finally, Congress presented sufficient findings demonstrating that anti-LGBT hate crimes have a substantial effect on interstate commerce (H.R. Rep. 110-113). Congress noted that such crimes impede the movement of targeted groups, and even force them to move across state lines to escape being subjected to violence (H.R. Rep. 110-113). Congress also concluded that perpetrators move across state lines to commit such violence and that channels, facilities, and instrumentalities of interstate commerce are used to facilitate the commission of such violence (H.R. Rep. 110-113). Moreover, members of targeted groups are prevented from purchasing goods and services, obtaining or sustaining employment, or participating in other commercial activities (H.R. Rep. 110-113). Given that a substantial proportion of anti-LGBT hate crimes target individuals who choose to inhabit LGBT-identified establishments and locations, such violence negatively affects LGBT-businesses nationwide. In light of these differences, *Morrison* does

not invalidate the constitutional authority of the federal government to address anti-LGBT violence through federal legislation.³⁰

B. *Reaffirming the Democratic Importance of Expression and Association*

Concluding that the U.S. federal government has the authority to prosecute and investigate anti-LGBT hate crimes does not explain why it is politically desirable for it to do so. I contend that since expression and association are vital tools to ensure democratic self-governance, truth-discovery, and autonomy, the federal government should have a role in rectifying social conditions that inhibit LGBT communities from having equal opportunities to express or associate on the basis of sexual orientation or gender identity. Even though a universally accepted theory regarding the necessity of protecting expression and association does not exist, scholars have put forth varying justifications for their being essential in democracy. Three common justifications are that expression and association foster (1) self-governance, (2) truth discovery, and (3) autonomy. A deeper exploration of these perspectives provides insight into the policy justifications regarding the desirability of LGBT individuals and communities' having equal expressive and associative opportunities on the basis of sexual orientation and gender identity.

1. Expression and Association as Means of Self-Governance

Many legal scholars and social theorists posit that expression and association are essential for democratic self-governance (Meiklejohn, 2001; Guttman, 1998). In *Justice and the Politics of Difference*, Iris Marion Young claims that justice obligates governments to create social arrangements that provide the necessary tools for individuals to pursue their conceptions of the good (Young, 1990). In her view, having the ability to develop and exercise one's capacities and express experiences is one of the institutional conditions that enables people to pursue their conceptions of the good (p. 37). Other scholars also emphasize the importance of expression and association in regard to participatory inclusion in political decision-making processes. For instance, social theorist Nancy Fraser (1998) argues through her concept of "participatory parity" that democratic inclusion requires social arrangements to enable adult members to interact with one another as peers. Fraser believes that sexual subordination, which results from cultural violence and diminished expressive and associative opportunities, prevents LGBT individuals from interacting with others as peers in democracy.³¹ She explains:

The effect [of sexual normalization] is to construct gays and lesbians as *despised sexually*, subject to sexually specific forms of *status subordination*. The latter include shaming and assault, exclusion from the rights and privileges of marriage and parenthood, curbs on rights of expression and association, demeaning stereotypical depictions in the media, harassment and disparagement in everyday life, and denial of the full rights of equal protections of citizenship. These harms are injustices of misrecognition. (p. 18)

Therefore, expression and association foster democratic self-governance by enabling individuals to express their perspectives in policy-making processes.

Legal scholars have also posited that expression and association foster self-governance by allowing individuals to directly criticize governing institutions and decisions (Blasi, 1977). Early framers of the U.S. Constitution, including James Madison and Thomas Jefferson, recognized the value that free press, assembly, and expression had in maintaining governmental accountability (p. 535). The U.S. Supreme Court has also sympathized with this view. In *New York Times v. Sullivan*, the Court has stated that the ability to criticize the government and its affairs is “the central meaning of the First Amendment.”³² Therefore, expression and association as vital means of self-government have transcended modern conceptions of democratic legitimacy (Lefort, 1988).

Reconceptualizing anti-LGBT hate crimes as inhibitors of expression and association on the basis of sexual orientation and gender identity exposes how such crimes threaten LGBT self-governance. First, violence that inhibits LGBT individuals from expressing their sexual orientations or gender identities eliminates LGBT-positive perspectives from the political marketplace. Two possibilities result. First, it is possible, although unlikely, that silencing issues of gender identity or sexual orientation in the political marketplace creates the perception that issues related to gender identity or sexual orientation are unworthy of any political attention or accountability. However, given the history of U.S. laws that discriminate against LGBT individuals, such as same-sex marriage amendments, under-inclusive health insurance for transgender people, and criminal sodomy laws, it is evident that issues relating to gender identity and sexual orientation are present in the U.S. political arena. Silencing LGBT-positive viewpoints in the political marketplace allows homophobic and transphobic views to continue to dominate the U.S. political marketplace. Such dominance fosters the continuous creation of unjust laws that inhibit LGBT individuals from obtaining the full equal rights and privileges afforded other citizens.

Violence that deters LGBT individuals from associating on the basis of

their gender identity and sexual orientation also negatively affects LGBT self-governance. On the most basic level, LGBT individuals are prevented from forming alliances or lobbyist initiatives. For example, an LGBT individual who fears violence may be less likely to participate in LGBT political rallies, or to actively volunteer or become affiliated with LGBT advocacy organizations. Such collective formations carry great weight in influencing not only political, but also social and cultural, change.

2. Expression and Association as Means of Truth Discovery

Legal scholars have argued that free expression and association are necessary for democratic truth-discovering purposes. Justice Brandeis affirmed this view in his *Whitney v. California* concurrence: “If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence” (274 U.S., 375, 377). This perspective is rooted in John Stuart Mill’s defense of free speech in his famous essay *On Liberty* (Greenawalt, 1989). In this essay, Mill (1859) claims that suppressing speech is harmful because it may suppress ideas that are true or partly true. In his view, even if an idea is false, challenging it reinforces what is true.

Modern social theorists have also upheld this defense of free speech. For instance, through his concept of communicative rationality,³³ Jurgen Habermas (1981) argues that expression allows people to state claims that they believe to be true and then to reach agreement through deliberation and compromise: “Argumentation insures that all concerned in principle, take part, freely and equally, in a cooperative search for the truth, where nothing coerces anyone except the force of the better argument” (p. 93). According to Habermas, the rationality of a stated claim increases as it undergoes public criticism because it is the product of multiple perspectives and deliberative consensus produces a claim that all discursive participants can consent to and use as a principle of common good rather than private bias interests.

The basic tenet of these scholarly perspectives is that the rational validity of a claim increases after being subjected to a variety of perspectives. Thus, violence that deters LGBT individuals from expressing or associating on the basis of gender identity and sexual orientation negatively affects how society assesses the validity of particular viewpoints on issues relating to gender and sexual orientation. First, by deterring LGBT expression, such violence prevents these perspectives from being introduced in social discussion. Second, by deterring LGBT association, individuals are inhibited from being active participants in social discussion on matters pertaining to gender and sexual orientation. The overall effect of violence that deters LGBT expression and association is that it skews the social percep-

tion of the validity of particular positions on LGBT issues, such as same-sex marriage, restrictions on sex and gender designations on identifying documentation, and LGBT protection from employment discrimination.

3. Expression and Association As Means of Autonomy

Scholars have also defended expression and association on the grounds that they foster democratic self-development and autonomy (Brison, 1998). Law professor Vincent Blasi explains, "The basic idea here is not that speech leads to truth or a stable society or some other social value, but rather that certain speech activities are valuable because they are integral to the process by which persons consciously choose from among alternatives, a process which is regarded as valuable in and of itself because it figures prominently in our vague notions of what it means to be human" (Blasi, 1977, p. 544). The legal notion that free expression and association are important for autonomy is also rooted in early philosophical thought. John Stuart Mill explained that through expressing and associating with others, individuals have a greater understanding of themselves, their opinions, and challenging opinions: "He who knows only his own side of the case knows little of that. His reasons may be good, and no one may have been able to refute them. But if he is equally unable to refute the reasons of the opposite side; if he does not so much as know what they are, he has no ground for preferring either opinion" (1869, pp. 98-99). Based on this notion, full self-understanding necessitates that people engage with opposite perspectives and use their rational capacities to choose their opinions from conflicting sets of beliefs. As Sadurski (1999) puts it: "[Communication] is crucial for self-fulfillment because the exercise of our capacities is only made possible through self-definition, and the determination of who we really are is impossible without open communication with our fellow human beings" (p. 17). Through dialogue, we communicate our preferences, which are based on informed autonomous judgments (p. 17).

Studies also confirm the importance of expressing one's sexual orientation or gender identity to LGBT identity formation (Carrion & Lock; Gavne, Tewksbury, & McGaughey, 1997). Fear of violence can complicate or deter an LGBT individual's decision to publicly reveal their sexual orientations or gender identities. For example, studies confirm the contention that violent reactions to publicly revealing transgender identity has driven some transgender people to repress and conceal their true gender identities (Gavne, Tewksbury, & McGaughey, 1997, p. 498). Carrion & Lock (1997, p. 372) explain:

Delay in recognition of sexual orientation can increase the likelihood of a

poor self-image. This may increase the risk for the development of conditions such as depression, suicidality, addictive disorders, promiscuity, substance abuse, anxiety disorders, sexual dysfunction and post-traumatic stress disorder (PTSD) (internal citations omitted).

Studies similarly confirm the importance of LGBT association on LGBT self-development. For instance, research confirms that many LGBT individuals inhabit LGBT-identified establishments to embrace their LGBT identities and receive validation from their LGBT peers (Cox & Gallois, 1996; Carrion & Lock, 1997). Violence that deters LGBT individuals from inhabiting these venues inhibits LGBT individuals from receiving such recognition.

VI. CONCLUSION

The Matthew Shepard Act emphasizes the need for the federal government to become involved in prosecuting and investigating anti-LGBT hate crimes when local and state hate crime laws are ineffective or nonexistent. However, the Act will not go politically and legally unchallenged when it is reintroduced in a subsequent congressional session. Given the relevant differences between hate crimes addressed under 18 U.S.C. § 245 and the Matthew Shepard Act, LGBT advocates and researchers should offer new justifications for hate crime laws that increase the law's responsiveness to the harms that such crimes specifically create for lesbian, gay, bisexual, and transgender individuals and communities. I advocate for empirical researchers and legal scholars to comprehensively re-examine anti-LGBT hate crime consequences, and more specifically, to conceptualize anti-LGBT hate crimes as inhibiting expression and association on the basis of sexual orientation and gender identity. The inequitable burden that anti-LGBT violence places on LGBT expressive and associative opportunities makes it obligatory and desirable for the federal government to become involved in the investigation and prosecution of anti-LGBT hate crimes when local and state hate crime laws are ineffective. This inequitable burden not only jeopardizes the self-governance and autonomy of LGBT individuals, but also decreases dialogue challenging dominant heterosexist conceptions of gender and sexuality. The law's current inability to address these inequitable expressive and associative opportunities jeopardizes vital democratic instruments that lie at the heart of modern conceptions of democratic justice.

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NOTES

1. UCLA School of Law, J.D. expected 2010; University of Cambridge, M.Phil. expected 2009, Harvard University, A.B. 2006. I would like to thank Professor Douglas NeJaime for his guidance and insightful comments on this article.

2. Title 18 U.S.C. § 245 (2006). The six federally protected activities are (1) applying or enrolling for admission to a public school or college; (2) participating in benefit or service programs and facilities administered by state and local governments; (3) applying for private or state employment; (4) serving in a jury; (5) traveling in or using a facility of interstate commerce or common carrier; (6) using a public accommodation or place of exhibition or entertainment, including hotels, motels, restaurants, lunchrooms, bars, gas stations, theaters, concert halls, sports arenas or stadiums.

3. S. Rep. No. 90-721 reprinted in 1968 U.S.C.C.A.N. 1837, 1839 (1967) (“The great majority of Americans have either welcomed or peacefully accepted the movement of Negroes toward full employment of equal rights. Unfortunately, however, a small minority of lawbreakers has resorted to violence in an effort to bar Negroes from exercising their lawful rights. . . Acts of racial terrorism have sometimes gone unpunished and have too often deterred the free exercise of constitutional and statutory rights”).

4. Hate crime statutes adopted by the United States generally fall into one of two categories. The first category addresses how statistical information about hate crimes is gathered and reported. See e.g. The Hate Crimes Statistics Act, 18 U.S.C. § 534 (2006). The second category focuses on how hate crimes are punished and prosecuted. See e.g. Cal. Pen. Code § 422.75 (2006). Many scholars and activists criticize the ability of hate crime laws to deter violence or change how minorities are inequitably treated. For a radical critique of hate crimes activism and the potential of hate crime laws to address gender, race, economic, and sexual subordination see Spade, Jade & Willse, Craig. (2000). Confronting the limits of gay hate crimes activism: A radical critique. *Chicano-Latino Law Review*, 21(2), 38-52.

5. The Hate Crimes Prevention Act (HCPA) of 1999 and the Local Law Enforcement

Hate Crime Prevention Acts of 2001, 2004, and 2005 were never successfully enacted into law. All of these Acts attempted to expand the scope of federal hate crime law.

6. Previous to the proposal of the Matthew Shepard Act, Congressional representatives have tried to expand federal hate crime law to include sexual orientation and gender identity. However, these attempts were unsuccessful. See Derrick Z. Jackson, "Optimism in the Hate Crimes Debate," *The Boston Globe*, May 26, 2007, p. 11A ("Hate crimes expansion has been proposed since 1998, the year Matthew Shepard, a gay college student, died after he was beaten and tied to a fence in Wyoming. The Senate passed it 65 to 33 in 2004. The House passed it 223 to 199 in 2005. But the Republican-controlled Congress squashed the bill in negotiations").

7. U.S. Const. amend I; see also *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976) (noting that the First Amendment does not protect against actions taken by private entities. Rather, it is "a guarantee only against abridgment by government, federal or state").

8. This power derives from the Article I, Section 8 of the U.S. Constitution which provides that "Congress shall have the power. . .to regulate Commerce with respect to foreign Nations, and among the several States, and within the Indian tribes." U.S. Const. Art. I, § 8.

9. The Thirteenth Amendment, passed in December 1865, abolished the institution of slavery. See U.S. Const. amend. XIII. The next major initiative was the Civil Rights Act of 1866, which secured citizenship to males who were enslaved and granted the same rights to all "without distinction of race or color, or previous condition of slavery or involuntary servitude." Civil Rights Act of 1866, 42 U.S.C. § 1981 et. seq. (2006). The Civil Rights Act of 1866 also permitted citizens to enforce contracts, inherit, and sue. See *id.* There were serious flaws with this piece of legislation since it did not prevent discrimination in areas solely within state jurisdiction. Therefore, in 1868, the scope of the Civil Rights Act of 1866 was extended through the ratification of the Fourteenth Amendment, which prohibited any state from denying guarantees under the Civil Rights Act of 1866 and forced states to grant equal protection under its laws. U.S. Const. amend. XIV. Finally, the Fifteenth Amendment was ratified in 1870; it prohibited denying or abridging the right to vote on the basis of "race, color, or previous condition or servitude." U.S. Const. amend. XV.

10. Schmidt, Bennno C. Jr. (1982). "Principle and Prejudice: The Supreme Court and Race in the Progressive Era." Part 3: "Black Disfranchisement from the KKK to the Grandfather Clause." *Columbia Law Review*, 82(5), 835, 842. ("Black voting in the South after the Civil War had always been threatened by terror, fraud, and chicanery, but the decade of the 1890's saw the development of systematic methods of exclusion. During Reconstruction, Southern resistance to black voting was carried on by night-riders, 'bull-dozers,' the Ku Klux Klan, and other white-supremacist groups"); see also Schaefer, Richard T. (1971). *The Ku Klux Klan: Continuity and change.* *Phylon*, 32(2), 143-157, 144-145 for a history of the Ku Klux Klan during Reconstruction.

11. 18 U.S.C. §§ 241-242. Jacobs and Potter argue that these laws are substantially different from modern hate crime laws because the two post-Civil War statutes applied equally to all victims. Unlike modern hate crime laws, they did limit protection to specific groups. See Jacobs and Potter (1998), p. 37.

12. Characteristics included in hate crime penalty-enhancement statutes vary among localities and states. For a comprehensive list of characteristics included in state statutes see Anti-Defamation League, "Map: State Hate Crime Statutory Provisions," <http://www.adl.org/combatinghate/>; see also Cogan, Jeanine C. (2002). Hate crime as a category worthy of policy attention. *American Behavioral Scientist*, 46(1), 173-185, 173-74 (describing how hate crimes became institutionalized as a legal category during the 1980s). Federal, state, and local hate crime laws not only protect different characteristics, but they also sometimes adopt different definitions of the term "hate." For instance, New Hampshire's hate crime statute authorizes a penalty enhancement if the perpetrator was "substantially motivated to commit the crime because of *hostility* towards the victim's

religion, race, creed, sexual orientation, national origin, or sex.” N.H. Rev. Stat. Ann. § 651:6(1)(g) (emphasis added). However, Wisconsin’s hate crime law enhances the penalty for crimes where the offender intentionally selects a victim based on a “belief or perception regarding the [victim’s] race, religion, color, disability, sexual orientation, national origin or ancestry.” Wis. Stat. Ann. § 939.645.

13. For instance, in 1982, the National Gay and Lesbian Task Force (NGLTF) launched its first ever national anti-violence organizing project. For a description of this project as well as the influence that NGLTF had in mobilizing efforts to pass hate crime legislation to protect LGBT people, see NGLTF, “Overview: Task Force’s long history of working to secure hate crimes protections for LGBT people,” http://thetaskforce.org/issues/hate_crimes-main_page/overview.

14. For instance, after the brutal murder of Matthew Shepard, advocates focused on the need for federal hate crime legislation in light of the fact that Wyoming was one of the states that did not have a hate crimes law. See Senators Torricelli, Robert; Kennedy, Edward; Boxer, Barbara, & Wyden, Ron. (1998). Why America needs federal legislation against hate crimes. *The Austin American-Statesman*, Oct. 26, 1998, p. A11; see also Cogan (2002), p. 176 (“Over the years, it became clear that certain hate crimes were not properly addressed by local police agencies, and the federal government had no authority to intervene”). For a description of how a federal hate crime law would affect state jurisdiction in prosecuting crimes, see Human Rights Campaign, “Questions and Answers: The Local Law Enforcement Hate Crimes Prevention Act,” 1, 4, <http://www.matthewshepard.org/site/DocServer/HRC-LLEHCPA-FAQ1-17-07.pdf?docID=463>.

15. Hate Crimes Statistics Act, PL 101-275, 104 Stat 140 (1990) (codified at 28 U.S.C. § 534 (2000)). Congress reauthorized the Act in 1996. Church Arson Prevention Act of 1996, Pub. L. No. 104-155, § 7, 110 Stat. 1392, 1394 (1996) (codified at 28 U.S.C. § 534).

16. *Id.*

17. Hate Crime Sentencing Enhancement Act of 1994 of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-332, § 280004 (1994). In 1995, the United States Sentencing Commission enacted a three-level sentencing guideline for hate crimes. See 28 U.S.C. § 994 (2005).

18. Since *Wisconsin v. Mitchell*, the Supreme Court has ruled only on the constitutionality of procedural aspects of hate crime penalty-enhancement statutes. See *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (holding that it is unconstitutional to deny facts that increase the penalty for a crime beyond the prescribed statutory maximum from being submitted to a jury).

19. The Wisconsin hate crime penalty-enhancement statute enhances the penalty for an offense if the perpetrator “intentionally selects the person against whom the crime. . . is committed. . . in whole or in part because of the actor’s belief or perception regarding race, religion, color, disability, sexual orientation, national origin, or ancestry of that person.” Wis. Statute § 939.645(1)(b). Under § 939.645, the maximum sentence for the perpetrator’s offense was raised from two to seven years. See *Mitchell*, 508 U.S. at 480.

20. The Supreme Court limited its First Amendment discussion to whether the Wisconsin hate crime penalty-enhancement statute violated the First Amendment rights of the perpetrator. See generally, *Mitchell*, 508 U.S. 476 (1993).

21. For a critical analysis of these categories see Jacobs and Potter (1998), pp. 81-88; see also Harel, Alon, & Parchomovsky, Gideon. (1999). On Hate and Equality. *Yale Law Journal*, 109(3), 507-540, 514-523 (criticizing the justification that hate crime penalty-enhancement statutes are justified because they produce greater wrong to victims and third parties).

22. Summary of Statement by Frederick M. Lawrence, Dean and Robert Kramer Research Professor of Law, George Washington University Law School, Committee on the Judiciary House of Representatives Subcommittee on Crime, Terrorism, and Homeland

Security Concerning H.R. 1592, April 17, 2007, p. 4-5. <http://judiciary.house.gov/media/pdfs/Lawrence070417.pdf>

23. One recent anti-gay hate crime that reached the national spotlight involved an anti-gay hate crime which occurred inside a gay bar located in New Bedford, Massachusetts. See Ellement, John R., & Mishra, Raja. (2006). Attack at gay bar leaves 3 injured. *The Boston Globe*, February 3, 2006, p. A1 (“After asking a bartender ‘Is this a gay bar?’ the 18-year-old New Bedford man, dressed entirely in black, allegedly began chopping at a patron with a hatchet, triggering a melee that ended with [the perpetrator]. . . wildly firing a handgun, according to court documents”).

24. The complete ghettoization of non-heterosexual orientations into the private sphere was especially extreme during the 1950s, when modern gay bathhouses appeared within the United States. Underground gay bathhouses became queer cultural centers of art, literature and music. See Chisholm, Dianne. (2005). *Queer constellations: Subcultural space in the wake of the city*, 72 (“Gay bathhouses opened their doors to the culture industry and the culture industry entered gay bathhouses, reproducing gay society for mainstream consumption. . . some bathhouses exhibited local art to encourage sexual community”). Bathhouses also served as spaces for gay males to be open about their sexual orientation without risking violence. See p. 66.

25. See H.R. Conf. Rep. No. 103-711, 385 (1994) reprinted in U.S.C.C.A.N. 1803, 1853 (1994); S. Rep. No. 103-138, 40 (1990); S. Rep. No. 101-545, 33 (1990).

26. The petitioners in *Morrison* did not contend that the Violence Against Women Act regulated a channel or instrumentality of interstate commerce. 529 U.S., p. 609.

27. Before *Morrison*, scholars also criticized previous attempts to expand federal hate crime legislation to include sexual orientation, gender, and disability as an improper exercise of Congress’s commerce power. See e.g., Combating Hate Crimes: Promoting a Responsive and Responsible Role for the Federal government: Hearing on S. 622 Before the Senate Comm. on the Judiciary, 106th Cong. 49 (1999) (statement of Akhil Reed Amar); see also Hate Crimes Prevention Act of 1998, Testimony on H.R. 3081 Before the House Comm. on the Judiciary, 105th Cong. (1998) (testimony of John C. Harrison); But see id. (statement of Cass Sunstein) (“The first—and most secure—possibility is that the commerce clause could be used, with appropriate findings, to support this assertion of national power. It is obvious that private violence may well interfere with interstate movement of both people and goods. The current findings are quite good in this regard”).

28. Although the issue is outside the scope of this paper, I believe that *Morrison* was an unfortunate reading of Congress’s commerce power and that the federal government should be enabled to specifically address gender-motivated violence.

29. Section 249 (a)(B), Matthew Shepard Local Law Enforcement Hate Crimes Prevention Act of 2007, S. 1105 (2007) provides:

(B) CIRCUMSTANCES DESCRIBED- For purposes of subparagraph (A), the circumstances described in this subparagraph are that—

(i) the conduct described in subparagraph (A) occurs during the course of, or as the result of, the travel of the defendant or the victim—

(I) across a State line or national border; or

(II) using a channel, facility, or instrumentality of interstate or foreign commerce;

(ii) the defendant uses a channel, facility, or instrumentality of interstate or foreign commerce in connection with the conduct described in subparagraph (A);

(iii) in connection with the conduct described in subparagraph (A), the defendant employs a firearm, explosive or incendiary device, or other weapon that has traveled in interstate or foreign commerce; or

(iv) the conduct described in subparagraph (A)—

(I) interferes with commercial or other economic activity in which the victim is engaged at the time of the conduct; or

(II) otherwise affects interstate or foreign commerce.

30. The petitioner in *Morrison* did not allege that the violence at hand regulated an instrumentality or channel of interstate commerce. Only the third category of permissibly regulated activities under Lopez was at issue. This further supports there is room after *Morrison* to characterize anti-LGBT violence differently from the gendered-violence at hand in *Morrison*. *United States v. Morrison*, 529 U.S. 598, 609 (2000) (“Petitioners do not contend that these cases fall within either of the first two of these categories of Commerce Clause regulation. They seek to sustain § 13981 as a regulation of activity that substantially affects interstate commerce. Given § 13981’s focus on gender-motivated violence wherever it occurs (rather than violence directed at the instrumentalities of interstate commerce, interstate markets, or things or persons in interstate commerce), we agree that this is the proper inquiry”).

31. *Id.* at 18. (“The effect [of sexual normalization] is to construct gays and lesbians as *despised sexually*, subject to sexually specific forms of *status subordination*. The latter include shaming and assault, exclusion from the rights and privileges of marriage and parenthood, curbs on rights of expression and association, demeaning stereotypical depictions in the media, harassment and disparagement in everyday life, and denial of the full rights of equal protections of citizenship. These harms are injustices of misrecognition”).

32. 376 U.S. 254, 273 (1964). Additionally, in *New York Times v. United States*, the Court reached the same conclusion when explaining the importance of free press. 403 U.S. 713, 717 (1971) (“In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government’s power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people”).

33. In explaining the concept of “communicative rationality,” Habermas writes, “the actors seek to reach an understanding about the action situation and their plans of action in order to coordinate their actions by way of agreement.” Habermas, Jurgen. (1981). *Volume One: The Theory of Communicative Action*, 86.

