

(Note: there are a few of the 200 footnotes about whose Bluebook format I am unsure. They are in red.)

“The dark places of the earth are full of the habitations of cruelty.”
Psalm 74:20.

I. Introduction

The story of the hate crime is an exceptionally old one, though the legislation which has come to specifically prohibit its commission is startlingly new in the history of law.¹ Like many of the changes that beset society in the latter part of the Twentieth century, it was motivated, at least in part, by an increasing awareness of the profound uniqueness of this type of offense, and of the particularized need to address it with harsher penalties.² Unlike many of the changes which came to characterize American criminal and constitutional law, however, the origin of hate crime law is rooted within the legislative bodies of the states which chose to proceed down the path of its drafting.³

Hate crime law was not imposed by judicial fiat, like so much of the change which defined American law in the 1960's under the Warren court.⁴ This makes its legitimacy more demonstrable, as the oft maligned “judicial activist” bears no responsibility for its creation. Yet like the development of civil rights jurisprudence which emerged from the Supreme Court, the development of hate crime legislation did

¹ See *infra* Section II for a brief history of hate crimes.

² *Wisconsin v. Mitchell*, 508 U.S. 476, 488 (1993).

³ See, e.g., N.Y. PENAL LAW § 485.10 (2007), WASH. REV. CODE § 9A.36.080 (2007), CAL. PENAL CODE § 422.55 (DEERING 2007).

⁴ See, e.g., *Mapp v. Ohio*, 367 U.S. 643 (1961) (creating from thin air the exclusionary rule), *Baker v. Carr*, 369 U.S. 186 (1962), (ordaining reapportionment non-political), *Engel v. Vitale*, 370 U.S. 421 (1962), (banning prayer in the public schools), *Miranda v. Arizona*, 384 U.S. 436 (1966) (concocting a requirement to advise criminal suspects of a purported “right to remain silent”), *Roe v. Wade*, 410 U.S. 113 (1973), (divining a constitutional right to abortion).

and continues to engender significant controversy. This controversy has taken many forms, and will be analyzed in thorough detail below.⁵

This paper is, fundamentally, a position piece. It will pursue two primary goals. First, its purpose will be to analyze and dissect a growing movement in the legal community to expand hate crime legislation to protect and include the homeless.⁶ Second, it will strive to offer an opinion regarding the wisdom of such action.⁷ Attendant to these two related purposes will be an effort to defend existing hate crime legislation. The paper will argue that the movement to expand hate crime legislation to include the homeless will serve as exactly the grist its opponents have long sought. The effort to expand existing hate crime laws to include the homeless threatens to “fling[] sand into the finely tuned ... gears”⁸ of this carefully crafted, though often attacked, legislation.

Existing hate crime laws serve the vital and compelling societal interest of more harshly punishing those who would target their victims because of race, religion, sexual orientation, disability, nationality, or gender. Such people *are* more dangerous criminals.⁹ And beyond the issue of dangerousness, courts have noted that hate crimes are deserving of harsher punishment because such crimes are “thought to inflict greater individual and societal harm.”¹⁰ The attacks leveled at hate crime legislation are themselves too often political in nature, and adding homelessness as a protected class would serve to legitimate many of the criticisms which now lack foundation. The heinous acts of violence directed toward the homeless are too often unspeakable in their

⁵ See *infra* Section III.

⁶ See *infra* Section II, E.

⁷ See *infra* Section IV.

⁸ In re Recticel Foam Corp., 859 F.2d 1000, 1004 (1st Cir. 1988).

⁹ The issue of “dangerousness” is a difficult one. Is the criminal who attacks a Jew because she is a Jew more dangerous than a criminal who sets a homeless person on fire for fun? Both have black hearts, to be sure. The controversy associated with this question is discussed *infra* at Section IV.

¹⁰ *Mitchell*, 508 U.S. at 487-88.

cruelty, sickening in their effect.¹¹ As detailed below, seeking to punish the inhuman offenders responsible for such violence under the umbrella of hate crime legislation is to betray the theoretical and practical underpinnings which today serve as the only legitimate legal basis for hate crime legislation. In so doing, it jeopardizes the legal cement of hate crime legislation which has only recently begun to harden.

The arguments against expansion of hate crime laws are discussed below in detail, but as an introductory matter, problems of varying severity abound. Most hate crime legislation is based on “immutable characteristics” – which is to say features about a person he is unable to change.¹² Exceptions to this exist, however, particularly with respect to religion and political affiliation, the latter of which is less commonly seen in hate crime legislation.¹³ Even with regard to these exceptions, a Jew is as protected as a Catholic, and a Republican is as protected as a Democrat.

Thus one basis for opposition discussed below is that the contemplated change effectively creates a “special” class of victims. Any advocate of hate crime legislation becomes ruefully familiar with the inaccurate criticisms leveled at it. “Hate crime laws only protect minorities.” “Hate crime laws give special privileges only to certain people.” As inaccurate as these criticisms are, they gain traction under the proposed expansion. Unlike the Jew and Catholic, Republican and Democrat examples above, there is no logical counterpart to the homeless. The proposed expansion protects the homeless and ... that is it.

¹¹ See *infra* Section IV.

¹² *Mitchell*, 508 U.S. at 487 (reasoning that pre-existing federal legislation which Constitutionality had already been established and which outlawed discrimination on the basis of race, color, religion, sex, or national origin thwarted the respondent’s claim).

¹³ John Hans Thomas, *Seeing Through a Glass Darkly: The Social Context of "Particular Social Groups" in Lwin v. INS*, 1999 B.Y.U.L. Rev. 799 (1999).

In addition to finally giving legitimacy to the criticisms by hate crime law opponents they have thus far lacked, the approach smacks of equal protection issues, at least under the rubric of hate crime law in general. Prosecutors and judges have thus far successfully beaten back the attempt to derail hate crime legislation precisely because, by design, it protects all equally. To say that hate crime laws “only protect minorities” may be a description of their effect, but it is incorrect to suggest that is how they are written. Domestic violence laws protect the spouse of a cohabitant, not merely women.¹⁴ The effect may be that the vast majority of people protected under domestic violence laws are women, but the statutory language is plainly neutral. Similarly, the effect of hate crime laws may be that the vast majority of people coming within the purview of hate crime victimization are so-called “minorities,” but the statutory language is also and irrefutably neutral. Under the contemplated expansion, this is no longer true. Hate crime laws will truly begin the slide down the slippery slope of creating special group after special group.

II. Background

A. What is a hate crime?

The definition of “hate crime” is, as with any form of legal parlance, subject to varying interpretations. A lay impression frequently misperceives hate crimes merely as hateful speech. Hate crime laws make no effort to prohibit merely hateful speech, and in the rare events where legislative efforts have stumbled into the “semantic morass”¹⁵

¹⁴ See, e.g., CAL. PENAL CODE § 273.5 which reads in relevant part: “Any *person* who willfully inflicts upon a person who is his or her spouse, former spouse, cohabitant, former cohabitant, or the *mother or father* of his or her child, corporal injury . . . ” (emphasis added).

¹⁵ *Kermarec v. Compagnie* 358 U.S. 625, 631 (1958).

which characterizes modern First Amendment law, the Supreme Court has been quick to invalidate such attempts.¹⁶

Instead, if one common theme runs throughout hate crime legislation, it is that it prohibits and more harshly punishes *already criminal acts* that are motivated by a victim's race or religion, for example. In California, a hate crime is defined as:

a criminal act committed, in whole or in part, because of one or more of the following actual or perceived characteristics of the victim: (1) Disability, (2) Gender, (3) Nationality, (4) Race or ethnicity, (5) Religion, (6) Sexual Orientation, (7) Association with a person or group with one more of these actual or perceived characteristics.¹⁷

Other states vary in the statutory language they use to proscribe the act. Some omit the use of the words "hate crime" at all. Washington State proscribes the act of "malicious harassment" and defines that crime as occurring when a person "maliciously and intentionally commits one of the following acts because of his or her perception of the victim's race, color, religion, ancestry, national origin, gender, sexual orientation, or mental, physical, or sensory handicap."¹⁸ Washington's statute goes on to further note that "[w]ords alone do not constitute malicious harassment *unless* the context or circumstances surrounding the words indicate the words are a threat."¹⁹

Florida allows for enhancement of penalty "if the commission of such felony or misdemeanor evidences prejudice based on the race, color, ancestry, ethnicity, religion, sexual orientation, national origin, mental or physical disability, or advanced age of the

¹⁶ See, e.g., *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377 (1992). This case is discussed in greater detail, *infra* at Section IV, B.

¹⁷ CAL. PENAL CODE § 422.55(a)(1-7) (Deering 2007).

¹⁸ WASH. REV. CODE § 9A.36.080 (2007). Washington's statute goes on to describe the "following acts" mentioned above as three primary crime areas, namely, causing physical injury, damaging property, or using threats.

¹⁹ *Id.* at § 9A.36.080(c).

victim.”²⁰ It specifically goes on to require, however, that “[i]t is an essential element of this section that the record reflect that the defendant perceived, knew, or had reasonable grounds to know or perceive that the victim was within the class delineated in this section.”

Federal law²¹ has thus far defined hate crimes as occurring when a person, “by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with ... any person because of his race, color, religion or national origin and because he is or has been” engaging in various federally protected activities.²²

The states which have adopted hate crime legislation use different language to proscribe bias motivated crimes, and to be sure, minor differences between are too voluminous to be dealt with here.²³ It is sufficient to say that a general definition of hate crime legislation is that it acts to punish more harshly criminal acts motivated by certain characteristics of a victim.

B. Violence Against the Homeless - Causes & Nature of a Growing Problem

The problem of homelessness has existed for as long as people have had homes. But just what it means to be homeless in the modern world is open to interpretation. And

²⁰ FLA. STAT. § 775.085(1)(a) (LEXISNEXIS 2007).

²¹ See *infra* Section II, D, 2, for a more complete analysis of federal hate crime legislation.

²² 18 U.S.C. § 245 (2007). Note that federal hate crime legislation does not include sexual orientation or gender, and despite numerous attempts by Congress to add these categories to federal hate crime legislation, it has not yet occurred. See Section III, *infra*, for a more thorough discussion of how the controversy behind these attempts relates to the desire to expand hate crime laws to include homelessness.

²³ Indeed, the rich tapestry of hate crime laws in the United States points to just how widely construed the criminal act is. Some states include certain classes which are omitted by others. Other states also punish hate crimes committed against a victim because of his or her *association* with a named class or group. A few states include political affiliation in the hate crime stew. Other states have no hate crime laws at all. The purpose of this paper of course is not to dissect the many different hate crime laws which exist throughout the United States. The reader’s understanding of hate crime expansion to include the homeless will not be informed by such an analysis, and it will not be undertaken. However, to the extent that understanding the controversy behind the inclusion of certain classes into hate crime legislation sheds light on the subject matter of this paper, it will be and is discussed, *infra*, at section II.

understanding why a person or family becomes homeless is itself an entire area of study.²⁴

Of course, “[h]omelessness is not a uniform condition.”²⁵ It can also be analyzed according to the “nature of the person’s living arrangements (place) and length of time in those arrangements.”²⁶ Despite this, however, it is arguably important, particularly in light of the effort to study hate crime legislation’s potential applicability to the homeless, to set a clear definition of homelessness. “[F]uzzy boundaries”²⁷ will inhibit the survivability of such legislation to vagueness charges.

Homelessness has become an increasing problem in our society, and as a result it has emerged as a growing issue to confront. The current push to expand hate crime legislation to protect the homeless is indisputably linked to the increasing societal problem homelessness has come to represent. Indeed, some even contend that homelessness has become such an expected component of city life that it is essentially “an anticipated part of the urban landscape.”²⁸ Homelessness has been described as a problem of “epic proportions.”²⁹ It is common that once societal ills become so described, the legislative mechanisms which have spurred much change in our nation’s history move into action. That is what is happening now.³⁰

²⁴ For a very brief but useful analysis on the background to homelessness in the United States, *see, e.g.*, Jennifer E. Watson, Note, *When No Place Is Home: Why the Homeless Deserve Suspect Classification*, 88 Iowa L. Rev. 501, 503-08 (2003). See also KIM HOPPER, *RECKONING WITH HOMELESSNESS* (Cornell University Press) (2003) for a thorough analysis of the history and anthropological implications of homelessness.

²⁵ See 1995 U.S. Department of Health and Human Services; Public Health Reports, *Public Health Rep 1995:110: 734-741*.

²⁶ *Id.* (parentheses in original).

²⁷ *Id.*

²⁸ Lucie White, *Symposium: Law and the Homeless: Essay and Article: Representing “The Real Deal”*, 45 U. Miami L. Rev. 271, 299 (1990-91).

²⁹ Mark Peters, Note, *Homelessness: A Historical Perspective on Modern Legislation*, 88 Mich. L. Rev. 1209 (1990).

³⁰ See *infra* Section II.

The deinstitutionalization of the mentally ill has left communities struggling to deal with the result.³¹ Turning loose such people has exacerbated pre-existing problems.³² Reduced government funding to combat mental illness is offered as another reason why homelessness has worsened.³³ Attributing homelessness to “mental illness, welfare, poverty, alcoholism and substance abuse” however, is but the most initial of descriptions.³⁴ It is folly to attempt, in an analysis like the one here sought to be undertaken, to tally the many reasons and causes of homelessness. Surely, the analysis of the causes of the problem will depend on whom one asks. The response to the causes and origins of homelessness often depends on the political striation of the purported commentator.³⁵

For purposes of the analysis offered here, the definition under federal law is adequate and encompassing. It reads as follows:

For purposes of this chapter, the term “homeless” or “homeless individual or homeless person” includes – 1) an individual who lacks a fixed, regular, and adequate nighttime residence; and 2) an individual who has a primary nighttime residence that is a) a supervised publicly or privately operated shelter designed to provide temporary living accommodations []; b) an institution that provides a temporary residence for individuals intended to be institutionalized; or c) a public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings.³⁶

It should be noted, particularly in light of the analysis offered in this paper, that the above definition does not attempt to delineate *why* a person finds himself in the situation therein

³¹ See 2006 The People-To-People Health Foundation, Inc. Health Affairs, May, 2006 – June, 2006.

³² Meredith Karasch, Note, *Where Involuntary Commitment, Civil Liberties, and the Right to Mental Health Care Collide: An Overview of California's Mental Illness System*, 54 Hastings L.J. 493, 523 (2003), (calling deinstitutionalization a “disaster”).

³³ *Id.*

³⁴ Gary Blasi, *Symposium: Advocacy and Attribution: Shaping and Responding to Perceptions the Causes of Homelessness*, 19 St. Louis U. Pub. L. Rev. 207, 216 (2000).

³⁵ White, *supra* note 28, at 279.

³⁶ 42 U.S.C.S. § 11302(a) (2007).

described. For reasons that will be articulated below, this inquiry provides insight into the ultimate inadequacy of the contemplated expansion of hate crime legislation to include the homeless. Truly, it is difficult to imagine that a person would choose to be homeless.³⁷ Still, exceptions even to this axiom exist.³⁸ However, the issue of choice is less clear as it relates to *staying* homeless³⁹ and the fact of that choice, even if only among the few, poses but one fatal problem for the proposed expansion of hate crime laws to include people who choose their status.⁴⁰

The problem of homelessness has grown since the 1980s.⁴¹ As a consequence, the “frequency and brutality” of crimes against the homeless have also seen an explosion in growth.⁴² This is a particularly lamentable observation, as many of the homeless already have sad experience as victims of violence.⁴³ Others among the homeless have been exposed to violence in a different setting, namely as part of military service, and indeed recent information indicates that as many as one in four homeless are veterans, despite comprising only 11% of the population.⁴⁴

³⁷ Tanene Allison, *Confronting the Myth of Choice: Homelessness and Jones v. City of Los Angeles*, 42 Harv. C.R.-C.L. L. Rev. 253, 257 (2007).

³⁸ Associated Press, *Some sex offenders opt to go homeless*, ORANGE CTY. REG., Nov. 1, 2007, at A12.

³⁹ Some scholars have acknowledged that in fact, some people choose to remain homeless. Karasch, *supra* note 32, at 504.

⁴⁰ See also Paul Ades, *The Unconstitutionality of "Antihomeless" Laws: Ordinances Prohibiting Sleeping in Outdoor Public Areas as a Violation of the Right to Travel*, 77 Calif. L. Rev. 595, 602 (1989). Choosing to stay homeless may in fact be attributable to the fact that the homeless view the assistance offered them as worse than living on the street, but this Hobson's choice hardly makes for the immutability required of hate crime legislation.

⁴¹ JAMES D. WRIGHT ET AL., *BESIDE THE GOLDEN DOOR: POLICY, POLITICS, AND THE HOMELESS* 1 (ALDINE TRANSACTION) (1998).

⁴² NAT'L COALITION FOR THE HOMELESS, *HATE, VIOLENCE, AND DEATH ON MAIN STREET USA, A REPORT ON HATE CRIMES AND VIOLENCE AGAINST PEOPLE EXPERIENCING HOMELESSNESS*, 25 (2007) [hereinafter HATE CRIME REPORT].

⁴³ Graciela Sevilla, *Violence Helps Fill Shelters: Survey Finds That Abuse Leads to Homelessness*, WASH. POST, Jan. 6, 1994, at MDH1 (discussing a study that revealed that upwards of 40% of homeless women had been victims of domestic violence, and in fact in whole or in part because of that victimization, found themselves homeless.)

⁴⁴ Kimberly Hefling, *Homelessness a dire chance for recent vets*, HONOLULU STAR-BULLETIN, Nov. 8, 2007, at A6.

Aptly described as a “sickening trend,”⁴⁵ at the very least few would doubt that inexplicable acts of violence against the homeless have begun receiving increased attention in the media.⁴⁶ The courts have dealt with numerous cases where victims of violent crime were homeless, particularly of late.⁴⁷ Some advocates for the homeless contend that efforts to “criminalize” homelessness have contributed to the problem of violence against the homeless.⁴⁸ Others suggest that the nauseating “twisted fad” of “bum fight” videos, which pervade the internet, have inspired the typical young male offender to victimize those widely perceived as “worthless, depraved, and disposable.”⁴⁹ Doubtless some might contend that increasing violence against the homeless, even assuming such a trend is true, is as attributable to increasing aggression by the homeless as it is to a newfound perverse joy in tormenting them. Or others might argue that increasing public frustration with the homeless has increased intolerance for them.⁵⁰

The reasons for this increasing violence against the homeless however, are beyond the scope of this paper. Regardless, the fact remains that the homeless *are* disproportionate victims of violent crime.⁵¹ The question thus presented is whether the proper response to that fact is to “return their sense of self worth and purpose” by expanding hate crime legislation to include them.⁵²

⁴⁵ HATE CRIME REPORT, *supra* note 42 at 13.

⁴⁶ *60 Minutes: Bum Hunting* (CBS television broadcast Oct. 1, 2006).

⁴⁷ *See, e.g.*, Grossman v. State (Alaska), 120 P.3d 1085 (2005), People v. Engelman 28 Cal.4th 436 (2002), People v. Williams, 4 Cal.4th 354 (1992) for just a few examples of crimes against the homeless.

⁴⁸ *See, e.g.*, Donald Saelinger, Note & Comment, *Nowhere to Go: The Impacts of City Ordinances Criminalizing Homelessness*, 13 Geo. J. Poverty Law & Pol’y 545 (2006).

⁴⁹ Michael Stoops & Brian Levin, *A Vile Teen Fad: Beating the Homeless*, CHRISTIAN SCIENCE MONITOR, October 18, 2006, at unnumbered page.

⁵⁰ C.W. Nevius, ‘Enough is Enough,’ *S.F. Says of Homeless*, SAN FRANCISCO CHRONICLE, Oct. 9, 2007, at A1.

⁵¹ HATE CRIME REPORT, *supra* note 42, at 13 (citing a report by the Association of Gospel Rescue Missions which revealed that as many as 1 in 5 homeless people is a victim of violent crime.)

⁵² *Id.*

C. Push is On

Currently, hate crime laws do not include homelessness or housing status among the “protected” categories.⁵³ All this attention has, however, spurred on several states to begin enacting or considering legislation that does what homeless advocates have long sought: expanding legal protections for those without housing.⁵⁴ Specifically, California, Florida, Maryland, Massachusetts, Nevada, and Texas all considered or are considering legislation that would expand hate crime laws to include the homeless.⁵⁵ The details and status of these efforts is discussed below, but is mentioned here to the extent that it reveals the extraordinary salience of this issue in today’s society.⁵⁶

Homelessness is a problem. Violence against the homeless is a problem. Hate crimes punish people for targeting specific individuals because of some trait. Therefore, why not expand hate crime laws to include the homeless? The calculus on initial impression seems sound. It is, however, flawed. Numerous reasons exist to cast doubt on the wisdom of proceeding down this road.⁵⁷ Still, it cannot be stressed enough that the motives of the advocates for this type of legislation are beyond reproach. No legitimate suggestion could be made that the motives of those with a long history of efforts to expand hate crime laws to include the homeless are anything less than honorable. But the road to hell is paved with good intentions, and despite the fact that the “push is on,” moving forward with the proposed expansion will jeopardize existing hate crime legislation and give grist to the opponents of all hate crime laws.

⁵³ *Id.* at 8, but see ME. REV. STAT. ANN. Tit. 17A, §1151 (2007), discussed *infra* at II.

⁵⁴ *Id.* citing B. Levin, *Hate Crimes: Worse by Defintion*, 15 J. of Contemp. Crim. Justice 6 (1999).

⁵⁵ *Id.* at 12.

⁵⁶ See *infra* section II, E.

⁵⁷ See *infra* section IV, B.

II. Hate Crime Law

A. Early History & Development

Understanding where hate crime law may be going necessitates understanding where it has been. The notion of the hate crime is of course, a two sided coin. One side is the legislation, and one side is the crime. The history of *crimes* motivated by racial or religious discrimination is simply, and sadly, too voluminous to catalog here. And since the basic attempt here is to articulate why expansion of hate crime legislation to include the homeless is a flawed idea, clearly the focus of this section must be on the history of *law* with racial, religious, or gender bases. Further, given the position this paper attempts to articulate, understanding the original bases for hate crime legislation serves to demonstrate why the contemplated expansion of hate crime legislation to include housing status is so fundamentally flawed.

Despite the near hysteria which often characterizes the arguments of those opposed to hate crime laws and other “laws based on race,” the notion of race playing a part in the legal system is well established. The American constitution itself was blemished by such distinctions.⁵⁸ American constitutional law is rife with race-based analyses.⁵⁹ It is curious indeed that some of these erstwhile race based designations are so universally condemned today, but that attempts to punish more harshly crimes committed on the basis of a victim’s race still engender controversy.

One need merely look to the First Amendment of United States Constitution to see the earliest indication that certain facets of human existence are so integral a part of

⁵⁸ U.S. CONST. art 1, § 2, cl. 3 *superseded by* U.S. CONST. amend XIV, § 2, (articulating the three-fifths compromise describing slaves as three fifths a person).

⁵⁹ *See, e.g.,* Dred Scott v. Sanford, 60 U.S. 393 (1856). *See also* Korematsu v. U.S. 323 US 214 (1944).

life that they are deserving of special protection.⁶⁰ Thus, the “free exercise” of religion occupies a hallowed place in American Constitutional law. The law, in the form of the First Amendment, bestowed a special privilege not to the practitioners of one religion, but instead forged a *right to practice* any and all religions.

After the Civil War, America finally started its long and arduous march towards equal protection. The Fifteenth Amendment,⁶¹ ratified in 1870, is the first in the Constitution that even mentions the word “race,” and its presence was made possible only by virtue of the Union victory in the Civil War.⁶² Though the Fifteenth Amendment does not expressly “provid[e] a punishment for its violation”⁶³ it is fairly described as one of the very earliest forerunners of hate crime legislation of our time.

Likewise, the Nineteenth Amendment is another example of the law interceding to protect not women (though they were the default beneficiaries of its ratification), but to bestow the right to vote *irrespective* of sex. It too was the product of decades of slow but steady work by those who recognized the fundamental unfairness of permitting only certain people to enjoy the law’s offerings.⁶⁴

Despite essentially conveying new (and much needed) rights on certain groups of Americans, the legitimacy of the Fifteenth and Nineteenth Amendments is rarely challenged in the world of modern legal practice. This is arguably attributable to the fact that though the *effect* of these laws was to convey special privileges only to certain

⁶⁰ The First Amendment to the United States Constitution reads in relevant part: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof” U.S. CONST. amend I.

⁶¹ The Fifteenth Amendment to the United States Constitution reads in relevant part: “Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.” U.S. CONST. amend. XV § 1.

⁶² Gabriel Chin, *Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?*, 92 Geo. L.J. 249 (2004).

⁶³ U.S. v. Reese, 92 US 214 at 216 (1875).

⁶⁴ David H. Gans, *The Unitary Fourteenth Amendment*, 56 Emory L.J. 907, (2007).

people who had before been without, the plain language thereof makes no such claim. *This is the root of their legitimacy.* Indeed, neither can be seriously challenged in the modern era. So, limiting our inquiry merely to the contents of the United States' Constitution, laws prohibiting conduct based on the race or sex of another are well established and beyond meaningful scrutiny.

Just as one need not begin his study of race and the law in American society merely in the middle part of the Twentieth century, neither is the notion of laws dealing with race or religion merely an American one. Drawing from German history, the Reich in September 1935 enacted its own race-based law⁶⁵ forbidding among other things intermarriage between Jews and Germans. And in quasi-historical references dating to the Bible, protagonists there make reference that “it is against our law for a Jew to associate with a Gentile or visit him.”⁶⁶

Of course, this is not a historical work. Innumerable examples of laws related to race, gender, and religion exist. Some proscribe conduct we today hold as inalienable. Others bestow rights we similarly regard as such. Regardless, such laws, both good and bad have existed throughout history.

B. California as Example

Civil rights law in general is deeply rooted in California.⁶⁷ And to the extent that civil rights laws prohibit discrimination on the basis of race or religion, for example, hate crime laws are properly considered within their broader meaning.⁶⁸ But while civil rights

⁶⁵ Gesetz zum Schutze des deutschen Blutes und der deutschen Ehre [Law for the Protection of German Blood and German Honor], Sept. 15, 1935. In addition to banning intermarriage, the law also forbade Jews from displaying the Swastika or from employing German women as domestic servants.

⁶⁶ Acts 10:28 (New International Version).

⁶⁷ Steven Arbuss, *The Unruh Civil Rights Act: An Uncertain Guarantee*, 31 UCLA L. Rev. 443 (1983).

⁶⁸ Indeed, California's hate crime penal statutes (§ 422.55, et seq.) appear within “Title 11.6 – Civil Rights” in the penal code.

laws as we know them today have existed in California for decades, the hate crime laws we now prosecute came into existence in the late 1980s.⁶⁹ Though provisions had existed for considering crimes motivated by race, color, religion, nationality, or country of origin a “circumstance in aggravation,” the “new crimes” we know today as “hate crimes” came into existence on September 28, 1987.⁷⁰ In addition to making a number of changes to the civil code, for our purposes, Assembly Bill 63 added the modern penal code sections 422.6 and 422.7, which today remain the hate crime charging statutes most commonly used by prosecutors.⁷¹ Today, section 422.6 reads in relevant part:

(a) 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 ... in whole or in part because of one or more of the actual or perceived characteristics of the victim listed in subdivision (a) of Section 422.55.⁷²

(b) No person, whether or not acting under color of law, shall knowingly deface, damage, or destroy the real or personal property of any other person for the purpose of intimidating or interfering with the free exercise or enjoyment of any right or privilege secured to the other person by the Constitution ... in whole or in part because of one or more of the actual or perceived characteristics of the victim listed in subdivision (a) of Section 422.55.⁷³

In practical effect then, section 422.6 is alleged where some bias-motivated crime occurs, but where no injury or only minor property damage results. It is seen in dubiously described “less serious” hate crimes. Interestingly, by its plain language, section 422.6, subdivision (a) allows for the punishment of speech alone, and this language has been

⁶⁹ See 1987 Cal ALS 1277; 1987 Cal AB 63; Stats 1987 ch 1277.

⁷⁰ *Id.*

⁷¹ See, for example, Orange County District Attorney Statistics from December 2005 through September 2007, where these two statutes were alleged in 79% of cases where a hate crime resolved during that time period.

⁷² CAL. PEN. CODE § 422.6(a) (Deering 2007).

⁷³ *Id.* at subsection (b).

upheld.⁷⁴ Section 422.6, subdivision (a) has undergone a few other changes since its drafting. Specifically, in 1991, a legislative amendment added disability and gender to the list of prohibited bias motivations.⁷⁵

The other main hate crime charging section to spring into existence in 1987 is Penal Code Section 422.7 – “Commission of Crime for Purpose of Interfering With Another’s Exercise of Civil Rights – Punishment.” This language reads in relevant part:

[A]ny hate crime that is not made punishable by imprisonment in the state prison shall be punishable by imprisonment in the state prison or in a county jail ... if the crime is committed against the person or property of another for the purpose of intimidating or interfering with that other person's free exercise or enjoyment of any right secured to him or her by the Constitution ... under any of the following circumstances ...:

(a) The crime against the person of another either includes the present ability to commit a violent injury or causes actual physical injury.

(b) The crime against property causes damage in excess of four hundred dollars (\$400)⁷⁶

What then, is the practical impact of this section? Prosecutors experienced in this area become quick devotees of this charging section, as it essentially permits them to charge what might otherwise be purely misdemeanor conduct, for example battery or brandishing a weapon, as a felony. It properly recognizes what the Supreme Court has recognized, namely, that hate crimes are worse than identical offenses not bias motivated.⁷⁷ Also, as with Penal Code Section 422.6, the legislature added the language “disability and gender” in 1991.

⁷⁴ *In re M.S.*, 10 Cal.4th 698 (1995) (holding that speech may be punished if it threatens violence and the defendant has the apparent ability to carry out that threat.)

⁷⁵ CAL. PEN. CODE § 422.55(1)(2) (Deering 2007).

⁷⁶ CAL. PEN. CODE § 422.7(a)(b) (Deering 2007).

⁷⁷ *Mitchell*, 508 U.S. at 488.

The third and final most commonly seen hate crime related section is Penal Code Section 422.75, which was enacted on October 5, 1991. In California, this is an “enhancement,” rather than a chargeable offense, and as such is either found to be “true” or “not true” by the finder of fact, and only then after first making a determination of guilt on the underlying felony crime to which the enhancement attaches. The court may impose additional prison time if the enhancement is found to be true. Penal Code Section 422.75, “Commission of Hate Crime – Additional Term” reads in relevant part:

(a) [A] person who commits a felony that is a hate crime or attempts to commit a felony that is a hate crime, shall receive an additional term of one, two, or three years in the state prison, at the court's discretion.⁷⁸

Subdivision (b) contains identical language, but permits a maximum of four years additional imprisonment if the conduct described in subdivision (a) is done in concert with others.

While several other penal code sections punishing bias motivated crimes exist, the three described above are the most commonly seen in practice.⁷⁹ As the legislature’s addition of language to include disability and gender in 1991 shows, hate crime laws can indeed be expanded and changed. Other minor and technical changes have since occurred, but a notable change happened in 1994, when these two statutes were modified to include the language “or because he or she perceives that the other person has one or

⁷⁸ CAL. PEN. CODE § 422.75(a) (Deering 2007).

⁷⁹ For further examples of such statutes in California, see CAL. PEN. CODE §§ 11411(a)(b) (terrorizing), 11411(c) (cross burning), 11412 (threats obstructing exercise of religion), 11413 (terrorism – use of destructive device or explosive or commission of arson in certain places), 302(a) (disorderly conduct at religious service), 538(c) attachment or insertion of unauthorized advertisement into newspapers without publisher’s consent), 594.3 (vandalism – place of worship), 640.2 (writings stamped or attached to consumer products or product containers), and 653m (annoying telephone calls) (Deering 2007). *See also* STACY RATNER AND KARYN SINUNU, HATE CRIMES (California District Attorneys Association) (2006) for an excellent practice guide to prosecuting hate crimes.

more of those characteristics,” referring to the classes now described in section 422.55.⁸⁰ Thus, it no longer mattered if a defendant was correct in his assumption that his victim was gay. The prosecutor need merely establish that the defendant *perceived* the victim to be gay, for example.

C. Early Federal Legislation

The federal government’s development of civil rights and hate crime legislation parallels California’s. Of course, as suggested above, early indication of the law’s changing focus on the issue of civil rights emerged in the years following the Civil War.⁸¹ But like California, the move to expand and strengthen federal civil rights laws became pronounced in the 1960s.⁸² Like California, federal civil rights legislation was the forerunner of modern federal hate crime statutes.⁸³

Sweeping and unprecedented change is not frequently seen in the law, and as alluded to above, the development of hate crime laws are no exception. Even the widely regarded Civil Rights Act of 1964 had many predecessors dating back almost 100 years.⁸⁴ Some of the first law in this area came in the form of providing civil remedies for discrimination rather than punishing offenders more harshly because of their bias

⁸⁰ In 2004, this language was again changed so that both § 422.6 and § 422.7 now relate back to § 422.55, which defines hate crimes. Specifically, the 2004 amendment reads in relevant part: “in whole or in part because of one or more of the actual or perceived characteristics of the victim listed in subdivision (a) of Section 422.55.” Thus, disability and gender were added in 1994, and effectively “moved” to § 422.55 in 2004, not affecting their applicability.

⁸¹ See, e.g., **Civil Rights Act of 1866**, which provided the first package of protections aimed at righting the wrongs of pre-emancipation jurisprudence. Much legislation with similar titles emerged from Congress in the ensuing decades, as Congress sought to grapple with the issue of race and the law.

⁸² See, e.g., **Civil Rights Act of 1964**, which predated the major federal hate crime laws by several years.

⁸³ Though federal civil rights and hate crime legislation is broad and expansive, the primary sections which this paper considers are Title 18 U.S.C., Part I, Chapter 13, §§241 (Conspiracy against rights), 242 (Deprivation of rights under color of law), and 245 (Federally protected activities.) Further, these statutes have a long and sometimes convoluted legislative history that establishes the long road modern hate crime legislation has since trod. Initial analysis of these statutes might lead one to think the federal government had hate crime legislation as long ago as 1909. The effect of these statutes, however, and their applicability to hate crime prosecution came about as the result of civil rights laws of the 1960s.

⁸⁴ See **Civil Rights Act of 1866**, *supra* note 81.

motivated conduct.⁸⁵ But eventually, in the late 1960s, modern federal hate crime legislation began to take shape.

Title 18 U.S.C. section 241, conspiracy against rights, “not only guarantees the safety and protection of persons in exercise of rights dependent on Constitution, but also those guaranteed by federal law.”⁸⁶ It provides for up to ten years imprisonment when

[T]wo or more persons conspire to injure, oppress, threaten, or intimidate any person in any State ... in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same⁸⁷

Title 18 U.S.C. section 242, deprivation of rights under color of law, provides for imprisonment when a person

[U]nder color of any law, statute, ordinance, regulation, or custom, willfully subjects any person ... to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race....⁸⁸

Given section 242’s focus on government actors depriving others of Constitutional rights, it is apparent that it is the “criminal counterpart” of a section 1983 federal civil rights lawsuit.⁸⁹

It is worth noting, however, that these statutes, under which federal hate crime prosecution may develop, typically lack the classic hate crime language that characterizes state laws used to prosecute similarly bias motivated acts.⁹⁰ This is because each such law is rooted in the requirement that the victim be engaged in some federally protected

⁸⁵ See, e.g., **Civil Rights Act of 1871**.

⁸⁶ Bergman v. United States, 565 F. Supp. 1353 at 1397 (1983) (footnote 12).

⁸⁷ Title 18 U.S.C. § 241 (2007) (excerpt).

⁸⁸ *Id.* at § 242 (excerpt).

⁸⁹ Wegwart v. Eagle Movers Inc., 441 F. Supp 872 at 879 (1977) (footnote 7).

⁹⁰ See authority cited *supra*, note 83.

activity, for example voting. Modern hate crime language did not appear in any directly applicable way until 1994, and is discussed below.⁹¹

Not until Title 18 U.S.C. section 245 do we see a federal statute that even refers to the early language which now flows off the tongue of any experienced hate crimes prosecutor: “race, color, religion or national origin.”⁹² Specifically, section 245 creates a federal crime where a person, “whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with ... any person because of his race, color, religion or national origin and because he is or has been” engaged in any number of subsequently listed and federally protected activities.⁹³

The movement to specifically identify and target acts that were bias motivated (as opposed to crimes which were incidentally so), developed significantly in September 1994 when Congress passed the Violent Crime Control and Law Enforcement Act of 1994. This sweeping law addresses assault weapon possession, prison funding, community policing, police recruitment and training, “justice grants,” violence against women and the elderly, sex crimes, terrorism, the federal death penalty (which it applied to numerous new offenses), drug control, youth violence, criminal street gangs, child pornography, victims’ rights, and finally, in section 280003 “Direction to United States Sentencing Commission regarding sentencing enhancements for hate crimes.”⁹⁴

⁹¹ Referring to Title 28 U.S.C. §280003 (1994), **VIOLENT CRIME CONTROL AND LAW ENFORCEMENT ACT OF 1994.**

⁹² Title 18 U.S.C. § 245(b)(2).

⁹³ *Id.*

⁹⁴ **Violent Crime Control and Law Enforcement Act of 1994.**

This section is actually a sentencing provision, and rather than creating new crimes allows for harsher punishment if the trier of fact finds that the crime was motivated by a certain trait of the victim. It reads in relevant part

... "hate crime" means a crime in which the defendant intentionally selects a victim ... because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person ... the United States Sentencing Commission shall promulgate guidelines or amend existing guidelines to provide sentencing enhancements of not less than 3 offense levels for offenses that the finder of fact at trial determines beyond a reasonable doubt are hate crimes.⁹⁵

Thus while some provision for harsher sentencing is in place, the governing law related to the federal prosecution of hate crimes rests primarily in the statutes described above. Nevertheless, neither section 245 nor the 1994 law marked the end of the desire to expand federal hate crime protections.

D. Recent Developments in Federal Hate Crime Laws

Advocates for expansion of hate crime laws to protect the homeless have been encouraged by the willingness of at least a few states to take up their issue. And just as states have expanded their hate crime legislation to add new prohibited bias motivated acts, the federal government has done the same. Indeed, as recently as this year, Congress was still trying to expand existing federal hate crime laws (as opposed to sentencing directions) to include crimes motivated by a victim's sexual orientation.⁹⁶

On March 20, 2007, the Representative John Conyers, joined by 171 co-sponsors, introduced the Local Law Enforcement Hate Crimes Prevention Act of 2007.⁹⁷ On May

⁹⁵ Title 28 U.S.C. §280003(a)(b) (1994), **VIOLENT CRIME CONTROL AND LAW ENFORCEMENT ACT OF 1994**.

⁹⁶ See **House Resolution 1592, Local Law Enforcement Hate Crimes Prevention Act of 2007**.

⁹⁷ GovTrack.us H.R. 1592 – 110th Congress (2007): Local Law Enforcement Hate Crimes Prevention Act of 2007, *GovTrack.us (database of federal legislation)* <http://www.govtrack.us/congress/bill.xpd?bill>

3, 2007, it passed the House of Representatives with 231 votes in favor, 180 votes opposed.⁹⁸ On April 12, 2007, the Senate version of the House bill, S. 1105, was introduced by Senator Edward Kennedy and 44 co-sponsors.⁹⁹ Despite having “strong support” from the National District Attorneys Association, and law enforcement nationwide, it floundered.¹⁰⁰ Frustrated by continued opposition from social conservatives, as recently as September the bill’s sponsors sought to force the president’s hand, who has described the bill as unnecessary in that local law enforcement agencies “are effectively using their laws to the full extent they can.”¹⁰¹ The purported rationale offered by the White House is inapplicable to states lacking hate crime legislation, and conceals the true reason for its opposition.¹⁰² Ultimately, despite the procedural efforts of its sponsors, in early December 2007, the Matthew Shepard Act failed in both houses.¹⁰³ Congressional leaders were condemned for having “disappointed ... again.”¹⁰⁴

Both the House and Senate versions would have expanded federal hate crime legislation to include “violence motivated by the actual or perceived race, color, national origin, gender, sexual orientation, gender identity, or disability of the victim.”¹⁰⁵ The House version would have amended Title 18 U.S.C. to add section 249 which would define and punish a person who “willfully causes bodily injury to any person or, ...

=h110-1592 (accessed Nov 19, 2007). The bill was known in the media as the Matthew Shepard Act, named after a Wyoming student murdered in 1998 because of his sexuality.

⁹⁸ *Id.*

⁹⁹ GovTrack.us S. 1105 – 110th Congress (2007): Matthew Shepard Local Law Enforcement Hate Crimes Prevention Act of 2007, *GovTrack.us (database of federal legislation)* <http://www.govtrack.us/congress/bill.xpd?bill=s110-1105> (accessed Nov 19, 2007).

¹⁰⁰ Editorial, *Caving In on Hate Crimes*, NEW YORK TIMES, December 10, 2007, available at <http://www.nytimes.com/2007/12/10/opinion/10mon3.html>.

¹⁰¹ Laurie Kellman, *Hate crimes bill tacked on Pentagon funding*, ORANGE CTY. REG. at A6, Sept. 28, 2007.

¹⁰² For a more thorough analysis of the controversy surrounding hate crime legislation, see section III, *infra*.

¹⁰³ Anne Flaherty, *Congress Drops Hate Crime Bill*, ASSOCIATED PRESS, December 6, 2007, available at http://www.usatoday.com/news/washington/2007-12-06-hate-crimes_N.htm.

¹⁰⁴ *Caving in on Hate Crimes*, *supra* note 100.

¹⁰⁵ **H.R. 1592, section 2(1).**

attempts to cause bodily injury to any person, because of the actual or perceived race, color, religion, or national origin ... gender, sexual orientation, gender identity or disability of any person....”¹⁰⁶ The significance of the change cannot be underestimated. Gone would be the requirement that the victim be engaging in some Constitutional activity.

Whether either the House or Senate versions ever eventually become law is likely dependent on who occupies the White House. The support for the respective legislative versions of the bill is not veto-proof, thus assuming current executive opposition remains it is unlikely the long-sought changes will materialize.¹⁰⁷ For our purpose, the debate surrounding the proposed expansion of federal hate crime law informs our understanding of just how controversial any proposed expansion to include homelessness would be. If the idea of expanding federal hate crime laws to include the victim’s sexuality is described as a “direct threat to freedom of religion” and providing “special federal protection for ... transsexuals, drag queens, and cross dressers,” expanding them to protect the homeless would send such opposition into orbit.¹⁰⁸ Such critics subsist on arguing, often wrongly, that hate crime laws create special classes of victims. Adding homelessness to the hate crime mix will embolden them in their efforts.

It is particularly telling that expanding hate crime laws to include sexuality is hardly a revolutionary legislative undertaking. Of the 44 states which have hate crime legislation in place, two dozen include sexuality.¹⁰⁹ The ferocity of opposition to

¹⁰⁶ H.R. 1592, Section 7(a).

¹⁰⁷ Kellman, *supra* note 101.

¹⁰⁸ Traditional Values Coalition, “Special Report,” *Hate Crimes Legislation: Unequal Treatment Under the Law*.

¹⁰⁹ Arizona, California, Connecticut, the District of Columbia, Delaware, Florida, Illinois, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, New York,

including sexuality in federal hate crime legislation is remarkable, given the widespread breadth of acceptance such expansion has already enjoyed at the state level. In contrast, not a single state has specifically adopted homelessness or housing status as a hate crime related offense.¹¹⁰

E. Recent Developments in Expanding State Law to Protect Based on Homelessness

Thus the picture painted for expanding hate crime legislation could be considered by homeless advocates as undeniably bleak on the one hand, and promising on the other. Bleak in that no state has thus far specifically adopted a victim's homelessness as a stand alone hate crime offense; promising in that hate crime laws have generally seen an expansion since their inception.

A few statutes exist which demonstrate the fact that bias motivated crimes against the homeless are slowly coming to the law's attention. Those favoring expansion of existing hate crime law to include homelessness are no doubt buoyed by the changes hate crime laws in California have undergone in the last twenty years. Neither have they have not been entirely without success in this effort. On September 22, 2004, the governor signed into law Senate Bill 1234,¹¹¹ which among other things created Penal Code Section 13519.64.¹¹² That statute reads in relevant part:

(a) The Legislature finds and declares that research ... demonstrate [sic] that California has had serious and unaddressed problems of crime against homeless persons, including homeless persons with disabilities.

Oregon, Rhode Island, Tennessee, Vermont, Washington, and Wisconsin all include sexuality in their respective hate crime legislation.

¹¹⁰ As discussed below at II,E, Maine has adopted a victim's homelessness as a permissible sentencing factor in aggravation; it is not its own constituted offense.

¹¹¹ In the California State Assembly, it went by Assembly Bill 2288.

¹¹² Because the law also made a number of minor changes to hate crime laws in general, it was in fact supported by over twenty interest groups including Crime Victims United and the National Coalition for the Homeless, according to the legislative analysis *available at* http://info.sen.ca.gov/pub/03-04/bill/sen/sb_1201-1250/sb_1234_cfa_20040524_182709_sen_floor.html.

(b)(1) By July 1, 2005, the Commission on Peace Officer Standards and Training, using available funding, shall develop a two-hour telecourse to be made available to all law enforcement agencies in California on crimes against homeless persons and on how to deal effectively and humanely with homeless persons, including homeless persons with disabilities

(2) Every state law enforcement agency, and every local law enforcement agency, to the extent that this requirement does not create a state-mandated local program cost, shall provide the telecourse to its peace officers.

Hinting at the controversy, discussed *infra*, which is attendant to any and all attempts to enact or modify hate crime legislation, two groups in opposition to this bill claimed “the legislature should not hand-pick a few victims.”¹¹³

Perhaps most dramatically highlighting the progress made by homeless advocates in this area is the Maine bill signed into law on April 6, 2006 by Governor John Baldacci. Introduced by Representative Patricia Blanchette, the bill “does not mandate a specific sentence if a victim is homeless” but “makes homelessness a factor to be considered by judges and district attorneys when determining sentences.”¹¹⁴ It specifically reads in relevant part:

The selection by the defendant of the person against whom the crime was committed or of the property that was damaged or otherwise affected by the crime because of the race, color, religion, sex, ancestry, national origin, physical or mental disability, sexual orientation or homelessness of that person or of the owner or occupant of that property.¹¹⁵

And so the Maine law is historic in that it is the first to afford harsher penalties for criminals who target a person because of his or her homelessness.

¹¹³ http://info.sen.ca.gov/pub/03-04/bill/sen/sb_1201-1250/sb_1234_cfa_20040524_182709_sen_floor.html

¹¹⁴ Susan M. Cover, *Homeless crime bill advances*, KENNEBEC JOURNAL, March 10, 2006, at 1B.

¹¹⁵ ME. REV. STAT. ANN. Tit. 17A, §1151 (2007).

Not surprisingly, in 2007, six states considered adding homelessness to existing hate crime legislation.¹¹⁶ It will inform our understanding of the issue if we study one of these efforts. Thus, as an example consider California State Senator Darryl Steinberg's "act to amend Sections 422.55 and 422.56 of the Penal Code."¹¹⁷ The bill sought to add the category of "homeless status" and defined that status.¹¹⁸ Specifically, the bill defined "homeless status" as

(d) an individual's lack of a fixed, regular, and adequate nighttime residence, or an individual's use of a primary nighttime residence that is one of the following: (1) A supervised shelter ... (2) An institution that provides a temporary residence for individuals intended to be institutionalized. (3) A public or private place not designed for ... a regular sleeping accommodation ...¹¹⁹

The bill was supported by a variety of groups, including the Western Center on Law and Poverty, the Los Angeles Coalition to End Hunger and Homelessness, and the AFL-CIO.¹²⁰ It was opposed by the California Attorneys for Criminal Justice and Taxpayers for Improving Public Safety.¹²¹ In the legislative analysis attached to the bill, one problem with the bill was that since it imposed additional incarceration time, it would "aggravate the prison and jail overcrowding crisis."¹²² This dubious claim is belied by the fact that a tiny percentage of violent crime in California is bias motivated, thus it is difficult to believe that the proposed change in the law would somehow flood California's prisons with new inmates as a result.¹²³

¹¹⁶ See *supra* section I, C *supra*. The six states are California, Florida, Maryland, Massachusetts, Nevada, and Texas.

¹¹⁷ Text of Senate Bill No. 122, January 22, 2007.

¹¹⁸ *Id.*

¹¹⁹ *Id.* (excerpted).

¹²⁰ Senate Committee on Public Safety, Hearing Date April 24, 2007.

¹²¹ *Id.*

¹²² *Id.* at comment 1.

¹²³ Gordon Dillow, *Hate crimes report gives skewed picture*, ORANGE CTY REG., May 23, 2007 at B1.

Further analysis offered in the legislative history argues, perhaps more persuasively, that the kind of crime sought to be prevented and punished by this bill is already punished more harshly and effectively by existing law.¹²⁴ For example, incidents of a homeless person being set on fire and murdered would be more appropriately prosecuted under penal code section 206, torture, and would result in a life sentence, compared to the maximum 3 or 4 years for which the bill provides.¹²⁵ The analysis also, somewhat cursorily contends that a more conventional charging decision by the prosecutor “may actually be easier to prove than a hate crime”¹²⁶ since hate crimes require proof of motive. The California Attorneys for Criminal Justice argued in the legislative analysis that the bill would “expand California’s hate crime statute to a category of individuals who are NOT also granted civil rights protections.”¹²⁷

The bill was held in committee on April 24, 2007. It made no further progress through the legislature. In what is likely a disappointing result, the outcome in California was not unique. Indeed, the efforts to expand hate crime legislation failed in all six states where it had been proposed, though the respective proposals occasionally had markedly more success than California’s measure, actually coming to a vote in some instances.¹²⁸

Interestingly, as recently as December 10, 2007, the city of Seattle passed a city ordinance that “makes harassing a homeless person a hate crime.”¹²⁹ However, this move, the first of its kind by a city in the United States¹³⁰, has been described as “largely

¹²⁴ [Text of Senate Bill No. 122](#), *supra* note 119.

¹²⁵ *Id.* at Comment 2.

¹²⁶ *Id.*

¹²⁷ *Id.* at Comment 4 (emphasis in original).

¹²⁸ See, e.g., Ovetta Wiggins, *Bill Passed to Protect Homeless*, WASH. POST, March 7, 2007 at B04.

¹²⁹ P-I Staff, *Harassing the homeless now a crime in Seattle*, SEATTLE POST INTELLIGENCER, December 12, 2007.

¹³⁰ Email from Michael Stoops, Director, National Coalition on Homelessness, December 13, 2007.

symbolic.”¹³¹ In an interesting, if perhaps somewhat anecdotal confirmation of just how controversial this issue truly is, the internet posted news story on the above action by the Seattle City Council generated 124 comments in slightly more than 14 hours.

F. Federal/State Hate Crime Distinctions

What does our analysis of federal and state hate crime laws reveal? It should be apparent, after the review provided above, that unlike the civil rights movement, the federal government has been a less than impressive ally of the aggressive efforts by states to enact and expand hate crime legislation. Virtually every state has some hate crime legislation, and of those, over half include sexuality. Only the federal government has been beset with such hyperbolic hand-wringing that it finds itself unable to enact this legislation, even with its proponents occupying a majority in both the House and the Senate.

The reasons for this nearly inexplicable recalcitrance are legion, and could be the subject of an entire article, but for our purposes the federal and state distinctions reveal the following: to the extent hate crime legislation expands to include homelessness, it is almost certain to do so at the state and local level. Washington is unable to secure passage of hate crime legislation to include sexuality, despite the fact that a majority of states with hate crime legislation have such language and despite the fact that the proponents of such legislation at the federal level are in power. Only political cowardice explains the failure of the party in legislative power to obtain passage of legislation they claim is so sorely needed. It seems clear, therefore, that it would be wholly unrealistic to look to Washington for any meaningful leadership in this area. And the data suggests as

¹³¹ *Id.*

much. The movement toward including homelessness in existing hate crime legislation, to the extent it has seen success at all, has seen that success happen at the state level.¹³²

III. Hate Crimes – Analysis

A. Criticisms

Inevitably, the reader must, if he has not already done so, ask himself why such rancor surrounds the topic of hate crime legislation. Why does the notion of punishing a person who selects another for victimization because of race or religion or sexuality, for example, provoke such irrational and often inaccurate criticism? There are many answers to this question, but what is clear is that hate crime opponents have a tired sheaf of arguments from which to choose attacks on these laws.

Opponents describe hate crime laws as being used to “silence pastors and church attendees.”¹³³ They describe hate crime legislation as “an effort to punish individuals who stray from the current politically correct orthodoxy.”¹³⁴ They wrongly claim that hate crime laws “punish a person’s thoughts.”¹³⁵ They claim that “hate crime laws provide special rights for favored groups.”¹³⁶ They argue that punishing the skinhead who knowingly targets a gay man for a crime is little more than punishing someone for his “beliefs about right and wrong.”¹³⁷ Others write that hate crime legislation is “unconstitutional because it violates the Fourteenth Amendment’s guarantee of equal protection under the law [because it] creates special protected status for a group of people

¹³² See *supra* Section II,E.

¹³³ Traditional Values Coalition, *Special Report, October 2005* at page 3 [hereinafter *Traditional Values Report*].

¹³⁴ *Id.*

¹³⁵ *Id.* at page 1.

¹³⁶ *Id.* at page 4.

¹³⁷ *Id.*

that is not available for others.”¹³⁸ A few argue that “[h]ate crimes legislation could be used to make speech against homosexuality a prosecutable offense.”¹³⁹ Still others claim that hate crime laws are blown out of proportion, and that they actually constitute a small percentage of violent crime, and that somehow because of this they should not be the focus of such scrutiny.¹⁴⁰ Some contend that “people will be prosecuted for what they think, or what someone thinks they think, not only for what they actually say.”¹⁴¹ As indecipherable as some of these criticisms are, and as incorrect as others will be shown below to be, many of these contentions gain traction when applied the context of homeless victimization as a hate crime.

Given the short summary of hate crime criticisms provided here, it is important to focus on why those criticisms are fundamentally invalid, which such attempt is undertaken below. But this is merely the first step. The argument which must logically follow is whether these criticisms would be any more valid were hate crime laws to include homelessness as a prohibited bias motivated category.

B. Jurisprudence

First, the claims that hate crime laws seek to “punish thought” apply a two-dimensional analysis to a three-dimensional problem. Hate crime laws do not punish thought. The bigot is free to think as he wishes. The homophobe is free to hate homosexuals. The ignorant man may hate to his heart’s content. Indeed the bigot who commits a crime unrelated to his bigotry will not be punished more harshly than any other similarly situated criminal. His “abstract beliefs, however obnoxious to most

¹³⁸ <http://erlc.com/article/reasons-to-oppose-hate-crimes-legislation-for-homosexuals/> [hereinafter Ethics and Religious Liberty Commission].

¹³⁹ *Id.*

¹⁴⁰ *Senate Committee on Public Safety*, *supra* note 122.

¹⁴¹ *Traditional Values Report*, *supra* note 136.

people”¹⁴² are his to have and no proponent of hate crime laws seeks to abrogate his right to have them.

As the Supreme Court has made clear, hate crime laws do not punish thought, but instead punish *conduct* based on that thought.¹⁴³ Thus where the criminal’s bigotry serves as the substantially motivating factor in his subsequent crime, he is rightly deserving of harsher punishment, just as the murderer who kills for financial gain is deserving of harsher punishment than is he who kills in the heat of passion. The argument that hate crime laws will make people afraid to be bigots has been dismissed by the Court. Specifically, the Court has described the notion that a person will “suppress[] his bigoted beliefs for fear that evidence of such beliefs will be introduced against him at trial if he commits a more serious offense” as “simply too speculative a hypothesis.”¹⁴⁴

Curiously, the foundation of this particular criticism seems to suggest that motive is an impermissible consideration in determining punishment. Critics shriek about punishing hate crimes more harshly because “who the victim is” should not matter.¹⁴⁵ Yet the law and order circles from which many of these critics emerge are the same people rightly advocating death sentences for people who kill police officers. The inconsistency is bizarre, it is inexplicable, and it is irrefutable. In reality, “[t]he defendant’s motive for committing the offense is one important factor.”¹⁴⁶ Indeed, California, for example, erects all sorts of additional and harsher penalties based on a

¹⁴² *Mitchell*, 508 U.S. at 485.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 489.

¹⁴⁵ Though they rarely realize or acknowledge it, in California it is true that in fact who the victim is really does not matter. What matters instead is who the defendant *thinks* the victim is. This issue is discussed *infra*.

¹⁴⁶ *Mitchell*, 508 U.S. at 485.

defendant's motive, up to and including death.¹⁴⁷ The enhanced penalties for bias-motivated crimes are not the unique aberrations the critics would have us believe. Further, and most directly on point, the Court has stated that "the Constitution does not erect a *per se* barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment."¹⁴⁸

Furthermore, the suggestion that hate crime laws bestow "rights" on victims is a fallacy. They do no such thing. How a penalty enhancement providing for additional punishment bestows a "right" on the victim is something hate crime opponents never quite explain. Indeed, whether the victim is *actually* black or white, gay or straight, Jewish or Catholic is entirely irrelevant to the hate crime determination. The focus in determining whether a hate crime has been committed is instead on the defendant's *perception*.¹⁴⁹

Thus the claim that hate crime laws bestow some ephemeral "right" on the victims is simply wrong. It is difficult to understand how any proponent of law and order would resist the opportunity to more harshly punish a criminal for a crime motivated by a victim's immutable traits. Indeed, such advocates frequently support harsher punishment for crimes motivated by a victim's status as a judge, juror, or police officer, none of which is an immutable characteristic. How such people can then turn around and oppose enhanced penalties for crimes motivated by *immutable* characteristics is revealing of the underlying intellectual dishonesty inherent in their opposition. The only conceivable rational explanation for critical opposition to hate crime laws is that such opponents are

¹⁴⁷ See, e.g., CAL. PEN. CODE § 190.2 (2007).

¹⁴⁸ Dawson v. Delaware, 503 U.S. 159 at 167 (1992).

¹⁴⁹ CAL. PEN. CODE § 422.55(a) (Deering 2007).

under the misimpression that “only gays” or “only minorities” enjoy their protection. The defendant in *Wisconsin v. Mitchell*, after seeing the movie, exclaimed to his friends “[y]ou all want to fuck somebody up? There goes a white boy; go get him.”¹⁵⁰ Yet somehow, critics think the hate crime laws which allowed for a harsher penalty for Mitchell somehow bestowed a “right” on the white victim who was targeted solely because of his race.

Second, implied in much of the arguments against hate crime laws, and present throughout the case law in this area is the position that hate crime laws run afoul of the First Amendment. But “[a]s speech strays further from the values of persuasion, dialogue, and free exchange of ideas, and moves toward willful threats to perform illegal acts, the state has greater latitude to regulate expression.”¹⁵¹ California’s courts have indicated that for mere speech to be punishable as a hate crime, “the prosecution must prove the speech itself threatened violence and the defendant had the apparent ability to carry out the threat.”¹⁵² Further, numerous restraints have been placed on hate crime laws, not the least of which are those requiring “the execution of a specific purpose to deprive another individual of his or her civil rights.”¹⁵³ A hate crime prosecution will not succeed if the defendant’s bias motivation was only slight, or where there exists some other significant fact outweighing that bias which motivated his crime. Instead, the defendant’s bias motivation must be a “substantial factor in the commission of the crime.”¹⁵⁴

¹⁵⁰ *Mitchell*, 508 U.S. at 480.

¹⁵¹ *In re M.S.* 10 Cal.4th 698 at 710 (1995).

¹⁵² *Id.* at 714.

¹⁵³ *People v. Lashley* 1 Cal.App.4th 938 at 949 (1991).

¹⁵⁴ *In re M.S.*, 10 Cal. 4th at 716.

Additionally, in those instances where such legislation has encroached on punishing protected speech, or where some other impermissible reason justified the statute's enactment, the courts have not hesitated to disallow them.¹⁵⁵ The Supreme Court invalidated a Minnesota law that prohibited placing "on public or private property a symbol, [or] object ... which one knows ... arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion or gender"¹⁵⁶ as impermissible content-based legislation. California Penal Code section 11411, on the other hand, provides that "[a]ny person who burns or desecrates a cross or other religious symbol ... on the private property of another without authorization *for the purpose of terrorizing the owner or occupant*" is guilty of a felony.¹⁵⁷

California's statute is an example of how carefully tailored such statutes are, precisely to avoid trampling the First Amendment rights hate crime opponents claim to hold so dear. Cross burning is not illegal, but cross burning *on someone else's* property *without permission for the purpose of terrorizing* is. This is an important distinction, as one act is free speech and the other clearly is not. Therefore, arguing that hate crime laws might make "speech against homosexuals a prosecutable offense"¹⁵⁸ reveals a very simplistic and hugely inaccurate understanding of the law. Those who casually toss out such hyperbole inevitably fail to describe how exactly their predictions of Orwellian terror just might come to pass.

Third, to contend that hate crime legislation violates "equal protection" is to reveal a very poor understanding of hate crime laws. The bizarre contention that "the

¹⁵⁵ As an example of the latter, *see, e.g., Marcavage* 2007 Pa. Commw. Lexis 616.

¹⁵⁶ *R.A.V. v. St. Paul*, 505 U.S. 377 at 380 (1992).

¹⁵⁷ CAL. PEN. CODE § 11411(c) (2007), *emphasis added*.

¹⁵⁸ Ethics and Religious Liberty Commission, *supra* note 138.

bill is in direct violation of the 14th Amendment to the US Constitution, which prohibits government from favoring any particular group” holds absolutely no merit.¹⁵⁹ Despite claims to the contrary, hate crime laws do not create any “protected minority class.”¹⁶⁰ Nor do they only protect gays, or blacks, or Jews. Indeed, the victim in the seminal hate crime case from the United States Supreme Court, *Wisconsin v. Mitchell* was a *white* youth beaten “severely” and “rendered unconscious and remained in a coma for four days” by a group of blacks, enraged after seeing the movie “Mississippi Burning.”¹⁶¹ Under current hate crime law in California, for example, it is *sexual orientation* that is included, not “homosexuality.”¹⁶² It includes *race*, not “blacks and other minorities.” It includes *religion*, not “Jews and Wiccans.” Only if the law protected only homosexuals, blacks and other minorities, or Jews and Wiccans for example, would the equal protection argument have any merit.

It is incomprehensible how a statute that is preceded with the phrase “*every person*, regardless of actual or perceived disability, gender, nationality, race or ethnicity, religion, [or] sexual orientation ...”¹⁶³ could ever be interpreted as running afoul of equal protection. That the overwhelming majority of hate crime victims are in fact minorities is a commentary not on the Constitutional infirmity of hate crime statutes, but rather on the nature of crime and bigotry in the United States.¹⁶⁴

Fourth, the criticisms that hate crime laws are blown out of proportion and actually constitute a tiny and apparently therefore insignificant percentage of violent

¹⁵⁹ <http://infowars.net/articles/october2005/311005hatebill.htm> accessed on December 21, 2007

¹⁶⁰ Traditional Values Report, *supra* note 133 at 1.

¹⁶¹ *Mitchell*, 508 U.S. at 479-80.

¹⁶² CAL. PEN. CODE § 422.55(a)(6) (Deering 2007)

¹⁶³ CAL. PEN. CODE § 11410(a) (Deering 2007) (emphasis added).

¹⁶⁴ See, for example, statistics of the Orange County Human Relations Commission which indicate that in 2006, 74% of hate crime victims were either racial minorities or homosexuals.

crime is particularly insidious. It is important to note that simply because only a small percentage of *reported* crime is bias motivated, this should not imply that the significance of the problem is similarly small. Some have claimed that the focus on hate crimes is merely “official hand wringing and gnashing of teeth.”¹⁶⁵ The spurious claim that “we are not awash in hatred” reveals an unsophisticated understanding of a crime that Chief Justice Rehnquist, writing for a unanimous Supreme Court, described as “more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest.”¹⁶⁶

The issue, which some critics seem unable to grasp, is not how sunny a picture is painted by the comparatively low numbers of hate crimes society seeks to punish. Nor is the issue whether we are “awash” in hate; it is simplistic in the extreme to suggest that because the crime is rare, it is not important. America has experienced only one 9/11, and yet we have appropriately spent billions to prevent it ever happening again. Indeed, under the “small in number, small in importance” analysis, the number of victims on that terrible day is comparatively small to the number of people lost to violent and dastardly acts. That fact makes their murders no less significant.

Finally, a critical distinction must be made between the hate crime and the opportunity crime, the crime committed *because of a protected characteristic* versus the crime committed *because of a bias motivation*. The distinction is a fine one, and given the subject of this article, a critical one. Specifically, “[i]s it enough that the perpetrator purposefully selects a victim who has or is perceived to have the protected characteristic

¹⁶⁵ Dillow, *supra* note 122.

¹⁶⁶ *Mitchell*, 508 U.S. 476.

... [o]r must the perpetrator also be motivated by some subjective attitude toward people who have the protected characteristic?”¹⁶⁷

Indeed, a cursory and initial analysis might logically lead one to conclude that where a “perpetrator purposefully selects a victim who has or is perceived to have a protected characteristic,”¹⁶⁸ that purposeful selection alone would seem to justify classification as a hate crime. Where the assailant admits to the purposeful selection of a disabled person for victimization, for example, has it not been thus demonstrated that but for the victim’s disability, the crime would not have occurred? Indeed, in such a scenario, by virtue of the defendant’s admission, it *has* been demonstrated that *but for* the victim’s disability, the crime would not have occurred. But this is not the end of the inquiry.

Thus, those who contend that a hate crime is committed by the purposeful selection of a homeless person for victimization, motivated by the perception that the homeless victim to be is an easy target, misconceive what precisely hate crime law requires. Initially, this statement seems to contradict what most people believe about hate crime law. If a person sees a victim who is disabled and thinks to himself “this person is disabled, therefore, I will rob him,” is it not indisputably true that the defendant selected that person *because of* the disability? And does not California’s hate crime statute use that very phrase? Specifically, California Penal Code section 422.6 states that where a person commits a crime “*because of* one or more of the actual or perceived characteristics of the victim,”¹⁶⁹ he is guilty of a hate crime. If this is so, then why is the *intentional* selection of a victim “because of” a protected characteristic not punished accordingly?

¹⁶⁷ 88 Op. Cal. Att’y. Gen. 141, 142 (2005) [hereinafter Att’y Gen. Opinion].

¹⁶⁸ *Id.*

¹⁶⁹ CAL. PEN. CODE § 422.6(a) (Deering 2007).

But quite the contrary, cogent legal analyses have concluded that “the intentional selection of a victim with a protected characteristic is not sufficient to constitute a hate crime.”¹⁷⁰

The difference instead turns on “some pre-existing negative attitude toward a protected characteristic.”¹⁷¹ Thus, “a hate crime is defined not as one in which perceived vulnerability is a cause in fact, but one in which *bias motivation* is a cause in fact.”¹⁷² Such an interpretation allows for other bases for the hate crime to exist, including but not limited to opportunity, vengeance, or jealousy, as long as the “prohibited bias was a substantial factor in the commission of the crime.”¹⁷³ Thus assuming homelessness were included as a prohibited bias motivation, the prosecutor would be required to show that the victimization occurred not merely because the victim was homeless, but rather because of a pre-existing negative attitude toward homelessness, a high standard to be sure. But the practical inability to demonstrate such a pre-existing negative attitude is but one problem for the proposed expansion.¹⁷⁴

IV. Expansion of Hate Crime Laws to Include Homelessness

A. Arguments in Favor

The realm of homeless advocacy has many players, whose membership is largely comprised of people deeply dedicated to the cause of ending homelessness. But among the most prominent and articulate of such advocates is the National Coalition for the Homeless (NCH). Starting in 1999, this organization began issuing an annual report that attempted to categorize and describe the violence with which America’s homeless must

¹⁷⁰ Att’y Gen. Opinion, *supra* note 167 at 147.

¹⁷¹ *Id.* at 148.

¹⁷² *Id.* at 150. (emphasis added).

¹⁷³ *In re M.S.*, 10 Cal.4th 698 at 716.

¹⁷⁴ *See infra* section V.

contend. It has arisen as a major force behind the expansion movement. Since it serves as one of the loudest and most important voices in this area, its arguments in favor of expanding hate crime law to include the homeless will serve as the main source for this section.

First, advocates contend that the victimization of the homeless is an expanding trend, which must be fought with new and expanded hate crime legislation. That the homeless are victimized by heinous crimes is indisputable. There can be no dispute that the tire-iron beating of a 62-year old homeless woman by a man whose demands for sex she had rejected is heinous.¹⁷⁵ Neither can the beating of 54 year old August Felix by a group of teenagers who “attacked him for fun” be seen as anything but sick.¹⁷⁶ That any human being should be subjected to being “grabbed ... and pushed to the ground,” then doused with gasoline and set on fire is inexplicable. Imagining his torment as he later told police, “I could feel my skin melting” is an unspeakable horror. These few examples are merely the tip of the iceberg, advocates contend.¹⁷⁷

Second, homeless advocates argue that an unseen world of crime, victimization, and darkness exists for America’s homeless, and that this problem is growing out of control. They argue that society either ignores or even exploits the issue.¹⁷⁸ Unprincipled and exploitative people make millions selling “bum fight” videos featuring the weakest of America’s adults pitted against each other in staged fights for money. Television cartoons joke about “staging bum fights” in one “side-splittingly hilarious”

¹⁷⁵ HATE CRIME REPORT, *supra* note 42 at 5.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 56.

¹⁷⁸ *Id.* at 12.

episode.¹⁷⁹ Society does not take seriously the plight of the homeless, but instead through its laws and skewed cultural values, regards them as “second class citizens.”¹⁸⁰

Third, proponents of expanding hate crime legislation to include the homeless contend that people who target and victimize the homeless “share demeaning stereotypes which identify the homeless as appropriate targets for aggression.”¹⁸¹ They argue in part that such a move will “ensure protection of civil rights for everyone, regardless of their [sic] economic circumstances or housing status.”¹⁸² They state that the “[t]hrough the inclusion of housing status, hate crimes and violent acts toward people experiencing homelessness will be more appropriately handled and prosecuted.”¹⁸³ They write that “[p]eople who are forced to live and sleep on the streets for lack of an appropriate alternative are in an extremely vulnerable situation, and it is unacceptable that hate crime prevention laws do not protect them.”¹⁸⁴ They go on to state that existing hate crime laws have helped combat bias motivated crimes against “people of varying race, ethnicity, disability and sexual orientation” but that “homeless victims have been denied this equal opportunity alongside other minority groups.”¹⁸⁵ Pointing to statistics, they suggest that between

1999 and 2005 there have been 82 homicides classified as the result of hate crimes [but that] [o]ver that same period there have been 169 deaths as a result of violent acts directed at homeless people ... more than twice the amount [sic] of deaths than those resulted from [sic] categorized hate crimes.¹⁸⁶

¹⁷⁹ **Volume One, American Dad, rear box cover, Twentieth Century Fox Film Corporation.**

¹⁸⁰ HATE CRIME REPORT, *supra* note 39 at 13

¹⁸¹ *Id.* at 6.

¹⁸² *Id.* at 7.

¹⁸³ *Id.* at 8-9.

¹⁸⁴ *Id.* at 9.

¹⁸⁵ *Id.* at 12.

¹⁸⁶ *Id.*

They also offer as evidence of the assailants' motive claims of "boredom ... thrill ... fun ... because they simply can."¹⁸⁷ Simply put, they argue, [t]hese atrocities are acts of hatred and should be classified as hate crimes."¹⁸⁸ In the 2006 NCH report "Hate, Violence, and Death on Main Street USA," the authors provide dozens of pages of incidents of violence against the homeless,¹⁸⁹ demonstrating in their view the severity of the problem and the attendant need to change the law accordingly.

In short, homeless advocates strongly argue that the intentional selection of a victim because he or she is homeless is a hate crime which must be aggressively prosecuted and punished. They argue that until this happens, the victimization of the homeless will continue to escalate.

B. Arguments in Opposition

Given the often graphic and disturbing nature of many violent crimes against the homeless, the argument that they have been the subject of particularly heinous crimes is a compelling one. Whether the proper response to this reality is to expand hate crime legislation to include such heinous acts is less so. Still, proponents of just such an undertaking offer a variety of passionate, if ultimately inapplicable arguments to advance their cause.

Homeless advocates seem to suggest that the heinousness of a criminal act against the homeless alone justifies its inclusion in hate crime law. But the horror of a particular act cannot be the determinative basis upon which we decide hate crime law's applicability. Many crimes are disturbing. Many are heinous. Many are motivated at

¹⁸⁷ *Id.* at 13 (internal quotation marks deleted.)

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 14-76.

least in part by the fact that the defendant believes his victim is weak and an easy target. These features, however, do not make a hate crime. As detailed above, the intentional selection of a victim because of a perception that he or she is an easy target is not a hate crime.

Further, many of the crimes cited by NCH in its 2006 as “hate crimes” contain no evidence of motive at all. For example, an incident from January 2006 where a homeless victim calls 911 “saying that a man had threatened to kill him” but that “it is unclear what caused this particular incident”¹⁹⁰ is offered in a report on the bias-motivated crimes the homeless endure. But no one would contend that this incident is evidence of a hate crime. Another incident involved teens drinking with a homeless victim who later returned to murder and rob him.¹⁹¹ A third incident involved a man who was “homeless by choice” who was murdered “while going to work.”¹⁹² A fourth incident involved a 67 year old man who “yelled a pick up line” to an 18 year old girl and was then involved in a physical altercation with her boyfriend in which he was killed.¹⁹³ Indeed, of the 20 murders described in the report, in roughly two thirds the motive is either not bias related or is unclear.

One cannot help but conclude that homeless advocates seem to be under the misimpression that if a victim happens to be homeless, than whatever crime to which he was subjected must have been bias motivated. But as abundant data make clear, the homeless are as likely to be targeted by other homeless people as they are by anyone

¹⁹⁰ *Id.* at 47.

¹⁹¹ *Id.* at 48.

¹⁹² *Id.* at 49-50.

¹⁹³ *Id.* at 52.

else.¹⁹⁴ The grievous attack on another person, however unjustifiable and sickening, is not made a hate crime merely because the victim is homeless. And as California courts have made clear, it is insufficient that the defendant intentionally selected his victim because of a protected trait.¹⁹⁵

Additionally, advocates for expansion seem to suggest that the act of setting a homeless person on fire for fun goes unpunished. It should be noted by the reader that in California, a person who sets a homeless person (or any person for that matter) on fire for the fun of it where that person dies as a result could potentially face a death sentence. Thus, any contention that heinous crimes against the homeless cannot be justly punished without hate crime enhancements misses the point.

It seems as though homeless advocates feel that without glomming on to the hate crime train, violence against the homeless will never abate. It is wrong, however, to hijack an effective and intellectually honest legal tool and appropriate it to one's own interest group. Just because hate crime laws have been effective in curtailing racial and religious bases bias crimes does not mean that hate crime laws are the appropriate remedy for violent crimes against the homeless.

Advocates for expansion might argue that society punishes hate crimes more harshly because the person who targets a victim because of some trait the victim cannot change is a more dangerous criminal. Thus, in their mind, the criminal who targets a homeless person for victimization is similarly more dangerous and therefore deserving of harsher punishment. But the courts have noted that hate crimes are more dangerous because where "victimization on the basis of an *immutable characteristic* or protected

¹⁹⁴ See, e.g., Adam Aansen, *Violence can erupt among homeless*, FLORIDA TIMES UNION, June 16, 2007, available at http://www.jacksonville.com/tu-online/stories/061607/met_177812529.shtml.

¹⁹⁵ *In re M.S.*, 10 Cal. 4th 698, *supra* note 151.

status has amore debilitating effect on the victim.”¹⁹⁶ Unless advocates for expansion plan on arguing that homelessness is an “immutable characteristic,” such a comparison cannot be drawn.

But even assuming for the sake of argument that the prosecutor found himself in a position where he could prove beyond a reasonable doubt that the attack on the homeless victim was substantially motivated by some bias against the homeless. Should such a case be considered a hate crime? No.

The analysis of the battle at the federal level to include sexuality in hate crime legislation is particularly useful to the extent it sheds light on another problem associated with expanding existing hate crime law to include homelessness. The risk of injecting politics into criminal law is particularly high in this area. The battle to include sexuality is a battle precisely because the issue of sexuality in our society is a lightning rod. Prejudice against gays is frequently justified and grounded in religious dogma. The prosecutor however, is inherently hesitant to pass judgment on this issue. If a person wants to disagree with homosexuality, that is his right. But the prosecutor is eager to prosecute such prejudice when it serves as the motivating factor in a criminal act. The message to be taken from the sexuality hate crime debate is that the criminal law is put on the defensive when politics is involved. Though a few challenge the idea that sexuality is an immutable characteristic, no one can seriously dispute that a person’s sexuality is as at least a significant part of his identity as is religion, which is clearly *not* immutable.

Homelessness is an even more divisive issue, in that the simple claim that a person is “forced” into homelessness, that he “lacks a reasonable alternative,” or that

¹⁹⁶ In re Joshua H., 13 Cal.App.4th 1734, 1748, footnote 9 (1993) (emphasis added).

none of the homeless choose to be so invite furious debate.¹⁹⁷ Many people might contend that the homeless themselves are more to blame for their situation than is society. Others might contend that drug use and mental illness are to blame. Still others might claim that the homeless are mostly lazy, or alcoholics, or people lacking drive. In response, advocates would no doubt argue that the homeless have been driven into their situation by a greedy society that makes it impossible for a certain percentage of people to make it, and that the resulting homelessness is unavoidable, but must be cured.

Who is “right” in this debate is immaterial for the purpose of this paper. Homelessness, however, is clearly not an immutable characteristic. “Immutable” is defined as “not capable of or susceptible to change.”¹⁹⁸ Such a definition is not applicable to homelessness, particularly since even homeless advocates acknowledge that “change” is precisely their goal. It is the *existence* of this debate, about a characteristic which is not immutable, that makes homelessness unsuitable for inclusion into hate crime laws.

If one thing has characterized modern hate crime law, it is that it almost exclusively focuses on immutable characteristics; that is things about a person which he or she is unable to change. Alternatively, in the case of religion, for example, hate crime law pertains to certain practices which are protected by the Constitution. Additionally, despite the erroneous criticisms frequently heard, hate crime laws apply equally to all people. Despite statements to the contrary, not a single special group has ever been created by a hate crime law in the United States.

¹⁹⁷ HATE CRIME REPORT, *supra* note 42 at 9.

¹⁹⁸ <http://www.m-w.com/dictionary/immutable> (accessed on December 24, 2007).

The movement to include the homeless in hate crime law would change that. For the first time, one group would receive special classification over another. And in an odd twist, adding homelessness to modern hate crime law makes it the only “protected trait” society was actively trying to eradicate. Today, race is included in hate crime law regardless of the context in which the attack occurs. The same may be said for religion, nationality, or sexuality for that matter. Under the proposed changes, the person who is homeless would find himself in a newly created group that only exists in its own limited legal context.

Critics of hate crime laws bemoan how they create special victims, or only protect homosexuals, or punish one crime against one kind of person more harshly than a crime against another kind of person. Notwithstanding that these criticisms are inaccurate and untrue, were homelessness to be added to hate crime laws, their criticisms would suddenly gain traction. Critics wrongly contend that hate crime laws “violate equal protection” because they bestow rights on certain crime victims. This is currently untrue. Were homelessness to be added, however, it would become entirely true.

Indeed, those who advocate for the expansion of hate crime laws to include the homeless unknowingly play into the hands of critics by arguing that the homeless need to be included “alongside other minority groups.”¹⁹⁹ Hate crime laws do not protect “minority groups,” but all groups. When homeless advocates write about how hate crime laws should apply to the homeless like they apply to other minority groups, they give hate crime opponents exactly what they seek, credibility in their arguments that hate crime laws have some ulterior motive. The only intellectually supportable basis for hate crime

¹⁹⁹ HATE CRIME REPORT, *supra* note 42.

law is to argue that all are equally protected by their existence. The enactment of these proposed laws will eviscerate this premise.

Further, proponents argue that hate crime laws have helped curtail racial or religious based crimes but that “homeless victims have been denied this equal opportunity.”²⁰⁰ What opportunity? Hate crime laws do not create any opportunities. Nor do hate crime laws bestow any rights. For years hate crime law proponents have advocated that quite contrary to the critics’ contention, hate crime laws do not give certain victims certain rights. Rather, hate crime laws punish more harshly the criminal who targets another person because of some characteristic that is inherent to all people. All people have a racial, religious, or sexual component. Thus the inclusion of these traits in hate crime law acts to protect all people. So when homeless advocates write about how the homeless “deserve” hate crime protection, the frustrated hate crime law advocate can only shake his head.

If homelessness is added to the otherwise universal characteristics appearing in hate crime statutes, it is clear that every other advocacy group would line up for similar consideration. Where would it stop? Socioeconomic status? The unemployed? Animal rights activists? Gun owners? Modern hate crime law is defensible because everyone falls within its meaning. There is not a person in America who is not protected by hate crime laws. If homelessness is added, that will no longer be the case, and the slide down the slippery slope of legal favoritism will have begun, creating an avalanche which threatens to destroy the carefully laid foundation of modern hate crime law.

²⁰⁰ *Id.* at 8-9.

VII. Conclusion

Fundamentally, the issue of expanding hate crime laws rests on the basis for which the advocate of expansion believes hate crime laws rest. If one believes hate crime laws have been drafted to protect only historically targeted groups, then the argument to expand hate crime laws prevails. Indeed if one subscribes to this interpretation, adding the homeless would be but the first step.

If on the other hand one believes that hate crime laws exist to protect all people equally, *regardless* of their race, religion, nationality, disability, sexual orientation, or gender, and also to punish more harshly those who would target others for such characteristics then the argument for expansion fails.

Of course, people are free to subscribe to either interpretation offered above. But it is clear that the courts have subscribed to the latter interpretation, and have recognized that hate crime laws are not expressly drafted to only protect certain historically targeted groups. Were this the case, hate crime statutes would expressly so indicate. Further, if that were the case, then all of the baseless criticisms to which hate crimes laws have been subject would be true.

Instead, hate crime laws apply equally to everyone. In order for that to remain so, then the notion of expanding hate crime laws to include the homeless must be rejected as fundamentally misguided. Violence against the homeless, because of homelessness is a serious crime which must be harshly punished. No one disputes that the person who decides to beat a sleeping homeless person for the fun of it deserves the harshest and most severe of punishments. And no one can seriously doubt that such a crime is

fundamentally motivated at its black heart by hate. But that does not make it a hate crime.