



Hate Crime Legislation

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Summary

Current law defines hate crime as any crime against either person or property in which the offender intentionally selects the victim because of the victim's actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation. Hate crimes *are not* separate and distinct offenses under current federal law. Rather, hate crimes are traditional crimes, during which the offender is motivated by one or more biases that are considered to be particularly reprehensible and damaging to society as a whole. Furthermore, federal jurisdiction over hate crime is limited to certain civil rights offenses, which are considered to be "hate crimes" when it is determined that the offender was motivated by a bias against race, color, religion, national origin, and, in limited instances, disability.

Determining the definitive federal role in addressing hate crime has proven elusive, as reflected in the legislative history and ongoing congressional debate. Legislation to widen federal jurisdiction over hate crime was passed by the Senate in the 106th and 108th Congresses and by the House in the 109th Congress. Opponents of hate crime legislation view creating separate federal offenses for hate crime as redundant and largely symbolic, arguing that separate hate crime offenses would be in addition to the legal prohibitions for traditional crime that already exist under either federal or state law. They also contend that in most cases the federal nexus is tenuous, and that such offenses are best handled at the state and local level. Proponents of creating a separate and distinct federal offense for hate crime maintain that there is a fundamental difference between ordinary crime and hate crime. They believe that hate crimes are often perpetrated to send a message of threat and intimidation to a wider group, that the effects of hate crime extend beyond the particular victim and reflect more pervasive patterns of discrimination on the basis of race, color, religion, national origin, and other characteristics.

In the 110th Congress, Representative John Conyers, chair of the House Judiciary Committee, introduced the Local Law Enforcement Hate Crimes Prevention Act (H.R. 1592). Passed by the House on May 3, 2007, H.R. 1592 would have widened federal jurisdiction over hate crimes and expanded the categories of protected persons to include sexual orientation and gender identity. Senator Edward Kennedy, a key sponsor and leading supporter of such legislation in previous Congresses, introduced a similar bill (S. 1105), the language of which was successfully amended to the Senate-passed FY2008 Defense Authorization bill (H.R. 1585) on September 27, 2007. That language, however, was a point of contention in pre-conference negotiations on H.R. 1585 and was dropped from the conference agreement. In addition, Representative Sheila Jackson-Lee introduced the David Ray Hate Crimes Prevention Act of 2007 (H.R. 254), and Representative Carolyn Maloney, the Hate Crime Statistics Improvement Act (H.R. 1164).

In the 111th Congress, the House Judiciary Committee amended and ordered reported a hate crimes bill (H.R. 1913) on April 23, 2009. The House passed H.R. 1913 on April 29, 2009. Senator Reid, for Senator Kennedy, introduced the Matthew Shepard Hate Crimes Prevention Act (S. 909) on April 28, 2009. Senator Leahy successfully amended the National Defense Authorization Act (S. 1390) with language that is similar to S. 909 on July 16, 2009. The Senate passed S. 1390, amended, on July 23, 2009. In addition, Representative Sheila Jackson-Lee has introduced three hate crime-related bills (H.R. 70, H.R. 256, and H.R. 262), and Representative Maloney has introduced a hate crime statistics act (H.R. 823). At issue for Congress is whether the prevalence and harmfulness of hate crimes warrant greater federal intervention to ensure that such crimes are systematically addressed at all levels of government. Another related issue Congress may choose to consider is the completeness and comprehensiveness of national hate crime data. This report will be updated to reflect further legislative action.

Contents

Most Recent Developments	1
Introduction	1
Legislative Action in the 111 th Congress	2
Legislative Action in the 110 th Congress	3
Overview of the Hate Crime Debate	5
Historical Evolution of Hate Crime Policy and Legislation	5
Early Civil Rights Movement	6
Second Wave of Civil Rights Movements	7
Anti-Hate Crime Movement	7
ADL Model Legislation	7
Establishing Baseline Hate Crime Statistics	8
Gender	8
Sexual Orientation and Gender Identity	8
Hate Crime and Current Law	9
Federal Civil Rights Statutes and Hate Crime	10
Hate Crime Statistics Act	11
Hate Crime Sentencing Enhancements	12
Violence Against Women Act	12
Church Arson Prevention Act	12
U.S. Armed Forces and Hate Crime Prevention	13
Federal Hate Crime Funding	13
Federal Grants for Hate Crime Prevention Education	13
VAWA Domestic and Sexual Abuse Programs	13
State and Local Law Enforcement Assistance	13
Federal Hate Crime Statistics	14
FBI Uniform Crime Reports (UCR) and Hate Crime	14
BJS Hate Crime Victimization Statistics	16
Reporting Hate Crime: Complications and Shortcomings	17
NBIRS Hate Crime Statistics and Juveniles	19
Hate Crime Bills in the 111 th Congress	19
Local Law Enforcement Hate Crimes Prevention Act of 2009 (H.R. 1913)	20
Matthew Shepard Hate Crimes Prevention Act (S. 909)	21
Amendments to the FY2010 Defense Authorization Act (S. 1390)	21
Noose Hate Crime Act of 2009 (H.R. 70)	22
David Ray Hate Crime Prevention Act of 2009 (H.R. 256)	22
David Ray Ritcheson Hate Crime Prevention Act (H.R. 262)	22
Hate Crime Statistics Improvement Act of 2009 (H.R. 823)	22
Hate Crime Legislative Action the 110 th Congress	23
Local Law Enforcement Hate Crimes Prevention Act of 2007 (H.R. 1592)	23
Local Law Enforcement Enhancement Act 2007 (S. 1105)	23
Amendments to the FY2008 Defense Authorization Act (H.R. 1585)	24
Hate Crime Legislative Action in the 107 th through 109 th Congresses	24
Possible Options and Issues for Congress	26

Should Federal Jurisdiction Be Broadened?..... 26
Should Baseline Statistics Be Improved?..... 26
Should Gender Be Included in Hate Crime Statistics?..... 27
Should Breakouts for Juveniles Be Included? 27
Should Federal Training for Law Enforcement Be Improved and Increased? 27

Tables

Table 1. Eleven-Year Hate Crime Summary Table 15

Contacts

Author Contact Information 28

Most Recent Developments

Current federal jurisdiction over hate crimes is limited to investigating and prosecuting certain civil rights offenses that are considered “hate crimes,” when it is determined that the offender was motivated by a bias against race, color, religion, national origin, and, in limited instances, disability.¹ Both the House and Senate have considered legislation to broaden federal jurisdiction over hate crime by authorizing the Attorney General to provide assistance, when requested by a state, local, or tribal official, for crimes that (1) would constitute a violent crime under federal law or a felony under state or tribal law, and (2) are motivated by the victim’s actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, or disability. On April 29, 2009, the House passed the Local Law Enforcement Hate Crimes Prevention Act of 2009 (H.R. 1913). On July 16, 2009, the Senate adopted the Mathew Shepard Hate Crimes Prevention Act (S. 909) as an amendment to the National Defense Authorization Act (S. 1390), and passed this bill on July 23, 2009. As described below, similar legislation was passed by the Senate during the 106th and 108th Congresses and in the House during the 109th Congress. Both chambers passed hate crime legislation in the 110th Congress.

Introduction

Current law defines hate crime to include any crime against either person or property, in which the offender intentionally selects the victim because of the victim’s actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation.² Hate crimes *are not* separate and distinct offenses under current federal law; rather, they are traditional crimes that are committed by individuals who are motivated by one or more biases that are considered to be damaging to society as a whole.³ Hate crime is also known as bias crime.

Federal jurisdiction over hate crime, however, is limited to investigating and prosecuting certain civil rights offenses. Those civil rights violations are considered “hate crimes” when it is determined that the offender was motivated by a bias against race, color, religion, national origin, and, in limited instances, disability.⁴ For bias-motivated offenses, there are enhanced penalties under federal law.

At issue for Congress is whether the prevalence and harmfulness of hate crime warrants greater federal intervention. Although there is a consensus that hate crime is deplorable, determining the

¹ U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Assistance, *A Policymaker’s Guide to Hate Crimes*, NCJ 162304, March 1997, p. 8.

² 28 U.S.C. §994 note.

³ Many traditional crimes involve hate perhaps in the traditional sense, yet they are not classified as “hate crime.” The distinguishing feature of a hate crime is that the offender is motivated to move against the victim, because of an ascribed characteristic that marks the victim as a justifiable target in the mind of the offender. Nevertheless, determining an offender’s motivation is difficult in many cases. Moreover, the definition of hate crimes varies among states. Some states, for example, do not include sexual orientation as a victim characteristic in their definitions of hate crime. Consequently, such states would likely not report a crime committed against an individual because of their sexual orientation as a hate crime.

⁴ U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Assistance, *A Policymaker’s Guide to Hate Crimes*, NCJ 162304, March 1997, p. 8.

definitive federal role in addressing hate crime appears to be elusive, as reflected in the legislative history and ongoing congressional debate.

This report provides an overview of the hate crime debate, with background on current law, hate crime statistics, a legislative history of hate crime prevention bills in recent Congresses, and discussion of possible options and issues for Congress. This report is not intended to be an analysis of the constitutional or other legal issues that often arise as part of the hate crime debate. For such an analysis, see CRS Report RS22812, *Constitutional Limits on Hate Crime Legislation*, by Alison M. Smith.

In addition, incidents have been reported in the national press where hangman's nooses were displayed in an apparent attempt to intimidate students, faculty, and a police officer.⁵ While it is not explicitly a federal crime to display such symbols of intimidation, it is a crime in some states to do so. For further information, see CRS Report RL34200, *Burning Crosses, Hangman's Nooses, and the Like: State Statutes That Proscribe the Use of Symbols of Fear and Violence with the Intent to Threaten*, by Kathleen Ann Ruane and Charles Doyle.

Legislative Action in the 111th Congress

On April 22-23, 2009, the House Judiciary Committee marked up the Local Law Enforcement Hate Crimes Prevention Act (H.R. 1913). Republicans offered several amendments, some of which could be described as underscoring their opposition to the bill, but these amendments were all defeated along party lines.⁶ Among other things, opponents argued that the bill, if enacted, might be used to prosecute religious leaders for exercising their First Amendment rights to free speech and religion. Representative Robert Scott, Chair of the committee's Crime, Terrorism, and Homeland Security Subcommittee, countered that the bill would not hinder free speech or religion and that it included language that emphasizes that the bill should not be construed as affecting any activities protected by the Constitution. Representative Scott also successfully offered an amendment that stripped out the findings section of the bill, as well as a section that would have amended the Hate Crime Statistics Act to require the collection of data on hate crimes committed by offenders motivated by a bias against "gender or gender identity," and on hate crimes committed by, or directed against, juveniles. H.R. 1913 is nearly identical to a bill (H.R. 1592, described below) passed by the House in the 110th Congress.

On April 27, 2009, the House Committee on the Judiciary filed the report on H.R. 1913 (H.Rept. 111-86, Part I). On April 28, the committee filed a supplemental report (H.Rept. 111-86, Part II). On April 29, 2009, the House passed H.R. 1913 by a recorded vote, 249-175 (Roll no. 223).

On April 28, 2009, Senator Harry Reid, for Senator Edward Kennedy, introduced the Matthew Shepard Hate Crimes Prevention act (S. 909). This bill is similar to H.R. 1913, and to language that Senator Kennedy successfully amended to the Senate-passed FY2008 Defense Authorization bill (H.R. 1585) in the 110th Congress.

⁵ Darryl Fears, "In Jena and Beyond, Nooses Return as a Symbol of Hate," *Washington Post*, October 20, 2007, p. A01.

⁶ For amendment text, see Leah Nysten and Seth Stern, "House Panel Begins Lengthy Markup of Hate Crimes Measure," CQ Committee Coverage, April 22, 2009, available at <http://www.cq.com/display.do?dockkey=/cqonline/prod/data/docs/html/committees/111/committees111-2009042200258314.html@committees&metapub=CQ-COMMITTEEMARKUPS&searchIndex=0&seqNum=3>.

On July, 16, 2009, Senator Patrick Leahy successfully offered an amendment (S.Amdt. 1511) to the FY2010 Defense Authorization bill (S. 1390) that would broaden federal jurisdiction over hate crimes by authorizing the Attorney General to provide assistance (technical, forensic, prosecutorial, or other), when requested by a state, local, or tribal official, for crimes that (1) would constitute a violent crime under federal law or a felony under state or tribal law, and (2) are motivated by the victim's actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, or disability.

Senator Hatch offered an amendment (S.Amdt. 1611) that would have nullified the provisions of the Leahy amendment and, in its stead, would have required a report on state-level hate crimes investigations, prosecutions, and sentencing. The Senate, however, rejected the Hatch amendment by a recorded vote, 29-62. Senator Brownback offered an amendment (S.Amdt. 1610) to the Leahy amendment, which was adopted by a recorded vote, 78-13, that would prohibit the implementation of any provision of the Leahy amendment in a manner that would violate or burden the exercise of an individual or group's First Amendment rights to free speech and association that were not intended to plan or incite violence against another individual. The Senate adopted a motion to invoke cloture by a recorded vote, 63-28, and the Leahy amendment was adopted by voice vote. The provisions of the Leahy amendment are similar to the provisions in the House-Passed H.R. 1913.

On July 20, 2009, the Senate considered and passed four more amendments to S. 1390. Two of these amendments dealt with the death penalty in hate crime cases. Senator Kennedy offered an amendment (S.Amdt. 1614) that would require the Attorney General to establish guidelines under which federal prosecutors would seek the death penalty for hate crime offenses that involved a "loss of life." Senator Sessions offered an amendment (S.Amdt. 1615) that would authorize the use of the death penalty in hate crimes cases if "death results from the offense." Senator Sessions offered another amendment (S.Amdt. 1617) that would require the Attorney General to establish guidelines under which hate-crime offenses would be identified and prosecuted according to neutral and objective criteria. Senator Sessions also offered an amendment (S.Amdt. 1616) that would prohibit the assault and battery of a person on account of their military service or status as a member of the U.S. Armed Forces. While the former amendments were adopted by unanimous consent, the latter amendment of service members was adopted by a recorded vote, 92-0. The Senate passed S. 1390 by a recorded vote, 87-7, on July 23, 2009.

Legislative Action in the 110th Congress

On March 20, 2007, Representative John Conyers, chair of the House Judiciary Committee, introduced the Local Law Enforcement Hate Crimes Prevention Act (H.R. 1592). As described below, similar legislation sponsored by Representative Conyers was passed by the House in the 109th Congress. On April 17, the Judiciary Subcommittee on Crime, Terrorism, and Homeland Security held a hearing on H.R. 1592. While the subcommittee approved of H.R. 1592 with little opposition on April 24, the full Judiciary Committee considered the bill for a contentious 10 hours at markup on the next day.⁷ Representative Lamar Smith, the ranking minority member, reportedly led much of the opposition against H.R. 1592, contending that:⁸

⁷ Elaine S. Povich, "Hate Crimes Bill Wrangles Through House Judiciary," *Congress Daily*, April 25, 2007.

⁸ Colby Itkowitz, "Panel Approved Bill Broadening Hate Crimes to Cover Gender, Sexual Orientation," *CQ Today—Legal Affairs*, April 25, 2007, 10:37 p.m.

In my view, all victims should have equal worth in the eyes of the law.... If someone intended to harm a person, no motive makes them more or less culpable for that conduct.

Despite vigorous opposition, the full Judiciary Committee approved H.R. 1592 with amendments by a “party-line” vote of 20-14.⁹ Several Republican amendments were considered, but most were defeated.¹⁰ In a press release, Chairman Conyers stated that:¹¹

H.R. 1592 offers federal protection, in conjunction with state and local officials, for victims of hate crimes targeted because of their race, religion, sexual orientation, gender, gender identity, or disability. These crimes constitute an assault not against the victim, but against our communities and against the very foundation of Democracy.¹²

The House passed H.R. 1592 on May 3, 2007, by a vote of 237-180. In a Statement of Administration Policy, however, the Office of Management and Budget (OMB) underscored that if H.R. 1592 would have been presented to the then President, George W. Bush, his senior advisors would have recommended that he veto the bill.¹³

Senator Edward Kennedy, a key sponsor and leading supporter of hate crimes legislation in previous Congresses, introduced a bill (S. 1105) that was nearly identical to H.R. 1592. Senator Kennedy successfully amended the FY2008 Defense Authorization bill (H.R. 1585) with language that was nearly identical to S. 1105 and H.R. 1592, following a vote of 60-39 invoking cloture on September 27, 2007. The Senate passed H.R. 1585 on October 3, 2007. The inclusion of the hate crimes language in H.R. 1585, however, was a point of contention during pre-conference negotiations on the FY2008 Defense Authorization bill.¹⁴ Some Republicans maintained that the President might veto H.R. 1585 if it included such language.¹⁵ Later, when House Democratic leaders determined that they did not have the votes to pass H.R. 1585 with the hate crimes language, House and Senate conferees reportedly agreed to drop that language from the conference agreement on December 6, 2007.¹⁶

In addition, Representative Jackson-Lee introduced the David Ray Hate Crimes Prevention Act of 2007 (H.R. 254), and Representative Carolyn Maloney, the Hate Crime Statistics Improvement Act (H.R. 1164).

⁹ Elaine S. Povich, “Hate Crimes Bill Wrangles Through House Judiciary,” *Congress Daily*, April 25, 2007.

¹⁰ *Ibid.*

¹¹ U.S. House of Representatives, Committee on the Judiciary, “House Judiciary Committee Passes Federal Hate Crimes Bill,” April 25, 2007, available at <http://judiciary.house.gov/newscenter.aspx?A=807>.

¹² *Ibid.*

¹³ Executive Office of the President, Office of Management and Budget, “Statement of Administration Policy: H.R. 1592—Local Law Enforcement Hate Crimes Prevention Act of 2007,” May 3, 2007, available at <http://www.whitehouse.gov/omb/legislative/sap/110-1/hr1592sap-h.pdf>.

¹⁴ John M. Donnelly, “Hate Crimes Language Puts Defense Authorization Conference in Jeopardy,” *CQ Today—Defense*, November 14, 2007.

¹⁵ *Ibid.*

¹⁶ Paul Kane, “Hill Negotiators Drop Hate-Crime Provision; Measure Sought to Extend Protections Based on Gender, Sexual Orientation, Disability,” *Washington Post*, December 7, 2007, p. A13.

Overview of the Hate Crime Debate

Proponents of creating a separate and distinct federal offense for hate crime maintain that there is a fundamental difference between ordinary crime and hate crime. They contend that hate crime is often perpetrated to send a message of threat and intimidation to a wider group. Furthermore, they argue that the effects of hate crime extend beyond the particular victim and reflect more pervasive patterns of discrimination on the basis of race, color, religion, national origin, and other characteristics. In addition, proponents argue that those characteristics, whether real or perceived, identify an individual as belonging to a group that has been marked for persecution and discrimination in the past, and to tolerate any further persecution and discrimination on such counts, as manifested in either crimes against persons or property, is no longer acceptable.

Opponents of creating a separate and distinct federal offense for hate crime often counter that the victim of any crime suffers regardless of the offender's motive. They claim that the perpetrator of an assault in the course of an armed robbery should be punished no less vigorously, no matter what his motivation might have been. They maintain that the public interest would be better served if law enforcement efforts addressed crime across-the-board, rather than focusing on the offender's motive. Opponents also view a separate federal offense for hate crime as redundant and largely symbolic, asserting that a separate hate crime offense would be in addition to the legal prohibitions for traditional crime that already exist under either federal or state law. In addition, they argue that the federal nexus is tenuous, and that such offenses should be handled at the state and local level.¹⁷

Historical Evolution of Hate Crime Policy and Legislation¹⁸

Social scientists view modern hate crime policy in the United States as having evolved, in part, out of the civil rights movement that began in the mid-1950s.¹⁹ Although the initial focus of the civil rights movement was on promoting the legal, social, and economic status of African-Americans, it soon expanded to include other racial and ethnic minorities in the 1960s.²⁰ Through nonviolent protest and other forms of political activism, these "rights-based movements" coalesced to expand civil rights and reduce violence directed at minorities.²¹

By the 1970s, the contemporary women's rights movement and the gay and lesbian rights movement constituted what some experts have termed the "second-wave civil rights

¹⁷ The federal nexus hinges upon powers given to the federal government under the U.S. Constitution. For analysis of federal police powers and hate crime, see CRS Report RL32850, *Hate Crimes: Legal Issues*, by Paul Starett Wallace, Jr.

¹⁸ Janice Cheryl Beaver contributed to portions of this section.

¹⁹ Valerie Jenness and Kendal Broad, *Hate Crimes: New Social Movements and the Politics of Violence* (New York: Aldine De Gruyter, 1997), p. 23. (Hereafter cited as Jenness and Broad, *Hate Crimes*.)

²⁰ *Ibid.*, p. 24.

²¹ Valerie Jenness and Ryken Grattet, *Making Hate Crime a Crime: From Social Movement to Law Enforcement* (New York: American Sociological Association, Rose Series in Sociology, 2001), p. 26. (Hereafter cited as Jenness and Grattet, *Making Hate Crime a Crime*.)

movements.²² In addition, the crime victims' movement emerged as part of the women's rights movement.²³ According to social scientists, by the 1980s, support from both the wider civil rights movement and the crime victims' movement provided the broad constituent base that proved critical to the formation of the early anti-hate-crime movement.²⁴ Even within the anti-hate crime movement, however, defining what constituted a hate crime and who would be protected against such crimes proved a matter of controversy.²⁵

Early Civil Rights Movement

In the not so distant past, some types of bias-motivated violence were in whole or part sanctioned by governments. Federal and state statutes that once legalized slavery loom large as examples of state-sanctioned violence in the United States. Under these laws, Africans and their descendants were subject to acts that resulted in millions of deaths and abuses, including beatings, rape, torture, branding, forced separation of families, trafficking in human beings, and exploitation.²⁶ Although slavery was ended, following Reconstruction, southern states adopted comprehensive segregation laws known as "Jim Crow" laws. These laws, which were upheld by the Supreme Court, effectively institutionalized post-slavery forms of violence and hate against African-Americans from the 1870s to the 1960s.²⁷

With the civil rights movement in the 1950s and 1960s, the struggle to address Jim Crow laws and other forms of discrimination was pioneered by the National Association for the Advancement of Colored People (NAACP) and Southern Christian Leadership Conference (SCLC).²⁸ Under the leadership of Dr. Martin Luther King, Jr. and others, the United States made great strides in addressing social injustices associated with the residual effects of slavery and other forms of institutionalized discrimination that were contrary to the principle of "equal justice for all" as set out in the U.S. Constitution.²⁹ Other disadvantaged groups were influenced by the early civil rights movement, particularly the success of the NAACP and SCLC.³⁰ Based on those models, in part, and the principle of nonviolent protest, minority groups mobilized by organizing themselves into nongovernmental organizations and advocacy groups.³¹

²² See Ryken Grattet and Valerie Jenness, "The Birth and Maturation of Hate Crime Policy in the United States," in Barbara Perry ed., *Hate and Bias Crime: A Reader* (New York: Routledge, 2003), p. 392.

²³ Terry A. Maroney, "The Struggle Against Hate Crime Movement at a Crossroads," *New York University Law Review*, vol 73 (May 1998), pp. 574-575. (Hereafter cited as Maroney, "The Struggle Against Hate Crime.")

²⁴ Jenness and Grattet, *Making Hate Crime a Crime*, p. 27.

²⁵ James B. Jacobs and Kimberly Potter, *Hate Crimes: Criminal Law & Identity Politics* (Oxford University Press, 1998), p. 72. (Hereafter cited as Jacobs and Potter, *Hate Crimes*.)

²⁶ See David Eltis, *The Rise of African Slavery in the Americas* (Cambridge: Cambridge University Press, 2000).

²⁷ Richard Wormser, *The Rise and Fall of Jim Crow: The African-American Struggle Against Discrimination, 1865-1954* (New York: Franklin Watts, 1999).

²⁸ Gilbert Jonas, *Freedom's Sword: the NAACP and the Struggle Against Racism in America, 1909-1969* (New York, NY: Routledge, 2005). Also, see Harvard Sitkoff, *The Struggle for Black Equality, 1954-1992* (New York: Hill and Wang, 1981).

²⁹ Taylor Branch, *Parting the Waters: America in the King Years, 1954-63* (New York: Simon and Schuster, 1988).

³⁰ Jenness and Grattet, *Making Hate Crime a Crime*, p. 24.

³¹ *Ibid.*, p. 26.

Second Wave of Civil Rights Movements

As part of the “second wave of civil rights movements,” the women’s rights movement and the gay and lesbian rights movement emerged in the 1970s out of the wider civil rights movement.³² Particularly in the women’s rights movement, the issue of the rights of victims of violent crime became an important issue, as crime victims and their advocates voiced concern about the “secondary victimization” of victims of rape and domestic abuse.³³ Secondary victimization is a term used to refer to the psychological trauma suffered by crime victims at the hands of the criminal justice system.³⁴ In particular, the crime victims’ movement was critical of the Warren Supreme Court for expanding defendants’ rights in criminal cases.³⁵ Advocates for greater crime victims’ rights asserted that in many cases the perpetrators of crime were inadequately punished and victims were inadequately protected.³⁶ According to social scientists who have studied the hate crime movement the crime victims’ rights movement lent impetus and considerable support to the anti-hate crime movement.³⁷

Anti-Hate Crime Movement

The convergence of the civil rights movement, the women’s movement, the gay and lesbian movements, and the crime victims’ movement created an environment that was open to a wider public discourse about how violence manifests itself as discrimination brought on by deep-seated social biases.³⁸ Out of this wider public discourse, the anti-hate crime movement emerged, calling attention to “hate crime” as a societal problem, which—in the view of the movement—warranted greater legislative intervention at either the state or federal level, or both.³⁹

ADL Model Legislation

By 1981, the Anti-Defamation League of B’nai B’rith (ADL) had developed proposed model hate crime legislation, and advocates for tougher laws targeting “hate crime” began lobbying state and federal legislators.⁴⁰ This model legislation consisted of five proposals that addressed vandalism directed at religious institutions, intimidation, a civil action for both types of crime, data collection, and police training.⁴¹ Based on one or more elements of this model legislation, more than half the states had enacted hate crime legislation by 1994.⁴²

³² Ryken Grattet and Valerie Jenness. “The Birth and Maturation of Hate Crime Policy in the United States,” in Barbara Perry ed., *Hate and Bias Crime: A Reader* (New York: Routledge, 2003), p. 392.

³³ Jenness and Grattet, *Making Hate Crime a Crime*, p. 27.

³⁴ *Ibid.*

³⁵ Maroney, “The Struggle Against Hate Crime,” pp. 574-575.

³⁶ Jenness and Grattet, *Making Hate Crime a Crime*, p. 27.

³⁷ *Ibid.*, p. 28.

³⁸ *Ibid.*, p. 30.

³⁹ Maroney, “The Struggle Against Hate Crime,” p. 580.

⁴⁰ Jenness and Broad, *Hate Crimes*, p. 32.

⁴¹ See discussion of model legislation at http://www.adl.org/99hatecrime/text_legis.asp.

⁴² Jenness and Broad, *Hate Crimes*, p. 40.

Establishing Baseline Hate Crime Statistics

Since 1981, civil rights advocacy groups, including the Southern Poverty Law Center (SPLC), the ADL, the Coalition on Hate Crimes Prevention, and the Klanwatch Project, called for the collection of national hate crime statistics.⁴³ At that time, there was no national source or mechanism for collecting hate crime data. Although some states collected such data, characterizing hate crimes accurately, or determining the extent of hate crimes nationally, was difficult, if not impossible. Nonetheless, civil rights advocates maintained that such data would (1) provide an empirical basis from which to shape public policy, (2) raise the consciousness of reporting law enforcement agencies, and (3) stimulate local prevention strategies, more effective responses, and greater sensitivity to the specific needs of hate crime victims.⁴⁴ Although hate crime proposals initially included categories of protected classes that were limited to race, religion, and ethnicity, the scope of those provisions were later expanded to include sexual orientation and gender.

Gender

Within the ranks of hate crime legislation supporters, the inclusion of gender under the hate crime statistics legislation proved contentious. For example, anti-gender bias-motivated crime was not included as a hate crime by the Coalition on Hate Crimes Prevention, one of the leading advocacy groups.⁴⁵ The coalition noted that statistics on domestic violence and rape were already being collected.⁴⁶ In many of these crimes, they pointed out the offenders were acquaintances of the victims.⁴⁷ They maintained that hate crime involved attacks on victims because of their membership in a group, not because of their individual identities.⁴⁸ Women's advocates countered that many crimes against women are committed by persons other than acquaintances, and that such crimes are often motivated by the offender's irrational fear and hatred of women.⁴⁹ And, even if the offender was an acquaintance, violent crimes against women often involve an element of misogyny.⁵⁰

Some observers have noted that the coalition's opposition to inclusion of anti-gender bias under the definition of "hate crime" was likely based upon the notion that, if it were included, other types of hate crime would be washed out by the prevalence and sheer volume of anti-gender bias motivated crime (misogynistic violence) against women.⁵¹

Sexual Orientation and Gender Identity

Legislative proposals have also included "sexual orientation" and "gender identity" as characteristics, for which certain violent crimes would be considered a "hate crime" if it could be

⁴³ *Ibid.*, p. 38.

⁴⁴ *Ibid.*, p. 38.

⁴⁵ Jacobs and Potter, *Hate Crimes*, p. 72.

⁴⁶ *Ibid.*, p. 72.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*, p. 73.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

shown that the perpetrators were motivated by an animus for their victims for reasons related to those characteristics. Issues related to sexual orientation and gender identity often overlap, but the characteristics are conceptually distinct. While sexual orientation speaks to an individual's sexual desire, gender identity speaks to an individual's gender expression.⁵² "Gender identity" has been defined as a person's internal, deeply felt sense of being male or female that is not always congruous with their biological sex.⁵³ Nevertheless, gender identity was largely subsumed under the debate over sexual orientation and hate crime during the 1980s.⁵⁴

The inclusion of sexual orientation as a characteristic under proposed legislation generated considerable debate during the 1980s in congressional hearings on anti-gay and -lesbian violence and during legislative debates leading to the Hate Crime Statistics Act.⁵⁵ Those debates often focused upon the question of whether sexual orientation should be considered an ascribed and immutable characteristic like race or ethnicity, or a matter of individual choice. In some cases, those favoring the inclusion of sexual orientation as a category for which hate crime statistics should be gathered held the former view, whereas those opposing such proposals often held the latter view.

It has been argued that "transgender" persons—those who do not meet gender-based expectations or engage in gender variant behavior—are inordinately victimized by violent criminals for their nonconformity.⁵⁶ As described below, Congress passed hate crime statistics legislation in 1990 and an amendment thereto in 1994. While sexual orientation was included as a category/characteristic for which federal hate crime data would be gathered, gender identity was not. In addition, neither characteristic is currently included as a protected category under federal civil rights statutes. Federal authorities, consequently, have no jurisdiction over bias-motivated crimes directed against individuals because of their sexual orientation or gender identity.

Hate Crime and Current Law

The term "hate crime" became prevalent during the 1980s, when there appeared to be an upward trend in violent crimes committed against persons for reasons related to their race, religion, sexual orientation, ethnicity, and other characteristics.⁵⁷ As hate crime statistics were not collected

⁵² Paisley Currah and Shannon Minter, *Transgender Equality—A Policy Handbook for Activists and Policy Makers*, (National Center for Lesbian Rights and National Lesbian and Gay Task Force, June 2000), as cited in Samantha J. Levy, "Trans-forming Notions of Equal Protection: The Gender Identity Class," *Temple Political & Civil Rights Law Review*, Fall 2002.

⁵³ *Ibid.*

⁵⁴ Carey Goldberg, "Shunning 'He' and 'She,' They Fight for Respect," *New York Times*, September 8, 1996.

⁵⁵ See U.S. Congress, House Committee on the Judiciary, Subcommittee on Criminal Justice, *Anti-gay Violence*, hearings, 99th Cong., 2nd sess., October 9, 1986; U.S. Congress, House Committee on the Judiciary, *Hate Crimes Statistics Act*, report, 100th Cong., 2nd sess., April 20, 1988; *Congressional Record*, vol. 134 no. 70 (May 18, 1988), p. H 3373; *Congressional Record*, vol. 135 no 87 (June 27, 1989), p. H 3179.

⁵⁶ One such case was dramatized in the 1999 movie entitled "Boys Don't Cry," which was based upon the murder of Brandon Teena. Born a female physiologically, Teena was living as a man in the early 1990s. Upon discovering this, two acquaintances assaulted and raped Teena on December 24-25, 1993. Teena reported the crimes to a Nebraska sheriff's department and the assailants were interviewed, but no arrest warrants were issued. Teena was subsequently murdered by one or both of his assailants on December 30, 1993.

⁵⁷ U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Assistance, *A Policymaker's Guide to Hate Crimes*, NCJ 162304 (March 1997), p. 1.

nationally, however, it was unknown whether hate crime was increasing, remaining the same, or decreasing. Nevertheless, the perception that bias crime was on the rise was reflected in the effectiveness of the anti-hate crime movement,⁵⁸ and many states were prompted to enact legislation against hate crimes.⁵⁹

Congress responded by considering several proposals that addressed hate crime, and it passed legislation that (1) required the Attorney General to capture hate crime statistics annually; (2) increased penalties for certain civil rights offenses that were determined to be bias-motivated; and (3) expanded federal jurisdiction over the arson, destruction, or vandalism of religious property as well as violent interference with an individual's right to exercise religious freedom. Also, Congress attached hate crime-related provisions to other pieces of legislation, such as the FY1997 Defense Authorization Act and the No Child Left Behind Act of 2001. Furthermore, Congress appropriated funding for anti-hate crime training.

Federal Civil Rights Statutes and Hate Crime

Enacted as part of the Civil Rights Act of 1968, section 245 of Title 18 of the United States Code (U.S.C.) prohibits interference with certain "federally protected activities." Specifically, it prohibits the use of force, or threat of force, to injure, intimidate, or interfere with any person for reasons related to their race, color, religion, or national origin, while they are engaged in one of six listed protected activities. Those federally protected activities include

- enrolling in or attending a public school or college;
- participating in or enjoying a service, program, facility, or activity provided or administered by any state or local government;
- applying for or enjoying employment;
- serving in a state court as a grand or petit juror;
- traveling in or using a facility of interstate commerce; and
- enjoying the goods and services of certain places of public accommodation.

Other civil rights statutes provide protection as well. According to the Federal Bureau of Investigation (FBI), its jurisdiction over hate crimes is primarily predicated on section 245, and the following three statutes:

⁵⁸ See generally James B. Jacobs and Kimberly Potter. *Hate Crimes: Criminal Law & Identity Politics* (Oxford University Press: 1998). Also Maroney, p. 580.

⁵⁹ High-profile incidents raised national consciousness about hate crime. Two of those crimes included the 1984 shooting death of Alan Berg, a Denver radio talk show host, and the 1986 beating of three African-American youth that resulted in the death of one of those youth, in the Howard Beach neighborhood of Queens in New York City. Similar crimes preceded enactment of the Hate Crimes Statistics Act (P.L. 101-275). Later in the mid-1990s, the racially motivated 1995 murder of an African-American couple by three soldiers from Fort Bragg in Fayetteville, North Carolina, as well as church burnings in Louisiana and Alabama, prompted congressional action, which led in part to the Hate Crime Sentencing Enhancements Act (P.L. 103-322) and the Church Arson Prevention Act (P.L. 104-155). The brutal 1998 murders of James Byrd, because he was an African-American in Jasper, Texas and of Matthew Shepard, because he was gay, outside of Laramie, Wyoming have appeared to increase the momentum of legislative proposals to create a separate and distinct hate crime offense under federal law, even though suspects in both cases were tried for murder under state law.

- 18 U.S.C. §241, Conspiracy Against Rights;
- 18 U.S.C. §247, Church Arson Prevention Act of 1996; and
- 42 U.S.C. §3631, Criminal Interference with Right to Fair Housing.⁶⁰

The FBI notes that there is no federal jurisdiction over any crimes (civil rights-related or otherwise), in which the offender is motivated by a bias against the victim's sexual orientation. Also, there is only limited federal jurisdiction over crimes motivated by a disability bias.⁶¹ In the latter case, federal jurisdiction is limited to offenses under 42 U.S.C. §3631, pertaining to interfering with a person's right to fair housing.⁶²

Hate Crime Statistics Act

Following several years of debate, Congress passed the Hate Crime Statistics Act (HCSA) in 1990.⁶³ The act requires the Attorney General to acquire data

about crimes that manifest evidence of prejudice based on race, religion, sexual orientation, or ethnicity, including, where appropriate, crimes of murder, non-negligent manslaughter; forcible rape; aggravated assault, simple assault, intimidation; arson; and destruction, damage, or vandalism of property.

In 1994, Congress amended this definition to include prejudice based on "disability" as well.⁶⁴ The HCSA further requires the Attorney General to publish that data on an annual basis. The Attorney General has delegated the duty for compiling hate crime statistics to the FBI as part of the Uniform Crime Reporting (UCR) program.

As required by the HCSA, the FBI first reported hate crime statistics in 1993 for 1991.⁶⁵ Although the statistics for 1991 are considered to be preliminary and were not published in a stand-alone report, the FBI has issued a separate hate crime report for the years 1992 through 2004.⁶⁶ As enacted, HCSA originally required that the data be collected annually for five years. Congress amended the HCSA in 1996 (with the "Church Arson Prevention Act," described below) and made the data collection authorization permanent, requiring the collection of these data "for each calendar year."⁶⁷ As discussed in greater detail below, however, collecting such data has proved problematic.

⁶⁰ See FBI, Investigative Programs, Civil Rights, Hate Crime, at <http://www.fbi.gov/hq/cid/civilrights/hate.htm>.

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ P.L. 101-275, 104 Stat. 140, codified at 28 U.S.C. 534 note.

⁶⁴ P.L. 103-322 (Sec. 320926), 108 Stat. 2131.

⁶⁵ "ADL Welcomes Release of FBI Statistics on Hate Crimes," U.S. Newswire, January 4, 1993.

⁶⁶ The hate crime statistics reports for 1995 through 2004 are available at <http://www.fbi.gov/ucr/ucr.htm#hate>. Copies of the hate crime statistics reports for 1992 through 1994 can be obtained by contacting the FBI Criminal Justice Information Services (CJIS) division.

⁶⁷ P.L. 104-155, 110 Stat. 1392.

Hate Crime Sentencing Enhancements

In 1994, as part of the Violent Crime Control and Law Enforcement Act, Congress included a provision that defined “hate crime” and directed the U.S. Sentencing Commission to promulgate guidelines or amend existing guidelines to provide sentencing enhancements of not less than three offense levels for hate crimes.⁶⁸ The provision defines “hate crime” as

a crime in which the defendant intentionally selects a victim, or in the case of a property crime, the property that is the object of the crime, because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person.⁶⁹

Under this provision, such offenses must be found to be hate crimes beyond a reasonable doubt as determined by “the finder of fact at trial.” The U.S. Sentencing Commission must ensure that sentencing enhancements for hate crimes are reasonably consistent with other guidelines, avoid duplicative punishments for substantially the same offense, and take into account mitigating circumstances that might justify exceptions.⁷⁰

Violence Against Women Act

Some observers, including the ADL, view the Violence Against Women Act (VAWA) as “hate crime” legislation.⁷¹ As described above, gender is included in the definition of “hate crime” under the Hate Crime Sentencing Act, but it is not included in the definition of “hate crime” under the Hate Crime Statistics Act. Among other things, many VAWA provisions provide authorizations and appropriations for law enforcement assistance programs aimed at combating domestic and sexual abuse. In addition, Congress included a provision in this statute that would have given victims a “private right of action” against offenders in cases of gender-related violence.⁷² The Supreme Court, however, ruled that this provision was unconstitutional, as it exceeded congressional power under both the Commerce Clause and the Fourteenth Amendment (*United States v. Morrison*, 529 U.S. 588, 608-10 (2000)). The issues related to this case, however, are beyond the scope of this report. For further information, see CRS Report RL32850, *Hate Crimes: Legal Issues*, by Paul Starett Wallace, Jr.

Church Arson Prevention Act

In response to an increase in church arson incidents, Congress passed the Church Arson Prevention Act of 1996.⁷³ This act expands federal jurisdiction over property crime related to incidents of arson, destruction, or vandalism of places of religious worship, and crime against persons related to violent interference with any individual’s exercise of religious freedom.

⁶⁸ P.L. 103-322 (Sec. 280003), 108 Stat. 2096, codified at 28 U.S.C. §994 note.

⁶⁹ *Ibid.*

⁷⁰ See United States Sentencing Guidelines §3A1.1.

⁷¹ P.L. 103-322, Title IV (Sec. 40001), 108 Stat. 1902.

⁷² 42 U.S.C. §13981.

⁷³ P.L. 104-155, 110 Stat. 1392, codified at 18 U.S.C. §247.

U.S. Armed Forces and Hate Crime Prevention

In the National Defense Authorization Act for Fiscal Year 1997, Congress included a provision requiring the Secretary of Defense to provide ongoing human relations training for armed forces personnel that would cover “race relations, equal opportunity, opposition to gender discrimination, and sensitivity to ‘hate group’ activity.”⁷⁴ It also requires the Secretary to conduct annual surveys on the “state of racial, ethnic, and gender issues and discrimination among members of the Armed Forces,” and to report survey results annually to Congress.⁷⁵

Federal Hate Crime Funding

Federal Grants for Hate Crime Prevention Education

In the No Child Left Behind Act of 2001, Congress included a provision authorizing the Department of Education (ED) to issue grants designed to prevent hate crime.⁷⁶ According to ED, while no monies have been appropriated under this authorization, the Secretary of Education allocated \$1.8 million in FY1996 funding for hate crime prevention education grants under the Safe and Drug-Free Schools and Communities Activities Grants Program.⁷⁷

VAWA Domestic and Sexual Abuse Programs

As described above, VAWA provides authorizations for programs and appropriations to assist state, tribal, city, and county law enforcement agencies with assistance in dealing with domestic and sexual abuse, and other violence directed against women and children. VAWA programs also provide for victim services in cases involving such violence. The 109th Congress has considered legislation to reauthorize and modify existing VAWA programs, as well as establish additional programs. For further information on VAWA, see CRS Report RL30871, *Violence Against Women Act: History and Federal Funding*, and CRS Report RS21259, *Violence Against Women Office: Background and Current Issues*, both by Garrine P. Laney.

State and Local Law Enforcement Assistance

For FY2004 and FY2005, Congress appropriated funding to provide anti-hate crime training to state and local law enforcement agencies. This hate crime grant program is administered by DOJ’s Office of Justice Assistance. For FY2004, Congress appropriated \$989,000.⁷⁸ For FY2005, Congress appropriated \$987,000.⁷⁹ For FY2006, Congress provided no funding for this grant

⁷⁴ Section 571 of P.L. 104-201, 110 Stat. 2532, codified at 10 U.S.C. §113 note.

⁷⁵ Section 571 of P.L. 104-201, 110 Stat. 2532, codified at 10 U.S.C. §451.

⁷⁶ Section 4123 of P.L. 107-110, 115 Stat. 1752, codified at 20 U.S.C. §7133.

⁷⁷ U.S. Department of Education, “Safe and Drug-Free Schools and Communities Federal Activities Grants Program (Hate Crimes Prevention); Final Priority and Inviting Applications for New Awards for Fiscal Year 1996; Notice,” 61 *Federal Register* 34669, July 2, 1996.

⁷⁸ P.L. 108-199, 118 Stat. 56. The total amount appropriated was \$1 million, however, the amount given above reflects certain across-the-board rescissions.

⁷⁹ P.L. 108-447, 118 Stat. 2864. The total amount appropriated was \$1 million, however, the amount given above reflects certain across-the-board rescissions.

program. For FY2007, the Administration requested no funding for hate crimes training for law enforcement.

Federal Hate Crime Statistics

As discussed above, the FBI is responsible for collecting hate crime statistics as part of its UCR program.⁸⁰ In November 2005, the FBI released its thirteenth annual report, *Hate Crime Statistics 2004*.⁸¹ In the same month, the Bureau of Justice Statistics (BJS) also released a report, *Hate Crime Reported by Victims and Police*,⁸² which is primarily based upon data gathered as part of the National Crime Victimization Survey (NCVS).⁸³

Although the BJS findings confirm many observations made by the FBI about hate crime on a percentage basis, there is a considerable difference (nine fold) in the overall number of hate crime victimizations according to the BJS, as compared to the hate crimes reported to the FBI. In addition, a BJS-sponsored report suggested that hate crime as reflected in the UCR statistics may be “seriously under-reported.”⁸⁴ Other shortcomings also limit the usefulness of the UCR hate crime statistics. Policymakers, for example, have been concerned about juveniles and hate crime from the beginning of the wider public discourse on hate crime, but even today UCR data tell us little about the prevalence of juvenile involvement in hate crime. Nevertheless, the UCR program remains the primary source of hate crime data, providing the only national statistical “baseline.”

FBI Uniform Crime Reports (UCR) and Hate Crime

As part of its regular compilation of crime statistics under the UCR program, the FBI has collected hate crime data on crime motivated by a bias against a person’s race, religion, sexual orientation, or ethnicity/national origin since 1992 (with preliminary data for 1991), and against a person’s disability since 1994.

As shown in **Table 1**, the number of law enforcement agencies reporting on hate crimes to the FBI has fluctuated somewhat during the 13 years covered, 1995 through 2007. Nevertheless, the trend has generally been upward. In 2007, of the more than 17,700 law enforcement agencies

⁸⁰ In 1930, the Attorney General made the FBI responsible for collecting, publishing, and archiving national uniform crime statistics for the United States. Today, the UCR program falls under the FBI’s Criminal Justice Information Services Division. The UCR program publishes crime data in three different volumes, which cover crime in the United States generally, hate crime specifically, and law enforcement officers killed and assaulted in the line of duty.

⁸¹ U.S. Department of Justice, Federal Bureau of Investigation, *Hate Crime Statistics 2004*, November 2005, 157 pp, available at <http://www.fbi.gov/ucr/hc2004/openpage.htm>. (Hereafter cited as DOJ, *Hate Crime Statistics 2004*.)

⁸² U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Hate Crime Reported by Victims and Police*, by Caroline Wolf Harlow, NCJ 209911, November 2005, 12 pp, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/hcrvp.pdf>. (Hereafter cited as BJS, *Hate Crime Reported by Victims and Police*.)

⁸³ The NCVS is the principal source of national crime victimization data. Conducted annually by the BJS, the survey includes a nationally representative sample of 42,000 households comprising 76,000 persons and yields statistically significant data on the frequency, characteristics, and consequences of criminal victimizations in the United States. For further information, go to <http://www.ojp.usdoj.gov/bjs/cvict.htm>.

⁸⁴ Jack McDevitt, et al., *Bridging the Information Disconnect in National Bias Crime Reporting, Final Report*, Northeastern University, Institute on Race and Justice, February 2003, p. 18. (Hereafter cited as McDevitt, *Bridging the Information Disconnect*.)

participating in the UCR, 13,241 (74.6%) responded to the FBI about hate crime.⁸⁵ In addition, **Table 1** shows that the number of reported hate crime incidents has fluctuated between a low of 7,163 in 2005 and a high of 9,730 in 2001. The annual average across the 13 years for reported hate crime incidents is 7,945. **Table 1** also shows the number of offenses, victims, and known offenders.

Of the 7,624 hate crime incidents reported to the FBI for 2007, 3,870 (51%) were motivated by a racial bias; 1,400 (18%), by a religious bias; 1,265 (17%) by a sexual-orientation bias; 1,007 (13%), by an ethnicity/national origin bias; 79 (1%), by a disability bias; and three, by multiple biases.

Of the 9,006 offenses reported for 2007, intimidations accounted for 2,565 (28%) offenses; and destruction, damage, or vandalism of property combined for 2,915 (32%) offenses. Simple assault accounted for 1,684 (19%) offenses, and aggravated assault accounted for 1,116 (12%). Other forms of crime against persons (murder, nonnegligent manslaughter, forcible rape, and other) accounted for 43 offenses (less than 1%). Of the nine bias-motivated murders reported for 2007, two stemmed from a racial bias (one anti-black and one anti-multiple races), five stemmed from sexual orientation (all five were anti-homosexual), and two stemmed from a ethnic/national origin bias (both were anti-hispanic). Other forms of crimes against property (robbery, burglary, larceny-theft, motor vehicle theft, arson, and other) accounted for 664 (7%) offenses. Crimes against society accounted for 19 offenses (less than 1%).

Table 1. Eleven-Year Hate Crime Summary Table

Year	Agencies Participating	Population covered ^a (%)	Agencies Reporting	Incidents ^b	Offenses ^c	Victims	Known Offenders
1995	9,584	74%	1,560	7,947	9,895	10,469	8,433
1996	11,354	83%	1,834	8,759	10,706	11,039	8,935
1997	11,211	82%	1,732	8,049	9,861	10,255	8,474
1998	10,730	78%	1,810	7,755	9,235	9,722	7,489
1999	12,122	83%	1,815	7,876	9,301	9,802	7,271
2000	11,690	84%	1,892	8,063	9,430	9,924	7,530
2001	11,987	85%	2,106	9,730	11,451	12,020	9,239
2002	12,073	86%	1,868	7,462	8,832	9,222	7,314
2003	11,909	83%	1,967	7,489	8,715	9,100	6,934
2004	12,711	87%	2,046	7,649	9,035	9,528	7,145
2005	12,417	83%	2,037	7,163	8,380	8,804	6,804
2006	12,620	85.2	2,105	7,722	9,080	9,652	7,330
2007	13,241	86.3	2,025	7,624	9,006	9,535	6,965

Source: CRS presentation of FBI data taken from the annual *Hate Crime Statistics* reports for 1995-2007.

- CRS based these percentages upon the estimated U.S. population covered, as reported by the FBI, over the estimated U.S. resident population.
- Incidents often include multiple offenses.
- Offenses include the number of violations for which charges were filed.

⁸⁵ DOJ, *Hate Crime Statistics 2007*, p. 1.

Of the 9,535 victimizations reported for 2007, 4,956 (52%) were race-based. An anti-Black bias accounted for 3,434 (36%) of all victims, and an anti-White bias for 908 (10%) offenses. An anti-religion bias accounted for 1,628 (17%) victims, with an anti-Jewish bias accounting for 1,127 (12%) victims. An anti-sexual orientation bias accounted for 1,512 (16%) victims, with an anti-male homosexual bias accounting for 890 (9%) victims. An anti-ethnicity/national origin bias accounted for about 1,512 (16%) victims. And an anti-disability bias accounted for 84 victims (nearly 1%).

BJS Hate Crime Victimization Statistics

Although many of the findings in the FBI and BJS reports are similar, the number of victimizations reported in each report stand in stark contrast. For example, for a 3½-year period (July 2000 through December 2003), BJS reported an annual average of 210,000 hate crime victimizations. Of these victimizations, survey results indicated that victims only reported them to the police on 92,000 occasions. For a comparable time period, 2000 through 2003, the FBI reported 40,266 victimizations, or about 10,000 annually.⁸⁶ Hence, BJS reported over nine times the number of hate crime victimizations than were reported by state and local police to the FBI for about the same time period. This variance, on the one hand, suggests that some state and local police agencies may be resistant to classifying crimes as hate crimes, despite the perceptions of victims. On the other hand, it also suggests that the FBI and BJS's methodologies for determining whether a crime should be considered a hate crime are very different.

For example, under the NCVS definition of hate crime there must be corroborating evidence of a bias motivation, which could include (1) the offender using derogatory language, (2) the offender leaving hate symbols, or (3) the police confirming that a hate crime had taken place.⁸⁷ The FBI protocol for determining a hate crime appears to be more rigorous. For such determinations, the FBI directs law enforcement agencies to consider whether several factors support a finding of bias.⁸⁸ Those factors include the following:

- Were the offender and victim of different race, religion, disability, sexual orientation, and/or ethnicity/national origin?
- Did the offender make oral comments, written statements, or gestures, which indicated his bias?
- Were bias-related drawings, markings, symbols, or graffiti left at the crime scene?
- Were other objects, items, or things used that would indicate a bias?
- Is the victim a member of a racial, religious, disability, sexual orientation or ethnic/national origin group, which is overwhelmingly outnumbered by other residents in the neighborhood where the victim lives and the incident took place?

⁸⁶ For 2000 through 2003, the FBI reported over 40,266 hate crime victimizations, or an annual average of 10,067.

⁸⁷ BJS, *Hate Crime Reported by Victims and Police*, p. 2.

⁸⁸ U.S. Department of Justice, Federal Bureau of Investigation, Criminal Justice Information Services Division, *Hate Crime Data Collection Guidelines: Uniform Crime Reporting*, Revised October 1999, p. 4, available at <http://www.fbi.gov/ucr/hatecrime.pdf>.

- Was the victim visiting a neighborhood where previous hate crimes were committed against other members of his racial, religious, disability, sexual-orientation, or ethnic/national origin and where tensions remain high against his group?
- Had several incidents occurred in the same locality, at or about the same time, and the victims were all of the same race, religion, disability, sexual orientation, or ethnicity/national origin?
- Did a substantial portion of the community where the crime occurred perceive the incident as bias-motivated?
- Was the victim engaged in activities promoting his race, religion, disability, sexual orientation, or ethnicity/national origin at the time of the incident?
- Did the incident coincide with a holiday or a date of particular significance related to a race, religion, disability, sexual orientation, or ethnicity/national origin?
- Was the offender previously involved in a similar hate crime or a hate group member?
- Were there indicators that a hate group was involved?
- Did a historically established animosity exist between the victim's and the offender's groups?
- Was the victim, although not a member of a targeted racial, religious, disability, sexual orientation, or ethnic/national origin group, supporting the precepts of a victim group?⁸⁹

Despite improvements in collection and coverage, observers of the FBI data have long suspected that hate crime could be under-reported.

Reporting Hate Crime: Complications and Shortcomings

Regarding under-reporting hate crime, DOJ has made some general observations. For example, some small and rural law enforcement agencies do not have the manpower, inclination, or expertise to report such crimes.⁹⁰ Victims are often reluctant to report such crime for fear of reprisals in some cases.⁹¹ For example, studies have cited the prevalence of nonreporting by victims of crimes based on sexual orientation for fear of secondary victimization and concerns about public disclosure of one's homosexuality.⁹² In other cases, some agencies are reluctant to report such crimes for fear of the cultural, political, and economic repercussions that could result from admitting that such problems exist in their communities.⁹³ Differences in state hate crime

⁸⁹ U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Assistance, *A Policymaker's Guide to Hate Crimes*, NCJ 162304, March 1997, pp. 5-6.

⁹⁰ *Ibid.*, pp. 9-10.

⁹¹ *Ibid.*, pp. 10-11.

⁹² Gregory M. Herek, Jeanine C. Cogan, and J. Roy Gillis. "Victim Experiences in Hate Crimes Based on Sexual Orientation," in Barbara Perry ed., *Hate and Bias Crime: A Reader* (New York: Routledge, 2003), pp. 243-259.

⁹³ DOJ, *Hate Crime Statistics 2004*, p. 10.

statutes have also led to differences in collection that make it difficult to compare such data from one jurisdiction to another and weaken the overall national assessment of hate crime trends and patterns.⁹⁴

To address some of those shortcomings, the FBI has developed an anti-hate crime training curriculum for state, tribal, and local law enforcement.⁹⁵ In addition, the FBI continues to advance its latest generation crime statistics program, the National Incident Based Reporting System (NIBRS). Under this more comprehensive crime reporting system, the FBI endeavors to capture additional data, including demographic characteristics for both victim and offender, that will improve determinations as to whether a crime is bias-motivated.

As of November 2005, 29 states were certified participants in NIBRS.⁹⁶ Those states were Arizona, Arkansas, Colorado, Connecticut, Delaware, Idaho, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Missouri, Nebraska, New Hampshire, North Dakota, Ohio, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, and Wisconsin.⁹⁷ Of these states, however, only eight submit all their data through NIBRS; these were Delaware, Idaho, Iowa, South Carolina, Tennessee, Virginia, West Virginia, and Vermont.⁹⁸ As full state participation in NIBRS is far from complete, the FBI continues to maintain the pre-existing UCR summary reporting system.

In addition, in one DOJ-sponsored study published in July 2000, Northeastern University researchers reported that UCR hate crime statistics may not be comprehensive. Among other things, the researchers pointed to “false zeroes” as evidence that hate crime is under-reported.⁹⁹ Based on a national mail survey of law enforcement investigators in several agencies, the study’s researchers reported that 31% of respondents (n=58) indicated that they believed their departments had investigated hate crimes in 1997, yet their departments had reported “zero” hate crimes to the FBI as participants in the UCR program.¹⁰⁰ Consequently, the researchers concluded that there was a disconnect between what line officers believed and what was reported to the FBI. The Northeastern researchers concluded that, because of problems with under-reporting, UCR statistics do not capture an accurate enough picture of hate crime nationally to allow for “cross-jurisdictional comparisons or national estimates.”¹⁰¹

In a followup study published in February 2003, the Northeastern University researchers reiterated the previous report’s finding that there was evidence that hate crime was “seriously under-reported” in the UCR statistics.¹⁰² Based on examining the hate crime reporting procedures

⁹⁴ Rory McVeigh, et al., “Hate Crime Reporting as a Successful Social Movement Outcome,” *American Sociological Review*, vol. 68, iss. 6 (December 2003), p. 3.

⁹⁵ See <http://www.fbi.gov/hq/cid/civilrights/hate.htm>.

⁹⁶ U.S. Department of Justice, Federal Bureau of Investigation, *Crime in the United States 2004, Uniform Crime Reports*, November 2005, p. 5.

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

⁹⁹ Jack McDevitt, et al., *Improving the Quality of and Accuracy of Bias Crime Statistics Nationally: An Assessment of the First Ten Years of Bias Crime Data Collection*, Northeastern University, Center for Criminal Justice Policy Research, Executive Summary, July 2000, p. 3. (Hereafter cited as McDevitt, *Improving the Quality and Accuracy of Bias Crime Statistics Nationally*.)

¹⁰⁰ *Ibid.*, p. 61.

¹⁰¹ *Ibid.*, p. 3.

¹⁰² Jack McDevitt, et al., *Bridging the Information Disconnect in National Bias Crime Reporting, Final Report*, (continued...)

at several police departments across the United States, the researchers concluded that the FBI-recommended two-tier reporting process was the best procedure for ensuring greater accuracy and consistency in hate crime reporting.¹⁰³ This process removes the responsibility for making the final bias motivation determination from the responding patrol officers and gives it to a criminal intelligence analyst or a hate crime specialist. Although the Northeastern University researchers made other recommendations, which are beyond the scope of this report, they concluded that because of problems with under-reporting, UCR statistics do not capture an accurate picture of hate crime nationally.¹⁰⁴

NBIRS Hate Crime Statistics and Juveniles

The involvement of juveniles in hate crime has been a concern for policymakers. Nevertheless, data on juvenile victims and offenders is limited.¹⁰⁵ For example, researchers at West Virginia University (WVU) have provided analysis of selected NIBRS data, which could suggest that juveniles represent a disproportionately high percentage of victims and offenders in hate crimes.¹⁰⁶ The WVU researchers culled through 5,855 bias crime incidents reported through NIBRS for the years 1995 through 2000.¹⁰⁷ Of the 5,855 incidents, there were 7,070 victims and 7,566 offenders of all ages. The victim's age was recorded in 4,874 incidents involving crimes against persons.¹⁰⁸ The offender's age was recorded in 3,330 of these incidents in crimes against both persons and property.¹⁰⁹ For hate crime incidents, in which the victims and offenders' ages were recorded, juveniles accounted for 26.7% (1,305) of victims and 29.1% (969) of offenders.¹¹⁰ However, these hate crime cases, as selected from NIBRS, do not represent a random or representative sample. Hence, it would not be valid to make any generalizations from those data about hate crime nationally regarding juvenile victims or offenders.

Hate Crime Bills in the 111th Congress

In the 111th Congress, several bills were reintroduced from the 110th Congress that would address hate crime issues. As described below, the House has passed and the Senate has considered hate crime legislation (H.R. 1913 and amendments to S. 1390).

(...continued)

Northeastern University, Institute on Race and Justice, February 2003, p. 18.

¹⁰³ *Ibid.*, p. 91.

¹⁰⁴ *Ibid.*, p. 3.

¹⁰⁵ Under the UCR program, reporting agencies record the age, sex, and race for both adult and juvenile arrestees. The UCR program, as described above, consists of the older summary reporting system and NIBRS. Under NIBRS, more comprehensive data is collected about crimes. For example, under NIBRS, data are collected for victims under 12 years of age, whereas similar data are not collected under the summary reporting system.

¹⁰⁶ James J. Nolan, III, et al., *NIBRS Hate Crimes 1995-2000, Juvenile Victims and Offenders*, available at <http://www.as.wvu.edu/~jnolan/nibrshatecrime.html>.

¹⁰⁷ It is notable, however, that during these years, 48,449 hate crime incidents in total were reported to the FBI. Consequently, only 12% of hate crimes were reported through NIBRS.

¹⁰⁸ James J. Nolan, III, et al., *NIBRS Hate Crimes 1995-2000, Juvenile Victims and Offenders*, available at <http://www.as.wvu.edu/~jnolan/nibrshatecrime.html>.

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

Local Law Enforcement Hate Crimes Prevention Act of 2009 (H.R. 1913)

Representative Conyers, chair of the House Judiciary Committee, introduced H.R. 1913 on April 2, 2009. On April 27, 2009, the House Committee on the Judiciary filed the report on H.R. 1913 (H.Rept. 111-86, Part I). On April 28, the committee filed a supplemental report (H.Rept. 111-86, Part II). The House passed this bill on April 29, 2009, by a recorded vote: 249-175 (Roll no. 223).

The bill would authorize the Attorney General to provide assistance (technical, forensic, prosecutorial, or other), when requested by a state, local, or tribal official, for crimes that (1) would constitute a violent crime under federal law or a felony under state or tribal law, and (2) are motivated by the victim's actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, or disability. It would also direct the Attorney General to give priority to crimes committed in more than one state, and to rural jurisdictions that would have difficulty covering the extraordinary investigatory or prosecutorial expenses.

To further assist state, local, or tribal officials with the expenses related to hate crime cases, the bill would authorize the Attorney General to establish a grant program. In implementing this grant program, the bill would direct the Office of Justice Programs to (1) work closely with funded jurisdictions to ensure that the needs of all interested parties were met, and (2) award grants to programs aimed at combating hate crime committed by juvenile offenders. The bill would set forth certain parameters for the grant application process and would authorize appropriations of \$5 million for FY2010 and FY2011. And it would authorize appropriations for DOJ to hire additional staff to respond to alleged violations of the hate crime provisions described below.

The bill would broaden federal coverage of hate crimes under two scenarios. First, under any circumstance, it would prohibit willfully inflicting bodily injury to any person, attempted or otherwise, through the use of fire, a firearm, explosive, or incendiary device, if such conduct were motivated on the basis of actual or perceived race, color, religion, or national origin of any person. Second, it would prohibit the same conduct, if such conduct were motivated on the basis of the victim's religion, national origin, gender, sexual orientation, gender identity, or disability. The reach of the second offense, however, would be limited to specific jurisdictional ties to the interstate Commerce Clause of the U.S. Constitution, which are outlined in the bill.

Under either scenario, offenders could be sentenced to 10 years' imprisonment and a fine, or for any term up to life imprisonment if the crime resulted in the victim's death, or involved attempted murder, kidnapping, attempted kidnapping, rape, or attempted rape.

For hate crime cases prosecuted federally under these provisions, the bill would require the Attorney General, or his subordinate, to certify that pertinent state or local officials (1) were unable or unwilling to prosecute, (2) favored federal prosecution, or (3) prosecuted, but the investigation or trial's results did not satisfy the federal interest to combat hate crimes.

Finally, the bill would establish a seven-year statute of limitations for hate crimes that did not result in death and a rule of evidence that makes inadmissible a defendant's expressions and associations that are not specifically related to the offense.

Matthew Shepard Hate Crimes Prevention Act (S. 909)

On April 28, 2009, Senator Reid (for Senator Kennedy and others) introduced S. 909. On June 25, 2009, the Committee on the Judiciary held a hearing on this bill, which is similar to the House-passed H.R. 1913 (described above). Unlike the House bill, the Senate bill includes (1) congressional findings; (2) a provision that would explicitly extend federal jurisdiction over hate crimes to include special maritime and territorial jurisdiction of the United States (in federal enclaves and ships of U.S. registry); and a provision that amends the Hate Crime Statistics Act to require that data are collected on offenses related to gender and gender identity, as well as on offenses committed by and directed against juveniles. Unlike the House bill, moreover, the Senate bill does not include a seven-year statute of limitations on such offenses.

Amendments to the FY2010 Defense Authorization Act (S. 1390)

On July 16, 2009, Senator Leahy successfully amended S. 1390 with language (S.Amdt. 1511) that was nearly identical to S. 909 (described above), except that the Leahy amendment included a provision that states that courts may consider relevant evidence of speech, beliefs, or expressive conduct to prove an element of an offence, but at the same time nothing in the bill should be construed to prohibit and constitutionally protected speech, expressive conduct, or activities. Along these lines, Senator Leahy offered a perfecting amendment to his own amendment regarding the First Amendment and related constitutional protections (S.Amdt. 1613), which the Senate adopted by voice vote.

Senator Hatch offered an amendment (S.Amdt. 1611) that would have nullified the provisions of the Leahy amendment and, in its stead, would have required GAO, in consultation with the National Governors' Association, to submit a report to Congress within 18 months of enactment that analyzed certain violent crimes in twenty jurisdictions that manifest evidence of prejudice based upon race, religion, disability, sexual orientation, or ethnicity. The amendment would have required further that half of those selected jurisdictions would be those with hate crime statutes, and the other half, those without such statutes. It would have also authorized the Attorney General, acting through the FBI Director, to make grants of up to \$100,000 to state and local governments to assist in the investigation and prosecution of crimes motivated by an animus towards a victim because of his membership in a particular class or group. The Senate rejected the Hatch amendment by a recorded vote, 29-62.

Senator Brownback offered an amendment (S.Amdt. 1610) to the Leahy amendment, which was adopted by a recorded vote, 78-13, that would prohibit the implementation of any provision of the Leahy amendment in a manner that would violate or burden the exercise of an individual or group's First Amendment rights to free speech and association that were not intended to either plan or incite violence against another individual. Lastly, the Senate adopted a motion to invoke cloture by a recorded vote, 63-28, and the Leahy amendment was adopted by voice vote.

On July 20, 2009, the Senate considered and passed four more amendments to S. 1390. Two of these amendments dealt with death penalty in hate crime cases. Senator Kennedy offered an amendment (S.Amdt. 1614) that would require the Attorney General to establish guidelines under which federal prosecutors would seek the death penalty for hate crime offenses that involved a "loss of life" and, in those cases, would require the Attorney General to certify with particularity in the indictment the facts of the case that support such a judgment. Senator Sessions offered an amendment (S.Amdt. 1615) that would authorize the use of the death penalty in hate crimes cases

if “death results from the offense.” Senator Sessions offered another amendment (S.Amdt. 1617) that would require the Attorney General to establish guidelines under which hate-crime offenses would be identified and prosecuted according to neutral and objective criteria. Senator Sessions also offered an amendment (S.Amdt. 1616) that would prohibit the assault and battery of a person on account of their military service or status as a member of the U.S. Armed Forces. The latter amendment was adopted by a recorded vote, 92-0, while the former three amendments were adopted by unanimous consent. The Senate passed S. 1390 by a recorded vote, 87-7, on July 23, 2009.

Noose Hate Crime Act of 2009 (H.R. 70)

On January 6, 2009, Representative Jackson-Lee introduced H.R. 70, a bill that would establish a federal penalty for displaying nooses with the intent of intimidating any person because of his or her race, color, religion, or national origin. The penalty under this bill would be a term of imprisonment of not more than two years and a fine, or both. This bill was introduced in the 110th Congress as H.R. 6777.

David Ray Hate Crime Prevention Act of 2009 (H.R. 256)

On January 7, 2009, Representative Jackson-Lee introduced H.R. 256, a bill that includes criminal provisions that are similar to those described above under H.R. 1913. It also includes similar findings and would have authorized a grant program to assist state, local, and tribal governments with hate crime cases, as well as would authorize DOJ to hire additional staff to enforce hate crime statutes. In addition, it includes a provision that would direct the U.S. Sentencing Committee to conduct a study to determine whether it would be appropriate to adjust the sentencing guidelines for hate crimes that involve the adult recruitment of minors to commit such offenses. This bill was previously introduced as H.R. 254 in the 110th Congress.

David Ray Ritcheson Hate Crime Prevention Act (H.R. 262)

On January 7, 2009, Representative Jackson-Lee introduced H.R. 262, a bill that would provide victims of hate crime with several benefits, including (1) unemployment insurance, (2) family and medical leave, and (3) temporary housing benefits. The bill would also prohibit health care insurers from considering factors related to hate crime for the purposes of determining a victim’s health insurance eligibility or costs related to such coverage. It would also authorize the Attorney General to award grants to (1) provide victims and their dependents with counseling; (2) establish and national clearing house on hate crime information and statistics; and (3) establish a national, toll-free telephone hotline and a website dedicated to assisting victims of hate crime. The bill would also authorize the Secretary of Education to provide grants to educational institutions to improve and provide programs on hate crime. This bill was previously introduced as H.R. 6776 in the 110th Congress.

Hate Crime Statistics Improvement Act of 2009 (H.R. 823)

On February 3, 2009, Representative Maloney introduced H.R. 823, a bill that would amend the Hate Crimes Statistics Act to require that the FBI collect statistics on gender-based hate crime. Under current law, such statistics are collected on the basis of race, religion, sexual orientation,

ethnicity, and disability. This bill was previously introduced in the 109th and 110th Congress (H.R. 1193 and H.R. 1164).

Hate Crime Legislative Action the 110th Congress

In the 110th Congress, hate crime bills were passed by the House and Senate, but neither bill was enacted.

Local Law Enforcement Hate Crimes Prevention Act of 2007 (H.R. 1592)

On March 20, 2007, Representative Conyers introduced H.R. 1592. This bill was nearly identical to H.R. 2662, a version of which was passed in the 109th Congress. On April 17, the Judiciary Subcommittee on Crime, Terrorism, and Homeland Security held a hearing on H.R. 1592. On April 24, the Subcommittee approved this bill. On April 25, the Judiciary Committee amended and approved H.R. 1592 in a markup that lasted a contentious 10 hours. The House passed this bill on May 3, 2007, by a vote of 237-180.

H.R. 1592, as introduced, set out congressional findings regarding the harmfulness posed to society by hate crimes, that is, crime motivated by the victim's actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, or disability. The bill also included findings regarding the constitutionality of federal intervention into such matters under the Commerce Clause of the U.S. Constitution, as well as sections of the Thirteenth, Fourteenth, and Fifteenth Amendments.¹¹¹ Other provisions in H.R. 1592 were nearly identical to those in H.R. 1913 (described above). Also, H.R. 1592 would have amended the HCSA to require that the FBI collect statistics on gender-and gender identity-related bias crimes, as well as juvenile victims and offenders. Under current law, such statistics are collected on the basis of race, religion, sexual orientation, ethnicity, and disability.

H.R. 1592 was nearly identical to language that was included in the Senate-passed FY2008 Defense Authorization bill (H.R. 1585) and a measure (S. 1105) introduced by Senator Kennedy (described below).

Local Law Enforcement Enhancement Act 2007 (S. 1105)

Introduced by Senator Edward Kennedy on April 12, 2007, S. 1105 was similar to H.R. 1592, except that it also included a provision that was similar to one in H.R. 259, which would have directed the U.S. Sentencing Committee to conduct a study to determine whether it would be appropriate to adjust the sentencing guidelines for hate crimes that involve the adult recruitment of minors to commit such offenses. Senator Kennedy introduced a similar measure (S. 1145) in the 109th Congress, which was referred to the Senate Judiciary Committee, but no further action was taken on that bill.

¹¹¹ For discussion of constitutional issues, see CRS Report RS22812, *Constitutional Limits on Hate Crime Legislation*, by Alison M. Smith.

Amendments to the FY2008 Defense Authorization Act (H.R. 1585)

On September 27, 2007, Senator Kennedy successfully amended the FY2008 Defense Authorization bill (H.R. 1585) with language that was nearly identical to S. 1105 and H.R. 1592 (described above), following a vote of 60-39 to invoke cloture. Senator Orrin Hatch also successfully amended H.R. 1585 by a vote of 96 to 3. The Hatch amendment would have required GAO to report on hate crimes in twenty jurisdictions and authorized the FBI Director to make grants of up to \$100,000 to state and local governments to assist in the investigation and prosecution of hate crimes. The Senate passed H.R. 1585 on October 3, 2007.

Hate Crime Legislative Action in the 107th through 109th Congresses

In four Congresses, the Senate has acted upon hate crime legislation. In the 107th Congress, the Senate Judiciary Committee reported hate crime legislation, but cloture motions to bring this bill to the Senate floor for further consideration were defeated. In the 106th and 108th Congresses, the Senate passed similar legislation as amendments to other bills on three other occasions. In the 109th Congress, the House passed hate crime legislation.

In the 108th Congress, on June 15, 2004, the Senate passed hate crimes legislation as an amendment offered by Senator Gordon H. Smith to the FY2005 Defense Authorization Act (S. 2400). This amendment would have broadened federal jurisdiction over hate crime by, among other things, creating hate crime offenses under federal law. The language was nearly identical to the Local Law Enforcement Enhancement Act of 2003 (S. 966), which was introduced by Senator Edward Kennedy. The amendment passed by a recorded vote, 65-33.

In the 107th Congress, on May 9, 2002, the Senate Judiciary Committee successfully reported out the Local Law Enforcement Enhancement Act of 2001 (S. 625; S.Rept. 107-147), which was introduced by Senator Kennedy. Senator Tom Daschle, the Majority Leader, attempted to invoke cloture and bring this bill to floor consideration, but the cloture bid was defeated.

In the 106th Congress, second session, on June 24, 2000, the Senate passed two hate crime-related amendments to the FY2001 Defense Authorization Act (S. 2549). Senator Kennedy offered language that would have broadened federal jurisdiction over hate crime. The language of this amendment was similar to the Hate Crimes Prevention Act (S. 622), which was also sponsored by Senator Kennedy. Senator Orrin Hatch offered an alternative amendment that would have required the Department of Justice and the then General Accounting Office to conduct studies on hate crime activity. The language of this amendment was similar to a bill to combat hate crimes (S. 1406), which was introduced by Senator Hatch. The Hatch amendment passed by a recorded vote, 50-49. The Kennedy amendment passed by recorded vote, 57-42. On September 13, 2000, the House passed a non-binding motion to instruct the conferees to accept the hate crime legislation as part of the final bill by recorded vote, 232-192.

In the 106th Congress, first session, on July 22, 1999, the Senate passed two hate crime-related amendments to the FY2000 Commerce-Justice-State Appropriations Act (S. 1217). Senator Kennedy offered language that was similar to his and Senator Craig's amendments described above. This amendment passed by voice vote, as did an amendment offered by Senator Hatch as

an alternative. The Hatch amendment would have provided \$5 million for a federal grant program to assist state, local, and tribal governments in prosecuting hate crimes.

In the 109th Congress, Representative John Conyers, who was then the ranking minority member on the Judiciary Committee, successfully offered an amendment to the Children’s Safety Act (H.R. 3132) on September 14, 2005, which included the language of the Local Law Enforcement Hate Crimes Prevention Act of 2005 (H.R. 2662).¹¹² The Conyers’ amendment would have broadened federal jurisdiction over hate crime by, among other things, establishing two partially overlapping categories of hate crime offenses under federal law.¹¹³ First, it would have prohibited the attempted or otherwise willful bodily injury to any person through the use of fire, a firearm, explosive, or incendiary device, if such criminal conduct were motivated on the basis of actual or perceived race, color, religion, or national origin of any individual. Second, it would have prohibited the same criminal conduct, if such conduct were motivated on the basis of an individual’s gender, sexual orientation, gender identity, or disability, in addition to the other four characteristics listed above.

As asserted in the amendment’s findings, both provisions were arguably founded upon Congress’s legislative authority under the Commerce Clause of, as well as provisions of the Thirteenth, Fourteenth, and Fifteenth amendments to the U.S. Constitution. The reach of the second offense, however, would have been limited to specific jurisdictional ties to the Commerce Clause, which were outlined in the amendment. In the past, opponents of expanding federal jurisdiction over hate crime have argued that such an expansion would be an overreach of congressional power, which could possibly be challenged in the Supreme Court. Opponents pointed to Supreme Court cases in which rulings were made based upon tighter interpretations of the Commerce Clause.¹¹⁴

In addition to the language of H.R. 2662, Representative Conyers also offered another hate crime-related amendment that would have required additional hate crime statistics be collected for gender-biased crime and that breakouts be reported for juvenile victims and offenders.¹¹⁵ With little debate, the House adopted this amendment by a voice vote.

The language of the Local Law Enforcement Hate Crimes Prevention Act of 2005 (H.R. 2662) proved more divisive, however. Representative F. James Sensenbrenner, Jr., chairman of the Judiciary Committee, argued that the amendment would be a “poison pill,” and would possibly erode the bill’s bipartisan support.¹¹⁶ The House nevertheless passed the amendment by a recorded vote of 223-199, on September 14, 2005. On the same day, the House passed H.R. 3132 by a recorded vote, 371-52. The Senate did not act upon this measure, however. On March 8, 2006, the House passed the Children’s Safety and Violent Crime Reduction Act of 2006 (H.R. 4472). Although this bill included many of the provisions that were in H.R. 3132, it did not include the hate crime language. As the bill was brought up under suspension of the rules, amendments were not considered and the hate crime issue was not addressed during consideration of H.R. 4472.

¹¹² House Amendment 544.

¹¹³ Proposed 18 U.S.C. §249.

¹¹⁴ For further information, see CRS Report RL32850, *Hate Crimes: Legal Issues*, by Paul Starett Wallace, Jr.

¹¹⁵ House Amendment 528.

¹¹⁶ *Congressional Record*, September 14, 2005, p. H7920.

On May 25, 2005, Senator Edward Kennedy introduced the Local Law Enforcement Enhancement Act of 2005 (S. 1145). This bill was similar to H.R. 2662 and the Conyers amendment to the House-passed version of H.R. 3132.

Possible Options and Issues for Congress

As noted in the introduction, an issue for Congress is whether the prevalence and harmfulness of hate crime warrants greater federal intervention to ensure that such crimes are systematically addressed at all levels of government (federal, state, tribal, city, and county). Although many believe that hate crime is deplorable, determining the federal role in combating hate crime has proven complicated and divisive.

Should Federal Jurisdiction Be Broadened?

As described above, Congress has and may in the future consider legislation to broaden federal jurisdiction over hate crime by creating a separate offense for such crimes under federal law. Although FBI hate crime statistics document that hate crimes continue to be perpetrated, it is questionable whether the statistics are robust enough to capture an accurate picture that allows for cross-jurisdictional comparisons or national estimates.¹¹⁷ Nor is it definitively known whether state and local authorities are unable or unwilling to investigate and prosecute such crimes. Consequently, opponents of creating a separate hate crime offense are likely to argue on the side of caution until better data are available and that Congress should not intervene into matters that may be best handled at the state and local level.

Proponents counter that state and local authorities are often not in a position to pursue such cases because of their complexity and cost. Moreover, they point out that under the Conyers/Kennedy proposal, federal intervention would be the course of last resort. Under their proposal, the Attorney General would have to certify that the local authorities had been unable or unwilling to prosecute a hate crime under existing state laws, among other conditions, before the federal authorities would take up the case. Finally, proponents argue that it is the federal government's duty to ensure that such cases are adequately addressed to combat vestiges of biases that as a civil society the United States has collectively found to be intolerable.

Should Baseline Statistics Be Improved?

In light of the finding that the data collected under the HCSA are arguably not complete and comprehensive enough to yield valid hate crime trends and patterns at the national level, Congress could choose to require the collection of additional data. As described above, Senator Hatch has made past proposals to assess UCR hate crime data.¹¹⁸ As a result of such an assessment, new reporting requirements might address the “false zero” phenomenon, regional trends, types of crime, trial outcomes, as well as sentences imposed.

¹¹⁷ Jack McDevitt et al., *Bridging the Information Disconnect in National Bias Crime Reporting, Final Report*, Northeastern University, Institute on Race and Justice, February 2003, p. 3.

¹¹⁸ See amendment number 3474 in the *Congressional Record*, June 24, 2000, p. S5340. In addition, see S. 1406, a bill introduced in the 106th Congress.

As a corollary issue, Congress could address the slow pace with which states are participating in the next-generation FBI crime statistics program, NIBRS. Congress could call upon the Bureau of Justice Statistics or the Government Accountability Office to assess the status of the NIBRS program, as a first step towards establishing a timetable for the program's full implementation with an eye on dovetailing such efforts with a more complete and comprehensive hate crime statistics report.

Should Gender Be Included in Hate Crime Statistics?

If Congress should consider legislation to broaden federal jurisdiction over hate crime, it is likely that proposals to expand the federal collection of hate crime statistics to include gender would be offered. Proponents assert that crimes that are motivated by a gender-bias ought to be singled out for special consideration as a hate crime. They point out that, like other forms of hate crime, violence against women in the United States has reached levels that require greater monitoring, and federal intervention is necessary.

Opponents counter that the consideration of gender as a protected class suggests that every domestic abuse, battery, rape, and murder case, in which the victim was of the opposite gender, could plausibly be considered a hate crime. Opponents contend that the inclusion of gender would increase the scope of what constitutes a hate crime to the point that hate crime statistics would largely become meaningless.

Should Breakouts for Juveniles Be Included?

Proposals have been considered to require hate crime statistics be expanded to include breakouts for juvenile victims and offenders. Selected data arguably suggest that juveniles could represent a disproportionately high percentage of victims and offenders in hate crimes. Yet those data are not robust enough to draw valid statistical conclusions. Although few would argue that better data would not be useful, opponents argue that an objective assessment of the current hate crime statistics should be made before placing additional data collection requirements on the FBI.

Should Federal Training for Law Enforcement Be Improved and Increased?

Congress could examine DOJ's efforts to assist state, tribal, city, and county law enforcement authorities in not only investigating and prosecuting hate crimes, but in categorizing and reporting hate crimes. Future efforts could be built upon the past and current efforts of the Bureau of Justice Assistance, the Community Relations Service, and the FBI. A comprehensively designed program might be one way to address the hate crime issue at the federal, state, tribal, city, and county levels. Congress could also call upon the Attorney General to report on DOJ's efforts to promote comprehensive, department-wide hate crime policies.

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