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THROUGH A LENS OF GENOCIDE: A DIFFERENT APPROACH FOR HATE CRIMES LEGISLATION

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ABSTRACT

Hate crimes perpetrators select their victims based on the victims' identity groups. Policies underlying legislation against hate crimes recognize that such crimes inflict greater harm on society than do the same actions committed for non-biased motives. Genocide may be conceptualized as hate crimes writ large; conversely, a new model of hate crimes legislation might be patterned on legal concepts of genocide scaled down to state or local levels. This new recognition could successfully address criticisms from both liberal and conservative factions along the political spectrum, offering a model that state and local governments could invoke for dealing with bias-motivated incidents that feature the perpetrators' systemic intent, without focusing on more marginal occurrences. Thus, the hybrid model of hate crime as genocide could appeal to the remaining legislatures that have refused to adopt hate crime statutes, as well as to prosecutors who have had reservations about charging suspects under existing hate crimes statutes. The conceptualization of hate crime as genocide on a state or local level could also encourage local authorities to take action when federal law enforcement is either unable or unwilling to do so.

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INTRODUCTION

Two particularly horrific incidents in 1998 brought hate crimes into national prominence and sparked discussion about laws to penalize such occurrences. First, on June 7, 1998, James Byrd Jr., a black man, "accepted a ride from three white men, who beat him, chained him to the back of a truck and dragged him to his death."[1] The perpetrators were white supremacists, one of whom had racist tattoos that included a scene of "a hanged black man" and led a group called the "Confederate Knights of America—Texas Rebel Soldier Division."[2] Mr. Byrd survived being

1. Meredith Worthen, *James Byrd Jr.*, BIOGRAPHY (Dec. 24, 2015), https://www.biography.com/crime-figure/james-byrd-jr.

2. Shane Croucher, *The Lynching of James Byrd Jr.: Two Decades Ago This Racist Murder Shocked America. Now His Killer Faces Execution*, NEWSWEEK (Apr. 20, 2019,

dragged behind the truck for one and a half miles, "rolling his body from side to side to cope with the pain as the friction wore his skin and flesh down to the bone, his ribs breaking on the bumps" until he was dragged into "an exposed culvert, tearing his right arm, neck, and head from his body."[3] The grisly murder led to legislative action against hate crimes in Texas, and on May 11, 2001, the governor signed a hate crime law named after Mr. Byrd.[4]

The second incident occurred on October 6, 1998, when Matthew Shepard—an openly gay student at the University of Wyoming—was lured into a truck outside a bar in Laramie by two men who then robbed him.[5] The perpetrators later drove Shepard to a remote location, tied him to a fence, and struck his face with the butt of a handgun between nineteen and twenty-one times.[6] After the perpetrators left, "Shepard remained tied to the fence in freezing conditions for over 18 hours" until he was "eventually found by [a] cyclist who had mistaken him for a scarecrow."[7] Medical personnel transported Shepard to a hospital in Fort Collins, Colorado,[8] and he died five days after the attack occurred.[9] While confessing to police, one of the perpetrators "repeatedly described Shepard as 'a queer,' 'the gay,' and 'fag.'"[10] The same perpetrator also stated that "[t]he night I did it, I did have hatred for homosexuals," and that Shepard was selected because "he was obviously gay"—"[t]hat played a part. His weakness. His frailty."[11] Wyoming had no hate crime legislation at the time of Shepard's murder,[12] and—unlike Texas and most other states—it still has none.[13]

5:00 AM), https://www.newsweek.com/james-byrd-jr-lynching-texas-death-row-execution-1394474.

3. *Id.*

4. Worthen, *supra* note 1.

5. Jude Sheerin, *Matthew Shepard: The Murder That Changed America*, BBC (Oct. 26, 2018), https://www.bbc.com/news/world-us-canada-45968606.

6. *Id.*

7. *Matthew Shepard*, CRIME MUSEUM, https://www.crimemuseum.org/crime-library/hate-crime/matthew-shepard/ (last visited Mar. 2, 2023).

8. Jason Marsden, *The Murder of Matthew Shepard*, WYOHISTORY.ORG (Nov. 8, 2014), https://www.wyohistory.org/encyclopedia/murder-matthew-shepard.

9. Sheerin, *supra* note 5.

10. Marsden, *supra* note 8.

11. Erik Hawkins, *What Happened to Matthew Shepard's Killers?*, OXYGEN (Oct. 16, 2019, 10:44 AM), https://www.oxygen.com/uncovered-killed-by-hate/crime-news/matthew-shepards-killers-russell-henderson-aaron-mckinney-hate-crime.

12. Carter T. Coker, *Hope-Fulfilling or Effectively Chilling? Reconciling the Hate Crimes Prevention Act with the First Amendment*, 64 VAND. L. REV. 271, 272 (2011).

13. *Federal Laws and Statutes*, U.S. DEP'T OF JUST., https://www.justice.gov/hatecrimes/laws-and-policies (last visited Mar. 2, 2023). This DOJ webpage includes a chart showing which federally recognized hate crime categories are addressed in the hate crime

However, both incidents motivated federal response over a period of years, culminating in Congress passing the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, which President Barack Obama signed into law on October 28, 2009.[14]

Hate crime statutes punish perpetrators who target victims because the victims are members of particular identity groups. The policy of penalizing hate crimes recognizes greater societal harm when the criminal act is committed because of animus based on race or religion or another protected category, compared to when the same action occurs in the absence of such a motive.[15]

However, hate crimes legislation has come under attack from both the left and right ends of the political spectrum. Left-leaning critics complain that although hate crime laws are often enacted with the announced purpose of providing protection to minority groups that have historically been victims of discrimination, these laws are frequently used in the prosecution of marginal cases against minority defendants.[16] Meanwhile, right-leaning critics denounce hate crimes legislation as impermissibly penalizing thought rather than action.[17]

In some contexts, smaller-scale hate crimes have set a stage for larger-scale genocide. Thus, Professor Allison Marston Danner has observed that "[b]ias crimes act as possible precursors to terrible events like genocide that can cause the death and destruction of thousands of members of a targeted group."[18] Professor Danner noted that largescale identity-group killings in the twentieth century were "preceded by less violent forms of discrimination that indicated to the larger society that these groups were appropriate targets of discrimination, and ultimately, destruction."[19] Professor Danner specifically referred to "Armenians in Turkey between 1915 and 1923, the Jews in Europe in the [1930s and

law of each state; the listed categories include "Race/Color," "National Origin," "Religion," "Sexual Orientation," "Gender/Sex," "Gender Identity," and "Disability." *Id.*

14. Herbert C. Brown, Jr., *A Crowded Room or the Perfect Fit? Exploring Affirmative Action Treatment in College and University Admissions for Self-Identified LGBT Individuals*, 21 WM. & MARY J. WOMEN & L. 603, 641 (2015).

15. Wisconsin v. Mitchell, 508 U.S. 476, 487–88 (1993).

16. *See* Sally Kohn, *Greasing the Wheel: How the Criminal Justice System Hurts Gay, Lesbian, Bisexual and Transgendered People and Why Hate Crime Laws Won't Save Them*, 27 N.Y.U. REV. L. & SOC. CHANGE 257, 270–71 (2001).

17. *See* Susan Gellman, *Hate Crime Laws Are Thought Crime Laws*, 1992 ANN. SURV. AM. L. 509, 514–15 (1992).

18. Allison Marston Danner, *Bias Crimes and Crimes Against Humanity: Culpability in Context*, 6 BUFF. CRIM. L. REV. 389, 450 (2002).

19. *Id.* at 412–13.

1940s], the Tutsis in Rwanda in 1994, and the Bosnian Muslims of Srebrenica in 1995."[20]

For jurisdictions that are hesitant to enact or enforce hate crimes legislation, this Article proposes the solution of retaining the Supreme-Court-approved model of enhancing sentencing for the underlying crime (such as vandalism or assault), while adding the federal genocide statute's focused, restrictive requirement of "specific intent to destroy, in whole or in substantial part, [an] . . . ethnic, racial, or religious group."[21] Other suspect classifications could also be added to the list of protected categories for states' hate crime legislation. This new hybrid model would allow heightened punishment for the most serious instances of hate crimes—involving mass casualties or planning by hate organizations—while not imposing additional punishment upon more marginal incidents such as a racial epithet being uttered during a spontaneous fist-fight between two individuals.

Part I of this Article examines different categories of hate crimes based on the social group identities of the perpetrator and the victim.

Part II reflects on the Supreme Court's treatment of paradigms for states' hate crime laws and then examines federal hate crime laws. This section notes the approval for states to use a model of sentencing enhancement for an underlying crime when perpetrators select victims on the basis of membership in a suspect classification. Part II also examines the alternative that has been treated with suspicion in state statutes but approved for federal statutes—creating a new, separate crime based on animus toward a suspect classification.

Part III scrutinizes the political criticisms of hate crime laws and considers their validity in light of more traditional criminal law.

Part IV turns to international law in the form of the specific intent requirement of the Genocide Convention, and then returns to domestic law to examine the more restrictive specific intent requirement of the federal genocide statute.

Finally, Part V proposes merging the sentencing enhancement model of state hate crimes legislation and the specific intent provision of the federal genocide statute. The hybrid model would result in greater punishment for organized, planned hate crimes and retain the possibility of having less serious instances punished as conventional crimes.

20. *Id.* at 413.
21. 18 U.S.C. § 1091(a).

I. CATEGORIZING HATE CRIMES BASED ON SOCIAL GROUP IDENTITIES

In an early article examining modern hate crime statutes, Dwight Greene set out three paradigms based on the social identities of the perpetrator and the victim.[22] The first is majority-on-minority crime, which Greene termed "white on black crime."[23] However, Greene included victims of other races, such as Asians, in the "black" category; for example, he noted the killing of several Asian or Asian American victims, including the well-known "murder of Vincent Chin in Detroit in 1982."[24] Majority-on-minority crimes "typically involve white gangs targeting a person of color."[25] Greene distinguished between spontaneous crimes committed by juveniles, and planned crimes committed by groups such as Aryan Nation and the Ku Klux Klan.[26]

More recently, during the COVID-19 pandemic, "fears about health and finances led to anger over [non-pharmaceutical interventions][27] and life disruptions, which in turn led to hatred and hate crimes against Asian Americans and Asian immigrants."[28] The rise in anti-Asian violence correlated with the Trump administration's anti-China rhetoric and use of terms such as "China virus" and "Kung Flu" to describe COVID-19.[29]

Returning to Greene's article, the second category of hate crime was "police-on-outsider."[30] He acknowledged incidents of police violence against black men such as Rodney King in Los Angeles and Malice Green in Detroit, but suggested that for police-on-outsider violence, "[t]he classic case in this paradigm is police crime against gays and lesbians."[31]

22. Dwight Greene, *Hate Crimes*, 48 U. MIA. L. REV. 905, 905–07 (1994).
23. *Id.* at 905.
24. *Id.*
25. *Id.*
26. *Id.* at 906.
27. The non-pharmaceutical interventions have included "physical distancing, self-quarantining, and wearing face masks, to flatten the curve of infection and not overwhelm health care system capacity." Peter H. Huang, *Pandemic Emotions: The Good, the Bad, and the Unconscious—Implications for Public Health, Financial Economics, Law, and Leadership*, 16 NW. J.L. & SOC. POL'Y 81, 84 (2021).
28. *Id.* at 99 (footnote omitted).
29. *See, e.g.*, Michelle Goodwin & Erwin Chemerinsky, *The Trump Administration: Immigration, Racism, and COVID-19*, 169 U. PA. L. REV. 313, 318–19 (2021); Natsu Taylor Saito, *Why Xenophobia?*, 31 BERKELEY LA RAZA L.J. 1, 2 (2021); Kevin Shalvey, *A New Study Has Linked the Rise in Anti-Asian Online Hate Speech with President Donald Trump's COVID-19 Rhetoric*, BUS. INSIDER (Mar. 27, 2021), https://www.businessinsider.com/anti-defamation-league-study-donald-trump-anti-asian-hate-speech-2021-3.
30. Greene, *supra* note 22, at 906.
31. *Id.*

Greene explained that "focus on gay and lesbian victims raises" the issue of "whether the problem is that the enforcers of hate crime statutes, both police officers and prosecutors, do not value hate crime victims."[32]

However, in more recent years after the publication of Greene's article, "[t]he death of Oscar Grant, Trayvon Martin, Eric Garner, Michael Brown, Walter Scott, Sandra Bland, Breonna Taylor, George Floyd, and many others brought attention to the systematic racism in the United States."[33] Martin's death stands apart from the others listed above because he was killed by "a volunteer community watchman," rather than by police.[34] Hate crime legislation does not formally reflect Greene's category of incidents committed by the police.

Greene's third category of hate crime encompasses minority-on-majority crime, which he labeled "black on white crime."[35] By reference to a speech from President Lyndon Johnson, Greene took the expansive view that "'Black' means any person who has been discriminated against in America based on the color of their skin."[36]

Greene also raised suggestive questions about other relations between identity groups of perpetrators and victims of hate crimes, such as, "[c]an hate crimes take place between groups that are both of color or within the same group?"[37] Hate crime legislation is structurally analogous to civil rights laws that prohibit discrimination,[38] and by analogy to federal anti-discrimination law, the answer to Greene's question would be yes. For example, in *Oncale v. Sundowner Offshore Services, Inc.*, the Supreme Court held that "sex discrimination consisting of same-sex sexual harassment is actionable under Title VII."[39] The reasoning of *Oncale* has been extended to acknowledge that claims of same-race discrimination are also cognizable under Title VII.[40]

32. *Id.* at 906–07.

33. Gregory S. Parks, *"When They See Us" the Great White Awakening to Black Humanity*, 21 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 1, 14 (2021). For a summary of some of the most prominent incidents of police killing black individuals in recent years, see *George Floyd: Timeline of Black Deaths and Protests*, BBC (Apr. 22, 2021), https://www.bbc.com/news/world-us-canada-52905408.

34. *See, e.g.*, Camille Gear Rich, *Angela Harris and the Racial Politics of Masculinity: Trayvon Martin, George Zimmerman, and the Dilemmas of Desiring Whiteness*, 102 CALIF. L. REV. 1027, 1028–29 (2014).

35. Greene, *supra* note 22, at 908.

36. *Id.*

37. *Id.* at 909–10.

38. ANTI-DEFAMATION LEAGUE, HATE CRIME LAWS: THE ADL APPROACH 1–2 (2019), https://www.adl.org/sites/default/files/hate-crime-laws-the-adl-approach.pdf.

39. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 77, 82 (1998).

40. *See, e.g.*, Ross v. Douglas County, 234 F.3d 391, 396 (8th Cir. 2000).

Although not placed within the three paradigms that Greene set out, his article does acknowledge the existence of crimes motivated by bias against religions.[41] Examples of anti-religious hate crimes since the time of Greene's article include the 2017 bombing of a mosque in Bloomington, Minnesota,[42] a 2017 shooting at a mosque in Quebec that killed six victims,[43] and a 2018 shooting that killed eleven people at the Tree of Life synagogue in Pittsburgh.[44]

II. HATE CRIMES MODELS: SENTENCING ENHANCEMENT VERSUS SEPARATE CRIME

In the states, some hate crime statutes provide for heightened punishment of underlying crimes when a perpetrator has committed the crimes for biased motives, while other hate crime legislation defines separate, standalone crimes. However, federal hate crime legislation takes the form of standalone offenses. This Part examines both state and federal hate crime statutes and their treatment in the courts.

A. Hate Crime Legislation in the States

A cluster of Supreme Court decisions has established that the Court tends to allow state punishment of hate crimes based on sentencing enhancement of the penalty for behavior that is already recognized as a crime (such as assault), while exercising skepticism when reviewing states' attempts to define new, separate crimes for bias incidents.

For example, in its 1993 decision of *Wisconsin v. Mitchell*, the Supreme Court upheld a statute that enhanced the penalty for a crime when the perpetrators selected the victim on the basis of his race.[45] Several young black men and boys had seen the film *Mississippi Burning*, "in which a white man beat a young black boy who was praying."[46] The group's agitation from the depiction of white-on-black violence resulted in selecting "a young white boy" who was walking near the group and

41. Greene, *supra* note 22, at 907.

42. *See* Jack Moore, *Trump's Failure to Condemn Minnesota Mosque Attack Stirs Social Media Anger*, NEWSWEEK (Aug. 7, 2017, 8:13 PM), https://www.newsweek.com/trump-failure-condemn-minnesota-mosque-attack-stirs-social-media-anger-647694.

43. *See id.* For a more extensive discussion of anti-Muslim hate crimes in recent years, see Vanita Saleema Snow, *Reframing Radical Religion*, 11 GEO. J.L. & MOD. CRITICAL RACE PERSP. 1, 26–28 (2019).

44. David Shortell, *'Tree of Life' Synagogue Shooting Suspect Charged with Hate Crimes*, CNN (Jan. 29, 2019, 6:04 PM), https://www.cnn.com/2019/01/29/us/tree-of-life-shooting-hate-crime-charges/index.html.

45. Wisconsin v. Mitchell, 508 U.S. 476, 480–83, 490 (1993).

46. *Id.* at 480.

beating him into a coma.[47] Following defendant Mitchell's conviction, his sentence for aggravated battery was increased under Wisconsin's hate crime statute because the victim was selected on the basis of race.[48] The Supreme Court upheld the penalty enhancement feature of the statute, and noted that "motive plays the same role under the Wisconsin statute as it does under federal and state antidiscrimination laws, which we have previously upheld against constitutional challenge."[49] The Court further observed that penalty enhancement for hate crimes reflects the greater harm that such crimes are thought to inflict on society:

> [T]he Wisconsin statute singles out for enhancement bias-inspired conduct because this conduct is thought to inflict greater individual and societal harm. For example, according to the State and its *amici,* bias-motivated crimes are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest.[50]

In addition, the Court discounted the defendant's argument about the statute having a chilling effect on free speech; the Court stated that in order to consider the argument,

> [w]e must conjure up a vision of a Wisconsin citizen suppressing his unpopular bigoted opinions for fear that if he later commits an offense covered by the statute, these opinions will be offered at trial to establish that he selected his victim on account of the victim's protected status, thus qualifying him for penalty enhancement.[51]

The Court found that argument to be too speculative, and also noted that "[t]he First Amendment, moreover, does not prohibit the evidentiary use

47. *See id.*
48. *Id.* at 480–81.
49. *Id.* at 487, 490.
50. *Id.* at 487–88. Years before the Supreme Court's decision in *Mitchell*, the Oregon Court of Appeals in *State v. Beebe*, similarly explained that:

> Assaultive behavior motivated by bigotry is directed not just at the victim but, in a sense, toward the group to which the particular victim belongs. Such confrontations therefore readily—and commonly do—escalate from individual conflicts to mass disturbances. That is a far more serious potential consequence than that associated with the usual run of assault cases. There being a rational basis for the distinction, we hold that it is constitutionally permissible to punish otherwise criminal conduct more severely when it is motivated by racial, ethnic or religious hatred than by individual animosity.

State v. Beebe, 680 P.2d 11, 13 (Or. Ct. App. 1984).
51. *Mitchell*, 508 U.S. at 488–89.

of speech to establish the elements of a crime or to prove motive or intent."[52]

By contrast, just one year before the *Mitchell* decision—in the 1993 case *R.A.V. v. City of St. Paul*—the Supreme Court struck down an ordinance that prohibited specific types of speech and that was used to prosecute a teenager, one of several perpetrators who constructed a cross and burned it on the yard of a black family.[53] In particular, the ordinance provided that:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.[54]

The Court decided that even if the penalty in the ordinance applied only to "fighting words" (as found by the Minnesota Supreme Court, which had upheld the provision), "the ordinance is facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses."[55] The Court thus held that the ordinance committed impermissible content discrimination, noting that under the scope of the ordinance:

> Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics. Those who wish to use "fighting words" in connection with other ideas—to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality—are not covered.[56]

The Court concluded its analysis of content discrimination by declaring that "[t]he First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects."[57]

52. *Id.* at 489.
53. R.A.V. v. City of St. Paul, 505 U.S. 377–80, 391 (1992).
54. *Id.* at 380.
55. *Id.* at 381.
56. *Id.* at 391.
57. *Id.*

Moreover, the *R.A.V.* decision also found that in practice, the St. Paul ordinance effectuated impermissible viewpoint discrimination.[58] The Supreme Court observed that the ordinance would permit a sign condemning "anti-Catholic bigots" but not one that condemned Catholics ("Papists"), and the Court proclaimed that "St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry [boxing] rules."[59]

In the 2003 case *Virginia v. Black*—which consolidated appeals from three cases arising from two incidents—the Supreme Court again addressed cross-burning, this time holding that "while a State, consistent with the First Amendment, may ban cross burning carried out with the intent to intimidate, the provision in the Virginia statute treating any cross burning as prima facie evidence of intent to intimidate renders the statute unconstitutional in its current form."[60] The contested statute provided that:

> It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place. Any person who shall violate any provision of this section shall be guilty of a Class 6 felony.
>
> Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.[61]

The defendant in one case "led a Ku Klux Klan rally which occurred on private property with the permission of the owner, who was in attendance."[62] The rally was visible from a public highway and the event included burning a cross that was between twenty-five and thirty feet high.[63] The jury instructions included the statement that "the burning of a cross by itself is sufficient evidence from which you may infer the required intent," and the defendant was found guilty.[64] The Supreme Court ruled that the statute's provision for cross-burning constituting

58. *Id.*
59. *Id.* at 391–92.
60. *See* Virginia v. Black, 538 U.S. 343, 347–48, 350–51 (2003).
61. *Id.* at 348 (quoting VA. STAT. ANN. § 18.2-423 (2022)).
62. *Id.*
63. *See id.* at 348–49.
64. *Id.* at 349–50.

prima facie evidence of intent to intimidate, "as interpreted through the jury instruction" was "unconstitutional on its face."[65]

In the other cases, the defendants burned a cross on the property of a black family, but the trial court did not instruct the jury on the Virginia statute's provision for cross-burning serving as prima facie evidence of intent to intimidate.[66] The Supreme Court remanded for a determination of whether the defendants could be retried—for example, if the statute might be read to be constitutionally valid in the absence of the jury instruction, or if the statutory provision regarding cross-burning serving as prima facie evidence might be severable from the rest of the statute.[67]

Like the legislative provision that the Supreme Court upheld in *Wisconsin v. Mitchell*,[68] the current version of Wisconsin's hate crime statute continues to feature penalty enhancement for conduct that other statutory sections define as crimes if the perpetrator selects the victim based on perception about the victim's "race, religion, color, disability, sexual orientation, national origin or ancestry."[69]

Nevertheless, some state statutes continue to define hate crimes as substantive crimes in themselves, rather than applying penalty enhancement to previously-existing, underlying offenses. For example, Oregon's "bias crime in the first degree" is defined as follows:

> (1) A person commits a bias crime in the first degree if the person:
>
> > (a) Intentionally, knowingly or recklessly causes physical injury to another person because of the person's perception of the other person's race, color, religion, gender identity, sexual orientation, disability or national origin;
> >
> > (b) With criminal negligence causes physical injury to another person by means of a deadly weapon because of the person's perception of the other person's race, color, religion, gender identity, sexual orientation, disability or national origin; or

65. *Id.* at 367. On remand to the Virginia Supreme Court for one of the consolidated appeals, the court held that the statute did not violate the First Amendment or the Virginia Constitution because it severed the prima facie evidence of intent provision from the statute. *See* Elliot v. Commonwealth, 593 S.E.2d 263, 269 (Va. 2004). However, on the books, the statute has yet to be officially amended. *See* § 18.2-423.

66. *Black*, 538 U.S. at 350–51.

67. *Id.* at 367–68.

68. 508 U.S. 476, 490 (1993).

69. WIS. STAT. § 939.645 (2022).

> (c) Intentionally, because of the person's perception of another person's race, color, religion, gender identity, sexual orientation, disability or national origin, places another person in fear of imminent serious physical injury.[70]

Oregon's "bias crime in the second degree" similarly involves subjecting the same categories of victims to bias-motivated actions consisting of interfering with the victim's property, "offensive physical contact," or threats of physical injury or property damage.[71]

B. Federal Hate Crime Legislation

In contrast to their treatment of state hate crime legislation, federal courts have upheld federal legislation that recognizes bias-based selection of criminal victims as a substantive crime in itself, rather than using sentencing enhancement for already-existing crimes. An older statute, which is still valid, criminalizes a range of activities under narrow circumstances in which the victim is pursuing a federally protected activity.[72] A newer statute, named after Matthew Shepard and James Byrd Jr., applies only to infliction of bodily injury, but can be applied under a wider range of circumstances, not only when the victim has engaged in a narrow range of federally protected activity.[73] Both statutes are examined below.

1. The Older Statute, 18 U.S.C. § 245(b)(2)

Congress enacted 18 U.S.C. § 245 in 1968.[74] Section 245(b)(2) criminalizes injuring, intimidating, or interfering with a victim based on "race, color, religion or national origin" and the victim's participation in a federally protected activity.[75] The statute provides:

70. OR. REV. STAT. § 166.165 (2022). The Oregon Supreme Court has upheld the statute against challenge under the Oregon and United States Constitutions. State v. Plowman, 838 P.2d 558, 565–66 (Or. 1992).

71. OR. REV. STAT. § 166.155; *see* State v. Beebe, 680 P.2d 11, 12–13 (Or. Ct. App. 1984) (upholding a previous version of the statute that was subjected to challenge under the Oregon and United States Constitutions).

72. *See* 18 U.S.C. § 245(b)(2).

73. *See id.* § 249(a).

74. *See, e.g.*, ANTI-DEFAMATION LEAGUE, *supra* note 38, at 4.

75. § 245(b)(2).

> (b) Whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with—
>
> . . . .
>
> (2) any person because of his race, color, religion or national origin and because he is or has been—
>
> (A) enrolling in or attending any public school or public college;
>
> (B) participating in or enjoying any benefit, service, privilege, program, facility or activity provided or administered by any State or subdivision thereof;
>
> (C) applying for or enjoying employment, or any perquisite thereof, by any private employer or any agency of any State or subdivision thereof, or joining or using the services or advantages of any labor organization, hiring hall, or employment agency;
>
> (D) serving, or attending upon any court of any State in connection with possible service, as a grand or petit juror;
>
> (E) traveling in or using any facility of interstate commerce, or using any vehicle, terminal, or facility of any common carrier by motor, rail, water, or air;
>
> (F) enjoying the goods, services, facilities, privileges, advantages, or accommodations of any inn, hotel, motel, or other establishment which provides lodging to transient guests, or of any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility which serves the public and which is principally engaged in selling food or beverages for consumption on the premises, or of any gasoline station, or of any motion picture house, theater, concert hall, sports arena, stadium, or any other place of exhibition or entertainment which serves the public, or of any other establishment which serves the public and (i) which is located within the premises of any of the aforesaid establishments or within the premises of which is

> physically located any of the aforesaid establishments, and (ii) which holds itself out as serving patrons of such establishments.[76]

Federal courts have upheld 18 U.S.C. § 245(b)(2) against constitutional challenge—finding the statutory provision a valid exercise of congressional power under the Commerce Clause of the Constitution,[77] as well as under the Fourteenth Amendment.[78] In addition, courts have upheld the application of § 245(b)(2) to race-based hate crime cases as action to eradicate "badges and incidents of slavery" pursuant to congressional authority under the Thirteenth Amendment.[79] The Thirteenth Amendment's provision for eliminating "badges and incidents of slavery" does not restrict the application of § 245(b)(2) to crimes involving black victims; thus, the Second Circuit upheld the applicability of § 245(b)(2) to a crime involving a Jewish victim.[80]

2. The Newer (Shepard/Byrd) Statute, 18 U.S.C. § 249(a)(1) and (a)(2)

As part of the Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act, 18 U.S.C. § 249(a)(1) establishes that inflicting bodily injury—or attempting to do so through some specific methods—constitutes a federal crime when the victim is selected on the basis of "actual or perceived race, color, religion, or national origin" and sets the punishment for that crime:

> Whoever, whether or not acting under color of law, willfully causes bodily injury to any person or, through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, attempts to cause bodily injury to any person, because of the actual or perceived race, color, religion, or national origin of any person—

76. *Id.*

77. *See, e.g.*, United States v. Allen, 341 F.3d 870, 881 (9th Cir. 2003), *cert. denied*, 541 U.S. 975 (2004).

78. *See, e.g.*, United States v. Bledsoe, 728 F.2d 1094, 1097 (8th Cir. 1984), *cert. denied*, 469 U.S. 838 (1984).

79. *See, e.g.*, *Allen*, 341 F.3d at 884 (concluding that the statute is a valid exercise of Congress's Commerce Clause power, and in the alternative, the statute is justified as regulation to eradicate "badges and incidents of slavery" pursuant to the Thirteenth Amendment); *Bledsoe*, 728 F.2d at 1097.

80. *See* United States v. Nelson, 277 F.3d 164, 213 (2d Cir. 2002).

> (A) shall be imprisoned not more than 10 years, fined in accordance with this title, or both; and
>
> (B) shall be imprisoned for any term of years or for life, fined in accordance with this title, or both, if—
>
> (i) death results from the offense; or
>
> (ii) the offense includes kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill.[81]

Federal circuit courts have found the prohibition against race-based selection of victims of bodily injury in § 249(a)(1) constitutional pursuant to Congress's power under the Thirteenth Amendment to abolish "badges and incidents of slavery."[82] For example, the Eighth Circuit has held that the absence of a requirement in § 249(a)(1) that the crime was motivated by the victim's "enjoyment of a public benefit" does not render that statutory section unconstitutional—§ 249(a)(1) may permissibly cover a wider range of circumstances than § 245(b)(2)(B).[83] The Eighth Circuit further observed that prohibition against race-based selection of victims of bodily injury in § 249(a)(1) is constitutional pursuant to Congress's power under the Thirteenth Amendment to abolish "the badges and incidents of slavery."[84] Like § 245(b)(2), § 249(a)(1) does not apply only to crimes against black victims; for example, in the Eighth Circuit case, the perpetrators spoke in ways that indicated a belief that the victims were Mexicans.[85]

A more recent high-profile federal hate crime case arose on June 17, 2015, when a twenty-one-year-old white man committed a "mass shooting of Black members of Emanuel African Methodist Episcopal Church in Charleston, South Carolina," resulting in the death of nine victims.[86] The perpetrator told law enforcement that he was motivated

81. 18 U.S.C. § 249(a)(1).

82. *See, e.g.*, United States v. Cannon, 750 F.3d 492, 505 (5th Cir. 2014); United States v. Hatch, 722 F.3d 1193, 1195 (10th Cir. 2013); *c.f.* United States v. Maybee, 687 F.3d 1026, 1031 (8th Cir. 2012) (rejecting defendant's argument that elements cases found *sufficient* to meet statutory requirements under § 245(b)(2)(B) were *necessary* to justify exercise of Congress's authority to enforce the Thirteenth Amendment).

83. *Maybee*, 687 F.3d at 1031.

84. *Id.* at 1030–31.

85. *See id.* at 1029.

86. Dennis Romero & Anthony Cusumano, *Death Sentence Upheld for Dylan Roof, Who Killed 9 in South Carolina Church Shooting*, NBC NEWS (Aug. 25, 2021, 11:27 PM), https:/

by the desire to bring about a "race war."[87] South Carolina has no hate crime statute,[88] but the perpetrator was indicted for multiple racially motivated federal hate crimes under § 249(a)(1), as well as for "obstruction of religious exercise" under § 247(a)(2), and associated use of a firearm; the district court upheld the validity of § 249 under the Thirteenth Amendment.[89] In 2017, he became the first person to receive the death penalty for a federal hate crime,[90] and he later pleaded guilty to murder charges in state court, receiving consecutive life imprisonment sentences for the state charges.[91] The shooting also had wider political repercussions: "The Charleston church murders sparked a national debate about the Confederate flag, and within a month of the shooting, the South Carolina legislature approved a measure to take down the Rebel flag that had flown on the state capitol grounds for more than 50 years."[92]

Subject to a more limited jurisdictional basis, § 249(a)(2) covers categories that overlap with those of § 249(a)(1)—specifically, religion and national origin—but also adds several additional categories.[93] Section 249(a)(2)(A) addresses actual or attempted bodily injury motivated by grounds of "religion, national origin, gender, sexual orientation, gender identity, or disability":

> Whoever, whether or not acting under color of law, in any circumstance described in subparagraph (B) or paragraph (3), willfully causes bodily injury to any person or, through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary

/www.nbcnews.com/news/us-news/death-sentence-upheld-man-who-killed-9-south-carolina-church-n1277667.

87. Polly Mosendz, *Dylan Roof Confesses: Says He Wanted to Start "Race War"*, NEWSWEEK (June 19, 2015, 9:38 AM), https://www.newsweek.com/dylann-roof-confesses-church-shooting-says-he-wanted-start-race-war-344797.

88. *See Federal Laws and Statutes*, *supra* note 13.

89. United States v. Roof, 225 F. Supp. 3d 438, 441–48 (D.S.C. 2016), *aff'd*, 10 F.4th 314 (4th Cir. 2021). The district court also upheld the validity of § 247 under the Commerce Clause of the Constitution. *Id.* at 455–56.

90. Jay Croft & Tristan Smith, *Dylan Roof Pleads Guilty to State Charges in Church Massacre*, CNN (Apr. 10, 2017, 9:03 PM), https://www.cnn.com/2017/04/10/us/dylann-roof-guilty-plea-state-trial/index.html; Meg Kinnard, *Dylan Roof Takes Church Shooting Appeal to US Supreme Court*, ASSOCIATED PRESS (Mar. 2, 2022), https://apnews.com/article/us-supreme-court-religion-shootings-south-carolina-charleston-7b89694504f9fc6ab9521592ea7c4ad6.

91. Croft & Smith, *supra* note 90.

92. Pierre Thomas & Jack Cloherty, *Dylan Roof Indicted on Federal Hate Crime Charges in Charleston Church Massacre, Court Documents Say*, ABC NEWS (July 22, 2015, 3:18 PM), https://abcnews.go.com/US/dylann-roof-hit-federal-hate-crime-charges-charleston/story?id=32620636; *see also* S.C. CODE ANN. § 1-10-10 (1976).

93. *See* 18 U.S.C. § 249(a)(1)–(2).

> device, attempts to cause bodily injury to any person, because of the actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability of any person—
>
> > (i) shall be imprisoned not more than 10 years, fined in accordance with this title, or both; and
> >
> > (ii) shall be imprisoned for any term of years or for life, fined in accordance with this title, or both, if—
> >
> > > (I) death results from the offense; or
> > >
> > > (II) the offense includes kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill.[94]

The jurisdictional restriction for § 249(a)(2) is found in § 249(a)(2)(B), which relies on traditional bases for federal jurisdiction, such as interstate travel or interstate commerce:

> For purposes of subparagraph (A), the circumstances described in this subparagraph are that—
>
> > (i) the conduct described in subparagraph (A) occurs during the course of, or as the result of, the travel of the defendant or the victim—
> >
> > > (I) across a State line or national border; or
> > >
> > > (II) using a channel, facility, or instrumentality of interstate or foreign commerce;
> >
> > (ii) the defendant uses a channel, facility, or instrumentality of interstate or foreign commerce in connection with the conduct described in subparagraph (A);
> >
> > (iii) in connection with the conduct described in subparagraph (A), the defendant employs a firearm, dangerous weapon, explosive or incendiary device, or other weapon that has traveled in interstate or foreign commerce; or the conduct described in subparagraph (A)—

94. *Id.* § 249(a)(2)(A).

> (I) interferes with commercial or other economic activity in which the victim is engaged at the time of the conduct; or
>
> (II) otherwise affects interstate or foreign commerce.[95]

In comparison to § 245(b)(2), § 249 can be applied under a wider federal jurisdictional basis, including general interstate commerce considerations, rather than to a narrower set of federally protected activities.[96] However, § 249 applies to a narrower range of substantive crimes because it fails to address offenses that do not involve bodily injury.[97] Thus, vandalism is not penalized under § 249.[98] Neither is cross-burning aimed at racial intimidation, such as was involved in the cases of *R.A.V. v. City of St. Paul*[99] and *Virginia v. Black*.[100] By contrast, cross-burning could fit within the racial intimidation prohibition of § 245(b)(2), but only if the victim was engaged in a narrowly-defined federally protected activity at the time—such as attending a public school or participating in a state-provided benefit.[101]

Federal courts have upheld § 249(a)(2) against constitutional challenge in light of the jurisdictional requirement in § 249(a)(2)(B), finding that enforcement of the statute is a valid exercise of congressional power under the Commerce Clause when a perpetrator "assault[ed] a coworker preparing packages for interstate sale and shipment" at the workplace,[102] when perpetrators traveled on a federal highway to the location of an assault,[103] and when perpetrators committed assault by using items that traveled in interstate commerce, "lured a victim by using the mail system and used motor vehicles to facilitate each assault."[104] The jurisdictional significance of using a motor vehicle was clarified in *United States v. Jenkins*, which noted that "motor vehicles have been described as 'the quintessential instrumentalities of modern interstate commerce.'"[105]

95. *Id.* § 249(a)(2)(B).
96. *Id.* § 245(b)(2); *id.* § 249.
97. *Id.* § 249 (a)(1).
98. *Id.*
99. 505 U.S. 377, 380, 391, 395–96 (1992).
100. 538 U.S. 343, 347–48 (2003).
101. *See* § 245(b).
102. United States v. Hill, 927 F.3d 188, 193, 210 (4th Cir. 2019).
103. United States v. Jenkins, 909 F. Supp. 2d 758, 771–72 (E.D. Ky. 2012).
104. United States v. Mullet, 868 F. Supp. 2d 618, 623 (N.D. Ohio 2012).
105. *Jenkins*, 909 F. Supp. 2d at 771–72 (quoting United States v. McHenry, 97 F.3d 125, 126 (6th Cir. 1996)).

Very recently, Congress passed the Emmet Till Antilynching Act, which President Joe Biden signed into law on March 29, 2022, more than 100 years after the first efforts to make lynching a federal crime.[106] The Act amends 18 U.S.C. § 249(a) so that conspiracy to commit any of the crimes already listed in that statutory section is a punishable offense.[107]

III. CRITICISM FROM BOTH SIDES

Some advocacy groups for minority communities have endorsed the enactment of hate crime laws because of the impact that hate crimes have beyond direct victims.[108] However, both conservative and liberal commentators have criticized such legislation. This Part examines those criticisms.

A. Conservative Criticism of Hate Crime Laws, and Response

A popular perception underlying disapproval of hate crime laws is evidenced by the argument made by the defendant in *Wisconsin v. Mitchell*, that—in violation of the First Amendment—such laws penalize thought or belief rather than conduct.[109] Reflecting a related view, the Wyoming legislature failed to enact hate crime legislation in response to the murder of Matthew Shepard because of a belief that such legislation "would give gays and lesbians special rights" in comparison to the rest of the population.[110] However, these criticisms miss the point that motive, intent, and degree of harm have often been important in conventional criminal law.

1. Response Based on Motive in Conventional Law

Motive has played an important role in conventional criminal law. For example, in some jurisdictions, a homicide perpetrator's motive

106. Michael D. Shear, *Biden Signs Bill to Make Lynching a Federal Crime*, N.Y. TIMES (Mar. 29, 2022), https://www.nytimes.com/2022/03/29/us/politics/biden-signs-anti-lynching-bill.html.

107. Emmett Till Antilynching Act, Pub. L. No. 117-107, § 2, 136 Stat. 1125 (2022).

108. *See generally* ANTI-DEFAMATION LEAGUE, *supra* note 38, at 1–2, 11–13.

109. Wisconsin v. Mitchell, 508 U.S. 476, 481–88 (1993). For criticism of the Court's reasoning in the *Mitchell* case, see generally Gellman, *supra* note 17.

110. Andrew M. Gilbert & Eric D. Marchand, Note, *Splitting the Atom or Splitting Hairs—The Hate Crimes Prevention Act of 1999*, 30 ST. MARY'S L.J. 931, 933 n.8 (1999) (quoting *Gay Student Found Beaten, Tied to Fence: Wyoming Victim in Critical Condition, Four Suspects Arrested*, DALL. MORNING NEWS, Oct. 10, 1998, at 3A); Nico Lang, *Matthew Shepard Died 22 Years Ago. Wyoming Still Doesn't Have a Hate Crimes Law*, THEM (Oct. 8, 2020), https://www.them.us/story/matthew-shepard-wyoming-hate-crimes-law.

differentiates which degree of murder he has committed,[111] or whether his crime should be categorized as manslaughter rather than murder.[112] Moreover, even when motive is not part of the definition of first-degree murder, proof of the defendant having motive for a substantial time before he committed the crime can help to establish "the inference of premeditation and deliberation" needed for a finding of first-degree murder.[113] In addition, a motive such as pecuniary gain can be an aggravating factor in sentencing.[114]

Thus, imposing different penalties—depending on different motives for undertaking the same sort of action—is not an aberrant feature of hate crime legislation; instead, it reflects established criminal law doctrine.

2. Response Based on Intent in Conventional Law

Similarly, criminalization of particular conduct often requires that the defendant have acted intentionally to harm the victim, and "intent" can be interpreted rather broadly:

> [T]he term "intent" is defined at common law to include not only those results that are the conscious objective of the actor—what he wants to occur—but also those results that the actor knows are virtually certain to occur from his conduct, even if he does not want them to arise.[115]

In fact, the intent required for criminal liability can be met when the perpetrator meant to harm someone but ended up inadvertently inflicting the harm on someone else: "In its classic form, the doctrine of transferred intent applies when the defendant intends to kill one person but mistakenly kills another. The intent to kill the intended target

111. *E.g.*, Carissa Byrne Hessick, *Motive's Role in Criminal Punishment*, 80 S. CAL. L. REV. 89, 99–100 (2006) (citing N.Y. PENAL LAW § 125.27(1)(a)(v) (McKinney 2004)) (stating defendant's motive meets the definition of first-degree murder where defendant intended to cause death and "the death was caused for the purpose of preventing the intended victim's testimony in any criminal action" or proceeding).

112. *Id.* at 100.

113. *E.g.*, Mills v. United States, 599 A.2d 775, 781 (D.C. 1991).

114. *See, e.g.*, U.S. SENT'G GUIDELINES MANUAL § 2A2.1 (U.S. SENT'G COMM'N 2021) ("If the offense [of attempted murder] involved the offer or the receipt of anything of pecuniary value for undertaking the murder, increase [the sentence imposed] by 4 levels.").

115. *See* JOSHUA DRESSLER & STEPHEN P. GARVEY, CRIMINAL LAW CASES AND MATERIALS 164 (7th ed. 2016).

is deemed to transfer to the unintended victim so that the defendant is guilty of murder."[116]

In addition, statutes that define degrees of murder based on the perpetrator's state of mind—and that punish first-degree murder more severely than second-degree murder—have not generated controversy over whether the difference in punishment somehow confers "special rights" upon victims of first-degree murder in comparison to victims of second-degree murder.[117] Accordingly, taking into account the perpetrator's intent is a common feature of criminal law, rather than a unique departure for hate crimes.

3. Response Based on Extent of Harm in Conventional Law

In addition to determining the perpetrator's motive and intent, conventional criminal law also considers the harm that a crime inflicts upon the victim. For example, under the Model Penal Code, whether the victim survives the attack is the main difference between assault in section 211.1[118] and criminal homicide in section 210.1.[119]

Justification for more severe punishment for hate crimes likewise invokes the idea of the greater harm that hate crimes tend to inflict on their victims and the wider community. Researchers have confirmed the tendency of hate crimes to inflict greater harm upon victims, noting that "hate crimes are more likely than crimes in general to involve multiple offenders, to cause injury, and to require hospitalization."[120] Victims of hate crimes also reported higher levels of trauma compared to victims of non-bias-motivated crimes, both soon after the incident and five years later.[121]

Conventional criminal law likewise recognizes harm to a wider community beyond direct victims when courts allow the use of victim impact statements during the sentencing phase of homicide trials. Because homicide victims are not alive to testify during trial, in victim impact statements for such trials, "family members typically present

116. *See, e.g.*, People v. Bland, 48 P.3d 1107, 1110 (Cal. 2002).

117. *See* Lee R. Russ, Annotation, *Modern Status of the Rules Requiring Malice "Aforethought," "Deliberation," or "Premeditation," as Elements of Murder in the First Degree*, 18 A.L.R.4th 961 § 1 (1982) ("The statutes generally make use of such terms as 'willful, deliberate, and premeditated,' or some variation thereon, to describe the mens rea necessary to hold a defendant subject to the higher punishment of first-degree murder.").

118. *See* MODEL PENAL CODE § 211.1 (AM. L. INST., Proposed Official Draft 1962).

119. *See id.* § 210.1.

120. Megan Sullaway, *Psychological Perspectives on Hate Crime Laws*, 10 PSYCH., PUB. POL'Y, & L. 250, 262 (2004).

121. *Id.* at 264.

such testimony,"[122] which can include their experience of "the emotional and psychological impact of the victim's death."[123]

Similarly, hate crimes tend to inflict harm upon others beyond the direct victims. As noted in Section II.A., the Supreme Court in *Wisconsin v. Mitchell* acknowledged that "according to the State and its *amici*, bias-motivated crimes are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest."[124]

Moreover, as one researcher has noted, harm to the identity group to which the victims belong can occur when perpetrators commit crimes with the intent of "sending a message" of intimidation to the victims' community.[125] In addition:

> [w]hen violent hate crimes are not reported to the police, as may be the case if the victim doubts the police will be sympathetic to him or her, or if the victim is in terror of the police (as in the case of immigrants from countries where police are corrupt or otherwise not trusted), the entire community is placed at increased risk.[126]

Researchers have also found that hate crimes can lead to cyclical perpetuation of retaliation and additional hate crimes.[127]

Therefore, imposing more severe punishment for bias-motivated crimes reflects the greater harm that such crimes tend to inflict upon both direct victims and the broader community.

B. Liberal Criticism of Hate Crime Laws, and Response

Some liberal groups note that minorities have been treated unfavorably by the criminal justice system and point to the irony of relying on that same system for protection through hate crime legislation and prosecution.[128] As one popular-level article summarizes, "[s]ome on the left argue that criminal law is the last thing that will help

122. Jeremy A. Blumenthal, *Affective Forecasting and Capital Sentencing: Reducing the Effect of Victim Impact Statements*, 46 AM. CRIM. L. REV. 107, 109 (2009).

123. Janice Nadler & Mary R. Rose, *Victim Impact Testimony and the Psychology of Punishment*, 88 CORNELL L. REV. 419, 421 (2003).

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

125. Sullaway, *supra* note 120, at 252.

126. *Id.* at 266.

127. *Id.*

128. *See* Avlana Eisenberg, *Hate-Crime Laws Don't Work as Their Supporters Intended*, ATLANTIC (June 22, 2021), https://www.theatlantic.com/ideas/archive/2021/06/hate-crimes-not-used-prosecutors/619179/.

communities of color, and that hate-crime laws will be applied disproportionately against the most marginalized, serving only to worsen our mass-incarceration crisis."[129]

Others have similarly noted the danger of bias against minority suspects in application of hate crime laws. In calling for better data collection about hate crimes, the American Constitution Society also raises the prospect of bias in the court system, provocatively asking: "Are prosecutors more apt to pursue hate crime penalty enhancement against nonwhite defendants? Are jurors less sympathetic to nonwhite hate crime victims?"[130] In addition, the Sylvia Rivera Law Project has more recently, and more specifically, stated the following background of disparate experiences that identity groups have had with the criminal justice system:

> African-American people are six times more likely to be incarcerated than white people; Latin@ people are twice as likely to be incarcerated as white people. LGBTS and queer people, transgender people, and poor people are also at greatly increased risk for interaction with the criminal justice system. It is clear that this monstrous system of laws and enforcement specifically targets marginalized communities, particularly people of color.[131]

However, the aspiration of hate crime legislation and prosecution in condemning bias-based crimes—beyond what more traditional criminal law provides—is highlighted by the prosecution and conviction of Ahmaud Arbery's killers on federal hate crime charges after they had already been convicted on state murder charges. On February 23, 2020, when Arbery was jogging through a neighborhood,[132] three white men pursued Arbery—an unarmed black man—in a chase that ended in one of the perpetrators fatally shooting him.[133] The perpetrators suspected

129. *Id.*

130. Kai Wiggins, *The Dangers of Prosecuting Hate Crimes in an Unjust System*, AM. CONST. SOC'Y (Aug. 5, 2019), https://www.acslaw.org/expertforum/the-dangers-of-prosecuting-hate-crimes-in-an-unjust-system/.

131. *SLRP on Hate Crime Laws*, SYLVIA RIVERA L. PROJECT, https://srlp.org/action/hate-crimes/ (last visited Mar. 2, 2023); *see also Section II: Incarceration & Its Consequences*, PRISON POL'Y INITIATIVE, https://www.prisonpolicy.org/prisonindex/prisoners.html (last visited Mar. 2, 2023) (providing statistics and citations underlying the characterizations used in the SLRP article).

132. Caroline Vakil, *Ahmaud Arbery Killers Convicted on Federal Hate Crime Charges*, HILL (Feb. 22, 2022, 10:44 AM), https://thehill.com/regulation/court-battles/595292-ahmaud-arbery-killers-convicted-on-federal-hate-crime-charges/?rl=1.

133. Janelle Griffith, *Three Men Convicted of Murdering Ahmaud Arbery Sentenced to Life in Prison*, NBC NEWS (Jan. 7, 2022, 6:21 PM), https://www.nbcnews.com/news/us-news/three-men-convicted-murdering-ahmaud-arbery-sentenced-life-prison-rcna10901.

Arbery had committed a series of break-ins in their Georgia neighborhood,[134] and pursued him in two pickup trucks, eventually trapping Arbery between the trucks.[135] The perpetrators did not face state hate crime charges because Georgia did not have a hate crime statute at the time Arbery was killed,[136] although the state's legislature enacted a hate crime statute in response to Arbery's death.[137] During the state murder trial, the prosecution did not focus on evidence that the killing was racially motivated.[138] In November of 2021, all three defendants "were convicted on state murder charges and sentenced to life in prison," and two of the three have no possibility of parole.[139]

In addition to the state murder charges, the defendants also faced charges of committing the federal hate crime of interference with federal rights under 18 U.S.C. § 245(b)(2)(B), as well as associated offenses of attempted kidnapping and use of a firearm during a crime of violence.[140] Prosecutors and defense counsel had reached a plea deal, which the judge rejected after Arbery's parents opposed it.[141] The Arbery family's attorney explained that the plea agreement "could have enabled Travis and Greg McMichael to spend the first 30 years of their life sentences in federal prison, rather than state prison where conditions are tougher."[142] The federal trial included "evidence of all three [defendants'] history of 'racial resentment'—from the frequent use of racial slurs, to texts and social media posts that urged violence against black Americans."[143] For example, prosecutors presented defendants' social media posts in which one of the men who murdered Arbery referred to black people as

134. Richard Fausset, *What We Know About the Shooting Death of Ahmaud Arbery*, N.Y. TIMES (Aug. 8, 2022), https://www.nytimes.com/article/ahmaud-arbery-shooting-georgia.html.

135. Griffith, *supra* note 133.

136. Tariro Mzezewa, *Regardless of the Verdict, the Arbery Murder Suspects Still Face Federal Hate-Crime Charges*, N.Y. TIMES (Nov. 23, 2021), https://www.nytimes.com/2021/11/23/us/arbery-suspects-hate-crime-charges.html.

137. Fausset, *supra* note 134.

138. Chelsea Bailey, *Ahmaud Arbery: Jury Finds Killers Guilty on Federal Hate Crimes Charges*, BBC (Feb. 22, 2022), https://www.bbc.com/news/world-us-canada-60482214.

139. Vakil, *supra* note 132.

140. Indictment at 1–6, United States v. McMichael, No. 21-cr-00022, 2021 WL 1686571 (S.D. Ga. Apr. 28, 2021).

141. *Judge Rejects Plea Deal on Federal Hate Crimes Charges in Ahmaud Arbery's Killing*, CBS NEWS (Jan. 31, 2022, 6:40 PM), https://www.cbsnews.com/news/ahmaud-arbery-travis-mcmichael-hate-crime-plea-deal-rejected/.

142. *Id.*

143. *Ahmaud Arbery: Jury Finds Killers Guilty on Federal Hate Crimes Charges*, BBC (Feb. 22, 2022), https://www.bbc.com/news/world-us-canada-60482214.

"subhuman savages" and "monkeys."[144] Another defendant used racist epithets to refer to black people, "shared racist views of issues like Martin Luther King Jr. Day over years, and expressed anger that his daughter had chosen to date a Black man. "[145] On February 22, 2022, the jury convicted all three defendants on all charges.[146]

Thus, the victim's family was unwilling to support a hate crime plea bargain on terms that would have resulted in easier prison conditions for the defendants. Moreover, unlike the state murder trial, the federal hate crime trial exposed details of the defendants' history of racial bias.

More recent cases have featured hate crime prosecution under 18 U.S.C. § 249(a)(1) or (a)(2). For example, on August 3, 2019, a shooter killed twenty-two victims in a Walmart store in El Paso, Texas along the border with Mexico.[147] The shooter, alleged to have driven "10 hours from north Texas to target Mexicans in El Paso,"[148] was charged for murder under Texas law and indicted for federal hate crimes[149] under 18 U.S.C. § 249(a)(2) as well as associated federal firearm crimes.[150] Most of the victims "were either Mexicans or Mexican-Americans. Minutes before the shooting, the suspect posted a lengthy anti-immigrant manifesto online, declaring that the attack was a response to 'the Hispanic invasion of Texas' and 'all the problems these invaders cause and will cause.'"[151] The shooter also posted a claim about "the potential for the Democratic Party to benefit from the growing Latino population."[152]

In a very recent case, on May 14, 2022, "[t]en people were killed in a racially motivated mass shooting at a supermarket in Buffalo . . . by a

144. Phil McCausland, *Ahmaud Arbery Killers' Hate Crime Trial: Prosecutors Share the Men's Messages, Social Media Posts*, NBC NEWS (Feb. 16, 2022, 9:58 PM), https://www.nbcnews.com/news/us-news/ahmaud-arbery-killers-hate-crime-trial-prosecutors-share-mens-messages-rcna16513.

145. *Id.*

146. Mike Hayes, *Ahmaud Arbery's Killers Found Guilty on All Counts in Federal Hate Crime Trial*, CNN (Feb. 22, 2022, 11:45 AM), https://www.cnn.com/us/live-news/ahmaud-arbery-killing-hate-crimes-verdict/h_2d42f428445a50cd32c2539e6b24d05e.

147. *Terror from the Right*, S. POVERTY L. CTR., https://www.splcenter.org/terror-from-the-right (last visited Mar. 2, 2023).

148. Jasmine Aguilera, *'It's Justified.' The El Paso Walmart Shooting Suspect Now Faces 90 Federal Charges*, TIME (Feb. 6, 2020, 8:12 PM), https://time.com/5779445/el-paso-walmart-shooting-hate-crime-charges/.

149. Eric Coulehan et al., *Federal Hate Crime Charges Filed in El Paso Shooting That Targeted Latinos*, N.Y. TIMES (Feb. 6, 2020), https://www.nytimes.com/2020/02/06/us/politics/el-paso-shooting-federal-hate-crimes.html.

150. Superseding Indictment at 1, United States v. Crusius, No. 20-cr-0389, 2020 WL 6572331 (W.D. Tex., July 9, 2020).

151. Coulehan et al., *supra* note 149.

152. Michael J. Klarman, *Foreword: The Degradation of American Democracy—and the Court*, 134 HARV. L. REV. 1, 33 (2020).

suspect in tactical gear who was livestreaming the attack."[153] The perpetrator shot a total of thirteen victims—eleven who were black, and two who were white.[154] In a note discovered in his bedroom, the perpetrator stated that he undertook the attack because of his concern "for the future of the White race."[155] He traveled more than two-hundred miles to attack the store, which was in a predominately black neighborhood.[156] In state court, the shooter was indicted for murder, attempted murder, hate crimes based on these charges, domestic terrorism, and a charge of "criminal possession of a weapon."[157] Subsequently, he was indicted in federal court for "hate crime resulting in death," "hate crime involving bodily injury," as well as associated weapons charges.[158] The federal hate crime charges were brought under 18 U.S.C. § 249(a)(1).[159] The federal complaint also alleges that the perpetrator apologized to a white victim he injured, rather than shooting him again, and then searched for more black people to kill.[160] The perpetrator pleaded guilty to the state charges.[161] In addition, he indicated a willingness to plead guilty to the federal charges if prosecutors would agree to forego seeking the death penalty.[162]

153. Artemis Moshtaghian et al., *10 People Killed in a Racially Motivated Mass Shooting at a Buffalo Supermarket, Police Say. The 18-Year-Old Suspect Is in Custody*, CNN (May 14, 2022, 10:44 PM), https://www.cnn.com/2022/05/14/us/buffalo-ny-supermarket-multiple-shooting/index.html.

154. *Id.*

155. Sarah Boxer et al., *Buffalo Shooting Suspect Said He Committed Massacre "For the Future of the White Race" in Note Apologizing to His Family, Affidavit Says*, CNN (June 16, 2022, 3:13 PM), https://www.cnn.com/2022/06/16/us/buffalo-shooting-suspect-federal-court/index.html.

156. *What We Know About the Buffalo Mass Shooter*, AXIOS (May 16, 2022), https://www.axios.com/2022/05/15/buffalo-mass-shooter-what-we-know.

157. Aaron Besecker, *Tops Shooter Faces Indictment Including Domestic Terrorism, Hate Crimes*, BUFFALO NEWS (June 1, 2022), https://buffalonews.com/news/local/crime-and-courts/tops-shooter-faces-indictment-including-domestic-terrorism-hate-crimes/article_17af7a26-e1b4-11ec-a051-df2500ff3960.html.

158. Sonia Moghe & Ray Sanchez, *Suspect in Racist Mass Shooting at a Buffalo Supermarket Faces Federal Hate Crime Charges*, CNN (June 15, 2022, 8:10 PM), https://www.cnn.com/2022/06/15/us/buffalo-shooting-payton-gendron-federal-charges/index.html.

159. Bill Chappell, *DOJ Charges Buffalo Gunman with Hate Crimes, and Says He Apologized to a White Victim*, NPR (June 15, 2022, 1:22 PM), https://www.npr.org/2022/06/15/1105226662/buffalo-payton-gendron-federal-hate-crime.

160. *Id.*

161. Mark Morales et al., *Buffalo Grocery Store Mass Shooter Pleads Guilty to Terrorism and Murder Charges in Racist Attack*, CNN (Nov. 28, 2022), https://www.cnn.com/2022/11/28/us/buffalo-tops-grocery-shooting-payton-gendron-plea/index.html.

162. Mark Morales et al., *Buffalo Grocery Store Mass Shooter Willing to Plead Guilty to Federal Charges if Death Penalty off the Table, Attorneys Say*, CNN (Dec. 9, 2022), https://www.cnn.com/2022/12/09/us/buffalo-tops-grocery-shooting-payton-gendron-plea/index.html.

IV. MORE-RESTRICTIVE INTENT REQUIREMENTS: THE GENOCIDE CONVENTION AND THE FEDERAL GENOCIDE STATUTE

As noted in Part III, intent has been a traditional component of conventional crimes. In addition, courts have noted a distinction between general intent and specific intent: "a general intent crime requires the knowing commission of an act that the law makes a crime. A specific intent crime requires additional 'bad purpose.'"[163] For example, in the context of bank robbery, the Supreme Court noted that a defendant exhibited general intent when he "entered a bank and took money from a teller at gunpoint," but failed to meet the specific intent requirement of "permanently [depriving] the bank of its possession of the money" because he "deliberately failed to make a quick getaway from the bank in the hope of being arrested so that he would be returned to prison and treated for alcoholism."[164]

Both the Genocide Convention and the federal genocide statute include a specific intent requirement in defining the crime of genocide, as examined below.

A. The Genocide Convention

The intent requirement of law dealing with the crime of genocide focuses on harm to the greater community, rather than on harm to individual victims. In providing context for the adoption of the Genocide Convention, the United Nations explained that:

> The Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) is an instrument of international law that codified for the first time the crime of genocide. The Genocide Convention was the first human rights treaty adopted by the General Assembly of the United Nations on 9 December 1948 and signified the international community's commitment to 'never again' after the atrocities committed during the Second World War.[165]

163. *E.g.*, United States v. Kimes, 246 F.3d 800, 807 (6th Cir. 2001) (quoting United States v. Kleinbart, 27 F.3d 586, 592 n.4 (D.C. Cir. 1994)).

164. Carter v. United States, 530 U.S. 255, 268 (2000) (discussing United States v. Lewis, 628 F.2d 1276, 1279 (10th Cir. 1980)).

165. *The Genocide Convention*, UNITED NATIONS, https://www.un.org/en/genocideprevention/genocide-convention.shtml (last visited Mar. 2, 2023).

"Never again" has been a succinct catchphrase for vigilance against allowing recurrence of the Holocaust that Nazi Germany committed against European Jewish people.[166]

Article I of the Convention outlaws genocide: "The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish."[167]

Article II provides a broad definition for the crime of genocide:

> In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) Killing members of the group;
>
> (b) Causing serious bodily or mental harm to members of the group;
>
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> (d) Imposing measures intended to prevent births within the group;
>
> (e) Forcibly transferring children of the group to another group.[168]

B. The Federal Genocide Statute

Congress enacted the federal genocide statute as implementing legislation to fulfill the United States' obligations under the Genocide

166. *See, e.g.*, Press Release, Secretary General, 'Never Again' Means Constant Retelling of Holocaust Story, Secretary-General Stresses at Exhibition Opening, Citing Rising Antisemitism, Other Hatreds, U.N. Press Release SG/SM/19943 (Jan. 21, 2020), https://www.un.org/press/en/2020/sgsm19943.doc.htm.

167. G.A. Res. 260 (III) A, Convention on the Prevention and Punishment of the Crime of Genocide (Dec. 9, 1948), https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf (last visited Mar. 2, 2023).

168. *Id.*

Convention.[169] Subsection (a) of the statute substantially mirrors a combination of article I and article II of the Genocide Convention, but with a more restrictive specific intent requirement:

> Whoever, whether in time of peace or in time of war and with the specific intent to destroy, in whole or in substantial part, a national, ethnic, racial, or religious group as such—
>
> (1) kills members of that group;
>
> (2) causes serious bodily injury to members of that group;
>
> (3) causes the permanent impairment of the mental faculties of members of the group through drugs, torture, or similar techniques;
>
> (4) subjects the group to conditions of life that are intended to cause the physical destruction of the group in whole or in part;
>
> (5) imposes measures intended to prevent births within the group; or
>
> (6) transfers by force children of the group to another group;
>
> shall be punished as provided in subsection (b).[170]

Moreover, the definition section of the statute provides that "the term 'substantial part' means a part of a group of such numerical significance that the destruction or loss of that part would cause the destruction of the group as a viable entity within the nation of which such group is a part."[171]

Therefore, the requirement of "specific intent to destroy, in whole or in *substantial* part, a national, ethnic, racial, or religious group" in the federal genocide statute[172] presents a higher threshold than the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group" in the Genocide Convention.[173] The requirement in the genocide

169. *See, e.g.*, David Sloss, *Section 230 and the Duty to Prevent Mass Atrocities*, 52 CASE W. RSRV. J. INT'L L. 199, 201 (2020).
170. 18 U.S.C. § 1091(a).
171. *Id.* § 1093(8).
172. *Id.* § 1091(a) (emphasis added).
173. G.A. Res. 260 (III) A., *supra* note 167.

statute is thus more restrictive—regarding the intent that perpetrators must have toward groups of victims—than is the corresponding provision in the Genocide Convention.[174]

At least one commentator, Jordan J. Paust, has thus called for abolishing the "substantial part" threshold of the federal statute,[175] contending that:

> [I]f a perpetrator within the United States intentionally kills forty-one of some forty-two million persons making up one racial group, and targeting them because they are members of that racial group, then prosecution under present U.S. legislation is not possible if the survival of one million persons from that group does not destroy the group "as a viable entity" within the United States. Astonishingly, under the special definition it may not be possible to prosecute perpetrators of the Holocaust for genocide.[176]

The first part of Professor Paust's criticism is well-stated. But in asserting that the "substantial part" threshold might disallow prosecution for Holocaust perpetrators under the federal statute, Professor Paust somehow seems to lose sight of the fact that the "substantial part" threshold is an *intent* requirement, rather than a measure of what the perpetrators were actually able to carry out. Perpetrators' actions and statements are relevant to establishing their intent. Thus, the Nazis' ominously worded "final solution to the Jewish question"[177] provides context for their extermination of millions of Jewish people in Europe between 1941 and 1945.[178]

V. A NEW MODEL FOR STATE AND LOCAL PROSECUTION: WHEN HATE CRIME IS GENOCIDE

This Article proposes a new model for state and local government bodies to consider adopting as hate crime laws, starting with the

174. Matthew Lipmann, *The Convention on the Prevention and Punishment of the Crime of Genocide: Fifty Years Later*, 15 ARIZ. J. INT'L & COMPAR. L. 415, 484 (1998). Lipmann further criticizes the federal statute's "substantial part" requirement as vague. *Id.*

175. Jordan J. Paust, *The Need for New U.S. Legislation for Prosecution of Genocide and Other Crimes Against Humanity*, 33 VT. L. REV. 717, 724–25 (2009).

176. *Id.* at 724.

177. *See, e.g.*, *Nazi Officials Discuss "Final Solution" at the Wannsee Conference*, HISTORY (Jan. 18, 2022), https://www.history.com/this-day-in-history/the-wannsee-conference.

178. *See The "Final Solution"*, U.S. HOLOCAUST MEM'L MUSEUM (May 11, 2021), https://encyclopedia.ushmm.org/content/en/article/the-final-solution.

sentencing enhancement feature that has passed constitutional muster in cases such as *Wisconsin v. Mitchell*,[179] and adding the specific intent requirement from the federal genocide statute[180]—but scaling the required intent to the state or local level.

Under this proposal, the defendant must have committed a crime such as vandalism, assault, or homicide. In addition, the defendant must have committed that crime with the specific intent to destroy the viability of the victim's identity group within the state or local scene. The defendant would then face an elevated level of punishment, compared to the penalties if the same actions had been undertaken without that specific intent.

Conceptualizing community harm of large-scale hate crimes as genocide on a state or local level would allow prosecution for atrocities targeting particular groups of victims when the federal government is either unable or unwilling to pursue federal hate crime and genocide charges. For example, if victims are not engaged in federally protected activities listed in 18 U.S.C. § 245—such as attending public school or accessing state benefits—then federal hate crime prosecution under that statute is not available.[181] Federal prosecutors might then turn to 18 U.S.C. § 249, which does not depend on such a restricted list of protected activities; however, criminal actions that do not involve intent to inflict bodily injury—such as incidents of vandalism that are meant to intimidate but not physically injure the victims—are not eligible for prosecution as hate crimes under that statute.[182] Thus, cross-burning incidents—such as those that were at issue in the Supreme Court cases of *R.A.V. v. City of St. Paul*[183] and *Virginia v. Black*[184]—could not be prosecuted under 18 U.S.C. § 249 because there was no evidence of intent to cause bodily injury.

As an alternative, the U.S. Department of Justice could seek to charge some hate crime offenders under the federal genocide statute, but only if the perpetrators' intent met the requirement of "specific intent to destroy, in whole or in substantial part, a national, ethnic, racial, or religious group."[185] However, if the victims' group had a nationwide presence but a hate organization focused on persecuting the victims in only one region of the country, that would not constitute genocide under the federal statute because of the definitional section that explains "the

179. 508 U.S. 476, 490 (1993).
180. 18 U.S.C. § 1091(a).
181. *See id.* § 245(b)(2).
182. *See id.* § 249(a).
183. 505 U.S. 377, 380, 391 (1992).
184. 538 U.S. 343, 347–48 (2003).
185. § 1091(a).

term 'substantial part' means a part of a group of such numerical significance that the destruction or loss of that part would cause the destruction of the group as *a viable entity within the nation* of which such group is a part."[186]

The federal government's willingness to pursue charges may also vary over time. In recent years, the number of hate groups has increased,[187] as have the number of hate crime incidents,[188] but federal prosecution for such crimes has decreased.[189] The inference that the upper echelon of federal law enforcement is not interested in prosecuting hate crimes can be exacerbated when officials charged with enforcing hate crime laws have previously expressed hostility to those laws—such as when the Trump Administration's first attorney general had previously argued as a senator that enacting a federal hate crime law was unconstitutional.[190]

An advantage that the sentencing enhancement model confers upon prosecutors is that after a defendant is convicted of a crime, then in the sentencing phase, the judge may consider evidence that would have been inadmissible under the evidentiary rules that apply to the liability phase of the trial.[191] In the context of hate crimes, such evidence could include prior convictions for previously committed hate crimes—or even evidence of incidents that were not adjudicated—as well as hearsay statements that witnesses could offer about the defendant's motive and intent.[192] Thus, if there is enough evidence to establish a genocidal motive for commission of a crime, then a wide range of sources may be considered as evidence to determine how severe the penalty should be.

186. *Id.* § 1093(8) (emphasis added).

187. *Hate Groups Reach Record High*, S. POVERTY L. CTR. (Feb. 19, 2019), https://www.splcenter.org/news/2019/02/19/hate-groups-reach-record-high (stating that "[r]ather than trying to tamp down hate, as presidents of both parties have done, President Trump elevates it—with both his rhetoric and his policies").

188. *See, e.g.*, Travis Bubenik, *Reported Hate Crimes on the Rise, but Federal Prosecutions Drop*, COURTHOUSE NEWS SERV. (Aug. 13, 2019), https://www.courthousenews.com/reported-hate-crimes-on-the-rise-but-federal-prosecutions-drop/; Christina Carrega & Priya Krishnakumar, *Hate Crime Reports in US Surge to the Highest Level in 12 Years, FBI Says*, CNN (Oct. 26, 2021, 2:05 PM), https://www.cnn.com/2021/08/30/us/fbi-report-hate-crimes-rose-2020/index.html.

189. *E.g.*, Bubenik, *supra* note 188. Bubenik's article notes the possibility that declining federal prosecution of hate crimes might be due to more states having enacted hate crime statutes; however, he also observes the limited success of hate crime prosecution in Texas. *Id.*

190. Ryan Katz, *Hate Crime Law Results in Few Convictions and Lots of Disappointment*, PRO PUBLICA (Apr. 10, 2017, 12:22 PM), https://www.propublica.org/article/hate-crime-law-results-in-few-convictions-and-lots-of-disappointment.

191. *See infra* notes 193–94 and accompanying text.

192. *See infra* notes 195–200 and accompanying text.

Federal Rule of Evidence 1101 explicitly provides that sentencing hearings are among the few "miscellaneous proceedings" in federal courts to which the Federal Rules of Evidence do *not* apply.[193] Because "many states have closely modeled their rules of evidence after the Federal Rules of Evidence,"[194] the nonrestrictive approach toward evidence for use in sentencing hearings also applies in many state court systems.

Regarding the use of previous convictions for sentencing by federal courts, 18 U.S.C. § 3661 provides that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."[195] In fact, in the federal courts, "unadjudicated prior bad acts may also be taken into account in the judge's exercise of discretion" for sentencing, which is similar to the practice used in many state courts.[196]

In addition, hearsay evidence, which is normally inadmissible at trial[197] unless it falls within an exception to the hearsay rule,[198] may be considered by judges at sentencing in both federal courts[199] and state courts.[200]

CONCLUSION

The hate crimes hybrid model that this Article proposes consists of the following features. First, there must be an underlying crime such as vandalism, or assault, or homicide. Second, by analogy to the federal genocide statute, the defendant must have committed the crime with the specific intent of destroying the victim's identity group as a viable entity at the state or local level—which can be established by the perpetrator's statements or actions, and those actions can include the sheer number of victims who share a particular trait. Third, the model utilizes the sentencing enhancement component for hate crime legislation that was upheld in *Wisconsin v. Mitchell* and subsequent cases, thus resulting in

193. FED. R. EVID. 1101(d)(3).

194. Ronald J. Allen & Esfand Nafisi, *Daubert and Its Discontents*, 76 BROOK. L. REV. 131, 135 n.15 (2010).

195. *See* 18 U.S.C. § 3661.

196. Chris William Sanchirico, *Character Evidence and the Object of Trial*, 101 COLUM. L. REV. 1227, 1268 (2001).

197. *E.g.*, FED. R. EVID. 802.

198. *E.g.*, FED. R. EVID. 803, 804.

199. *E.g.*, United States v. Littlesun, 444 F.3d 1196, 1200 (9th Cir.), *cert. denied*, 549 U.S. 885 (2006).

200. *E.g.*, People v. Monk, 528 N.E.2d 1063, 1070 (Ill. App. Ct. 1988), *appeal denied*, 535 N.E.2d 919 (Ill. 1989).

a more severe penalty compared to if the same sort of criminal action were undertaken without genocidal intent.

Examining some of the previously discussed hate crime cases, we see that the hybrid model offers an avenue for prosecution in situations like those in *R.A.V. v. City of St. Paul* and *Virginia v. Black*, in which cross-burning was used as a means of intimidating black individuals but where the Supreme Court struck down the hate crime statutes at issue that defined new, substantive crimes rather than using sentencing enhancement for previously existing crimes.[201] If the prosecution could establish that the perpetrators in these types of cases had the intent of driving members of a racial group out of the community, then that would fit the model of hate crime as genocide.

On the other hand, the hybrid model would not apply in situations like the case of *Wisconsin v. Mitchell*, in which the Supreme Court upheld the application of a sentencing enhancement hate crime statute to the single victim of a beating who was selected because of his race.[202] Prosecution would not be undertaken under the hybrid model because there was no indication of the perpetrators intending to eradicate the viability of white people—the victim's racial group—at the state or local level.[203]

Returning to the examples that began this Article, we can see that the hybrid hate crime/genocide model of legislation would have differing results in prosecuting the murders of James Byrd Jr. and Matthew Shepard. Genocidal intent could be found in Byrd's murder, for example, because the tattoo of "a hanged black man" on the skin of one of the perpetrators[204] could be viewed as somatic text declaring intention to eradicate black people as a viable entity in the community. The perpetrator's role as leader of the "Confederate Knights of America—Texas Rebel Soldier Division"[205] could also be examined for evidence of statements or actions establishing such an intention.

By contrast, in Matthew Shepard's murder—notwithstanding the abhorrent nature of the crime, accompanied by one of the perpetrators using gender slurs in referring to the victim[206] and stating that Shepard being gay played into his selection as a victim[207]—no evidence indicated an intention to destroy the viability of the gay community, either in the

201. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 379–80, 391 (1992); Virginia v. Black, 538 U.S. 343, 347–48 (2003).
202. Wisconsin v. Mitchell, 508 U.S. 476, 480–83 (1993).
203. *See id.*
204. Croucher, *supra* note 2.
205. *Id.*
206. Marsden, *supra* note 8.
207. Hawkins, *supra* note 11.

city of Laramie or statewide throughout Wyoming. The men who killed Shepard were close to his age of twenty-one when they assaulted him—one was twenty-one and the other was twenty-two.[208] Thus, the incident more neatly fits Dwight Greene's category of spontaneous juvenile crime rather than his category of crimes planned by hate organizations,[209] and given the absence of evidence establishing intent to eradicate an identity group to which Shepard belonged, the model of hate crime as genocide would not apply to the prosecution of Shepard's killers.

Therefore, the hybrid model proposed in this Article can be a complement, rather than a replacement, for statutes that penalize bias-motivated crimes targeting individuals without intent to inflict harm upon a larger identity group. Recognizing crimes against identity groups as a level of genocide places those crimes in a context that emphasizes the harm they inflict upon wider society and vindicates the interests that victims and their communities have in condemning the broader societal harm.

208. James Brooke, *Mother of Suspect in Killing of Gay Student Freezes to Death*, N.Y. TIMES (Jan. 6, 1999), https://www.nytimes.com/1999/01/06/us/mother-of-suspect-in-killing-of-gay-student-freezes-to-death.html.

209. *See* Greene, *supra* note 22, at 906.