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Invidious Deliberation: The Problem of Congressional Bias in Federal Hate Crime Legislation

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INVIDIOUS DELIBERATION: THE PROBLEM OF CONGRESSIONAL BIAS IN FEDERAL HATE CRIME LEGISLATION

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ABSTRACT

Through the enactment of federal hate crime laws, Congress decides which groups are most vulnerable to bias motivated-violence, and which groups are worthy of statutory protection against such crimes. This Article contends that such congressional decisions—specifically the selection of which groups are entitled to protection under federal hate crime legislation—discriminate against the very groups that are most vulnerable to bias.

This Article analyzes evidence of bias in over two decades of congressional deliberations concerning the Hate Crime Statistics Act (the HCSA), which functions as a "gateway" for groups seeking protection under federal hate crime legislation. The Article reviews congressional decisions relating to eight groups: the seven currently covered groups—race, religion, ethnicity, sexual orientation, disability, gender, and gender identity—and the only candidate group to receive a congressional hearing that has not yet been admitted to the HCSA: the homeless. The review observes that Congress exhibited greater resistance to constructing animus against gays, lesbians, and the homeless as morally or legally

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wrong, especially in comparison to the other covered groups. This congressional resistance is not attributable to an equitable, principled deliberation process; instead, it is an expression of Congress's own "unrecognized" bias against unpopular groups. As a result, congressional bias may exclude the most vulnerable groups from hate crime protection.

To address this problem, Congress should explicitly and consistently use a set of principled criteria in its assessments of HCSA candidate groups. This Article proposes certain suspect classification factors as one example of such criteria. If Congress used such principled criteria, it could mitigate the ironic presence of congressional bias in anti-bias legislation.

INTRODUCTION

[The] equal protection doctrine does not prevent the majority from enacting laws based on its substantive value choices. Equal protection simply requires that the majority apply its values

evenhandedly.[1]

The legislature "makes a normative statement when it frames its bias crime statute—there is no such thing as a 'neutral' bias crime law."[2]

As a human enterprise, the legislative process is not immune to the distinctly human pathology of bias. Indeed, political power and social popularity have unsurprising influences on the shape of statutory law. But Equal Protection principles—as well as a basic sense of fairness and decency—compel the rejection of invidious discrimination,[3] that is, evidence that a law treats similarly situated groups unequally and without a principled justification,[4] resulting in a diminished or degraded moral status for the target.[5]

This Article identifies a problem with bias in congressional deliberations at a particularly critical point: when Congress decides which groups to protect under federal hate crime legislation. This Article systematically reviews two decades of congressional decisions with respect to expansions of the Hate Crime Statistics Act ("HCSA"), which functions as a critical "gateway" for groups seeking

1. Watkins v. U.S. Army, 875 F.2d 699, 720 (9th Cir. 1989) (Norris, J., concurring).

2. FREDERICK M. LAWRENCE, PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW 17 (1999).

3. "Invidious discrimination" is a classification which is "arbitrary, irrational, and not reasonably related to a legitimate purpose." BLACK'S LAW DICTIONARY 826 (6th ed. 1990); *see* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (recognizing that application of "strict scrutiny" may be necessary to eliminate the risk of a state invidiously discriminating "against groups or types of individuals in violation of the constitutional guaranty of just and equal laws").

4. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985) (noting that judicial intervention in the form of strict scrutiny is appropriate when a law "reflect[s] prejudice and antipathy-a view that those in the burdened class are not as worthy or deserving as others"); Reed v. Reed, 404 U.S. 71, 76 (1971) (holding that treating similarly situated classes differently without a normative justification amounts to the "very kind of arbitrary legislative choice forbidden by the [Constitution]"); *cf.* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 130-31 (1994) (concluding that legislative discrimination violates the Fourteenth Amendment when it "serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes"); Watkins, 875 F.2d at 724 (sanctioning some forms of "discrimination . . . against some groups because the animus is warranted—[for example,] no one could seriously argue that burglars form a suspect class"); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 154 (1980) (similarly justifying discrimination against burglars).

5. *See* Frontiero v. Richardson, 411 U.S. 677, 686-87 (1973) (discussing how discriminatory legislation relegates the target group to an "inferior legal status"). The use of the word "target" in this manner can be attributed to Jennifer Earl & Sarah Soule, *The Differential Protection of Minority Groups: The Inclusion of Sexual Orientation, Gender, and Disability in State Hate Crime Laws, 1976-1995*, *in* THE POLITICS OF SOCIAL INEQUALITY 3 (Betty A. Dobratz et al. eds., 2001).

protection from bias-motivated violence.[6] This review concludes that these congressional choices tend to discriminate against the very groups that are most vulnerable to bias.

This Article argues that these legislative deliberations are compromised by the presence of latent or "unrecognized" bias. For hate crime purposes, animus toward a particular group only registers as bias[7] if that animus is a "recognizable social pathology."[8] Put another way, animus against a group is only construed as "wrong" if society believes the group is undeserving of animus.[9] For example, animus directed at a certain group based solely on the group members' negative or damaging behavior, such as criminal action, is more likely to be normatively construed as acceptable because the behavior is perceived to justify the animus.[10] Such "justified" animus

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6. Hate Crimes Statistics Act, Pub. L. No. 101-275, 104 Stat. 140 (1990) (codified as amended at 28 U.S.C. § 534 (2012)).

7. Through the HCSA, the federal government ultimately tasked the Uniform Crime Reporting ("UCR") Program with the job of establishing the necessary guidelines and procedures for collecting hate crime data. CRIMINAL JUSTICE INFO. SERV. DIV., FBI, HATE CRIME DATA COLLECTION GUIDELINES AND TRAINING MANUAL 1-2 (2012) [hereinafter HATE CRIME DATA COLLECTION MANUAL], *available at* http://www.fbi.gov/about-us/cjis/ucr/data-collection-manual. The UCR guidelines define a hate crime as "[a] committed criminal offense that is motivated, in whole or in part, by the offender's bias(es)." *Id.* at 8. The guidelines also define bias as "[a] preformed negative opinion or attitude toward a group of persons based on their race, religion, disability, sexual orientation, ethnicity, gender, or gender identity." *Id.*

8. LAWRENCE, *supra* note 2, at 11 (arguing that in order to qualify as a bias crime, the "antipathy [animating the offense] must exist in a social context, that is, it must be an animus that is shared by others in the culture and that is a recognizable social pathology within the culture"). My use of the phrase "unrecognized bias" also channels Grattet and Jenness's discussion of how the passage of time and narrative normalization "reflects the relative newness of [a candidate group] as a recognizable axis of discrimination." Ryken Grattet & Valerie Jenness, *Criminology: Examining the Boundaries of Hate Crime Law: Disabilities and the "Dilemma of Difference"*, 91 J. CRIM. L. & CRIMINOLOGY 653, 668-69 (2001) [hereinafter Grattet & Jenness, *Criminology*] (discussing the evolved perception and recognition of discrimination against the disabled); *see id.* at 671-73 (discussing similar evolutions with respect to gender, disability, and sexual orientation, which "have only recently been recognized by policymakers responsible for the formulation of hate crime law as legitimate axes around which hate crime occurs"). In some respects, the phrase "recognizable social pathology" also invites comparisons to "unconscious bias." Unconscious bias refers to when people "fail to perceive the factors that cause them to exhibit . . . preferences." Hart Blanton & James Jaccard, *Unconscious Racism: A Concept in Pursuit of a Measure*, 34 ANN. REV. SOC. 277, 279 (2008). It also "refers to individuals' lack of awareness of the effects of their own actions on other people, social institutions, and so on." *Id.* For an interesting discussion on the construction of "unconscious" prejudice in the Equal Protection context, see Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

9. *See, e.g.*, ELY, *supra* note 4, at 154 (reviewing situations where animus against certain groups may be perceived as warranted).

10. *See, e.g.*, Watkins, 875 F.2d at 724 (sanctioning some forms of "discrimination . . . against some groups because the animus is warranted—[for example,] no one could

is generally not recognized as a bias in the legal or moral sense. Of course, American society—including its proxy in Congress—still suffers from a range of unrecognized social pathologies of which it is not consciously aware or which it does not wish to recognize. When Congress is in a position to determine whether a certain group is subject to bias, as it is when it assesses candidate groups for coverage under federal hate crime laws, Congress may not even recognize its own bias against certain candidate groups as a "social pathology" warranting statutory redress.[11] Indeed, the problem of unrecognized bias becomes especially pressing with respect to the HCSA: it is the gateway to federal, uniform data that might corroborate a group's special vulnerability to bias-based violence and clarify any need for further statutory protection.

If Congress used a principled set of criteria to assess HCSA candidate groups, it would encourage greater consistency, equity, and accountability in its decision-making process. Congressional deliberations would become more transparent and predictable, and the public could more readily hold Congress accountable for unsupported deviations from these principles. Consistent use of these principles would bring greater coherence and credibility to the legislative decision-making process. A principled congressional narrative would improve both the legislative and public understanding of the law. Ultimately, this consistent application of principled criteria may mitigate the potential for legislative bias in future expansions of the HCSA.

This Article tests the principled quality of congressional decision-making with respect to expansions of the HCSA. Part I provides a brief overview of the HCSA, including its purpose and current group coverage. Part II takes a closer look at congressional decisions to add or exclude each candidate group, including race, religion, ethnicity, sexual orientation, disability, gender, gender identity, and homelessness. This examination reveals that Congress does not consistently or equitably assess candidate groups; instead, congressional decisions may be influenced by "unrecognized bias" against less popular groups, such as the LGBTQ community and the homeless. Part III explains why the combined lack of principles and the influence of unrecognized bias are inherently problematic in legislative constructions of hate crime laws. Part IV urges Congress to address this problem by consistently and transparently applying a

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seriously argue that burglars form a suspect class").

11. "Indeed . . . the act of identifying a problem is as much a normative judgment as it is an objective statement of fact; thus, if analysis proceeds from the identification of a problem, and the problem is defined normatively, then one cannot say that any subsequent analysis is strictly neutral." THOMAS A. BIRKLAND, AN INTRODUCTION TO THE POLICY PROCESS: THEORIES, CONCEPTS, AND MODELS OF PUBLIC POLICY MAKING 15 (3d ed. 2011).

set of criteria in its assessments of HCSA candidate groups. This section also proposes certain suspect classification factors as one way Congress could improve the principled quality of its deliberations over expansions of the HCSA. Ultimately, this Article seeks correction of the ironic presence of congressional bias in anti-bias legislation.

I. THE HATE CRIME STATISTICS ACT: A LENS TO DETECT BIAS

As a diagnostic tool, the HCSA is a critical first step to federal recognition of a group's vulnerability to bias-motivated violence. The HCSA mandates the collection of statistical data on bias crimes committed against specifically enumerated groups.[12] This statistical data can help to determine whether a group is significantly victimized and to identify trends in the types of bias crimes occurring; trends relating to the perpetrators of such violence; and other information to support the public, law enforcement, and community service agencies in preventing and addressing such violence.[13]

As a gateway to further federal hate crime protection, the HCSA also provides a helpful lens to detect congressional attitudes and perceptions relating to bias. As demonstrated below, legislative deliberations over which groups to include under the HCSA help to reveal congressional dispositions to either recognize animus toward a particular group as bias or to construe such animus as acceptable.[14]

Although some of this Article's observations could apply across federal hate crime statutes, there are several reasons to narrow the scope to the HCSA. First, the HCSA can serve as a diagnostic tool, implemented before the passage of other statutory measures. In other words, the HCSA is a logical starting place to determine the need for or scope of other hate crime statutes. Second, the HCSA is defensible on its own terms and without reference to other hate crime laws; as a diagnostic resource, the HCSA simply provides information. As opposed to other federal hate crime laws—such as those that provide for aggravated sentencing, budgetary allocations, or other preventative or remedial measures—the HCSA does not mandate or recommend any particular response to the information collected. Instead, the data is available to educate the public, law

12. Hate Crimes Statistics Act, Pub. L. No. 101-275, 104 Stat. 140 (1990) (codified as amended at 28 U.S.C. §534 (2012)).

13. J. M. Fernandez, *Bringing Hate Crime into Focus - The Hate Crime Statistics Act of 1990, Pub. L. No. 101-275*, 26 HARV. C.R-C.L. L. REV. 261, 263-64 (1991) (discussing the legislative intent behind the HCSA).

14. Thus, legislative history can provide direct evidence of congressional attitudes toward HCSA candidate groups. *See* Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887, 909 (2012) (discussing the United States Supreme Court's treatment of legislative history as "direct evidence" of legislative animus).

enforcement, and community service providers so each can better understand, coordinate, and respond more effectively to violence against vulnerable groups.[15] Because of these features, the HCSA should not provoke the broad range of criticism and debate directed to other federal hate crime statutes.

Certainly, some critiques firmly reject the purpose and efficacy of any hate crime legislation. For example, some dispute the premise that the law should punish bias crimes differently than "ordinary" crimes.[16] Others pose moral, ethical, economical, and practical challenges to hate crime laws generally.[17] But critiques that dispute

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15. *See* Grattet & Jenness, *Criminology*, *supra* note 8, at 661-62.

16. *See, e.g.*, Heidi M. Hurd & Michael S. Moore, *Punishing Hatred and Prejudice*, 56 STAN. L. REV. 1081 (2004) (arguing that no scholarship through 2004 demonstrates "an adequate moral justification or an acceptable doctrinal framework" for hate crime legislation); Anthony M. Dillof, *Punishing Bias: An Examination of the Theoretical Foundations of Bias Crime Statutes*, 91 NW. U. L. REV. 1015 (1997) (assessing justifications for bias crime statutes and concluding that such justifications rest on unsettled ground); Michael McGough, Op-Ed., *The Kansas Killings: Will Every Crime Be a Hate Crime Someday?*, L.A. TIMES (Apr. 15, 2014, 12:58 PM), http://www.latimes.com/opinion/opinion-la/la-ol-hatecrime-kansas-antisemitism-20140415-story.html#axzz2zLBPomnh (identifying "the perplexities that surround hate-crime laws," including the argument that "hate-crime laws may have the paradoxical effect of privileging some victims of violence over others"). Other scholars maintain that hate crimes not only divert attention away from the root causes and consequences of bias and prejudice, but also point out a "dilemma of difference" inherent in federal hate crime legislation. The phrase "dilemma of difference," which describes how the stigma of difference may be created both by ignoring and acknowledging it, is from MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 20-23 (Cornell U. Press, 1991). For related critiques, see generally Grattet & Jenness, *Criminology*, *supra* note 8 (discussing Minow's "dilemma of difference" in application to hate crime legislation); Jane Spade & Craig Willse, *Confronting the Limits of Gay Hate Crimes Activism: A Radical Critique*, 21 CHICANO-LATINO L. REV. 38, 39 (2000) (interrogating the legal categorization of queer and transgender people as "a practice of 'identity politics' that, despite accomplishing certain goals, nonetheless dangerously reifies constructs of homosexual identity"); Kimberlé W. Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 STAN. L. REV. 1242 (1991) ("The embrace of identity politics, however, has been in tension with dominant conceptions of social justice."). Legal scholarship is replete with other critiques that pose a broader range of moral, ethical, economical, and practical concerns. LAWRENCE, *supra* note 2, at 45-63 (discussing arguments for why hate crimes should be punished differently).

17. *See, e.g.*, Susan B. Gellman & Frederick M. Lawrence, *Agreeing to Agree: A Proponent and Opponent of Hate Crime Laws Reach for Common Ground*, 41 HARV. J. ON LEGIS. 421, 422-33 (2004) (outlining arguments for and against hate crime laws); Jeannine Bell, *Policing Hatred: Police Bias Units and The Construction of Hate Crime*, 2 MICH. J. RACE & L. 421, 448-60 (1997) (critiquing the impact of "broad" police discretion in enforcing hate crime laws); Christopher Chorba, *The Danger of Federalizing Hate Crimes: Congressional Misconceptions and the Unintended Consequences of the Hate Crimes Prevention Act*, 87 VA. L. REV. 319, 321, 344-60 (2001) (arguing that federal hate crime legislation is unnecessary and that the Prevention Act would "have a disparate effect on racial minorities" because the statutory language may be read to include interracial crime); Jordan Blair Woods, *Addressing Youth Bias*

the propriety of any federal hate crime law can be set aside here: Congress has already decided that a federal scheme is appropriate. Moreover, such general detractions can be distinguished from the specific critiques of the HCSA that are addressed in this article.[18] The specific focus of this Article is how Congress selects certain groups to cover under the HCSA.

A. A First Glance at Group Coverage

The HCSA was the first federal statute to mandate the national, uniform reporting of hate crimes.[19] At the time of its passage in 1990, the HCSA required the FBI to collect data on bias crimes motivated by race, religion, ethnicity, and sexual orientation.[20] Currently, the HCSA requires the FBI to collect data from law enforcement agencies on crimes that evidence prejudice based upon race, religion, ethnicity, sexual orientation, disability, gender, or gender identity.[21]

Congressional decisions as to which groups to include or exclude under the HCSA have evolved over time.[22] The first bills, proposed in 1985, focused exclusively on race, religion, and ethnicity;[23] sexual orientation was first added in 1987,[24] shortly before the enactment of

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Crime, 56 UCLA L. REV. 1899, 1903-05, 1908-14, 1923-34 (2009) (rejecting the aggravated sentencing provisions of the Sentencing Act and advocating for rehabilitation for youth bias crime offenders); David Goldberger, *The Inherent Unfairness of Hate Crime Statutes*, 41 HARV. J. ON LEGIS. 449, 449 (2004) (criticizing hate crime sentencing enhancement statutes "for granting prosecutors inordinate power over plea bargaining and sentencing"). *But see* LAWRENCE, *supra* note 2, at 45-63 (discussing arguments for why hate crimes should be punished differently).

18. General objections to federal hate crime legislation, including the Prevention Act, often relate to federalism concerns and First Amendment rights. Although these are persistent objections, they have repeatedly been resolved in favor of such legislation. *See, e.g.*, David Hong, *Hate Crime Regulation and Challenges*, 10 GEO. J. GENDER & L. 279, 287-94 (2009) (discussing First Amendment, Fourteenth Amendment, and Commerce Clause challenges); Gellman & Lawrence, *supra* note 17, at 426-38 (discussing First Amendment concerns); Murad Kalam, *Hate Crime Prevention*, 37 HARV. J. ON LEGIS. 593, 593-94 (2000) (reviewing federalism and First Amendment concerns). This Article addresses these general objections only when they intersect with evidence of congressional resistance to the addition of specific groups.

19. Hate Crimes Statistics Act, Pub. L. No. 101-275, 104 Stat. 140 (1990) (codified as amended at 28 U.S.C. § 534 (2012)).

20. *Id.*

21. 28 U.S.C. § 534 (2012).

22. Overviews of the general development of federal hate crime legislation can be found elsewhere. *See, e.g.*, Valerie Jenness, *Managing Differences and Making Legislation: Social Movements and the Racialization, Sexualization, and Gendering of Federal Hate Crime Law in the U.S., 1985-1988*, 46 SOC. PROBS. 548, 551-52 (1999); LAWRENCE, *supra* note 2, 9-28; Grattet & Jenness, *Criminology*, *supra* note 8, at 661-66.

23. Hate Crime Statistics Act, H.R. 2455, 99th Cong. (1985).

24. Hate Crime Statistics Act, H.R. 3193, 100th Cong. (1987).

the HCSA in 1990.[25]

Then in 1994, Congress added disability and gender to the scope of federal hate crime laws. That year, Congress specifically modified the HCSA to collect data for bias crimes against the disabled.[26] Gender was not immediately incorporated into the HCSA; instead, that same year, Congress passed the Violence Against Women Act ("VAWA"), the first federal hate crime law to focus specifically on gender.[27] Also in 1994, Congress passed a new Hate Crimes Sentencing Enhancement Act (Sentencing Act), which provided aggravated sentencing guidelines for bias crimes committed against specifically enumerated groups; the list included the groups that were included in the HCSA but added gender.[28] However, these 1994 developments fell short of modifying the HCSA to mandate the collection of data on crimes motivated by gender.

Finally, in 2009, Congress broadened federal hate crime legislation again, adding gender and gender identity as protected groups under the HCSA and the Sentencing Act through the passage of the Hate Crimes Prevention Act ("Prevention Act").[29] The Prevention Act was the first federal statute to offer protection to transgender people.[30] It was also the first piece of hate crime legislation to remove the federal jurisdiction requirement, so victims of hate crime no longer had to be engaged in a federally-protected activity in order to justify federal intervention.[31] The Prevention Act clarified the federal mandate to collect data on crimes motivated by

25. Pub. L. No. 101-275, 104 Stat. 140 (codified as amended at 28 U.S.C. § 534 (2012)).

26. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320926, 108 Stat. 1796 (1994).

27. The Violence Against Women Act specifies that "[a]ll persons within the United States shall have the right to be free from crimes of violence motivated by gender." Violence Against Women Act of 1994, Pub. L. No. 103-322, Title IV, § 40302(b) (1994), *invalidated by* United States v. Morrison, 529 U.S. 598 (2000).

28. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 280003(a), 108 Stat. 2096 (1994). For purposes of the Sentencing Act, a hate crime is defined as criminal conduct wherein "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." *Id.*

29. Hate Crimes Prevention Act of 2009, Pub. L. No. 111–84, §§ 4701–4713, 123 Stat. 2835 (2009). For ease, this statute and all of its closely related predecessors are hereinafter referred to as the Prevention Act in text; citations will specify any title variations.

30. *See* Ilona M. Turner, *Pioneering Strategies to Win Trans Rights in California*, 34 U. LA VERNE L. REV. 5, 12 (2012).

31. Lisa Kye Young Kim, *The Matthew Shepard and James Byrd, Jr. Hate Crimes Act: The Interplay of the Judiciary and Congress in Suspect Classification Analysis*, 12 LOY. J. PUB. INT. L. 495, 496-97 (2011).

gender and gender identity.[32]

Legislative history occasionally mentions other potential HCSA candidate groups, such as children, the elderly, police officers, and union members. However, these proposals were not made by outside stakeholders; instead, congressional opponents of federal hate crime laws proposed such alternatives as straw man arguments to obstruct passage of the legislation.[33] Relatedly, these candidate groups "did *not* attract significant, sustained advocacy and social movement mobilization."[34] Without a significant outside lobby for the inclusion of these groups under the HCSA, Congress never held hearings to examine their vulnerability to bias-motivated violence.[35] Since 2007, only one group with significant outside support and congressional sponsorship has received a hearing but so far has been unsuccessful in securing coverage under the HCSA: the homeless.

B. A Closer Look at Congressional Decision-Making With Respect to Group Coverage

The evolution of groups covered under the HCSA proves that Congress exercises some discrimination in the selection of covered groups; the key question is whether Congress is at risk of invidious discrimination in its deliberative process. How has Congress chosen some groups for coverage under the HCSA and resisted the addition of others?

As reviewed below, legislative history reveals inconsistencies in the depth and scope of congressional inquiry and debate. In 1990, Congress decided to cover race, religion, and ethnicity with virtually

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32. Apparently, the FBI did not begin incorporating this data into its published uniform statistics until after 2010. *Compare* FBI, HATE CRIME STATISTICS 2010, *available at* http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2010/resources/hate-crime-2010-about-ucr (last visited Apr. 8, 2014) ("The Matthew Shepard and James Byrd, Jr. Hate Crime Prevention Act of 2009 requires the collection of data on crimes motivated by 'gender and gender identity' bias . . . . The national UCR Program staff is developing collection strategies to meet both of these most recent mandates."), *with* HATE CRIME DATA COLLECTION MANUAL *supra* note 7, at 2 ("As a result [of the Prevention Act], the FBI UCR Program now captures statistics on hate crimes based on gender and gender identity prejudices . . . .").

33. For example, in the course of congressional debates over the HCSA, dissenting Senator Chuck Grassley (R-IA), who consistently voted against federal hate crime legislation, proposed an amendment to add labor unions to Senate bill 702. *See* S. Rep. No. 100-514 at 5 (1988). The lack of a legitimate effort or process to consider bias crimes against union members is also observed in Grattet & Jenness, *Criminology*, *supra* note 8, at 673. Similarly, in the course of debates over the bills that would ultimately become the Hate Crimes Prevention Act of 2007, dissenting conservatives suggested the inclusion of several alternate groups, including the military, children, police, the elderly, victims, and witnesses. *See, e.g.*, H.R. REP NO. 110-113 (2007). *See* discussion of other poison pill efforts *infra* notes 146, 241 and accompanying text.

34. Grattet & Jenness, *Criminology*, *supra* note 8, at 673.

35. *Id.*

no debate.[36] But the proposal to add sexual orientation generated prolonged and heated congressional argument. Four years later, in 1994, disability was added, again without significant debate. [37] Although gender took a rather circuitous route, ultimately, its 2009 addition to the HCSA was a relatively tame affair. Gender identity, also added in 2009,[38] was a curious case: its proposal re-ignited debate over sexual orientation, but this debate was sporadic and comparatively muted. That same year, Congress granted a hearing on bias crimes affecting the homeless,[39] but to this day, Congress has resisted the addition of the homeless to the HCSA.

Analysis of these congressional decisions also shows that statistics and other evidence of need for hate crime protection have played an inconsistent role in a candidate group's bid for coverage under the HCSA. Certainly, in order for a group to warrant coverage, Congress must perceive some threshold evidence of that group's vulnerability to bias crimes. Put another way, a candidate group cannot receive coverage under the HCSA simply because it asks[40] or because it lacks any supportive statistical data. Instead, a candidate group should proffer some credible evidence to support the need for statutory protection.[41]

But Congress does not consistently require a candidate group to prove its vulnerability to animus. Instead, congressional vetting of candidate groups appears to correlate with the relative social acceptability or popularity[42] of the candidate group. As described below, with respect to race, religion, disability, and gender, Congress either did not require evidence of vulnerability to bias crimes or readily accepted whatever evidence was proffered.[43] But when

36. *See* Hate Crimes Statistics Act, Pub. L. No. 101-275, 104 Stat. 140 (1990).

37. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994).

38. *See* Hate Crimes Prevention Act of 2009, Pub. L. No. 111-84, 123 Stat. 2835 (2009).

39. *See* H.R. REP. NO. 111-86 (2009).

40. 134 CONG. REC. S. 11403 (1988) (statement of Sen. George W. Gekas).

41. The credible evidence standard does not demand scientific or empirical purity, particularly because candidate groups generally lack the resources to collect such data; hence, their application for coverage under the HCSA. Instead, "[c]laims are empirically credible 'to the extent that there are events and occurrences that can be pointed to as documentary evidence.'" Jenness, *supra* note 22, at 556 n.6 (internal citations omitted).

42. By "relative social acceptability," I am generally referring to a whether a candidate group is commonly accepted by society as embodying majority values and identities at the time it was assessed by Congress for coverage under the HCSA. The concept of social acceptability and popularity also invokes the Supreme Court's description of animus as a "desire to harm a politically unpopular group." U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973).

43. *See infra* Part II.

certain "unpopular" candidates—such as homosexuals[44] or the homeless—seek coverage under the HCSA, Congress not only appears to require evidence of the group's vulnerability to bias crimes, but also appears to subject such proffered evidence to higher levels of scrutiny and debate. Significantly, these congressional choices do not mirror judicial heightened scrutiny analysis under the Equal Protection Clause;[45] nor do they correlate with protections afforded in contemporaneous federal civil rights legislation.[46]

The irony of this inconsistency is at least three-fold: first, it demonstrates the vulnerability of unpopular groups to legislative discrimination based on their group membership and identity. Second, these unpopular groups are more likely to lack

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44. The juxtaposition of the word "homosexual" with "unpopular" groups is intentional here; it was the term most commonly used by members of Congress who objected to the inclusion of sexual orientation in federal hate crime legislation. The relevant term under the HCSA is "sexual orientation"; however, the term was often subject to congressional debate and definitional wrangling. *See, e.g., infra* pp. 576-77, 587-88.

45. Congressional resistance does not simply correlate to the level of judicial scrutiny applied to suspect classes. If measured by United States Supreme Court decisions at the time each group was a candidate for addition to the HCSA, the following levels of judicial scrutiny applied: race and ethnicity (strict scrutiny), *see, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967); sexual orientation (rational basis review), *see* Bowers v. Hardwick, 478 U.S. 186 (1986); disability (rational basis), *see* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985); gender (intermediate scrutiny), *see* Craig v. Boren, 429 U.S. 190 (1976); and gender identity (rational basis), *see* Ulane v. Eastern Airlines, Inc., 742 F.2d 1081 (7th Cir. 1984) (holding "[t]he words of Title VII do not outlaw discrimination against a person who has a sexual identity disorder, i.e. . . . a person born with a female body who believes herself to be male"), *cert. denied*, 471 U.S. 1017 (1985). *See also* Gwen Havlik, *Equal Protection for Transgendered Employees? Analyzing the Court's Call for More Than Rational Basis in the* Glenn v. Brumby *Decision*, 28 GA. ST. U. L. REV. 1315, 1322-24 (2012). If levels of congressional resistance correlated with levels of judicial review, one would expect similar levels of resistance demonstrated in deliberations over disability, sexual orientation, and gender identity because these were all subject to rational basis review at the time they were assessed for the HCSA; however, as explained *infra*, comparisons of congressional dispositions toward these and other candidate groups do not support such a correlation. Even if congressional decision-making could be argued to more closely correlate to judicial levels of scrutiny, it should not. The spirit of the judiciary's use of suspect classification scrutiny is to shield vulnerable groups from legislative discrimination. This spirit is contravened if Congress uses heightened scrutiny as a means to deny statutory protection to vulnerable groups. *Anti-Gay Violence: Hearings Before the Subcomm. on Criminal. Justice of the H. Comm. on the Judiciary*, 99th Cong. 8 (1986) [hereinafter *Anti-Gay Violence Hearing*] (statement of Rep. Barney Frank) ("[T]he role of the Government ought to be to protect minorities who are made vulnerable because of prejudice, whatever the source."). Congress can use suspect classification factors to improve the principled quality of deliberations over expansions of the HCSA without being bound by judicial tiers of scrutiny. *See* Sara K. Rankin, *Prime Suspects? The Viability of Suspect Classification Standards to Develop Federal Hate Crime Legislation* (working paper on file with the author).

46. *See, e.g., supra* pp. 571-72.

organizational support or other resources to gather superlative evidence of their own vulnerability. Therefore, unpopular groups are inherently less likely to pass higher levels of congressional scrutiny. Third, when these groups produce whatever evidence they have garnered in support of their application for coverage under the HCSA, critics often attack the adequacy of this data—which is, of course, directly related to why these groups seek coverage under the HCSA in the first place: to improve access to data about their vulnerability to bias crimes.

II. EVIDENCE OF CONGRESSIONAL BIAS WITH RESPECT TO CURRENTLY COVERED GROUPS

Currently, the HCSA covers race, religion, ethnicity, sexual orientation, disability, gender, and gender identity. Over two decades of legislative history reveals a different journey for each of these candidate groups: admission to the HCSA was a nebulous application process, marked by unclear criteria and varying levels of scrutiny. Aside from the logical prediction that Congress would look to see if a candidate group was subject to animus-motivated violence, the vetting process was a black box. But looking back on congressional records, one thing is clear: the same rules would not necessarily apply to each candidate group. Even among similarly situated groups, some would be favored in the selection process and others would not.

A. The "Anchoring Trio" of Race, Religion, and Ethnicity

The trio of race, religion, and ethnicity has been referred to as "the anchoring provisions of all hate crime law" because the trio was the exclusive focus of early federal hate crime law proposals.[47] Indeed, legislative history regarding the HCSA shows a persistent and exclusive focus on race and religion.[48]

Although there are several potential explanations for why Congress adopted this exclusive focus,[49] none clearly explain why

47. Jenness, *supra* note 22, at 548. Frederick Lawrence refers to these groups as "classic bias crime categories." LAWRENCE, *supra* note 2, at 17.

48. The early focus of the HSCA can be detected as early as 1983, when "the U.S. Civil Rights Commission recommended that federal and state authorities should 'develop workable reporting systems that will produce an accurate and comprehensive measurement of the extent of criminal activity that is clearly based on racial and/or religious motivations.'" Fernandez, *supra* note 13, at 264 (quoting U.S. COMM'N ON CIVIL RIGHTS, INTIMIDATION AND VIOLENCE: RACIAL AND RELIGIOUS BIGOTRY IN THE UNITED STATES 28 (1983)).

49. Jenness concludes that coverage of this trio "occurred without protest from federal legislators over the appropriateness of these provisions [because the trio] had already been legitimated by prior decades of civil rights organizing and changes in the law." Grattet & Jenness, *Criminology*, *supra* note 8, at 672 (internal citations omitted). But this observation does not fully explain the distinction because gender and sexual

race, ethnicity, and religion were initially selected over other groups. The trio could descend from the First Amendment right to religion and the Fourteenth Amendment's Equal Protection Clause, which has galvanized constitutional protection for race, religion, and ethnicity.[50] However, a constitutional precedent would suggest that other groups with explicit constitutional rights—such as gender, which is expressed through the Nineteenth Amendment—should have been included among the first federal hate crime proposals.

The anchoring trio might also descend from the Civil Rights Act of 1964, which covers race, color, ethnicity, national origin.[51] Aside from the parallel inclusion of race, religion, and ethnicity in both the early federal hate crime bills and the Civil Rights Act, congressional debates over whether to include a newly proposed group in federal hate crime legislation sometimes discuss whether the proposed group is covered by the Civil Rights Act.[52] However, the 1964 Act also covers gender; later extensions of federal civil rights legislation also cover disability,[53] age,[54] familial status,[55] and veteran status.[56] If the federal civil rights legislation were the source for early federal hate crime bills, then Congress not only waited several years before adding gender and disability, but continues to exclude the other groups from federal hate crime protections even today.[57]

Inspiration for the anchoring trio could also come from the 1969 Federally Protected Activities Act.[58] The FPAA prohibits interference with federally protected activities such as voting, receiving an

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orientation had also been at the center of decades of civil rights movements. *See, e.g.*, WILLIAM J. KROUSE, CONG. RESEARCH SERVS., HATE CRIME LEGISLATION 2-3 (2010) (describing the impact of "the contemporary women's rights movement and the gay and lesbian rights movement" on hate crime developments and citing Ryken Grattet and Valerie Jenness, *The Birth and Maturation of Hate Crime Policy in the United States*, *in* HATE AND BIAS CRIME: A READER 389, 392 (Barbara Perry ed., Routledge (2003))).

50. U.S. CONST. amend. I; U.S. CONST. amend. XIV, § 1.

51. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964).

52. Jenness, *supra* note 22, at 561 (discussing such discourse by Representatives Dannemeyer, Gekas, and Frank).

53. Vocational Rehabilitation and Other Rehabilitation Services of 1979, 29 U.S.C. § 794 (1973); Americans with Disabilities Act, Pub. L. No. 101-336, 104 Stat. 328 (1990).

54. Age Discrimination in Employment Act, 29 U.S.C. § 623 (1967).

55. Fair Housing Act § 804(a), 42 U.S.C. § 3604 (2012).

56. Vietnam Era Veterans Readjustment Assistance Act of 1974, 38 U.S.C. § 4212 (2012).

57. A minority of states include other factors such as "mental or physical disability or handicap," "age," or "political affiliation." *See* ANTI-DEFAMATION LEAGUE, ANTI-DEFAMATION LEAGUE STATE HATE CRIME STATUTORY PROVISIONS 1, 1-2 (2011), *available at* http://www.adl.org/assets/pdf/combating-hate/state_hate_crime_laws.pdf (charting group coverage under state hate crime provisions as of 2011).

58. 18 U.S.C. § 245 et seq.

education, or travelling, thereby requiring a basis for the exercise of federal jurisdiction.[59] In relevant part, the FPAA criminalizes the use of "force or threat of force [that] willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with"[60] an individual "because of his race, color, religion or national origin and because" that individual is engaging in certain federally protected activities.[61] But the focus of the FPAA is to protect the pursuit of certain federally protected activities, so it also contains broader provisions that prohibit similar interferences with "any person" engaging in such activities.[62]

The anchoring trio of race, religion, and ethnicity may also be traced back to the Anti-Defamation League's ("ADL") historical role in the "monitoring of bias crimes and the systematic collection of hate crime data."[63] In 1981, the ADL authored and distributed a model hate crime bill for introduction in state legislatures; the bill provided enhanced sentences for crimes motivated by the victim's actual or perceived race, color, national origin, religion, or sexual orientation.[64] Over the next several years, various states adopted hate crime statutes similar to ADL's model; however, early federal bills did not include sexual orientation.[65]

All of these precedents show that Congress selected race, religion, and ethnicity for inclusion in the HCSA over other potential target groups. But perhaps most significantly, race, religion, and ethnicity can also be considered the anchoring trio because Congress subjected them to virtually no pushback in the process of adding them to federal hate crime legislation:

> Although representatives from the Federal Bureau of Investigation (FBI) objected to the bill on the grounds that it was unenforceable, no testimony contested the legitimacy of race, religion, and ethnicity as core provisions in hate crime legislation. Moreover, no additional status provisions were mentioned, much less formally introduced as amendments to the bill. Clearly, this conceptualization of the social problem was devised by outside claimsmakers (i.e., [social movement organizations] and their

59. *Id.* at (b)(1)(A), (b)(2)(A), (b)(2)(E).

60. *Id.* at (b).

61. *Id.* at (b)(2).

62. *Id.* at (b)(1).

63. Jenness, *supra* note 22, at 556.

64. *Hate Crimes Laws: The ADL Approach*, ANTI-DEFAMATION LEAGUE, http://www.adl.org/combating-hate/hate-crimes-law/c/adl-approach-hate-crimes-laws.html#.VAI59GMnr3A; *see also* Jenness, *supra* note 22, at 556-57.

65. Jenness, *supra* note 22, at 557. The first hate crime bills proposed in 1985 focused exclusively on "racial, ethnic, and religious prejudice." *Id.* (citing H.R. 775, 99th Cong. (1st Sess. 1985); H.R. 1171, 99th Cong., (1st Sess. 1985)); *see also* Fernandez, *supra* note 13, at 268-69 (discussing legislative history before the proposed addition of sexual orientation to the HCSA).

> representatives), generally agreed upon by the relevant moral entrepreneurs, and encountered little resistance when it was imported into the federal legislative arena.[66]

The fact that Congress accepted these groups as the anchoring trio without scrutiny means that Congress took as a given historical and contemporary evidence of racial, ethnic, and religious intolerance and persecution.[67] In other words, the anchoring trio represents "classic bias crime categories"[68] because their vulnerability to prejudice is a consciously "recognizable social pathology within [American] culture."[69] Congress did not require evidence that race, ethnicity, and religion are vulnerable to bias because its collective conscience could no longer deny such animus is pervasive and wrong. Therefore, Congress comfortably intuited that race, ethnicity, and religion are often targets of bias and deserving of statutory protection against bias crimes.

B. Sexual Orientation

In sharp contrast, Congress did not accept as given historical and contemporary evidence of violence committed on the basis of the victim's real or perceived sexual orientation. The proposals to collect nationwide statistics concerning bias crimes committed against gays and lesbians[70] sparked fierce, and sometimes vitriolic, legislative

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66. Jenness, *supra* note 22, at 557; *see also* Fernandez, *supra* note 13, at 270 ("Given the relatively uncontroversial nature of a project designed simply to monitor racial, religious, and ethnic crime, the bill moved easily through the House, although the Senate adjourned before it could pass the bill."). The role of "social movement organizations" is key to the evolution of group coverage in federal hate crime legislation. Grattet & Jenness, *Criminology*, *supra* note 8, at 676, 679. Social movement organizations, or SMOs, are interest groups that mobilize and lobby for certain groups to receive legislative protection. *See id.* at 676. Indeed, "social movement-related factors, especially the presence of [SMOs] and expert networks, provide robust and durable predictors of the criminalization of hate." Jenness, *supra* note 22, at 550. Several legal scholars have analyzed how social movement mobilization impacts constitutional interpretation. *See, e.g.*, Jack M. Balkin, *How Social Movements Change (Or Fail to Change) the Constitution: The Case of the New Departure*, 39 SUFFOLK U. L. REV. 27 (2005); William N. Eskridge, *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419 (2001); Edward L. Rubin, *Passing Through the Door: Social Movement Literature and Legal Scholarship*, 150 U. PA. L. REV. 1 (2001).

67. Jenness concludes that congressional acceptance "occurred without protest from federal legislators over the appropriateness of these provisions [because they] had already been legitimated by prior decades of civil rights organizing and changes in law." Grattet & Jenness, *Criminology*, *supra* note 8, at 672 (internal citation omitted). But gender and disability had also been at the center of civil rights movements before 1990, so this observation does not clearly explain differences in congressional receptiveness to these groups as candidates for the HCSA.

68. LAWRENCE, *supra* note 2, at 13.

69. *Id.* at 11.

70. Legislative records make clear that Congress perceived the term "sexual

debates.[71]

The protracted battle for HCSA coverage of sexual orientation provides helpful lessons. It revealed four indicators of heightened congressional resistance to a candidate group, including (1) an apparent requirement that the candidate group present compelling evidence of their vulnerability to bias crimes; (2) a tendency to critique the candidates' proffered data as inflated or inadequate; (3) moral condemnation of the candidate group, including the portrayal of the candidates as criminals or perpetrators of violence; and (4) to a lesser extent, persistent technical arguments, such objections to statutory definitions of the candidate group as vague or over-inclusive. As described below, these indicators would not appear with respect to another candidate group until a similarly controversial applicant emerged nearly twenty years later. But sexual orientation would blaze an important trail.

1. 1985-1987: Setting the Stage

Sexual orientation was not included among the original federal hate crime bills. The first versions of the HCSA, proposed in 1985, enumerated only the anchoring trio of race, religion, and ethnicity.[72] But also in 1985, some members of the House and the Senate introduced bills to extend the 1964 Civil Rights Act to prohibit discrimination on the basis of sexual orientation.[73] Although these bills died in Committee, the activity suggested support might exist for adding sexual orientation to the HCSA.

Two years later, on August 7, 1987, Representative John Conyers (D-MI) introduced H.R. 3193, the first congressional bill to add sexual orientation to the proposed HCSA.[74] Two months later, on October 7, 1987, the National Institute of Justice ("NIJ") received the results of a study it had commissioned to examine how police and

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orientation" to encompass only "gay men and lesbians." *See, e.g.*, *Hate Crime Statistics Act of 1988: Hearing on S. 702, S. 797 and S. 2000 Before the S. Comm. on the Constitution*, 100th Cong. (1988) [hereinafter *Senate 1988 Hearing*] (statement of Rep. John Conyers); *see also infra* p. 583-84 (explaining some tussles over the meaning and clarity of the term "sexual orientation").

71. *See* Fernandez, *supra* note 13, at 270-81; Jenness, *supra* note 22, at 557-61.

72. The first versions of the HCSA were proposed in 1985 as H.R. 1171 and H.R. 775. *See Hate Crime Statistics Act: Hearing on H.R. 1171 and H.R. 775 Before the Subcomm. on Crim. Justice of the H. Comm. on the Judiciary*, 99th Cong. (1985). Various versions of the bills passed the House but failed to pass the Senate. *See, e.g.*, Hate Crime Statistics Act, H.R. 2455, 99th Cong. (1985); *Bill Summary and Status: 99th Congress (1985-1986): H.R. 2455: All Congressional Actions*, LIBR. OF CONGRESS, http://thomas.loc.gov/cgi-bin/bdquery/z?d099:HRO2455:@@@X (last visited Apr. 4, 2014).

73. Civil Rights Amendments Act of 1985, H.R. 230, 99th Cong. (1985); Civil Rights Protection Act of 1988, S. 2109, 100th Cong. (1988).

74. Hate Crime Statistics Act, H.R. 3193, 100th Cong. (1987).

prosecutors were addressing hate crimes.[75] The NIJ Study made three critical findings: (1) very few jurisdictions had enacted laws mandating the collection of data on hate crimes;[76] (2) "blacks, Hispanics, Southeast Asians, Jews, and gays and lesbians" are "the most frequent victims of hate crimes";[77] and (3) "[h]omosexuals are probably the most frequent victims" of hate-motivated violence.[78]

On October 9, 1987, just two days after the NIJ Study was reported, the Subcommittee on Criminal Justice of the House Committee on the Judiciary held an oversight hearing on violence against gays and lesbians.[79] Here, the pivotal role of social movement organizations became clear: the witness list included testimony from the National Gay and Lesbian Task Force; Community United Against Violence; New York City Gay and Lesbian Anti-Violence; the "Liaison to the Gay Community" for the District Attorney for the County of New York; the New York City Police Chief; and the Institute for the Protection of Lesbian and Gay Youth.[80] These organizations had also secured the assistance of Representative Frank[81] and Representative Conyers,[82] who were instrumental in ultimately securing congressional support for the inclusion of sexual orientation under the HCSA.

Several participants at the hearing commented on an increase in

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75. THE RESPONSE OF THE CRIMINAL JUSTICE SYSTEM TO BIAS CRIMES, NAT'L INST. OF JUSTICE (October 7, 1987) [hereinafter NIJ Study], appended to the *Hate Crime Statistics Act of 1988, Hearing before the Subcomm. on the Constitution of the Comm. of the Judiciary*, 100th Cong. 123-206 (1988).

76. *Id.* at 140.

77. *Id.* at 126.

78. *Id.*

79. *Hate Crimes Statistics Act of 1988: Hearing on S. 107, S. 797, and S. 2000 Before the S. Comm. on the Constitution of the H. Comm. on the Judiciary*, 100th Cong. (1988). Some speakers at these hearings referenced the NIJ Study, but not in great detail. *See, e.g., id.* at 98 (statement of Kevin Berrill, Director, Anti-Violence Project, National Gay and Lesbian Task Force). This was likely due to the fact that the report was dated (and presumably released) only two days before the hearing.

80. *Id.*

81. Representative Frank, the first member of Congress to come out as openly gay, made his announcement in 1987 in the midst of congressional debates over whether to include sexual orientation under the HCSA. *See* Alan Silverleib, *Frank Discusses Coming Out As Gay, Going Out As Congressman*, CNN (Dec. 2, 2011, 7:23 AM), http://www.cnn.com/2011/11/29/politics/barney-frank/. In 2012, Senator Tammy Baldwin of Wisconsin became the first openly gay person to be *elected* to the Senate. Emanuella Grinberg, *Wisconsin's Tammy Baldwin is First Openly Gay Person Elected to Senate*, CNN.COM (Nov. 7, 2012, 3:01PM), http://www.cnn.com/2012/11/07/politics/wisconsin-tammy-baldwin-senate/.

82. Representative Conyers, one of the founding members of the Congressional Black Caucus, was known as a passionate supporter of civil rights. *See International Civil Rights Walk of Fame: John Conyers, Jr.*, NAT'L PARK SERVICE U.S. DEP'T OF THE INTERIOR, http://www.nps.gov/features/malu/feat0002/wof/John_Conyers.htm (last visited May 13, 2014).

political power in the gay and lesbian community; however, this increase was still generally described as fragile and geographically bound.[83] Greater political power and representation was explicitly recognized as key to securing more favorable treatment by politicians and police.[84] Increased political power and representation was also understood to have an ameliorative impact on bias; for example, more diverse police departments are more likely "to do a better job" serving diverse communities.[85] Similarly, political power and representation facilitate a sort of "six degrees of separation" phenomenon that can undercut prejudice. One proponent explained:

> We know that when members of the majority groups can interact with a person from a minority group and have an ongoing relationship with that person, it really does a lot to educate the person and to reduce prejudice. . . . [I]t seems the most important thing [to combat prejudice] is for heterosexual people to know an openly lesbian or gay person. Today it is likely that most people in this country do know someone who is gay, but they don't know that the person they know is gay. In public opinion polls, about 25 to 30 percent of the American public say that they know someone who is openly gay. We need to increase that figure dramatically.[86]

Proponents also drew from another key theme: to analogize the gay and lesbian community to the anchoring trio of race, religion, and ethnicity.[87] Although the HCSA had yet to be enacted, but advocates realized that congressional debate thus far had accepted the notion that race, religion, and ethnicity were groups vulnerable to animus. For example, several witnesses at the hearing wore pink triangles. One proponent explained the basis of the association:

> [T]he badge . . . identified homosexual inmates of Nazi concentration camps. Although it is an often overlooked fact, tens of

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83. *See Anti-Gay Violence Hearing*, *supra* note 45, at 1 (statement of Rep. Conyers) (stating that the murders of San Francisco Mayor George Moscone and City Supervisor Harvey Milk "symbolized the growing political strength of the gay community, as well as the hostility directed toward them, which became more prominent as a result of political empowerment"); *see also id.* at 28-30 (noting remedial steps and legislation in jurisdictions such as California and New York City and contemplating its effectiveness).

84. *See, e.g.*, *id.* at 28-30 (including discussions among several hearing participants).

85. *Id.* at 25 (statement of Rep. Frank).

86. *Id.* at 26 (statement of Dr. Gregory M. Herek, American Psychological Association).

87. *See* Grattet & Jenness, *Criminology*, *supra* note 8, at 673 n.62 ("[A]dvocates for gays and lesbians successfully made the case that violence against gays and lesbians was as epidemic and consequential as violence against people of color, immigrants, and Jews.") (citation omitted); *see also*, Jenness, *supra* note 22, at 558 (noting that supporters at the hearing explicitly drew analogies between the violence suffered by gays and lesbians to that suffered on account of the victim's race, religion, or ethnicity).

> thousands of gay persons were herded into the camps and, along with Jews, gypsies and others, were gassed and incinerated. We wear the triangle to remember them and to remind all people of the terrible cost of bigotry.[88]

But the core of the proponents' case was a range of statistical and anecdotal evidence suggesting that anti-gay violence was a serious national problem. Proffered data indicated that "[m]ore than 1 in 5 gay men and nearly 1 in 10 lesbians had been physically assaulted because of their sexual orientation."[89] Framed another way, "a significant minority of lesbian and gay respondents—between 15 and 25 percent—have been punched, kicked, or beaten because of their sexual orientation."[90] Other data suggested anti-gay violence in San Francisco had increased from the previous year by 61 percent; New York reported a 41 percent increase over the prior year and a 91 percent increase in the first few months of 1986.[91] Written and oral witness testimony, recounting statistical and anecdotal evidence of the seriousness and pervasiveness of anti-gay violence, ultimately generated a hearing transcript of over 220 pages.[92]

Advocates acknowledged the "limitations" of their data.[93] Although the problem of anti-gay violence had been described as gaining visibility,[94] the relatively limited political power and resources of the gay and lesbian community impeded the collection of purely scientific or refined data.[95] Still, the best available data commonly established the significance of anti-gay violence.[96]

Although proponent testimony was primarily focused on evidence of violent crime, some underscored a link between violence and the larger social and psychological marginalization of the gay and lesbian community. Significantly, the hearing occurred just a few months after the U.S. Supreme Court's decision in *Bowers v. Hardwick*, which upheld Georgia's anti-sodomy law.[97] Several witnesses argued that anti-sodomy laws and the *Bowers* decision

88. *Anti-Gay Violence Hearing*, *supra* note 45, at 5 (statement of Kevin Berrill).

89. *Id.* at 3 (statement of Rep. Conyers).

90. *Id.* at 12 (statement of Dr. Herek).

91. *Id.* at 1 (statement of Rep. Conyers).

92. *See id.*

93. *Id.* at 3 (statement of Kevin Berrill) (acknowledging such limits, but also clarifying the NGLTF study "has been widely praised by sociologists and criminologists. [The] findings have been confirmed by local and State studies, which have shown similar high rates of harassment and violence.").

94. *Id.* at 4-5. The hearing transcript reflects other similar statements. *See also id.* at 29 (statement of Dr. Herek) (discussing the increasing visibility of the gay community and consequent reactions).

95. *Id.* at 12-13 (statement of Dr. Herek).

96. *Id.*

97. 478 U.S. 186, 197 (1986).

"legitimat[ed] hostility toward gay people."[98] Such mainstreaming of anti-gay sentiment was also evident in common responses to the victims of anti-gay violence, who are often blamed for "inviting the attack or deserving it."[99] The hearing is replete with such discussion of how such institutional validation of bias urges society to view gays and lesbians "as second-class citizens,"[100] thereby facilitating and sustaining a broader culture of prejudice against homosexuality.[101]

The hearing also exposed a related discursive tactic to portray homosexuals as perpetrators of crime as opposed to potential victims.[102] This rhetoric frames homosexuality as something society should fear and fortify itself against, as opposed to a status that deserves statutory protection:

> The so-called dangers of the homosexual range from a danger to the family to a danger to civilization. Homosexuals are repeatedly held up as dangers to children despite the repeated evidence that heterosexual child abuse and heterosexual sexual molestation is endemic in our society. Homosexuals have even been accused of causing crime in the streets . . . .[103]

Thus, the criminalization of homosexuality in legislative, judicial, and social discourse, proponents argued, demonstrates and sustains a climate of hate that, in turn, supports the commission of bias crimes against gays and lesbians.[104]

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98. *See Anti-Gay Violence Hearing*, *supra* note 45, at 13 (statement of Dr. Herek). David Wertheimer from the New York City Gay and Lesbian Anti-Violence Project similarly described the role of *Bowers* in legitimating violence against homosexuality: "When the Chief Justice of the Supreme Court states an opinion and discusses extensively the way in which homosexuality used to be a capital crime, it is something some Americans will interpret as license to go out and hurt us, attack us." *Id.* at 18 (statement of Mr. Wertheimer). *See also id.* at 29 (statement of Diana Christensen, Community United Against Violence) (discussing the gay panic defense as another societal expression of bias that validates the victimization of homosexual communities).

99. *Id.* at 12 (statement of Dr. Herek).

100. *Id.* at 30-31 (statement of Kevin Berrill).

101. *See id.* at 16-17; *see also id.* at 25-26 (statement of Mr. Wertheimer); *id.* at 27-31 (discussions among several hearing participants).

102. *See, e.g.*, *id.* at 114 (statement of Ms. Joyce Hunter, Institute for the Protection of Lesbian and Gay Youth) ("[L]ike the Jews in Europe and the blacks in this country, homosexuals are accused of the very violence that is perpetrated against them. Kenneth Gangel, a fundamentalist minister, accuses homosexuals of gang rape as a regular occurrence.").

103. *Id.* at 147 (statement of Dr. A. Damien Martin, Executive Director, Institute for the Protection of Lesbian and Gay Youth).

104. Congressional hearings are replete with other examples of the societal facilitation of homophobia. *See, e.g.*, *id.* at 113 (statement of Ms. Hunter) ("We have recently had the Chief Justice of the Supreme Court suggest that homosexual behavior between consenting adults is worse than violent rape."); *id.* at 201 (statement of Dr. Martin P. Levine, The American Sociological Association) ("Our legislatures, schools, and churches . . . perpetuate and reinforce anti-homosexual sentiments . . . .").

2. 1988 in the House: Gaining a Toehold

Not one witness appeared at the Anti-Gay Violence hearing to oppose the common narrative that bias against gays and lesbians was a significant national problem.[105] Instead, opponents waited until the April 20, 1988 House Report on H.R. 3193 to emerge.[106] The report focused mostly on the perceived need for the federal collection of data on hate crimes;[107] it also summarized data on the incidence of hate crimes against the proposed covered groups: race, religion, ethnicity, and sexual orientation.[108] But significantly, the dissenting views targeted only sexual orientation.[109]

Opponents attacked the credibility of statistical evidence of homophobic violence, contending that supporters were inflating the statistics and using the HCSA "merely [as] a tempting vehicle to dramatize what [supporters] assert is an increase in crime against homosexuals."[110] The evidence, opponents argued, did not suggest that "crime against gays and lesbians is perpetrated through the use of interstate networks such as those employed by the Ku Klux Clan which 'transcend[] the ability of individual States to respond . . .' and thus require the intervention of federal law enforcement."[111] Despite the evidence proffered at the Anti-Gay Violence hearing and the contemporaneous NIJ Study[112] that confirmed the prevalence of bias crimes on the basis of the victim's sexual orientation, the dissenters maintained that "there appear[ed] no convincing evidence that homosexuals are more targeted for crime than [other] groups."[113]

Finally, opponents objected to the statutory term "sexual orientation" as too broad, and maintained that the addition of the term would render the data collection process too expensive.[114]

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105. *See id.* at 1-31.

106. H.R. REP. NO. 100-575, at 12-13 (1988).

107. *Id.* at 2-7.

108. *Id.* at 8-11 (additional views of Rep. Conyers).

109. *Id.* at 12-13.

110. *Id.* at 12 (dissenting views of Reps. Gekas (R-PA), McCollum (R-FL), Coble (R-NC), Dannemeyer (R-CA), and Smith (R-TX) to H.R. 3193). For a discussion of similar tactics, see Fernandez, *supra* note 13, at 279.

111. Fernandez, *supra* note 13, at 273 (quoting H.R. REP. NO. 100-575, at 12).

112. *See supra* Part II.B.1.

113. H.R. REP. NO. 100-575, at 12 (dissenting views of Reps Gekas, McCollum, Coble, Dannemeyer, and Smith to H.R. 3193).

114. *Id.* (noting that H.R. 3193 added "something described as the 'sexual orientation' of the victim" and suggesting that the legislation as written would come at "considerable cost"). Similar objections to the vagueness of the term "sexual orientation" were raised frequently. *See, e.g.*, Fernandez, *supra* note 13, at 276-280; Jenness, *supra* note 22, at 560 (describing objections to the term "sexual orientation," including Representative Swindall's (R-GA) statement that the phrase was too ambiguous and "could very easily . . . be construed to include child molestation") (internal citations omitted).

Ultimately, Representative Gekas offered an amendment on the House floor to remove the term "sexual orientation," purporting to rationalize the amendment on overbreadth concerns.[115] Instead, the Gekas amendment was countered with another amendment from Representative John Miller (R-WA) to replace "sexual orientation" with "homosexuality or heterosexuality" and to add a provision clarifying "that nothing in the Act creates or expands civil rights not currently recognized by law."[116] The Miller Amendment passed by a vote of 384 to 30.[117] As amended, H.R. 3193 passed the House by a vote of 383 to 29.[118]

3. 1988 in the Senate: The Shut Down

Before H.R. 3193 was submitted to a vote in the House, on January 25, 1988 the Senate introduced a companion bill, S. 2000.[119] On June 21, 1988, shortly after the House passed H.R. 3913, the Senate held a hearing.[120] The list of witnesses, both in terms of members of Congress and outside social movement organizations, was substantial.[121] Like the prior hearings, the June 1988 Senate hearing centered on the need for the HCSA, as well as statistical and anecdotal evidence of bias crimes directed at the all of the candidate groups.[122] Most of the testimony and supporting documentation did

115. *See* 134 CONG. REC. 11,403 (1988) (amendment introduced by Rep. Gekas on May 18, 1988).

116. *See id.* at 404 (amendment introduced by Rep. Miller on May 18, 1988).

117. *See* H.R. REP. NO. 101-109, at 2 (1989) (stating that H.R. 3193 "was amended on the House floor"). A few weeks later, Representative Gekas expressed some discomfort with the result of the maneuvering on the House floor and stated that he now felt "constrained to support this legislation":

> I . . . felt . . . we were wading in dangerous waters when we were attempting to raise the homosexuals to a constitutionally guaranteed or protected class which was not in accord with race, creed, and color, as was already articulated in the Civil Rights Act of 1964. So I attempted at that time to say that if we were going to include the homosexuals, why not include the handicapped, the elderly, the infants, and other classes of people in our society who might be the victims of hate crimes?
>
> The will of the Congress was to supplant my concern with placing another category juxtaposed to homosexuals; namely, heterosexuals, and put them both in the statute as protected classes without violating the age-old concern . . . I have that they are not in effect constitutionally protected classes . . . .

15 CONG. REC. 13542 (1989) (statement of Rep. Gekas).

118. 134 CONG. REC. 3389 (1988).

119. 134 CONG. REC. 3, at 26 (1988).

120. The hearing concerned three different HCSA bills, but only one, S. 2000 (introduced by Senator Alan Cranston (D-CA)), added a provision for "affectional or sexual orientation." *See Senate 1988 Hearing*, *supra* note 70. S. 702 (introduced by Sen. Paul Simon (D-IL)) and S. 797 (introduced by Sen. Howard Metzenbaum (D-OH)) were virtually identical and concerned only race, religion, and ethnicity. *See id.* at 54.

121. *See id.* at II.

122. *See, e.g.*, *id.* at 20 (Sen. Simon's commentary on the government's obligation to

not distinguish sexual orientation from the anchoring trio; the candidate groups were generally referenced together.[123] Some notable exceptions reviewed statistical and anecdotal data and arguments specifically relating to the bid to add sexual orientation.[124]

A hallmark of the June 1988 Senate hearing was the emphasis on societal and governmental blindness to gay bias crimes. This critique was helpfully rooted in the NIJ Study, which concluded that "[h]omosexuals are probably the most frequent victims" of hate-motivated violence and that gay Americans are frequently targeted for assault and vandalism.[125] The NIJ Study also reviewed the tendency of state legislatures to specifically exclude homosexuals from coverage under hate crime legislation and suggested that such exclusion "either condones bias crime[s] against gays and lesbians or suggests it does not exist."[126] The Study even suggested that blindness to bias crimes is actually a form of societal prejudice against the victims:

For the most part, the criminal justice system—like the rest of society—has not recognized the seriousness of the hate violence problem. Police officers, prosecutors, and judges tend to regard most incidents as juvenile pranks, harmless vandalism, private matters between the involved parties, or acceptable behavior against disliked groups.[127]

Joan Weiss, Executive Director of the National Institute Against Prejudice and Violence, picked up on this theme, attacking denials that hate crime was a legitimate national problem:

We don't need this legislation to tell us there's a problem. Those of us who monitor the problem know that it's an issue that needs to be addressed, but do not have the resources to turn it around.

Only public officials can do that and the problem in this country is that public officials, for the most part—police departments, county

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act when "evidence shows that certain groups are targeted").

123. *See id.*

124. *See, e.g.*, *id.* at 94-102 (statement of Kevin Berrill); *id.* at 103-09 (statement of Reverend Charles Bergstrom, Former Director of the Lutheran Office for Governmental Affairs); *id.* at 241-43 (statement of Leonard O. Goodstein, Ph.D., American Psychological Association); *id.* at 253-54 (statement of Sen. John Kerry (D-MA)); *id.* at 12-17 (statement of Rep. Conyers).

125. NIJ Study, *supra* note 75, at 126.

126. *Id.* at 159.

127. *Id.* at 126. The Study continued the observation:

> Many criminal justice system personnel do not believe that hate violence exists in their community. Others are aware it exists but are reluctant to publicize the fact for fear their communities' will be branded as racist or hotbeds of violence. Lack of police and prosecutor attention to bias crime often reflects the attitudes of local residents who do not want minorities in their community.

Id.

executives, legislators, mayors, Governors—do not believe this is a serious problem. The citizens of this country have a great deal of denial going on. And the problem, therefore, cannot be addressed.[128]

In fact, the U.S. Commission on Civil Rights quite unintentionally demonstrated its own blindness to anti-gay bias at the hearing.[129] The Commission's Acting Chairman, Murray Friedman, extolled the Commission for fighting "bigotry-related crime" because a few months earlier, it issued a resolution for Congress to enact legislation to mandate "the collection of hate crimes data."[130] But Friedman also acknowledged that "several Commissioners [had] objected" to the original version of the resolution because it included sexual orientation.[131] Once sexual orientation was removed from the resolution language, the Commissioners unanimously approved it.[132]

Despite the evidence and testimony in the hearing—including the admonitions not to ignore the evidence and impact of hate crimes—the Senate did not act on H.R. 3193 or S. 2000 before the 100th Congress adjourned.[133]

4. 1989: Poison in the House

On June 23, 1989, the 101st Congress issued a report on the latest pending HCSA bill, H.R. 1048, a reintroduction of H.R. 3193.[134] The report reviewed familiar arguments and evidence in support of the bill's passage.[135] Conservative author[136] and Congressman

128. *See Senate 1988 Hearing*, *supra* note 70, at 72.

129. *Id.* at 217.

130. *Id.* at 217, 223.

131. *Id.* at 224.

132. *Id.* at 231 (appending news release, "Rights Commission Issues Hate Crimes Resolution," Feb. 12, 1988).

133. *See* H.R. REP. NO. 101-109, at 2 ("The bill passed the House by a vote of 383 to 293 and was pending in the Senate when the 100th Congress adjourned.").

134. H.R. REP. NO.101-109.

135. *See id.* at 2-4. One unique but short-lived development was a proposal by Representative Gekas "to allow the Attorney General to include any additional category of victims he deems appropriate." 135 CONG. REC. 13549 (1989). Representative Conyers described his perception of Gekas's particular amendment was "to make the legislation more inclusive." *Id.* Representative Conyers stated: "I am aware that interest has been expressed in having crimes against women and the elderly included in the bill, and perhaps through further congressional hearings on hate crimes, a record can be created to support action in that regard by the Attorney General." *Id.* Gekas's language survived the final passage of H.R. 1048 in the House, but appears to have been set aside in conference. The Senate companion to H.R. 1048, S. 419, did not contain Gekas's language. *See id.* There is no clear record of how or why Congress removed the language granting discretion to the Attorney General to cover new groups under the HCSA.

136. Representative Dannemeyer authored an anti-homosexuality text, SHADOW IN THE LAND: HOMOSEXUALITY IN AMERICA (1989), just before the 1990 enactment of the

William Dannemeyer (R-CA) penned the Dissenting View.[137]

Representative Dannemeyer opined that the point of hate crime legislation was to "convey[] the entirely reasonable message that some hate crimes are worse than others."[138] He defended the inclusion of race, color, religion, and national origin on the grounds they were named in the 1964 Civil Rights Act; therefore, it was appropriate to infer these groups were subject to the "worse" variety of prejudice.[139] But, "homosexuality . . . does not fit into that honorable tradition."[140] To embellish his point, Representative Dannemeyer quoted "an eloquent civil rights activist," Dr. David Pence[141]:

> Homosexual behavior is a completely different category of activity which . . . cannot be seriously considered even an analogue of race or gender. The freedom train has been hijacked. The new agenda of the civil rights movement will not be written until the philosophical and social tenets of the sexual revolutionaries are exposed as inimical to the poor. While feminists cry for an end to patriarchy, the poor demand responsible fathers. While homosexuals cry for sexual license, the poor demand sexual discipline.[142]

Representative Dannemeyer repeated his objections and his quoted materials three days later, when then-Representative Charles Schumer (D-NY) moved to suspend the rules and pass H.R. 1048.[143]

HCSA. In it, Representative Dannemeyer not only generally excoriates homosexuality, but he also specifically criticizes the inclusion of sexual orientation in the HCSA.

137. H.R.REP. NO. 101-109, at 9-10.

138. *Id.* at 9.

139. *Id.*

140. *Id.*

141. *Id.* The basis for Representative Dannemeyer's characterization of Pence as a "civil rights activist" is unclear. Pence wrote a book, RELIGION, SEX, AND POLITICS: FOR MEN ONLY (2012). An editorial review of the book states that Pence "served one year as a VISTA volunteer in a black community in Wilmington, Delaware in 1967." Editorial Review of *Religion, Sex, and Politics*, AMAZON, http://www.amazon.com/Religion-Politics-M-D-David-Pence/dp/159526065X (last visited Feb. 13, 2014). Representative Dannemeyer would later state that Dr. Pence "marched with the civil rights activists in the South prior to the adoption of the Civil Rights Act of 1964." 135 CONG. REC. 13546 (1989).

142. H.R. REP. NO. 101-109, at 9 (dissenting views of Rep. Dannemeyer). Representative Dannemeyer also professed to expose the "ultimate goal of homosexual rights legislation" by quoting a "homosexual activist." *Id.* at 10. The basis for Representative Dannemeyer's attribution of the quote to a "homosexual activist" is unclear; Representative Dannemeyer later attributed the quote to a "homosexual publication[] . . . called Guide." 135 CONG. REC. 13545 (1989).

143. 135 CONG. REC. 3179, 3184 (1989). But when Representative Dannemeyer repeated the quote from Dr. David Pence, Representative Barney Frank challenged the apparent dig at feminism:

> [I]n the quotation the gentleman read, he listed among the enemies of the poor, feminism. Is it also his intention to strike sex from this? He read a statement there which denounced feminists as also being antipoor. In this

Representative Dannemeyer was among those who objected to a suspension, suggesting that the House should consider amendments that had been previously voted down.[144] Although outspoken, Representative Dannemeyer was not alone. Several other members of Congress endeavored to sink the bill by calling for coverage of union members.[145] Such proposals, recognized as poison pills, were unsupported by the union lobby and had been repeatedly rejected in the House.[146] These tangles stymied progress, and H.R. 1048 died before Congress adjourned.

5. 1990: The Dark Before the Dawn

While Congress squabbled over the bid to add sexual orientation to the HCSA, gay and lesbian organizations continued to coordinate. By 1990, a formidable coalition emerged, including an extensive range of general civil rights organizations, as well as bi-partisan support from Senators Orrin Hatch (R-UT) and Paul Simon (D-IL).[147] On February 8, 1990, Congress debated S. 419, a companion bill to H.R. 1048.[148] Senator Simon wasted no time in tackling the heart of the matter: "The area that is most controversial . . . is whether we include gay and lesbian groups here."[149] Senator Hatch tried to pitch his support to conservatives: "I do not condone homosexual activity, and I do not support separate civil rights legislation for homosexuals. But I certainly do not believe anyone should be beaten up, vandalized, or otherwise criminally assaulted, regardless of what

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effort to clean this bill up is he also going to strike sex as one of the bases on which we would classify?

Representative Frank's underlying reference to a bill is unclear. It is possible that he meant the pending bill, H.R. 1048; however, gender was not a proposed category. H.R. 1048, 101st Cong. (2d Sess. 1990). It is also possible Representative Frank meant the Civil Rights Act of 1964, which Representative Dannemeyer had vaguely referenced, but then Representative Frank's reference to Representative Dannemeyer's position on pending legislation would not make sense. Perhaps the most interesting thing about this passionate interaction is that Representative Dannemeyer's attack on homosexuality and feminism prompted Representative Frank to outwardly confront only the latter.

144. 135 CONG. REC. 3170, 3183 (1989).

145. H.R. REP. NO. 101-109 at 7-8 (additional views of Reps Hyde (R-IL), McCollum, Coble, Slaughter (R-VA), Smith (R-TX), Smith (R-MS), Douglas (R-NH), and James (R-FL)).

146. This tactic had been tried before by Senator Grassley, who unsuccessfully proposed an amendment to H.R. 3193 that would have added "crimes that manifest evidence of prejudice based on membership or non-membership in a labor organization" and that would have added the crime of "extortion" to the enumerated crimes. *See* S. REP. NO.100-514, at 5. The Grassley Amendment was defeated 5-7. *Id.* *See* discussion of other poison pill efforts at *infra* note 241 and accompanying text.

147. *See* 136 CONG. REC. 1067 (1990) (listing various agencies and organizations supporting S. 419).

148. 136 CONG. REC. 1067-1092 (1990).

149. 136 CONG. REC. 1072 (1990).

that person may be or what that person's lifestyle is . . . ."[150]

But Senator Hatch's perspective was rejected by many conservatives,[151] including the indomitable Senator Jesse Helms (R-NC). Although prior hearings explained that homophobic rhetoric actually supports the commission of bias crimes against gays and lesbians,[152] instead of rebutting such rhetoric, Senator Helms actually sought to capitalize on it. He opened with the claim that Senate Bill 419 was "the flagship of the homosexual, lesbian legislative agenda,"[153] and "simply one step in their radical revolution."[154] As a result, "[s]tudying hate crimes against homosexuals [would be] a crucial first step toward achieving homosexual rights and legitimacy in American society."[155] Inclusion of sexual orientation in the HCSA would therefore undermine "traditional" family values by promoting homosexuality.[156]

The problem of anti-gay violence, according to Senator Helms, was an illusion: Senate Bill 419 was "dreamed up by the National Gay and Lesbian Task Force," and "militant homosexuals" were "building up numbers of complaints—not . . . criminal offenses or charges."[157] In fact, Senator Helms declared, even assuming NGLTF's reports of violent crimes against gays and lesbians were true, the number of reported crimes was "a relatively minute number compared to their percentage of the population."[158]

Not only should Congress discredit such manufactured evidence of anti-gay violence, Senator Helms opined, but it should recognize

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150. 136 CONG. REC. 1075 (1990).

151. Nineteen members of Congress voted for Senator Helms' proposed amendment to Senate Bill 419. 136 CONG. REC. 1086 (1990). *See infra* note 166 and accompanying text.

152. Congressional hearings are replete with other examples of the societal generation and support of homophobia. *See, e.g., Anti-Gay Violence Hearing, supra* note 45, at 114 (statement of Dr. Herek) ("We recently had the Chief Justice of the Supreme Court suggest that homosexual behavior between consenting adults is worse than violent rape."); *see id.* at 203 (statement of Martin P. Levin, The American Sociological Association) ("Our legislatures, schools, and churches . . . perpetuate and reinforce anti-homosexual sentiments . . . ."). Of course, individuals are free to hold discriminatory views, but the Constitution's equal protection guarantee prevents such prejudice from being given the force of law: "[t]he Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." Palmore v. Sidoti, 466 U.S. 429, 433 (1984).

153. Senator Helms observed "a great deal of political clout of the homosexual community." 136 CONG. REC. 1076 (1990).

154. 136 CONG. REC. 1764 (1990)

155. 136 CONG. REC. 1770 (1990) (statement of Sen. Helms).

156. Fernandez, *supra* note 13, at 278-81 (internal citations omitted).

157. Instead, Helms proclaimed, "80 percent of so-called hate crimes against homosexuals were acts of name calling." 136 CONG. REC. 1762-63 (1990).

158. *Id.*

homosexuals as the perpetrators of crimes instead of as potential victims.[159] He described some specific "hate crimes" perpetrated by homosexuals, including "unspeakable acts" committed by pairs of gay men in Senator Helms's office, prompting Senator Helms to secure the intervention of the U.S. Marshal.[160] Another alleged episode, originally reported by conservative Pat Buchanan, involved the invasion of a Catholic church by "dozens of homosexuals," who "began screaming, and standing on pews, and tossing condoms in the air."[161] But, Senator Helms fumed,[162] there was no "outcry" or "prosecution of these criminals" because of "the homosexual apologists in the media and in politics."[163]

Senators Hatch and Simon sought to throw water on Senator Helms's speech by offering Amendment 1250. Amendment 1250, Senators Hatch and Simon hoped, would assuage Senator Helms and other conservative dissenters because it was an express assurance that the HCSA would not be "misperceived as stamping congressional approval on homosexuality." [164] Amendment 1250 expressly articulated that:

> 1. The American family life is the foundation of American society,
>
> 2. Federal policy should encourage the well-being, financial security, and health of the American family,
>
> 3. Schools should not deemphasize the critical value of American family life.
>
> (B) Nothing in this Act shall be construed, nor shall any funds be appropriated to carry out the purpose of the Act be used, to promote or encourage homosexuality.[165]

The Hatch-Simon Amendment was unanimously approved; even Senator Helms and other dissenters voted for it, at least momentarily.[166]

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159. 136 CONG. REC. 1761 (1990).

160. 136 CONG. REC. 1762 (1990).

161. 136 CONG. REC. 1764 (1990) (statement of Sen. Helms).

162. The record supports this characterization. *Id.* ("I say to my friend from Illinois [Senator Simon], if I sound like I am worked up, I am worked up.") (statement of Sen. Helms).

163. *Id.* Senator Helms implored, "This is the crowd we want to follow, do we not, in deciding what legislation we are going to pass and what legislation we are not going to pass?" *Id.*

164. 136 CONG. REC. 1767 (1990).

165. *Id.* Amendment 1250 passed by a vote of ninety-six to zero. 136 CONG. REC. 1769 (1990).

166. Senator Helms's support, and apparently that of 19 other conservative members of Congress, was qualified. Just after the Hatch-Simon Amendment was approved, Senator Helms proposed Amendment 1251, which provided in relevant part:

> (1) the homosexual movement threatens the strength and survival of the American family as the basic unit of society; (2) State sodomy laws should be

But proponents did not limit their strategies to compromise. Supporters, proffering "voluminous" evidence of hate crimes committed against gays and lesbians,[167] also responded that the bill "'simply' requires the collection of data 'to guide the efforts of police, prosecutors, and public' against hate crime."[168] Numerous law enforcement organizations disputed opponents' claims that the bill would be too vague or difficult to implement.[169] To the contrary, supporters argued, passage of the bill would improve state and local awareness, reporting, and training around bias crimes through the collection and provision of reliable federal data.[170] Ultimately, the exclusion of sexual orientation from the bill would signal that "[c]rimes against gays and lesbians [were] . . . less significant, less pervasive, and less reprehensible than crimes motivated by racial, religious, or ethnic prejudice."[171]

Just before the final vote on Senate Bill 419, Senator Barbara Mikulski (D-MD) made an impassioned statement in support. Although her comments presumably addressed the need for hate crime legislation generally, Senator Mikulski's statements could have easily been addressed to the members of Congress who opposed the addition of sexual orientation to the HCSA:

> Why do we hate? We hate because we fear. We fear what we do not understand. We are afraid of strangers. We are afraid of people who are different. We are afraid that they are going to take what is ours. We fear they want to change us and we drive them away because we are threatened. We hate rather than overcome fear.[172]

After three years of battle, reams of data, pages of testimony, and fervent advocacy from a range of organizations and officials, Congress finally waded through the rhetorical blood on the floor and passed the HCSA—with coverage for sexual orientation—by a vote of 92-4.[173] Although supporters ultimately prevailed in their quest to include sexual orientation under the HCSA, the battle was a protracted and bitter one. Social movement organizations were essential; supporters needed sufficient political power,

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enforced because they are in the best interest of public health; (3) the Federal Government should not provide discrimination protections on the basis of sexual orientation; and (4) school curriculums should not condone homosexuality as an acceptable lifestyle in American society.

136 CONG. REC. 1770 (1990). Senator Helms's amendment was rejected by a vote of nineteen to seventy-seven. 136 CONG. REC. 1773.

167. Fernandez, *supra* note 13, at 273 (detailing the data).

168. *Id.* at 271-73 (describing Rep. Conyers's advocacy in support of the bill).

169. *Id.* at 273-74.

170. *Id.* at 275.

171. *Id.* at 274.

172. 136 CONG. REC. 1082 (1990).

173. 136 CONG. REC. 1082 (1990).

representation, and organization to secure the support necessary to overcome legislative resistance.[174]

Sexual orientation's long and embattled journey on to the HCSA revealed four indicators of heightened congressional resistance to a candidate group, including (1) an apparent requirement that the candidate group present compelling evidence of their vulnerability to bias crimes; (2) a tendency to critique the candidates' proffered data as inflated or inadequate; (3) moral condemnation of the candidate group, including the portrayal of the candidates as criminals or perpetrators of violence; and (4) to a lesser extent, technical arguments, such objections to statutory definitions of the candidate group as vague or over-inclusive. These indicators were not evident in the decision to add any other candidate groups to the HCSA, including the next group to be covered: disability.

C. Disability

Congress first added disability to federal hate crime legislation in 1994, when it was specifically incorporated into the new Sentencing Act and incorporated into the reauthorized HCSA.[175] There is a dearth of legislative history to shed light on why disability was not included in the HCSA at the time of its passage in 1990, but at least one scholar opines that "Congress apparently did not think that disabled people compromised [sic] a 'high risk' group in relation to interpersonal violence" in the early phases of deliberating the scope of hate crime legislation.[176] Other scholars apparently attribute the delay in adding disability to a lack of advocacy from social movement organizations and other activist groups.[177]

What is remarkable about the 1994 incorporation of disability into federal hate crime law is that it occurred not only without significant advocacy from disability advocates[178] but also with virtually no congressional discussion.[179] In fact, Congress never held

174. Grattet & Jenness, *Criminology*, *supra* note 8, at 671 (citing civil rights activism and "identity politics" as reasons for the increased support). Of course, the irony is that the most vulnerable groups often do not have such organizational support. As explained *infra*, the homeless are a perfect example of a group that falls into a "dialogic default" where their needs and rights are soundly ignored by both the legislative and judicial branches, but they lack the organization, support, or representation to overcome the deficit. *See* Julie A. Nice, *No Scrutiny Whatsoever: Deconstitutionalization of Poverty Law, Dual Rules of Law & Dialogical Default*, 35 FORDHAM URB. L.J. 629, 631-32 (2008).

175. *See* Violent Crime Control and Law Enforcement Act § 320926.

176. Grattet & Jenness, *Criminology*, *supra* note 8, at 676 (quoting Barbara Faye Waxman, *Hatred: The Unacknowledged Dimension in Violence Against Disabled People*, 9 SEXUALITY & DISABILITY 185, 186 (1991)) (internal quotation marks omitted).

177. *Id.* at 673-77.

178. *See id.* at 673-76.

179. *Caught in the Crossfire: Kids Talk About Guns, Hearing Before the Subcomm.*

a hearing to discuss bias crimes directed at those with disabilities.[180] Instead, the term disability was "simply" inserted into the definition of hate crimes in the Sentencing Act by a proposed amendment, which was accepted without objection or discussion before a favorable Senate vote of 95 to 4.[181] Thus, the incorporation of disability into the HCSA, through the Sentencing Act, was a non-event.[182]

Why did Congress so easily incorporate disability into the HCSA, especially when compared to congressional battles over the addition of sexual orientation? The discrepancy cannot be explained on the basis of evidence—no evidence of bias crimes against the disabled was proffered or debated. Perhaps Congress silently recalled evidence from hearings over the 1990 Americans with Disabilities Act ("ADA"), which demonstrated the prevalence of discrimination against the disabled.[183] But the ADA hearings occurred over four years prior to the addition of disability to the HCSA,[184] and they did not directly address bias crimes related to the disabled. Moreover, Congress held hearings on bias crimes committed against gays and lesbians, and these hearings were contemporaneous with the enactment of the HCSA;[185] still, Congress mightily resisted the

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on Crime & Criminal Justice of the H. Comm. on the Judiciary, 103d Cong. (1994) [hereinafter *Senate Hearing 1994*].

180. Grattet & Jenness, *Criminology*, *supra* note 8, at 674-75.

181. *See Senate Hearing 1994*, *supra* note 179. The inspiration to add disability might have come in part from a July 29, 1992 hearing before the Subcommittee on Crime and Criminal Justice. At that hearing, Congress compared the proposed federal law with an existing Wisconsin law. *Hate Crime Sentencing Enhancement Act of 1992: Hearing on H.R. 4797 Before the Subcomm. on Crime & Criminal Justice of the H. Comm. on the Judiciary*, 102d Cong. 184 (1992). Both laws listed race, religion, ethnicity, and sexual orientation. *Id.* The Wisconsin law also included disability. *Id.* at 184.

182. The relative ease of the addition of the disabled to the HCSA is not to suggest that effective implementation of the law has been easy. *See* Grattet & Jenness, *Criminology*, *supra* note 8, at 678-79 (discussing the challenges to implementation of disability in hate crime legislation).

183. Americans with Disabilities Act, Pub. L. No. 101-336, 104 Stat. 327 (1990) (explaining that discrimination against individuals with disabilities remains a serious social problem). *See* Brief for Law Professors as Amici Curiae Supporting Respondents at 2, Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2000) (No. 99-1240), 2000 WL 1154031, at *2 ("[T]he ADA itself was a product of several years of negotiation and compromise, the very kind of consultation and fact-gathering suggested by this Court in *City of Cleburne* . . . ."); *see also* Waxman, *supra* note 176, at 189 ("Violence toward disabled people has . . . been part of the federal record for many years . . . .").

184. Rebecca Hill, *Passing the Americans with Disabilities Act*, THE AMERICANS WITH DISABILITIES ACT: A SOCIAL AND STRUCTURAL REVOLUTION, http://37616344.nhd.weebly.com/passing-the-ada.html (last visited Apr. 13, 2014) (stating that the draft of the Americans with Disabilities Act was introduced to Congress in September of 1989).

185. *See Senate 1988 Hearing*, *supra* note 70, at 1, 12; Fernandez, *supra* note 13, at 263 (noting that the HSCA was passed in 1990).

addition of sexual orientation despite the presentation of "irrefutable"[186] and "voluminous"[187] evidence of anti-gay bias.

Perhaps the lack of statutory precedent regarding sexual orientation could explain some of the difference in Congressional response. The HCSA was the first major federal law to recognize discrimination against gays and lesbians,[188] so the lack of a precedent comparable to the ADA might be one reason for increased Congressional resistance to the addition of sexual orientation in comparison to the disabled. But the sexual orientation lobby had extraordinary support from social movement organizations,[189] and Congress added disability to the HCSA despite a lack of any outside pressure.[190]

Simply put, there are no principled criteria to justify the stark difference in tenor over Congressional deliberations to add disability in comparison to sexual orientation. But at least one unprincipled reason for such differential treatment is unrecognized bias.

D. Gender

Gender, like disability, was added to the Sentencing Act in 1994.[191] Although gender's road to the HCSA was more circuitous and bumpy than that taken by disability, it proved to be nothing like the battle waged over sexual orientation. Gender was first suggested as a potential candidate for federal hate crime protection in a 1986 hearing on "Ethnically-Motivated Violence Against Arab-

186. *See Senate 1988 Hearing*, *supra* note 70, at 75, 79 (statement of Joan Weiss, Executive Director, The National Institute Against Prejudice and Violence) (explaining that research shows that thousands of incidents of crime motivated by sexual orientation and bias and other bias occur each year).

187. Fernandez, *supra* note 13, at 273 (noting that Congressman Conyers was "armed with voluminous data on hate crime").

188. *Hate Crime Protections Timeline: Task Force's Long History of Combating Hate Crimes Against Our Community*, NATIONAL GAY AND LESBIAN TASK FORCE, http://www.thetaskforce.org/issues/hate_crimes_main_page/timeline (last visited Apr. 13, 2014).

189. *Hate Crime Protections Historical Overview: Task Force's Long History of Working to Secure Hate Crimes Protections for LGBT People*, NATIONAL GAY AND LESBIAN TASK FORCE, http://www.thetaskforce.org/issues/hate_crimes_main_page/overview (last visited Apr. 13, 2014).

190. *See* Hate Crimes Statistics Act, Pub. L. No. 101-275, 104 Stat. 140 (1990).

191. *See* Act of Aug. 26, 1994, Pub. L. No. 103-322, § 280003(a), 108 Stat. 1781 (codified as amended at 28 U.S.C. § 994 (2012)) (extending the definition of a hate crime to include those motivated by bias against gender). Although the Sentencing Act modified the HCSA to collect data on disability bias crimes, it fell short of modifying the HCSA to mandate the collection of data on crimes motivated by gender. *See id.* The Prevention Act finally clarified the federal mandate to add gender to the HCSA. *See* Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, § 4708, 123 Stat. 2835 (2009) (codified as amended at 18 U.S.C. § 249 (2012))

Americans."[192] At that time, Congress was focused on race, religion, and ethnicity as the anchoring trio of federal hate crime laws.[193] But by the early 1990s, Congress began to specially consider gender in the context of federal hate crime legislation. The first congressional hearing on "Legislation to Reduce the Growing Problem of Violence Against Women" was held in 1990, and a series of hearings took place over the next three years.[194]

These hearings ultimately culminated in the 1994 passage of the Violence Against Women Act ("VAWA").[195] Then-Senator Joseph Biden, VAWA's principal sponsor, clearly pitched VAWA as federal hate crime legislation directed at violent gender bias crimes.[196] The Act's central premise is that "[a]ll persons within the United States shall have the right to be free from crimes of violence motivated by gender."[197] It allocated over $1.6 billion to improve coordination among communities, support organizations, law enforcement, and the judicial system to better deal with crimes such as domestic violence, rape, sexual assault, and stalking.[198] VAWA addresses gender bias crimes from the standpoint of prevention and intervention,[199] and provides victims with civil remedies, including compensatory and punitive damages.[200]

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192. Jenness, *supra* note 22, at 561.

193. *See id.* (explaining that "race, religion, ethnicity, and sexual orientation were [already] inscribed into hate crime law" when gender was first mentioned).

194. *Id.* at 562 (reviewing "multiple hearings on the VAWA" from 1990-1993).

195. Violence Against Women Act, 42 U.S.C. §§ 13925-14045 (2012).

196. *See Women and Violence, Hearing on Legislation to Reduce the Growing Problem of Violent Crime Against Women Before the S. Comm. on the Judiciary*, 101st Cong. 36 (1990) (statement of Sen. Joseph Biden) ("One of the things we are trying to do in the Violence Against Women Act is to make it a policy of the country that rapes are hate crimes committed against women, crimes of violence directed disproportionately at one group based on their gender.").

197. 42 U.S.C. § 13981(b).

198. *See* Pamela Bozeman-Evans, *Violence Against Women Act*, CHICAGO TRIBUNE (Jan. 9, 2013), http://articles.chicagotribune.com/2013-01-09/opinion/chi-violence-against-women-act-20130109_1_vawa-violence-against-women-act-domestic-violence (noting allocation of $1.6 billion toward crimes against women through the VAWA); 42 U.S.C. § 13925-14045 (noting the different categories where the funding may be used).

199. 42 U.S.C. § 14043c(c)(2) (providing for counseling programs and mental health services); § 14043d-1 (preventing "crimes involving violence against women, children and youth"; increasing availability of resources and services; mandating the development and implementation of education and services programs, mandating collaboration between community organizations and governmental agencies); § 10413 (mandating the establishment of a national twenty-four hour domestic violence hotline); § 280b-1b(a)-(b) (providing for rape educational and prevention programs including hotlines, and the dissemination of information).

200. § 13981(c) (providing victims the right to claim compensatory and punitive damages). In a 5-4 decision, *United States v. Morrison* invalidated the civil remedy provision on the grounds Congress lacked authority, under either the Commerce Clause or the Fourteenth Amendment, to enact this section. 529 U.S. 598, 617, 626

Despite the fact that VAWA is often described as "landmark" legislation because it articulated the most sweeping legislative response to gender crimes,[201] congressional scrutiny was relatively sedate at the time of passage.[202] In fact, VAWA's legislative record was "largely uncontested":

> Interestingly, the redefinition of gender violence required to convert acts such as rape into hate crimes did not evoke much debate, especially compared to the magnitude and intensity of debates over the sexual orientation provision in the HCSA. . . . [S]ome hearings on the VAWA . . . featured *no* oppositional testimony and the remaining [legislative history] . . . manifest[s] very little evidence of contestation over including the status of "gender" in hate crime.[203]

Most concerns expressed in the VAWA hearings related to technical matters, such as the feasibility of collecting data on violent crimes against women, which were generally accepted as "pervasive."[204] Indeed, Senator Biden noted the lack of opposition to VAWA, stating that he was in the awkward and "unusual position . . .of trying to build a case against [his] own bill"[205] to flesh out the congressional record.[206]

So the VAWA hearings were unlike congressional combat over adding sexual orientation to the HCSA in at least two significant respects: first, Congress did not question any evidence that gender is vulnerable to bias crimes;[207] second, outside advocates played a minimal role in securing gender to federal hate crime legislation through VAWA.[208] Indeed, the "minimal resistance" to VAWA was "easily addressed and subsequently dismissed by legislators without the testimony of outside claimsmakers (i.e., representatives from

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(2000). However, program funding remained unaffected. *See id.* at 598-666 (mentioning nothing indicating changes in the amount of funding allocated).

201. *See, e.g.*, Sally F. Goldfarb, *"No Civilized System of Justice": The Fate of the Violence Against Women Act*, 102 W. VA. L. REV. 499, 504, 540 (2000) (calling VAWA "a legal milestone").

202. Jenness, *supra* note 22, at 562-63.

203. *Id.* at 563.

204. *Id.* (discussing how testimony established the feasibility of such data collection).

205. *Id.* at 564.

206. Predictably, the VAWA hearings repeated some of the rhetoric successfully used by social movement organizations to justify the addition of sexual orientation to the HCSA: VAWA hearings often analogized gender to other groups covered under federal hate crime legislation, especially the anchoring trio of race, religion, and ethnicity. *Id.* at 562-63.

207. *See id.* at 564.

208. *Id.* at 562 (noting that "support for [VAWA] was based less on direct pressure from those engaging in collective action, and more on the previously established logic used to justify" the inclusion of groups already covered in the HCSA and the Sentencing Act).

women's organizations)."[209]

But if gender-bias violence was so apparent in 1990, why did Congress wait nineteen years before adding gender to the HCSA in 2009? Legislative history does not shed light on why gender was not proposed as a candidate group for the HCSA before its enactment.[210] But Congressional hearings on VAWA began around the same time the HCSA was enacted;[211] the contemporaneous evolution of VAWA may have caused some confusion about whether and to what extent the HCSA should also focus on data collection about gender bias crimes.

In fact, some of the nation's premiere women's organizations had not reached consensus about whether to lobby for gender to be added to the HCSA.[212] Some scholars point to conflicts among the very same coalition that supported the bid to add sexual orientation, suggesting that these organizations ultimately decided not to advocate for the inclusion of gender at the same time.[213] Still, others blame more technical arguments distinguishing gender bias crimes from those

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209. *Id.* at 563.

210. In fact, the only evidence that women's organizations participated in HCSA hearings is limited to a short prepared statement from the National Organization for Women, which was appended to the July 15, 1998 hearing on S. 2000. *See Hate Crime Statistics Act of 1988: Hearing on S. 2000 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 100th Cong., 2d Sess. 262-83 (1988) (statement of Molly Yard, President, National Organization for Women). The statement suggested that H.R. 3913 be amended to "include women." *Id.* Except for this submission, there is no evidence that any other women's organization participated in congressional hearings on the HCSA. The only other legislative record that suggests congressional awareness of any interest in adding gender to the HCSA is a brief statement by one of the key supporters of the HCSA, Representative Conyers. *See* 135 CONG. REC. 3179, 3187 ("I am aware that interest has been expressed in having crimes against women and the elderly included in the bill, and perhaps through further congressional hearings on hate crimes, a record can be created to support action in that regard by the Attorney General.").

211. Jenness, *supra* note 22, at 562 (providing dates).

212. Fernandez, *supra* note 13, at 275.

213. *Id.* Fernandez explains the coalition's hesitancy this way:

> Although some members . . . considered the idea of adding gender as a counted category, eventually the coalition decided against this expansion. Most groups believed that a hearing was needed to examine the deficiencies in current gender-based crime data collection . . . and that to expand the categories to include gender would not improve upon current data collection on rape and domestic violence. Moreover, women's rights groups in Washington could not agree on whether inclusion of gender in the Act was the appropriate way to count gender-based crime. Given these difficulties, the coalition decided to continue to work for the passage of the versions of the bill [that did not include gender].

Id. See also Jenness, *supra* note 22, at 563 n.9 (offering similar reasons, but also noting additional concerns "that including gender would open the door for age, disability, position in a labor dispute, party affiliation, and/or membership in the armed forces provisions").

relating to race, religion, ethnicity or sexual orientation.[214] For example, some argued that most gender bias crimes appeared to involve offenders who "were acquaintances of the victims."[215] However, these accounts are vague and do not clearly attribute these views to a particular speaker or time,[216] so it is difficult to gauge any potential impact of these arguments on Congressional decision-making with respect to the HCSA.

A significant point is that none of these arguments suggest Congress was reluctant to construct animus against women as social pathology deserving of statutory redress. First, to the extent these objections occurred in the midst of the enactment of the HCSA, they would also occur simultaneously with the enactment of VAWA, a landmark piece of legislation addressing gender bias crimes. Second, even women's organizations were not in consensus about whether to lobby for gender's inclusion in the HCSA. Third, the arguments against adding gender to the HCSA did not feature most of the indicators of Congressional resistance evident in the effort to add sexual orientation: Congress did not require the presentation of specific, compelling evidence of gender bias crimes before adding the term to the HCSA; congressional records do not reveal significant debate over any such proffered data, and certainly do not reveal critiques of the data as inflated or inadequate; and congressional records relating to the HCSA are devoid of any moral condemnation of or negative associations with gender or women.

Although VAWA provided for federal collection of gender bias crimes since 1990, by 2009, gender had unambiguously secured its place in the HCSA through the enactment of the Prevention Act.[217] Congressional debates over the Prevention Act barely feature any discussion specifically related to gender.[218] Gender identity, however, was another matter.

E. Gender Identity (or Sexual Orientation, Redux)

Gender identity, also added to the HCSA through the enactment of the Prevention Act in 2009,[219] was a curious case; with a few

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214. *See, e.g.*, KROUSE, *supra* note 49, at 5 (citing JAMES B. JACOBS & KIMBERLY POTTER, HATE CRIMES: CRIMINAL LAW & IDENTITY POLITICS 72 (Oxford University Press 1988)).

215. *See id.* at 5.

216. *Id.*

217. *See* Hate Crime Prevention Act of 2009 § 4702, Pub. L. No. 111-84 §§ 4701-4713, 123 Stat. 2835 (2009).

218. *See, e.g.*, S. REP. NO. 107-147, at 8 (2002) (featuring approximately one page of general, but positive discussion of gender as a candidate group).

219. §§ 4701-4713, 123 Stat. at 2835-44. Some of the first iterations of the Prevention Act did not incorporate a reference to statistics or to the HCSA, but contained specific congressional findings that "the incidence of violence motivated by

notable exceptions, congressional debates generally did not target gender identity. Instead, the proposal of the Prevention Act reignited some pointed objections to covering sexual orientation; but this time, objections were sporadic and comparatively muted. Perhaps the decline was due to exhaustion from battle over sexual orientation nearly two decades prior. Moreover, Congress debated the Prevention Act on the heels of the Matthew Shepard murder, which focused significant national attention on the grisly reality of anti-gay violence;[220] detractors may have thought it a poor time to go overboard denying the problem of anti-gay bias crimes. The subdued reaction to gender identity was also likely helped by congressional confusion over the difference between sexual orientation and gender identity. Put another way, debates over gender identity were likely conflated with sexual orientation.[221] Whatever the cause, the shift in tenor from congressional debates over the addition of sexual orientation in the late 1980s to that over gender identity in 2005-2008 is undeniable.

Congressional debates over the Prevention Act waged for approximately a decade;[222] but the vast majority focused on the

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the actual or perceived race, color, national origin, religion, sexual orientation, gender, or disability of the victim poses a serious national problem." *See* Hate Crime Prevention Act of 1999, H.R. 1082, 106th Cong. (1999). As a result, the Prevention Act sought to expand federal jurisdiction over hate crimes by authorizing the Attorney General to provide assistance to state investigations or prosecutions of bias crimes under certain circumstances.

220. James Brooke, *Gay Man Dies from Attack, Fanning Outrage and Debate*, N.Y. TIMES, Oct. 13, 1998 at A1.

221. Congressional records tend to blur the lines between sexual orientation and gender identity. *See, e.g.*, S. REP. NO. 107-147 (discussing sexual orientation under the "gender" heading); *Local Law Enforcement Hate Crimes Prevention Act of 2007: Hearing Before the Subcomm. on Crime, Terrorism and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. 51-53 (2007) [hereinafter *Hearing on H.R. 1592*] (statement of Frederick Lawrence, Dean, George Washington University Law School) (discussing sexual orientation and gender identity under the same heading, but mostly specifically discussing sexual orientation); *id.* at 158-59 (statement of Christopher E. Anders, Legislative Counsel, The American Civil Liberties Union) (purporting to introduce examples of sexual orientation and gender identity bias, but categorizing all examples as bias crimes on the basis of sexual orientation). By April 30, 2007, congressional reports show some effort to distinguish between sexual orientation and gender identity. *See* H.R. REP. NO. 110-113, at 12-13 (2007).

222. Representative Conyers first introduced the Prevention Act to the 106th Congress in 1999 as part of that year's Department of Defense authorization bill. *See* Hate Crime Prevention Act of 1999, H.R. 1082, 106th Cong. (1999). A precise recount of each step in the Prevention Act's legislative history is beyond the scope of this Article; instead, this Article focuses only on direct evidence of congressional decision-making with respect to group coverage under the HCSA. For more exhaustive coverage of congressional records relating to the Prevention Act, *see, e.g.*, Kalam, *supra* note 18 (discussing the difficult history of getting the HCPA passed by Congress); Kim, *supra* note 31 (analyzing the interplay between the legislative and judicial branches in using the HCPA to combat crimes on the basis of sexual orientation).

constitutionality of the Act, especially federalism[223] and First Amendment[224] concerns. Because the Prevention Act permitted federal involvement in state-level prosecutions of bias crimes, debates also commonly tackled the proper scope of federal jurisdiction and congressional regulatory authority.[225] But, at least with respect to the earliest iterations of the Prevention Act in 1999, congressional debate over candidate groups may have been tempered by the fact that the bills proposed only the groups already covered under the HCSA or the Sentencing Act: race, religion, ethnicity, sexual orientation, gender, and disability.[226]

Although a 2002 Senate Report referred to "antitransgender incidents" of bias crimes under the heading of "sexual orientation,"[227] gender identity was not specifically proposed for Prevention Act coverage until May 26, 2005.[228] H.R. 2662 was the first bill to include gender identity, which it defined as "actual or perceived gender-related characteristics."[229] Although the Senate introduced a

223. *See, e.g.*, S. REP. NO. 107-147, at 10-14 (2002) (discussing federalism concerns).

224. *See generally* Carter T. Coker, *Hope-Fulfilling or Effectively Chilling? Reconciling the Hate Crimes Prevention Act with the First Amendment*, 64 VAND. L. REV. 271 (2011) (discussing First Amendment critiques of the HCPA); S. REP. NO. 107-147, at 14-23 (discussing general concerns with the constitutionality of the Prevention Act).

225. The provisions of the Prevention Act anticipate challenges to the proper scope of congressional authority, animated by the United States Supreme Court's decision in *United States v. Morrison*. 529 U.S. 588, 608-10 (2000) (holding the private cause of action provision in VAWA unconstitutional because it exceeded Congressional power under both the Commerce Clause and the Fourteenth Amendment). Such concerns were generally resolved by a Department of Justice letter opining that the Prevention Act was constitutional. *See* June 13, 2000 letter from Assistant Attorney General Robert Raben, *available in* S. REP. NO. 107-147, at 16-23.

226. *See, e.g.*, Hate Crime Prevention Act of 1999, H.R. 1082, 106th Cong. (1999).

227. S. REP. NO. 107-147, at 6. The relative attention paid to Prevention Act candidate groups is interesting and may reflect the level of opposition expected for each group. Specific discussion of sexual orientation extends about one and a half pages, with approximately one page devoted to reviewing statistics on the prevalence of violence on the basis of sexual orientation and approximately four paragraphs describing the Matthew Shepard case. *Id.* at 6-7. The discussion of gender extends about one page, but does not cover any statistics on gender bias crimes; instead, the discussion generally concerns VAWA. *Id.* at 7-8. The discussion of disability extends about three paragraphs; like the treatment of gender, there is no discussion of statistical evidence of bias crimes on the basis of disability; rather, the section references Congress's "consistent and durable commitment over the past decade to the protection of persons with disabilities from discrimination based on their disabilities." *Id.* at 8. Later, the report provides seventeen examples of "Violent Hate Crimes Not Covered By Existing Law": thirteen are categorized as anti-gay bias crimes, two are categorized as transgender bias crimes, one is categorized as a gender bias crime, and one is categorized as a disability bias crime. *Id.* at 26-30.

228. Local Law Enforcement Hate Crimes Prevention Act of 2005, H.R. 2662, 109th Cong. (2005).

229. *Id.* at 14.

companion bill on the same day, it did not include gender identity;[230] in fact, the Senate did not include the term until nearly two years later, when it introduced S. 1105 on April 12, 2007.[231]

Five days after the introduction of S. 1105, a series of congressional hearings would be the first to explicitly reflect on the propriety of the Prevention Act candidate groups.[232] Gender was virtually absent from discussion,[233] but conservatives refreshed opposition to the protection of sexual orientation and, for the first time, attacked the addition of gender identity.[234] Representative Louis Gohmert (R-TX) set the tone, offering one of the few jabs specifically mentioning gender identity:

> This hate crimes bill says to the world that sexual orientation—and not just gender, but gender identity, whatever that vague definition means—are in the same category as those persons who have suffered for the color of their skin or their religion. It says to the world that . . . a transvestite with gender identity issues will now be more important to protect than a heterosexual, than college or school students, or even senior citizens and widows with no gender identity issues.[235]

Although gender identity was the only newcomer to federal hate crime legislation, such general objections to its addition seem relatively innocuous, particularly in contrast to the more pointed attacks at sexual orientation. For example, despite a settled definition of sexual orientation as consensual homosexual or heterosexual conduct, opponents argued the term could be construed to mean any sexual orientation, including pedophilia, necrophilia, and bestiality.[236] Representative Daniel E. Lungren (R-CA) expressed

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230. Matthew Shepard Local Law Enforcement Enhancement Act of 2005, S. 1145, 109th Cong. (2005).

231. Local Law Enforcement Hate Crime Prevention Act of 2007, S. 1105, 110th Cong. (2007).

232. *Hearing on H.R. 1592*, *supra* note 221; H.R. REP. NO. 110-113 (2007); Local Law Enforcement Hate Crime Prevention Act of 2007, S. 1105, 110th Cong. (2007). The April 17 hearing occurred the day after the notorious campus shootings at Virginia Tech. Some members of Congress used the tragedy to bolster their opposition to the Prevention Act. *See, e.g.*, *Hearing on H.R. 1592*, *supra* note 221, at 2-4 (statement of Rep. Gohmert) ("This hate crime legislation . . . tells the country that victims like those young people yesterday, if they are killed randomly, they are not nearly as important to the country as transvestites with gender issues.").

233. Any discussion of gender was not only limited and general, but could be fairly described as supportive or at least neutral. *See, e.g.*, *Hearing on H.R. 1592*, *supra* note 221, at 50-51 (statement of Dean Lawrence); *id.* at 114-15 (question and answer between Mr. Nadler and Dean Jack McDevitt).

234. Hearing on H.R. 1592, *supra* note 221, at 3-4 (statement of Rep. Gohmert).

235. *Id.*

236. *Id.* at 3 ("[S]exual orientation one of these days will be taken to mean those very words that includes you are sexually oriented toward children, sexually oriented toward corpses, sexually oriented toward animals.").

particular concern that the term "sexual orientation" would be exploited by organizations such as the North American Man/Boy Love Association (NAMBLA):

> NAMBLA, instead of hiding, proudly proclaims their position of "sexual orientation." They argue, for instance, that we are denying children their right to have sexual expression with adults and that somehow we are hampering their development . . . . I am not making this up, my colleagues. This is a fact. And under a non-defined term of "sexual orientation," that very well may be included.[237]

Such efforts to associate sexual orientation with criminal and morally repugnant behavior harkened back to discursive tactics from the HCSA debates in the late 1980s.[238] And yet, in 2007, opponents appeared to engage in these tactics less frequently and with somewhat less enthusiasm.[239] But opponents did not completely give up: they assembled an arsenal of poison pills designed to derail the bill; these were defeated, although sometimes narrowly.[240] Predictably, a few opponents explicitly proposed to remove sexual orientation and gender identity from the Prevention Act; these proposals were also defeated, but by relatively close margins.[241]

Perhaps sensing a slightly depressed appetite for battle, few advocates shined a spotlight on sexual orientation or gender identity; instead, they tended to advocate more broadly for the passage of the Prevention Act and all of its candidate groups. [242] For example,

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237. 153 CONG. REC. 11,159 (2007) (statement of Rep. Daniel Lungren).

238. *See supra* pp. 573-75, 592 (discussing the indicators of heightened congressional resistance to a candidate group).

239. Emblematic of much of the congressional debate over the Prevention Act, the Dissenting View in the April 30, 2007 House Report briefly and wearily objects to the coverage of sexual orientation and gender identity, but mostly it concentrates on more general objections to the Prevention Act. *Hearing on H.R. 1592*, *supra* note 221, at 39-49.

240. Most of these poison pills proposed to add new members to the list of covered groups, including members of the military. H.R. REP. NO. 110-113, at 20 (2007) (introduced by Rep. Randy Forbes (R-VA), defeated 16 to 2); *see also id.* at 23 ("senior citizens"); *id.* at 24 ("pregnant women") (introduced by Rep. Robert Goodlatte (R-VA), defeated 16 to 12); *id.* (witnesses in a judicial proceeding) (introduced by Rep. Goodlatte, defeated 16 to 15); *id.* at 25 ("animus associated with the victim's status as a victim of a prior crime") (introduced by Rep. Steven Chabot (R-OH), defeated 20 to 15); *id.* at 28 (children under 18) (introduced by Rep. Forbes, defeated 21 to 16). Some of the proposed amendments were particularly cheeky; for example, one challenged the constitutionality of the Prevention Act under the First Amendment, proposing "to change the name of the Act to the 'Local Law Enforcement Thought Crimes Prevention Act of 2007." *Id.* at 29 (introduced by Rep. Steve King, defeated 21 to 13). Representative King explained the Orwellian basis for his proposed amendment at H4436.

241. H.R. REP. NO. 110-113, at 20 (2007) (introduced by Rep. Gohmert, defeated 18 to 13); *id.* at 28 (introduced by Rep. Steven King, defeated 20 to 15).

242. Most statements in support of sexual orientation or gender identity were fairly

proponents generally challenged the presence of intolerance in Congress. Representative Steny Hoyer (D-MD) used racial bias to illustrate how the recognition of congressional prejudice can be constrained by the passage of time:

> [I]n times past, [members of Congress] rose on this floor and rationalized slavery and rationalized why we should not have antilynching laws in America. . . . We lament it, and we say to ourselves, had we lived in those times . . . hopefully we would have been beyond our time . . . . We serve now in the 21st century, and we know that there are those . . . who preach hate against a class of people not because of their actions, not because of their character, but because of who they are. That is what this vote is about today.[243]

The passage of nearly twenty years since the HCSA debates certainly seemed to make a difference in the overall tenor of congressional debates over the Prevention Act: even with the addition of gender identity, the bill passed the Senate.[244] But the victory was short-lived: President George W. Bush threatened to veto the entire Defense authorization bill if the Prevention Act was attached.[245] A release from the Executive Office of the President expressed support for "strong criminal penalties for violent crime, including crime based on personal characteristics such as race, color, religion, or national origin," but the release did not mention sexual orientation or gender identity.[246] Instead, White House Spokesperson Tony Fratto clarified that the veto related to the sexual orientation provisions.[247] Ultimately, the President's objection to the Prevention

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general and brief. Representative Jan Schakowsky's (D-IL) statement is illustrative: "This is not about thought. This is not about speech. This is about violence. And you or your pastor may not agree with homosexuals or transgenders, but surely you don't think that is a reason for them to be assaulted." 135 CONG. REC. 11,176 (2007). Proponents' relatively relaxed posture was particularly evident with respect to gender identity. For example, at the April 17, 2007 hearing, the most pointed discussion relating to gender identity was a brief question and answer between then-Representative Tammy Baldwin (D-WI) and Dean Jack McDevitt over the prevalence of violence motivated by anti-transgender bias. *Hearing on H.R. 1592*, *supra* note 221, at 130. Dean McDevitt pointed to data suggesting that "30 to 40 percent of individuals who are transgender or have gender identification issues, but those data are all tainted by the fact they are collected by advocacy groups. If the FBI were to collect them, then we would be in a much better place of having more reliable data." *Id.* (statement of Dean Jack McDevitt, Associate Dean for research and graduate studies, Northeastern University School of Criminology and Criminal Justice).

243. 135 CONG. REC. 11,177 (2007).

244. The House passed the bill, 237-180. 135 CONG. REC. 11,188 (2007).

245. *See* OFFICE OF MGMT. & BUDGET, STATEMENT OF ADMINISTRATION POLICY: H.R. 1592: LOCAL LAW ENFORCEMENT HATE CRIMES PREVENTION ACT OF 2007 (May 3, 2007), *available at* http://georgewbush-whitehouse.archives.gov/omb/legislative/sap/110-1/hr1592sap-h.pdf.

246. *Id.*

247. *See* Editorial, *Bush Vows to Veto Hate-Crime Expansion for Gays*, WASH. TIMES

Act as "unnecessary and constitutionally questionable"[248] was celebrated by conservative groups.[249]

The threat of a presidential veto iced the Prevention Act until Representative Conyers and Senator Ted Kennedy (D-MA) re-introduced it under the Obama Administration in April 2009.[250] The April 27, 2009 House Report on H.R. 1913 signaled a gradual shift in congressional attitudes toward sexual orientation and gender identity.[251] The report cribbed heavily from a preceding report's section entitled, "Hate Crimes Based on Sexual Orientation, Gender, Gender Identity, or Disability."[252] This section pointed to "an emerging consensus" that these groups were worthy of hate crime protection, specifically noting that sexual orientation, gender, and disability had been enumerated as protected groups in the 1994 Sentencing Act.[253] Although gender identity had not been covered in the Sentencing Act, the section noted that "since 1994, gender identity has been added to numerous State and local hate crimes statutes based on the same understanding of the corrosive effects of bias-motivated violence, and in recognition of the fact that this particular bias has been behind particularly violent assaults."[254] The section also separately, but briefly, presented the case for extending federal jurisdiction to cover each candidate group, including gender identity.[255] The report conceded there were "no federally compiled statistics" on anti-transgender bias crimes, but it offered data from advocacy groups reporting "that over 400 people have been murdered due to anti-transgender bias since 1999."[256] Further, the report noted

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(Aug. 7, 2007), http://www.washingtontimes.com/news/2007/aug/07/bush-vows-to-veto-hate-crime-expansion-for-gays/.

248. *Id.*

249. *See, e.g.*, *President Bush Vows to Veto "Hate Crimes" Bill—Or Does He?*, FAMILY POLICY NETWORK (July 17, 2007), http://familypolicy.net/us/nation/?p=3.

250. H.R. REP. NO. 111-86 (2009).

251. *Id.*

252. *Compare id.* at 9-12, *with Hearing on H.R. 1592*, *supra* note 221, at 10-13.

253. H.R. REP. NO. 111-86, at 9.

254. *Id.* at 9-10.

255. *Id.* The attention paid to each group is revealing. The case for sexual orientation is approximately one page long. *Id.* (discussing FBI statistics of anti-gay bias crimes and the Matthew Shepard case); gender identity is also approximately one page, *id.* at 10-11 (discussed in the accompanying text); gender is approximately a half page, *id.* at 11 (discussing VAWA and observing that "[a]lthough all 50 States have statutes prohibiting rape and other crimes typically committed against women, only 28, plus the District of Columbia, have hate crimes statutes that include gender"); and disability is approximately a third of a page long, *id.* at 12 (discussing the ADA and observing that "24 States plus the District of Columbia" include disability in hate crime legislation). Although statistical evidence of vulnerability to bias crimes is only briefly reviewed for sexual orientation and gender identity, the report does not mention statistical evidence of gender-bias or disability-bias crimes.

256. *Id.* at 11.

that in the prior calendar year "of 2008 alone, there were 21 murders of transgender and gender non-conforming people."[257] Another paragraph discussed the Brandon Teena murder, "dramatized in the movie 'Boys Don't Cry.'"[258] Finally, the section set forth additional measures of support for transgender bias crime protection, including the fact that 13 states included hate crime protections for transgender individuals, "13 states and 93 localities" covered transgendered individuals in anti-discrimination laws, and a 2002 Human Rights Campaign foundation survey indicated that 68% of Americans supported the inclusion of transgendered individuals in federal hate crime legislation.[259] Within six months of this report, the Prevention Act again passed both chambers of Congress and was signed into law by President Obama on October 28, 2009.[260]

Even as the newcomer to federal hate crime legislation, gender identity escaped significant congressional scrutiny—both because of and in spite of the fact that it was closely associated with sexual orientation. Although the blurring of sexual orientation and gender identity likely created some confusion, this blurring also likely benefitted the bid to add gender identity to the Prevention Act. First, to some degree, gender identity rode on the coattails of sexual orientation, which had already run the gauntlet to coverage under the HCSA. Second, although Congress never held a hearing specifically focused on anti-transgender bias, anti-transgender bias crime data appeared to be subsumed in data relating to anti-gay bias crimes. Finally, sexual orientation and gender identity could draw from the same well of organizational support, which had grown considerably in the 20 year span between the HCSA and the Prevention Act, and which was vital to the successful enactment of both laws.[261]

Of course, the successful addition of any candidate group to federal hate crime legislation does not resolve the problem of deeply rooted bias against it.[262] In January of 2010, the Prevention Act

257. *Id.*

258. *Id.* at 12.

259. *Id.*

260. Hate Crimes Prevention Act of 2009, Pub. L. No. 111-84, 123 Stat. 2835 (2009).

261. The Prevention Act enjoyed "the support of more than 210 civil rights, education, religious, and civic organizations" and the support of "the law enforcement community," including 31 state attorneys general. 153 CONG. REC.11,154 (2007) (statement of Rep. James McGovern (D-MA)). *See also* Jenness, *supra* note 22, at 566 (explaining the vital role of organizational support for the bid to add sexual orientation to the HCSA).

262. *See, e.g.*, Paisley Currah & Shannon Minter, *Unprincipled Exclusions: The Struggle To Achieve Judicial And Legislative Equality For Transgender People*, 7 WM. & MARY J. WOMEN & L. 37, 39-40 (2000) ("For the most part, transgender people have not been excluded from civil rights protections because of conceptual or philosophical failures in legal reasoning, but rather because they have not been viewed as worthy of

received the dubious honor of being named the "number one anti-Christian Act of 2009 by the Christian Anti-Defamation League" because the Act covered sexual orientation and gender identity.[263] Still, the Prevention Act was the last tool successfully used to expand the list of groups covered under the HCSA.

F. Summary of Observations

More than two decades of debates over the propriety of HCSA-covered groups suggest that Congress applies a higher level of scrutiny to "unpopular" candidate groups—those that are subject to prejudice that is not recognized as social pathology at the time they are assessed for coverage. Compared to race, religion, ethnicity, disability, and gender, the bid to cover sexual orientation generated the most sustained and fervent congressional resistance. A comparative study of legislative history reveals four common indicators of heightened congressional resistance to a candidate group, including (1) an apparent requirement that the candidate group present compelling evidence of its vulnerability to bias crimes; (2) a tendency to critique the candidates' proffered data as inflated or inadequate; (3) moral condemnation of the candidate group, including the portrayal of the candidates as criminals or perpetrators of violence; and (4) to a lesser extent, technical arguments, such as objections to definitions of the candidate group as vague or over-inclusive. These indicators were not evident in the decisions to provide HCSA coverage for race, religion, ethnicity, and disability. Although Congress may have been aware of some technical arguments regarding the addition of gender to the HCSA in 1990, it contemporaneously made gender-bias crimes the focus of VAWA, and later added gender to the HCSA without significant debate. Gender identity appeared to dodge some of the intense attacks characteristic of congressional debates over sexual orientation in the late 1980s; however, resistance to gender identity was likely conflated with the renewed, but slightly dampened, opposition to sexual orientation at the beginning of the 21st century.

Legislative history also reveals helpful commentary on the dynamics of bias, which can be understood not only in terms of the

protection or, in some cases, even as human."). Several complaints challenging the constitutionality of the HCSA illustrate this homophobic and transphobic reasoning. *See About the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act of 2009*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/crt/about/crm/matthewshepard.php (last visited Apr. 15, 2014) (linking to "recent opinions addressing constitutional challenges" to the Prevention Act).

263. Pete Winn, *Hate-Crimes Law Named No.1 Anti-Christian Act of 2009*, CNSNEWS (Jan. 20, 2010), http://cnsnews.com/news/article/hate-crimes-law-named-no1-anti-christian-act-2009.

product of hate crime legislation, but also in terms of the *process* of crafting hate crime legislation. For example, debates over the inclusion of sexual orientation in the HCSA often focused on how political power and representation can influence the perceived social acceptability of a candidate group.[264] If a group is perceived as socially acceptable or relatively integrated into mainstream society, Congress is more likely to construct animus against that group as pathological, and therefore, deserving of statutory protection.[265] The irony, of course, is that less socially acceptable groups are more likely to be marginalized and subject to discrimination and prejudice, but in turn, that prejudice is less likely to be construed as morally or legally wrong. This tendency was illustrated in conservative tendencies to reject or ignore credible evidence of anti-gay violence.

Strong support from a broad range of social movement organizations was crucial to the successful addition of sexual orientation and gender identity in federal hate crime legislation.[266] Indeed, effective advocacy and organization has resulted in increasing societal acceptance of LGBTQ rights, which at the time of this writing, is most recently exemplified in the United States Supreme Court's *United States v. Windsor* decision, which ruled the Defense of Marriage Act was unconstitutional.[267] The remarkable shift from the *Bowers*[268] decision in 1986 to the *Windsor* decision in 2013 speaks not only to the potency of LGBTQ social movement organizations, but it also reflects a corresponding shift in the perceived social acceptability of LGBTQ rights.[269] Political representation continues to be significant for the LGBTQ community.[270] Mainstream visibility of LGBTQ individuals is also increasing, leading to what has sometimes been referred to as the six

264. *See, e.g.*, *supra* Part I.B.

265. *Id.*

266. *See* Jenness, *supra* note 22, at 550 (discussing the role of "social movement organizations" in securing hate crime coverage).

267. 133 S. Ct. 2675, 2682 (2013).

268. Bowers v. Hardwick, 478 U.S. 186 (1986).

269. A recent Washington Post-ABC News poll shows that the majority of Americans approved of both the *Windsor* decision to strike down DOMA and the return of marriage equality to California. *Post-ABC Poll: Impression of Supreme Court's Decisions on Gay Marriage and Voting Rights*, WASH. POST (July 3, 2013), http://www.washingtonpost.com/politics/polling/postabc-poll-impression-supreme-courts-decisions/2013/07/03/4cb57d98-e3cf-11e2-bffd-37a36ddab820_page.html.

270. According to some sources, the vast majority of states have openly gay or lesbian public officials. *See* Paul Canning, *48 States Now Have Openly Gay Politicians*, CARE2.COM (Jan. 3, 2012, 7:30 PM),_http://www.care2.com/causes/48-states-now-have-openly-gay-politicians.html; *see also Find a Leader*, GAY & LESBIAN VICTORY INST., http://www.victoryinstitute.org/out_officials (offering an interactive database listing of "openly LGBT leaders").

degrees of separation phenomenon.[271] As a result, prejudice against LGBTQ individuals is increasingly recognized as pathological; both Congress and the courts today are more likely to construe animus against LGBTQ individuals as wrong when compared to twenty years ago.[272] These developments suggest that sexual orientation and gender identity are secure as firmaments in federal hate crime legislation.[273]

But since 2009 and to this day, another vulnerable group continues to struggle for recognition and protection under federal hate crime laws: the homeless.[274] As explained below, like the congressional debates over sexual orientation, legislative history regarding the bid to add homelessness to the HCSA reveals all of the indicators of heightened congressional resistance.[275] Like the LGBTQ community in 1990, available data and common sense shows the homeless are vulnerable to violent bias crimes; however, because the homeless are regarded as socially unacceptable, Congress appears to regard animus against the homeless as normal or justified to some degree.[276] Even more unfortunate is that the homeless are missing the most potent arrows in their quiver—those held by the LGBTQ community: effective organization, political representation, and mainstream visibility.[277] Even though comparisons between the homeless and currently covered groups suggests that the homeless are similarly deserving of HCSA coverage, today the homeless are more vulnerable to "unrecognized" congressional prejudice against them.[278]

III. EVIDENCE OF CONGRESSIONAL BIAS WITH RESPECT TO THE SOLE

271. *See* Lymari Morales, *Knowing Someone Gay/Lesbian Affects Views of Gay Issues*, GALLUP (May 29, 2009), http://www.gallup.com/poll/118931/Knowing-Someone-Gay-Lesbian-Affects-Views-Gay-Issues.aspx (discussing results of USA Today-Gallup poll and reporting "that, when controlling for ideology, those who know someone who is gay or lesbian are significantly more supportive of gay marriage than are those of the same political persuasion who do not personally know someone who is gay or lesbian"); Bruce Drake, *As More Americans Have Contacts with Gays and Lesbians, Social Acceptance Rises*, PEW RESEARCH CTR. (June 8, 2013), http://www.pewresearch.org/fact-tank/2013/06/18/as-more-americans-have-contacts-with-gays-and-lesbians-social-acceptance-rises/ (discussing results of Pew Research Center surveys showing relationship between personal contact with and perceived social acceptability of LGBTQ individuals).

272. *Compare, e.g.*, *Bowers*, 478 U.S. at 192, *with Windsor*, 133 S. Ct. at 2693.

273. *See* Grattet & Jenness, *Criminology*, *supra* note 8, at 671 (determining that Congress seems to have settled on sexual orientation as a member of federal hate crime legislation).

274. *See infra* Part III.

275. *See infra* Part III.A.

276. *See infra* Part III.

277. *See infra* Part III.

278. *See infra* Part III. A.

NEW CANDIDATE GROUP: THE HOMELESS

The homeless are the only candidate group that has received a congressional hearing, but has yet to be admitted to the HCSA.[279] The push began on May 8, 2007, when Representative Eddie Bernice Johnson (D-TX) first introduced a bill proposing to amend the HCSA to add the homeless.[280] The bill, H.R. 2216, was referred to the House of Representatives Committee on the Judiciary and died there without debate.[281] Hoping for a different outcome two years later, on July 30, 2009, Johnson re-introduced the bill as H.R. 3419, again in the House of Representatives.[282] Although Johnson gained more co-sponsors for the bill, like its predecessor, H.R. 3419 died without a hearing.[283]

That fall, on October 8, 2009, Senator Benjamin Cardin (D-MD) introduced S. 1765, a bill virtually identical to those previously sponsored by Representative Johnson.[284] Senate Bill 1765 was referred to the Senate Committee on the Judiciary, and for the first time, a hearing was held on the bill.[285] But the excitement was short-lived; S. 1765 also died in Committee.[286]

After the Senate hearings on S. 1765, the bill languished despite significant congressional sponsorship and advocacy group support.[287] Members of Congress reintroduced the bill in in November 2011[288]

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279. *See infra* Part III.

280. Hate Crimes Against the Homeless Statistics Act of 2007, H.R. 2216, 110th Cong. (2007). The bill attracted 20 co-sponsors. *Id.*

281. *See H.R. 2216 (110th): Hate Crimes Against the Homeless Statistics Act of 2007*, GOVTRACK.US, https://www.govtrack.us/congress/bills/110/hr2216 (last visited Apr. 16, 2014).

282. Hate Crimes Against the Homeless Statistics Act of 2009, H.R. 3419, 111th Cong. (2009). Although the total number of co-sponsors dropped to 13, several representatives repeated their co-sponsorship. *See id.*

283. *See H.R. 3419 (111th): Hate Crimes Against the Homeless Statistics Act of 2009*, GOVTRACK.US, https://www.govtrack.us/congress/bills/111/hr3419 (last visited Apr. 16, 2014) [hereinafter *H.R. 3419*, GOVTRACK.US).

284. Hate Crimes Against the Homeless Statistics Act of 2009, S. 1765, 110th Cong. (2009). The bill was initially introduced by Senator Cardin with co-sponsors Senator Susan Collins (R-ME), Senator Sherrod Brown (D-OH), Senator Mikulski, Senator Sheldon Whitehouse (D-RI), Senator Charles Schumer (D-NY), and Senator Roland Burris (D-IL). *Id.* Before the bill died in committee, it grew to 11 co-sponsors. *Overview of S. 1765 (111th): Hate Crimes Against the Homeless Statistics Act of 2009*, GOVTRACK.US, https://www.govtrack.us/congress/bills/111/s1765#overview (last visited Apr. 16, 2014) [hereinafter *S. 1765*, GOVTRACK.US].

285. *Crimes Against America's Homeless: Is the Violence Growing?: Hearing Before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary*, 111th Cong. S. 111-915, (2010) [hereinafter *Hearing on Crimes Against America's Homeless*].

286. *See supra* note 283.

287. *See supra* note 284.

288. On November 30, 2011, Congresswoman Johnson (D-TX) and 5 co-sponsors re-introduced the bill as H.R. 3528 in the House of Representatives. Hate Crimes Against

and again in March of 2013,[289] but neither bill went to a hearing. As a result, the hearing on Senate Bill 1765 is the only documented glimpse into congressional deliberations regarding the inclusion or exclusion of the homeless into federal hate crime legislation.

A. The Congressional Hearing on the Homeless: Familiar Problems

At the Senate Bill 1765 hearing, advocates for the homeless advanced arguments and proffered evidence similar to that offered by successful target groups. Opponents articulated arguments similar to those against the addition of sexual orientation. So the key question of whether Congress would treat homelessness differently than the various groups already covered under the HCSA took center stage.

The hearing, titled *Crimes Against America's Homeless: Is the Violence Growing?*, was conducted before the Senate Committee on the Judiciary's Subcommittee on Crime and Drugs on September 29, 2010.[290] Senator Cardin, the bill's primary sponsor, moderated the presentations given by advocates for and against the inclusion of the homeless in the HCSA. Several representatives testified in support of the bill, including Congresswoman Johnson; Professor Brian Levin, from California State University's Center for the Study of Hate & Extremism;[291] Richard Wierzbicki, Commander of the Hate Crimes-Anti-Bias Task Force for the Broward County Florida Sheriff's Office; and Simone Manning-Moon, the sister of homeless murder victim, Norris Gaynor.[292] Unlike LGBTQ advocates, homeless advocates

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the Homeless Statistics Act of 2011, H.R. 3528, 112th Cong. (2011). H.R. 3528 was referred to the House Committee on the Judiciary and, aside from picking up 17 additional co-sponsors for a total of 22 co-sponsors, no further developments were reported before the bill died in Committee. *H.R. 3528 (112th): Hate Crimes Against the Homeless Statistics Act of 2011*, GOVTRACK.US, https://www.govtrack.us/congress/bills/112/hr3528 (last visited Apr. 16, 2014).

289. H.R. 1136, the Violence Against the Homeless Accountability Act of 2013, was introduced by Congresswoman Johnson on Mar 13, 2013. Violence Against the Homeless Accountability Act of 2013, H.R. 1136, 113th Cong. (2013). This bill has 14 co-sponsors and has been referred to the Subcommittee on Crime, Terrorism, Homeland Security, and Investigations. *See H.R. 1136: Violence Against the Homeless Accountability Act of 2013*, GOVTRACK.US, http://www.govtrack.us/congress/bills/113/hr1136 (last visited Apr. 16,2014).

290. *Hearing on Crimes Against America's Homeless*, *supra* note 285.

291. The website for the Center for the Study of Hate & Extremism states that it is "a nonpartisan research and policy center that examines the ways that [b]igotry . . . den[ies] civil or [h]uman [r]ights to people on the basis of race, ethnicity, religion, gender, sexual orientation, disability or other relevant status characteristic. The center seeks to aid . . . others with objective information to aid them in their examination and implementation of law, education and policy." Center for the Study of Hate & Extremism, *About Us*, CAL. STATE UNIV. SAN BERNADINO, http://hatemonitor.csusb.edu/aboutUs/index.htm (last updated Jan. 7, 2014).

292. *See Hearing on Crimes Against America's Homeless*, *supra* note 285, at III.

were not as successful at organizing a broad range of social movement organizations and law enforcement agencies to testify at the hearing. Still, both the National Coalition for the Homeless (NCH) and the National Law Center on Homelessness and Poverty submitted written data and testimony, while approximately 150 organizations submitted a letter of support for Senate Bill 1765.[293]

Senator Cardin dispensed with general objections to hate crime legislation at the outset, stating: "[T]hat debate has been one that we have had in Congress . . . . [A]nd the majority in Congress passed the hate crimes, signed into law . . . . [But] that is not the debate today."[294] Some opponents insisted on general challenges to the statistical validity or constitutionality of federal hate crime legislation.[295] In response, Senator Cardin acknowledged the limitations of the HCSA, but stated that the opponents' arguments reminded him "of people who complain that we should not try to stop wars because we cannot stop all wars or we should not fight for human rights because we cannot end all human rights abuses. I mean, you make progress where you can make progress."[296] Instead, Senator Cardin advocated for a pragmatic approach, describing the HCSA as "not perfect, but it is certainly the best we have."[297] In other words, Senator Cardin argued, part of the justification for coverage under the HCSA is to seek a more uniform set of data, one that could create a clearer picture of a group's vulnerability to bias-motivated violence.[298] The data the HCSA generates would still help law enforcement and community organizations better understand bias crimes and to fashion more effective responses.[299]

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293. *Id.* at 170 (statement of the National Coalition for the Homeless); *see also id.* at 149-55 (expressing support for S. 1765 in the "Miscellaneous Coalition Letter" to Senator Cardin).

294. *Id.* at 15-16 (statement of Sen. Cardin).

295. *Id.* at 10-12, 132-36 (statement of Professor Erik Luna, Washington and Lee School of Law); *see also id.* at 156-64 (statement of David B. Muhlhausen, Research Fellow, The Heritage Foundation). The accuracy of the HCSA has also been challenged by legal scholars. *Compare* William B. Rubenstein, *The Real Story of U.S. Hate Crimes Statistics: An Empirical Analysis*, 78 TUL. L. REV. 1213 (2004) (providing a critical assessment of the statistical accuracy of the HCSA), *with* LAWRENCE, *supra* note 2, at 23 (discussing multiple factors that lead to underreporting of hate crimes). Significantly, the critique that the HCSA is an imperfect statistical reporting tool has never, on its own, prevented the inclusion of a group under the HCSA.

296. *Hearing on Crimes Against America's Homeless*, *supra* note 285, at 18 (statement of Sen. Cardin).

297. *Id.* at 17.

298. *See* Fernandez, *supra* note 13, at 263 (discussing this rationale in the context of efforts to add sexual orientation to the HCSA).

299. *See Hearing on Crimes Against America's Homeless*, *supra* note 285, at 13 (statement of Richard Wierzbicki, Commander, Hate Crimes/Anti-Bias Task Force, Broward County Florida Sheriff's Office) (praising the HCSA as a helpful tool for law enforcement). Indeed, even Professor Luna's written testimony concedes as much:

Setting aside such general objections to the validity and utility of hate crime legislation, the battle ultimately centered on the credibility and sufficiency of proof that the homeless are subject to violent, bias-motivated crimes. NCH proffered approximately ten years of reports detailing such statistical and anecdotal evidence,[300] including a 2009 report completed shortly before the congressional hearing.[301] The NCH data, along with other data "from the United States and Canada show[ed] a disturbing consistency regarding the prevalence of . . . brutal victimizations" of the homeless.[302] "The studies and surveys repeatedly indicate an annual risk of criminal victimization as high as 66% to 82%, about the highest for any subgroup in the industrialized world."[303] The data also suggested that more than 240 homeless men and women were killed in hate crime violence nationwide "over the past decade."[304] These hate crimes revealed a trend "of severe overkill. Methods include blunt force trauma, shootings, maiming, drowning, stabbings, and the burning of victims alive."[305] Indeed, advocates determined "that there were well over twice as many homeless people killed in apparent bias related attacks than the combined total number of deaths for every other 'official' hate crime category reported by the [FBI] in the last decade."[306] Moreover, data showed the trend of violence against the homeless was also increasing, even as the overall violent crime and homicide rates were decreasing nationwide.[307]

Like proponents of the bid to add sexual orientation to the

"[T]he inherent limitations of these statistics are—or should be—understood and acknowledged by policymakers; and as long as any errors in classification are random, the data provided under the Hate Crime Statistics Act might still give a reasonable overall picture with all the caveats attached." *Id.* at 11 (statement of Professor Luna).

300. *See id.* at 167-229 (statement of National Coalition for the Homeless); *see also Homeless Hate Crimes Legislation*, NATIONAL COALITION FOR THE HOMELESS, http://nationalhomeless.org/advocacy/homeless_hate_crimes.html (last modified July 30, 2013) (linking to reports).

301. *Hearing on Crimes Against America's Homeless*, *supra* note 285, at 169 (statement of National Coalition for the Homeless) (thanking Senator Cardin for introducing the report into the record).

302. *Id.* at 56 (statement of Professor Brian H. Levin, California State University).

303. *Id.*

304. *Id.* at 57.

305. *Id.*

306. *Id.* ("From 1999-2008 (the last year with available FBI data) 245 homeless people were killed in apparent hate homicides versus 103 for all the hate crime homicides for race, religion, sexual orientation, national origin and disability combined.").

307. *Id.* at 57-58 ("In 2009 alone in the United States, at least 43 homeless people were killed in hate attacks—the highest since 2001, when 43 people were also killed. 2009 was the fourth increase in five years. This increase, while based on admittedly small numbers, nonetheless comes at a time when overall violent crime and homicide are on a multi-year decline, with criminal homicide down a full 9% from 2005.").

HCSA, homeless advocates reviewed pervasive and disturbing evidence of mainstream bias against the homeless.[308] For example, advocates argued that popular media depicts the "homeless as disposable people": a recent issue of Maxim magazine suggested to its readers: "Kill one for fun. We're 87 percent sure it's legal."[309] Similarly, popular fight videos and viral hits such as "Bumfights" feature "fights between homeless men plied by the producers with alcohol, as well as sadistic assaults where terrified sleeping homeless people are startled awake and bound with duct tape."[310] Proponents gave numerous other examples of how popular culture glorifies violence against the homeless and promotes anti-homeless sentiment.[311]

Much like opponents of the bid to add sexual orientation to the HCSA, opponents of the homeless bid questioned the credibility and sufficiency of evidence submitted by advocates. David Muhlhausen, a research fellow at the Heritage Foundation,[312] charged that

> the NCH report uses a highly questionable methodology for estimating crimes against the homeless. Using a variety of sources, the cases of violence against the homeless identified in the NCH report appear to be primarily collected from media reports and homeless advocates.[313]

Similar to claims that sexual orientation advocates were "inflating" or "manufacturing" their data, Professor Erik Luna, an adjunct fellow at the Cato Institute,[314] challenged the legitimacy of

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308. *See id.* at 60.

309. *Id.*; *see also id.* at 4 (statement of Sen. Cardin).

310. *Id.* at 60 (statement of Professor Levin).

311. *Id.* at 57; *see also id.* at 171-229 (statement of the National Coalition for the Homeless).

312. The Heritage Foundation's website states that it is "a research and educational institution—a think tank—whose mission is to formulate and promote conservative public policies based on the principles of free enterprise, limited government, individual freedom, traditional American values, and a strong national defense." *About Heritage*, THE HERITAGE FOUNDATION, http://www.heritage.org/about (last visited Apr. 16, 2014).

313. *Hearing on Crimes Against America's Homeless*, *supra* note 285, at 158 (statement of David B. Muhlhausen).

314. The Cato Institute's website uses very similar language to the Heritage Foundation website. It states that "[t]he Cato Institute is a public policy research organization—a think tank—dedicated to the principles of individual liberty, limited government, free markets and peace. Its scholars and analysts conduct independent, nonpartisan research on a wide range of policy issues." *About Cato*, CATO INSTITUTE, http://www.cato.org/about (last visited Apr. 16, 2014). Professor Luna's written testimony objected to hate crime legislation generally, and specifically rejected the validity of the statistical data proffered by homeless advocates. *See Hearing on Crimes Against America's Homeless*, *supra* note 285, at 131-45. But at the Senate hearing, Professor Luna's oral testimony was more qualified: he restated his general objections to hate crime legislation; however, he stated that he had no objection to the passage of

data showing that violent bias crimes are committed against the homeless:

> [T]o be blunt, integrity and consistency in empirical claims have not been a strong suit for some advocates and scholars, who can claim that hate crimes are either an "epidemic" or "rare" depending on the demands of their audience. . . . Unfortunately, some of these problems appear to exist in the NCH's reports on hate crimes against the homeless.[315]

Instead, Professor Luna preferred that homeless advocacy groups like the NCH—an organization that is typically staffed by an average of four full time employees[316]—use the same "type of standards in reporting and identifying crimes that are utilized by the FBI."[317] As an alternative, Professor Luna suggested, NCH should be required to provide sufficient proof that each reported incident of violent crime against the homeless amounted to a bias crime.[318] Otherwise, Congress could not be sure that the NCH reports were anything more than "speculation."[319]

Proponents rejected the notion that such a heightened level of proof was required before Congress could take note of the problem of hate crimes committed against the homeless. Similar to positions taken by LGBTQ advocates, homeless advocates acknowledged the limitations of their data,[320] but argued "in the same way a smoke alarm sends out a credible message that something is wrong, . . . we have enough data to indicate that there is an additional problem."[321] Law enforcement testimony also corroborated the legitimacy and sufficiency of homeless advocates' data.[322] Moreover, proponents stressed that the available data likely undercounted the incidence of bias crimes committed against the homeless, who suffer from "fear of

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Senate Bill 1765 to allow for the compilation of uniform statistical data documenting violence against the homeless. *See id.* at 17 ("I have absolutely nothing against this bill itself. . . . I totally agree that it is a good thing to have [uniform statistical data]."); *see also id.* at 31 (stating "the [data collection] approach taken pursuant to the Hate Crime Statistics Act does not seem inherently unreasonable to me.").

315. *Hearing on Crimes Against America's Homeless*, *supra* note 285, at 135.

316. E-mail from Michael Stoops, Director of Community Organizing, National Coalition of the Homeless, to author (Aug. 4, 2013) (on file with author).

317. *Hearing on Crimes Against America's Homeless*, *supra* note 285, at 17.

318. *See id.* at 135-38 (written testimony of Professor Luna).

319. *Id.* at 136.

320. Professor Levin acknowledged "the paucity of cases coupled with the incomplete nature of secondary and indirect reporting methods and sources limits the utility of the data, particularly in the area of annual trend analysis." *Id.* at 58. He also pointed out "significant limitations that include unofficial sources, a low base of cases, and a high beta." *Id.* at 59.

321. *Id.* at 20.

322. *See id.* at 238 (written testimony of Richard Wierzbicki, Commander, Hate Crimes/Anti-Bias Task Force, Broward County Florida Sheriff's Office).

police, fear of retaliation, disability, and more limited access to tools like cars and telephones that aid reporting."[323]

Undaunted, opponents suggested that violent crimes against the homeless were unworthy of special attention. For example, Muhlhausen suggested that the proper measure was to focus on homicide, specifically to compare the number of murders of homeless people to the total number of murders nationwide.[324] This comparison showed that in 2009, there were 15,241 homicides in the entire United States, but only 43 of those murdered were homeless.[325] Therefore, Muhlhausen maintained, the total number of homeless people murdered was "tiny" and did not rise to the level of congressional concern.[326] Muhlhausen recounted data showing that the murder rate for the homeless (6.7 incidents per 100,000 homeless persons in 2009) was higher than the national murder rate (5.0 incidents per 100,000 residents); however, this data could also be discounted: "While the homeless murder rate is higher than the national rate, the difference is neither startling nor a justification for the Federal Government to begin formally collecting statistics on these crimes."[327]

Moreover, Muhlhausen suggested, the homeless are unworthy of congressional attention because they tend to be criminals.[328] Like the homophobic rhetoric evident in congressional hearings over the addition of sexual orientation to the HCSA, Muhlhausen urged Congress to discount evidence of violent crimes committed against the homeless because "[t]he homeless commit too many violent and property crimes. . . . [They] are generally not a collection of law abiding individuals."[329] Such claims invoke a familiar script from opponents of the bid to add sexual orientation to the HCSA: Congress should be protecting society against the homeless instead of construing the homeless as worthy of protection.[330]

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323. *Id.* at 58 (written testimony of Professor Luna).

323. Proponents for the addition of sexual orientation to federal hate crime legislation have made similar arguments about the problem of under-reporting in the LGBTQ community. *See, e.g.*, Kim, *supra* note 31, at 500-01 (discussing various causes of underreporting including fear of law enforcement and retaliation).

324. *See Hearing on Crimes Against America's Homeless*, *supra* note 285, at 159-61 (written testimony of David B. Muhlhausen).

325. *Id.* at 161.

326. *Id.*

327. *Id.* at 15. Professor Levin construed the small percentage of the homeless population differently, concluding that taking into account the "homeless population [is] less than one percent of the population . . . the [hate crime] numbers are even more staggering." *See id.* at 57 (written testimony of Professor Levin).

328. *Id.* at 163-64.

329. *Id.* at 163 (written testimony of David B. Muhlhausen).

330. Muhlhausen's position can be contrasted with that of Simone Manning-Moon, the sister of a homeless man murdered in an apparent hate crime in Georgia. Her

After the hearing, Senators Tom Coburn (R-OK) and Amy Klobuchar (D-MN)[331] submitted written questions to the panel members.[332] Most of these exchanges revisited a variety of technical concerns with hate crime laws generally,[333] but panelists also continued to debate specific technical concerns, such as the cost and feasibility of adding homelessness to the HCSA.[334] The exchanges also resurrected familiar straw-man arguments, suggesting the addition of numerous other groups that had never appealed to Congress for protection. For example, Senator Coburn asked, "Why should the act cover the homeless, but not members of the military, pregnant women, members of a certain political party, etc.?"[335] Opponents seized the opportunity to grease fears of a slippery slope,[336] but proponents urged Congress to stay focused on the specific proposal at hand: the need to collect federal data on bias-motivated violence directed at the homeless.[337]

The hearing appeared to have no impact; Senate Bill 1765 died in Committee.[338] Despite the bill's reintroduction in 2013, Congress continues to appear largely apathetic to evidence of bias crimes committed against the homeless.[339]

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testimony challenged any suggestion that her brother, a military veteran, did anything to justify the savage attack that took his life. *See id.* at 146-48 (statement of Simone Manning-Moon).

331. Senator Klobuchar is a member of the Minnesota Democratic-Farmer-Labor Party, an affiliate of the Democratic Party. Aviva Breen, *Progressive Minnesota? A Perspective on Women's Issues in the Legislature*, 33 WM. MITCHELL L. REV. 397, 400 (2006).

332. *See Hearings on Crimes Against America's Homeless*, *supra* note 286, at 24, 27, 36, 38.

333. *See, e.g.*, *id.* at 30 (statement of Professor Luna) (answering Senator Coburn's questions about the proper standard of proof "to establish bias sufficient to include an offense in the federal hate crime statistics"); *see also id.* at 33 (revisiting general "policy and constitutional questions" about the HCSA).

334. *See, e.g.*, *id.* at 32 (conceding that the FBI and other law enforcement panelists testified that the addition of homelessness would not be burdensome, but countering "that the simplicity of a classification system and relevant instrument may raise concerns about the validity of any results").

335. *Id.* at 36.

336. *See, e.g.*, *id.* at 36 (statement of David B. Muhlhausen) (asserting that "[t]he inclusion of the homeless in the HCSA only opens the door wider for advocacy groups to assert that crimes against other groups need to be added to the HCSA" and then advocating for coverage of pregnant women, children, and the military); *id.* at 34 (statement of Professor Luna) (cautioning "there is no logical limit to the number or types of groups that might be included in a hate crimes statute").

337. For example, Commander Wierzbicki responded to slippery slope arguments simply and matter-of-factly: "In my 28 years as a law enforcement officer . . . I have not experienced bias motivated hate directed towards the victims of crimes from the groups you have listed." *Id.* at 39 (statement of Commander Wierzbicki).

338. *See S. 1765*, GOVTRACK.US, *supra* note 285.

339. *See supra* notes 279-80 and accompanying text.

B. Comparing the Homeless to the Other Covered Groups

Similar to congressional debates over sexual orientation, the Senate hearing on anti-homeless violence featured all four indicia of congressional resistance: (1) the apparent requirement of compelling evidence that the homeless are vulnerable to bias crimes; (2) rejections of such proffered evidence; (3) expressions of hostility toward the homeless, including suggestions that the homeless are criminal, morally inadequate, or otherwise unworthy of protection; and (4) technical challenges, such as the attacks on the clarity of the definitional term "homeless" or the feasibility of data collection.[340]

In another parallel move, advocates for the homeless advanced the same arguments for inclusion and offered evidence that was qualitatively comparable[341] to that offered by sexual orientation advocates. This offense included credible evidence of special vulnerability to violent bias crimes; pervasive evidence of systemic discrimination and social rejection; and related analogies to currently covered groups.[342]

And there are further similarities: the weight of scholarship establishes that, for purposes of hate crime protection, the homeless are similarly situated to the other HCSA covered groups.[343] If the

340. *See generally Hearing on Crimes Against America's Homeless*, *supra* note 285 (highlighting the issues surrounding protection of the homeless).

341. Both candidate groups offered statistical and anecdotal evidence that was compelling, but was also subject to acknowledged limitations, many of which were determined by the limited resources of the proffering advocacy groups. Nonetheless, both groups' evidence could be considered credible by a pragmatic standard. *See* Jenness, *supra* note 22, at 556 n.6 ("Claims are empirically credible 'to the extent that there are events and occurrences that can be pointed to as documentary evidence.'") (internal citation omitted).

342. Frederick Lawrence suggests that one application of the second stage is to make analogical comparisons between the candidate group and the "classic social fissure lines" of race. LAWRENCE, *supra* note 2, at 14. Unfortunately, the hearing on homelessness missed a critical opportunity to analogize the institutionalization of bias against the homeless: like anti-sodomy laws, laws that criminalize the homeless are widespread, well-documented, and soundly criticized as violating the constitutional rights of the homeless. *See, e.g.*, NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, CRIMINALIZING CRISIS: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 17 (2011), *available at* http://www.nlchp.org/Criminalizing_Crisis; U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, SEARCHING OUT SOLUTIONS: CONSTRUCTIVE ALTERNATIVES TO THE CRIMINALIZATION OF HOMELESSNESS 2-5 (2012), *available at* http://www.usich.gov/resources/uploads/asset_library/RPT_SoS_March2012.pdf.

343. *See, e.g.*, Jeff McDonald, *Should "Bum-Bashing" Be a Hate Crime?*, 15 PUB. INT. L. REP. 115, 116-17 (2010); Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE U. L. REV. 135 (2011); Sarah Finnane Hanafin, *Legal Shelter: A Case for Homelessness as a Protected Status Under Hate Crime Law and Enhanced Equal Protection Scrutiny*, 40 STETSON L. REV. 435, 436-37 (2011); Raegan Joern, Note, *Mean Streets: Violence Against the Homeless and the Makings of Hate Crime*, 6 HASTINGS RACE & POVERTY L.J. 305, 306-07 (2009); Jennifer E. Watson, Note, *When No Place Is Home: Why the Homeless Deserve Suspect Classification*, 88 IOWA L. REV. 501 (2003).

homeless are equally deserving of coverage, then there is "no sensible ground for differential treatment."[344] On a comparative basis, the homeless should be covered under the HCSA. And yet, despite repeated efforts from homeless advocates over the last four years, Congress continues to manifest indifference to the problem of bias-motivated violence against the homeless.

The plight of the homeless is also compounded by a relative lack of effective organization and power, political representation, and mainstream visibility. Each of these factors significantly contributed to the successful effort to add sexual orientation to the HCSA. But the homeless do not enjoy organizational power comparable to the formidable coalition that fought for the inclusion of sexual orientation. Unlike the bid to add sexual orientation, which benefited from representative political insiders like Representative Barney Frank (D-MA) and Senator Tammy Baldwin (D-WI),[345] there are no homeless politicians at any level of government. And unlike the gay and lesbian community, which capitalized on a growing "six degrees of separation" phenomenon among the general population in the late 1980s, the homeless remain a shadowy population of strangers to the vast majority of Americans.[346]

But if the homeless are similarly situated to the other groups currently covered under the HCSA, what explains the lack of congressional response? One explanation rests on the relationship between apathy and discrimination: prejudice against a particular group need not always take the form of deliberate and overt discrimination; prejudice can also be expressed through indifference.[347]

Compare Katherine O'Keefe, *Protecting the Homeless Under Vulnerable Victim Sentencing Guidelines: An Alternative to Inclusion in Hate Crime Laws*, 52 WM. & MARY L. REV. 301, 302-05 (2010), *with* Scott Steiner, *Habitations of Cruelty: The Pitfalls of Expanding Hate Crime Legislation to Include the Homeless*, 45 CRIM . L. BULL. 1 (2009).

344. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985).

345. *See supra* note 80.

346. *See notes* 85, 271, and accompanying text (explaining the phenomenon).

347. *See, e.g.*, *In re* Charges of Unprofessional Conduct in Panel File 98-26, 597 N.W.2d 563, 567 (Minn. 1999) ("Racism, whether it takes the form of an individual's overt bigotry or an institution's subtle apathy, is, by its very nature, serious."); Carolyn B. Ramsey, *The Exit Myth: Family Law, Gender Roles, and Changing Attitudes Toward Female Victims of Domestic Violence*, 20 MICH. J. GENDER & L. 1, 6 (2013) (examining the "standard narrative about public responses to domestic violence [as revealing] a history of apathy and discrimination toward abused women"); Stuart W. Tisdale, Jr., *Reasonable Accommodation and Non-Invidious Discrimination Under the Maine Human Rights Act*, 40 ME. L. REV. 475, 476 (1988) ("[A]ntidiscrimination law now focuses on the more subtle but equally pernicious factors of apathy and indifference . . . .").

IV. PRINCIPLED EXPANSIONS OF FEDERAL HATE CRIME LEGISLATION

As shown above, Congress may exclude the homeless—arguably an otherwise meritorious candidate group—from HCSA coverage. Such deliberations may be compromised by the lack of transparent and consistent principles, as well as the influence of unrecognized bias. In this respect, the legislative omission helps to reify social group biases because similarly situated groups are not equitably assessed; instead, legislative protections are filtered through private, often unrecognized, biases.

As a result, statistics and other evidence of need for hate crime protection have played an inconsistent role in a candidate group's bid for coverage under the HCSA. Instead, congressional vetting of candidate groups appears to correlate with the relative social acceptability or popularity of the candidate group. Unpopular candidate groups are more likely to be required to present compelling evidence of their vulnerability to bias crimes; more likely to experience rejection or discounting of their proffered data; more likely to be portrayed as morally repugnant; and more likely to receive persistent technical objections.

There is no principled basis for such a spike in congressional scrutiny for socially unpopular groups. But Thomas Birkland describes a relationship between evidence and "emotion" in policymaking that may help to explain:

> [O]ne need not necessarily have all the evidence in hand if one's argument strikes a chord with the public and decision makers. This means, more bluntly, that one needs relatively little evidence is needed to make an argument if it is possible to appeal to popular prejudices and common misconceptions, or to common values or interests that are not too far outside the mainstream of current thought. This sounds cynical, but there are abundant examples in American history and world history of emotion overcoming rationality in policy making, such as the imposition of Jim Crow laws on black Americans based on a scientifically unfounded belief that blacks are genetically inferior to whites in some way. Because neither facts nor emotions are solely decisive, evidence *and* emotion play important roles in policy making, and sometimes emotion gains the upper hand.[348]

If the dominant legislative emotion is antipathy, aroused by the involuntary traits of a particular group, the attendant deliberations are likely to be invidious.[349] Legislative discrimination becomes "irrational prejudice"[350] because it does not "rest[] on meaningful

348. BIRKLAND, *supra* note 11, at 17.

349. Legislative discrimination is particularly concerning when it is directed at status or traits, as opposed to conduct. *See* Pollvogt, *supra* note 14, at 904-05.

350. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 450 (1985).

considerations."[351] In fact, such prejudice is particularly irrational when Congress is supposed to be assessing a candidate group's vulnerability to bias.

Of course, an essential function of Equal Protection jurisprudence is to root out uneven, arbitrary or unprincipled application of the laws.[352] Although the judiciary is not immune to bias,[353] it is supposed to monitor legislative discrimination through the enforcement of the Equal Protection Clause of the Fourteenth Amendment. Equal Protection jurisprudence vets legislative discrimination against legal *principles*; that is, courts use *stare decisis*, analogical reasoning, and other interpretive norms to ensure the equitable impact of any legislation.[354] In this respect, judicial review acts as a check on legislative decision-making, intervening when a law has a prejudicial impact on a certain group or groups.[355] Furthermore, judicial review should help to ensure that the legislature is not discriminating against "unpopular" groups that cannot combat such discrimination through means like political power and representation.[356] Ultimately, the imposition of judicial review means that although the legislature necessarily must discriminate among various members of society, it may not do so in a way that offends the Constitution.

Although Equal Protection jurisprudence generally operates to ensure the legislature is not discriminating against unpopular and

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351. *Id.* at 441.

352. *See, e.g., id.* at 440 (justifying judicial intervention in the form of strict scrutiny when a law "reflect[s] prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others"); Reed v. Reed, 404 U.S. 71, 76 (treating similarly situated classes differently without a normative justification amounts to the "very kind of arbitrary legislative choice forbidden by the [Constitution]").

353. Indeed, the reviewing role of the judiciary hardly means it is neutral or immune to discrimination; to the contrary, Equal Protection jurisprudence also requires courts to walk a similar tightrope. *See, e.g.*, Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 787 (1991) (noting that judicial distinctions between "justifiable [and] unjustifiable disadvantaging quite plainly requires a substantive value choice").

354. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 19 (1959) (noting that, to have any "legal quality," a decision is "obliged to be . . . entirely principled"). *See generally* Klarman, *supra* note 353, at 747 (discussing the role of judicial review over legislative decision-making from a POLITICAL process theory perspective).

355. *See* Klarman, *supra* note 353, at 782-88. But of course, judicial review does not always function as a proper check on legislative discrimination. *See generally* Nice, *supra* note 174 (arguing that both the legislature and the judiciary ignore the constitutional rights of the poor, resulting in a "dialogic default").

356. *See* United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938) ("[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities . . . .").

politically powerless groups, this check does not exist in this case.[357] Instead, in the context of shaping hate crime legislation, it must be Congress's job to protect the most vulnerable.[358] Julie Nice's theory of "dialogic default" provides a helpful framework for this imperative.[359] Nice explains that the judiciary defers to the legislature on matters of "social or economic legislation"[360] because the "Justices presume any problems will be remedied within the political process."[361] But this deference creates a "dialogic default" because certain vulnerable groups may "not expect equal constitutional protection from the judiciary, [and] they also lack the types of resources typically required for effective political mobilization to pursue protection from the political branches of government."[362] When vulnerable groups like the homeless enter such a dialogic default, the result is the "stagnation" of their social and constitutional rights.[363]

While other candidates can combat congressional resistance by leveraging organizational and political power, the homeless have no comparable resources. As a result, the homeless are trapped by societal prejudice, stymied by congressional apathy, and omitted from statutory protections against animus-motivated violence—even though the homeless are similarly situated to other groups currently covered under the HCSA. As a practical matter then, the lack of principles (and concurrent lack of accountability) evident in congressional expansions of the HCSA leaves those that are most vulnerable to unrecognized bias omitted from statutory protections against bias-motivated violence. A more consistent, transparent, and principle-driven process would mitigate the potential impact of unrecognized bias and consequential dialogic default.[364]

V. SUSPECT CLASSIFICATION FACTORS AS PRINCIPLED CRITERIA

Suspect classification factors are imperfect but essential tools in

357. *See, e.g.*, Nice, *supra* note 174, at 643-49. The legislative omission of meritorious groups from hate crime protection is essentially invisible to the judiciary. *Id.*

358. *See Anti-Gay Violence Hearing*, *supra* note 45, at 8 (statement of Rep. Frank) ("[T]he role of the Government ought to be to protect minorities who are made vulnerable because of prejudice, whatever the source.").

359. *See* Nice, *supra* note 174, at 657-63. Professor Nice's thesis focuses on the poor in particular; however, the theory applies equally as well to the homeless. *Id.* at 629-36.

360. *Id.* at 638-44.

361. *Id.* at 631 (citing Lawrence v. Texas, 539 U.S. 558, 579-80 (2003) (O'Connor, J., concurring)).

362. *Id.*

363. *Id.* at 662-63.

364. A comprehensive evaluation of the viability of suspect classification factors for congressional use is beyond the scope of this Article; instead, this Article introduces the proposal, which is more fully developed in Rankin, *supra* note 45.

Equal Protection jurisprudence. At the moment, these factors only come into play after a law is passed and is challenged as offensive to the Equal Protection Clause; in other words, suspect classification analysis is commonly understood as a *judicial, reactive* process.[365] Congress is not required to use suspect classification factors to determine which groups to include under federal hate crime legislation.[366] But this article suggests that at least some suspect classification factors should function *proactively* on the *legislative* decisions with respect to expansions the HCSA.[367]

Although the consistent use of any equitable criteria could represent an improvement over the status quo, suspect classification factors may be a natural source of principled guidance for at least three reasons: (1) they are legal constructs for measuring the degree to which bias or prejudice against a certain group is a recognizable social pathology; (2) a broad range of legal scholarship implicitly adopts suspect classification factors to advocate for the inclusion or exclusion of candidate groups under hate crime legislation; and (3) Congress appears to subconsciously consult some of these factors, albeit inconsistently.

Suspect classification factors generally include inquiries into whether the candidate group (1) shares a coherent group identity; (2) has suffered historical discrimination, (3) is unable to protect itself in the political process, (4) is defined by a trait that is immutable or difficult to change; and (5) shares a defining trait that is relevant to an individual's ability to function or contribute to society.[368] Legal

365. Julius Cohen, *Legisprudence: Problems and Agenda*, 11 HOFSTRA L. REV. 1163, 1165-66 (1983).

366. Indeed, Justice Scalia's passionate dissent in *Romer* suggested that Congress can and should send a message of social rejection to certain groups that might undermine "traditional . . . mores." Romer v. Evans, 517 U.S. 620, 636 (1996) (Scalia J., dissenting) (arguing that Colorado's proposition to repeal all laws and policies protecting homosexuals from discrimination served a legitimate purpose: "to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws"). Justice Scalia's position, which he based in part on the subsequently overturned *Bowers v. Hardwick*, 478 U.S. 186 (1986), has been soundly criticized by scholars as morally and doctrinally wrong. *See, e.g.*, Joseph S. Jackson, *Persons of Equal Worth:* Romer v. Evans *and the Politics of Equal Protection*, 45 UCLA L. REV. 453, 469-71 (1997) (stating that Justice Scalia's "rhetoric cannot withstand analysis"); Pollvogt, *supra* note 14, at 914-15 (arguing that Justice Scalia's reliance on *Bowers* was misplaced after the Court's decision in *Lawrence v. Texas*).

367. 28 U.S.C. § 534 (2012).

368. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439-47 (using factors to determine whether cognitively disabled persons are a suspect class); Mass. Bd. of Retirement v. Murgia, 427 U.S. 307, 313-14 (1976) (using factors to determine whether the elderly are a suspect class); Frontiero v. Richardson, 411 U.S. 677, 684-87 (1973) (using factors to determine whether women are a suspect class). To date, the Court has applied heightened scrutiny when governments discriminate based on race, gender, illegitimacy, alienage, and national origin. *See Romer*, 517 U.S. at 629; Clark v. Jeter, 486 U.S. 456, 461 (1988); City of New Orleans v. Dukes, 427 U.S. 297, 303

scholars increasingly engage suspect classification standards in debates over whether a candidate group should be covered under hate crime legislation, although none explain how or why it is appropriate to graft these judicially-created and retroactively applied factors to the legislative decision-making process.[369] Congressional records also occasionally invoke some of these factors, especially a factor that is properly at the heart of anti-bias inquiries: evidence of discrimination against a candidate group.[370] At times, Congress could also be construed as flirting with immutability,[371] political powerlessness,[372] positive traits,[373] and even group coherence,[374] but such exchanges are fleeting and often misdirected.[375] If these factors are clarified for congressional use,[376] deliberations over expansions of the HCSA could become more equitable, consistent, and transparent.

(1976). Classifications based on religion also warrant heightened scrutiny, but this review is separately warranted by the Free Exercise Clause of the First Amendment. *See, e.g.*, Locke v. Davey, 540 U.S. 712, 720 n.3 (2004). On the other hand, the Court has declined such scrutiny for classifications based on mental disability, *Cleburne*, 473 U.S. at 443; age, *Murgia*, 427 U.S. at 313; wealth, Lyng v. Castillo, 477 U.S. 635 (1986); and close family relationship, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

369. *See, e.g.*, LAWRENCE, *supra* note 2, at 12-14 (stressing the need to analyze group identity and history of discrimination); Grattet & Jenness, *Criminology*, *supra* note 8 (applying same factors); Hanafin, *supra* note 344 (applying group identity and immutability); O'Keefe, *supra* note 344 (considering immutability and "equal applicability"); Steiner, *supra* note 344 (applying group identity, immutability, and "equal applicability"); Watson, *supra* note 344 (applying evidence of a "discrete and insular minority," historical discrimination, political powerlessness, "irrelevance," and immutability); Joern, *supra* note 343 (emphasizing group identity, evidence of legislative discrimination).

370. The problem, as suggested throughout this Article, is that Congress does not consistently require or scrutinize a statistical record. When Congress does not evenly apply standards for "acceptable" statistical proof, then the potential for invidious discrimination increases. When Congress ratchets up the evidentiary requirements only for unpopular groups, it ironically suggests discrimination against these groups. To minimize the potential impact of legislative bias, Congress needs to identify principled criteria and to consistently and equitably apply these criteria to all candidate groups.

371. *See, e.g.*, *Hearing on Crimes Against America's Homeless*, *supra* note 285, at 61 (written testimony of Professor Levin) (critiquing immutability).

372. *See, e.g.*, *supra* pp. 573-75 (discussing the political power of gays and lesbians).

373. *See, e.g.*, *supra* pp. 579-81 (debating whether homosexuality has a positive or negative influence on society).

374. Because debates over the breadth of statutory definitions relate to whether and how members of the candidate group can be identified, these debates express concerns with group coherence. *See, e.g.*, *supra* notes 67-69, 114-15 and accompanying text.

375. For example, in debates over the addition of sexual orientation, opposing conservatives discussed their views on the political power and positive traits of gays and lesbians, but this rhetoric was frequently homophobic and not emblematic of the equal protection concern with protecting vulnerable groups from legislative discrimination.

376. *See* Rankin, *supra* note 45.

But further analysis is necessary: although some suspect classification factors seem particularly salutary for legislative purposes, some suspect classification factors appear less appropriate. For example, immutability has been soundly criticized by legal scholars and the United States Supreme Court.[377] One pointed critique is illustrative:

> The list of complaints with the immutability factor's role . . . for Equal Protection purposes continues to grow, and the list of defenders of immutability as a useful doctrinal tool has nearly shrunk to zero . . . . Indeed, they claim, it has no real relationship with the true organizing principle of the Equal Protection Clause—to protect precariously positioned minorities from failures of the democratic process.[378]

Such resounding critiques suggest that the simple importation of immutability into legislative assessments of HCSA candidate groups would be at best unhelpful and perhaps harmful to the interest in protecting vulnerable groups.[379]

Another factor that warrants caution before encouraging its deployment in congressional deliberations is the positive trait factor. Positive trait analysis measures whether members of a group are generally compromised in their ability to contribute to society.[380] Although this factor is generally accepted for purposes of judicial review,[381] it may not be an appropriate legislative filter to admit or exclude candidate groups from hate crime protections. This caution is evident in legislative history, which as proven above, demonstrates a tendency to construe unpopular groups as having limited or deleterious effects on society. Therefore, the positive trait inquiry

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377. The Court has expressly rejected the proposition that alienage classifications should not be subject to strict scrutiny because "a resident alien can voluntarily withdraw from favored status." Nyquist v. Mauclet, 432 U.S. 1, 9 n.11 (1977). *But see Cleburne*, 473 U.S. at 442 n.10 ("[T]here's not much left of the immutability theory, is there?" (quoting ELY, *supra* note 4, at 150)). Similarly, judges have noted the mutability of the defining traits of each suspect class. *See* Kim, *supra* note 31, at 517 ("[T]here are operations to change one's gender, one can take medicines to change skin tone, and aliens can become naturalized." (citing Watkins v. Army, 875 F.2d 699,726 (9th Cir. 1989))).

378. Michael A. Helfand, *The Usual Suspect Classifications: Criminals, Aliens, and the Future of Same Sex Marriage*, 12 U. PA. J. CONST. L. 1, 3 (2009).

379. If immutability has any relevance to congressional deliberations over hate crime laws, it must be re-examined for consistency with this particular context. *See id.* at 8-9 (discussing the "significance of . . . context-sensitivity" in judicial importations of the immutability factor).

380. *See, e.g.*, *Cleburne*, 473 U.S. at 442-44 (determining the trait of cognitive disability could limit one's ability to function in society and could therefore be a valid basis for legislative classifications).

381. *See, e.g.*, Strauss, *supra* note 342, at 165-67 (discussing judicial consideration of a group's defining trait in relation to the relevancy of that trait to the ability to "participate and contribute to society").

may be too easily hijacked to justify exclusion of unpopular groups from hate crime protections—even if the group provides credible evidence of vulnerability to violent hate crimes. Moreover, the "positive trait" inquiry appears to have no relevance to the narrow inquiry of hate crime law development: is this group's defining trait the focus of animus-based, violent crime? The positive trait factor unnecessarily broadens the focus of this inquiry, and invites reliance on stereotypes and prejudices as opposed to careful and equitable legislative judgment. Therefore, the positive trait factor does not seem appropriate for grafting onto congressional assessments of HCSA candidate groups.[382]

Although undeniably imperfect,[383] suspect classification factors can at least provide some grounding for the development of more equitable hate crime legislation. Indeed, the adoption of any more consistent and principled criteria might be an improvement, but the problem of congressional bias in federal hate crime legislation should not be considered lightly: the fate of some vulnerable groups hangs in the balance. Ultimately, the fate of these groups will depend on whether Congress can be persuaded to equitably assess them for coverage under the HCSA.

CONCLUSION

> *There is prejudice abroad in the land. By ignoring it, we silently condone it. By documenting its existence, incident by incident, we are forced to face its reality, whereby we begin to find a solution.*[384]

How can we understand congressional decisions as to which groups to include or exclude under federal hate crime legislation? To a large extent, the answer depends on whether the review is descriptive (that is, describing the way things are) or normative (describing the way things should be). Acknowledging that the legislative process can be volatile and complex is certainly a realistic description of the status quo,[385] but resignation to unprincipled "politics" does nothing to advance the discussion of what legislative decision-making sometimes can be and more often should be.[386]

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382. If the positive trait factor were to play any helpful role in congressional decision-making, it should be understood more broadly as a focus on status, not conduct. *See* Pollvogt, *supra* note 14, at 904-05 (discussing this distinction in Supreme Court precedent).

383. *See, e.g.*, Strauss, *supra* note 342, at 141 (discussing "the inconsistencies and absurdities" of suspect classification tests). Moreover, suspect classification analyses have been blasted as poorly designed, and haphazardly created. *See, e.g.*, *id.* at 147.

384. 135 CONG. REC.3179, 3182 (1989) (statement of Rep. Barbara Kennelly).

385. *See generally* Vincent Di Lorenzo, *Legislative Chaos: An Exploratory Study*, 12 YALE L. & POL'Y REV. 425 (1994) (applying chaos theory to legislative process); Jenness, *supra* note 22, at 549 (describing legislative decision-making with respect to federal hate crimes as a "fundamentally political process").

386. The late Professor Julius Cohen acknowledged the political and often

Simply accepting legislative decision-making as unprincipled also ignores observations that legislative decision-making can be more principled despite political turbulence.[387] Moreover, the unpredictable storm of politics certainly impacts judicial decision-making,[388] but such pressures have never been accepted as the most desirable methodological practice for court decisions.

Congress should improve the principled quality of its assessments of HCSA candidate groups. This imperative stems not only from a basic call for fairness, but it also becomes even more poignant in the process of crafting anti-bias legislation. Congress can mitigate the potential impact of unrecognized bias by using more consistent and transparent criteria to decide group coverage under the HCSA. Such criteria will help to develop congressional awareness and accountability; it will also help to discourage legislators from relying on stereotypes or prejudice to justify the omission of an otherwise meritorious candidate group from coverage under the HCSA.

If Congress is not so persuaded, vulnerable groups like the homeless will remain invisible: stuck in a dialogic default where the legislature does not feel compelled to protect them by affording statutory protection from violent bias-motivated crimes, and the judiciary will not review such legislative omissions for evidence of inequities or prejudice. As a result, those that are most vulnerable to unrecognized bias will remain subject to the legislative whim that now decides whether a candidate group really is subject to discrimination.

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unprincipled nature of legislative process, but argued:

> This discouraging picture is not designed to suggest that improvements cannot possibly be made, and that efforts by theorists in legisprudence to minimize vagueness and ambiguity in legislative language should therefore be abandoned. To the contrary, such theorists must recognize and directly confront the problems that are involved, with full awareness that the odds are stacked against reaching Nirvana. One should not, in the language of Tourtoulon, "throw to the dogs all that is not fit for the altar of the gods."

Cohen, *supra* note 365, at 1172 (quoting P. DE TOURTOULON, PHILOSOPHY IN THE DEVELOPMENT OF LAW 348 (Ass'n of Am. L. Sch. ed. 1922)).

387. *See generally id. But see* Di Lorenzo, *supra* note 385, at 429 (arguing there are positive functions to "the unpredictable nature of legislative action").

388. *See* Cohen, *supra* note 365, at 1166.

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