



Progressive or Regressive?: An In-Depth Policy Analysis of the Decision to Include Gender Identity in the Federal Hate Crimes Law

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[ABSTRACT]

The decision to advocate for, and achieve, the inclusion of the term “gender identity” in the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act has been criticized by some scholars and activists as a mistake in strategy for the transgender movement. This paper first examines the reasoning and strategies of transgender advocates behind adding “gender identity” to this legislation. Then, it analyzes various critiques of the hate crimes law, including: that people of color and

those with low income are likely to be targeted by these laws for prosecution; that hate crimes laws increase the resources available to law enforcement, empowering them to do more harm to marginalized communities; that sentence enhancement makes those imprisoned leave prison with more rage and thus more likely to commit more violent crimes; that hate crimes laws do not result in a decrease in hate crimes; and that supporting these laws lends credibility to law enforcement as an appropriate societal response to crime in general, as opposed to law enforcement being viewed as a perpetrator of crimes itself.

Introduction

The decision to advocate for, and achieve, the inclusion of the term “gender identity” in the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Actⁱ has been criticized by some scholars and activists as a mistake in strategy for the transgender movement. Hate crimes laws, and the federal hate crimes law in particular, have been criticized for providing more tools and resources to an inherently unjust law enforcement system, while providing no reduction of hate crimes against transgender people.

This article delves deeper into the political, cultural, and practical reasons that transgender and allied leaders decided to pursue inclusion of gender identity in the federal hate crimes bill. This, Part One of the series, focuses on describing with precision what the critiques of hate crimes legislation are and it provides initial analyses on whether these critiques are valid. Given my role in the transgender movement,ⁱⁱ in

this article I endeavor to separate fact and opinion, allowing readers to come to their own conclusions about the merits of the decision to seek inclusion.

In Part Two, both the potential and realized negative effects of the bill and lawⁱⁱⁱ will be balanced against the positive effects of passage, including: facilitating the inclusion of gender identity in the Employment Non-Discrimination Act through education and sensitization of members of Congress; promoting cultural change and awareness of transgender people; precipitating the training of law enforcement officers; and adding gender identity to the Department of Justice's conflict resolution efforts.

History of Gender Identity Inclusion in the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act

The federal hate crimes bill was first introduced in 1997^{iv} after the White House Conference on Hate Crimes.^v Among other items, the original bill added federal jurisdiction for violent hate crimes based on actual or perceived gender, sexual orientation, and disability, and removed jurisdictional barriers faced by Department of Justice prosecutors for hate crimes based on race, color, religion, and national origin, which had been included in the law since 1968.

The effort to add "gender identity"^{vi} to the bill was one of the initial aims of the Transgender Civil Rights Project at the National Gay and Lesbian Task Force (the Task Force). From the beginning, other organizations were also interested in securing "gender identity" in the bill's language: Parents, Family, and Friends of Lesbians and

Gays (PFLAG)^{vii} offered its support in 2001 and the National Center for Transgender Equality (NCTE) became engaged after its founding in early 2003.^{viii} A range of organizations expressed various levels of support in those early years, with many at times maintaining that “actual or perceived gender”^{ix} was sufficient to cover anti-transgender hate crimes, especially if Congress created legislative history to clarify that Congress intended to cover transgender people.^x

The hate crimes bill was managed by the Hate Crimes Task Force (known and hereinafter referred to as the Hate Crimes Coalition) of the Leadership Conference for Civil Rights (now known as the Leadership Conference for Civil and Human Rights). In 2001, a multi-year educational effort began to educate the over 30 organizations^{xi} that comprise the Hate Crimes Coalition and LGBT organizations that were not fully supportive, on two issues: first, the importance of covering anti-transgender hate crimes, and second, the legal inadequacy of relying on “actual or perceived gender.” In 2002, Mara Keisling, who would go on to found NCTE a year later, and two local transgender community members^{xii} told their stories about the risk of violence they faced in their everyday lives during an initial educational session for the Hate Crimes Coalition.

Congressman Barney Frank was also an early, vocal supporter of gender identity inclusion in the hate crimes bill, despite his initial opposition to adding gender identity to the Employment Non-Discrimination Act (ENDA). As early as 1999, during a hearing on the hate crimes bill in the House Judiciary Committee, Congressman Frank expressed his view that there should be explicit protections for transgender people.^{xiii} According to a recent interview, he was compelled by the fact that transgender people experience a

disproportionate amount of hate violence. In his view, the rate of such violence is second only to hate crimes perpetrated against African Americans.^{xiv}

Due to the collective efforts of many organizations and Congressman Frank, in 2005, Congressman John Conyers, the lead sponsor of the hate crimes bill in the House, agreed to introduce a version of the hate crimes bill that included the term “gender identity.”^{xv} Later that year, the bill passed the House as an amendment to a child safety bill,^{xvi} with the gender identity language intact.

As the Senate considered passing its own version of the hate crimes bill, which did not yet enumerate gender identity, as an amendment to the Senate version of the child safety bill, many organizations, led by the Task Force, sent a statement to Senators asking the Senate to pass the House version.^{xvii} Ultimately, the Senate did not add any version of the hate crimes legislation to the child safety bill, and the conference committee merging the two versions of the child safety bill removed the hate crimes language from the final child safety legislation.^{xviii}

Despite the strong and uniform pressure put on the Senate by the Hate Crimes Coalition to vote for a hate crimes bill that included gender identity in 2005, the bill’s primary sponsor, Senator Edward Kennedy, was still reluctant to change the bill’s language. Senator Kennedy’s office provided two reasons for his reluctance: fear of losing momentum for the bill’s passage and belief that “actual or perceived gender” would be sufficient to cover hate crimes against transgender people.^{xix} In fact, after a while, Senator Kennedy’s office staff began to resist scheduling any more meetings with LGBT advocates about this issue.^{xx} Thus, in 2006, the Task Force and NCTE asked allies at the National Organization of Women to schedule a meeting with the Senator’s

office to speak about the bill, and asked that they be allowed to bring additional organizational representatives. By this time, educational efforts directed at the Hate Crimes Coalition had worked; nearly every LGBT organization in addition to several non-LGBT organizations strongly supported adding gender identity to the bill. In the Senate meeting, the leading voices on gender identity inclusion (the Task Force, PFLAG, and NCTE) were able to remain in the background while over 20 organizations implored the Senator's staff to update the bill's language to include gender identity. When the bill was introduced in the next session, the Senate bill contained gender identity.^{xxi}

Beginning in 2001, the motivation to add gender identity to the hate crimes bill was driven primarily by the assumption that its inclusion would pave the way for inclusion of gender identity in the Employment Non-Discrimination Act (ENDA). It was thought by the core group of transgender/allied advocates at the time and even today, that ENDA, if passed, would do much more to combat the violence that transgender people face than passage of the federal hate crimes bill.^{xxii} Because of rampant employment discrimination, many transgender people are homeless and/or make a living on the streets, which puts them at much higher risk for violence.^{xxiii} It was believed that ensuring transgender people have access to employment opportunities, specifically traditional employment, was a more important, life-saving, aim.^{xxiv}

The Potential Costs of Hate Crimes Laws

A handful of scholars and activists have published articles that question or criticize hate crimes laws in general, most often focusing on penalty enhancement provisions.^{xxv}

General Opposition to Hate Crimes Laws

In 2001, the American Friends Service Committee published a working paper^{xxvi} calling into question the wisdom of both state hate crimes bills and the federal hate crimes proposal. In doing so, they stated that advocates should consider the “probable unintended harmful consequences of many hate crimes laws...that compound rather than counteract the systemic violence of racism, misogyny, homophobia, poverty, and economic exploitation.”^{xxvii}

Noting that “the U.S. criminal justice system...is itself a key institutional perpetrator of violence and hatred and is responsible for massive abuses of civil and human rights,”^{xxviii} the AFSC explained the risk that hate crimes laws, most notably sentence enhancement laws, potentially pose:

For hate crimes, no empirical data is available that correlates sentencing outcomes with race and economic status of victims of perpetrators. In other areas of criminal justice policy, however, a great deal of data is available—and it demonstrates that racial and class bias by police, prosecutors, and courts is the most important fact in determining who receives the longest prison sentences. Again, we see no reason to assume the system will operate differently when it comes to hate violence. For all of these reasons, AFSC believes that penalty enhancements are a dangerously misguided response to the problem of hate

violence, and we find ourselves unable to support legislation that utilizes such an approach.^{xxix}

They continue:

In almost every instance, the underlying offense of a hate crime—whether threat, malicious intimidation, assault, or murder—is already subject to criminal penalties. Penalty enhancements, which almost invariably involve longer sentences, have been widely favored as the best way to signal the seriousness of hate violence and to recognize the harm it does to the larger community as well as the individual victim. In an ideal world, such an approach might be defensible. In the real world of the U.S. criminal justice system, however, whenever penalty enhancements have been enacted to underline the seriousness of certain types of offenses, they are not applied against those responsible for causing the greatest harm. Instead, they are overwhelmingly applied to defendants with the fewest resources: the least access to counsel, the least sophistication about the system, and not coincidentally, the least social status (that is, the least human value) in the eyes of prosecutors, judges, and juries. In other words, poor people, people of color, and youth.^{xxx}

They further note that hate crimes laws may have the opposite effect on those who are incarcerated for longer sentences:

Penalty enhancements are equally if not more likely to make our communities more dangerous, given that current conditions in U.S. prisons are so violent and dehumanizing that many people return to the community more filled with uncontrollable rage than when they entered the system.^{xxxi}

Specific Opposition to Hate Crimes Laws from the Transgender Community

Opposition to hate crimes laws has been voiced by the transgender community. Based in large part on the AFSC report, the Sylvia Rivera Law Project (SRLP), an organization based in New York City that works for transgender people with an emphasis on those most marginalized, put out a much stronger statement in opposition to the federal hate crimes law in 2009 after its passage. In it, they stated:

What hate crimes laws do is expand and increase the power of the same unjust and corrupt criminal punishment system. Evidence demonstrates that hate crimes legislation, like other criminal punishment legislation, is used unequally and improperly against communities that are already marginalized in our society. These laws increase the already staggering incarceration rates of people of color, poor people, queer people and transgender people based on a system that is inherently and deeply corrupt.^{xxxii}

An even more forceful critique came from scholar and activist Professor Dean Spade, one of the founders of SRLP and a member of SRLP when the above statement was made. Professor Spade published a book in 2012 entitled Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of the Law,^{xxxiii} which criticizes the transgender movement's focus on both hate crimes and non-discrimination laws. With regard to hate crimes laws, he asserts:

- That hate crimes laws create “primarily symbolic change” that do nothing to stop hate crimes.^{xxxiv}

- They “co-opt the fear, grief, and rage of trans communities at the high levels of violence we face and the low worth our lives are given into the project of expanding a system that targets us.”^{xxxv}
- The federal hate crimes law “provides millions of dollars to enhance police and prosecutorial resources, which increases the amount of harm police can direct at people of color and other marginalized communities”^{xxxvi}
- Advocates for these laws “participate in the false logic that criminal punishment produces safety, when it is clear that it is actually the site of enormous violence. Criminal punishment cannot be the method we use to stop transphobia when the criminal punishment system is the most significant perpetrator of violence against trans people.”^{xxxvii}
- “Hate crimes laws do nothing to prevent violence against transgender people, but instead focus on mobilizing resources for criminal punishment systems’ response to such violence. Because trans people are frequent targets of criminal punishment systems and face severe violence at the hands of police and prisons every day, investment in such a system for solving safety issues actually stands to increase harm and violence.”^{xxxviii}

Initial Analysis of the Critiques of, and Potential Harms Caused by, Hate Crimes Laws

Collectively, critics of hate crimes laws make five arguments against these laws: 1) that people of color, and those with low income, are likely to be targeted by these laws for prosecution, 2) that hate crimes laws increase the resources available to law enforcement, empowering them to do more harm to marginalized communities, 3) that

sentence enhancement makes those imprisoned leave prison with more rage and thus more likely to commit more violent crimes, 4) that hate crimes laws do not result in a decrease in hate crimes, and 5) that supporting these laws lends credibility to law enforcement as an appropriate societal response to crime in general, as opposed to law enforcement being viewed as a perpetrator of crimes itself.

It is important to note that, with regard to the first and second concrete harms listed above, some critics of hate crimes laws, notably SRLP, have stated that such laws are enforced in a manner that leads to the incarceration of more people of color, and other marginalized people (the first harm). The AFSC and Professor Spade make a different argument, contending that these laws cause *resources* to be invested in the criminal system, which in turn makes the system more capable of inflicting harm on marginalized groups (the second harm).

The first asserted harm, that people of color are disproportionately prosecuted under these laws, was asserted by SRLP but not Professor Spade or AFSC. In fact, AFSC noted itself that there is no data on the question of whether or not *hate* crimes laws are used disproportionately against people of color. Transgender and allied advocates were skeptical that it was actually the case that people of color were disproportionately prosecuted under hate crimes laws. To analyze this potential harm objectively, one could design a study of all of the prosecutions under state and federal laws; such research is beyond the immediate scope of this paper. However, whether the previously existing hate crimes statute, enacted in 1968, was used disproportionately against people of color and others can be more easily examined. The provisions of 18 U.S.C. 245 [hereinafter “Section 245”] concerned crimes based on race, religion, and

national origin. For this article, I researched 27 cases brought under Section 245, which represent all cases brought between 1992-1997.^{xxxix} The results showed that only 8 percent of the defendants were people of color, while 92 percent were white or probably white.^{xl} Thus, for at least that five-year period, Section 245 was not used disproportionately against people of color, given that 30.6 percent of the general population were people of color at the time of the 2000 Census.^{xli} Whether Section 245 was used disproportionately against those who were of low income generally is not easily detectable without undergoing a major research study.

Furthermore, one of the lesser-known facts about Section 245 is that it was not used often—on average four to six times per year, and never more than ten times per year.^{xlii} Advocates expected that the hate crimes bill would mean just a few more federal prosecutions per year, because it was meant as a back stop to local and state authorities when they do not or cannot take appropriate action to address bias-motivated crime.^{xliii}

The second harm, that more resources are provided to law enforcement through these laws which in turn will harm people of color, is evaluated in Part Two of this series, as this is an easily measurable potential harm that can be assessed by examining the funding granted through the law. To fully understand the magnitude of this harm, however, it is important to understand that Professor Spade, SRLP, and AFSC are correct that the U.S. criminal justice system has inherent racial and economic bias and that increases in funding available to law enforcement likely does increase law

enforcement's ability to harm people of color, transgender people, and other marginalized communities.^{xliv}

The third harm, that those subjected to sentence enhancement would leave prison more likely to commit additional violent crimes –potentially hate motivated crimes, is more difficult to directly measure. In Part Two, it is explained that the law was primarily not about sentence enhancement, with only one minor part that had a sentencing enhancement aspect. Canadian researchers conducted a major study in 1999 on how the length of time in prison effects recidivism rates by reviewing the extant literature, much of which was based on research in the U.S. They concluded that a longer sentence results in a 2-4 percent increase in recidivism rates.^{xlv}

The fourth critique is less of a cost than an observation. Professor Spade and others made forceful arguments that these laws do not deter crimes in any real way.^{xlvi} According to Mara Keisling, she and other advocates never expected the hate crimes bill to lead to a discernible decrease in hate crimes; she saw the main positive direct effect on hate crimes to be the data collection and police training/awareness required by the bill, which are described in the next section. Indeed, advocates were careful to not say that the law would lead to a decrease in hate crimes.^{xlvii}

The fifth critique, that supporting these laws lends credibility to the law enforcement system, which allows law enforcement to continue to disproportionately target marginalized communities without public awareness of the injustice, is relatively theoretical. Professor Spade and AFSC's critiques explain that there are alternatives to the criminal justice system, such as community processes for healing and mediation

that do not resort to imprisonment as the primary means of dealing with violent crime. Since the criminal justice system, as we know it, is not going to be eliminated in any real way for the foreseeable future, and there is no active debate in this country about eliminating it as a legitimate societal institution, the marginal harm of lending it more legitimacy would seem to be small.

Conclusion

In Part One, I have endeavored to provide a balanced overview of the critiques of scholars and activists about hate crimes legislation and the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act. I then provided initial analyses of these critiques showing that they are less powerful than they appear at first glance, including to those who have a thoughtful and strong belief system that includes the awareness of the race and class bias in the current U.S. criminal justice system.

In Part Two of this article (forthcoming), I will describe the bill's provisions and intended and actual effects, and analyze these from a progressive, social justice viewpoint. This includes the creation of new federal jurisdiction for potential federal prosecution of anti-transgender crimes, federal financial and technical assistance authorized by the bill to be given to local law enforcement authorities, expansion of federal mediation services, expansion of statistics collection and law enforcement training, sentencing enhancement, cultural awareness created by the bill, and the political effect on gender identity inclusion in other legislation of unambiguous benefit to the transgender movement such as the Employment Non-Discrimination Act.

ⁱ The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act was signed into law by President Obama in 2009, as an amendment to the National Defense Authorization Act for Fiscal Year 2010, H.R. 2647, 111th Cong. (2009). It can be found starting on page 646 of the enrolled bill. For verification: <http://www.gpo.gov/fdsys/pkg/BILLS-111hr2647enr/pdf/BILLS-111hr2647enr.pdf>

ⁱⁱ In 2001, I founded the Transgender Civil Rights Project at the National Gay and Lesbian Task Force with initial funding provided by a two-year fellowship with the Equal Justice Works Foundation. Until 2013, I was the sole full-time staff person on the project, deeply involved in developing the strategy to ensure that gender identity was included in the federal hate crimes law. Since the law's passage, I have worked directly with the FBI to shape training of law enforcement on these issues. Because of my central role as an advocate, I have a first-hand understanding of the nuances of the intended and the actual effects of the law; this experience also puts me at risk for bias. In this article, I try diligently and objectively to describe the provisions of the law and the facts concerning its implementation, leaving my opinions aside. Today, I serve as the Deputy Executive Director of the National Center for Transgender Equality.

ⁱⁱⁱ Throughout this article, I refer to the hate crimes bill (before passage) or to the law (after passage). The bill's content stayed generally the same from the time it was introduced in 1997 through its re-introduction every two years in both the Senate and the House; however, the name changed several times. It was known as the Hate Crimes Prevention Act, the Local Law Enforcement Enhancement Act, the Local Law Enforcement Hate Crimes Prevention Act, and finally, the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act.

^{iv} The first version was introduced by Senator Ted Kennedy in the Senate (S. 1529) in the 105th Congress and then-Representative Charles Schumer in the House (H.R. 3081) in November 1997. For verification: <http://beta.congress.gov/bill/105th-congress/senate-bill/1529> and <http://beta.congress.gov/bill/105th-congress/house-bill/3081/text?q=%7B%22search%22%3A%5B%22h.r.3081%22%5D%7D>

^v Interview with Michael Lieberman, General Counsel, Anti-Defamation League, by author, on 13 December 2012.

^{vi} While on the state and local level the Task Force and other advocates have pushed for "gender identity or expression," a decision was made to use the seemingly more limited term, "gender identity" in federal legislation. This decision was based on a calculation of the legal implications of using the term "expression." Advocates were concerned that as courts determined what was meant by "expression" in hate crimes and other statutes, that could limit the interpretation of the term as used in the First

Amendment of the Constitution, or vice versa.

^{vii} Lisa Weiner-Mahfuz supported this effort as staff at PFLAG National.

^{viii} Mara Keisling was involved before she started NCTE as one of a handful of trans activists engaged in federal advocacy, though without a staffed organization.

^{ix} I prepared, in 2002, a memorandum explaining that “actual or perceived... gender” was not sufficient to guarantee coverage of anti-transgender hate crimes because most courts interpreting “sex” and “gender” in federal statutes had, at that time, had determined that transgender people were not covered by these terms. Today, the case law is much more positive on this legal question, although not so positive that this language would guarantee coverage.

^x Creating legislative history would help courts conclude that transgender people were covered, but would not guarantee coverage. However, it was important to make sure this legislative history was created in case efforts to add gender identity failed. Thus, I worked with Senator Kennedy’s and Senator Gordon Smith’s office to get stories of anti-transgender violence in the record, on the floor and in committee reports. Committee on the Judiciary, Local Law Enforcement Act of 2001, S. Rep. No. 107-147, (2002) (mentioning anti-transgender crimes several times and providing an example of an anti-transgender crime as a reason the bill was needed). For verification: http://thomas.loc.gov/cgi-bin/cpquery/?&sid=cp107LH9vq&r_n=sr147.107&sel=DOC& Compare this to the 1998 Senate Hearing Report, with transgender used only twice, in a footnote that cited two reports that included transgender as part of their titles. *S.J. Res 1529, A bill to enhance federal enforcement of hate crimes, Hearing Before the Committee on the Judiciary*, 105th Cong., S. Hrg. No. 105-904 (1998). Not available online for verification.

^{xi} To quantify the membership of the Hate Crimes Coalition is difficult, because there is no official membership list. According to Michael Lieberman, Co-Chair of the Hate Crime Coalition, there are representatives from dozens of organizations on the email list and over 300 national organizations endorsed the legislation. In my personal experience since 1999, approximately 30 organizations regularly attend meetings.

^{xii} The local speakers were affiliated with Transgender Health Empowerment, a community organization that had recently been founded to primarily support transgender African-Americans using funding from HIV-prevention grants.

^{xiii} *Hate Crime Violence: Hearing of the Committee on the Judiciary*, House of Representatives, 106th Congress 102 (1999). For verification: not available online.

^{xiv} Interview with Congressman Barney Frank by the author, 20 December 2012.

^{xv} While the definition of gender identity agreed to at that time was sufficient for hate crimes purposes, it is inappropriate for non-discrimination legislation and should not be replicated elsewhere. The definition included in the bill is as follows: “‘gender identity’ means actual or perceived gender-related characteristics.” This language is acceptable in the context of hate crimes because such crimes are usually triggered by a gender-related characteristic of the victim, such as identity, appearance, mannerism, dress, or physical characteristics. However, in the context of discrimination, this language is not sufficient because it is anticipated that the highly-paid corporate defense attorneys would be able to convince judges that the employer was not basing its discrimination against a transgender person on the basis of “gender-related characteristics.”

^{xvi} Children’s Safety Act of 2005, H.R. 3132, 109th Cong. (2005). National Gay and Lesbian Task Force, “Task Force Hails Historic First—House of Representatives Votes to Extend Protections for Lesbian, Gay, Bisexual and Transgend[er People],” news release, September 14, 2005, http://www.thetaskforce.org/press/releases/pr867_091405. For bill verification: <http://beta.congress.gov/bill/109th-congress/house-bill/3132?q=%7B%22search%22%3A%5B%22h.r.3132%22%5D%7D>

^{xvii} Statement delivered in person and via facsimile, “House Vote Creates Historic Opportunity for Hate Crimes Legislation this Congress,” 2005, on file with author. Signatories were: American Association of People with Disabilities, American Association of University Women, American Civil Liberties Union, American Humanist Association, The American Jewish Committee, The American-Arab Anti-Discrimination Committee, Anti-Defamation League, Asian American Justice Center, Children of Lesbians & Gays Everywhere, DignityUSA, Disciples Justice Action Network (Disciples of Christ), The Episcopal Church, Equal Partners in Faith, Equality Federation: Statewide Advocates for LGBT Justice, Family

Pride Coalition, Gay, Lesbian and Straight Education Network, The Interfaith Alliance, International Foundation for Gender Education, Japanese American Citizens League, Log Cabin Republicans, Mautner Project (The National Lesbian Health Organization), National Association of LGBT Community Centers, National Association for the Advancement of Colored People (NAACP), National Black Justice Coalition, National Center for Lesbian Rights, National Center for Transgender Equality, National Coalition for the Homeless, National Coalition of Anti-Violence Programs, National Council of Jewish Women, National Gay and Lesbian Task Force, National Latino/a Coalition for Justice, National Organization for Women (NOW), National Stonewall Democrats, National Transgender Advocacy Coalition, New York City Gay & Lesbian Anti-Violence Project, People For the American Way, PFLAG: Parents, Family & Friends of Lesbians & Gays, Presbyterian Church (USA), Pride At Work, AFL-CIO, Sikh American Legal Defense and Education Fund, Transgender Law Center, Transgender Law and Policy Institute, Unitarian Universalist Association of Congregations, United Church of Christ, Justice and Witness Ministries, United States Student Association, and the Woodhull Freedom Foundation.

^{xviii} As a technical matter, the Senate never passed H.R. 3132, but instead passed a similar, second child safety bill, H.R. 4472, that passed the house without hate crimes legislation attached to it. For verification:

<http://beta.congress.gov/bill/109th-congress/house-bill/3132?q=%7B%22search%22%3A%5B%22h.r.3132%22%5D%7D>

and

<http://beta.congress.gov/bill/109th-congress/house-bill/4472?q=%7B%22search%22%3A%5B%22h.r.4472%22%5D%7D>

^{xxix} Interview with Mara Keisling, by author, 20 December 2012.

^{xx} Ibid.

^{xxi} Senate Bill 1105 was introduced on April 12, 2007 by Senator Kennedy and the other lead sponsors.

For verification: <http://beta.congress.gov/bill/110th-congress/senate-bill/1105?q=%7B%22search%22%3A%5B%22s+1105%22%5D%7D>

^{xxii} The core group included the National Gay and Lesbian Task Force, PFLAG, National Organization for Women and NCTE. Interview with Mara Keisling, by author, 20 December 2012.

^{xxiii} According to the National Transgender Discrimination Survey (NTDS), sixteen percent (16%) turned to sex work or other criminalized activity in order to earn an income due to the discrimination they face as transgender people. Grant, Jaime M., Lisa A. Mottet, Justin Tanis, Jack Harrison, Jody L. Herman, and Mara Keisling. "Injustice at Every Turn: A Report of the National Transgender Discrimination Survey." National Center for Transgender Equality and National Gay and Lesbian Task Force, 2011. For verification: http://endtransdiscrimination.org/PDFs/NTDS_Report.pdf

^{xxiv} Employment discrimination is rampant: 26% of transgender people have lost a job due to anti-transgender bias, 50% have experienced harassment at work, and 44% were not hired due to bias. Due to this severe discrimination, the transgender community sees a federal law prohibiting discrimination as a top policy priority. Ibid.

^{xxv} The AFSC notes it is particularly concerned with "the central role of penalty enhancements" in hate crimes legislation. "In a Time of Broken Bones: A Call to Dialogue on Hate Violence and Limitations of Hate Crimes Laws," American Friends Service Committee, 2001, page 7. For verification: <https://www.afsc.org/document/time-broken-bones>

^{xxvi} AFSC, *Broken Bones*.

^{xxvii} Ibid. 8.

^{xxviii} Ibid.

^{xxix} Ibid. 18.

^{xxx} Ibid.

^{xxxi} Ibid.

^{xxxi} "SRLP on Hate Crimes Laws," available at: <http://srlp.org/our-strategy/policy-advocacy/hate-crimes/>.

^{xxxi} Spade, Dean. *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of the Law*. South End Press, 2012. For verification: http://www.amazon.com/Normal-Life-Administrative-Violence-Critical/dp/0896087964/ref=sr_1_1?s=books&ie=UTF8&qid=1395713012&sr=1-1&keywords=normal+life+dean+spade

^{xxxi} Spade, *Normal Life*, 56.

^{xxxi} Ibid. 156.

^{xxxi} Ibid. 89.

^{xxxi} Ibid. 90.

^{xxxviii} Ibid. 36.

^{xxxix} These cases were taken from the written submission of Eric Holder, Deputy Attorney General. *S.J. Res 1529, A bill to enhance federal enforcement of hate crimes, Hearing Before the Committee on the Judiciary*, 105th Cong., S. Hrg. No. 105-904, 68-71 (1998). These are all of the cases from fiscal years 1992-1997. This period of time is not entirely random because it was mostly during the Clinton administration. A longer list of all cases, dating back to 1969, was also available (at pages 80-88); however, this list included few details, making it nearly impossible to track down their facts. With the shorter list, I successfully identified the facts of the cases using online research tools.

^{xi} Analysis available from the author. Those identified as white by the court or media sources, as well as supremacists or skinheads were counted as white. Where information was not available, surname research was used to figure out the probable race of the defendant, in combination with the facts of the incident, to come to a relatively reliable conclusion. 55% were identified as white, 32% were almost assuredly white, and 5% were likely white.

^{xii} Catalyst, *People of Color in the U.S.*, (New York, NY 2009) accessed March 26, 2014 at <http://www.nmsdc.org/nmsdc/app/template/Content.vm/attachmentid/2945;jsessionid=FB0826877C06FA4C6726D61BCF4569B8>.

^{xiii} Committee on the Judiciary: Local Law Enforcement Enhancement Act of 2001, Sen. Rep. No. 107-147, 10 (2002) (“As stated above, it is both the intent and the expectation of Congress that the enactment of the Hate Crimes Act will result in only a modest increase in the number of hate crimes prosecutions brought by the Federal Government. In the more than 30 years since 18 U.S.C. 245 was enacted, the Federal Government, on average, has prosecuted four hate crimes a year.” See also Statement of Eric Holder, Deputy Attorney General, *S.J. Res 1529, A bill to enhance federal enforcement of hate crimes, Hearing Before the Committee on the Judiciary*, 105th Cong., S. Hrg. No. 105-904, 7 (1998) (“Now, I truly want to emphasize that State and local law enforcement agencies would continue to play the primary role in the investigation and prosecution of all types of hate crimes. From 1992 through 1997, the Department of Justice brought a total of 33 Federal hate crimes prosecutions under 18 U.S.C. Section 245, an average of fewer than 6 per year. We predict that the enactment of the Hate Crimes Prevention Act of 1998 would result in only a modest increase in the number of hate crimes prosecutions brought each year by the federal government.” See also Statement of Michael Lieberman, Matthew Shepard Hate Crimes Prevention Act of 2009: Hearing Before the Committee on the Judiciary, S. Hrg. No. 111-33, 36 (“In no year from 1968-2009, were there ever more than 10 indictments under 18 USC 245.”) For verification: not available online.

^{xiii} Interview with Mara Keisling, by author, 20 December 2012.

^{xiv} One objective study that demonstrates the chronic, widespread racial bias in the U.S. criminal justice system found that there is racial bias in sentences with young black males being given harsher sentences than similarly situated black males. U.S. Sentencing Commission, *Demographic Differences in Sentencing*, Booker Report, Part E (2012), accessed on March 25, 2014 at http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Booker_Reports/2012_Booker/Part_E.pdf#page=1. The problem of bias and violence against transgender people interacting with police and the criminal justice system more generally is also well-documented. Overall, seven percent of transgender people report being arrested or held in a cell due solely to police bias against transgender people, with 41 percent of black transgender respondents and 21 percent of Latino or Latina respondents reporting the same. In prison, transgender people report being harassed more by correctional officers than their peers (37 versus 35 percent) National Transgender Discrimination Survey, 158.

^{xiv} Gendreau, Paul, Claire Goggin and Francis T. Gullen. “The Effects of Prison Sentences on Recidivism” User Report: 1999-3. Unsure of how to cite the piece. For verification: , available at: <http://www.prisonpolicy.org/scans/e199912.htm>.

^{xvi} Professor Spade points out that those interested in committing crimes do not consult law books and decide not to commit a hate crime because the sentence is longer. Spade, *Normal Life*, 87.

^{xvii} Interview with Mara Keisling, by author, 20 December 2012.