

# **Progressive or Regressive?: An In-Depth Policy Analysis of the Decision to Include Gender Identity in the Federal Hate Crimes Law (Part Two)**

by Lisa Mottet

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## **Introduction to Part Two**

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. Hate crimes laws, and the federal hate crimes law in particular, have been condemned 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. Part One, published in 2014 (Volume IV), focused on (1) describing the critiques of hate crimes legislation, and (2) providing initial analyses on whether these critiques are valid.

Here, in Part Two, both the potential and realized negative effects of the bill and law are 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 about transgender people; and adding gender identity to the Department of Justice’s conflict-resolution efforts. Given my role in the transgender movement, in this article I endeavor to separate my opinions from objective facts,

allowing readers to come to their own conclusions about the merits of the decision to seek inclusion.<sup>1</sup>

## **I. Description, and Analysis, of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act from a Progressive Viewpoint**

In this section, the various substantive provisions of the law are described and then examined for their potential effects on the transgender community, as well as people of color when relevant. While not part of the calculus done by those supporting the bill, last-minute amendments made to the legislation are also described below.

### **A. Creation of New Federal Hate Crime Jurisdiction for Potential Federal Prosecution**

#### *Description*

The bill's primary goals were to: 1) create a new federal bias crime that would allow federal prosecutors to step in when local or state law enforcement ignored or provided minimal prosecution<sup>2</sup> for violent hate crimes based on *sexual orientation, disability, or gender (and gender identity*, in the later years) and 2) remove a jurisdictional barrier that existed in the predecessor 1968 law with regard to bias crimes based on *race, religion, and national origin*. That barrier required that the person be attacked while they were exercising a federally protected right, such as going to school, voting, or serving as a juror.<sup>3</sup> Importantly, with regard to sexual orientation, gender, disability and gender identity, the statute requires some involvement in interstate commerce for federal jurisdiction, which also serves as a limitation on when the statute can be invoked.<sup>4</sup>

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<sup>1</sup> In 2001, I founded the Transgender Civil Rights Project at the National Gay and Lesbian Task Force (Task Force) with initial funding provided by a two-year fellowship with the Equal Justice Works Foundation. From 2001-2013, I served as the sole full-time staff person on the project. In this role, I was deeply involved in developing the strategy to ensure that gender identity was included in the federal hate crimes law. After the law's passage, I worked directly with the FBI to shape training of law enforcement on these issues. I have since moved to the National Center for Transgender Equality, where I supervise staff that works with Department of Justice, including the FBI and the DOJ Community Relations Service, to implement the law. 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. I also attempt to separate out my personal opinions, to the extent practicable, so that readers may come to their own conclusions.

<sup>2</sup> Section 4707(a) "No prosecution of any offense described in this subsection may be undertaken by the United States, except under the certification in writing of the Attorney General, or a designee, that—

“(A) the State does not have jurisdiction;

“(B) the State has requested that the Federal Government assume jurisdiction;

“(C) the verdict or sentence obtained pursuant to State charges left demonstratively unvindicated the Federal interest in eradicating bias-motivated violence; or

“(D) a prosecution by the United States is in the public interest and necessary to secure substantial justice.

<sup>3</sup> 18 U.S.C. 245.

<sup>4</sup> The nexus to interstate commerce was included to ensure the Constitutionality of the law for these characteristics but was not considered necessary for race, national origin and religion because of other Constitutional authority related to the prohibition of slavery. See Section 4707(a) of the statute.

Crimes are included under the law if they are violent or involve arson or an explosive or incendiary device; most attempted crimes of these natures are also included.<sup>5</sup> The overall penalty is up to 10 years in prison and/or fines.<sup>6</sup> Crimes that involve death, kidnapping, aggravated sexual abuse, or an attempt to kill or commit aggravated sexual abuse carry a sentence for any number of years up to a life sentence.<sup>7</sup>

A last minute amendment extended the bill to cover crimes against military service members and veterans motivated because they currently serve in, or previously had served in, the military. This provision was not part of the original bill and has a broader definition of crimes including assault, battery, and property damage. Fines and jail times for these crimes are spelled out in the law.<sup>8</sup>

### *Analysis*

As explained in Part One, some critics of hate crimes laws have asserted that such laws result in disproportionate prosecution of people of color. As of March 2015, the new statute, 18 U.S.C. 249, had been used to bring charges related to 22 separate hate crime incidents since the law's passage in 2009. Thus, on average, a little more than four hate crimes incidents per year have resulted in indictments since 2009. None of the prosecuted incidents involved anti-transgender violence. Six were anti-gay, and the others were based on race, national origin, religion, disability or a combination of those. The defendants are disproportionately white; 77.5% were white and 22.4% were people of color.<sup>9</sup>

Thus, the data indicates that this new law has not been used disproportionately to indict people of color so far. In addition, the gender identity provision has not been used as an indictment even once, so there is no support, at this time, for an argument that the addition of gender identity resulted in higher prosecutions or sentences.

Whether or not the law has been used against people with low income is not readily ascertainable without undertaking a major research study. In addition, there are no reports collected on

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<sup>5</sup> Crimes are only under the purview of the Act if the perpetrator "willfully causes bodily injury to any person or, through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device" or "attempts to cause bodily injury to any person." Section 4707(a).

<sup>6</sup> While a last-minute amendment to add the death penalty was inserted by legislators who opposed the bill as an attempt to kill it, the amendment was defeated in conference committee. Organizations in support of the bill advocated vigorously against the death penalty provision. Tyler Lewis, *Senate Adds Death Penalty Amendment to Kill Hate Crimes Legislation July 20, 2009*, available at: <http://www.civilrights.org/archives/2009/07/531-sessions.html>. See also, *Task Force Action Fund urges for removal of death penalty amendment from Department of Defense authorization bill, July 20, 2009*, available at [http://www.thetaskforce.org/press/releases/prAF\\_072009](http://www.thetaskforce.org/press/releases/prAF_072009).

<sup>7</sup> For most crimes covered by the act, the sentence is imprisonment of "not more than 10 years" and the potential of being "fined in accordance with this title" or both. For certain offenses, the sentence is up to and including life, in addition to fines. See Section 4707(a).

<sup>8</sup> The longest penalty is up to 10 years. See 18 U.S.C. 1389.

<sup>9</sup> "List of Cases Indicted under 18 U.S.C. 249", on file with author. In an effort not to overstate my case, one incident involved 16 white male defendants, and I removed them from the total as an outlier that would skew data. However, technically, there have been 65 white male defendants and the actual percentage of people of color defendants was 17%.

whether the threat of federal prosecution has been used as a tactic to extract guilty pleas and longer sentences from criminal defendants, in cases where there was no formal indictment.

Because the previous version of the hate crimes law, Section 245, was rarely used, as explained above, supporters of gender identity inclusion expected limited use of the new law as well, including for anti-transgender hate crimes. Given that only a small number of additional prosecutions would take place nationally overall (and rarely would they be based on gender identity), the overall risk of potential harm from prosecutorial abuse was viewed by supporters of gender identity inclusion as low. So far, the facts have shown that numbers of prosecutions have been low, at least with regard to race and gender identity.

## **B. Federal Financial and Technical Assistance**

### *Description*

Another purpose of the law is to provide federal financial assistance<sup>10</sup> to local law enforcement authorities in the investigation and prosecution of bias crimes that are violent felonies, on request of the local law enforcement. These funds are to be granted only when the local jurisdiction truly lacks the funds for proper investigation and/or prosecution; and these funds must not supplant funds that the local jurisdiction would have otherwise made available for investigation and/or prosecution.<sup>11</sup> For example, funds could be granted for a local prosecutor to pay an expert to testify at trial. During discussions in support of this law, advocates often cited an example from Wyoming to demonstrate the need for financial assistance. Following the death of Matthew Shepard in 1998, the Laramie, Wyoming police department had to furlough two police officers in order to afford the prosecution of Shepard's killers.<sup>12</sup>

The law also authorized the creation of a grant program allowing local jurisdictions to apply for funding for programs designed to combat hate crimes committed by juveniles. As an example, funding may be used for training of law enforcement to prevent, identify, investigate, and prosecute hate crimes committed by juveniles.<sup>13</sup>

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<sup>10</sup> "The Attorney General may award grants to State, local, and tribal law enforcement agencies for extraordinary expenses associated with the investigation and prosecution of hate crimes." Section 4704(b)(1).

<sup>11</sup> The local jurisdiction must: "certify that the State, local government, or Indian tribe lacks the resources necessary to investigate or prosecute the hate crime" and "(iv) certify that any Federal funds received under this subsection will be used to supplement, not supplant, non-Federal funds that would otherwise be available for activities funded under this subsection." Section 4703(b)(3)(C).

<sup>12</sup> Hearing, Local Law Enforcement Hate Crimes Prevention Act of 2007, Subcommittee on Crime, Terrorism, and Homeland Security, Committee on the Judiciary, House of Representatives, Serial No. 110-71, April 17, 2007, Page 221.

<sup>13</sup> Section 4705: "AUTHORITY TO AWARD GRANTS.—The Office of Justice Programs of the Department of Justice may award grants, in accordance with such regulations as the Attorney General may prescribe, to State, local, or tribal programs designed to combat hate crimes committed by juveniles, including programs to train local law enforcement officers in identifying, investigating, prosecuting, and preventing hate crimes.

(b) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated such sums as may be necessary to carry out this section."

Notably, the law provides that \$5 million dollars was *authorized* to be appropriated for these two programs.<sup>14</sup>

The law also provides for non-monetary technical assistance<sup>15</sup> to local law enforcement agencies, which generally refers to assistance with processing forensic evidence, including collecting evidence and running DNA and other tests on evidence at FBI laboratories.

Lastly, the law authorized sums to be appropriated as necessary to add more Department of Justice personnel to implement the Act.<sup>16</sup>

### *Analysis*

There exists a distinction, rarely understood outside of Congress and lobbying circles, that there is a significant difference between *authorizations* for appropriations, and *actual appropriation* of funds. Appropriation is the process by which the expenditure of funds is approved by Congress; this happens during yearly budgeting.<sup>17</sup> If funds are only *authorized*, but not actually *appropriated*, then the funds are not available for use. The \$5,000,000 and other funds that were authorized in the federal hate crimes law have never been appropriated and thus, no funds have been distributed to local law enforcement agencies, nor to the Department of Justice for increased staff. This is a result that many beltway insiders like the members of the hate crimes coalition could have predicted.

Therefore, so far, there has been no *overall* increase in funding toward law enforcement agencies, either federally or locally, attributable to the federal hate crimes law.

However, in support of points raised by hate crimes law critics, it is also possible that through the provision of federal technical assistance, some federal resources have been used to assist local law enforcement, meaning that the local law enforcement may have more resources of their own to carry out law enforcement in a unjust, racist manner.

In addition, it is possible that if the law is funded in the future, scholars' warnings may come true and more resources would be provided to an inherently unjust criminal system. Yet former Congressman Barney Frank, when asked about this aspect of the law, noted that the most likely jurisdictions to apply for funds would be the friendlier jurisdictions, those that wanted to ensure

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<sup>14</sup> (7) AUTHORIZATION OF APPROPRIATIONS.—There is authorized to be appropriated to carry out this subsection \$5,000,000 for each of fiscal years 2010, 2011, and 2012.

<sup>15</sup> The law states "At the request of a State, local, or tribal law enforcement agency, the Attorney General may provide technical, forensic, prosecutorial, or any other form of assistance in the criminal investigation or prosecution ..." (Section 4704(a)(1) of the NDA of FY2010) Priority is given to rural areas and those who are investigating or prosecuting someone who has committed crimes in more than one state. Section 4704(a)(2). \

<sup>16</sup> Section 4706: "There are authorized to be appropriated to the Department of Justice, including the Community Relations Service, for fiscal years 2010, 2011, and 2012 such sums as are necessary to increase the number of personnel to prevent and respond to alleged violations of section 249 of title 18...."

<sup>17</sup> To demonstrate this lack of understanding that an authorization does not equal an appropriation, one need look no further than Wikipedia, where the current entry falsely reports that \$5,000,000 was provided from 2010-2012. It states that the law "provides \$5 million per year in funding for fiscal years 2010 through 2012 to help state and local agencies pay for investigating and prosecuting hate crimes," available at: [http://en.wikipedia.org/wiki/Matthew\\_Shepard\\_and\\_James\\_Byrd,\\_Jr.\\_Hate\\_Crimes\\_Prevention\\_Act](http://en.wikipedia.org/wiki/Matthew_Shepard_and_James_Byrd,_Jr._Hate_Crimes_Prevention_Act).

that crime was addressed in equitable ways with a concern for civil rights. Thus, federal funds would likely not go to jurisdictions with no regard for and an egregious attitude when it comes to civil rights.<sup>18</sup>

Furthermore, the chance that any of the funding will be appropriated significantly dropped by the end of 2012, because Congress only authorized funds for the fiscal years 2010, 2011, and 2012. Thus, funds would have to be authorized again by Congress and then also be appropriated for any funding to materialize.

### **C. Expansion of Federal Mediation Services to Address Hate Crimes**

#### *Description*

The hate crimes law expanded the jurisdiction of the Department of Justice's Community Relations Service (CRS) to include assisting if there are community tensions that could result or have resulted in hate violence. The CRS is a federal mediation service originally designed to address community tensions related to race, color, and national origin. According to their website, CRS is "dedicated to assist State and local units of government, private and public organizations, and community groups with preventing and resolving racial and ethnic tensions, incidents, and civil disorders, and in restoring racial stability and harmony." Because the hate crimes law passed, CRS has been able to expand its work and now also includes this language on their website as a part of what they do: "work with communities to employ strategies to prevent and respond to alleged violent hate crimes committed on the basis of actual or perceived race, color, national origin, gender, gender identity, sexual orientation, religion or disability."

In essence, Community Relations Service is a small but nimble agency charged with community mediation. It most often works to resolve tensions and conflicts between community members and law enforcement agencies and/or school authorities, creating agreements between the community players as an "alternative to coercion, violence, or litigation." For example, CRS's professional conciliators will often help ensure that training or other programs are instituted to reduce tension and the potential for violence.

#### *Analysis*

After passage of the hate crimes law, organizations that work for and with lesbian, gay, bisexual, and transgender (LGBT) communities trained the full staff of CRS through a mandatory all-day training covering LGBT sensitivity.<sup>19</sup> Two examples shed light on the important work of CRS. Following that training, CRS worked with communities in Minneapolis, MN, after the stabbing of a transgender woman. CRS negotiated an agreement for advocates to train police officers on transgender cultural competency and opened up conversations about better policies regarding the

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<sup>18</sup> Interview with Congressman Frank, December 20, 2013.

<sup>19</sup> The organizations that conducted the training included the Task Force (myself as trainer), National Center for Transgender Equality (Justin Tanis), and Human Rights Campaign (Ellen Kahn and Allyson Robinson). Because we knew that the transgender issues were likely less familiar to them than lesbian, gay, and bisexual concerns, transgender topics were emphasized during the training.

arrest and holding of transgender people by Minneapolis police.<sup>20</sup> In Puerto Rico, where anti-transgender murders have been rampant and Puerto Rico police are perceived as ignoring these crimes, CRS helped to put together a community forum that highlighted the need for police training.<sup>21</sup> Although more must be done in Minneapolis, Puerto Rico, and elsewhere, CRS involvement has lent increased legitimacy to advocates' calls, including for more police training.

While CRS has limited resources, its engagement in even a few communities to address transgender-related issues is an incredibly important advancement. This is just one more step toward addressing larger scale issues faced by transgender people in many communities, including disrespectful or violent treatment by police or school authorities.

## **D. Expansion of Statistics Collection**

### *Description*

The law also added “gender” and “gender identity” to the Hate Crimes Statistics Act of 1990.<sup>22</sup> The Hate Crimes Statistics Act obligated the FBI to gather and produce annual reports on hate crimes (originally only based on race, religion, disability, and sexual orientation) reported to them, as a voluntary matter, by state and local law enforcement. Over 14,000 law enforcement agencies participate voluntarily in this data collection.<sup>23</sup> The law also requires that the FBI document whether the tracked hate crimes are committed by or against juveniles.

### *Analysis*

The federal hate crimes law triggered an update of both the Hate Crime Incident Form and the computer system that local law enforcement uses to report to the FBI data on hate crimes in their jurisdictions.<sup>24</sup> The new system/form now includes the category of “Anti-Gender Identity” with check boxes for “Anti-Transgender” and “Anti-Gender Non-Conforming.”<sup>25</sup> The new form has been used since January 2013 with the electronic reporting system updated before then.

Since 1996, the FBI has had a training manual<sup>26</sup> for law enforcement on how to properly identify hate crimes for purposes of reporting them to the FBI. The training manual has now been

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<sup>20</sup> Community Relations Service Fiscal Year 2011 Annual Report, available at <http://www.justice.gov/crs/pubs/crs-annual-report2012.pdf>.

<sup>21</sup> Community Relations Service Fiscal Year 2010 Annual Report, available at <http://www.justice.gov/crs/pubs/annualreport2010.pdf>.

<sup>22</sup> Section 4708.

<sup>23</sup> 2011 Hate Crimes Statistics Act Report, available at <http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2011/narratives/jurisdiction>. The most recent report (2013) is available at: <http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2013>.

<sup>24</sup> Local agencies use either the Hate Crime Incident Form or the computer system to report their data, but not both. For instructions on the computer system, showing codes for different motivations, see <http://www.fbi.gov/about-us/cjis/ucr/hate-crime-technical-specification-version-1.1-pdf>.

<sup>25</sup> The form/computer reporting system also added Anti-Gender with checkboxes for Anti-Female and Anti-Male. See page 10 of <http://www.fbi.gov/about-us/cjis/ucr/hate-crime-technical-specification-version-1.1-pdf>.

<sup>26</sup> Hate Crime Data Collection Guidelines, last updated in 1999, available at <http://www.fbi.gov/about-us/cjis/ucr/hate-crime/hcguidelinesdc99.pdf> and Training Guide for Hate Crimes Data Collection, issued in 1996,

updated to include information about transgender people and how to treat them in a culturally competent manner.<sup>27</sup> The training manual, which became publicly available in January of 2013, includes:

- Definitions of transgender, gender non-conforming, transgender woman and transgender man
- Epithets and disrespectful terms used to refer to transgender people
- The differences between transgender people and LGB people
- Typical hate violence scenarios, such as perpetrator “panic” after a romantic encounter with a transgender person
- Information on pronouns and chosen names, and the importance of using those that the transgender person prefers, regardless of whether the person has undergone a legal name change

Because transgender people—especially those who are low-income, young, or of color—often experience violence from police officers, the inclusion of this cultural competency information in an FBI manual is incredibly important. For instance, many police officers, especially those in urban areas, tend to think all transgender women are sex workers because the police officers have become accustomed to arresting transgender women for survival sex work on the street. A side benefit of the training publication is that it should help sensitize and question the stereotyped views of police officers by showing that transgender people can be victims and witnesses of crime as well.

Of course, not all police officers in the U.S. will read this publication. However, some percentage will, and they will then be better equipped to treat transgender people they interact with in a more respectful manner and to educate their colleagues on respectful treatment. In addition, the manual serves as a useful starting place for other efforts to educate police officers at the local level to treat transgender people respectfully.

## **E. Sentencing Enhancement**

### *Description*

Contrary to what many critics think, the federal hate crimes bill was not primarily about sentencing enhancement (though many state laws are enhancement laws). The provisions described above were jurisdictional—giving federal prosecutors the ability to prosecute in special cases when local law enforcement chooses not to do so.

However, one provision in the bill included a limited sentencing enhancement. A federal law passed in 1994 had provided for sentencing enhancement for federal crimes based on bias related to race, color, and sexual orientation, among other characteristics.<sup>28</sup> This adjustment is not

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available at: <http://www.fbi.gov/about-us/cjis/ucr/hate-crime/trainguidedc99.pdf>.

<sup>27</sup> Hate Crime Data Collection Guidelines and Training Manual, available at <http://www.fbi.gov/about-us/cjis/ucr/hate-crime-data-collection-guidelines-and-training-manual.pdf>, see Appendix E.

<sup>28</sup> It did so by adding “gender identity” to Section 280003(a) of the Violent Crime Control and Law Enforcement



relevant to most federal crimes, such as white collar financial crimes or mail fraud, which are not typically bias-motivated. The most relevant federal crimes are those violent crimes that occur on federal property, primarily federal parks, federal office buildings, and in federal prisons. Importantly, this enhancement is an “adjustment,” meaning it only can increase a person’s sentence *inside* the sentencing range for the underlying crime.<sup>29</sup> And, unlike many other sentencing adjustments, hate crimes motivation must be shown “beyond a reasonable doubt.”<sup>30</sup>

The law also requires the United States Sentencing Commission (USSC) to prepare a report for Congress on the United States’ mandatory minimum sentencing policies, including how mandatory minimums affect sentencing disparities and the size of the federal prison population, as well as any recommendations the USSC has for Congress to improve federal sentencing policy.<sup>31</sup> According to Michael Lieberman, General Counsel of the Anti-Defamation League and the primary lobbyist for the hate crimes bill over the decade leading to its passage in his role as the co-chair of the Hate Crimes Coalition, this provision was added as a political maneuver to avoid having mandatory minimum sentences in the hate crimes bill, which many progressive organizations oppose.<sup>32</sup>

### *Analysis*

Because sentencing reports are sealed, there is no objective way to determine how often the enhancement adjustment has been used.<sup>33</sup> Of course, because the “enhancement” is actually an adjustment within a pre-determined range, in many circumstances, the adjustment will not result in an enhanced sentence. The judge uses his or her discretion in determining the sentence and may not decide to adjust a sentence based on bias-motivation.

In 2011, the United States Sentencing Commission released the required report, which contains many recommendations and explanations that, if adopted by Congress, would improve the sentencing guidelines from a progressive standpoint.<sup>34</sup>

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Act of 1994 (Public Law 103–322; 108 Stat. 2096).

<sup>29</sup> This means that if a sentence range of a specific crime is 12-24 months, and the judge was planning to sentence someone to 14 months based on the severity of the crime, the judge could add additional months because of the bias motivation, but the person could not get more than 24 months total.

<sup>30</sup> For example, if an assault had a sentencing range of 5-10 years, a person could get a few more months/years within that range) if the fact finder found that there was hate crimes motivation beyond reasonable doubt. Accordingly, that person could receive a sentence of 8 years instead of 7, but he or she would not be subject to an 11 year sentence. Sentencing Guidelines, available at [http://www.ussc.gov/Guidelines/2012\\_Guidelines/Manual\\_HTML/3a1\\_1.htm](http://www.ussc.gov/Guidelines/2012_Guidelines/Manual_HTML/3a1_1.htm).

<sup>31</sup> Section 4713 describes the content of the report to include, among other items, "an assessment of the effect of mandatory minimum sentencing provisions ... on the goal of eliminating unwarranted sentencing disparity," the "impact of mandatory minimum sentencing provisions on the Federal prison population," "a description of the interaction between mandatory minimum sentencing provisions ... and plea agreements," "a detailed empirical research study of the effect of mandatory minimum penalties," and "a discussion of mechanisms other than mandatory minimum sentencing laws by which Congress can take action with respect to sentencing policy."

<sup>32</sup> Interview with Michael Lieberman, General Counsel of the Anti-Defamation League and co-chair of the Hate Crimes Coalition since its origins.

<sup>33</sup> Mike Gangloff, Federal sentences are not clear-cut, October 24, 2010, The Roanoke Times, available at: <http://www.roanoke.com/news/roanoke/wb/264958>

<sup>34</sup> Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System, October 2011,

## **II. Other Positive Effects of the Law**

### **A. Cultural Awareness**

The debate over passage of the law, as well as the implementation of the law, served to educate society—and importantly law enforcement—about the existence and unique needs of transgender people.<sup>35</sup> Following a hate crime incident, the ensuing investigation, including potential involvement of federal law enforcement officials, raises awareness in the community and among members of the media. This heightened awareness translates into an acknowledgement of transgender people’s right to exist without violence against them—and an awareness that laws exist to support and protect transgender people. Taken together, these effects result in much-needed cultural change.

Hate crimes statistics, and their annual release, also raise public awareness when highlighted by media.<sup>36</sup>

### **B. Effect on Gender Identity Inclusion in Other Legislation**

Given the realities of politics, Members of Congress can be highly risk-averse, and in the 2000s, taking up transgender people’s issues was considered a large political risk. Thus, when advocates were lobbying for the inclusion of gender identity in the hate crimes bill, perhaps the highest objective was actually facilitating transgender-inclusion in Employment Non-Discrimination Act. By adding the term to the hate crimes bill, and requiring Members of Congress to vote on the language, the goal was to demonstrate that transgender people were not the political poison that Members of Congress had feared.

Congressman Frank had been especially clear on this point, both with regard to transgender people as well as LGB people. When asked about his views with regard to the interrelationship between transgender-inclusion in the hate crimes bill and ENDA, he explained that the importance of establishing transgender-inclusion in the hate crimes bill was about making Members of Congress comfortable with transgender people and comfortable with voting for them as a legitimate group of people entitled to legal rights. He explained that supporting transgender people in the hate crimes context was much easier because transgender-inclusion in ENDA brings up what he saw as harder issues, including being seen as interfering with business owners’ rights to run their business, as well as questions about use of certain sex-specific facilities.<sup>37</sup>

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available at

[http://www.uscc.gov/Legislative\\_and\\_Public\\_Affairs/Congressional\\_Testimony\\_and\\_Reports/Mandatory\\_Minimum\\_Penalties/20111031\\_RtC\\_Mandatory\\_Minimum.cfm](http://www.uscc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/20111031_RtC_Mandatory_Minimum.cfm).

<sup>35</sup> See, e.g., Carl Hulse, House Votes to Expand Hate Crimes Definition, October 8, 2009, [http://www.nytimes.com/2009/10/09/us/politics/09hate.html?\\_r=0](http://www.nytimes.com/2009/10/09/us/politics/09hate.html?_r=0).

<sup>36</sup> Professor Spade acknowledges this potential positive cultural effect. Spade, page 81

<sup>37</sup> Interview with Congressman Frank, December 20, 2013.

Mara Keisling of NCTE explained that the most important reason to seek transgender-inclusion in the hate crimes bill was to get trans-inclusion in ENDA. At numerous times over the years in advocating for this bill, she expressed the sentiment that “Congress first has to agree it is not okay to kill you before they will agree that it is not okay to fire you.” She explained that the movement would be in a much poorer position with regard to transgender-inclusion in ENDA if gender identity was not included in the hate crimes bill.<sup>38</sup>

Those who agree with Professor Spade’s critiques of anti-discrimination laws may disagree that seeking gender identity inclusion in ENDA was a worthwhile goal. I whole-heartedly believe that strong federal laws that explicitly prohibit discrimination on the basis of gender identity are important. While I have no delusions that such laws will eliminate all discrimination against transgender people, laws do play an important role in awareness and prevention of discrimination before it happens, as entities create policies and training to comply with them. These policies and training, and the awareness they generate among those who make and enforce laws, in turn create a significant cultural change—broader society’s acceptance of transgender people of all kinds and ages, which I believe should be the ultimate goal of the transgender movement.

Since the inclusion of gender identity in the hate crimes law, several more pieces of non-discrimination legislation have been proposed, including the Student Non-Discrimination Act,<sup>39</sup> a bill that would prohibit discrimination against LGBT students in Kindergarten-12<sup>th</sup> grades, and bills prohibiting discrimination in housing<sup>40</sup> and credit.<sup>41</sup> In July 2015, the Equality Act was introduced, which is a bill that would ban discrimination in employment, housing, public accommodations, provision of federal funds, among other areas of life.<sup>42</sup> Lastly, “gender identity” was included in the non-discrimination section of the reauthorization of the Violence Against Women Act (VAWA) in 2013 along with sexual orientation, which means that domestic violence shelters, and all related service providers receiving federal funds, may no longer discriminate against transgender people.<sup>43</sup> This passed through a Republican-controlled House of Representatives. Of course people may differ on whether or not “gender identity” in the hate crimes bill was a necessary political predecessor to the VAWA victory, it is hard to imagine that the Republican-controlled House would have included “gender identity” for the first time in federal law without it having previously passed in into statute by the Democratically-controlled Congress.

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<sup>38</sup> Interview with Mara Keisling, December 20, 2013. In addition, she noted the transgender community’s precarious position in the LGBT movement in the early 2000s. Specifically, it was important to be clear that the broader LGBT movement must fully integrate the transgender community in all legislation and all work. To have held a different position, that the trans community wanted to be included in some bills, but not other bills, would have undermined the position that the movement needed to be fully transgender-inclusive.

<sup>39</sup> See, for example, the Student Non-Discrimination Act of 2015, S. 439.

<sup>40</sup> See, for example, the Housing Opportunitites Made Equal Act of 2013, H.R. 2479.

<sup>41</sup> See, for example, the Freedom from Discrimination in Credit Act of 2013, S. 1159.

<sup>42</sup> Zack Ford, The Equality Act Could End Legal LGBT Discrimination for Good, July 23, 2015, ThinkProgress (blog), available at <http://thinkprogress.org/lgbt/2015/07/23/3683728/equality-act-introduction/>.

<sup>43</sup> Ashley Parker, House Renews Violence Against Women Measure, February 28, 2013, New York Times, available at <http://www.nytimes.com/2013/03/01/us/politics/congress-passes-reauthorization-of-violence-against-women-act.html>.

### III. Conclusion

On balance, having added gender identity to the pending federal hate crimes legislation was an important advance for the transgender movement. Not only has the law contributed to general public awareness of transgender people, but it has specifically triggered training of law enforcement about transgender people. It has empowered federal mediators to come into communities where there exists articulable tension between law enforcement or school authorities and the transgender community, so that they can broker training, education, and other advances locally.

Perhaps most importantly, transgender inclusion in the federal hate crimes law catalyzed the education of Members of Congress about transgender people, and made legislators more comfortable with voting for the rights of transgender people in future legislation, including the Violence Against Women Act which passed, but also the many pending bills including but not limited to, ENDA, the Equality Act, and the Student Non-Discrimination Act, bills which will more directly improve the lives of transgender people.

By contrast, the negative effects of the bill cannot be substantiated. First of all, the inclusion of gender identity has not yet resulted in a single prosecution, and new prosecutions based on the other covered characteristics have overwhelmingly been against white people, meaning that the fears concerning disproportionate prosecution, at least against people of color, have not materialized. Further study is needed of whether people with low- or no-income have been disproportionately targeted for prosecution. Secondly, fears that financial resources would be invested into strengthening an unjust criminal system have also not yet come to fruition and are unlikely to come to fruition. The other harms brought up by hate crimes laws critics remain theoretical, such as lending credibility to the criminal justice system.

Of course, legislative solutions to the problems of discrimination and violence against the transgender community are only part of what the transgender community must seek. No law is a magical solution to the problems the community faces. Ultimately, true cultural change is needed, so that families and communities embrace their transgender members unconditionally. To achieve this cultural change, legislation is an important tool, especially laws that require education about transgender people to segments of our society, whether that be law enforcement, places of work, or educational institutions. The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act is one of these laws that can press society forward toward more equality and acceptance for all, and should be celebrated by the transgender movement as a major achievement on the road toward transgender equality.