

COMMENTS

WHAT DO YOU GET WHEN YOU ADD MEGAN WILLIAMS TO MATTHEW SHEPARD¹ AND VICTIM-OFFENDER MEDIATION? A HATE CRIME LAW THAT PROSECUTORS WILL ACTUALLY WANT TO USE

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1. Matthew Shepard was “brutally attacked by his hateful, homophobic assailants and left to die on a fence.” 153 CONG. REC. H4 433 (daily ed. May 3, 2007) (statement of Rep. Baldwin). The Matthew Shepard Local Law Enforcement Hate Crimes Prevention Act of 2007 is among the laws that are the focus of this comment. The Act was named in honor of Mr. Shepard’s life and in recognition of his violent, hate-based death. *Id.*

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I. HATE CRIMES LEGISLATION IN THE UNITED STATES

At the hands of her captors in a rundown hillside trailer in Big Creek, West Virginia, Megan Williams was forced to drink blood² and eat rat, dog, and human feces.³ She was choked with a cable cord and stabbed with a butcher's knife while her captors called her "nigger."⁴ They poured hot water over her body, and hot wax.⁵ Megan's hair was

2. *All Things Considered: West Virginia Torture Case Under Review* (NPR radio broadcast Sept. 13, 2007), available at <http://www.npr.org/templates/story/story.php?storyId=14394895>.

3. *West Virginia Woman Speaks Out About Torture, Black Woman Tortured by Six White Men and Women Urges Filing of Hate-Crime Charges*, CBS NEWS, Oct. 23, 2007, <http://www.cbsnews.com/stories/2007/10/23/national/main3400474.shtml> [hereinafter *Woman Speaks Out*].

4. *No Hate Crime Charges in Torture Case, But Charges with Stiffer Penalties Sought After Black Woman was Allegedly Beaten and Raped By 6 Whites*, CBS NEWS, Sept. 12, 2007, <http://www.cbsnews.com/stories/2007/09/12/national/main3253257.shtml> [hereinafter *No Hate Crime Charges*] (noting that a suspect "used the N-word" in telling Megan she was victimized because she was black).

5. *Hot Wax, Urine Alleged in Torture Case, More Details Emerge of Horrors Allegedly Endured by Woman in W. Va.*, CBS NEWS, Sept. 19, 2007,

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cut off in some places, and ripped out in others.⁶ She was made to drink from the toilet,⁷ and two of her captors forced her to consume their urine.⁸ Some even took Megan to a lake and showed her where they would throw her body once they killed her.⁹ For more than a week in September of 2007, six men and women beat and sexually abused Megan Williams.¹⁰

Notwithstanding the raw depravity, what makes this case so striking is that Megan Williams is black and at least two of her seven abusers—all of whom were white¹¹—admitted that race was the catalyst for her debasement.¹² And yet, while it took West Virginia State prosecutor Brian Abrahams a mere four days to levy mainstream charges like kidnapping and assault,¹³ one-hundred and fifty days passed before he brought his single charge based on racial hate.¹⁴ Megan's case falls

<http://www.cbsnews.com/stories/2007/09/19/national/main3277524.shtml>
[hereinafter *Hot Wax*].

6. *Woman Speaks Out*, *supra* note 3.

7. *No Hate Crime Charges*, *supra* note 4.

8. *Hot Wax*, *supra* note 5.

9. *Woman Speaks Out*, *supra* note 3.

10. 153 CONG. REC. S11647-01 (daily ed. Sept. 18, 2007) (statement of Sen. Cardin).

11. *Id.* Six defendants—Bobby Brewster, Frankie Brewster, Karen Burton, Danny Combs, George Messer and Alisha Burton—were initially charged in Williams' kidnapping. Gary A. Harki, 'She Wasn't There Hating by Herself' Black Leaders React to Indictments in Williams Case, CHARLESTON GAZETTE & DAILY MAIL, Feb. 7, 2008, at 1C, available at 2008 WLNR 2388730. A seventh, Linnie Burton Jr., was later indicted. *Id.*

12. To date, at least two of the seven have confessed to telling Megan "[t]his is what we do to niggers around here." Cash Michaels, *West Virginia Torture Case a Legal Circus*, WILMINGTON JOURNAL, Dec. 19, 2007, http://news.newamerica.com/news/view_article.html?article_id=15033380f55a5fc7ab9b74638d42cddb&from=rss [hereinafter *Legal Circus*].

13. Megan Williams was found on September 8, 2007. *Hot Wax*, *supra* note 5. Charges were filed on Wednesday, September 12, 2007. *No Hate Crime Charges*, *supra* note 4 (noting that authorities decided that day to pursue state charges).

14. *Two Plead Guilty in Logan Torture Case Grand Jury Indicts Five, Including One Who Faces Hate Crime Charge*, CHARLESTON GAZETTE & DAILY MAIL, Feb. 6, 2008, at 4C, available at 2008 WLNR 2389291 [hereinafter *Two Plead Guilty*] (noting that Williams was found on September 8, 2007, and a grand jury indicted one of her captors for a hate crime on Tuesday, February 5, 2008).

squarely in the spectrum of hate-based law, leaving Abrahams' late in the day charge to raise the simple question: why was the prosecutor so reticent about pursuing the defendants under the doctrine of criminalized hate?

The decision to levy hate crimes charges implicates not just the prosecutor, but also the victim and community stakeholders, and each can be at odds with the other's agenda on how, or whether, to pursue a hate crimes charge. At one end of the spectrum, prosecutors levy charges as dictated by the facts, and their primary goal is to incarcerate criminals for as long as the law allows.¹⁵ Hate crimes charges can be disfavored as contrary to that agenda. They can be more complex and costly than mainstream charges because they require proof of a bias-based motive, and bias is an onerous sell under less than perfect facts.¹⁶

Though this comment primarily focuses on race hate, the considerations advanced apply to all forms of bias crimes as covered by the various state and federal laws. The terms "hate" and "bias" are used interchangeably.

15. Telephone Interview with Oscar Garcia, Deputy District Attorney, Hate Crimes Unit, San Diego District Attorney's Office, in San Diego, Cal. (Feb. 19, 2008). In researching this comment, I spoke with several state and federal attorneys who deal with civil rights violations and bias crimes. The attorneys shared the belief that prosecutors hold available charges up against known facts, and pursue charges as supported by those facts. This suggests that hate crimes, like other charges, rise and fall according to a confluence of events that include a prosecutor's evaluation of the facts. *See also*, Beverly McPhail, Ph.D., *Research Study Summary on Considering Hate Crime Enhancements in Charging Decisions*, 40 THE PROSECUTOR 30, 36 (2006). McPhail did a research study on prosecutors considering hate crime enhancements under Texas law. *Id.* at 30-31. About the decision on what charges to levy, one prosecutor said "[w]e want this guy in prison for as long as this crime deserves, and how, within the law we get them there may not be of concern for us as it is to the family." *Id.* at 36.

16. Evan M. Read, Comment, *Put to the Proof: Evidentiary Consideration in Wisconsin Hate Crime Prosecutions*, 89 MARQ. L. REV. 453, 454-55 (2005) ("[T]he prosecutor must be confident in her ability to convince a jury beyond a reasonable doubt that the defendant had an impermissible motive in selecting the victim. In the absence of a tell-tale clue, such as a spontaneous outburst by the defendant or a long history of biased acts, convincing a jury is an arduous task."); *see also Rally to Add Hate Charges in Torture Case*, CBS NEWS, Nov. 3, 2007, <http://www.cbsnews.com/stories/2007/11/03/national/main3449015.shtml> (noting the prosecutor's position that hate-based bias might be difficult to prove because the victim had a "social relationship" with one of the suspects months before the assault); Julia Reynolds, *DA Won't Pursue Hate Crime Charges in Scuffle*,

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The *Williams* case is a textbook example. There, Abrahams was reluctant to levy hate charges because one of Williams' captors was a prior acquaintance of hers, and hate crimes typically occur between strangers.¹⁷ Worse, the maximum sentence for hate crimes in the rural state of West Virginia is ten years.¹⁸ In comparison, Abrahams charged the defendants with sexual assault, which carried a maximum sentence of thirty-five years in prison, and kidnapping, which carried a maximum sentence of life in prison.¹⁹ The law made it easy for Abrahams to fairly distill his question to this: "[a]s a practical matter, sentenced to life, what else can be done?"²⁰

At the other end of the spectrum are the stakeholders: the victim and his or her victim class. The class empathizes with the victim and, for several reasons, can be at odds with a prosecutor's inclination to neuter a charging decision for practical purposes.²¹ First, when hate

MONTEREY COUNTY HERALD, Feb. 22, 2008, at B3, *available at* 2008 WLNR 3519070 (discussing how the Monterey County District Attorney would not levy a hate charge against a man who "uttered racial slurs" at a city councilman, and then punched him in the abdomen, because the prosecutor believed that more was needed to show that race spurred the attack).

17. *Woman Speaks Out*, *supra* note 3 (noting that Prosecutor Abrahams "backed off state hate-crime charges" because of complications that included the fact that Williams knew one of her subjects). Williams filed a domestic assault charge against one of the suspects just a few months before her abduction. *Id.* This prompted Abrahams to speculate that a hate crime would be hard to prove because such crimes typically occur between strangers. *Id.*

18. *Hot Wax*, *supra* note 5; *No Hate Crime Charges*, *supra* note 4. Under West Virginia Code, persons within West Virginia have the right to be free from acts of violence because of their race. W. VA. CODE ANN. § 61-6-21(a) (West 2007). One who interferes with that right is subject to a five-thousand dollar fine and/or ten years of imprisonment. *Id.* § 62-6-21(b).

19. *Hot Wax*, *supra* note 5.

20. *No Hate Crime Charges*, *supra* note 4 (noting that authorities decided not to pursue hate charges because other charging options carried stiffer penalties).

21. See Robert J. Ward Jr., *Race Relations and Conflicts in the United States*, 32 GONZ. L. REV. 511, 513 (1997) [hereinafter *Race Relations*] ("Prompt identification and labeling of bias or hate crimes is important to the victims, the community of which the victim is a member, and to society generally."). Contrast that to McPhail's finding that the reason behind a conviction is of less consequence to a prosecuting attorney than securing the conviction itself. See McPhail, *supra* note 15 and accompanying text. See also Craig L. Uhrich, Comment, *Hate Crime Legislation: A Policy Analysis*, 36 HOUS. L. REV. 1467, 1522 (1999). The author

crimes go uncharged, both the victim and the victim's class are left vulnerable and disenfranchised.²² A prosecutor who narrowly focuses his or her charges on the manifestation of hate (for example, the assault) instead of its root (in other words, the hate itself) pursues a proxy-charge that both dilutes society's cure²³ and potentially reopens its wounds.²⁴ Next, pure incarceration—the traditional response to hate crimes—fails to adequately address the stakeholders' needs.²⁵ Incarceration lends society a lesser protection against recurrence,²⁶ is too limited to offer the victim solace,²⁷ and is too passive to encourage offender accountability.²⁸ Again, the *Williams* case provides a provocative example. Bypassing hate crimes and instead levying

notes that in the context of state laws, an equal rights public policy consideration may require hate crimes enforcement to ensure that such crimes are pursued. *Id.*

22. *Infra* note 95.

23. *Cf.* Alexander Tsesis, Review Essays, *Contextualizing Bias Crimes: A Social And Theoretical Perspective*, 28 LAW & SOC. INQUIRY 315, 330 (2003) (“Punishing a person for a bias crime might restore some of the community equilibrium and reapportion the unfair in-group advantage gained by organized violent acts.”).

24. Some scholars refer to this reaction as “secondary victimization.” Arthur S. Winer, *Hate Crimes, Homosexuals, and the Constitution*, 29 HARV. C.R.-C.L. L. REV. 387, 414 (1994). Coined for instances where the criminal justice system responds to a hate crime against a protected class by mistreating the victim, secondary victimization constitutes harassment against the protected class. *Id.*

25. Alyssa H. Shenk, *Victim-Offender Mediation: The Road to Repairing Hate Crime Injustice*, 17 OHIO ST. J. ON DISP. RESOL. 185, 212 (2001). Shenk argues that hate crime legislation does little more than parrot traditional criminal justice system values, i.e., incarceration. *Id.* “The enactment of legislation alone is not the answer to curtailing hate crimes because it fails to provide the sense of justice originally intended as a basis for establishing hate crimes legislation. Specifically, hate crimes legislation fails to address the needs of the victims.” *Id.*

26. *Id.* at 192 (contrasting traditional justice to restorative justice, where restorative justice uniquely offers an alternative that will provide an offender with skills and confidence that make an impact on the crime by aiding in future deterrence). “[V]ictim-offender mediation assures a reduction in recidivism.” *Id.* at 215.

27. Iyssa Wellikoff, Note, *Victim-Offender Mediation and Violent Crimes: On the Way to Justice*, 5 CORDOZO ONLINE J. CONFLICT RESOL. 2, Part V.A. (2004) (discussing how the justice system's role as punisher does not offer solace from the effects of a crime).

28. *See* Shenk, *supra* note 25, at 189.

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proxy-charges for all but one defendant, said one Williams activist, was not enough: “we’re going to stay in the fight 100 percent to make sure that whoever prosecutes this case, prosecutes it right, and that the proper charges are added.”²⁹

Congress sits squarely in the middle of the conflict between prosecutors and society, and victim-offender mediation does not, but should. Congress is proposing two hate crimes bills, and each stands to have a curative effect on the disconnect between the prosecutor’s burden and the conjoined society/victim need. The House of Representative’s Local Law Enforcement Hate Crimes Prevention Act of 2007 and the Senate’s Matthew Shepard Local Law Enforcement Hate Crimes Prevention Act of 2007 both propose providing states with grants, personnel, and other technical assistance to support state prosecution of hate crimes.³⁰ For the prosecutor, if either bill were ratified, the support he or she would receive in investigating and pursuing hate crimes would offset the proof burden.³¹ For the victim and society, more frequent litigation could mean freeing society’s protected classes from a perception of marginalization.³² Moreover, an increase in litigation can only further clarify this nebulous area of the law. While neither bill is designed to simplify a prosecutor’s proof burden, nor ease a victim’s or society’s potential disenfranchisement, ratification potentially can achieve both.

Victim-Offender Mediation (VOM) is an interactive form of restorative justice that can also close the gap between a prosecutor’s burden and society’s need. It allows the victim to have a face-to-face

29. *Legal Circus*, *supra* note 12.

30. *See* Local Law Enforcement Hate Crimes Prevention Act of 2007, H.R. 1592, 110th Cong., §§ 3(a), 3(b)(5), 5 (2007); Matthew Sheppard Local Law Enforcement Hate Crimes Prevention Act of 2007, S. 1105, 110th Cong., §§ 4(a), 4(b)(5), 5, 6 (2007).

31. Local Law Enforcement Hate Crimes Prevention Act of 2007, H.R. 1592, 110th Cong., §§ 3(a), 3(b)(5), 5 (2007); Matthew Sheppard Local Law Enforcement Hate Crimes Prevention Act of 2007, S. 1105, 110th Cong., §§ 4(a), 4(b)(5), 5, 6 (2007); *see also* H.R. 1592, *supra* note 30, § 3(a)(1)(C); S. 1105, *supra* note 30, § 4(a)(1)(C).

32. *See* Tsesis, *supra* note 23, at 330 (noting that punishment restores the community equilibrium by taking from an offender what he owes, presumably, to society).

dialogue with her offender about the impact of the crime committed against her.³³ The victim benefits because she can directly face her antagonist and express the impact of the offense.³⁴ Society benefits because the offender can return to the harmed community to make amends,³⁵ which reduces recidivism.³⁶ The offender benefits because it encourages personal accountability³⁷ as he or she faces the implications of the hate crime.³⁸ For the prosecutor, VOM has powerful implications in both non-violent and violent cases. In non-violent cases of hate, it replaces litigation with a plea agreement if a defendant makes him- or herself available to the victim.³⁹ That, in turn, eliminates proof issues and incentivizes a more aggressive application of hate crimes law.⁴⁰ In violent cases of hate, while VOM

33. Victim-Offender Mediation Association, About Victim-Offender Mediation and Victim-Offender Dialogue, <http://www.voma.org/abtvom.shtml> (last visited Nov. 9, 2008). The dialogue can sometimes include the victim's family, or community stakeholders. Interview with Gregg Relyea, Mediator, Association for Dispute Resolution-San Diego, Inc. in San Diego, Cal. (Mar. 18, 2008) [hereinafter Interview with Relyea]. Gregg F. Relyea, Esq. is a lawyer, mediator, mediation trainer and a law professor at several southern California law schools and Universities, including California Western School of Law. Mr. Relyea is a member of the Association for Dispute Resolution-San Diego, Inc.

34. Shenk, *supra* note 25, at 191.

35. MARK S. UMBREIT, PH.D., & JEAN GREENWOOD, M.DIV., GUIDELINES FOR VICTIM-SENSITIVE VICTIM-OFFENDER MEDIATION: RESTORATIVE JUSTICE THROUGH DIALOGUE 1, 11 (U.S. Dep't of Just. 2000) available at http://www.ojp.usdoj.gov/ovc/publications/infores/restorative_justice/restorative_justice_ascii_pdf/ncj176346.pdf ("A victim has the right to select the restitution option that best meets his or her needs [and] may request that the offender undertake community service.").

36. Shenk, *supra* note 25, at 192 ("As for the offender, restorative justice provides skills and confidence while making real the impact of the crime, all of which aids in future deterrence.").

37. *Id.* at 190.

38. MARK S. UMBREIT, PH.D., & ROBERT B. COATES, PH.D., MULTICULTURAL IMPLICATIONS OF RESTORATIVE JUSTICE: POTENTIAL PITFALLS AND DANGERS 1, 3 (U.S. Dep't of Just. 2000), available at http://www.ovc.gov/publications/infores/restorative_justice/restorative_justice_ascii_pdf/ncj176348.pdf.

39. UMBREIT & GREENWOOD, *supra* note 35, at 2 (noting that VOM can result after a formal admission of guilt).

40. This is not unlike one of the arguments for adding gender to the list of federally protected classes. Marguerite Angelari, *Hate Crime Statutes: A Promising Tool for Fighting Violence Against Women*, 2 AM. U. J. GENDER SOC. POL'Y & L.

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admittedly does little to mitigate a prosecutor's burden, capitalizing on it can come to be a need for the victim or her family.⁴¹ However, VOM is not a viable option if either party is unwilling to voluntarily face the other and candidly explore the issues behind the victim's harm and the offender's hate.⁴² Because VOM "[f]ocuses on crime's harms rather than [on] rules broken," it places emphasis on paying back the innocent and society for harm⁴³ and is ripe to augment hate crimes jurisprudence. Restorative justice underscores the social policy of hate crimes litigation, and can be an effective bridge between a prosecutor's burden and society's need.

Over the backdrop of the Megan Williams case, this comment highlights some of the universal difficulties state prosecutors have in pursuing hate crimes. The analysis considers the tangential implications that failure to prosecute hate crimes has on society, the potentially curative effect of passing proposed federal legislation, and the necessity of overlaying restorative justice to both heal damage from and decrease incidents of hate crimes.

Part II details the most significant obstacle undermining pursuit of hate crimes, proving motive. Part III addresses the fissure between

63, 100 (1994) (considering how upgrading the penalty options "provide[s] a much needed incentive for police and prosecutors to take violent crimes [more] seriously.").

41. *Id.* (noting that over the last ten years, an "increasing number of victims of sexual assault, attempted homicide, and survivors of murder victims are requesting the opportunity to meet the offender to express the full impact of the crime upon their life . . . and to gain a greater sense of closure so that they can move on with their lives.").

42. *See* UMBREIT, COATES, VOS, & BROWN *infra* note 201, at 3 ("The process of victim sensitive dialogue in crimes of severe violence should be entirely voluntary for all parties."); *see also* Hodak, *infra* note 196, at 1102. The need to participate, surprisingly, does grow to exist in offenders. For example, in a 2002 VOM study involving offenders in cases of severe violence, thirty-six percent of the offenders took steps to try and meet with their victims or family members. UMBREIT, COATES, VOS, & BROWN *infra* note 201, at 7. "In most cases [VOM occurred] many years after the crime." *Id.* at 1.

43. Patrick Glen Drake, Comment, *Victim-Offender Mediation in Texas: When "Eye for Eye" Becomes "Eye to Eye,"* 47 S. TEX. L. REV. 647, 655 (2006) (quoting Restorative Justice Restructures Victims and Offenders Lives: What is Restorative Justice?, 5 Corrections Prof., Mar. 24, 2000, available in LEXIS, Legal News Library).

society's needs and a prosecutor's objectives when it comes to hate crimes pursuit. Further, this section examines shortcomings of society's one-dimensional approach to punishing hate crimes. Part IV considers the current federal hate crimes laws, followed by a brief comparison between current and proposed law. This section concludes with a discussion on how proposed law can potentially overcome state obstacles. Part V considers an adjustment to proposed laws. That is, it suggests that Congress incorporate VOM into hate crimes penalties by (1) amending current legislation to include public funding for departments of corrections VOM programs; and, (2) developing guidelines and procedures for the Bureau of Prisons to accommodate VOM use within the federal penal system. This comment evaluates the benefits of VOM from three perspectives: first, how folding VOM into the judicial process can potentially entice prosecutors to pursue hate crimes because in at least cases of non-violent hate, a conviction is assured; next, how the restorative justice approach can further cure the actual damage from both non- and severely-violent hate crimes; and finally, how offender confrontation offers more of a long-term cure than the current incarceration-only approach. Finally, in Part VI, we return to Megan Williams and West Virginia State Prosecutor Brian Abrahams, and consider their circumstances as a way to model the question of hate crimes management for the larger legal community and general public.

Though it is tempting to pursue the question of whether hate crimes are necessary, such is not considered here. Similarly, this comment does not contemplate which subgroups should be protected by hate crimes legislation, whether hate crimes should be federalized, or whether they violate the First Amendment. Finally, because it merits a serious, stand alone discussion, this comment will not address the proposed law's severe restrictions on hate crimes evidence.⁴⁴

44. See H.R. 1592, 110th Cong., § 6(a) (2007) and S. 1105, 110th Cong., § 7(a) (2007) (proposing that hate crimes law, as reflected under what will be 18 U.S.C. § 249(d), bars introducing expressions and associations as substantive trial evidence unless they specifically relate to the offense or properly can be used to impeach). Expressions are the cornerstone of evidence used to prove motive in hate crimes litigation. See, e.g., John Ip, *Debating New Zealand's Hate Crime Legislation: Theory and Practice*, 21 N.Z. UNIV. L. REV. 525, 588 (2005) ("The most likely source of evidence of a hateful motive will be an offender's contemporaneous

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These issues are, and will continue to be, the subject of much scholarly scrutiny; they are, however, beyond the scope of this analysis.

II. MOTIVE, A PROSECUTOR'S BURDEN

"The difficulty with hate crimes law is the reluctance of authorities to acknowledge that a hate crime has occurred and use the laws that are available to address the problem. Proof of a hate crime is difficult so the authorities tend to avoid charging crimes under the law." ~Respondent, Hate Crimes Survey⁴⁵

speech."); *infra* note 177. However, consider the implications of restricting expressions, as proposed, on a case like James Byrd, Jr.'s, who was tortured and killed because of his race. H.R. REP. NO. 110-113, § Current Law and the Need for Expanded Jurisdiction to Fulfill Federal Responsibilities of Support, Cooperation, and Backstopping (2007), reprinted in 2007 WL 1306354 [hereinafter H.R. REP. 110-113, § Current Law]. Prosecutors used non-contemporaneous expressions such as pictures, tattoos, and writings as evidence of the racist beliefs that, according to prosecutors, prompted Byrd's killing. *F.B.I. Expert Ties Blood to Jasper Defendants*, N.Y. TIMES, Feb. 20, 1999, available at <http://query.nytimes.com/gst/fullpage.html?res=9C02EED6143DF933A15751C0A96F958260> [hereinafter FBI Expert]. Restricting expressions poses severe evidentiary risks to hate crimes prosecution.

45. *Hate Crimes Survey*, at Question 8, Comment 29 (Mar. 10, 2008) (on file with author), available at http://www.surveymonkey.com/sr.aspx?sm=wi2IIKx_2bsA_2bdqBDuYnbfo9eeVw7ty7qxwIXy_2bfX9KG0_3d [hereinafter Hate Crimes Survey]. In conjunction with this comment, an internet survey was published on public attitudes towards hate crimes legislation. One hundred and six people participated in the survey; only one hundred and five people completed all questions, and were included in the summary contained in this comment. This voluntary comment was given in response to the question:

Given the purpose you just chose in Question 6 (WHAT IS THE PURPOSE OF HATE CRIME LAW? Rank the sentences from "Best Description" to "Worst Description" according to what you believe to be the ACTUAL purpose of hate crime law), do you think hate crime laws are working?"

Id.

Most questions requested a voluntary comment. Only one question (Question 14) required a comment. *Id.*

The mere prospect of having to prove an amorphous element like motive may deter a prosecutor from seeking hate-based charges.⁴⁶ While motive is the linchpin of successful bias litigation,⁴⁷ it is fundamentally different than a prosecutor's normal proof burden. Criminal liability normally focuses on intent—the desire to commit the crime—not motive—the reason why the crime was committed.⁴⁸ Hate crimes are the exception to the law's traditional criminalization of *what* an offender is doing versus *why* he is doing it.⁴⁹ This highly subjective variation is arduous to prove (1) without some confession or admission by the offender;⁵⁰ (2) when relying on the complex and

46. James Morsch, Comment, *The Problem of Motive in Hate Crimes: The Argument Against Presumptions of Racial Motivation*, 82 J. CRIM. L. & CRIMINOLOGY 659, 672 (1991). Of motive, one prosecutor said: “[t]here are so many crimes from my standpoint that I don't understand why they happened, but I know they did. And then to have to take that crime one step further and show, 'What were you thinking? Why did you do this?' That can be an unbelievable burden.” McPhail, *supra* note 15, at 32.

47. Morsch, *supra* note 46, at 672; McPhail, *supra* note 15, at 33 (discussing why prosecutors would bypass bias charges, McPhail says “[t]he crucial piece for prosecutors quickly became motive.”). *Id.* at 32.

48. Morsch, *supra* note 46, at 665. Intent is “the desire that a particular consequence follow from one's actions.” *Id.* See Carissa Byrne Hessick, *Motive's Role in Criminal Punishment*, 80 S. CAL. L. REV. 89, 93 (2006). Morsch makes the clear distinction:

Consider the case of an individual apprehended in the process of breaking into a bank. The individual likely intends to steal money from the bank's safe. The individual's motive may be any number of possible things, from the accumulation of wealth for wealth's sake to beneficence [sic] towards a needy friend. While the law traditionally imposes criminal liability on the individual's intent to rob the bank, it does not make judgements [sic] about the “good” or “bad” motives behind that intent.

Morsch, *supra* note 46, at 665.

49. See Susan B. Gellman, *Agreeing to Agree: A Proponent and Opponent of Hate Crime Laws Reach for Common Ground*, 41 HARV. J. ON LEGIS. 421, 426-27 (2004) [hereinafter *Agreeing to Agree*] (explaining the different roles that purpose and intent play when compared to motive). “A purpose or intent is not an opinion on a social or political issue; bigotry (the motive for bias crime), noxious though it may be, is.” *Id.* at 427.

50. Read, *supra* note 16, at 472-73. Absent a self-incriminating statement like the use of a racial slur, “prosecutors generally will not charge the hate enhancement.” *Id.* Of course, that evidence must come from the very party who can

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costly approach of litigating a purely circumstantial-based case;⁵¹ or, (3) when a prosecutor has to tease the hate motive out from multiple, co-mingled motives for a crime.⁵² Consequently, prosecutors develop exacting standards for what constitutes a hate crime, and avoid litigation for all but the purest of cases.⁵³

A. Proving Motive Without a Self-Incriminating Statement

Without a confession from the defendant, proving the reason for his or her crimes may be problematic.⁵⁴ In fact, self-incrimination is such a critical source of motive evidence that prosecutors generally avoid a hate crime charge in its absence.⁵⁵ Naturally, a defendant's confession, admission, or perhaps contemporaneous statement is a prosecutor's smoking gun.⁵⁶ Few defendants, however, are that accommodating about providing their motives.⁵⁷ The *Williams* case is, again, on point. Following months of public pressure, just one of the seven defendants was charged with a hate crime.⁵⁸ That defendant

invoke the Fifth Amendment privilege against self-incrimination. Morsch, *supra* note 46, at 667.

51. Absent an explicit admission, a prosecutor must fall back on circumstantial evidence. Morsch, *supra* note 46, at 667. *See generally* Peter Finn, Bias Crime: *Difficult to Define, Difficult to Prove, New Laws and Techniques That Are Putting Violent Offenders Behind Bars*, 3 CRIM. JUST. 19, 21-22 (1998) (discussing how two state hate bias units showed that in some cases they must perform extensive preliminary investigation to determine whether a crime is hate related).

52. Morsch, *supra* note 46, at 667-68 ("The exact contours of motive, accordingly, will be within each individual's knowledge alone as personality and psyche are inherently subjective.").

53. McPhail, *supra* note 15, at 37. "Prosecutors have adopted high standards for what constitutes a hate crime thereby narrowing the possible cases to be charged as bias crimes." *Id.* "Accepting only 'pure' cases of hate once again limits the cases that can be considered for enhancement." *Id.* at 33.

54. Urich, *supra* note 21, at 1514.

55. Read, *supra* note 16, at 472-73.

56. *Id.* at 461.

57. *Id.* at 462.

58. *See* Shaya Tayefe Mohajer, *One Charge of Hate Crime Filed WVU Expert Says Indictment in Torture Case is a Winnable Test of Law*, CHARLESTON GAZETTE & DAILY MAIL, Feb. 7, 2008, at 12A, available at 2008 WLNR 2500330.

made an incriminating statement about her motive.⁵⁹ The remaining six also made statements, but because they were reportedly racially charged but not self-incriminating, none received hate charges.⁶⁰ Self-incrimination seemed to be the single determinative factor defining whom Abrahams chose to prosecute for hate, versus whom he did not.⁶¹ Given that “[t]he most likely source of evidence of a hateful motive will be an offender’s contemporaneous speech,”⁶² Abraham’s pursuit of the “winnable” charge⁶³ was, in at least this regard, somewhat understandable.

B. Proving Motive through Circumstantial Evidence

Proving a case through circumstantial evidence can be quite difficult given the inherent ambiguity of motive.⁶⁴ In cases where a defendant makes racially charged statements, a jury may remain unconvinced that he or she committed the crime in whole or part because of bias towards a protected class, and may seek to subsidize a verdict with circumstantial evidence.⁶⁵ Alternatively, in cases where a defendant makes no explicit admission, a prosecutor must turn to circumstantial evidence to prove his or her case.⁶⁶ Under either scenario, proving the defendant’s hate-based state of mind during the crime is complicated.

59. *Legal Circus*, *supra* note 12 and accompanying text.

60. *See* Mohajer, *supra* note 58 (“[O]ther defendants in the case also allegedly used the racial epithet [nigger] but those crimes were committed for other reasons.”).

61. *Id.*

62. John Ip, *Debating New Zealand’s Hate Crime Legislation: Theory and Practice*, 21 N.Z. UNIV. L. REV. 525, 588 (2005).

63. Mohajer, *supra* note 58 (“This one particular charge in this one particular case is winnable.”).

64. Morsch, *supra* note 46, at 667.

65. Read, *supra* note 16, at 473 (“Once alerted by the actor’s statement, prosecutors will seek to introduce evidence supporting the actor’s motive, or absence of other motives.”).

66. Morsch, *supra* note 46, at 667.

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Notwithstanding its ambiguity, the problem with circumstantial evidence is that it is costly to unearth.⁶⁷ Take, for example, the case of James Byrd, Jr. Mr. Byrd, who was African-American, was targeted, tortured, and killed solely because of his race.⁶⁸ After accepting a ride, his three white assailants drove him to a secluded area, beat him, chained him to their truck, and sped down a bumpy road with Byrd attached to their vehicle.⁶⁹ Mr. Byrd's "severed head, neck and right arm were discovered about a mile from where his shredded torso was dumped. A trail of blood, body parts and personal effects stretched for two miles."⁷⁰ The case was investigated through a joint state-federal venture.⁷¹ FBI experts analyzed DNA evidence from bloody clothing found in one defendant's apartment, and on the tires of the truck used in the crime, and linked both to Mr. Byrd.⁷² They also analyzed cigarette butts and beer bottles found at the crime scene, and tied them to the three defendants in the case.⁷³ Local law enforcement collected other circumstantial evidence such as pictures of one defendant's tattoos and writings, and other physical evidence that exemplified the defendant's racist beliefs, and which, according to prosecutors, prompted him to kill Byrd.⁷⁴ The investigation that

67. See 153 Cong. Rec. H4421-03 (daily ed. May 3, 2007) (statement of Rep. Stark) (discussing how states often lack resources to investigate and prosecute hate crimes). Said of the Albany County Sheriff's Department, which investigated the case of Matthew Shepard, "[w]e believe that justice was served, but not without cost. We have been devastated financially, due to the expense incurred in bringing Matthew's killer to justice." H.R. REP. NO. 110-113 n.10 (2007). The investigation was so costly, it resulted in the layoffs of five Albany County sheriffs. *Id.*

68. H.R. REP. NO.110-113, § Current Law, *supra* note 44.

69. *3 Whites Indicted Dragging Death of Black Man in Texas*, CNN NEWS, July 6, 1998, <http://www.cnn.com/US/9807/06/dragging.death.02/index.html> ("Authorities believe that Byrd, 49, accepted a ride from the suspects as he walked home from a niece's bridal shower.").

70. *Id.*

71. H.R. REP. NO.110-113, § Current Law, *supra* note 44 ("From the time of the first reports of Mr. Byrd's death, the FBI collaborated with local officials in an investigation that led to the prompt arrest and indictment of three men on State capital murder charges.").

72. *F.B.I. Expert*, *supra* note 44.

73. *Id.*

74. *Id.*

resulted in two of Mr. Byrd's three killers being sentenced to death, and a third sentenced to life,⁷⁵ cost nearly \$300,000 in federal forensic, investigative, and prosecutorial assistance alone.⁷⁶

C. Proving a Hate Motive When There Are Multiple Motives

To further muddle the problem's complexity, there is usually more than one motive behind a hate crime.⁷⁷ "A mind is not easily divided, and it may well be that the actor does not know exactly why he or she selected the victim."⁷⁸ When a defendant's actions suggest only one motive, prosecutors have a better chance of conviction.⁷⁹ In a majority of hate crimes cases, however, motive is unclear. When crimes are the result of many motives,⁸⁰ prosecutors have virtually no chance of sifting free the evidence that proves hate-based harm.⁸¹

The burden of proof puts severe limits on the volume of charges and convictions obtained.⁸² Not only are prosecutors fearful of "cluttering" their cases with this new case-in-chief burden of "motive," they are mindful of dividing their juries⁸³ with theories of hate juxtaposed against theories of general criminal behavior. If the prosecutor is able to cleanly prove the underlying case but fails to prove the bias element, in the public's eye, the case will seem as a

75. Jim Yardley, *The 2000 Campaign: The Texas Record; Bush Stance on Bias Crimes Emerges as Campaign Issue*, N.Y. TIMES, Oct. 13, 2000, available at <http://query.nytimes.com/gst/fullpage.html?res=9F06E7D8153FF930A25753C1A9669C8B63>.

76. H.R. REP. NO. 110-113, § Hate Crimes Based on Sexual Orientation, Gender, Gender Identity, or Disability (2007), available at 2007 WL 1306354.

77. McPhail, *supra* note 15, at 33.

78. Read, *supra* note 16, at 474.

79. Morsch, *supra* note 46, at 671.

80. McPhail, *supra* note 15, at 33.

81. Morsch, *supra* note 46, at 671-72 ("Conversely, when circumstantial evidence indicates the existence of mixed motives, the prosecutor's burden of proof can be nearly impossible.").

82. *Id.* at 660.

83. McPhail, *supra* note 15, at 36.

loss.⁸⁴ Of course, if the prosecutor charges and fails using a straight hate crimes law, and not an enhancement provision, his or her loss will be actual.⁸⁵ Either scenario adds a risk to a prosecutor's case-in-chief that some would rather bypass if advancing a social policy on hate-based crime is all that is at stake.⁸⁶

III. AVOIDANCE, SOCIETY'S BANE

A. *The Unrequited Harm*

Both the victim and his or her class are left vulnerable following a hate crime.⁸⁷ One must be mindful that "[h]ate crimes involve the purposeful selection of victims for violence and intimidation based on bias against their perceived attributes."⁸⁸ This is important for two reasons. First, an offender selects a victim because of his or her class and withdrawing from one's race or national origin, for example, obviously is not an option.⁸⁹ Next, those with similar characteristics as the victim (for example, blacks who all live in a neighborhood where a black person was victimized because of hate) could very

84. Gregory R. Nearpass, Comment, *The Overlooked Constitutional Objections and Practical Concerns to Penalty-Enhancement Provisions of Hate Crime Legislation*, 66 ALB. L. REV. 547, 570 (2003).

85. After stringing together a few losses, a prosecutor can quickly become disenchanted with hate crime pursuit and stick with the mainstream or underlying charge. *Id.*

86. One attorney in McPhail's study who opposed the law said that if he could be politically correct "and gain an advantage in a jury case," he would pursue the charge. McPhail, *supra* note 15, at 32. But, if he had to lose an advantage or "weaken my chances at a jury case to be politically correct," he would reject political correctness. *Id.*

87. Uhrich, *supra* note 21, at 1506-07 (noting that feelings of isolation exist because victims "carry with themselves the reason for their victimization," and that "feeling is further compounded when law enforcement fails to prosecute the perpetrator.").

88. H.R. REP. NO. 110-113, § Overview (2007), available at 2007 WL 1306354.

89. "[H]ate crime . . . is seen as a societal concern because the victim is selected not because of a personal animus, but because of a categorization over which the victim has no control and consequently has no warning that he or she has been selected as a target." Read, *supra* note 16, at 457.

easily perceive an attack on one member as an attack on all members, and possibly experience anger, fear, and intimidation at pace with the victim.⁹⁰

In many cases, the victim and his or her class feel underserved when a prosecutor bypasses a hate charge in lieu of a more traditional offense. This is because such a choice puts the focus on the *manifestation* of the hate but not the real harm, which seems to be *acting on the hate itself*. Take, for example, one Texas case where two white teenagers beat a third, Latin male teenager into unconsciousness while yelling ethnic slurs.⁹¹ Although prosecutors charged the perpetrators with aggravated assault, which carried a maximum sentence of life imprisonment, prosecutors did not file hate crimes charges because such charges would not increase the punishment range for the teens.⁹² The community vocalized its outrage at the prosecutors' decision.⁹³ The mere charging of the underlying crime did not cure the real harm suffered by either the Latin teen, victimized by the assault, or by the teen's community, victimized by the hate.⁹⁴

Hate-based victimization remains a constant threat when prosecutors "sanction" it through silence, and potentially send the message that the victim class is undervalued.⁹⁵ One might suggest that the same is true for activists in the *Williams* case, who made it clear that by bypassing hate crimes and instead levying proxy-charges

90. 57 AM. JUR. 3D *Proof of Facts* § 1 (2000) [hereinafter *Proof of Facts*] (noting that hate crimes harm is not limited to the victim, but can extend to "those who share the same characteristic in the community," which can see an attack on another as an attack on themselves).

91. McPhail, *supra* note 15, at 30.

92. *Id.*

93. *Id.*

94. *See generally id.* at 30 (discussing how civil rights groups insisted that the crime be charged as a hate crime even though prosecutors explained that a hate charge would add no extra penalty).

95. *See Uhrich, supra* note 21, at 1507-08 ("It is likely that the message of tolerance is reinforced by the community only when state officials prosecute a hate criminal. One must wonder, however, what message is sent when the state or local government refuses to prosecute a perpetrator of a violent hate crime while the federal authorities step in to do so. It would seem that this scenario would tend to reinforce the message that the community does not value minorities.").

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for all but one of Megan's antagonists, society's wounds were left to weep:⁹⁶ "I think that it is good that we got one but [the defendant who was charged with a hate crime] wasn't there hating by herself."⁹⁷ Failing to prosecute such cases as a serious breach of civil rights robs the stakeholders of the therapeutic effect of a public trial⁹⁸ on the real issue: the criminal manifestation of bias-based hate.

B. The Inadequate Cure

The criminal judicial system's approach of determining blame and administering punishment is "a contest between the offender and the state."⁹⁹ The system "has done an excellent job of 'keep[ing] crime victims, the community, and offenders from deciding how society will respond to crime."¹⁰⁰ All but three states statutorily respond to hate crimes with incarceration alone, but mere punishment "fails to provide the sense of justice originally intended as a basis for establishing hate

96. *Id.*; see also *Race Relations*, *supra* note 21, at 513 (suggesting that law enforcement, for example, contributes to the problems of hate crimes when it fails to charge individuals who select their victims because of race, gender, religion or sexual orientation because offenders need to know their actions will not be tolerated, and society needs that identification to heal the wounds that divide it).

97. Cash Michaels, *Megan Case: Hate Crime Suspect Pleads Guilty*, N.Y. AMSTERDAM NEWS, Vol. 99, Issue 8, Feb. 14, 2008, at 1, available at 2008 WLNR 4114909 [hereinafter *Megan Case*].

98. Yale Law Journal, *Discretion to Prosecute Federal Civil Rights Crimes*, 74 YALE L.J. 1297, 1299 (1965) [hereinafter *Discretion to Prosecute*] ("[D]isclosing the Government's evidence in a public trial, can have an educative and therapeutic effect upon the entire community.") (quoting U.S. COMM'N ON CIVIL RIGHTS, JUST. REPORT (Book 5) 63 (1961) available at <http://www.law.umaryland.edu/marshall/usccr/documents/cr11961bk5.pdf>).

99. Wellikoff, *supra* note 27, at Part I (quoting Loren Walker, *Conferencing: A New Approach for Juvenile Justice in Honolulu* (June 2002), <http://www.restorativepractices.org/Pages/lwalker02/html>) (emphasis added); see also *id.* at Part V.A. ("Punishment is not for the benefit of the victims. Our society exacts punishment in response to the notion that crime is a violation against the State and it creates a debt to the State.") (quoting Marty Price, *Crime and Punishment: Can Mediation Produce Restorative Justice for Victims and Offenders?*, VICTIM-OFFENDER MEDIATION ASS'N, <http://www.vorp.com/articles/art.html> (last visited Nov. 9, 2008)).

100. Shenk, *supra* note 25, at 186.

crimes legislation.”¹⁰¹ Victims rarely can express to the offender how the crime affected their lives;¹⁰² society does not have the benefit of a response that deters recurrence;¹⁰³ and, the offender lacks a mental gatekeeper like VOM, leaving him free to rationalize his behavior.¹⁰⁴ Within its current framework, hate crimes legislation does not meet the needs of the stakeholders in a hate crime.¹⁰⁵

The traditional approach to addressing hate crimes is inadequate for the victim because, poised as a “punisher,” the judicial system offers no solace from the effects of that crime.¹⁰⁶ Victims are not solely seeking revenge or punitive retribution.¹⁰⁷ Consequently, retribution is inadequate because through it, victims’ losses cannot be restored, their questions cannot be answered, their fears cannot be relieved, and they cannot “make sense of their tragedy or heal their wounds.”¹⁰⁸ Even just punishment fails where victims rarely can

101. See *supra* note 25. See also Abraham Abramovsky, *Bias Crime: A Call for Alternative Responses*, 19 FORDHAM URB. L.J. 875, 888 (1992) (“Indeed, to most effectively combat the problem of bias crime, it is apparent that mere punishment after an offense has been committed is insufficient.”). Only three states, Colorado, Illinois, and New Mexico, have restorative justice directly imbedded into their hate crime sentencing schemes. COLO. REV. STAT. § 18-9-121 (Supp. 2003); 720 ILL. COMP. STAT. ANN. 5/12-7.1 (West 2002); N.M. STAT. ANN. § 31-18B-3 (West 2003).

102. Mark S. Umbreit & William Bradshaw, *Victim Experience of Meeting Adult vs. Juvenile Offenders: A Cross National Comparison*, 61 DEC. FED. PROBATION 33, 33 (1997) [hereinafter *Cross National Comparison*].

103. See Shenk, *supra* note 25, at 192 (offering a restorative justice alternative that will provide an offender with skills and confidence to make an impact on the crime and aid in future deterrence).

104. Wellikoff, *supra* note 27, at Part III.A.b (quoting American Bar Association Endorsement of: Victim-Offender Mediation/Dialogue Programs, Part 1 (Aug. 1994) reprinted in Victim-Offender Reconciliation Program Information and Resource Center, <http://vorp.com/articles/abaendors.html> (last visited Nov. 9, 2008)) (suggesting VOM in addition to traditional punishment because VOM subverts an offenders ability to defend and rationalize his criminal actions and thus makes the harm he caused “no longer an abstraction but very real.”).

105. Shenk, *supra* note 25.

106. Wellikoff, *supra* note 27.

107. *Id.* at Part V.A.; see also *infra* note 232 and accompanying text.

108. Shenk, *supra* note 25, at 185-86 (quoting Marty Price, *Crime and Punishment: Can Mediation Produce Restorative Justice for Victims and*

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provide thoughts on how their cases should be resolved.¹⁰⁹ Given this, when retribution is the single response to a criminal event, punishment is inadequate because it only affects the offender and entirely bypasses the victim's need for closure and relief.¹¹⁰

The traditional approach to addressing hate crimes is inadequate for the community because society requires some response that will aid in future deterrence.¹¹¹ Hate crimes not only reflect deeply-ingrained hatred for the victim's group, they also affirm the offender's belief of inherent superiority of his or her own group.¹¹² In this way, many offenders "detach themselves by denying responsibility" because of their supposed superiority.¹¹³ Traditional punishment offers no mechanism by which offenders must acknowledge their wrongdoings and cease that rationalization.¹¹⁴ VOM directly subverts this process because it goes beyond making a victim's harm real.¹¹⁵ It strikes at the roots of bias, the instilled notions of hatred, and the misconceptions of "difference."¹¹⁶ This awareness cycle is critical to the process of deterrence and recidivism,¹¹⁷ yet is wholly absent in the current incarceration model. Pure incarceration is not likely to convert the offender into a contributing member of society.¹¹⁸

Offenders?, VICTIM-OFFENDER MEDIATION ASSOCIATION, <http://www.vorp.com/articles/crime.html> (last visited Nov. 9, 2008)).

109. *Id.* (quoting CTR. FOR RESTORATIVE JUSTICE & PEACEMAKING, RESTORATIVE JUSTICE FOR VICTIMS, COMMUNITIES AND OFFENDERS 2 (1996), available at <http://ssw.che.umn.edu/rjp/resources/documents/cctr96a.pdf> (last visited Oct. 12, 2001)).

110. Wellikoff, *supra* note 27, at Part V.A.

111. Shenk, *supra* note 25.

112. Abramovsky, *supra* note 101.

113. Wellikoff, *supra* note 27, at Part III.A.b.

114. *Id.*

115. *Id.*

116. Abramovsky, *supra* note 101 (highlighting failures in the current approach to strike at the roots of the problem).

117. *See generally supra* note 26.

118. Shenk, *supra* note 25, at 189 (quoting Marty Price, *Can Mediation Produce Justice?*, ADR Report, Oct. 29, 1997, at 6, available at <http://www.vorp.com/articles/justice.html>).

Unlike ordinary crimes, hate crimes are “driven by characteristics inherent to the personality of the offender. They are not crimes of greed or lust, but rather of personal prejudice, denoting the underlying attitudes and values of individual offenders.”¹¹⁹ The traditional sentencing paradigm of incarceration is, alone, too narrow a response to address a victim’s, the community’s, or society’s needs.¹²⁰ Though strict penalties are a necessary part of the overall solution, that remedy must not be solely relied upon to address criminalized bias.¹²¹ “Disciplines outside of the legal system must be involved in the effort to eradicate bias crime completely,”¹²² so that the needs of victims of hate crimes become the focus, and the overarching goals for hate crimes legislation are best met.¹²³

IV. THE PATH TO A PROSECUTOR’S CURE: SHEPARD’S LAW

Since the enactment of the Interference with Federally Protected Activities Act (IFPAA) of 1968,¹²⁴ the federal government has developed an extensive war chest to advance hate crimes litigation and shield citizens from interference with working, attending school, serving on a jury, or performing other protected activities, and based on their membership in one of four protected classes: race, color, religion, or national origin.¹²⁵ However, because states can access

119. *Id.* at 213.

120. *Id.* at 185-86.

121. *Id.* (noting that inflicting punishment does not restore the victim’s losses, and contrasting it to restorative justice, which seeks to not only engage the victim but turn to the community and the offender to examine ways that the offender can directly repair victim and societal harm).

122. Abramovsky, *supra* note 101, at 908.

123. Shenk, *supra* note 25, at 213.

124. Interference with Federally Protected Activities, H.R. 3516, 90th Cong. (1968) (codified at 18 U.S.C. § 245 (1996)).

125. See H.R. REP. 110-113, § Current Law, *supra* note 44, at 9-10 (discussing the invaluable investigative expertise the federal government offers in its identification and proof of bias-motivated violence). “The resources, forensic expertise, and civil rights experience of the FBI and the Department of Justice provided assistance of great value to local law enforcement officials.” *Id.* “Through this cooperation, State and Federal law enforcement officials have been able to bring the perpetrators of hate crimes swiftly to justice.” *Id.*

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federal investigative and prosecutorial resources for a local hate crime if—and only if—that crime also falls within these federal activity/class parameters, many state hate crimes do not qualify for this federal aid.¹²⁶ Proposed federal legislation seeks to broaden the federal/state partnership by removing the protected activity limits and expanding the list of protected classes.¹²⁷ The potential net result is that prosecutors could more thoroughly vet and litigate the issue of motive, and thereby expand the body of law surrounding hate crimes and motive proof. The *Williams*' case failed to qualify for federal aid; as analyzed below, Shepard's Law could have had a profound impact on the prosecution of hate crimes committed against Megan.

A. The States' Problem with Current Federal Hate Crimes Laws

In 1968, Congress enacted the IFPAA,¹²⁸ and it is still the premier federal hate crimes statute today.¹²⁹ The IFPAA amended Title 18 of

126. See generally H.R. REP. NO. 110-113, § Overview (2007), available at 2007 WL 1306354 (noting that concurrent federal jurisdiction is necessary to permit devotion of federal resources to a state). Several state cases where racially motivated violence was not in doubt nonetheless led to acquittals because prosecutors could not meet the "federally protected activity" requirement. *Id.*

127. See *id.* The House report considered how both expanding scenarios under which hate crimes could be prosecuted and allowing prosecution for bias-motivated, violent, injurious crimes based on the victim's race, color, religion or national origin, "will permit the Federal Government to provide assistance to State law enforcement in a wider range of circumstances, and criminalize instances of vicious bias-motived [sic] crimes that presently fall outside the reaches of the Federal criminal laws." *Id.* The House report goes on to address scope expansion through removal of federally protected activity limits. *Id.*; see also H.R. 1592, *supra* note 30, § 3(a)(1)(C); S. 1105, *supra* note 30, § 4(a)(1)(C) (redefining federal limits and removing protected activity proscriptions).

128. *Supra* note 124.

129. See H.R. REP. 110-113, § Current Law, *supra* note 44, at 7 ("Section 245(b) . . . has been the principal Federal hate crimes statute since its enactment in 1968."). Including section 245, there are eight federal hate crimes laws in existence today. The remaining laws are included because they make up a web of statutes that pass as our current body of federal hate-based law, very narrowly protecting citizens as they worship, vote, and go to school. See Fair Housing Act of 1968, 42 U.S.C. § 3631 (1996) (establishing that it is a crime to interfere with a person selling, purchasing, or renting property because of her race, color, religion, gender, handicap, national origin, or family status); Higher Education Amendment of 1992, 20 U.S.C. § 1092 (2002) (amending existing federal educational law to require institutes of

the United States Code to include section 245, prescribing penalties for “certain acts of violence or intimidation” based on a victim’s race, color, religion, or national origin.¹³⁰ Bias-based interference while attending a public school, enjoying a federal benefit or assistance, working for the federal government, serving as a juror, or enjoying public accommodations is punishable by any combination of fines and/or one year to life imprisonment, or death.¹³¹ The penalty depends on the severity of the offense, the weapons used, and the harm to the victim.¹³² Through the IFPAA, the federal government not only developed resources and expertise in proving hate crimes, it has also made invaluable inroads into criminal networks to prove bias-

higher learning to collect data on victim selection based on race, gender, religion, sexual orientation, ethnicity or disability, in accordance with 28 U.S.C. § 534); Freedom of Access to Clinic Entrances Act of 1994, 18 U.S.C. § 248 (1994) (protecting and promoting public safety and health by criminalizing certain acts to injure or intimidate persons seeking reproductive health services); Violence against Women Act of 1994, 42 U.S.C. § 13981(a) (1994) (protecting victims of gender motivated crimes, and subsequently held unconstitutional for its failure to impact interstate commerce in *United States v. Morrison*, 529 U.S. 598, 619 (2000) (holding that a section 13981 claim cannot be sustained under the commerce clause because Congress lacks the constitutional authority to enact the civil remedy)); Church Arson Prevention Act of 1996, 18 U.S.C. § 247 (2002) (making it a crime to damage religious structures for racial or ethnic reasons, and not just religious reasons as originally defined by the Act); Hate Crimes Statistics Act of 1990, 28 U.S.C. § 994 (2006) (charging the Attorney General to acquire data about crimes based on race, religion, sexual orientation, and ethnicity, among other things); Violent Crime Control and Law Enforcement Act of 1994, 28 U.S.C. 994 (2006) (directing the United States Sentencing Commissions to promulgate guidelines enhancing the penalties for federal crimes committed because of a person’s “actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation” by at least three levels).

130. H.R. 3516, *supra* note 128.

131. 18 U.S.C. § 245(b)(2) and (b)(5), *supra* note 124. A defendant is exposed to a minimum of a fine and/or one year imprisonment. *Id.* § (b)(5). If bodily injury results, or the biased act involves dangerous weapons or explosives, the penalty is a fine and/or up to ten years imprisonment. *Id.* Finally, if the victim dies, or the act involves kidnapping, sexual abuse, or an attempt to kill, the penalty is a fine and/or up to life imprisonment, or death. *Id.* Note, however, that § 245, *supra* note 124, 18 U.S.C. § 241 (1996), and 18 U.S.C. § 247 (2002) are the subject of proposed legislation to redact death as punishment. *See* Federal Death Penalty Abolition Act of 2007, S. 447, 110th Cong. (2007).

132. 18 U.S.C. § 245(b)(5).

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motivated violence.¹³³ Consequently, the federal government is well positioned to provide “training and assistance to ensure that hate crimes are effectively investigated and prosecuted.”¹³⁴

Given the narrow scope of federal law, however, federal resources are beyond states’ reach when hate crimes fall outside of IFPAA’s preclusive parameters, and many do.¹³⁵ The *Williams* case study is an effective example: in addition to being a crime motivated by hate, if Prosecutor Abrahams wished to access federal resources, the IFPAA required a residue of a federally protected activity for concurrent state/federal jurisdiction.¹³⁶ Though Megan was clearly a victim of hate, there were no evidentiary footprints of activities protected under government law.¹³⁷ IFPAA’s precise and narrow scope barred Abrahams from drawing down federal resources to aid in the investigation of the hate crimes committed against Ms. Williams.

Consider as another example the notorious murder of Urban League President Vernon Jordan, by a white supremacist.¹³⁸ There, Jordan was shot by a man who later admitted targeting him to advance a crusade to eradicate blacks, Jews, and “race mixers.”¹³⁹ While jurors found sufficient motive for a hate-based killing, they did not believe the shooting was done to interfere with Jordan’s use of the hotel into which he was walking when he was killed.¹⁴⁰ Thus, the shooter escaped hate crimes prosecution because hate-based justice

133. H.R. REP. 110-113, § Current Law *supra* note 44, at 8-9. *See supra* text accompanying note 125.

134. 153 CONG. REC. S11647-01, *supra* note 10, at S11647-48.

135. H.R. REP. NO. 110-113, § Overview, at 6-8 (2007), *available at* 2007 WL 1306354. Federal jurisdiction per section 245 requires proof that the crime was committed with the intent to interfere with the victim’s federally protected activity. *Id.* The House report stated that in limited circumstances, the Department of Justice found a need to backstop local efforts, but could not because of deficiencies under the current law. *Id.*

136. 153 Cong. Rec. H4209-01 (daily ed. Apr. 30, 2007) (statement of Rep. McGovern), 2007 WL 1245659 (noting that “[t]hese grants are only available when a federal jurisdictional basis exists.”).

137. *See supra*, Part I.; *see also* 18 U.S.C. § 245(b)(2) (2008) (listing all federally protected activities).

138. H.R. REP. 110-113, § Current Law, *supra* note 44, at 10.

139. *Id.*

140. *Id.*

hinged on the artificial distinction of “whether a racially motivated assault occur[ed] on a public sidewalk as opposed to a private parking lot across the street.”¹⁴¹ The *Williams* and *Jordan* cases show how the net effect puts federal resources beyond state access.

States almost exclusively prosecute our nation’s incidents of criminal hate.¹⁴² All states except Georgia and South Carolina criminalize certain instances of bias-hate as either a stand alone charge¹⁴³ or sentencing enhancement,¹⁴⁴ and the combined states prosecute an “overwhelming majority” of criminal hate cases.¹⁴⁵ In

141. *Id.*; see also *supra* note 127 and accompanying text.

142. See H.R. REP. 110-113, § Current Law, *supra* note 44, at 9 (“[A] large majority of hate crimes prosecutions will continue to be brought in State court under State law.”).

143. See COLO. REV. STAT. § 18-9-121 (West 2003); CONN. GEN. STAT. § 53a-181j (2003); IDAHO CODE ANN. § 18-7902 (1997); 720 ILL. COMP. STAT. ANN. 5/12-7.1 (West 2002); IND. CODE ANN. § 10-13-3-1 (West 2003); KAN. CRIM. CODE ANN. § 21-4003 (West 2003); ME. REV. STAT. ANN. tit. 5, § 4684-A (2003); MD. CODE ANN., CRIM. LAW § 10-304 (2002); MASS. GEN. LAWS ANN. ch. 265, § 39 (West 2002); MICH. COMP. LAWS ANN. § 750.147b (West 2003); MINN. STAT. ANN. § 609.749 Subd. 3 (West 2003); MO. ANN. STAT. § 557.035 (West 2000); N.J. STAT. ANN. § 2C:16-1 (West 2003); N.Y. PENAL LAW § 485.05 (2004); N.D. CENT. CODE § 12.1-14-04 (1997); OKLA. STAT. ANN. tit. 21, § 850 (West 2002); OR. REV. STAT. ANN. § 166.165 (West 2001); S.D. CODIFIED LAWS § 22-19B-1 (1998); WASH. REV. CODE ANN. § 9A.36.080 (West 2000); W. VA. CODE § 61-6-21 (2000); WYO. STAT. § 6-9-102 (2003).

144. See ALA. CODE § 13A-5-13 (West 1994); ALASKA STAT. § 12.55.155(c)(22) (2002); ARIZ. REV. STAT. ANN. § 13-702 (2003); ARK. CODE ANN. § 16-123-106 (West 2003); CAL. PENAL CODE § 422.75(a)-(b) (West 1999); DEL. CODE ANN. tit. 11, § 1304 (2001); D.C. CODE § 22-3703 (2001); FLA. STAT. ANN. § 775.085 (West 2000); HAW. REV. STAT. § 706-662(6)(b) (1999); IOWA CODE ANN. § 712.9 (West 2003); KY. REV. STAT. ANN. § 532.031 (West 2003); LA. REV. STAT. ANN. § 14:107.2 (2004); MISS. CODE ANN. § 99-19-301 (West 1994); MONT. CODE ANN. § 45-5-222 (2002); NEB. REV. STAT. § 28-111 (2003); NEV. REV. STAT. § 193.1675 (2003); N.H. REV. STAT. ANN. § 651:6(I)(f) (2003); N.M. STAT. ANN. § 31-18B-3 (West 2003); N.C. GEN. STAT. ANN. § 15A-1340.16(d)(17) (West 2003); OHIO REV. CODE ANN. § 2927.12 (West 2003); 18 PA. CONS. STAT. ANN. § 2710 (West 2003); R.I. GEN. LAWS § 12-19-38 (2002); TENN. CODE ANN. § 40-35-114(17) (West 2003); TEX. PENAL CODE ANN. § 12.47 (Vernon 2004); UTAH CODE ANN. § 76-3-203.3 (West 2003); VT. STAT. ANN. tit. 13, § 1455 (2002); VA. CODE ANN. § 18.2-57 (West 1996); WIS. STAT. ANN. § 939.645 (West 2003).

145. See H.R. REP. NO. 110-113, § Overview (2007), available at 2007 WL 1306354

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2006, for example, 7,720 incidents of hate crimes were reported to the FBI.¹⁴⁶ That same year, the Department of Justice levied a record high 201 charges for civil rights violations.¹⁴⁷ Contrast that to just one state—California—which filed charges for 272 hate crimes alone during the same period.¹⁴⁸ Prosecuting a hate crime is difficult because of the almost intractable burden of proving motive; the absence of federal aid only makes this hard job even harder.¹⁴⁹ Though this comment focuses on proposed federal laws, the state's burden is a paramount consideration; passing federal law is relevant primarily for the role it will play in assisting states in bias-crime prosecutions.¹⁵⁰

*B. The States' Solution within Proposed
Federal Hate Crimes Legislation*

Proposed federal legislation seeks to remove the federally protected activity limit¹⁵¹ and provide states with financial,

146. Press Release, Dep't of Just., FBI Releases 2006 Hate Crimes Statistics (Nov. 19, 2007), *available at* <http://www.fbi.gov/ucr/hc2006/pressrelease.html>.

147. Press Release, Dep't of Just., Fact Sheet: Hate Crimes and Prosecutions of Civil Rights Violations (Nov. 15, 2007), *available at* http://www.usdoj.gov/opa/pr/2007/November/07_crt_921.html [hereinafter Civil Rights Violations].

148. CAL. DEP'T OF JUST., OFFICE OF THE ATT'Y GEN., HATE CRIMES IN CALIFORNIA 1, 14 (2006), *available at* <http://ag.ca.gov/cjsc/publications/hatecrimes/hc06/preface06.pdf> [hereinafter OAG STATISTICS].

149. According to the investigators in the Matthew Shepard case, hate crime litigation can be financially devastating, and states are challenged to pursue them without federal expertise and resources to draw upon. 153 CONG. REC. H4421-03, *supra* note 166, at H4425 (statement of Rep. McGovern) (addressing an excerpt from a letter to then House Speaker Dennis Hastert from Sheriff James Pond and Detective Sergeant Robert DeBree, Albany County Sheriff's Department, Nov. 11, 1999); *see also supra* note 125 and accompanying text.

150. *See infra* Part IV.B (discussing how proposed federal law will support states through resources and funds to investigate and prosecute local hate crimes).

151. Civil Rights Violations, *supra* note 147; OAG STATISTICS, *supra* note 148.

investigatory, and prosecutorial resources.¹⁵² The overarching goal is to increase the number of successful state hate crimes prosecutions.¹⁵³

In some form or fashion, hate crimes legislation has been placed before Congress more than two dozen times since 1987.¹⁵⁴ At the moment, each branch of Congress is considering hate crimes legislation to amend provision 249 to Title 18 of the United States Code. On May 3, 2007 the House passed House Bill 1592, the Local Law Enforcement Hate Crimes Prevention Act of 2007;¹⁵⁵ meanwhile, the Senate is considering the Matthew Shepard Local Law Enforcement Hate Crimes Prevention Act of 2007, Senate Bill 1105 (Shepard's Law).¹⁵⁶ Through these bills, Congress hopes to reshape

152. See S. 1105, 110th Cong. § 4(a)(1) (2007) ("At the request of 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 of any crime" involving hate and violence); *id.* § 4(b)(1) ("The Attorney General may award grants to State, local, and Indian law enforcement agencies for extraordinary expenses associated with the investigation and prosecution of hate crimes."); *id.* § 6 ("There are authorized to be appropriated to the Department of the Treasury and the Department of Justice including the Community Relations Service" for "sums necessary to increase the number of personnel to prevent and respond to alleged violations" hate crimes); see also H.R. 1592, 110th Cong. §§ 3(a)(1), 3(b)(1), 5 (2007) (mirroring the referenced text of Senate Bill 1105, respectively).

153. See H.R. REP. 110-113, § Current Law, *supra* note 44.

154. There have been ten hate crime related bills introduced by the Senate and sixteen bills introduced by the House of Representatives. See H.R. 2216, 110th Cong. (2007); H.R. 2217, 110th Cong. (2007), H.R. 1592, 110th Cong. (2007); H.R., 110th Cong. 1164 (2007); H.R. 254, 110th Cong. (2007); H.R. 1343, 106th Cong. (2001); H.R. 1164, 106th Cong. (2001); H.R. 682, 106th Cong. (2001); H.R. 74, 106th Cong. (2001); H.R. 4317, 105th Cong. (2000); H.R. 1082, 104th Cong. (1999); H.R. 77, 104th Cong. (1999); H.R. 3081, 103rd Cong. (1997); H.R. 4232, 99th Cong. (1994); H.R. 1152, 98th Cong. (1993); H.R. 4797, 97th Cong. (1992); S. 1105, 110th Cong. (2007); S. 625, 106th Cong. (2001); S. 19, 106th Cong. (2001); S. 1406, 104th Cong. (1999); S. 622, 104th Cong. (1999); S. 1529, 103rd Cong. (1997); S. 1624, 102nd Cong. (1996); S. 1522, 98th Cong. (1993); S. 2522, 97th Cong. (1992); S. 797, 92nd Cong. (1987).

155. See H.R. 1592, 110th Cong. (2007); 153 CONG. REC. S11647-01 at S11648 (daily ed. Sept. 18, 2007) (statement of Rep. Cardin).

156. See S. 1105, 110th Cong. (2007); 153 CONG. REC. S11647-01 at S11648 (daily ed. Sept. 18, 2007) (statement of Rep. Cardin) (discussing Senator Benjamin Cardin's urging of the Senate to pass its version of hate crime legislation). The two

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federal laws against bias-based violence by assisting state, local, and tribal law enforcement agencies in prosecuting hate crimes and, in limited cases, empowering the federal government to insert itself into a hate crimes prosecution when a state will not or cannot respond.¹⁵⁷ The amendments modify the existing composite of federal hate crimes law in several ways that could have been helpful to a state prosecutor like Brian Abrahams.

1. The Proposed Law Adds to Existing Law

The proposed legislation¹⁵⁸ adds to existing law by expanding the protected class, and funding state and tribal investigation, prosecution, and staffing. This benefits a state prosecutor because it provides much needed financial, and other, support towards investigation and prosecution. Under Shepard's Law, the protected class is expanded to include victims of hate crimes committed because of perceived sexual orientation, gender, gender identity, or disability.¹⁵⁹ Legislation includes sexual orientation because it is the third highest category of all reported hate crimes and, despite the prevalence of crimes against gays, lesbians, and transgenders, they are not covered by current hate crimes law.¹⁶⁰ Legislation also includes gender because a "significant number of women are exposed to terror, brutality, serious injury, and

laws being proposed by Congress are substantively indistinguishable. For purposes of this analysis, they will be collectively referenced as "Shepard's Law."

157. H.R. 1592, *supra* note 30, at 1 (calling H.R. 1592 an act "[t]o provide federal assistance to State, local jurisdictions, and Indian tribes to prosecute hate crimes."); *see also id.* § 6(b); S. 1105, *supra* note 30, § 7(b).

158. Note that the Local Law Enforcement Hate Crimes Prevention Act of 2007 (HCPA) and Matthew Shepard's Local Law Enforcement Hate Crimes Prevention Act of 2007 (Shepard's Law) are being singularly addressed as "proposed law" or "Shepard's Law" as there is no difference between the two provisions save the titles and introductory findings that Shepard's Law includes but HCPA does not. *Compare* H.R. 1592, 110th Cong. (2007), *with* S. 1105, 110th Cong. (2007).

159. H.R. REP. NO. 110-113, § Hate Crimes Based on Sexual Orientation, Gender, Gender Identity, or Disability (2007), *available at* 2007 WL 1306354.

160. *Id.* at 11.

even death because of their gender.”¹⁶¹ The new law includes gender identity for two reasons: (1) hate crimes against transgenders are particularly violent; and (2) the lack of understanding and tolerance by law enforcement implies “the need for a Federal backstop for State and local authorities.”¹⁶² Finally, Congress is committed to protecting the disabled from discrimination. While current federal laws do not protect these groups, most states with hate crimes laws do,¹⁶³ and there is an increasing consensus among law enforcement officials and policymakers to make crimes motivated against these subgroups subject to federal prosecution.¹⁶⁴

Shepard’s Law provides states funding,¹⁶⁵ personnel, and other support to investigate and prosecute crimes,¹⁶⁶ and up to \$100,000 per jurisdiction for extraordinary annual expenses related to investigation and prosecution.¹⁶⁷ States also will have access to additional funding to train law enforcement officers to identify, investigate and prosecute

161. *Id.* at 12. “H.R. 1592 will not result in the Federalization of all rapes, other sexual assaults, or acts of domestic violence,” but only those acts motivated by gender-based animus, which implicate the greatest federal interest. *Id.*

162. *Id.* at 12-13.

163. *Agreeing to Agree*, *supra* note 49, at 423.

164. H.R. REP. NO. 110-113, § Hate Crimes Based on Sexual Orientation, Gender, Gender Identity, or Disability (2007), *available at* 2007 WL 1306354.

165. This section authorizes appropriations of sums necessary, if any, to support the investigation and prosecution of alleged violations of the bill’s prohibitions. Local Law Enforcement Hate Crimes Prevention Act of 2007, H.R. 1592, 110th Cong. § 3 (2007); Matthew Sheppard Local Law Enforcement Hate Crimes Prevention Act of 2007, S. 1105, 110th Cong. § 4 (2007); H.R. REP. NO. 110-113, Section-By-Section Analysis (2007), *available at* 2007 WL 1306354; *see also supra* note 152.

166. Proposed laws allow for technical, forensic, or any other support to state law enforcement agencies to aid in the investigation and prosecution of crimes “motivated by prejudice based on the actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, or disability of the victim, or is a violation of the State, local, or Tribunal hate crime laws.” H.R. 1592, 110th Cong. § 3(a)(1)(C) (2007); S.1105, 110th Cong. § 4(a)(1)(C) (2007).

167. H.R. REP. NO. 110-113, Section-By-Section Analysis (2007), *available at* 2007 WL 1306354; *see also* H.R. 1592, 110th Cong. § 3(b)(5); S. 1105, 110th Cong. § 4(b)(5).

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bias crimes by juveniles.¹⁶⁸ Shepard's Law gives priority to rural jurisdictions experiencing difficulty with extraordinary costs associated with investigating and prosecuting hate crimes.¹⁶⁹ Certainly, this could have aided the small province of Bear Creek where the *Williams* case was the first hate crimes charge in West Virginia history.¹⁷⁰

2. The Proposed Law Eliminates the Federally Protected Activity Mandate

Proposed law eliminates the need for a victim to perform a federally protected activity as a precursor to invoking federal law. This elimination benefits a state prosecutor because it results in a far more expansive scope of concurrent jurisdiction. Under current law, to establish a 245(b) violation, the government must prove beyond a reasonable doubt (1) the intent to commit a crime of violence that was motivated by racial, ethnic, or religious hatred, *and* (2) the intent to interfere with a victim's enjoyment of at least one enumerated federally protected activity.¹⁷¹ Where Shepard's Law removes this "double-intent" requirement, the federal government can serve as an effective backstop in state prosecution of a number of heinous hate crimes.¹⁷² Certainly in the *Williams* case study, federal support would have been accessible.

3. The Net Effect Benefits the States

On the whole, a state prosecutor gets additional money and resources through the broader channels of concurrent jurisdiction with the federal government. This type of assistance helps states to overcome proof barriers because (1) the jurisdictional flexibility provides states access to experts and resources, allowing prosecutors to more thoroughly vet the issue of motive, and, (2) the resultant

168. H.R. 1592, 110th Cong. § 4; S. 1105, 110th Cong. § 5; H.R. REP. NO. 110-113, Section-By-Section Analysis, § 5 (2007), *available at* 2007 WL 1306354.

169. H.R. 1592, 110th Cong. § 3(a)(2); S. 1105, 110th Cong. § 4(a)(2).

170. *Megan Case*, *supra* note 97.

171. H.R. REP. 110-113, § Current Law, *supra* note 44.

172. *Id.*

potential net increase in opportunities to prosecute allows courts to develop the doctrine around proving motive.

a. Jurisdictional Flexibility Means More State Resources

Under proposed law, prosecutors have access to federal resources to help collect and interpret circumstantial evidence, which is the legal fabric of hate-based motive.¹⁷³ The approach is complex,¹⁷⁴ but not impossible, and proposed legislation provides aid in exactly the form states need: money and expertise.¹⁷⁵ Prosecutors can use investigators to look for a defendant's history of hate-driven violence or prior involvement with a hate group, just a few of the factors examined when assessing a case for bias.¹⁷⁶ Investigation will reveal whether the defendant made statements of biased beliefs or used racial epithets during the crime.¹⁷⁷ Experts can help interpret tattoos and other statements that show bias, which is valuable to a hate crimes investigation.¹⁷⁸ An expert can also render an opinion about the role of bias in a hate-based crime.¹⁷⁹ Such circumstantial evidence typically is unearthed after long hours of investigation by experienced and trained investigators, and investigation is among the many types of aid both bills provide.¹⁸⁰

173. S. 1105, 110th Cong. § 4(a)(1).

174. Finn, *supra* note 51, at 23 (“Prosecuting hate violence successfully can sometimes be difficult.”).

175. S. 1105, 110th Cong.

176. McPhail, *supra* note 15, at 32. After looking at three primary factors considered for all cases in potential bias crimes—what the law says, what the case facts are, and what can be proven beyond any reasonable doubt—prosecutors assess any history of violence, prior involvement with hate groups, use of racial epithets, tattoos, literature and other indices of bias beliefs, as well as the relationship between the victim and offender. *Id.*; see also Read, *supra* note 16, at 460-61 (noting a variety of evidentiary sources as to defendant's motive in victim selection, which “could include the defendant's clothing or tattoos, possession of literature, or music reflecting a bias, or the defendant's choice of interior décor.”).

177. McPhail, *supra* note 15, at 32.

178. *Id.*

179. *Proof of Facts*, *supra* note 90, § I.B.4.

180. See discussion *supra* note 152.

b. More Resources Means More Litigation, and More Litigation Means More Legal Direction for Proving Motive Through Circumstantial Evidence

Overcoming the difficulty of proving a required mental state of mind is nothing new to America's justice system.¹⁸¹ Consider the history of intent in American jurisprudence, and the period when proving intent might have presented challenges similar to those the judiciary now faces when proving motive. Initially, courts had to study the circumstances of each individual case to unearth an actor's intent.¹⁸² As the law matured, however, courts generated enough legal history to shorthand the intent analysis by taking certain understandings about the legal significance of the acts of earlier offenders and using them to gauge the intent of those before the judiciary: a person who puts a gun in another's mouth and pulls the trigger has the intent to kill;¹⁸³ a person who loops a belt around another's neck and drags her so she cannot breathe has the intent to kill;¹⁸⁴ a person who shoots another while struggling over possession of the accused's gun has the intent to kill.¹⁸⁵ In this way, courts evolved to the point where they could read in that a person intended to

181. As far back as the 1300s, courts litigated novel scenarios and began the creation of a quilt work of facts about one defendant that could later be used to read intent into any *subsequent* defendant's state of mind. *See, e.g.*, *S et Ux v. W de S.* at the Assizes, 1348. This vetting of intent continued through the 1800s, *see United States v. Bowen*, 24 F. Cas. 1207 (D.C. Cir. Ct. 1835) (intent to assault can be inferred when a slave enters his master's room at night with an ax), and the law continues to evolve today. *I de S* is one of the earliest instances where the court ferrets out a defendant's intent by examining his acts. There, the court used surrounding circumstances to infer that the defendant, who threw an ax at the plaintiff's wife, had the state of mind to cause her immediate apprehension. *Id.*

182. *See, e.g.*, *Pierson v. State*, 528 N.E.2d 787, 789 (Ind. 1988) (holding that the intent to kill could be inferred from the circumstantial evidence of using a deadly weapon in a manner calculated to cause injury); *People v. Smith*, 219 N.E.2d 82, 86-87 (Ill. App. Ct. 1966) (noting defendant's admission to placing a belt around the victim's head and dragging her, and the Court's discussion of its relevance to the defendant's intent).

183. Uhrich, *supra* note 21, at 1513.

184. *Smith*, 219 N.E.2d at 86-87.

185. *Austin v. State*, 190 N.W.2d 887, 890 (Wis. Ct. App. 1971).

experience the natural consequence of his act based on circumstantial and factual evidence surrounding that act.¹⁸⁶ Hate crimes law is far too newly seeded for courts to make those same kinds of seasoned assumptions about motive.¹⁸⁷ Nevertheless, the potential exists to overlay the process for developing the body of law to prove one form of *mens rea* onto the method for developing the body of law to prove another. While motive presents certain novel issues of proof, history teaches that such can be overcome by time and judicial exposure.¹⁸⁸

Applying this theory to the *Williams* case study, Prosecutor Abrahams charged Karen Burton with a hate crime.¹⁸⁹ Burton made the affirmative statement, “[t]his is what we do to niggers around here,” while stabbing Megan in the ankle.¹⁹⁰ The remaining defendants went uncharged because, other than the use of racial epithets, the issue of criminal race hate was legally silent.¹⁹¹ Litigating the issue may have clarified whether other events, when considered in conjunction with the epithets, would have been enough to legally presume a hate-based motive. Passing proposed law will broaden the doctrine of legal shorthand for proving, or ruling out, hate-based motive. As the proposed federal hate crimes law remains dormant, however Megan’s case represents yet another missed opportunity to mature the body of hate crimes law.

186. *See, e.g., id.* (discussing and applying the standard for intent to the defendant’s actions, and finding that the defendant’s had the requisite intent).

187. For example, legal jurisprudence has not yet evolved to the point where it can make the same leap of logic regarding a hate-based motive when, for example, a person kills a homosexual or an African-American. Uhrich, *supra* note 21, at 1513. While more than those facts must be present, the principle is the same.

188. *Supra* notes 183-185.

189. *See Two Plead Guilty, supra* note 14.

190. Mohajer, *supra* note 58.

191. *See id.*

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V. THE INROADS TO RESTORATION: VICTIM-OFFENDER MEDIATION

“Hate crimes have two levels of victim: the individual and the community. A true hate crime is an affront to the entire community.” ~Respondent, Hate Crimes Survey¹⁹²

“Punishment does not educate.” ~Respondent, Hate Crimes Survey¹⁹³

“[A] victim really wants the criminal to understand the way the crime has affected his/her life, [and victim- offender mediation] may give the victim some closure.” ~Respondent, Hate Crimes Survey¹⁹⁴

192. Hate Crimes Survey, *supra* note 45, at Question 13, Comment 5. This voluntary comment was given in response to the question:

MEMBER OF GROUP IN COMMON WITH THE VICTIM OF NON VIOLENT CRIME. Imagine you are a member of the same group of a victim of a hate crime (for example, both you and your neighbor are Jewish and a swastika has been painted on your neighbor's house). Your neighbor has agreed to a reduced prison sentence for the offender in exchange for the offender agreeing to (1) community service and (2) sit down in a controlled setting and hear your neighbor out on all the ways that then offender's racist or bigoted attitude impacted your neighbor's life. If given the chance, would you find it beneficial to participate as well?

Id.

193. *Id.* at Question 14, Comment 80. This required comment was given in response to the question: “Assuming that the goal of hate crime legislation is to both punish the offender AND educate him/her so that the offense is not repeated, what is your opinion about the best way to punish a non- or minimally- violent hate crime?”

194. *Id.* at Question 12, Comment 22. This voluntary comment was given in response to the question:

VICTIM OF A HATE CRIME. Imagine you are the victim of a hate crime (like being threatened with a noose or a swastika, or being attacked because of your sexual orientation). Would you agree to shorten the offender's sentence in exchange for the offender agreeing to (1) community service and (2) sit down in a controlled setting and hear you out on all the ways his/her racist or bigoted attitude impacted your life?

Id.

Once hate crimes get to court, stakeholders should have access to a more responsive cure than pure incarceration.¹⁹⁵ That cure can be VOM, because like hate crimes legislation, it has the goal of making the parties and society better off,¹⁹⁶ or whole again. VOM is a form of reparative or restorative justice where the victim has a face-to-face dialogue with her offender about the impact of the crime committed against her.¹⁹⁷ While VOM is far from a hate crime cure-all, “restorative justice focuses on remedying the *harms caused* rather than on retribution.”¹⁹⁸ That missing element of healing surrounding hate crimes harm is key.¹⁹⁹ This comment proposes that Congress (1) amend current legislation to include public funding for the departments of corrections VOM programs; and (2) develop guidelines and procedures for the Bureau of Prisons to accommodate VOM use within the federal penal system.

195. Abramovsky speaks directly to this issue:

Stricter penal sanctions, although recommended, should not be considered the sole solution to the bias crime problem. No legislative program can ever fully address bias violence. Enhanced penal sanctions should be considered one part of a broader scheme of combatting [sic] these crimes. To augment the current and proposed statutes, alternative methods should be employed in the overall remedial scheme, including increased civil recoveries, additional sources of recovery (such as vicarious parental liability), and educational and community-sponsored workshops and awareness groups. These methods are not mutually exclusive and ideally would be used as part of a comprehensive plan.

Abramovsky, *supra* note 101, at 905.

196. Kerry M. Hodak, Note, *Court Sanction Mediation in Cases of Acquaintance Rape: A Beneficial Alternative to Traditional Prosecution*, 19 OHIO ST. J. ON DISP. RESOL. 1089, 1112 (2004).

197. See *supra* note 33 and accompanying text.

198. Hodak, *supra* note 196, at 1100-01 (emphasis added).

199. Hate crimes laws are ripe for the introduction of VOM as a form of resolution because hate crimes “may be more violent and do more physical and psychological damage to the victims than ‘regular’ crimes.” *Proof of Facts*, *supra* note 90, at Part I.A.2.

A. How Victim-Offender Mediation Generally Works

VOM breaks away from the more traditional “trail ‘em, nail ‘em, and jail ‘em”²⁰⁰ approach of the justice system. It deals primarily with offering offenders of less serious crimes a chance to repair harms they caused, and victims a chance to have their questions answered.²⁰¹ VOM focuses on having the offender pay back the innocent victim and society for the harm of his or her crime.²⁰²

VOM typically consists of four phases: intake, preparation, mediation, and follow-up.²⁰³ At intake, a mediator screens potential VOM cases to insure that they are appropriate for mediation.²⁰⁴ Next, the mediator meets individually with the parties in preparation for the mediation. If either party is not willing to mediate in good faith, the mediator returns the case for litigation because VOM will not work.²⁰⁵ If parties are willing, they then move on to the mediation phase where they ask questions of each other, and generally are expected to explain their feelings and their versions of the events.²⁰⁶ Victims inform the offenders about how the crime affected them, receive answers to questions, and are directly involved in developing a restitution plan to account for victim loss, where possible.²⁰⁷ Offenders take direct responsibility for their behavior, learn of the full impact of their acts, and develop a plan for making amends to whomever they violated.²⁰⁸ In at least the case of a non-violent crime, the parties “must come to a

200. See UMBREIT & GREENWOOD, *supra* note 35, at 1.

201. MARK S. UMBREIT, PH.D., ROBERT B. COATES, PH.D., BETTY VOS, PH.D., & KATHY BROWN, PH.D., VICTIM OFFENDER DIALOGUE IN CRIMES OF SEVERE VIOLENCE, A MULTI-SITE STUDY OF PROGRAMS IN TEXAS AND OHIO 1, 1 (U. MINN. 2002), available at http://rjp.umn.edu/img/assets/13522/Ex_Sum_TX_OH_VOD_CSV.pdf.

202. Drake, *supra* note 43, at 655.

203. Hodak, *supra* note 196, at 1102 (quoting Richard Delgado, *Prosecuting Violence: A Colloquy on Race, Community, and Justice*, 52 STAN. L. REV. 751, 756 (2000)).

204. *Id.*

205. *Id.*

206. *Id.*

207. *Cross National Comparison*, *supra* note 102, at 33.

208. *Id.*

mutually acceptable resolution to the dispute, which usually includes some form of restitution for the victim or an assignment of a work order.”²⁰⁹ Finally, in the follow-up phase, the case is subject to oversight and returned to court if there is a break down during any phase of VOM.²¹⁰

*B. Victim-Offender Mediation and Crimes of
Severe Violence or Death*

Introducing VOM into a violent crime analysis courts an almost visceral response of skepticism, and raises a series of well-put questions. Why would the victim participate? Why would the offender? How can it possibly help more than harm? How would it work? It is not difficult to see a paradigm of revenge and rage consuming a victim or her family to such a point where VOM is more an affront than a viable solution. Take, for example, the family of Elaine Meyers, whose husband and parents were interviewed about their feelings toward the drunk driver who took Elaine’s life. Said David, Elaine’s husband, who was outraged by the fact that the driver’s alcoholism ended his wife’s life, “I wanted to cut that bottle she drank from and cut her into hamburger.”²¹¹ Elaine’s mother said of the driver “let her be fertilizer; put her in compost.”²¹² Megan’s sentiments are not dissimilar: “I just hope they fry for what they did to me . . . I hope they fry.”²¹³

Still, in 2000 the Office for Victims of Crime (OVC) reported that a growing number of victims of severe violence requested to meet with their offenders.²¹⁴ One relative of a victim of violence explained her reasons this way:

You can tell the police, you can tell your friends, you can tell other people that have lost somebody, you can tell your therapist, your psychiatrist, this is how I feel and this is what he’s done to me, but

209. Hodak, *supra* note 196, at 1102.

210. *Id.*

211. *20/20: Healing Justice* (ABC television broadcast Apr. 26, 1999).

212. *Id.*

213. *Woman Speaks Out*, *supra* note 3.

214. UMBREIT & GREENWOOD, *supra* note 35, at Executive Summary.

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there's no describing that feeling when you finally get to look at him eye to eye and say, "this is what you've done, she was a real person."²¹⁵

In 2002, OVC's Center of Restorative Justice and Peacemaking (CRJP) published a four-year study, which was the first multi-state analysis on interventions for victims of severe violence.²¹⁶ After considering several factors, OVC reported that the principles of restorative justice can be successfully applied in crimes of extreme violence, and even death.²¹⁷ The study effectively dismantled the notion that restorative justice is beyond the scope of curative solutions for crimes of severe violence. Returning to Elaine's family as an example, after moving past the initial rage and grief at their loss, they

215. Family member participant in the Office for Victims of Crime's Center for Restorative Justice & Peacemaking (CRJP) study on crimes of severe violence. UMBREIT, COATES, VOS, & BROWN, *supra* note 201, at 14.

216. The CRJP study is the first large scale study to serve victims of severe violence and to apply the concept of restorative justice and challenge the assumption that restorative justice is excluded from the violent crime venue. UMBREIT, COATES, VOS, & BROWN, *supra* note 201, at 1.

217. *Id.* at 1. The following research questions guided the study:

1. Who participates in the mediation/dialogue process and why?
2. What is involved in the actual process of victim-offender mediation/dialogue?
3. How satisfied are victims/offenders with their experience with mediation/dialogue?
4. What are the outcomes of mediation/dialogue for victims and offenders?
5. What are the benefits and risks of mediation/dialogue for victims and offenders?
6. How was the Victim Services Mediation/Dialogue Program developed and what are the critical issues for replication in other areas?
7. What are the implications for restorative justice theory, based on the findings that emerged from this study?
8. What are the implications for training and practice, based on the findings that emerged from this study?
9. What are the policy implications for other jurisdictions considering a similar initiative?

Id. at 5. Half of the offenses for which mediation took place were for murder/manslaughter, followed by sexual assault, vehicular homicide, and attempted murder. *Id.* at 6. Most of the non-offender participants were family members (parents were the most common); only nine were direct victims. *Id.*

participated in VOM and “adopted” Elaine’s killer, and even petitioned the State of Washington for her early release.²¹⁸ Through VOM, the family came to see Suzanne, the woman who killed Elaine, as a human being.²¹⁹ As for Suzanne, she finished her education, takes care of her children, and has dedicated her life to making certain that others do not make the same mistake with alcohol.²²⁰ The expressions of rage and hate from Elaine’s survivors have been replaced with healing and acceptance through forgiveness not for Suzanne’s benefit, but for their own, and surprisingly, for Suzanne’s children.²²¹

Naturally, in cases of severe violence there is no repayment for the loss of a life or for harm suffered from a physically and emotionally damaging assault.²²² Yet, some have gone as far as to suggest that the more profound impact of healing occurs in restorative justice when applied in cases of a violent or extreme crime like that seen in the *Williams* case.²²³ Consider one Texas woman who was raped, stabbed, and bludgeoned until her rapist thought she was dead.²²⁴ The victim required over 600 stitches and several surgical procedures to regain her physical health.²²⁵ The victim specifically requested the chance to confront her attacker and ask the question only he could answer: why?²²⁶ In another case, a woman needed to

218. 20/20: *Healing Justice*, *supra* note 211.

219. *Id.*

220. *Id.*

221. *Id.* (“I was able to see her as a human being and my definition for forgiveness is to recognize that in a wrongdoer.”).

222. UMBREIT, COATES, VOS, & BROWN, *supra* note 201, at 7 (“In the violent crimes covered in the [CRJP study], there is no possible repayment for losses the victim has incurred; thirty of the victims were dead as a result of the crime, and the rest had suffered physical and emotional harm as a result of assault.”).

223. *See id.* at 1 (“Some would even suggest that the deepest healing impact of restorative justice is to be found in addressing and responding to such violent crimes [as murder].”).

224. Drake, *supra* note 43, at 648.

225. *Id.*

226. *Id.* at 649; *see also* Wellikoff, *supra* note 27, § III A(a) (noting that during VOM sessions, victims were able to ask the questions that haunt them in order to ease their minds and heal).

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confront her son's killer so that he knew "the devastating effect the crime had on her life, and to get answers to many questions."²²⁷ In yet a third case, a victim's family noted the immediate emotional healing after participating in a mediation session.²²⁸ The day after the mediation, the victim's mother said "her tension had disappeared and she felt relief as she let go of 'feelings of vengeance and despair.'"²²⁹ The CRJP study found that eight out of ten of the severe violence VOM participants reported a major life change following their mediation dialogue session.²³⁰

VOM was developed as a response to low- and mid-level crimes, yet more and more victims of crimes such as attempted homicide and rape request to meet with their offenders.²³¹ This is consistent with the findings of the Hate Crimes Survey conducted in conjunction with this comment. According to the survey, respondents believed that combating hate through pure incarceration is the least successful approach,²³² while requiring some form of perpetrator confrontation is

227. Shenk, *supra* note 25, at 200 (quoting MARK S. UMBREIT, *MEDIATING INTERPERSONAL CONFLICTS* 149 (1995)).

228. Wellikoff, *supra* note 27, § V.B.

229. *Id.* (quoting Elizabeth S. Menkin, *Life After Death*, VICTIM-OFFENDER MEDIATION ASS'N (Sep. 4, 1994), <http://vorp.com/articles/lifeaft.html>).

230. UMBREIT, COATES, VOS, & BROWN, *supra* note 201, at 3. Eighty percent of the violent crime research participants reported that their involvement resulted in a profound change. *Id.* at 13. Among the benefits, victims/family members reported that they felt more at peace and better able to cope with their lives, better able to let go of hate, place their anger where it belonged, and have a human encounter and/or experience the offender's remorse. *Id.*

231. *See id.* at 1. CRJP reports that twelve states have Victim Services Units operating at various levels to allow for encounters involving victim/survivors of severe, violent crimes and the offender. *Id.*

232. Hate Crimes Survey, *supra* note 45, at Question 7. Respondents were asked to rank their preferences from one to five first according to what they thought the actual purpose of hate crime law was, and then according to what they thought the best purpose of hate crime law was (or what they wished it to be). To the first question, 51.4% of the respondents agreed that among their five choices, the *actual* purpose of hate crime law was best described as "to protect special classes of Americans." *Id.* To the second question, 41.9% agreed that the *preferred* purpose of hate crime law should be to decrease racism and end bigotry. *Id.* at Question 9. Moreover, 46.7% also agreed that the least preferred objective for hate crime law

the most successful.²³³ As with non-violent crimes, the overwhelming reason victims of violence or their family members seek VOM is to get answers or information.²³⁴

Although many non-victims might have serious misgivings about both the process and the offender's sincerity, actual victims seemed to need the closure.²³⁵ In fact, the concept of VOM in cases of severe violence may become more palatable when one appreciates that it is driven by the need to give the *victim* closure, and not to understand nor even forgive the offender.²³⁶ One way a victim achieves this is by telling the offender how the crime impacted his or her life.²³⁷ Some victims are able to move through a myriad of emotions and eventually

should be to incarcerate offenders for longer periods of time. *Id.* That was 20 percentage points higher than the next ranked response. *Id.*

233. *Id.* at Question 12. Almost half (46.6%) of the 105 respondents said they would "definitely, probably, or might" sit down with an offender in a controlled setting to be heard on the impact the crime had on his or her life. *Id.* That figure rose to 52.9% within the same "definitely, probably or might" cohort when only those who had been a victim of crime against persons or knew of a victim of hate crime were considered. *Id.* That figure rose markedly when the "definitely, probably or might" cohort who were also victims or victim associates were asked whether they would find it beneficial to participate in such a meeting in support of someone with traits with which they identified (64.1%), suggesting a significant commitment *by the community* to confront and possibly rehabilitate perpetrators of hate crime. *Id.* at Question 13. Almost 70% of that same group (69.8%) felt that current hate crime laws do not work towards their expected goal. *Id.* at Question 8.

234. UMBREIT, COATES, VOS, & BROWN, *supra* note 201, at 7.

235. *See supra* note 216 and accompanying text.

236. Both the Texas and Ohio program, for example, make it clear that offender forgiveness is not the program goal. UMBREIT, COATES, VOS, & BROWN, *supra* note 201, at 12.

237. Wellikoff, *supra* note 27, § II.B ("Through this dialogue, victims are able to understand who their offenders are and what may have caused them to commit the crime."). This remains consistent in cases of severe violence. In the CRJP study, the four most common reasons victim/family sought mediation were to get answers to lingering questions, to express the impact of the crime, to experience human interaction with the offender, and to advance the victim's/family member's healing process. UMBREIT, COATES, VOS, & BROWN, *supra* note 201, at 2. In some cases, the offender was the last to see the family member alive. *Id.* at 7.

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forgive their offenders,²³⁸ let go of their anger, resentment, and fear, and get past the crime committed against them,²³⁹ again not for the offender's well being but for their own.²⁴⁰ Consider what a family member of a victim of severe violence said about VOM: "I am here to try and make [the offender] human instead of an animal. Because the anger they [sic] have left me is killing me, so not only are they doing time, I'm doing the worst time."²⁴¹ In Megan's case, images of abuse and captivity still haunt her dreams.²⁴² In time,²⁴³ Megan may find that she cannot move forward without relief from her private prison, and may seek that relief through the very men and women who both mentally and physically imprisoned her.

A final benefit of VOM is that it breaks away from the backward looking approach of the criminal justice system.²⁴⁴ In traditional justice, an offender's conduct is always considered historically: who did what in the past?²⁴⁵ Restorative justice broadens the victim's field of view by looking first at the past, but then asking the parties to check in with their current feelings before finally considering their future orientation through restoration.²⁴⁶

While the benefits of VOM differ little between mediation for violent and non-violent crimes,²⁴⁷ the process differs vastly. Violent crime mediators require crucial training beyond that normally received for VOM.²⁴⁸ The mediator prepares for the victim and offender

238. Wellikoff, *supra* note 27, § II.B ("Offenders learn the consequences of their actions, understand the enduring effects of their criminal acts, and may apologize and/or gain forgiveness.").

239. *Id.* § III.A.a

240. *See generally supra* note 230.

241. UMBREIT, COATES, VOS, & BROWN, *supra* note 201, at 8.

242. "Every time I close my eyes all I see is that knife," Williams says. *Woman Speaks Out*, *supra* note 3.

243. The CRJP study found that the average length of time between the offense and mediation was about 9.5 years. UMBREIT, COATES, VOS, & BROWN, *supra* note 201, at 2.

244. Interview with Relyea, *supra* note 33.

245. *Id.*

246. *Id.*

247. *See infra* Parts V.C-E.

248. UMBREIT, COATES, VOS, & BROWN, *supra* note 201, at 3.

dialogue for much longer, and the interchange itself is more intense than for other types of criminal mediation.²⁴⁹ For example, in Ohio, one of the two states whose violent VOM program OVC studied, the average preparation time was four and a half months.²⁵⁰ In Texas, the second of the two, preparation time was sixteen months.²⁵¹ It cannot be overemphasized that, like in traditional criminal mediation, severe violence VOM “should be entirely voluntary for all parties.”²⁵² Finally, severe violence VOM must be victim initiated.²⁵³

Violent and non-violent mediation move closer in appearance and outcomes once the process is set in motion. Whether dealing with a crime of violence or a lesser, hate related charge, VOM allows both victims and offenders to experience “a kind of meaningful accountability that punishment [cannot] provide,”²⁵⁴ and goes directly to the heart of victims’, society’s, and legislative needs by reducing incidents of hate-driven harm.²⁵⁵

C. Victim-Offender Mediation Benefits the Offender

VOM benefits the offender for several outcome-rich reasons. First, offenders find it difficult to make excuses for their behavior when forced to come face-to-face with their victims and their harm.²⁵⁶ When offenders face their victims, their harm becomes very real, and it is extremely “difficult for the offenders to rationalize their criminal behavior.”²⁵⁷

249. *Id.*

250. *Id.* at 2.

251. *Id.*

252. *Id.* at 3.

253. *Id.*

254. Wellikoff, *supra* note 27, § II.B (quoting Marty Price, *Victim-Offender Mediation: The State of Art*, VICTIM-OFFENDER MEDIATION ASS’N, available at <http://www.vorp.com/articles/art.html> (last visited Nov. 9, 2008)).

255. Shenk, *supra* note 25, at 214 (stating that VOM “may deter the offender from committing crimes of a similar nature in the future.”).

256. *Id.* at 196.

257. *Id.* (quoting Victim-Offender Reconciliation Program Information and Resource Center, *Victim-Offender Mediation/Dialogue Programs*, <http://www.vorp.com/articles/abaendors.html> (last visited Oct. 12, 2001)).

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Next, being confronted by their victims makes it harder for offenders to maintain the same biases they held before the mediation.²⁵⁸ Given that VOM has among its goals looking beyond the crime and exploring the underlying thoughts and feelings of both victims and offenders, the process is tailored to unearth the bias, racism, and bigotry that led the offender to commit his or her hate crime.²⁵⁹ The Hate Crimes Survey clearly mirrors this desire to teach offenders about the impact of their harm. A full thirty-four percent of respondents who either had been a victim of crime against persons or knew a hate crime victim, agreed that after ending or decreasing racism or bigotry, teaching offenders about the real harm of racism and bigotry was the second most important reason for hate crimes law.²⁶⁰ The majority of respondents (50.9%) said that incarcerating offenders for longer periods of time was the worst reason over all considered.²⁶¹ In the *Williams* case, Karen Burton, who was the single defendant charged with a hate crime, is the grandmother of two biracial children she loves dearly, and found herself “a little surprised” at the hate charge.²⁶² Karen’s surprise personifies the type of extreme disconnect that an interactive model like VOM potentially fuses.

Finally, offenders experience emotional and rehabilitative growth by participating in the process. Unlike those in non-violent cases, violent offenders do not garner their personal benefit from incentive-based engagement, but from helping the victim.²⁶³ Many wished to

258. *Id.* at 215-16.

259. *Id.* at 213.

260. Hate Crimes Survey, *supra* note 45, at Question 9 (filtered to include only those who had been a victim of crime against persons, or knew of someone who had been a victim of hate crime).

261. *Id.*

262. See Mohajer, *supra* note 58 (recalling that Burton allegedly stabbed Williams in the ankle while saying “this is what we do to n---- down here.”); *Woman Pleads Guilty to Hate Crime against Megan Williams*, CHARLESTON DAILY MAIL, Feb. 7, 2008, <http://www.dailymail.com/News/200802070494>.

263. UMBREIT, COATES, VOS, & BROWN, *supra* note 201, at 7. Offender participants in VOM for crimes of severe violence do not earn rewards to shorten or improve their prison stay, and their participation is not a part of any parole consideration. *Id.*

apologize and help victims heal,²⁶⁴ and when asked more explicitly, they frequently cited how this benefitted their own rehabilitation process.²⁶⁵ One offender-participant in the CRJP severe violence study said that because the family member forgave him for murdering their child, he could not bring himself to “mess up again.”²⁶⁶ Of the thirty-three participants that were asked whether the VOM dialogue was a life changing event, all pointed to “being accountable [and] understanding the impact of their actions” among their benefits of engaging in the process.²⁶⁷

D. Victim-Offender Mediation Benefits Society

VOM actually protects society by deterring future hate crime offenses.²⁶⁸ Because an offender can no longer rationalize his behavior and must face the biases that drove his acts, VOM not only empowers the victim, but also reduces recidivism as well.²⁶⁹ VOM co-opts community involvement by allowing the community to bring to bear resources in the prevention of criminal acts.²⁷⁰ In fact, thirty-two percent of all respondents in the Hate Crimes Survey who had either been involved in crime against persons or knew a victim of a hate crime indicated that they would probably sit in a controlled setting and support a neighbor in some form of VOM.²⁷¹

264. *Id.*

265. *Id.* at 8.

266. *Id.* at 13.

267. *Id.*

268. *Supra* note 36 and accompanying text.

269. Hodak, *supra* note 196, at 1103.

270. UMBREIT & GREENWOOD, *supra* note 35 (noting, for example, that “[t]rained community volunteers serve as mediators or co-mediators along with agency staff.”).

271. Of that same cohort (i.e., those who had been a victim of crime against persons or knew of a victim of hate crime were considered), 64.1% said they would “definitely, probably, or might” find it beneficial to participate in a victim-offender session in support of someone with traits with which they identified. Hate Crimes Survey, *supra* note 45, Question 13. This suggests a significant community commitment to confront hate crime perpetrators. Finally, and again within the same cohort, the majority (50.9%) said that incarcerating offenders for longer periods of time was the least valuable purpose over all purposes considered. *Id.* at Question 9.

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VOM allows stakeholders to help create community-based resolutions as strong adjuncts to criminal justice-based resolutions.²⁷² There are a variety of adaptive models to the restorative paradigm that draw in this group. A Community Reparation Board is one such example, where a committee of community members is responsible for monitoring compliance with reparation terms,²⁷³ thus empowering them to be a stakeholder in the process of healing hate crime wounds. Another example is Circle Sentencing, where the victim, community elders, and other local representatives meet with the offender and tell their stories.²⁷⁴ This fosters an understanding of how the crime involved not just the victim but the victim's community as well.

E. Victim-Offender Mediation Benefits Prosecutors

Prosecutors may be more likely to pursue hate crimes charges if VOM is packed into the resolution. One of the primary reasons prosecutors do not pursue civil rights violations is the difficulty they present in securing convictions.²⁷⁵ At least in non-violent offenses, VOM replaces a trial in the face of a guilty plea,²⁷⁶ and if an agreement is reached, the court disposes of the case.²⁷⁷ Some VOM

Though still the largest plurality or consensus opinion, that figure was only slightly lower when all survey respondents (not just victims or victim associates) were considered (46.7%). *Id.* at Question 9. These responses assume that offender participation is conditioned on community service and an exchange for some form of sentence reduction. *Id.*

272. For example, Relyea discussed one case where a young woman struck and killed the driver of another car. The woman participated in a session with the driver's parents and spouse, during which she ultimately agreed to provide educational seminars to other young drivers, as a legacy to the memory of the woman she killed. Interview with Relyea, *supra* note 33.

273. UMBREIT & COATES, *supra* note 38, at 5.

274. *Id.*

275. According to an admittedly dated but still applicable finding in a report by the United States Commission on Civil Rights, when the Department of Justice decides whether to prosecute apparent violations of one of the "hate crime" codes like 18 U.S.C. § 242 (1996), one of the principle factors it considers is the likelihood of conviction. *Discretion to Prosecute*, *supra* note 98, at 1298; see also protracted discussion in *supra* Part II.

276. Hodak, *supra* note 196, at 1101.

277. *Id.*

programs refer cases after the court has accepted a formal admission of guilt, with the mediation being a condition of probation.²⁷⁸ Either way, integrating VOM into the “penalty” process could have the two-fold benefit of increasing pursuit of, and conviction for, bias-based harm, and forcing the issues of accountability and awareness onto the offender. Further, the court remains involved,²⁷⁹ and the offender is still responsible for the crime.²⁸⁰ The net effect not only increases the prosecutor’s conviction rate, but also eliminates issues of proof, thus incentivizing a more aggressive application of the law by prosecutors and police.²⁸¹

F. Where Victim-Offender Mediation Fails

Although VOM “is viewed as a highly effective program,” it is far from being a panacea for hate crimes law, able to solve all the varied components of bias-driven hate.²⁸² VOM critics point to victim safety as a primary concern, especially when considering crimes of violence, and inappropriate case referrals to VOM.²⁸³ These concerns are serious but not insurmountable, and VOM still operates with an American Bar Association (ABA) endorsement.²⁸⁴

Re-victimization can occur when an offender confronts his victim;²⁸⁵ understandably then, victim safety is of paramount concern. As it relates to violent crimes mediation, CRJP found that a mediator’s most important task was providing a safe place for the parties to converse,²⁸⁶ especially because VOM dialogue sessions often occur in

278. *Cross National Comparison*, *supra* note 102, at 33.

279. Hodak, *supra* note 196, at 1106.

280. *Id.* at 1117.

281. *See* Angelari *supra* note 40, at 100 and accompanying text.

282. Ilyssa Wellikoff, *Victim-Offender Mediation and Violent Crimes: On the Way to Justice*, 5 CARDOZO J. CONF. RES. 2, Part III.B (2003) available at <http://www.cojcr.org/vol5no1/note02.html> [hereinafter Wellikoff II].

283. *Id.*

284. *Id.*

285. *Id.*

286. UMBREIT, COATES, VOS, & BROWN, *supra* note 201, at 3.

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prison settings.²⁸⁷ In the case of both violent and non-violent VOM, victims are both sensitive and apprehensive when facing offenders.²⁸⁸ This sensitivity highlights the critical need for specialized mediator training, especially in cases of severely violent crimes.²⁸⁹ Even the ABA notes that “special care must be taken,” and only extensively trained mediators should handle “such highly sensitive cases.”²⁹⁰ Finally, mediators should engage in some form of collaboration with psychotherapists to prevent re-victimization.²⁹¹

Inappropriate referral acceptance presents potential problems for VOM.²⁹² VOM, again, must be voluntary to be successful.²⁹³ “Voluntary” does not include court-ordered mediation, mediation motivated solely by a sentence reduction, or mediation of a case simply because the court has no interest in handling the issue, e.g., in cases of incest.²⁹⁴ Forcing mediation, or allowing it under less than proper circumstances “would ‘not only conflict with the philosophical underpinnings but would exacerbate the loss of control already felt by people who have already been victimized by crimes.’”²⁹⁵

287. *Id.* at 1 (“[T]he actual mediation/dialogue session is typically held in a secure institution where the offender is located.”).

288. Wellikoff II, *supra* note 282, at Part 3(B).

289. UMBREIT, COATES, VOS, & BROWN, *supra* note 201, at 3.

290. Randolph Stone, American Bar Association Endorsement of: Victim-Offender Mediation/Dialogue Programs, *reprinted in* Victim Offender Reconciliation Program Information Center, <http://vorp.com/articles/abaendors.html> (last visited Nov. 9, 2008). “Foremost, it is imperative that the mediators empathize with the victims and understand the victimization experience [and] sympathize with grieving families . . . to cope with their losses.” *Id.*

291. *Id.*

292. Wellikoff II, *supra* note 282.

293. *Id.*

294. *Id.*

295. *Id.* (citing *American Bar Association Endorsement of: Victim-Offender Mediation/Dialogue Programs*, Part I (Aug. 1994), *reprinted in* Victim-Offender Reconciliation Program Information and Resource Center, <http://vorp.com/articles/abaendors.html> (last visited Nov. 9, 2008)).

The ABA can mitigate some of these concerns by setting out guidelines for mediation of non-violent and violent crimes.²⁹⁶ However, even given its shortcomings, which seem more procedural than systemic, VOM remains a strong resource in countering criminalized hate. Restorative justice, “not only seeks to engage victims in the justice process, but it also turns to the community as well as the offender in order to examine the ways in which an offender may directly repair the harm done to the victim and society.”²⁹⁷ Given restorative justice’s three primary goals of giving the victim a voice, enhancing offender accountability, and promoting a greater sense of community protection,²⁹⁸ this vastly underutilized tool may be key to successful hate crimes legislation.

VI. CONCLUSION

A prosecutor serves society by procuring the most generous penalty for an offender that the law allows. This encourages bypassing an inferior hate crimes charge that has the added burden of being more difficult to prove because it has a *mens rea* of motive, not the more traditional intent. Without a confession, when relying on pure circumstantial evidence, or when faced with multiple motives, proof can be an almost impossible task. The result is prosecutorial avoidance, which increases the distance between a prosecutor’s service to society and society’s need to confront criminalized bias head on. The curative impotence of incarceration as the single response to hate crimes exacerbates this problem: victims can rarely express to the offender how the crime affected their lives, society does not have the benefit of a response that deters recurrence, and the offender lacks a mental-gatekeeper to keep him from rationalizing his behavior.

296. *Id.* at Part V.C (“In addition, the concern over potential shortcomings would dissipate if the American Bar Association sets out more explicit and stringent guidelines for victim-offender mediation programs.”).

297. Shenk, *supra* note 25, at 186. Restorative justice gives the victim and other stakeholders a kind of restitution a jury simply just could not award. Interview with Relyea, *supra* note 33.

298. Shenk, *supra* note 25, at 190-91.

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Proposed hate crimes legislation may bridge the prosecutor-societal disconnect because it is less restrictive than current law and provides fiscal aid and expertise to support states in their defense against hate-based harm. Injecting VOM into the penalty phase solidifies a national priority of victim and community healing. Congress can achieve the objective by incorporating funding provisions into the proposed law to develop state and federal VOM adjuncts to hate crimes prosecution.

“Prosecutors are in a pivotal position both to promote targeting of bias crime among police and judges and to sustain whatever efforts law enforcement and the judiciary are already devoting to hate violence offense.”²⁹⁹ Prosecutors can play a major role in promoting change in this area.³⁰⁰ As the Norfolk County District Attorney’s Office wrote:

A prosecutor has direction to influence, if not determine, what might be called the public safety climate that citizens in the communities he serves will experience, . . . [and to] establish a public safety climate that fosters the full enjoyment of civil and political rights by the minority members of our communities requires a focused political will directed to that end as well as resources and capacity.³⁰¹

The most recent case for change has come in the beleaguered forms of Megan Williams and Brian Abrahams. Megan and her family moved to Ohio in the spring of 2008.³⁰² Last noted, Megan was recovering from surgeries caused by a stick with brown and red

299. Finn, *supra* note 51, at 48.

300. *Id.*

301. *Id.* at 20 (quoting Peter S. Agnes, Jr., *Public Safety in the 80s: New Cultural Dimensions in Society, A Modern Prosecutor's Response to the Challenges Posed by Cultural Diversity*, Unpublished paper, Norfolk County (Mass.) District Attorney's Office, n.d.).

302. Daniel Heyman, *6th White Defendant Admits Role In Black Woman's Torture*, N.Y. TIMES, Sept. 26, 2008, available at <http://www.nytimes.com/2008/09/27/us/27abduct.html?partner=rssnyt&emc=rss>.

matter attached,³⁰³ which was presumably inserted into some part of her body. She received a two year, \$40,000 scholarship towards her education, a new computer, and six months of tutoring towards her general education diploma.³⁰⁴ Abrahams was called to military duty but he says that should not affect Megan's case.³⁰⁵

All seven of Megan's assailants have been convicted and face sentences ranging from six months to forty years.³⁰⁶ Linnie Burton, Karen Burton's son, received the most lenient sentence. Virginia prosecutors charged him with one count of misdemeanor battery.³⁰⁷ Burton pled guilty, and "was given a six-month suspended jail sentence and placed on one year of supervised probation."³⁰⁸

The bulk of the defendants will spend at least ten years in prison. Alisha Burton, Karen's daughter, and George Messer pled guilty to "one count of kidnapping and one count of assault during the commission of a felony" and were both sentenced to concurrent prison terms of ten years for the kidnapping and two to ten years for the assault.³⁰⁹ Frankie Brewster pled to second degree assault after having Megan perform oral sex on her.³¹⁰ Brewster received a ten to twenty-five year sentence,³¹¹ and is required to be registered as a sex

303. *Shabazz Addresses Hate Crimes Charges, Williams' Health*, CHARLESTON DAILY MAIL, Feb. 12, 2008, available at <http://www.dailymail.com/News/200802120096>.

304. *Torture Victim Megan Williams Gets \$40,000 Scholarship During Montel Appearance*, CHARLESTON DAILY MAIL, Feb. 7, 2008, available at <http://www.dailymail.com/News/200802070356>.

305. Gary Harki, *Military Duty Won't Affect Williams Case, Prosecutor Says*, SUNDAY GAZETTE-MAIL (W. Va), Feb. 28, 2008, available at <http://www.wvgazette.com/News/200802280764> [hereinafter Harki II].

306. *Suspect in Torture Case Pleads Guilty*, CHARLESTON GAZETTE & DAILY MAIL (WV), July 17, 2008, available at 2008 WLNR 13412259. At six months, defendant Linnie Burton Jr. received the lightest sentence; defendant Bobby Brewster faces up to forty years in prison. *Id.*

307. Harki II, *supra* note 305.

308. *Suspect in Torture Case Pleads Guilty*, *supra* note 306.

309. *See* Mohajer, *supra* note 58.

310. Harki II, *supra* note 305.

311. *Two in Logan Case Get Maximum Sentences*, CHARLESTON DAILY MAIL, Mar. 13, 2008, available at <http://www.dailymail.com/News/200803130309>.

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offender for the remainder or her life.³¹² Danny Combs pled guilty “to first degree sexual assault, assault during the commission of a felony, and conspiracy to commit kidnapping.”³¹³ It was Combs who raped Megan at knifepoint, and forced “her to eat dog and rat feces.”³¹⁴ Combs pled shortly after Bobbie Brewster agreed to testify against him as a condition of Brewster’s plea.³¹⁵ The court sentenced Combs to four to twenty years.³¹⁶

Virginia courts handed down the harshest penalties to Karen Burton and Bobbie Brewster, Frankie Brewster’s son. Karen pled guilty to a hate crime, malicious assault, and assault during the commission of a felony.³¹⁷ She received a two to ten year sentence for each assault charge and ten years for the civil rights violation,³¹⁸ and the three charges are to be served consecutively.³¹⁹ Karen will, consequently, serve a minimum of fourteen years, and possibly up to thirty years, in prison. Bobby Brewster pled guilty to assault in the second degree, malicious assault, and conspiracy to holding Williams hostage.³²⁰ He will serve as least thirteen years in prison, and faces up to forty years for his three convictions.³²¹ While Williams, her family,³²² her attorney, local citizens,³²³ and at least one law-maker³²⁴

312. *Suspect in Torture Case Pleads Guilty*, *supra* note 306.

313. Heyman, *supra* note 302.

314. *Id.*

315. *As Part of A Plea Agreement, Torture Defendant Agrees To Testify in September Trial*, Associated Press, July 17, 2008 available at 7/17/08 APALERTWV 19:48:55 [hereinafter *Plea Agreement*].

316. Heyman, *supra* note 302.

317. *Two in Logan Case Get Maximum Sentences*, *supra* note 311.

318. *Id.*

319. *Id.*

320. *Plea Agreement*, *supra* note 311.

321. *Suspect in Torture Case Pleads Guilty*, *supra* note 306.

322. WSAZ.com, *Megan Williams’ Family Says Abusers Deserve More Prison Time*, WSAZ.COM, Feb. 27, 2008, www.wsaz.com/home/headlines/16050857.html (noting that Megan’s parents are lashing out at the local prosecutor for not securing harsher penalties for some of the offenders, whom they wanted to receive life sentences).

323. Nicky Walters, *Megan Williams Family Angered By Plea Deals*, WOWK TV NEWS, Feb. 27, 2008, <http://www.wowktv.com/story.cfm?func>

were unhappy with many of the earlier outcomes, the family consulted with Logan County prosecutors for Bobbie Brewster's plea.³²⁵ The Williams family did not comment on Danny Combs' conviction, and Combs was the last to be sentenced following Megan's horrible ordeal.³²⁶

Abrahams charged none of the defendants with federal hate crimes laws because those laws were simply beyond his reach. Abrahams, along with the United States Attorney's Office and the Federal Bureau of Investigation, considered—but ruled out—federal statutes because “stabbing someone in the leg and calling them the ‘N’ word is [not] a federal crime unless you can tie it with some federally protected activity.”³²⁷ Worse, proposed laws lay dormant in the legislature and had Shepard's law been in effect, Megan's case would not have been barred by the double intent requirement, and thus eligible for federal investigatory aid.³²⁸

From that legislative void stem at least three quantifiable harms. First, every single defendant escaped a death sentence, or life in federal prison, for the vile and hate-driven dehumanization of Megan Williams,³²⁹ brutalized as a placeholder for her race through crimes that shocked the nation.³³⁰ At a minimum, the legal gap saved defendants Linnie Burton and Danny Combs between six and nine and

=viewstory&storyid=35362 (noting that Black Lawyers for Justice voiced their concerns as well).

324. Representative Sheila Jackson Lee, a Houston Congresswoman, believes the sentences handed down for Karen Burton and Frankie Brewster were not “harsh enough.” *Houston Congresswoman Says W. Va. Torture Case Sentence Too Lenient*, KXAN.COM AUSTIN NEWS, Mar. 14, 2008, <http://www.kxan.com/Global/story.asp?S=8018369>.

325. *Suspect in Torture Case Pleads Guilty*, *supra* note 306.

326. Heyman, *supra* note 302.

327. Gary Harki, *Prosecutor Looks Back on Williams Case*, SUNDAY GAZETTE-MAIL, Dec. 7, 2008, available at <http://wvgazette.com/News/200812060490>.

328. *See supra* Part IV(B)(2).

329. Under 18 U.S.C. § 245(b)(5) (2007), when the victim of a hate crime is kidnapped or sexually abused, the penalty includes life imprisonment or death.

330. *See supra* note 12; *see also* *W. Va. Man Pleads Guilty in Torture Case*, ASSOC. PRESS, July 17, 2008 available at 7/17/08 APALERTWV (referring to the torture of Megan Williams as a case that “shocked the nation.”).

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one half years in a state prison because they were not forced to answer for perhaps the most far reaching of their crimes—hate directed not just at Williams, but at her entire race.³³¹ Next, investigatory aid could have brought with it access to circumstantial evidence, and Abrahams may have been less inclined to limit his hate crimes pursuit to the one scenario bolstered by a defendant’s confession. Finally, the body of law around motive and hate crimes may have been more mature had a case such as Megan’s been litigated with more frequency by the time her case came before the Virginia court.³³² As a result, proving up each defendant’s state of mind in the *Williams* case may have been less cumbersome for the neophyte hate-crime state of Virginia.³³³ One fervently hopes that through Megan’s sacrifice, Abrahams’ avoidance, and the defendants’ utter inhumanity, the immediate need for passage has come into focus, and has somehow gotten us closer to engineering this sorely needed legal—and social—change.

*Catherine Pugh**

331. Again, Burton was sentenced to six months in prison. *Suspect in Torture Case Pleads Guilty*, *supra* note 306. Combs was sentenced to a minimum of four years. Heyman, *supra* note 302. A hate crimes charge under Virginia law could have netted each ten years. W. VA. CODE ANN. § 62-6-21 (West 2007).

332. *See supra* Part IV(B)(3)(b).

333. *Id.*

* To my in-laws, Dorris and Lorenzo, thank you. You were my personal team of editors, cheerleaders, and friends. I could not have asked for more knowledgeable and committed partners. Special love goes to my four little monsters, Mouse, Moose, Stink, and Q. They put up with a never-ending stream of “Not now. Mommy has to study.” Mommy is so proud of all of you! And finally, separate and precious notes to my two heroes. Mom, through your strength, force, love and sacrifice, you have shaken the earth silent so that your children could speak. There is no greater a woman or mother than you. Chris and I have learned all that you have taught, and all four of us will do you proud. B.D., you were such a powerful provider that you carved out a quiet place in the world where I could indulge, selfishly, in my dream. You are my “fullback,” my husband, my partner, and my friend; you bless me with the gift of your love. I adore you, sweetheart, and forever my heart is yours.