

HATE CRIME STATUTES: A PROMISING TOOL FOR FIGHTING VIOLENCE AGAINST WOMEN

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INTRODUCTION

Many feminist theorists and advocates argue that numerous types of violent crime against women should be characterized as “hate crime”; that is, crime motivated by a hatred of women and a desire to control and terrorize women.¹ As early as 1975, Susan Brownmiller

1. See CENTER FOR WOMEN POLICY STUDIES, *VIOLENCE AGAINST WOMEN AS BIAS MOTIVATED HATE CRIME: DEFINING THE ISSUES* 1 (1991) (stating that “[t]hroughout these past two decades, feminist theorists have written extensively about violence against women, which is seen as the quintessential example of sex discrimination and sexual oppression—as the most powerful tool of male domination and patriarchal control”). The Center for Women Policy Studies relies on the following works to support its proposition: SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN, AND RAPE* 14-15 (1975) (stating that “[m]an’s discovery that his genitalia could serve as a weapon to generate fear must rank as one of the most important discoveries of prehistoric times, along with the use of fire and the first crude stone axe”); CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 245 (1989) [hereinafter MACKINNON, *THEORY OF THE STATE*] (asserting that the rape of women by men “is integral to the way inequality between the sexes occurs in life. Intimate violation with impunity is an ultimate index of social power. Rape both evidences and practices women’s low status relative to men. . . . Threat of sexual assault is threat of punishment for being female.”); KATE MILLETT, *SEXUAL POLITICS* 25, 44 (1970) (claiming that “[i]n rape, the emotions of aggression, hatred, contempt, and the desire to break or violate personality, take a form consummately appropriate to sexual politics”); and Charlotte Bunch, *Women’s Rights as Human Rights: Toward a Re-Vision of Human Rights*, 12 *HUM. RTS. Q.* 486, 486 (1990) (arguing that gender-related abuse should be incorporated into human rights goals and that “many violations of women’s human rights are distinctly connected to being

argued that rape is not a crime of sex, but rather a crime of violence that preserves male dominance and keeps all women in a state of terror.² This same analysis of violence against women is applied in the context of domestic violence.³ Studies show that victims of rape

female—that is, women are discriminated against and abused on the basis of gender”).

2. Brownmiller defines rape as “a conscious process of intimidation by which *all men keep all women* in a state of fear.” BROWNMILLER, *supra* note 1, at 15 (emphasis in original). Catharine MacKinnon argues that “[r]ape is an act of dominance over women that works systematically to maintain a gender-stratified society in which women occupy a disadvantaged status as the appropriate victims and targets of sexual aggression.” Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1302 (1991) [hereinafter MacKinnon, *Sex Equality*]; accord MACKINNON, THEORY OF THE STATE, *supra* note 1, at 126 (asserting that dominance and submission between women and men is eroticized, placing women in a dangerous position in relation to men); Susan Griffin, *Rape: The All-American Crime*, 10 RAMPARTS 26, 27 (1971) (emphasizing that all women are victims of rape even if they have not experienced a direct attack because “rape and the fear of rape are a daily part of every woman’s consciousness”), quoted in Patricia L.N. Donat & John D’Emilio, *A Feminist Redefinition of Rape and Sexual Assault: Historical Foundations and Change*, 48 J. SOC. ISSUES 9, 15 (1992).

Dr. JoAnn Evans-Gardner, a founder of the Association for Women in Psychology, asserts that rape is “an act of political oppression,” and that “[r]apists perform for sexist males the same function that the Ku Klux Klan performed for racist whites—they keep women in their ‘place’ through fear.” NANCY GAGER & CATHLEEN SCHURR, SEXUAL ASSAULT: CONFRONTING RAPE IN AMERICA 209 (1976); accord MacKinnon, *Sex Equality*, *supra* at 1303 (stating that “sexual assault in the United States today resembles lynching prior to its recognition as a civil rights violation”).

However, some African-American feminists argue that these theories about the functions of rape have been developed by caucasian feminists in response to their own particular experience of rape. See *infra* notes 162-196 and accompanying text (discussing the argument that mainstream feminism is essentialist). But see BELL HOOKS, *Reflections on Race and Sex, in YEARNING* 57, 59 (1990) (“both groups [caucasian men and African-American men] have been socialized to condone patriarchal affirmation of rape as an acceptable way to maintain male domination. It is the merging of sexuality with male domination within patriarchy that informs the construction of masculinity for men of all race and classes.”).

3. See Edward W. Gondolf, *Anger and Oppression in Men Who Batter: Empiricist and Feminist Perspectives and Their Implications for Research*, 10 VICTIMOLOGY: AN INT’L J. 311 (1985). Gondolf asserts that “feminist researchers . . . analyze abuse as an expression of patriarchy. Men abuse women in the home as they do elsewhere in our society—as a means of maintaining power and exerting control over women. Wife abuse in this light is a kind of gender terrorism.” *Id.* at 313. Gondolf further states that

feminists . . . consider male oppression to be fundamental to violence against women. The individual batterer abuses his wife not so much to release his anger as he has been taught to do, as the empiricists imply, but rather, for the same reason men exploit women in the larger society and have beaten and discriminated against them throughout history—to keep them in their place The man then uses abuse not to relieve or release anger but to exert his power and privilege.

Id. at 316.

Professor Elizabeth Schneider makes the same argument when she states that “[t]raditionally, feminist work on battering identified battering as a problem of sexism, of male domination within heterosexual relationships, shaped by the institution of marriage.” Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U. L. REV. 520, 539 (1992). She further notes that feminists have challenged “the traditional interpretive frameworks used by psychologists” in the field of wife-battering, and in doing so “have drawn analogies between battered women and other victims of terrorism.” *Id.* at 541 n.81; see also Michele Bograd, *Feminist Perspectives on Wife Abuse: An Introduction, in FEMINIST PERSPECTIVES ON WIFE ABUSE* 11, 14 (Kersti Yllo & Michele Bograd eds., 1988) (stating that “[even] if individual men refrain from employing physical force against their partners, men as a class benefit from how women’s lives are restricted and limited because of their fear of violence by husbands and lovers as well as strangers”).

and domestic violence, like victims of other hate crimes, are interchangeable in the eyes of their attackers.⁴ Moreover, violent crimes against women are frequently devoid of any criminal motive and are excessively violent.⁵ In similar fashion, advocates for victims of violent crimes motivated by racial and ethnic hatred argue that the intent of such hate-based crimes is to control and terrorize the members of racial and ethnic groups.⁶ These crimes also lack criminal motive⁷ and are excessively violent.⁸

Despite the similarities between race and ethnic hate-based crimes and violence against women, the development of the law concerning the two types of crimes has differed considerably. While many feminist theorists and women's rights advocates adopt the perspective that violence against women is often hate crime,⁹ they have generally failed to have gender included in hate crime statutes.¹⁰ Advocates for victims of ethnic, racial, and other hate-based violence, on the other hand, have successfully promoted legislation that treats such violent crimes differently from other violent crimes through the inclusion of these crimes in hate crime statutes.¹¹

This article explores the legal and political issues surrounding the inclusion of gender in hate crime statutes. Part I discusses hate crime statutes in general and the constitutional constraints on the types of behavior that these statutes cover. Part II describes federal and state

4. See Elaine Hilberman, *Overview: The "Wife-Beater's Wife" Reconsidered*, 137 AM. J. PSYCHIATRY 1336, 1337 (1980) (arguing that "[t]he basic fact of the victim's femaleness is used by the offender to justify the assault"); *Hate Crime Statistics Act of 1988: Hearing on S. 2000 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 100th Cong., 2d Sess. 262, 268 (1988) (testimony of Molly Yard, President, National Organization for Women) [hereinafter Yard testimony] (stating that "in the eyes of the rapist, one woman could stand in for any other").

5. See CENTER FOR WOMEN POLICY STUDIES, *supra* note 1, at 10 (explaining that "[m]any crimes against women involve excessive violence, including mutilation, that characterizes bias-motivated hate crimes"); Peter Finn, *Bias Crime: A Special Target for Prosecutors*, THE PROSECUTOR, Spring 1988, at 9, 13 (explaining that crimes are identified as bias-motivated by considering the "severity of the attack (e.g., mutilation)").

6. See Peter Finn, *supra* note 5, at 10 (asserting that "crimes motivated by bias have a far more pervasive impact . . . because they are intended to intimidate an entire group") (emphasis in original).

7. See Finn, *supra* note 5, at 13-14 (stating that "[w]ith some hate violence incidents there seem to be no innocent victims—everyone appears compromised").

8. See *supra* note 5 and accompanying text.

9. See *supra* notes 1-5 and accompanying text (citing to proponents of the argument that violent crime against women is based upon the attacker's desire to control and intimidate women as a group).

10. See *infra* notes 110-137 and accompanying text (discussing the opposition of national advocacy groups to the inclusion of gender in hate crime statutes).

11. See *infra* notes 11-27 and accompanying text (discussing legislative efforts on the state and federal level to fight hate crime); see *infra* note 110 and accompanying text (discussing the success of national advocacy organizations in including a broad range of individuals in hate crime statutes).

hate crime legislation that includes gender. Part III examines the obstacles to the passage and implementation of these laws and the arguments against treating violence against women as hate crime. Part IV analyzes two potential benefits to treating violence against women as hate crime. The article concludes that these potential benefits outweigh the concerns raised in Part III, and that therefore women's advocacy groups should promote both the inclusion of gender in hate crime statutes and the effective implementation of these statutes.

I. GUIDANCE FROM EXISTING LAW

A. *Hate Crime Statutes In General*

1. *Federal Law*

For over a century, the American legal system has recognized that individual members of some groups are the targets of violence merely because of their membership in a specific group. The Ku Klux Klan Act of 1871,¹² passed in response to violence against African-Americans following the Civil War and arguably the first federal hate crime statute, was the first federal effort to combat attacks motivated by a person's membership in a particular group.¹³ Since the passage of this statute, federal hate crime statutes have expanded the scope of federal protection to include racial, religious, and ethnic minorities.¹⁴ These statutes impose criminal penalties and/or civil remedies.

12. Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. §§ 1985-1986 (1988)) (attempting to curtail the violence against African-American citizens from the Ku Klux Klan).

13. See S. REP. NO. 197, 102d Cong., 1st Sess. 42 (1991) (stating that Congress first barred discriminatory "attacks against persons because of their race, religion or political beliefs" in 1871).

14. For example, the following federal statutes provide criminal sanctions for those convicted of violating a person's civil rights on the basis of the person's race, religion, or ethnicity. These statutes address: (1) conspiracy to interfere with civil rights, 18 U.S.C. § 241 (1988); (2) deprivation of civil rights under color of law, 18 U.S.C. § 242 (1988); (3) forcible interference with civil rights, 18 U.S.C. § 245 (1988 & Supp. IV 1992); and (4) willful interference with civil rights under the Fair Housing Act, 42 U.S.C. § 3631 (1988). Although three statutes cover private acts, one requires a conspiracy, 18 U.S.C. § 241, and one is restricted to the housing context, 42 U.S.C. § 3631. Furthermore, the statute that addresses forcible interference with civil rights protects only specific civil rights: voting and election activities; participation in programs administered or financed by the United States; federal employment; and jury service in the federal courts. 18 U.S.C. § 245.

Additionally, at least four federal statutes offer civil remedies for victims of civil rights violations that are based upon the victim's race, religion, or ethnicity. 42 U.S.C. § 1983 (1988) (prohibiting an individual from depriving another person of equal protection of the law); 42

2. State Law

A majority of states have enacted hate crime statutes.¹⁵ Many states provide for both criminal penalties and civil remedies in cases of hate crime.¹⁶ Some states require data collection on hate crime.¹⁷ Others train their police to handle hate crime cases.¹⁸ Most importantly, state hate crime statutes extend protection to several traditionally disadvantaged groups not protected by federal

U.S.C. § 1985 (1988) (prohibiting two or more individuals from conspiring to deprive any person or class of persons of equal protection of the law); 42 U.S.C. § 1986 (1988) (providing a cause of action against any person who fails to prevent a conspiracy that deprives another person of his civil rights, where the person charged with violating the statute also has the power to prevent the commission of the conspiracy); 42 U.S.C. § 3617 (1988) (providing a cause of action for victims of interference, coercion, or intimidation in violation of the Fair Housing Act). See generally NATIONAL INSTITUTE AGAINST PREJUDICE AND VIOLENCE, STRIKING BACK AT BIGOTRY: REMEDIES UNDER FEDERAL AND STATE LAW FOR VIOLENCE MOTIVATED BY RACIAL, RELIGIOUS AND ETHNIC PREJUDICE 23-37 (1986) (discussing federal hate crime remedies, with a particular concentration on the legal remedies for violence motivated by race and religion).

15. The following hate crime statutes are in force: CAL. PENAL CODE § 422.6 (West Supp. 1993); COLO. REV. STAT. § 18-9-121 (Supp. 1992); CONN. GEN. STAT. ANN. § 46a-58 (West 1986); D.C. CODE ANN. § 22-4001 (1992); FLA. STAT. ANN. ch. 877.19 (Harrison 1991); IDAHO CODE § 18-7902 (1987); ILL. ANN. STAT. ch. 38, para. 12-7.1 (Smith-Hurd 1992); IOWA CODE ANN. § 729A.2 (West 1993); KY. REV. STAT. ANN. § 15.331 (Baldwin 1992); ME. REV. STAT. ANN. tit. 25, § 1544 (West 1988); MD. CODE ANN. art. 27, § 470A (1987 & Supp. 1991); MASS. GEN. LAWS ANN. ch. 22C, § 32 (West 1992); MICH. COMP. LAWS ANN. § 28.257 (West 1991); MINN. STAT. ANN. § 609.2231(4) (West Supp. 1993); MO. ANN. STAT. § 574.090 (Vernon 1992); MONT. CODE ANN. § 45-5-221 (1991); NEV. REV. STAT. § 207.185 (1991); N.H. REV. STAT. ANN. § 651:6(g) (1955 & Supp. 1992); N.J. STAT. ANN. § 2C:12-1(b)7e (West 1982 & Supp. 1993); N.Y. PENAL LAW § 240.30 (McKinney 1989 & Supp. 1993); N.C. GEN. STAT. § 14-401.14 (1992); OHIO REV. CODE ANN. § 2927.12 (Anderson 1993); OKLA. STAT. ANN. tit. 21, § 850 (West 1993); OR. REV. STAT. § 166.155, .165 (1991); PA. STAT. ANN. tit. 18, § 2710 (1983); R.I. GEN. LAWS §§ 9-1-35, 11-42-3 (1992); TENN. CODE ANN. § 39-17-309 (1991); UTAH CODE ANN. § 76-3-203.3 (Supp. 1993); VT. STAT. ANN. tit. 13, § 1455 (Supp. 1990); VA. CODE ANN. § 8.01-42.1 (Michie 1992); WASH. REV. CODE ANN. § 9A.36.080 (Supp. 1993); W. VA. CODE § 61-6-21 (1992); WIS. STAT. ANN. § 939.645 (West 1992).

16. The following hate crime statutes include both criminal and civil penalties: D.C. CODE ANN. § 22-4003, -4004 (1992); FLA. STAT. ANN. ch. 775.085 (Harrison 1992); IDAHO CODE § 18-7903 (1987); IOWA CODE ANN. §§ 716.7A, 729A.5 (West 1993); MICH. COMP. LAWS ANN. § 750.147b (West 1991); OR. REV. STAT. § 30.190 (1991); R.I. GEN. LAWS §§ 9-1-35, 11-42-3 (1992); VT. STAT. ANN. tit. 13, §§ 1455, 1457 (Supp. 1990).

17. The following statutes require the collection of hate crime statistics: CONN. GEN. STAT. ANN. § 29-27m (West 1986); D.C. CODE ANN. § 22-4002 (1992); FLA. STAT. ANN. ch. 877.19 (Harrison 1991); IDAHO CODE § 18-7902 (1987); IOWA CODE ANN. § 729A.2 (West 1993); KY. REV. STAT. ANN. § 17.1523 (Baldwin 1992); ME. REV. STAT. ANN. tit. 25, § 1544 (West 1988); MD. CODE ANN. art. 88B, § 9 (1991); MASS. GEN. LAWS ANN. ch. 22C, §§ 32-35 (West 1992); MICH. COMP. LAWS ANN. § 28.257 (West 1991); MINN. STAT. ANN. § 626.5531 (West Supp. 1994); OR. REV. STAT. § 181.550 (1991); R.I. GEN. LAWS § 44-28-46 (1992); TEX. GOV'T CODE ANN. § 441.046 (West Supp. 1993).

18. The following statutes mandate special police training for dealing with hate crimes: IOWA CODE ANN. § 80B.11 (West 1984 & Supp. 1993); KY. REV. STAT. ANN. § 15.331 (Baldwin 1992); MASS. GEN. LAWS ANN. ch. 6, § 116B (West 1992); MINN. STAT. ANN. § 609.8451 (West Supp. 1993).

hate crime statutes, such as gays and lesbians,¹⁹ women,²⁰ the mentally and physically disabled,²¹ the elderly,²² and members of unpopular political groups.²³ The inclusion of such groups is a direct response to changing attitudes about who can be a victim of hate crime. Today, most hate crime originates not with organized hate groups such as the Ku Klux Klan, but instead with "individuals or small groups of people acting on their own."²⁴ By broadening the definition of the hate crime perpetrator, the definitions of hate crime and the hate crime victim are broadened as well.

Over half of all state hate crime statutes are based on, or are similar to, the model hate crime statute developed by the Anti-Defamation League of B'nai B'rith (ADL) in 1981.²⁵ The distinctive feature of this statute is its enhancement of penalties for criminal activities when the victim is a member of a protected group and the perpetrator

19. The following hate crime statutes include sexual orientation as a protected characteristic: CAL. PENAL CODE § 422.6 (West Supp. 1993); D.C. CODE ANN. § 22-4001 (1992); ILL. ANN. STAT. ch. 38, para. 12-7.1 (Smith-Hurd 1992); IOWA CODE ANN. § 729A.2 (West 1993); MASS. GEN. LAWS ANN. ch. 22C, § 32 (West Supp. 1992); MICH. COMP. LAWS ANN. § 28.257 (West 1992); MINN. STAT. ANN. § 609.2231(4) (West Supp. 1993); NEV. REV. STAT. § 207.185 (1991); N.H. REV. STAT. ANN. § 651:6(g) (1955 & Supp. 1992); N.J. STAT. ANN. § 2C:12-1(b)7e (West 1982 & Supp. 1993); OR. REV. STAT. § 166.165 (1991); VT. STAT. ANN. tit. 13, § 1455 (Supp. 1990); WIS. STAT. ANN. § 939.645 (West 1992).

20. The following hate crime statutes include gender as a protected characteristic: CAL. PENAL CODE § 422.6 (West Supp. 1993); CONN. GEN. STAT. ANN. § 46a-58 (West 1986); D.C. CODE ANN. § 22-4001 (1992); ILL. ANN. STAT. ch. 38, para. 12-7.1 (Smith-Hurd 1992); IOWA CODE ANN. § 729A.2 (West 1993); KY. REV. STAT. ANN. § 15.331 (Baldwin 1992); MICH. COMP. LAWS ANN. § 28.257 (West 1992); MINN. STAT. ANN. § 609.2231(4) (West Supp. 1993); N.H. REV. STAT. ANN. § 651:6(g) (1955 & Supp. 1992); VT. STAT. ANN. tit. 13, § 1455 (Supp. 1990); W. VA. CODE § 61-6-21 (1992).

21. The following hate crime statutes include physical and/or mental disability as a protected characteristic: CAL. PENAL CODE § 422.6 (West Supp. 1993); CONN. GEN. STAT. ANN. § 46a-58 (West 1986); D.C. CODE ANN. § 22-4001 (1992); ILL. ANN. STAT. ch. 38, para. 12-7.1 (Smith-Hurd 1992); IOWA CODE ANN. § 729A.2 (West 1993); MASS. GEN. LAWS ANN. ch. 22C, § 32 (West 1992); MINN. STAT. ANN. § 609.2231(4) (West Supp. 1993); OKLA. STAT. ANN., tit. 21, § 850 (West 1992-1993); VT. STAT. ANN. tit. 13, § 1455 (Supp. 1990); WASH. REV. CODE ANN. § 9A.36.080 (1988 & Supp. 1993); WIS. STAT. ANN. § 939.645 (West 1992).

22. The following hate crime statutes include age as a protected characteristic: D.C. CODE ANN. § 22-4001 (1992); IOWA CODE ANN. § 729A.2 (West 1993); MINN. STAT. ANN. § 609.2231(4) (West Supp. 1993); VT. STAT. ANN. tit. 13, § 1455 (1990).

23. The following hate crime statutes include political affiliation as a protected characteristic: D.C. CODE ANN. § 22-4001 (1992); IOWA CODE ANN. § 729A.2 (West 1993); MONT. CODE ANN. § 45-5-221 (1991); W. VA. CODE § 61-6-21 (1992).

24. Finn, *supra* note 5, at 9. In fact, "at least half" of all people who are arrested for bias crimes are between the ages of 16 and 25. *Id.* at 9-10. These individual perpetrators of hate crime may be encouraged by the rhetoric of hate groups and by the lack of an effective community response to hate crime. *Id.* at 9.

25. See ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, HATE CRIMES STATUTES: A 1991 STATUS REPORT 2-5 (1991) (setting forth model hate crime legislation intended to assist state and local legislatures that are considering enacting hate crime laws). The ADL stated that over half of all state hate crime statutes are based upon, or similar to, the ADL model statute. *Id.* at 1.

commits the crime because of the victim's membership in this group.²⁶ Like federal hate crime statutes, the ADL model statute also provides civil remedies for victims of hate crime.²⁷

B. Enforcement Of Hate Crime Statutes In Race Cases

In general, the enforcement of hate crime statutes is problematic. The same prejudices that motivate people to commit hate crime may also influence the decisions of prosecutors and the actions of the police.²⁸ To combat these prejudices while assisting the enforcement of hate crime statutes, some jurisdictions have created special police and prosecutorial units that deal solely with hate crime cases.²⁹ Some of these special units coordinate police and prosecutorial action,³⁰ while others work directly with the community organizations of statutorily-protected groups.³¹ Although data is limited, it appears that hate crime statutes are most effectively enforced in jurisdictions with these special units.³² When the police know that they have community support and that prosecutors will actually prosecute hate

26. *Id.* at 2 (concluding that prosecutors would be more inclined to pursue convictions under hate crime statutes if the penalties were increased).

27. *Id.* at 3. In the ADL model statute, civil remedies include general tort damages, punitive damages, and attorney's fees. *Id.* In addition, the model ADL statute makes parents liable for their children's actions. *Id.*

28. See Finn, *supra* note 5, at 10 (stating that a "[l]ack of police and prosecutor attention to bias crime sometimes reflects the attitudes of local residents who do not want minorities in their community"); Tanya Katerí Hernández, Note, *Bias Crimes: Unconscious Racism in the Prosecution of "Racially Motivated Violence"*, 99 YALE L.J. 845, 851-55 (1990) (stating that "unconscious racism, ingrained in North American culture, makes it difficult for prosecutors to concede that racially motivated violence is indeed a crime").

29. See Finn, *supra* note 5, at 11-12. For example, in New York City, the Manhattan District Attorney's office has appointed a senior trial attorney to supervise cases involving crimes against gays and lesbians. *Id.* at 12. Sensitivity training regarding the unique problems of gay and lesbian crime victims is mandatory for new District Attorneys. *Id.* Prosecutors are to recommend the highest offense possible for persons charged with the commission of a bias crime and are to urge the judge to consider the bias when passing sentence. *Id.*

30. For example, the Queens County, New York, District Attorney's office has created an Anti-Bias Bureau that works through the Police Department's Bias Incident Investigating Unit. Finn, *supra* note 5, at 11-12. The Unit monitors and investigates hate violence that is allegedly based upon the victim's race, religion, ethnicity, or sexual orientation. *Id.* at 11. The Anti-Bias Bureau follows up with legal action where appropriate. *Id.* at 11. Very few of these bias cases are plea-bargained. *Id.* at 12.

In Boston, Massachusetts, the Police Department's Community Disorders Unit aggressively pursues bias-crime investigations, including ride-alongs with victims, surveillance, rapid response operation, and undercover operations. *Id.* Once satisfied that a hate crime has occurred, the case is forwarded directly to the Attorney General's Civil Rights Division for prosecution. *Id.*

31. For instance, a paralegal in the Manhattan, New York, District Attorney's Office also acts as a liaison to the gay and lesbian community. Finn, *supra* note 5, at 12.

32. In spite of the difficulties inherent in hate-crime investigation, the successes encountered by those states which have created special units suggests that "targeting these cases is both feasible and rewarding." Finn, *supra* note 5, at 14. For example, in 1986, Boston's Community Disorders Unit brought 155 charges, 93 criminal and 62 civil, and convicted nearly 90% of those charged. *Id.* at 12.

crime cases, the police have a strong incentive to treat hate crime seriously.³³ Unfortunately, most jurisdictions are not devoting special efforts to prosecuting hate crime.³⁴

In addition, there are two particular problems with the enforcement of race-based hate crime statutes. First, caucasians appear to be using these statutes in surprisingly high numbers. For instance, in Minnesota, 49% of the victims who reported hate crimes between 1988 and 1991 were caucasian.³⁵ Some advocates maintain that hate crime statutes should only be available to minority victims.³⁶ The justification offered for this position is that hate-motivated violence against caucasians has less impact on the individual and the community than hate-motivated violence does against members of racial and ethnic minorities.³⁷

Second, racial and other biases among prosecutors is believed to be a primary obstacle to the use of these statutes by minorities.³⁸ Two proposed solutions include revising the statute to create a presumption of racist motivation in all interracial crimes of violence³⁹ and

33. Finn, *supra* note 5, at 15 (stating that "unless it becomes office policy for all trial assistants to single out hate violence, police may stop arresting suspects for these offenses when equally aggressive prosecutorial action does not follow").

34. Finn, *supra* note 5, at 15.

35. MINNESOTA BOARD OF PEACE OFFICER STANDARDS AND TRAINING, BIAS MOTIVATED CRIMES: A SUMMARY REPORT OF MINNESOTA'S RESPONSE 38 (1990) [hereinafter SUMMARY REPORT] (noting that 49% and 51% of the victims of hate crimes in 1988 and 1989, respectively, were caucasian); Minnesota Department of Public Safety, Minnesota Bias Offense Summary 1990-1991 (1992) (unpublished manuscript, on file with *The American University Journal of Gender & the Law*) [hereinafter Bias Offense Summary] (noting that 48% of hate crime victims in both 1990 and 1991 were caucasian).

36. See Marc L. Fleischauer, Comment, *Teeth for a Paper Tiger: A Proposal to Add Enforceability to Florida's Hate Crimes Act*, 17 FLA. ST. U. L. REV. 697, 703, 706 (1990) (proposing that minority offenders be exempted from penalty enhancements and civil damages in racially motivated crimes).

37. See Hernández, *supra* note 28, at 861 (arguing that "white victims may feel threatened by criminals who happen to be people of color, but this is a concern to be distinguished from the fear of bias motivated attacks which contributes to the oppression of disfavored groups").

In the case of hate speech involving civil action, not criminal, advocates argue that expressions of hatred directed against members of historically dominant-groups are not the same as hate speech directed at a member of a historically subordinate group because the latter keeps "victim groups in an inferior position." Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2362 (1989).

38. Hernández, *supra* note 28, at 851-52 (arguing that the lack of enforcement of state hate crime statutes is a result of "unchecked prosecutorial discretion," which is greatly affected by "unconscious racism of prosecutors"); Note, *Combatting Racial Violence: A Legislative Proposal*, 101 HARV. L. REV. 1270, 1275 (1988) (stating that prosecutors have wide discretion and can use their own racist sentiment to find that a criminal act was not racially motivated).

39. See Fleischauer, *supra* note 36, at 704 (proposing that the state legislatures create a presumption of bias in their hate crime statutes, while simultaneously creating an affirmative defense that places the burden on the defendant to prove that his actions were not racially-motivated); Note, *supra* note 38, at 1275 (concluding that the "Constitution permits states . . . to shift to the defendant the burden of proving a lack of racial motivation").

creating mechanisms for monitoring and challenging prosecutorial discretion.⁴⁰

II. LEGISLATION THAT TREATS VIOLENCE AGAINST WOMEN AS HATE CRIME

A. Federal Legislation

The only federal statute that offers remedies to victims of violent acts that are motivated by gender bias is Title VII of the Civil Rights Act of 1964.⁴¹ This statute only applies to cases of discrimination in an employment setting.⁴² Congress, however, is currently considering the enactment of several pieces of legislation—the Violence Against Women Act of 1993 and the Hate Crimes Sentencing Enhancement Act of 1993—which would define bias-motivated crimes based upon the victim's gender as a type of hate crime.

1. *The Violence Against Women Act of 1993*

The Violence Against Women Act of 1993 (VAWA)⁴³ was introduced in the Senate in January 1993 by Senator Joseph Biden.⁴⁴ A companion bill⁴⁵ was also introduced in the House of Representatives by Representative Patricia Schroeder in February 1993.⁴⁶ As amended, the bills share a number of important provisions.⁴⁷ Among other things, both provide federal funding to improve

40. One commentator recommends that each state establish a Bias Reporting Agency to aid in regulating prosecutorial discretion. Hernández, *supra* note 28, at 855. This agency, among other things, would require a "mandatory justification process" for prosecutors who plea bargained or failed to prosecute a bias crime case. *Id.* at 856. It would also assist victims who wished to challenge a prosecutor's decision not to prosecute a case. *Id.* at 856-58. The agency could also bring a class action against individual prosecutors who displayed a pattern of not prosecuting bias crimes. *Id.* at 860.

41. Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701-716, 78 Stat. 241, 253-66 (codified as amended at 42 U.S.C. § 2000e to 2000e-17 (1988 & Supp. III 1991)).

42. *Id.* § 703, 78 Stat. at 255 (prohibiting unlawful employment practices that result in discrimination on the basis of race, color, religion, gender, or national origin).

43. S. 11, 103d Cong., 1st Sess. (1993).

44. 139 CONG. REC. S190, S345 (daily ed. Jan. 21, 1993). As of the time that this article was written, the bill had been favorably reported by the Senate Judiciary Committee as amended, 139 CONG. REC. D597 (daily ed. May 27, 1993), and submitted to the Senate for consideration, *id.* at S11,444 (daily ed. Sept. 10, 1993).

45. H.R. 1133, 103d Cong., 1st Sess. (1993).

46. 139 CONG. REC. H877, E450 (daily ed. Feb. 24, 1993). As of the time that this article was written, the bill had passed the House of Representatives by a voice vote, *id.* at H10,370 (daily ed. Nov. 20, 1993), and was awaiting consideration by the Senate Judiciary Committee, *id.* at S16,935 (daily ed. Nov. 22, 1993) (referring the bill to committee).

47. The amended version of the Senate bill may be found in the Senate Judiciary Committee's Report, S. REP. NO. 138, 103d Cong., 1st Sess. 2-37 (1993). Similarly, the amended version of the House bill is located in the House Judiciary Committee's Report, H.R. REP. NO. 395, 103d Cong., 1st Sess. 1-24 (1993).

criminal law enforcement;⁴⁸ implement pro-arrest policies in domestic violence cases;⁴⁹ authorize education and training programs for judges of state and federal courts;⁵⁰ create a United States Department of Justice Task Force on Violence Against Women;⁵¹ establish new federal criminal penalties for domestic violence;⁵² and require that financial restitution be made to victims by their attackers when their attackers are convicted of federal sex offenses.⁵³

In addition, the Senate bill contains several additional remedies that are not included in the House bill. First, Title III of the bill⁵⁴ allows for the recovery of damages⁵⁵ under federal civil rights law for violent crimes that are motivated by the victim's gender.⁵⁶ The effect of this provision is to offer women something entirely new—a federal civil rights remedy that is available outside of the employment setting.⁵⁷ Second, the Senate bill contains penalty increase and

48. S. 11, § 121 (authorizing grants to combat violent crimes against women through increased training of police officers and development of law enforcement programs specifically designed for fighting these crimes); H.R. 1133, §§ 126, 1701-1704 (authorizing grants to "develop law enforcement and prosecution strategies to combat violent crimes against women").

49. S. 11, §§ 231, 317; H.R. 1133, §§ 221, 1901-1904.

50. S. 11, §§ 501, 511-514, 521-522 (authorizing grants to train state judges on gender-motivated bias crimes, as well as grants to study gender bias in the federal courts); H.R. 1133, §§ 401-404, 411-412 (using the same language as the Senate bill).

51. S. 11, §§ 141-148; H.R. 1133, §§ 311-319. The purpose of the Task Force is to develop strategies for combatting and punishing violent crimes against women. S. 11, § 142; H.R. 1133, § 312.

52. S. 11, § 221 (creating new penalties for interstate domestic violence where a spouse or intimate partner is injured); H.R. 1133, § 211 (punishing interstate domestic violence where the victim suffers bodily injury).

53. S. 11, § 113; H.R. 1133, § 131.

54. S. 11, §§ 301-304.

55. *Id.* §§ 302(c), 303 (allowing the victim to recover compensatory and punitive damages, declaratory and injunctive relief, and attorney's fees, among other remedies).

56. *Id.* § 302(c). The term "motivated by gender" is borrowed from existing civil rights law, specifically, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e to 2000e-17, which prohibits employment discrimination because of sex. *See* S. REP. NO. 138, *supra* note 47, at 52-53.

57. S. 11, § 302(a)(2) (stating a Congressional finding that "current law provides a civil rights remedy for gender crimes committed in the workplace, but not for gender crimes committed on the street or in the home").

However, certain organizations have voiced concerns about the potential impact of Title III on other civil rights laws. For example, Brenda Smith of the National Women's Law Center stated that, hypothetically, if the bill were to pass with a provision requiring a higher standard of proof for demonstrating gender bias, such as that the crime must be "overwhelmingly" because of gender bias, then perhaps there would be an attempt to move this standard over to other kinds of cases, such as employment discrimination. Telephone Interview with Brenda V. Smith, Senior Staff Attorney, National Women's Law Center (July 6, 1992). This issue is specifically addressed in October 1991 Senate Judiciary Committee Report, which states that the term "overwhelmingly" was specifically eliminated from the 1991 bill because there was "no counterpart to such language in any other civil rights remedy." *See* S. REP. NO. 197, *supra* note 13, at 51 (stating additionally that such a term would "pose an unnecessary and harmful burden on women"); *see also* S. REP. NO. 138, *supra* note 47, at 53 (noting that the 1993 bill does not require a higher standard of proof than in other civil rights cases and that it is not intended to undermine existing civil rights laws). As Ms. Smith suggested, however, the bill theoretically

enhancement provisions for certain defendants who are convicted of sexual assault.⁵⁸

2. *The Hate Crimes Sentencing Enhancement Act of 1993*

Another recent effort to combat hate crimes on the federal level is the Hate Crimes Sentencing Enhancement Act of 1993 (HCSEA),⁵⁹ introduced in the House of Representatives by Representative Charles Schumer in March 1993.⁶⁰ A companion bill⁶¹ was also introduced in the Senate by Senator Dianne Feinstein in October 1993.⁶² Both the House bill as amended, and the Senate bill, direct the United States Sentencing Commission to create and/or amend guidelines to provide sentencing enhancements for hate crime.⁶³ Hate crime is defined in both bills as one in which the defendant intentionally "selects a victim . . . because of the [victim's] actual or perceived race, color, religion, national origin, ethnicity, gender, or sexual orientation"⁶⁴ The sentencing enhancements are to raise an offense by at least three "severity" levels, increasing, on average, the actual time served by one-third.⁶⁵

It is expected that both of these bills will be able to withstand any challenges to their constitutionality. In *Wisconsin v. Mitchell*,⁶⁶ the U.S. Supreme Court recently upheld a Wisconsin hate crime statute that enhances criminal penalties where the defendant intentionally selects a victim based upon certain protected characteristics of the

could be amended to include a higher standard of proof.

58. S. 11, § 111 (increasing the prison term of a repeat sex offender up to twice that which is otherwise authorized); *id.* § 112 (directing the U.S. Sentencing Commission to enhance penalties for persons who are convicted of aggravated sexual abuse).

However, as discussed in Part III of this article, the bill's progress has been stalled in part because of concerns expressed by women's rights and other organizations about these provisions. See *infra* notes 144-161 (discussing the objections made by some organizations to increasing penalties for sex offenses).

59. H.R. 1152, 103d Cong., 1st Sess. (1993).

60. 139 CONG. REC. H911 (daily ed. Mar. 1, 1993). As of the time that this article was written, the bill had passed the House of Representatives by a voice vote, *id.* at H6795-96 (daily ed. Sept. 21, 1993), and was awaiting consideration by the Senate Judiciary Committee, *id.* at S12,241 (daily ed. Sept. 22, 1993) (referring the bill to committee).

61. S. 1522, 103d Cong., 1st Sess. (1993).

62. 139 CONG. REC. S13,172, S13,175-77 (daily ed. Oct. 6, 1993). As of the time that this article was written the bill was awaiting consideration by the Senate Judiciary Committee. See *id.* (referring the bill to committee).

63. S. 1522, § 2(b); H.R. 1152, § 2(a).

64. S. 1522, § 2(a); H.R. 1152, § 2(b). To date, it appears that there has been no controversy surrounding the inclusion of gender as a protected characteristic in the bill. However, the only women's organization that has endorsed the bill is the National Council of Jewish Women. List of Groups Supporting the Hate Crimes Sentencing Enhancement Act (as of Mar. 12, 1993) (on file with *The American University Journal of Gender & the Law*).

65. H.R. REP. NO. 244, 103d Cong., 1st Sess. 2 (1993).

66. *Wisconsin v. Mitchell*, ___ U.S. ___, 113 S. Ct. 2194 (1993).

victim, such as race.⁶⁷ The language of the penalty enhancement clause of the Wisconsin statute is substantially similar to that of the Senate and amended House bills.⁶⁸ *Wisconsin v. Mitchell* is consistent with the opinions expressed during the July 1992 hearing held by the Subcommittee on Crime and Criminal Justice of the House Committee on the Judiciary concerning the constitutionality of penalty enhancement statutes in light of *R.A.V. v. St. Paul*.⁶⁹ At this hearing, leading constitutional scholars testified that penalty enhancement provisions do not violate the First Amendment.⁷⁰

B. State Statutes

There has been more progress at the state level than at the federal level in treating violence against women as hate crime. Eleven states and the District of Columbia now include gender in their hate crime

67. 113 S. Ct. at 2194. The Court found that the statute did not violate the defendant's First Amendment rights because it was not designed to punish his bigoted beliefs, but rather to redress special harms that are caused by hate crimes. *Id.* at 2199. Nor did the statute violate his Fourteenth Amendment rights because it was not overbroad and thus did not have a chilling effect on free speech. *Id.* at 2201.

68. Both the Wisconsin statute and the Congressional bills define hate crime as one in which the perpetrator intentionally selects his victim based upon a particular protected characteristic. Compare *id.* at 2197 n.1 (citing the Wisconsin hate crime statute) with S. 1522 and H.R. 1152. In fact, the House bill was deliberately amended to include language that "parallel[s] as much as possible" the Wisconsin statute's language. See 139 CONG. REC. H6793 (daily ed. Sept. 21, 1993) (statement of Rep. Hyde) (explaining that the purpose of the amendment was to avoid constitutional challenges to the statute by having it comport with the language upheld in *Wisconsin v. Mitchell*).

69. *R.A.V. v. St. Paul*, ___ U.S. ___, 112 S. Ct. 2538 (1992) (striking down an ordinance that prohibited bias-motivated disorderly conduct on the grounds that it violated the First Amendment).

The hearing concerned H.R. 4797, the Hate Crimes Sentencing Enhancement Act of 1992. H.R. 4797, 102d Cong., 2d Sess. (1992). See *Hate Crimes Sentencing Enhancement Act of 1992: Hearing on H.R. 4797 Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. (1992) [hereinafter *Hearing on H.R. 4797*]. H.R. 4797 is identical in form to H.R. 1152 as the latter was introduced in March 1993. Compare H.R. 4797 with H.R. 1152. H.R. 4797 passed the House of Representatives by voice vote in October 1992, 138 CONG. REC. H11,136 (daily ed. Oct. 3, 1992), but died in the Senate.

70. While these arguments were made with regard to H.R. 4797, they are also applicable to H.R. 1152 in spite of amendments to the latter; this means that H.R. 1152 will likely pass muster under the First Amendment. See, e.g., *Hearing on H.R. 4797*, *supra* note 69, at 18, 19 (statement of Floyd Abrams, Esq., Cahill, Gordon & Reindel, New York, New York) (stating that while the government may not punish evil thoughts or ideas per se, it may consider evil motive when fashioning a sentence); *id.* at 59, 64 (prepared statement of Bruce Fein, former Associate Deputy Attorney General of the United States) (stating that under *R.A.V. v. St. Paul*, a statute may proscribe fighting words directed at protected groups and not violate the First Amendment because the proscription is "ideologically neutral"); *id.* at 7, 10 (statement of Lawrence H. Tribe, Professor of Law, Harvard Law School) (stating that H.R. 4797 is neither overbroad nor void for vagueness); see also H.R. REP. NO. 981, 102d Cong., 2d Sess. 5 (1992) (asserting that the First Amendment is not "unduly burdened when otherwise protected statements are used at sentencing as evidence to show that illegal conduct was motivated by hatred, bias or prejudice").

statutes.⁷¹ Vermont's hate crime statute passed with virtually no discussion about the inclusion of gender as a protected characteristic.⁷² Similarly, a recent amendment to include gender⁷³ in an Illinois hate crime statute passed through the legislature by overwhelming margins in both legislative houses.⁷⁴

The remedies offered to women victims by state hate crime statutes vary considerably. Of the states that include gender in their hate crime statutes, six states and the District of Columbia offer civil

71. (1) CAL. PENAL CODE § 422.6(a)-(b) (West 1988 & Supp. 1993) (making it a crime to injure a person, or a person's real or personal property, because of that person's gender); CAL. CIV. CODE § 51.7(a) (West 1982) (providing that every person within the state has the right to be free from gender-based violence against his or her person or property).

(2) CONN. GEN. STAT. ANN. § 46a-58(a) (West 1986) (declaring it a crime to violate a person's constitutional rights based on that person's gender).

(3) D.C. CODE ANN. § 22-4001 (Supp. 1992) (defining a "bias-related crime" as a crime that is of a certain class of designated criminal acts and that demonstrates the offender's bias towards the victim's gender).

(4) ILL. ANN. STAT. ch. 38, para. 12-7.1(a) (Smith-Hurd Supp. 1992) (making it a crime for a person to commit certain offenses against another person or person's property because of gender).

(5) IOWA CODE ANN. § 729A.1 (West 1979 & Supp. 1993) (creating a civil rights provision that protects a person's right to be free from violence or intimidation because of the person's gender); *id.* § 729A.2 (defining "hate crime" as one where an offender commits certain types of public offenses against an individual because of gender).

(6) KY. REV. STAT. ANN. § 15.331(1) (Baldwin Supp. 1992) (defining bias-related crime as an offense which is either the result of or related to the victim's gender).

(7) MASS. GEN. LAWS ANN. ch. 22C, § 32 (West 1992) (defining "hate crime" as a criminal offense motivated by bias, which includes gender).

(8) MICH. COMP. LAWS ANN. § 750.147b(1) (West 1992) (making intimidation or harassment of a person because of that person's gender a crime).

(9) MINN. STAT. ANN. § 609.2231(4(a)) (West 1987 & Supp. 1993) (declaring it a crime to assault a person because of that person's sex); *id.* § 609.595(1a), (2) (criminalizing damage to property perpetuated because of the property owner's gender); *id.* 609.605(3) (prohibiting trespass that is motivated by gender bias); *id.* § 609.746(3) (criminalizing interference with a person's privacy because of that person's gender); *id.* § 609.79(1a(a)) (making it a crime to make obscene or harassing telephone calls which are motivated by the recipient's gender); *id.* § 609.795(2(a)) (declaring it a crime to use the mails in a harassing manner because of the recipient's gender).

(10) N.H. REV. STAT. ANN. § 651:6 (1955 & Supp. 1992) (allowing the state to extend the term of imprisonment if the victim's gender "substantially motivated" the offender to commit the crime).

(11) VT. STAT. ANN. tit. 13, § 1455 (Supp. 1990) (defining "hate crime" as a crime that is "maliciously motivated" by the victim's gender).

(12) W. VA. CODE § 61-6-21(a) to (c) (1992) (making it a felony to forcefully interfere with a person's constitutional rights because of the person's gender, or to conspire to interfere with those rights because of gender).

72. Telephone Interview with Judy Rex, Coordinator, Vermont Network Against Domestic Violence and Sexual Assault (July 6, 1992).

73. H. 2065, 87th Gen. Ass., 1991 Reg. Sess., 1991 Ill. Legis. Serv. 2210 (West) (codified at ILL. ANN. STAT. ch. 38, paras. 12-7.1, 1005-5-3.2 (Smith-Hurd 1982 & Supp. 1992)) (including as a hate crime the commission of certain criminal offenses by reason of the victim's gender).

74. Telephone Interview with Jan Schakowsky, Representative, State of Illinois General Assembly (July 20, 1992). Representative Schakowsky introduced H. 2065.

remedies.⁷⁵ Nine states and the District of Columbia have statutes that inflict criminal penalties: four states make the offense a misdemeanor⁷⁶ and five states classify crimes motivated by bias as felonies.⁷⁷ New Hampshire and Vermont extend the imprisonment term

75. (1) CAL. CIV. CODE § 52(b) (West 1982 & Supp. 1993) (awarding actual damages plus exemplary damages, a twenty-five thousand dollar civil penalty, and attorney's fees); *id.* § 52(c) (authorizing the state Attorney General, a District Attorney, City Attorney, or any aggrieved party to file a civil action requesting an injunction, restraining order, or other preventive relief); *id.* § 52(d) (allowing the state Attorney General, or a District or City Attorney, to intervene when a hate crime victim has filed a civil action alleging an equal protection violation under the Fourteenth Amendment and the case is of "general public importance").

(2) CONN. GEN. STAT. ANN. § 52-251b (West 1991) (allowing the recovery of costs and attorney's fees in a civil action, but declining to create a new cause of action).

(3) D.C. CODE ANN. § 22-4004(a) (Supp. 1992) (providing hate crime victims a cause of action for appropriate relief, including, but not limited to, an injunction, actual damages [including damages for emotional distress], punitive damages, attorney's fees, and costs).

(4) ILL. ANN. STAT. ch. 38, para. 12-7.1(c) (Smith-Hurd Supp. 1992) (providing for an independent civil action for actual and punitive damages [including emotional distress damages], and injunctive or other appropriate relief).

(5) IOWA CODE ANN. § 729A.5 (West 1979 & Supp. 1993) (authorizing a civil action for injunctive relief, general and special damages, attorney's fees, and costs for victims of hate crimes).

(6) MICH. COMP. LAWS ANN. § 750.147b(3) (West 1991) (creating a civil cause of action for injunctive relief, actual damages, damages for emotional distress, and other appropriate relief). Furthermore, a plaintiff who prevails in such an action may recover the greater of treble the actual damages or two thousand dollars, attorney's fees, and costs. *Id.*

(7) VT. STAT. ANN. tit. 13, § 1457 (Supp. 1990) (creating an independent civil cause of action for compensatory and punitive damages, injunctive relief, costs, attorney's fees, and other appropriate relief).

76. (1) CAL. PENAL CODE § 422.6(c) (West 1988 & Supp. 1993) (setting the punishment for a hate crime violation at imprisonment in a county jail for no more than one year, a fine of no more than five thousand dollars, or both).

(2) CONN. GEN. STAT. ANN. § 46a-58(d) (West 1986) (establishing the penalty for a hate crime that violates a person's civil rights and incurs no more than one thousand dollars in property damages as a misdemeanor).

(3) IOWA CODE ANN. § 716.8.3 (West 1993) (providing punishments for "serious misdemeanor" for trespass with the intent to commit a hate crime, and "aggravated misdemeanor" for trespass to commit a hate crime which results in injury to a person or in damage of more than one hundred dollars to any property).

(4) MINN. STAT. ANN. § 609.2231(4) (West 1987 & Supp. 1993) (setting the penalty for a bias-motivated assault in the fourth degree); *id.* § 609.595(2(b)) (establishing the penalty for criminal damage to property in the third degree that is bias-motivated); *id.* § 609.605(3) (making a bias-motivated trespass a misdemeanor); *id.* § 609.746(3) (adding the punishment of misdemeanor for a bias-related invasion of privacy); *id.* § 609.79(1a(a)) (setting the punishment for gender-based obscene or harassing telephone calls as a misdemeanor); *id.* § 609.795(2(a)) (establishing the penalty for using the mails for harassment purposes as a misdemeanor). The penalty for all of these misdemeanor offenses is no more than one year in jail, a three thousand dollar fine, or both.

77. (1) CONN. GEN. STAT. ANN. § 46a-58(d) (West 1986) (making a hate crime that violates a person's civil rights because of gender a felony where the violation results in more than one thousand dollars worth of property damage).

(2) ILL. ANN. STAT. ch. 38, para. 12-7.1(b) (Smith-Hurd 1992) (classifying hate crime as a Class 4 felony for a first offense, a Class 2 for subsequent offenses). Any probation or conditional discharge may include a minimum of an extra two hundred hours of community service. *Id.*

(3) MICH. COMP. LAWS ANN. § 750.147b(2) (West 1992) (setting the penalty for ethnic intimidation as a felony punishable by up to two years in jail, a five thousand dollar fine, or both).

for hate-motivated crime.⁷⁸ Four states increase penalties for repeat offenders.⁷⁹ Four states have penalty enhancement power: Iowa and the District of Columbia have penalty enhancement statutes,⁸⁰ while Illinois and West Virginia treat hate crime as an aggravating factor at the time of sentencing.⁸¹ Two states define hate crime as a civil rights violation.⁸²

Additionally, some state hate crime statutes contain provisions governing data collection and law enforcement training. Eight states and the District of Columbia mandate hate crimes data collection.⁸³

(4) MINN. STAT. ANN. § 609.595(1a(a)) (establishing the punishment for criminal damage to property in the second degree as imprisonment for no more than one year and one day, payment of a three thousand dollar fine, or both).

(5) W. VA. CODE § 61-6-21(b)-(c) (1992) (making it a felony to forcefully interfere with a person's civil rights, the penalty for which is up to ten years in jail, a five thousand dollar fine, or both).

78. N.H. REV. STAT. ANN. § 651:6 (1955 & Supp. 1992) (extending the penalty for misdemeanor crime by two to five years); VT. STAT. ANN. tit. 13, § 1455(1) (Supp. 1990) (stating that where the imprisonment penalty for a hate crime is ordinarily no more than one year it shall be increased to no more than two years, a fine of no more than two thousand dollars, or both).

79. (1) CAL. PENAL CODE § 422.7(c) (West 1988 & Supp. 1993) (increasing the penalty for a person who has been previously convicted of committing, or conspiring to commit, a hate crime to no more than one year in jail, no more than a ten thousand dollar fine, or both).

(2) CONN. GEN. STAT. ANN. § 53a-40a (West 1985 & Supp. 1993) (increasing the penalty for "persistent offenders" by one offense level at the court's discretion). This means that if the offense would ordinarily be punished as the most serious type of misdemeanor that it will now be punished as the least serious type of felony. *Id.*

(3) ILL. ANN. STAT. ch. 38, para. 12-7.1(b) (Smith-Hurd Supp. 1992) (increasing the penalty by two offense levels for the commission of subsequent hate crime).

(4) MINN. STAT. ANN. § 609.2231(4(b)) (West 1987 & Supp. 1993) (creating a new punishment for a hate-motivated assault that is committed within five years of a prior assault by increasing the penalty to a maximum sentence of one year and one day, a three thousand dollar fine, or both); *id.* § 609.747 (West Supp. 1993) (making it a gross misdemeanor for a person to harass the same victim within six months of the first violation, where the harassment is bias-related).

80. (1) IOWA CODE ANN. § 712.9 (West 1979 & Supp. 1993) (classifying and punishing a hate crime which violates individual rights as an offense which is one level higher than the underlying offense); *id.* § 716.6A (classifying and punishing bias-motivated criminal mischief in violation of individual rights as an offense which is one level higher than the underlying offense).

(2) D.C. CODE ANN. § 22-4003 (Supp. 1992) (authorizing the court to sentence a hate crime offender to no more than one and one-half times the maximum imprisonment and fine allowed by the underlying offense).

81. ILL. ANN. STAT. ch. 38, para. 1005-5-3.2(a)(10) (Smith-Hurd 1982 & Supp. 1992) (making a bias-motivated hate crime a factor in aggravation to be considered when imposing an imprisonment term or when deciding whether to impose a more severe sentence); W. VA. CODE § 61-6-21(d) (1992) (authorizing the court to consider the fact that a crime is bias-related as an aggravating circumstance when the court imposes sentence).

82. CAL. PENAL CODE § 422.6 (West 1988 & Supp. 1993) (including hate crimes as a violation in the exercise of individual rights); IOWA CODE ANN. § 729A.2 (West Supp. 1993) (providing that hate crime offenses include violations of individual rights).

83. (1) CONN. GEN. STAT. ANN. § 29-7m (West 1990) (ordering the state police who are within the department of public safety to "monitor, record and classify" all bias-related crimes). (2) D.C. CODE ANN. § 22-4002 (Supp. 1992) (ordering the Metropolitan Police force to afford all victims of bias-related crimes the opportunity to submit a written report). The reports are collected, compiled, and analyzed by the Mayor, who shall annually publish the results of this

Five states mandate police training in the identification of hate crime.⁸⁴ Iowa requires sensitivity training for police and prosecutors.⁸⁵ California suggests sensitivity training for offenders as a condition of probation,⁸⁶ and Illinois allows for a human relations program in all public universities.⁸⁷

Interestingly, two states include gender in their hate crime statutes for some purposes but not for others. Connecticut includes gender in a civil rights statute that classifies bias crime as a misdemeanor,⁸⁸ but does not include gender in a criminal statute enacted in 1990 that

analysis. *Id.*

(3) Act of June 29, 1992, ch. 293, 1992 Haw. Sess. Laws 754 (authorizing the state Attorney General to develop a model for the specification and collection of data regarding hate crimes, and to submit any appropriate findings, recommendations, and implementing legislation).

(4) ILL. ANN. STAT. ch. 127, para. 55a(31) (Smith-Hurd 1993) (mandating the Department of State Police to "collect and disseminate information relating to 'hate crimes'").

(5) IOWA CODE ANN. § 692.15 (West 1993) (requiring all law enforcement agencies to report information on hate crimes to a bureau that generates crime statistics).

(6) KY. REV. STAT. ANN. § 17.1523 (Baldwin Supp. 1992) (creating the uniform offense report, which is to be completed by all officers when investigating a bias-related crime).

(7) MASS. GEN. LAWS ANN. ch. 22C, §§ 33-35 (West Supp. 1992) (establishing a comprehensive model for the collection of hate crime data).

(8) MICH. COMP. LAWS ANN. § 28.257a (West 1992) (authorizing the regional chiefs of police to report certain information regarding bias-motivated crime to the state police).

(9) MINN. STAT. ANN. § 626.5531 (West Supp. 1994) (establishing a comprehensive system for the collection of hate crime data. Investigating officers are required to complete reports on all bias crimes, which are discussed and analyzed in monthly reports by local law enforcement agency chiefs. The monthly reports are further summarized and analyzed in the annual report to be filed by the commissioner of public safety.).

84. (1) CAL. PENAL CODE § 13,519.6 (West 1988 & Supp. 1993) (instructing the Commission on Peace Officer Standards and Training to develop an instruction course related to hate crimes).

(2) IOWA CODE ANN. § 80B.11 (West 1984 & Supp. 1993) (requiring that all law enforcement officers complete a course on the "investigation, identification, and reporting" of all hate crime).

(3) KY. REV. STAT. ANN. § 15.331 (Baldwin Supp. 1992) (requiring biennial law enforcement training courses to include a unit on bias-related crimes).

(4) MASS. GEN. LAWS ANN. ch. 6, § 116B (West Supp. 1992) (authorizing the criminal justice training council to provide instruction for all law enforcement personnel in "identifying, responding to and reporting" all hate crime).

(5) MINN. STAT. ANN. § 626.8451 (West Supp. 1994) (establishing a comprehensive training system for all officers in identifying and responding to bias-motivated crimes). This system includes training courses on violent crimes, and pre-service and in-service training requirements.

Id.

85. IOWA CODE ANN. § 729A.4 (West 1979 & Supp. 1993) (directing the prosecuting attorneys' training coordinator to develop a sensitivity training course for police and prosecutors to enable them to determine whether a civil rights violation has occurred).

86. CAL. PENAL CODE § 422.95(a) (West Supp. 1993) (deferring to the court's discretion to decide whether a sensitivity training class, or "similar training in the area of civil rights," should be a condition of probation for an offender).

87. ILL. ANN. STAT. ch. 144, para. 189.21(a)(3) (Smith-Hurd Supp. 1992) (requiring all public universities, among other things, to forward all reports of hate crime on their campuses to the local state's attorney).

88. CONN. GEN. STAT. ANN. § 46a-58(d) (West 1986) (making it a misdemeanor to deprive a person of their constitutional rights because of gender). However, if the violation results in property damage in excess of one thousand dollars, the violation is a felony. *Id.*

classifies intimidation based on bigotry or bias as a felony.⁸⁹ Massachusetts amended its Hate Crimes Reporting Act⁹⁰ to include gender-motivated hate crime in response to the murders of at least nineteen women by their estranged husbands, ex-spouses, or boyfriends in the first six months of 1992.⁹¹ After signing the measure, Governor William Weld stated, "We are seeing a disturbing pattern of violent crime against women in Massachusetts. . . . By explicitly defining gender prejudice as a hate crime, we are helping law enforcement officials get a better handle on the dimensions of the problem and focus resources where they're needed."⁹² Nevertheless, despite Governor Weld's intent to define violence against women as hate crime, the Massachusetts legislature did not amend the statutes providing civil and criminal remedies for hate crime to include gender.⁹³

While eleven states and the District of Columbia include gender in their hate crime statutes, interviews with women's rights advocates, hate crime victims' advocates, and state attorney generals' offices in these jurisdictions revealed no knowledge of instances in which these statutes have actually been used in cases of violence against women.⁹⁴ Minnesota's evaluation of its hate crime statute may offer insight into why this is the case. In 1988, the Minnesota legislature mandated the development of a training course for police officers, which was to include written material to assist officers in distinguishing, understanding, and reporting hate crime.⁹⁵ When Minnesota added gender to its hate crime statute in May 1989,⁹⁶ it also mandated the

89. *Id.* § 53a-181b(a) (classifying intimidation based on bigotry or bias against a person or property because of the person's race, religion, ethnicity, or sexual orientation as a crime).

90. MASS. GEN. LAWS ANN. ch. 265, § 39 (West 1992).

91. *Weld Signs Hate Crime Amendment*, UPI, June 3, 1992, available in LEXIS, Nexis Library, Curnws File.

92. *Id.*

93. MASS. GEN. LAWS ANN. ch. 265, § 39 (West 1992) (making intimidation of a person based on that person's race, religion, ethnicity, or national origin a felony punishable by up to two and one-half years imprisonment, a fine of at least five thousand dollars, or both).

94. Telephone Interview with Diane Alexander, Assistant Director of Library and Information Services, National Victim's Center (July 6, 1992); Telephone Interview with Loretta Frederick, Attorney, Minnesota Battered Women's Coalition (July 6, 1992); Telephone Interview with Ann Noel, Hearing Officer, California Fair Employment and Housing Commission and Bay Area Hate Crimes Investigating Association (July 21, 1992); Telephone Interview with Judy Rex, *supra* note 72; Telephone Interview with Elizabeth Shumann-Moore, Staff Attorney, Chicago Lawyer's Committee for Civil Rights Under Law (July 20, 1992); Telephone Interview with John Stein, Department Executive Director, National Organization for Victim Assistance (June 22, 1992).

95. MINN. STAT. ANN. § 626.5531, .8451 (West Supp. 1994) (mandating officer training courses, as well as pre-service and in-service training requirements).

96. Act of May 25, 1989, ch. 261, 1989 Minn. Laws 892 (codified at MINN. STAT. ANN. § 609.2231, .595, .605, .746, .79, .795 (West 1987 & Supp. 1993)) (amending sections of the code which increase penalties for crimes that are bias-motivated to include gender).

collection of data on all types of hate crime, including those crimes that were motivated by gender-bias.⁹⁷ However, the training materials that Minnesota developed and the actual data collected on hate crime indicate that the police have virtually ignored crimes motivated by gender-bias.⁹⁸ For instance, the information collected at hearings and from testimony, and submitted to the Governor's Task Force on Violence and Prejudice, indicated that through April 1988, gender-biased crimes constituted 38.08% of all hate crimes reported.⁹⁹ Yet gender accounted for only 2% of the bias crimes reported to police in 1988,¹⁰⁰ 1.2% of those reported in 1989,¹⁰¹ and fewer than 1% of those reported in 1990 and 1991.¹⁰² Moreover, at a May 1989 conference on bias-motivated crimes, over fifteen panelists from hate crime advocacy organizations, local and national police investigation units, and a gay and lesbian rights organization participated.¹⁰³ There were, however, no panelists representing victims of rape or domestic violence.¹⁰⁴ Nowhere in the Summary Report, which was prepared from presentations made at the conference, is there any mention of gender-motivated hate crimes.¹⁰⁵

III. OBSTACLES TO TREATING VIOLENCE AGAINST WOMEN AS HATE CRIME

As discussed in Part II, while some states have included gender in their hate crime statutes, they have been either unwilling or unable to fully implement these statutes so as to provide women with the protection due to them under the statutes. Several possible reasons for this failure in implementation are examined below.

97. *Id.* (codified at MINN. STAT. ANN. § 626.5531 (West Supp. 1994)) (requiring the reporting by law enforcement personnel of bias-motivated crimes).

98. See MINNESOTA BOARD OF PEACE OFFICER STANDARDS AND TRAINING, BIAS-MOTIVATED CRIMES: INSTRUCTIONAL MATERIALS FOR LAW ENFORCEMENT 29-30, 35 (1990) (defining a bias-motivated crime as one which is motivated by the victim's race, religion, ethnicity, sexual orientation, or gender but failing to instruct law enforcement to ask questions regarding gender); SUMMARY REPORT, *supra* note 35, at 22, 35 (listing incidents of gender-based hate crime reported to the Governor's Task Force and to law enforcement personnel).

99. SUMMARY REPORT, *supra* note 35, at 22.

100. SUMMARY REPORT, *supra* note 35, at 35.

101. SUMMARY REPORT, *supra* note 35, at 35.

102. Bias Offense Summary, *supra* note 35.

103. SUMMARY REPORT, *supra* note 35, at 43-57 (summarizing the remarks made during the conference by the individual panelists).

104. SUMMARY REPORT, *supra* note 35, at 43-57.

105. SUMMARY REPORT, *supra* note 35, at 43-57. Additionally, not one of the sources listed in the Summary Report's bibliography appears to address violence against women. *Id.* at 83-87.

A. *Resistance From Hate Crime Victim Advocacy Groups And Judges*

Advocates for victims of hate crime and judges often resist accepting the fact that rape, domestic violence, and other violent crimes against women should be treated as hate crime. The following discussion demonstrates the ways in which this resistance has been manifested.

1. *The Argument That Inclusion Of Gender Will Stall Passage Of Progressive Legislation And Implementation Of Hate Crime Statutes*

The Hate Crime Statistics Act (HCSA)¹⁰⁶ directs the United States Attorney General to collect data on crimes that "manifest evidence of prejudice based on race, religion, sexual orientation, or ethnicity";¹⁰⁷ crimes motivated by gender bias are not included. The Senate Judiciary Committee Report on one of the Senate companion bills states that the purpose of this type of act is to provide information about the incidence of hate crime to "help law enforcement agencies and local communities combat hate crimes more effectively by identifying their frequency, location, and other patterns over time."¹⁰⁸ Advocates of the HCSA argue that it also raises public awareness of hate crime and encourages the police to develop greater "sensitivity to the particular needs of victims of hate crimes."¹⁰⁹

The passage of the HCSA without the inclusion of gender as a counted category illustrates the resistance on the part of hate crime victim advocacy groups to recognizing violence against women as hate crime. The enactment of the HCSA in its present form is the result of strong lobbying efforts by the Coalition on Hate Crimes Prevention, a group composed of religious, civil rights, gay and lesbian, and law enforcement organizations.¹¹⁰ Although some member groups of the Coalition wanted to lobby Congress to add gender as a category

106. See H.R. 1048, 101st Cong., 1st Sess. (1989) (codified at 28 U.S.C. § 534 (Supp. IV 1992)).

107. *Id.* These crimes include murder, non-negligent manslaughter, forcible rape, simple and aggravated assault, intimidation, arson, and destruction or vandalism of property. *Id.* The Attorney General is to develop guidelines for determining when such a crime is bias-motivated. *Id.* In addition, the Bias Crimes Programs Establishment Act, H.R. 1437, 103d Cong., 1st Sess. (1993), directs the Attorney General to appoint a National Director of bias crimes, who would develop instructions on how to comply with reporting requirements under the HCSA.

108. S. REP. NO. 21, 101st Cong., 1st Sess. 2 (1989), reprinted in 1990 U.S.C.A.N. 158, 158 (discussing S. 419, 101st Cong., 1st Sess. (1989)).

109. Joseph M. Fernandez, Recent Development, *Bringing Hate Crime Into Focus—The Hate Crime Statistics Act of 1990*, Pub. L. No. 101-275, 26 HARV. C.R.-C.L. L. REV. 261, 263 (1991).

110. CENTER FOR WOMEN POLICY STUDIES, *supra* note 1, at 12; see Fernandez, *supra* note 109, at 269-78 (discussing the efforts of the Coalition in pushing the Act through Congress, especially when various Members objected to inclusion of sexual orientation).

ry,¹¹¹ the Coalition eventually decided against taking such action for a number of reasons.¹¹²

First, some member groups were concerned that lobbying for such an addition would delay passage of the bill.¹¹³ Additionally, it was argued that adding gender would “open the door” to other groups, such as the elderly or disabled,¹¹⁴ and thereby delay the passage even further. In promoting these arguments to defeat the inclusion of gender, the Coalition acted in its own interest¹¹⁵ and displayed a surprising lack of empathy for the victims of violence against women.

Second, most of the Coalition members felt that additional hearings were needed to determine whether existing gender-based crime data collection was deficient.¹¹⁶ Adding gender as a counted category, it was argued, would not improve then-existing data collection of rape and domestic violence.¹¹⁷ Some member groups even suggested that collecting any data on violence against women would be too difficult because it is so pervasive¹¹⁸ and because, it was argued, such violence is not the same as other types of hate crime.¹¹⁹ However, the Coalition should have known that the collection of data on rape and domestic violence is sorely inadequate in terms of both figures

111. At no time did the Act ever include gender. See Fernandez, *supra* note 109, at 275-81 (describing how H.R. 1048 was amended before being passed by Congress, but never to include gender). Those organizations that urged the addition of gender to it were predominantly women's advocacy groups. CENTER FOR WOMEN POLICY STUDIES, *supra* note 1, at 13.

112. Fernandez, *supra* note 109, at 275 (stating that the Coalition considered and rejected expanding the statute to include gender).

113. CENTER FOR WOMEN POLICY STUDIES, *supra* note 1, at 13.

114. CENTER FOR WOMEN POLICY STUDIES, *supra* note 1, at 13.

115. The bill was largely supported and promoted by four distinct lobbying groups, all of which had their own interests and agendas in ensuring the passage of the bill. The first group was a loosely connected alliance of organizations that were expressly created to fight racial, ethnic, and religious hate crime, such as the Anti-Defamation League (ADL) and the Anti-Klan Network. Fernandez, *supra* note 109, at 269-70. The second group was a coalition of gay and lesbian organizations. *Id.* at 270-74. The third group consisted of unassociated civil liberties organizations, such as the ACLU. *Id.* at 272. The final group was a confederation of law enforcement agencies. *Id.* at 274. The exclusion of national multi-issue women's organizations was noticeable. See Marie de Santis, *Hate Crimes Bill Excludes Women*, OFF OUR BACKS, June 1990 (noting the “absence of any women's groups” from the Coalition).

116. See Fernandez, *supra* note 109, at 275 n.74 and accompanying text (summarizing Fernandez's telephone interviews with Sue Armsby, a Lobbyist for People for the American Way, and Kevin Berrill, Director of the Anti-Violence Project of the National Gay and Lesbian Task Force).

117. Fernandez, *supra* note 109, at 275.

118. CENTER FOR WOMEN POLICY STUDIES, *supra* note 1, at 13.

119. CENTER FOR WOMEN POLICY STUDIES, *supra* note 1, at 13. An example of the belief that gender-based hate crime differs from other hate crime is that, because female victims of hate crime sometimes have a prior relationship with their attacker, they are not interchangeable in the way that other hate crime victims are. *Id.* (citing an argument made by the ADL against including gender in hate crime statutes). The issue of a victim's interchangeability is explored further in Part III, *infra* notes 128-137 and accompanying text.

and methods used.¹²⁰ Moreover, rape and domestic violence are not the only crimes against women that are motivated by gender hatred. Like racial minorities and gays and lesbians, women are the victims of such crimes as murder, assault, battery, and intimidation, simply because they are women.¹²¹

Third, women's rights groups in Washington could not agree whether including gender in the statute would be "the appropriate way to count gender-based crime."¹²² However, almost two years before the HCSA was enacted, the National Organization for Women (NOW) had come out strongly in favor of including gender as a enumerated category.¹²³ NOW and the National Coalition Against Domestic Violence (NCADV) even met several times with the Coalition to discuss the inclusion of gender in the bill.¹²⁴ Even eight months prior to the bill's enactment, the two groups had sponsored several meetings of various organizations to discuss gender inclusion.¹²⁵ Clearly there was strong, well-organized support among these groups for including gender in the bill.

120. To begin with, it is difficult to determine the actual number of violent crimes that are committed against women every year, because women often fail to report them to police. CENTER FOR WOMEN POLICY STUDIES, *supra* note 1, at 6 (stating that statistics on reported crime "represent a substantial undercount of actual violence against women"); see Finn, *supra* note 5, at 9 (explaining that many bias crime victims fail to report the crime to police because the victim distrusts the police, feels the crime was minor, believes that the police cannot "do anything" about the crime, has a language barrier, or fears retaliation from the perpetrator if the crime is reported).

But even if all violent crimes against women were reported to the police, the federal government is unable to compile meaningful statistical data on these crimes because of flaws in its data collection system. See CENTER FOR WOMEN POLICY STUDIES, *supra* note 1, at 6-8 (discussing problems with data collection on information concerning violence against women). Furthermore, at the time that the bill was passed, no "working models or police protocols" existed at the state or local level for identifying gender-motivated hate crimes as actually being hate crime. Fernandez, *supra* note 109, at 275 n.4.

121. CENTER FOR WOMEN POLICY STUDIES, *supra* note 1, at 8.

122. Fernandez, *supra* note 109, at 275.

123. See Yard testimony, *supra* note 4, at 264 (urging the amendment of S. 2000, one of the Senate companion bills to H.R. 1048, to include gender). Molly Yard testified before the Senate in June 1988. *Id.* However, Congress did not enact the bill until April 1990. 136 CONG. REC. H1460 (daily ed. Apr. 4, 1990) (concurring in the Senate amendment to H.R. 1048).

124. Memorandum from Nancy Buermeyer, Director, Lesbian Rights, NOW, to the NOW Executive Committee 1 (Dec. 15, 1988) (on file with *The American University Journal of Gender & the Law*) (discussing NOW and NCADV's December 1988 meeting with the Coalition). However, the Coalition notified NOW and NCADV that a poll had been taken and that the Coalition member-groups had decided unanimously to not include gender, thereby cancelling any future meetings. de Santis, *supra* note 115.

125. Letter from Nancy Buermeyer, Director, Lesbian Rights, NOW, and Janet Nudelman, Public Policy Advocate, NCADV, to organizations supporting the inclusion of gender in the bill (Aug. 28, 1989) (on file with *The American University Journal of Gender & the Law*) (referring to an August 1989 meeting of "feminist" organizations concerning the inclusion of gender in the bill, and inviting additional organizations to participate in a September 1989 forum on the same subject).

Ironically, the Coalition argued that “[w]ithout the inclusion of sexual orientation in the act, there would be two standards. Crimes against gays and lesbians would be viewed as less significant, less pervasive, and less reprehensible than crimes motivated by racial, religious, or ethnic prejudice.”¹²⁶ That a coalition of religious, civil rights, and gay and lesbian organizations should fail to see that their actions relegated crimes against women to the same secondary position illustrates one of the major obstacles that women’s advocates must overcome before violence against women will be treated as hate crime.

2. *The Argument That Women Are Not Interchangeable In The Same Way As Other Hate Crime Victims*

Interchangeability is important to hate crime victims’ advocates. They argue that hate crime should be punished more severely, at least in part because such crime has a greater impact on the particular community to which the victim belongs.¹²⁷ A particular community is more affected by a hate crime that is motivated by the victim’s membership in the community, because the victim could be interchanged with any other member of the group. Therefore, other members of the community may live in fear that such a crime could happen to them.¹²⁸ Similarly, women fear for their own safety when another woman in the community is the victim of a violent crime, whether the attacker is known to the woman or is a stranger.

Female victims of violent crime often have a prior relationship with their attackers.¹²⁹ For some commentators, the existence of a prior relationship between victim and perpetrator is the only factor that should determine how the legal system addresses violence against women.¹³⁰ If a woman has a prior relationship with her attacker, they would argue, then she is not “interchangeable” as are victims of racial and other hate crimes.

126. Fernandez, *supra* note 109, at 274 (citing John H. Buchanan, Chairman, People for the American Way Action Fund, from his remarks in a June 7, 1990 press release).

127. See *supra* note 6 and accompanying text (noting that bias crimes against an individual because of that person’s membership in a particular group affect the entire group who share that immutable characteristic because such bias crime is intended to intimidate that particular group of people).

128. Finn, *supra* note 5, at 10 (finding that the fear that hate crimes generate can “victimize a whole class of people”).

129. CENTER FOR WOMEN POLICY STUDIES, *supra* note 1, at 12 (stating that women who are victimized are often victimized by “close associates”).

130. CENTER FOR WOMEN POLICY STUDIES, *supra* note 1, at 13 (citing a memo by the Civil Rights Division of the Anti-Defamation League, which says that crimes against racial and ethnic groups are interchangeable because a crime against a member of one of these groups sends a message to the entire group but that rape victims may not be interchangeable).

In an interview, Richard Cohen, the Legal Director of the Southern Poverty Law Center, the umbrella organization for Klanwatch, offered an explanation for the position that women are not perceived to be interchangeable in the same manner as victims of racial and other hate crime.¹³¹ In his effort to illustrate that violence against women does not have the same effect on the community as violence against racial and ethnic minorities, Cohen asked me to compare two hypotheticals. In the first, a caucasian male writes "I'm going to get you nigger" on the door of an African-American's home. In the second, a male writes "I'm going to get you bitch" on the door of a woman's home. Cohen argued that the second example would not threaten women in the community because it is directed at a specific individual and not at women in general. I countered that it would threaten women in the community because "bitch," like "nigger," is a derogatory term that applies to a sub-group of the population. By using the term "nigger" or "bitch," the aggressor signifies that it is the victim's ethnicity or femaleness that he sees as prominent. If I were to see the statement "I'm going to get you bitch" on a door in my neighborhood, I would assume that there is a man in the vicinity who hates women and I would fear encountering him.

In a similar vein, the Anti-Defamation League of B'nai B'rith (ADL), a leader in the hate crime victims' movement, advocates that, because many women have a prior relationship with their attackers, they are not interchangeable like other victims of hate crime.¹³² The ADL has stated that "the relationship between individual perpetrator and victim is the salient fact—whether the defendant is a women-hater in general is irrelevant."¹³³ The ADL has not only refused to support the inclusion of gender in hate crime statutes, but has actually testified against it.¹³⁴

In conclusion, both Richard Cohen and the ADL assume that when women have a prior relationship with their assailants, they are neither interchangeable nor perceived to be interchangeable; therefore, violence against women does not have the same impact on the community as other hate crime. Remarkably, these advocates appear completely unaware of the arguments feminist advocates and theorists

131. Telephone Interview with Richard Cohen, Legal Director, Southern Poverty Law Center (Aug. 5, 1992).

132. CENTER FOR WOMEN POLICY STUDIES, *supra* note 1, at 13.

133. CENTER FOR WOMEN POLICY STUDIES, *supra* note 1, at 13.

134. Susan R. Boyle, *Legislative News*, MASS. LAW. WKLY., May 25, 1992, at 23 (noting that the ADL, one of the original drafters of the Massachusetts hate crime reporting law, testified against a proposal to modify the law to include gender because "domestic violence and rape cases would draw attention from crimes involving bias").

have been making for decades—that rape and domestic violence victims are interchangeable in the minds of their attackers¹³⁵ and that women alter their lifestyles in numerous ways to avoid male violence because they fear such violence happening to them.¹³⁶

3. *Persistent Sexism Among Judges*

Another obstacle to treating violence against women as hate crime is the persistence of sexism among judges. This hurdle emerged in the debate about passage of the 1991 Senate version of the Violence Against Women Act.¹³⁷ In a statement opposing the civil rights remedy granted by the Act,¹³⁸ the Conference of Chief Justices stated, by implication, that granting legal remedies for family violence cases will allow women to misuse the law by making false legal claims, and that granting a federal civil rights remedy for hate violence against women will choke the federal courts with domestic relations issues.¹³⁹ The Chief Justice of the United States Supreme Court, William Rehnquist, shares this view.¹⁴⁰

The Conference of Chief Justices maintains that family policy is a sensitive issue that should be reserved to the states, and that the remedies offered in the Violence Against Women Act would contra-

135. See *supra* note 4 (discussing the interchangeable nature of female victims of violent crime).

136. Margaret Gordon and Stephanie Riger interviewed women and men living in several large cities to assess how fear of violence affects their lives. The authors' study found that 68.4% of the women, but only 5.4% of the men, never go to bars and clubs alone. Further, 47% of the women, but only 7.5% of the men, said that they never go downtown alone after dark. MARGARET T. GORDON & STEPHANIE RIGER, *THE FEMALE FEAR* 15 (1989), cited in CENTER FOR WOMEN POLICY STUDIES, *supra* note 1, at 11.

137. S. 15, 102d Cong., 1st Sess. (1991); H.R. 1502, 102d Cong., 1st Sess. (1991).

138. The civil rights remedies contained in the 1991 version of the Act are substantially similar to those contained in the 1993 version. Compare S. 15, § 301 with S. 11, §§ 301-304 (providing, in both bills, victims of gender-based crimes of violence with the right to sue for compensatory and punitive damages and for injunctive or declaratory relief). Thus, arguments against these remedies apply to the 1993 Act as well.

139. *Violence Against Women: Victims of the System: Hearings on S. 15 Before the Senate Comm. on the Judiciary*, 102d Cong., 1st Sess. 314, 315 (1991) [hereinafter *Hearings on S. 15*] (prepared statement of Hon. Vincent L. McKusick, President, Conference of Chief Justices) [hereinafter McKusick statement]:

If, as it appears to be the case, Section 301(c) permits civil suits against male relatives, particularly against husbands or intimate partners, it can be anticipated that this right will be invoked as a bargaining tool within the context of divorce negotiations and add a major complicating factor to an environment which is often acrimonious as it is.

Id.

This opinion demonstrates the gender bias of the Chief Justices. They ignore the fact that a civil rights remedy will allow women to pursue legitimate claims against their abusers. They also ignore a primary reason victims want to be in federal court—the unwillingness of state courts to remedy their wrongs.

140. See Jack Sirica, *Federal Protection of Women at Issue*, NEWSDAY, Feb. 16, 1992, at 17 (noting that Rehnquist told the American Bar Association that the "proposed civil rights protections for women would 'unnecessarily expand' the jurisdiction of federal courts").

dict state law.¹⁴¹ This statement clearly reflects the assumption that family violence should be treated differently from other violence. The Justices fail to grasp that it is precisely because state remedies for victims of gender-motivated hate crime are inadequate, in both theory and practice, that a federal civil rights remedy was deemed necessary.¹⁴²

B. *The Debate Over Increased Penalties Versus Treatment For Sex Offenders*

As previously discussed in Part II, the Senate version of the Violence Against Women Act of 1993 (VAWA) contains a provision calling for penalty increases and enhancements for certain defendants that are convicted of sex offenses.¹⁴³ While a number of prominent multi-issue women's rights organizations endorse the Senate bill,¹⁴⁴ still other such organizations oppose the bill because of these penalty provisions.¹⁴⁵ Some of these opponents favor treatment programs for sex offenders over increased punishment.¹⁴⁶ The resulting debate over treatment versus incarceration has divided the women's advocacy community.

In September 1990, the Task Force on the Violence Against Women Act¹⁴⁷ began meeting to promote the Senate version of the Violence

141. McKusick statement, *supra* note 139, at 317 (arguing that Title III will override "state laws on damages and civil suits between spouses").

142. S. REP. NO. 138, *supra* note 47, at 49 (noting that "[t]raditional [s]tate law sources of protection have proved to be difficult avenues of redress for some of the most serious crimes against women"); S. REP. NO. 197, *supra* note 13, at 43 (noting that crimes that disproportionately affect women are often treated "less seriously" by the courts than comparable crimes against men). For example, certain court practices, such as the "prompt complaint" rule, deter victims from reporting and prosecuting crimes of violence and put the victim on trial. S. REP. NO. 197, *supra* note 13, at 45-46. Finally, stereotypes of crime victims prevent them from receiving equal treatment by the courts. *Id.* at 46-48 (discussing the problem of victim-blaming in rape cases).

143. S. 11, 103d Cong., 1st Sess. §§ 111-112 (1993); see *supra* note 58 and accompanying text (explaining the provisions of the bill).

144. Those organizations that support the bill include, among others, Center for Women Policy Studies, Ms. Foundation for Women, National Coalition Against Domestic Violence, NOW, National Women's Health Resource Center, and National Women's Political Caucus. See List of Organization Endorsements, Violence Against Women Act of 1993 (as of Oct. 13, 1993) (on file with *The American University Journal of Gender & the Law*).

145. For example, the National Women's Law Center and Women's Legal Defense Fund support neither the Senate nor the House version of the VAWA. *Id.*

146. Statement of NOMAS, VAWA Title I: Treating Sex Offenders: Concerns (on file with *The American University Journal of Gender & the Law*) [hereinafter Statement of NOMAS] (stating that "when we consider battery, rape, or child abuse, the thought quickly moves to the issues of treatment for the offenders").

147. The Task Force is a coalition of women's advocacy groups dedicated to crafting and promoting the bill. Letter from Sally F. Goldfarb, Senior Staff Attorney, NOW Legal Defense and Education Fund, to organizational supporters of the VAWA (Sept. 13, 1990) (on file with *The American University Journal of Gender & the Law*) (enclosing minutes from the Task Force's

Against Women Act of 1991.¹⁴⁸ Certain members of the Task Force immediately raised concerns about several provisions that increased penalties for convicted sex offenders;¹⁴⁹ such penalty increases, it was argued, would have a disproportionate effect on communities of color.¹⁵⁰ As a result, some Task Force member organizations refused to support the bill.¹⁵¹ Despite this opposition, substantially similar penalty provisions were carried over to the succeeding bill, the Violence Against Women Act of 1993.¹⁵²

In February 1993, Representative Patricia Schroeder introduced the House version of the Violence Against Women Act.¹⁵³ This bill does not contain a penalty increase provision; instead, it provides grants to develop treatment programs for sex offenders.¹⁵⁴ A similar provision in the 1991 House bill¹⁵⁵ received a great deal more support than the 1991 Senate bill.¹⁵⁶ As of the time that this article was written, it was too early to tell which 1993 version of the bill would

September 1990 that describe the Task Force and its function). Specifically, the Task Force assists in drafting the Act, mobilizes support for the bill and any amendments to it, and educates the public about the bill to ensure its passage. *Id.*

148. S. 15, 102d Cong., 1st Sess. (1991).

149. S. 15, §§ 111, 112. Section 111 provides that repeat sex offenders may receive up to twice the imprisonment and/or fine otherwise provided in the guidelines. Similarly, section 112 increases penalties for rape and aggravated rape by at least four offense levels.

150. See Minutes from the December 18, 1990 Meeting of the Task Force on the Violence Against Women Act 2-4 (Dec. 18, 1990) (on file with the *American University Journal of Gender & the Law*) [hereinafter Task Force Minutes] (suggesting that a number of Task Force members opposed the sentencing provisions because of their disproportionate effect on minorities). Two factors contribute to this disproportionate effect. First, because Indian reservations are the most populated areas subject to federal jurisdiction, Native Americans also are the largest group of people to be affected by the penalty increase provisions. See *Hearings on S. 15, supra* note 139, at 299, 300 (prepared statement of Peg Rogers, Attorney, Native American Rights Fund) (stating that Native Americans will "bear the weight" of the provisions). Second, the danger of selective prosecution means that members of minority groups would be punished in greater proportion than those of non-minority groups. *Id.* at 295, 295 (prepared statement of The Women's Circle) (noting that "the law is followed to the letter" when used against Native Americans and other minorities).

151. See Task Force Minutes, *supra* note 150, at 3 (noting that during one meeting of the Task Force, it was determined that "[i]f the Task Force supported increased sentences, many groups could not support the bill"). These groups also stated that they would "lobby against the sentencing provision and not support the bill as a whole" if the provision remained in the bill. *Id.* at 4.

152. Compare S. 15, § 111 with S. 11, § 111 (making, in both bills, a subsequent sexual offense punishable by a term of imprisonment up to twice that which is authorized by statute or by the sentencing guidelines).

153. H.R. 1133, 103d Cong., 1st Sess. (1993).

154. *Id.* § 121(a).

155. Compare H.R. 1502, § 112 (requiring that all federal sex offenders participate in a treatment program within 30 days of entering prison) with H.R. 1133, § 127 (requiring the United States Attorney General to ensure that community treatment information is made available to released sex offenders).

156. See List of Organization Endorsements, Violence Against Women Act of 1991 (as of Oct. 29, 1992) (on file with *The American University Journal of Gender & the Law*) (indicating that 34 organizations supported only the House version while twelve supported only the Senate version).

receive more support. However, it is conceivable that another such split could occur.

Concern about increasing incarceration for rapists has led the Task Force on the Violence Against Women Act to form a subcommittee to explore the possibility of treatment for sex offenders.¹⁵⁷ Interestingly, it is the sole men's group involved in the Task Force, the National Organization for Men Against Sexism (NOMAS), that has highlighted the apparent contradiction between labeling certain acts "hate crime" and maintaining that the perpetrators of such crime can be treated.¹⁵⁸ NOMAS argues that treating sex offenders from a healing perspective, rather than from a criminal justice perspective, reinforces the erroneous belief that sex offenders are different from other hate crime perpetrators and merely require treatment.¹⁵⁹ In fact, much of the work of anti-rape advocates has focused on countering the image of rapists as sick individuals who should spend time in therapy and, instead, promoting the notion that these individuals should be treated as perpetrators of violent crime who deserve to spend time in jail.¹⁶⁰

Promoting treatment as a response to violence against women has distracted women's advocates from the task of promoting the VAWA. As a practical matter, the treatment/incarceration debate has split the women's advocacy community. The opposition that some women's organizations have toward the increased penalties provision signifies their discomfort with the underlying premise of hate crime statutes that contain penalty enhancement provisions—that is, that increased penalties are desirable.¹⁶¹

C. *The Argument That Male Violence Against Women Affects Women Differently*

As discussed in Part III, concern exists that increased penalties for convicted sex offenders have a disproportionate effect on communi-

157. Telephone Interview with Rus Ervin Funk, Coordinator, Men's Anti-Rape Resource Center, National Organization for Men Against Sexism (NOMAS) (July 6, 1992). NOMAS is a member of the Task Force subcommittee.

158. Statement of NOMAS, *supra* note 146.

159. Statement of NOMAS, *supra* note 146 (stating that no other hate crime legislation mandates treatment of hate crime offenders, and suggesting that treatment for offenders of the Violence Against Women Act undermines its characterization as a hate crime).

160. Statement of NOMAS, *supra* note 146. A more acceptable option might be to permit "sensitivity training," the way that California does, as a condition of probation for all hate crimes. See CAL. PENAL CODE § 422.95 (West Supp. 1993). This option focuses on confronting the assailant's desire to dominate women as a whole rather than focusing on the assailant's individual problem of "controlling" his sexuality.

161. For example, national women's organizations have not endorsed the Hate Crimes Sentencing Enhancement Act. See *supra* note 64 and accompanying text.

ties of color.¹⁶² Therefore, while it is tempting to assume that male violence against women plays the same role in all women's lives and that all women believe that an increased judicial response to violence against women is desirable and/or effective, such an assertion is essentialist.¹⁶³

The anti-essentialist critique of feminism maintains that mainstream feminist legal theory assumes that there is an "essential 'woman'" beneath the race, class, and sexual orientation differences that distinguish women from one another.¹⁶⁴ Feminist theorists who speak of a single women's voice or experience view women's interests as the same and the fate of all women as being bound together.¹⁶⁵ However, it is argued, the single women's voice that is spoken is that of the caucasian woman.¹⁶⁶ In this way, mainstream feminism ignores the experiences of women of color.¹⁶⁷

In particular, feminism has been charged with essentialism in its theories on rape. Some African-American feminists argue that African-American women and caucasian women have had, and continue to have, very different experiences of rape, giving rape a different meaning for the two groups.¹⁶⁸ For instance, Angela Harris asserts that for African-American women rape is a far more complex experience than it is for caucasian women, for it is rooted in racism.¹⁶⁹ On the one hand, while rape laws historically were used in a racist fashion to single out African-American men for the rape of

162. See *supra* note 150 and accompanying text (discussing the effect that penalty increase provisions have upon Native American communities).

163. The theory of gender essentialism asserts that a "monolithic 'women's experience'" exists that can be isolated and described independently of such factors as a woman's race, class, or sexual orientation. Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 588 (1990).

164. See *id.* at 591. Angela Harris also discusses the work of Robin West as an example of mainstream feminist legal theory that is based upon essentialism. *Id.* at 602-05.

165. For example, Catharine MacKinnon argues that society is constructed along gender lines, with women being dominated by men. CATHARINE A. MACKINNON, *Desire and Power, in FEMINISM UNMODIFIED* 46, 51 (1987) (stating that gender is "a matter of dominance, not difference"). Thus, in spite of their different situations, women are linked to each other by their membership in a subordinated gender class. *Id.* at 56.

166. ELIZABETH V. SPELMAN, *INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* 3-4 (1988) (asserting that mainstream feminism's description of women 'as women' is almost always a description of middle-class women from western industrialized countries); Harris, *supra* note 163, at 588 (stating that most feminist legal theorists who claim to speak for all women are caucasian, heterosexual, and from socio-economically advantaged backgrounds).

167. Angela Harris explains that essentialism requires that some voices be silenced to benefit the woman who speaks for all women. Harris, *supra* note 163, at 585. Those silenced voices are "the same voices silenced by the mainstream legal voice of [the country]—among them, the voices of black women." *Id.*

168. Harris, *supra* note 163, at 598.

169. Harris, *supra* note 163, at 598.

caucasian women,¹⁷⁰ the laws did at least provide formal protection to caucasian women.¹⁷¹ On the other hand, the law did not even recognize the rape of an African-American woman as a crime until after the Civil War.¹⁷² Even after the Civil War, the laws were seldom used to protect these women, because African-American women were considered to be naturally promiscuous.¹⁷³

The intersection of rape and racism continues today.¹⁷⁴ Statistics show that African-American men are more likely to receive harsher penalties for rape than caucasian men,¹⁷⁵ and that all men are treated less harshly when the rape victim is African-American.¹⁷⁶ As a result, when an African-American woman is raped by an African-American man and reports her rape to the police, she is exposing herself, and her assailant, to a criminal justice system that is both

170. Harris, *supra* note 163, at 598 (quoting Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 646 n.22 (1983)); Jennifer Wriggins, *Rape, Racism, and the Law*, 6 HARV. WOMEN'S L.J. 103, 106 (1983) (discussing the "selective recognition" of only one type of rape—that of a caucasian woman by an African-American man). The mere allegation that an African-American man raped a caucasian woman sometimes led to his lynching by a mob; a conviction brought castration or death. Wriggins, *supra* at 105. Caucasian men accused of raping caucasian women were subjected to far less severe penalties. *Id.* at 106 n.15.

171. *But see* Wriggins, *supra* note 170, at 107 (noting that traditional common law barriers protected most caucasian rapists from prosecution for raping caucasian women).

172. Harris, *supra* note 163, at 599; Wriggins, *supra* note 170, at 118.

173. *See* Sharon A. Allard, *Rethinking Battered Woman Syndrome: A Black Feminist Perspective*, 1 UCLA WOMEN'S L.J. 191, 199-200 (1991) (stating that because African-American women were deemed to be "immoral," they were undeserving of legal protection from sexual exploitation).

174. This commingling extends into distant areas. For example, the myths and stereotypes about African-American women that justified their sexual abuse during slavery affects their experience of sexual harassment in the workplace. *See* Kimberlé Crenshaw, *Whose Story Is It Anyway? Feminist and Antiracist Appropriations of Anita Hill*, in RACE-ING JUSTICE, EN-GENDERING POWER 402 (Toni Morrison ed., 1992). The first result is that the sexual harassment of African-American women is often used to note the woman's "subordinate racial status." *Id.* at 412-14. For example, while both caucasian and African-American women may be objectified as "pieces," insults directed at African-American women may often be prefaced with "nigger," "black," or other words that call attention to the woman's race. *Id.* The second result is that courts may be less likely to believe African-American women's reports of harassment. *See id.* (noting that because an African-American woman was not expected to be chaste, she was considered less likely to be truthful and thus her testimony was less likely to be believed by judges and jurors). Therefore, mainstream feminism should recognize this difference in women's experiences, and develop alternative narratives of sexual harassment that are grounded in African-American women's experiences as well. *See id.* at 435 (stating that "[n]onwhite and working-class women . . . must see their own diverse experiences reflected in the practice and policy statements of these predominantly European-American middle-class groups").

175. For example, between 1930 and 1967, 89% of the men executed for rape in the United States were African-American. Harris, *supra* note 163, at 600 (citing SUSAN ESTRICH, *REAL RAPE* 107 n.2 (1982)).

176. African-American men continued to be treated more harshly "when charged with raping white women . . . [than] with raping black women." DIANA SCULLY, *UNDERSTANDING SEXUAL VIOLENCE: A STUDY OF CONVICTED RAPISTS* 145 (1990) (citing Gary D. LaFree, *The Effect of Sexual Stratification by Race on Official Reactions to Rape*, 45 AM. SOC. REV. 842 (1980)); *see also* Wriggins, *supra* note 170, at 121-22 (stating that both judges and caucasian jurors impose lighter sentences where the victim is African-American).

racist and sexist.¹⁷⁷ This reality has led some commentators to question the goal of mainstream feminism to increase the number of rape convictions, arguing that it would merely serve to reproduce the problem of disparate punishments between African-American and caucasian rapists.¹⁷⁸

It has also been argued that mainstream feminism is essentialist in its treatment of domestic violence. Some feminists believe that African-American women experience male violence differently from caucasian women, giving violence against women a different meaning for the two groups.¹⁷⁹ This difference in meaning, it is argued, has been ignored by mainstream feminists.¹⁸⁰ Instead, the efforts of mainstream feminism on behalf of battered women have been based on caucasian women's experiences.¹⁸¹ The resulting feminist legal theory on woman-battering issues, such as coercive intervention in

177. For example, many African-American women remain silent about experiences of sexual abuse out of fear that their stories will be used to "reinforce stereotypes of black men as sexually threatening." Crenshaw, *supra* note 174, at 415. Even African-American women who do not share this fear may choose not to testify against African-American men because they fear ostracism from those who do share this view. *Id.*

In addition, Crenshaw states that the African-American community has not fully addressed intra-racial rape and "other abusive practices," partly because of a reluctance to expose internal conflict that could, in turn, reflect negatively on the rest of the community. *Id.* at 420. The effect of this "code of silence" is to coerce women into keeping quiet for fear of being labeled a traitor to their race. *Id.* at 420-22 (noting that many accounts of the Anita Hill/Clarence Thomas Senate hearings portrayed Hill as a traitor to African-American people for testifying against Thomas).

178. Wiggins, *supra* note 170, at 138.

Angela Harris takes this argument one step further, arguing that caucasian feminists have not only ignored the racist use of rape, but in fact have perpetuated it as well. She relates an example where Susan Brownmiller, a caucasian feminist, describes the African-American defendants in a rape trial as "pathetic, semiliterate fellows" and the caucasian female accusers as "innocent pawns of white men." Harris, *supra* note 163, at 601 (quoting Brownmiller, *supra* note 1, at 237). Thus, the contemporary feminist analysis of rape explicitly relies on racist ideology to minimize caucasian women's complicity. *Id.*

179. See Crenshaw, *supra* note 174, at 414. Crenshaw states that "[b]lack women experience much of the sexual aggression that the feminist movement has articulated but in a form that represents simultaneously their subordinate racial status." *Id.*

180. See ANGELA Y. DAVIS, WOMEN, CULTURE AND POLITICS 45 (1990) (discussing the reluctance of African-American, Latina and Native American women to join the anti-rape movement of the early 1970s because the feminist theoretical foundations for the campaign failed to "develop an analysis of rape that acknowledged the social conditions that foster sexual violence as well as the centrality of racism in determining those social conditions"). Davis states that "since much of the early activism against rape was focused on delivering rapists into the hand of the judicial system, Afro-American women were understandably reluctant to become involved with a movement that might well lead to further repressive assaults on their families and their communities." *Id.* at 44.

181. See ANDREA DWORKIN, WOMAN HATING 21-22 (1974) (stating that most of the women who were involved in the early stages of feminism were caucasian and middle class). As a result, most of them, and hence the movement, failed to take any action that would harm their privileged lifestyle. *Id.*; see Schneider, *supra* note 3, at 532 (noting that, until recently, the battered women's movement, a sub-group of the feminist movement, was "largely shaped by the experiences and understanding of white women").

family matters¹⁸² or battered woman syndrome,¹⁸³ may not address the experiences of African-American women at all.¹⁸⁴

Despite the fact that women as a group suffer from male violence, a variety of factors influence a woman's decision to seek assistance from the criminal justice system. Obviously, race is one factor that should not be ignored.¹⁸⁵ However, it is essentialist to assert that

182. Catharine MacKinnon has argued that the privacy doctrine shields battery and marital rape when they occur inside the home. MacKinnon states that certain alternatives for women are precluded by conditions of sex, race, and class before a legal doctrine is chosen, ensuring that "the existing distribution of power and resources within the private sphere will be precisely what the law of privacy exists to protect." CATHARINE A. MACKINNON, *Roe v. Wade: A Study in Male Ideology*, in ABORTION: MORAL AND LEGAL PERSPECTIVES 45, 53 (Jay L. Garfield & Patricia Hennessey eds., 1984) [hereinafter MACKINNON, *Roe v. Wade*]. According to Dorothy Roberts, MacKinnon's argument is an example of how mainstream feminist legal theory "focuses on the private realm of the family as an institution of violence and subordination." Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1470 (1991) (citing MACKINNON, *Roe v. Wade*, *supra* at 51-53). However, Roberts argues, women of color often focus on the family as the "site of solace and resistance against racial oppression." *Id.* at 1470-71; see also ELMER P. MARTIN & JOANNE M. MARTIN, THE BLACK EXTENDED FAMILY 1 (1978) (noting the importance of the family to African-Americans for psychological and material support). Thus, women of color may view domestic violence less as a type of abuse within the private sphere (the battering) and more as a potential abuse in the public sphere (the government intervention); cf. Roberts, *supra* at 1471 (asserting that in the area of reproductive rights, many African-American women are more concerned about coercive government intervention than about abuse in the private sector).

183. Battered woman syndrome is characterized by a cyclical pattern of psychological and physical abuse which may be divided into three stages, those of tension-building, acute battering, and reconciliation. LENORE E. WALKER, THE BATTERED WOMAN 55-70 (1979). The syndrome is based upon the idea that the woman suffers from "learned helplessness," a state of psychological paralysis where she feels incapable of escaping the battering relationship. *Id.* at 47-48.

However, at least one commentator has noted that battered woman syndrome is built on a definition of woman which is based on "limited societal constructs of appropriate behavior for white women." Allard, *supra* note 173, at 192-94. Moreover, African-American women must hurdle the additional stereotype asserting that they do not deserve the protection under the syndrome because of their race. See *id.* at 199-200 (noting that in the Victorian era, African-American women were deemed to be "immoral." This stereotype was used to further the perception that these women did not deserve legal protection from sexual exploitation.).

184. For example, "[w]omen of color may believe that the means to ending their abuse is to end racial oppression, not gender subordination. The battered women's movement as it has been constructed may not speak to their experiences at all." Schneider, *supra* note 3, at 532 n.46.

185. In reality, most African-American women, like most caucasian women, are raped by men of the same race. Statistics show that 90% of rapes are intra-racial. MacKinnon, *Sex Equality*, *supra* note 2, at 1300 n.90 (citing MENACHEM AMIR, FORCIBLE RAPE 44 (1971)). A recent Department of Justice study shows that "in rapes with one offender, 7 of every 10 white victims were raped by a white offender, and 8 of every 10 Black victims were raped by a Black offender." *Id.* (citing CAROLINE WOLF HARLOW, FEMALE VICTIMS OF VIOLENT CRIME 10 (1991)).

Furthermore, the percentage of African-American women who experience sexual assault is similar to that of caucasian women. Note, for example, the percentage of women who reported being victimized at least once by rape or attempted rape: caucasian (non-Jewish), 45%; Jewish, 50%; African-American, 44%; Latina, 30%; Asian, 17%; Filipina, 17%; Native American, 55%; and other, 28%. DIANA E.H. RUSSELL, SEXUAL EXPLOITATION: RAPE, CHILD SEXUAL ABUSE, AND WORKPLACE HARASSMENT 84, tbl. 3.3 (1984).

Additionally, African-American women may be more likely than women of other racial and ethnic groups to report their rapes. In one study, 20% of rapes overall were reported. Out of

race is the only factor that influences women's decisions about whether to seek out judicial intervention¹⁸⁶ or to assert that all women of a particular race feel the same way about judicial intervention.¹⁸⁷ Feminists, in particular, should allow policy decisions to be guided by the voices of the women who have actually been the victims of male violence.¹⁸⁸ Through personal work experience, I have encountered many women of color who believed that their abuse should be treated as seriously as violent crime between strangers; who wanted their abusers to be prosecuted to the full extent of the law; and who chose to take advantage of all legal remedies, both civil and criminal.¹⁸⁹ Advocates should listen to the voices of women from diverse backgrounds to ensure the availability of all possible remedies. Individual women can then choose the appropriate remedy.

D. The Argument That Domestic Violence Should Be Treated Differently From Other Hate Crime

The argument that the interests of domestic violence victims may be better served by training police and prosecutors to address the specific problems of domestic violence, rather than by treating domestic violence as the more general problem of hate crime, has some merit. Victims of domestic violence are different from victims of other hate crime in that they often maintain an intimate relation-

these, 17% of the rapes of African-American women were reported, 9% of the rapes of Jewish women, 8% of the rapes of Asian and Filipina women, 7% of the rapes of caucasian non-Jewish women, and 0% of the rapes of Native American women. *Id.* at 100.

186. For instance, one study found that, regardless of race, victims of rape were most likely to seek judicial intervention when their homes were broken into, they were raped by a stranger, they were threatened with a weapon, or they were subject to a "high degree of violence." RUSSELL, *supra* note 185, at 96-98.

187. Joan Williams has noted that the sameness/difference debate has divided the African-American community, as well as the feminist community. Joan C. Williams, *Dissolving the Sameness/Difference Debate: A Post-Modern Path Beyond Essentialism in Feminist and Critical Race Theory*, 1991 DUKE L.J. 296, 297. Williams offers a post-modern formulation of "difference" in which "[c]laims of difference simply mean that *in some contexts* gender or race may shape (or even determine) one's outlook. This reformulation of difference . . . avoids essentialism because it refuses to concede that race, gender—or, indeed, *any* given category—will always be determinative." *Id.* at 307 (emphasis in original).

188. The idea that women's voices are silenced under patriarchy and that feminism should therefore look to individual women's experiences is not new. *Id.* at 320 (advocating that women's "personal narrative" be used "to enable women to communicate what they see as basic realities").

189. My experiences include volunteering as a hotline counselor at a shelter for battered women; serving as the shelter's house manager; counseling women seeking Civil Protection Orders through the Civil Victim's Advocacy Project of the D.C. Coalition Against Domestic Violence; surveying over one thousand intrafamily offense cases for the D.C. Task Force on Gender Bias in the Courts; and representing battered women as a student attorney with The American University Women and the Law Clinic.

ship with their attackers following a battering incident.¹⁹⁰ Throughout my experiences working with police and prosecutors on behalf of battered women,¹⁹¹ I found that this single factor completely guided the former's approach to reports of domestic violence. They responded with either disbelief—if she stayed then the alleged violence must not have occurred—or with the belief that the abused woman would not follow through with the prosecution of her case. This resistance by police, prosecutors, and judges to treating domestic violence as a crime has been, in fact, well documented.¹⁹² Therefore, given their special biases against battered women, law enforcement personnel need to be educated about the dynamics of relationships in which domestic violence takes place. Only with this education will law enforcement officials be able to understand domestic violence as an expression of hatred toward women¹⁹³ and be motivated to prosecute domestic abusers to the full extent of the law.

It might appear that in those few jurisdictions that have already developed an adequate law enforcement response to domestic violence, including gender in hate crime statutes would not help, and might even harm, domestic violence victims. This issue recently arose in Connecticut, where domestic violence advocates have been training law enforcement officials on how to properly respond to domestic disturbances.¹⁹⁴ When the possibility of including gender in a pending hate crime statute arose, Connecticut NOW and the

190. Some victims choose to continue living with their batterers. Some reasons why a victim stays include: the batterer pleads and promises to reform; he threatens, and/or performs, further acts of violence if she leaves him; the victim has no place else to go; the children still live in the home; and the victim feels love or sorrow for the batterer. DEL MARTIN, *BATTERED WIVES* 72-86 (1976) (citing a 1975 survey of battered women). Even if the victim does leave her batterer, in some cases she will continue to maintain a contact with him. For example, the victim and batter may have a child in common and thus need to maintain a non-intimate relationship.

191. See *supra* note 189.

192. See S. REP. NO. 138, *supra* note 47, at 44 (stating that there is "widespread gender bias in the courts," especially regarding domestic violence cases). A California task force on gender bias in the courts has reported that every element of the California justice system, from police to judges, treats domestic violence victims "as though their complaints were trivial, exaggerated or somehow their own fault." *Id.* at 46 (citing to the findings of the Administrative Office of the Judicial Council of the Courts of California); cf. Carolyne R. Hathaway, Case Comment, *Gender Based Discrimination in Police Reluctance to Respond to Domestic Assault Complaints*, 75 GEO. L.J. 667, 672 (1986) (addressing the fact that prosecutors are slow in responding to domestic violence complaints and that judges do not impose meaningful sanctions in domestic violence cases).

193. CENTER FOR WOMEN POLICY STUDIES, *supra* note 1, at 10 (discussing wife abuse as a "motiveless" crime of domination and control. "In virtually all of these cases, the 'motive' is hatred and anger at women, and a desire to control [women], acted out on a particular woman.").

194. Telephone Interview with Betty Gallow, Lobbyist for the Connecticut Civil Liberties Union, Coalition for Gay and Lesbian Rights, and Connecticut Coalition Against Domestic Violence (Aug. 4, 1992).

Connecticut Coalition Against Domestic Violence decided not to advocate the inclusion of gender in the statute.¹⁹⁵ The group was concerned that the police, who had already been trained to respond to domestic violence calls in one manner, would become confused, and therefore less effective, if required to treat domestic disturbances as hate crime incidents.¹⁹⁶

The inclusion of gender in hate crime statutes does not, however, preclude legislatures from offering more specific guidance to law enforcement officials about how to address domestic violence. Hate crime statutes already include special guidelines for addressing violence against gays and lesbians, women, the mentally and physically disabled, the elderly, and members of unpopular political groups.¹⁹⁷ Therefore, there is no reason why guidelines and training programs which states have already developed for fighting domestic violence cannot be incorporated into a state's program for addressing hate crime.

E. The Argument That Hate Crime Statutes Will Be Used Against Women

Another argument against including gender in hate crime statutes is that these statutes may be used *against* domestic violence victims if not specifically restricted to crime against recognized subordinate groups. For instance, in some cases police have responded to mandatory arrest statutes¹⁹⁸ by arresting both parties; as a result, mandatory arrest statutes that were intended to protect the victim often become a second form of abuse for the victim.¹⁹⁹ Therefore, hate crime statutes that do not specifically state that they can only be used against a member of a dominant group by a member of a

195. *Id.*

196. *Id.*

197. See *supra* notes 19-23 and accompanying text (describing the groups that are covered by state hate crime statutes).

198. Mandatory arrest statutes require the police to arrest the primary physical aggressor when they have probable cause to believe that a felony or misdemeanor domestic assault has occurred. Sarah Mausolf Buel, *Mandatory Arrest for Domestic Violence*, 11 HARV. WOMEN'S L.J. 213, 214-15 (1988).

199. Professor Catherine Klein has stated that

[a] major area of concern surrounding mandatory arrest laws has been dual arrests, which occur when the victim is arrested along with the abuser. A dual arrest is rarely appropriate in domestic violence cases. . . . [Nevertheless,] in some jurisdictions, usually during the initial implementation period of a mandatory arrest policy, dual arrests have occurred all too frequently. There appear to be two main reasons: some police officers, resenting the loss of some of their discretion, were trying to sabotage the mandatory arrest law; and some officers, because of inadequate training, genuinely misunderstood the provisions of the law.

Catherine F. Klein, *Domestic Violence: D.C.'s New Mandatory Arrest Law*, WASH. LAW., Nov./Dec. 1991, at 24, 27-28.

subordinate group may pose a particular threat to battered women, who are normally in a subordinate position to their batterers.²⁰⁰ As previously discussed in the context of racial discrimination in Part I, if both dominant and subordinate groups can use these statutes, then statutes created to protect subordinate groups may in fact be used against them by dominant groups.²⁰¹

One solution to this problem is to provide law enforcement officials with adequate training about the purpose of hate crime statutes and to explain the reasoning behind the legislature's decision to curtail their discretion by creating special reporting and arrest guidelines for hate crimes.²⁰² Another solution to this problem is to monitor prosecutorial decisions, as suggested in Part I.²⁰³ Together these measures help ensure that the subordinate members of society are not further injured by the very laws that are designed to protect them.

F. *The Argument That Proving Gender Bias Is Difficult*

Another obstacle to progress in the states on treating violence against women as hate crime is confusion about how to prove motive.²⁰⁴ Discussions with advocates in states that include gender in their hate crime statutes indicated that there is interest in using these statutes in cases involving violence against women.²⁰⁵ However, these advocates expressed concern that there were no guidelines for demonstrating that a particular act of violence against a woman was motivated by gender bias.²⁰⁶

Concern about proving motive should not, however, be a barrier to using hate crime statutes to protect women. Motive can be difficult

200. See WALKER, *supra* note 183, at 34-35 (discussing the "traditionalist orientation" of the battered woman, and noting her subordination to her husband in the marriage, her home, her career, her financial position, and her other relationships).

201. See *supra* notes 36-38 and accompanying text (discussing problems associated with the enforcement of race-based hate crime statutes).

202. For example, some jurisdictions have amended mandatory arrest laws to ensure that the police arrest only the primary aggressor in situations where both parties have used violence, thus protecting the subordinate party. "In determining who was the primary aggressor, the officer was to take several factors into account, including the relative degree of injury inflicted by both parties and the existence of a prior history of violence." Klein, *supra* note 199, at 28.

203. See *supra* notes 38-40 and accompanying text (discussing bias among prosecutors as a primary obstacle to the use of race-based hate crime statutes by minorities, and offering two possible solutions).

204. See Finn, *supra* note 5, at 13-14 (listing proof of bias motive as the main problem in prosecuting hate violence).

205. Telephone interview with Loretta Frederick, *supra* note 94; telephone interview with Ann Noel, *supra* note 94; telephone interview with Judy Rex, *supra* note 72; telephone interview with Elizabeth Shumann-Moore, *supra* note 94.

206. Telephone interview with Loretta Frederick, *supra* note 94; telephone interview with Ann Noel, *supra* note 94; telephone interview with Judy Rex, *supra* note 72; telephone interview with Elizabeth Shumann-Moore, *supra* note 94.

to prove for any hate crime.²⁰⁷ However, mere difficulty in proving motive has not prevented the legal system from punishing hate crime based on characteristics other than gender. For example, proving motive is perceived as a major obstacle in race-based hate crime prosecutions, yet race-based hate crime is successfully prosecuted.²⁰⁸

There are a number of sources of guidance for proving motive. One source is federal employment discrimination law. The Senate Judiciary Committee Report on the Violence Against Women Act of 1993 states that Title VII employment discrimination cases are to provide federal prosecutors with standards for establishing motive in gender-based hate crime.²⁰⁹

A second source is the National Institute of Justice of the United States Department of Justice's guidelines, which list factors to be considered in determining whether a crime is motivated by bias.²¹⁰ These factors include the following: common sense; language (for example, use of racial epithets); severity of harm; lack of provocation; previous history of similar events in the area; and absence of motive (for example, battery without robbery).²¹¹ The guidelines could easily be applied in cases of gender bias: sexist slurs are often made during attacks on women; lack of provocation and severity of harm might be demonstrated in a case where a man pummels his wife for burning the dinner; and absence of motive is apparent when a woman is assaulted on the street or in her home and her assailant makes no attempt to rob her.²¹²

207. Finn, *supra* note 5, at 13 (noting that a potential bias crime may lack the necessary "physical evidence, verification of bias language used by the alleged offender, or reliable witnesses" to prove that it is bias-motivated); Fleischauer, *supra* note 36, at 701 (arguing that "prosecutors face the difficult burden of proving not only the elements of the original crime and the disparate races . . . of the victim and the offender, but also that the reason or motivation for the crime itself was racist in nature").

208. Finn, *supra* note 5, at 11-13, 14 (describing the success of state task forces on bias crime and special prosecution units in prosecuting bias cases).

209. S. REP. NO. 138, *supra* note 47, at 52-53 (stating that because the "definition of gender-motivated crime is based on [T]itle VII," case law discussions of Title VII "will provide substantial guidance to the trier of fact in assessing whether the requisite discrimination was present").

210. CENTER FOR WOMEN POLICY STUDIES, *supra* note 1, at 9.

211. CENTER FOR WOMEN POLICY STUDIES, *supra* note 1, at 9.

212. A more difficult question is whether all rapes should be treated as hate crime. One commentator has suggested that there should be a presumption that every rape is a hate crime, but that the defendant can rebut this presumption by demonstrating some other motive for the rape. Wendy R. Willis, Note, *The Gun is Always Pointed: Sexual Violence and Title III of the Violence Against Women Act*, 80 GEO. L.J. 2197, 2206 (1992) (stating that rape is "almost always gender-motivated").

Under Willis' proposed scheme, the plaintiff has the initial burden of making a prima facie case that there was sexual contact with the defendant and that it occurred under coercive circumstances. *Id.* at 2217. Once met, the burden shifts to the defendant to raise voluntary consent as an affirmative defense. *Id.* If the plaintiff then proves sexual assault by a preponderance of the evidence, the court presumes that the assault was gender-motivated. *Id.*

In conclusion, while the application of these guidelines and the standards developed in Title VII cases might seem unusual at first, especially in domestic violence cases, difficulty in proving motive in gender-based hate crime should not deter advocates from pressuring prosecutors to use these statutes on behalf of women.

IV. POTENTIAL BENEFITS TO TREATING VIOLENCE AGAINST WOMEN AS HATE CRIME

Two important benefits exist for treating violence against women as hate crime. Together they more than outweigh the arguments against such treatment discussed in Part III.

A. *Valuable New Legal Remedies For Female Victims Of Violence*

The strongest argument for classifying violent acts against women that are motivated by gender bias as hate crime is that hate crime statutes offer legal remedies that are not presently available to women. For example, while rape and sexual assault statutes provide criminal remedies for crimes involving specified sexual acts between strangers, these statutes often offer less severe penalties when the victim and the assailant are acquainted, and perhaps offer no penalties when the victim and the assailant are married.²¹³ Furthermore, domestic violence statutes offer injunctive relief to victims of violence who are either married to, or involved in long-term relationships with, their attacker, but do not offer relief to other female victims of male violence.²¹⁴ Treating violence against women as hate crime would close these gaps.

Including gender in hate crime statutes offer women the following additional remedies. First, by upgrading assaults from misdemeanor to felony status, penalty enhancement statutes provide a much needed incentive for police and prosecutors to take violent crimes against women seriously.²¹⁵ Second, including gender in hate crime statutes

213. See Robin West, *Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment*, 42 FLA. L. REV. 45, 46 (1990) (explaining that severe sexual assault laws that exempt, or provide lighter sentences for, marital rape, deny victims their Fourteenth Amendment right to equal protection of the law).

214. For instance, in the District of Columbia, Civil Protection Orders are only available for committed or threatened intrafamily offenses. D.C. CODE ANN. §§ 16-1003, -1004 (1989). Intrafamily offenses are limited to criminal acts committed upon a person "to whom the offender is related by blood, legal custody, marriage, having a child in common, or with whom the offender shares or has shared a mutual residence; and with whom the offender maintains or maintained an intimate relationship . . ." D.C. CODE ANN. § 16-1001(5)(A)-(5)(B) (1989 & Supp. 1993).

215. Arrest and prosecution rates in domestic violence cases are notoriously low. For instance, while over twelve hundred women petitioned for Civil Protection Orders in the District

offers women the opportunity to seek civil remedies and enhanced criminal penalties for bias-motivated acts of violence perpetrated by casual acquaintances and strangers, regardless of whether the acts are explicitly sexual. Third, damages awarded in civil suits provide the financial assistance that some victims of bias-motivated violence need. As the result of an attack, some victims suffer from emotional trauma so severe that they are temporarily or permanently unable to support themselves. In cases of sexual assault, victims collect damages in less than 1% of the cases.²¹⁶ There were only 255 trial verdicts over a ten-year period in civil rape cases.²¹⁷ It is even more difficult for women to seek civil damages if they are married to their attacker; not all states permit civil suits between spouses or permit them only in limited circumstances.²¹⁸ Fourth, civil suits offer an important

of Columbia in 1989, only 22 court jackets indicated that criminal cases were pending. District of Columbia Courts, Final Report of the Task Force on Racial and Ethnic Bias and Task Force on Gender Bias in the Courts 123-24 n.199 (1992) [hereinafter D.C. Gender Bias Task Force Report]. The District of Columbia police receive approximately nineteen thousand domestic violence calls each year. Sandra J. Sands, Karen Baker & Naomi Cahn, Report on District of Columbia Police Response to Domestic Violence 1, 54 (Nov. 3, 1989) (unpublished manuscript, on file with *The American University Journal of Gender & the Law*). Yet in 1986, only 42 written police reports were taken. *Id.* This means that there were no more than (and possibly less than) 42 arrests. *Id.*

216. Jury Verdict Research, Inc., cited in S. REP. NO. 197, *supra* note 13, at 44 n.43.

217. Jury Verdict Research, Inc., cited in S. REP. NO. 197, *supra* note 13, at 44 n.43.

218. The common law doctrine of interspousal tort immunity prohibited suits between a husband and wife, on the grounds that such suits

disturb the harmony of the marital relationship; they involve the courts in 'trivial' disputes between spouses; they encourage fraud and collusion between spouses; criminal and divorce law provide adequate remedy; [and] the defendant is rewarded for his wrong, since he stands to recover some of the judgement if the parties cohabit.

National Woman Abuse Prevention Project, *Victim Compensation: An Old Remedy Opens New Avenues for Battered Women*, 3 THE EXCHANGE 1, 4 (1989). The following states have abrogated this doctrine in whole, unless otherwise noted parenthetically:

(1) *Penton v. Penton*, 135 So. 481, 483-84 (Ala. 1931).

(2) *Cramer v. Cramer*, 379 P.2d 95, 97 (Alaska 1963).

(3) *Fernandez v. Romo*, 646 P.2d 878, 880-83 (Ariz. 1982) (en banc) (abrogating the doctrine for vehicular tort actions only).

(4) *Leach v. Leach*, 300 S.W.2d 15, 17 (Ark. 1957).

(5) *Klein v. Klein*, 376 P.2d 70, 71-72 (Cal. 1962) (en banc).

(6) *Rains v. Rains*, 46 P.2d 740, 742-44 (Colo. 1935).

(7) *Brown v. Brown*, 89 A. 889, 890-91 (Conn. 1914).

(8) *Beattie v. Beattie*, 630 A.2d 1096, 1098-101 (Del. 1993).

(9) FLA. STAT. ANN. ch. 741.235 (Harrison Supp. 1992); *Waite v. Waite*, 618 So. 2d 1360, 1361-62 (Fla. 1993).

(10) *Harris v. Harris*, 313 S.E.2d 88 (Ga. 1984) (abrogating the doctrine only in situations where there is "realistically speaking, no 'marital harmony' to be protected by application of the interspousal immunity rule . . . [nor] any hint of collusion between the [husband and wife] or of intent to defraud an insurance company").

(11) HAW. REV. STAT. § 572-28 (1993).

(12) *Rogers v. Yellowstone Park Co.*, 539 P.2d 566, 571-72 (Idaho 1975) (abrogating the doctrine for vehicular tort actions only); *Lorang v. Hays*, 209 P.2d 733, 737 (Idaho 1949) (abrogating the doctrine in intentional tort actions only).

emotional reward for victims: establishing the "guilt" of their attacker.²¹⁹ Finally, statutes that define violent acts against women as civil rights violations offer victims of gender bias-motivated violence confirmation that their suffering is part of a greater, and regrettably unaddressed, social problem of violence against women. In this sense,

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- (13) ILL. ANN. STAT. ch. 40, para. 1001 (Smith-Hurd 1993).
 (14) *Brooks v. Robinson*, 284 N.E.2d 794, 798 (Ind. 1972).
 (15) *Shook v. Crabb*, 281 N.W.2d 616, 619-20 (Iowa 1979) (abrogating the doctrine for personal injury actions only).
 (16) *Flagg v. Loy*, 734 P.2d 1183, 1189-90 (Kan. 1987).
 (17) *Brown v. Gosser*, 262 S.W.2d 480, 481-84 (Ky. 1953).
 (18) *MacDonald v. MacDonald*, 412 A.2d 71, 75 (Me. 1980).
 (19) *Boblitz v. Boblitz*, 462 A.2d 506, 522 (Md. 1983) (abrogating the doctrine for negligence actions-only); *Lusby v. Lusby*, 390 A.2d 77, 89 (Md. 1978) (abrogating the doctrine for intentional tort actions only).
 (20) *Lewis v. Lewis*, 351 N.E.2d 526, 532-33 (Mass. 1976) (abrogating the doctrine for vehicular tort actions only).
 (21) *Hosko v. Hosko*, 187 N.W.2d 236, 237-38 (Mich. 1971).
 (22) *Beaudette v. Frana*, 173 N.W.2d 416, 420 (Minn. 1969).
 (23) *Burns v. Burns*, 518 So.2d 1205, 1209 (Miss. 1988).
 (24) *Townsend v. Townsend*, 708 S.W.2d 646, 650 (Mo. 1986) (en banc) (abrogating the doctrine as to intentional tort actions only).
 (25) MONT. CODE ANN. § 40-2-109 (1993); *Noone v. Fink*, 721 P.2d 1275, 1276 (Mont. 1986).
 (26) *Imig v. March*, 279 N.W.2d 382, 386 (Neb. 1979).
 (27) *Rupert v. Stienne*, 528 P.2d 1013, 1017 (Nev. 1974) (abrogating the doctrine for vehicular tort actions only).
 (28) *Gilman v. Gilman*, 95 A. 657, 657 (N.H. 1915).
 (29) *Merenoff v. Merenoff*, 388 A.2d 951, 960-62 (N.J. 1978).
 (30) *Maestas v. Overton*, 531 P.2d 947, 948 (N.M. 1975).
 (31) N.Y. GEN. OBLIG. LAW § 3-313 (McKinney 1989); *State Farm Mut. Auto. Ins. Co. v. Westlake*, 324 N.E.2d 137, 139 (N.Y. 1974).
 (32) N.C. GEN. STAT. §§ 52-5, -5.1 (1991); *Crowell v. Crowell*, 105 S.E. 206, 208-10 (N.C. 1920).
 (33) *Fitzmaurice v. Fitzmaurice*, 242 N.W. 526, 527-29 (N.D. 1932).
 (34) *Shearer v. Shearer*, 480 N.E.2d 388, 392-94 (Ohio 1985).
 (35) *Courtney v. Courtney*, 87 P.2d 660, 665-70 (Okla. 1938).
 (36) *Antonacci v. Davis*, 816 P.2d 1202, 1203 (Or. Ct. App. 1991).
 (37) *Hack v. Hack*, 433 A.2d 859, 868-69 (Pa. 1981).
 (38) *Digby v. Digby*, 388 A.2d 1 (R.I. 1978) (abrogating the doctrine for vehicular tort actions only).
 (39) *Pardue v. Pardue*, 166 S.E. 101, 103 (S.C. 1932).
 (40) *Scotvold v. Scotvold*, 298 N.W. 266, 268-69 (S.D. 1941).
 (41) *Davis v. Davis*, 657 S.W.2d 753, 759 (Tenn. 1983).
 (42) *Price v. Price*, 732 S.W.2d 316, 319 (Tex. 1987).
 (43) *Stoker v. Stoker*, 616 P.2d 590, 590-92 (Utah 1980).
 (44) *Richard v. Richard*, 300 A.2d 637, 641 (Vt. 1973) (abrogating the doctrine for vehicular tort actions only).
 (45) *Surratt v. Thompson*, 183 S.E.2d 200, 201-02 (Va. 1971) (abrogating the doctrine for vehicular tort actions only).
 (46) *Freehe v. Freehe*, 500 P.2d 771, 773-76 (Wash. 1972) (en banc).
 (47) *Coffindaffer v. Coffindaffer*, 244 S.E.2d 338, 343-44 (W. Va. 1978).
 (48) *Wait v. Pierce*, 209 N.W. 475, 480-81 (Wis. 1926).
 (49) *Tader v. Tader*, 737 P.2d 1065, 1069 (Wyo. 1987).
 219. National Woman Abuse Prevention Project, *supra* note 216, at 5.

civil rights remedies promote one of the fundamental tenets of feminism—the personal is political.²²⁰

B. Increased Public Awareness Of The Seriousness And Prevalence Of Violence Against Women

The use of hate crime statutes in cases of violence against women focuses attention on the root of the crime—hatred. There are two potential benefits to focusing on the hatred involved in violence against women. First, treating violence against women as a hate crime may direct emphasis away from the sexual nature of certain bias-motivated acts of violence against women, such as rape. In the minds of many, rape is simply the result of a misguided sexual urge.²²¹ This perception is problematic because it immediately diverts attention away from the perpetrator and toward the victim.²²² The extent to which juries accept culturally supported “rape myths” demonstrates this problem.²²³ Three of these myths—that rape is an expression of sexual desire; that women invite sexual assault by their dress, behavior, or decision to be alone in the “wrong” place; and that a woman’s prior consensual sexual relations with the accused implies consent—confuse rape with sex. The effect of these myths is to “shift the focus from the perpetrator to the victim from the very moment the offense takes place.”²²⁴ Instead of looking for evidence that the rapist hates women, juries are led to look for indications that

220. MACKINNON, *THEORY OF THE STATE*, *supra* note 1, at 120. After explaining what “the personal is the political” does *not* mean, MacKinnon stresses women’s powerlessness next to men. She states that it “means that gender as a division of power is discoverable and verifiable through women’s intimate experience of sexual objectification, which is definitive of and synonymous with women’s lives as gender female. Thus, to feminism, the personal is epistemologically the political, and its epistemology is its politics.” *Id.*

221. Richard T. Andrias, *Rape Myths*, 7 A.B.A. Crim. Just. 3, 3 (1992).

222. *Id.*

223. Richard Andrias, a New York State Supreme Court Justice, lists seven common rape myths:

- The true victim of a rape will immediately seek out and complain to family, friends, or the police.
- Rape usually occurs at night, out of doors, and between strangers; the perpetrator uses a weapon and leaves the victim physically injured.
- Rape is an expression of sexual (albeit misplaced) desire.
- Women falsely accuse men of rape.
- The woman invited the sexual assault by her dress, behavior, or being alone in the wrong place.
- A woman’s prior consensual sexual relations with the accused (or with others known to the accused) implies consent.
- A woman impaired by drugs or alcohol deserved to be raped.

Id.

224. *Id.*

the woman either consented or gave the appearance of consent.²²⁵ A logical step toward treating rape as an expression of power and dominance²²⁶ is to divorce sex from rape where possible.²²⁷

Second, viewing violence against women as hate crime might deflect the emphasis away from the relationship between the perpetrator and victim.²²⁸ Just as the misperception that rape is a crime of sex impedes the prosecution of sex crimes against women, the misperception about the significance of the relationship between victim and assailant also serves as a barrier to effective prosecution.²²⁹ Treating violence against women as hate crime emphasizes the tremendous significance of the violence.

CONCLUSION

Hate crime statutes offer a promising tool for fighting violence against women. As discussed in Part I, gender is now included in legislative efforts to combat hate crime on both the state and federal levels. State statutes that provide women with civil rights remedies, and mandate data collection and special police training, are becoming increasingly prevalent.

Nevertheless, a variety of obstacles have stalled the inclusion of gender in hate crime statutes and the implementation of hate crime statutes in cases of violence against women. First, there is resistance on the part of hate crime victims' advocates and others to the inclusion of gender in hate crime statutes. In their efforts to keep gender out of hate crime statutes, these advocates have overlooked much feminist scholarship concerning violence against women.

225. See S. REP. NO. 138, *supra* note 47, at 45-46 (asserting that the "pervasive suspicion of rape victims' credibility," and persistent victim-blaming by court and law enforcement personnel, move the focus in hate crime cases "from the attacker—where it should be—to the behavior of the victim") (citation omitted).

226. GORDON & RIGER, *supra* note 136, at 45 (saying that feminists argue rape keeps women afraid, dependent on men, and subservient).

227. One example of the effort to divide rape and sex is a recent movement on the part of police and prosecutors to change the names of their specialized units from "sex crimes" to "special victims." Andrias, *supra* note 223, at 4.

228. See *supra* note 130 and accompanying text (noting that opponents to treating hate violence against women as hate crime believe that existence of a relationship between the victim and perpetrator means that a victim is not interchangeable with other women). Focusing on their relationship impedes focusing on the fact that rape is violence against women as a group. *Id.*

229. In response to a survey by the D.C. Task Force on Gender Bias in the Courts, 50% of respondents stated that they believed bail was set lower in domestic violence cases than in "other cases of similar violence"; 70% of the respondents with an opinion stated that when the parties are married, sentences are generally shorter than in "other similar cases"; and 50% of the respondents with an opinion stated that sentences in domestic violence cases are shorter than "other similar cases," even when the parties are not married. D.C. Gender Bias Task Force Report, *supra* note 215, at 126.

Second, national multi-issue women's organizations have expressed ambivalence over whether lengthening incarceration periods is an appropriate response to male violence. This ambivalence is primarily the result of concern that lengthening incarceration periods will disproportionately impact communities of color due to racism in the American criminal justice system. Furthermore, it has been argued that increased judicial intervention in cases of violence against women may not be desirable to women of color. However, although sexual violence may have a different meaning for many African-American women due to the racist use of rape laws in this country, the argument that all African-American women do not want an effective criminal justice response to crimes of violence against them is essentialist and therefore ignores the individuality of these women. Feminist advocates should listen to the voices of victims of male violence to determine whether to support increased penalties for gender-based hate crime. In response to the claim that treating domestic violence as hate crime might be less effective, it cannot be denied that the inclusion of gender in hate crime statutes does not preclude legislatures from creating more specific responses to domestic violence. Finally, the confusion in the states about how to demonstrate motive in cases of hate-based violence against women should not preclude prosecution of these cases. Since motive is always difficult to demonstrate in hate crimes, advocates should lobby for application of pre-existing motive determination guidelines in cases involving women.

In conclusion, the potential benefits of the use of hate crime statutes for women outweigh the concerns that have arisen. Hate crime statutes offer completely new legal remedies for women. Moreover, by focusing attention on the general hatred of women that violent acts motivated by gender bias demonstrate, these statutes could help overcome the two major barriers to prosecuting hate-motivated violence against women by de-emphasizing the significance of the relationship between the victim and her assailant and directing attention away from the sexual nature of so many violent crimes against women. Now more than ever, it is critical that women's advocacy groups become, or remain, involved in the fight to include violence against women in hate crime statutes.

