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Hate Crimes, Homosexuals, and the Constitution

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Abstract
This Article begins with an analysis of certain features of the Equal Protection Clause of the Fourteenth Amendment and demonstrates that this clause establishes a fundamental right to the equal benefit of laws protecting personal security. Laws protecting personal security must be applied evenhandedly. Any discriminatory application of such laws is presumptively invalid under the Equal Protection Clause. This Article next shows that gay men and lesbians are among the most common victims of hate crime, that hate crimes against gays and lesbians are significant, persistent and widespread, and that gays and lesbians have a substantial stake in the manner in which the hate crime phenomenon is addressed. However, the interest of homosexuals in hate crime legislation is far more compelling than that. Because of societal antipathy toward gay men and lesbians, legislatures frequently exclude lesbians and gay men from the protection of hate crime statutes. In such cases, homosexuals are denied the equal benefit of laws protecting personal security, a right required by the Equal Protection Clause. This Article thus concludes that homosexual men and women have much more than a mere interest in the protection of hate crime statutes. Once a state decides to enact a hate crime statute protecting members of certain other societal groups, homosexuals have a constitutional right to its protection as well.

Keywords
Homosexuality, equality, constitutional rights, liberties

Disciplines
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Adoption of Her Child by a Gay Couple, N.Y. TIMES, Aug. 1, 1993, at Cl. 

Issues regarding homosexuality and the rights of lesbians and gay men have been at the forefront of public discourse in recent months. These issues have arisen in a broad variety of contexts. Some of the more visible controversies have involved the service of lesbians and gay men in the armed forces,¹ local and statewide efforts to limit civil rights for lesbians and gay men,² and questions concerning rights to marriage, adoption, and child custody.³

Another topic of ongoing national debate in recent years has been the question of so-called “hate crimes.” Hate crimes can be characterized as violent crimes against members of minority groups because of the attackers’ prejudice against those groups. Attacks of this kind gained national notoriety in the late 1980s and early 1990s with such incidents as the racially motivated killings in the Bensonhurst,⁴ Howard Beach,⁵ and Crown Heights⁶ sections of New York City. Violence based on social prejudice has engendered public outrage, and state and local governments have enacted numerous laws and ordinances to deal with these hate-motivated crimes.

Such laws have generated nearly as much controversy as the violence that inspired them, particularly in discussions over their constitutionality. Indeed, the United States Supreme Court, in two recent cases decided within a year of each other, determined that one such law was unconstitutional and the other valid.

In spite of the recent discussions of legal issues affecting homosexuals, and in spite of the current debate concerning the constitutionality of hate crime statutes, there has as yet been little discussion of the interrelationship between lesbians and gay men, the phenomenon of hate crime, and the constitutionality of hate crime statutes. An important point can be made about the extent to which lesbians and gay men may claim the protection of hate crime statutes under the Constitution.

This Article begins with an analysis of certain features of the Equal Protection Clause of the Fourteenth Amendment and demonstrates that this clause establishes a fundamental right to the equal benefit of laws protecting personal security. Laws protecting personal security must be applied even-handedly. Any discriminatory application of such laws is presumptively invalid under the Equal Protection Clause.

This Article next shows that gay men and lesbians are among the most common victims of hate crime, that hate crimes against gays and lesbians are significant, persistent and widespread, and that gays and lesbians have a substantial stake in the manner in which the hate crime phenomenon is addressed.

However, the interest of homosexuals in hate crime legislation is far more compelling than that. Because of societal antipathy toward gay men and lesbians, legislatures frequently exclude lesbians and gay men from the protection of hate crime statutes. In such cases, homosexuals are denied the equal benefit of laws protecting personal security, a right required by the Equal Protection Clause.

7 Among the numerous articles and essays on the subject and on the degree of controversy involved, some of the most helpful are included in Symposium, Penalty Enhancement for Hate Crimes, 2 CRIM. JUST. ETHICS 3 (1992) [hereinafter Symposium, Penalty Enhancement].


9 In R.A.V., the Court determined that the St. Paul, Minnesota, ordinance at issue was facially invalid under the First Amendment guarantee of free speech. 112 S. Ct. at 2547.

10 In Mitchell, the Court upheld a Wisconsin statute against a challenge primarily grounded on First Amendment free speech concerns. 113 S. Ct. at 2202. Of course, there is ample ground for distinction between R.A.V. and Mitchell, as discussed at greater length, infra.

11 The most cogent discussion to date was presented as a symposium in Law & Sexuality, but this material concerned chiefly hate speech, rather than hate crimes involving physical violence and statutes designed to deal with them. See Symposium, Legal Restrictions on Homophobic and Racist Speech: Collateral Consequences on the Lesbian and Gay Community, 2 LAW & SEXUALITY 1 (1992) [hereinafter Homophobic and Racist Speech].
This Article thus concludes that homosexual men and women have much more than a mere interest in the protection of hate crime statutes. Once a state decides to enact a hate crime statute protecting members of certain other societal groups, homosexuals have a constitutional right to its protection as well.

I. Background

Equal Protection Clause jurisprudence has developed along two distinct avenues: suspect classification analysis\(^ {12} \) and fundamental rights analysis. This Article employs the latter, which focuses on protecting “fundamental rights” through the application of the judicially created strict scrutiny test. Thus, if a state action infringes upon a fundamental right, it will be struck down unless it is supported by a “compelling state interest and is narrowly tailored to achieve that interest in the least restrictive manner possible.”\(^ {13} \)

Much controversy exists concerning which rights should be considered “fundamental” for purposes of equal protection analysis.\(^ {14} \) The controversy exists because the Supreme Court has never formulated a definitive test to determine which rights are fundamental. The conception of such a test has derived in significant part from the work of legal scholars. Some scholars take a fairly broad view of which rights should be considered fundamental,\(^ {15} \) and others, more critical of fundamental rights analy-

\(^{12}\) It is fairly well settled that under the “suspect classification” branch of Equal Protection analysis there are three standards of review that may be applied: strict scrutiny (applicable to discrimination on the basis of “suspect” classifications), intermediate scrutiny (applicable to discrimination on the basis of “quasi-suspect” classifications), and rational basis review (applicable to all other cases). See, e.g., City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440–41 (1985).

The courts have generally not considered sexual orientation to be a suspect or even a quasi-suspect classification. See, e.g., Steffan v. Aspin, 8 F.3d 57 (D.C. Cir. 1993); High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 571 (9th Cir. 1990); Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989), cert. denied sub nom. Ben-Shalom v. Stone, 494 U.S. 1004 (1990); Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990). Consequently, under these cases state action that discriminates on the basis of sexual orientation would be reviewed under the rational basis test.


\(^ {14} \) It is of course also possible to criticize the very concept of framing equal protection claims in terms of fundamental rights. See, e.g., Michael J. Perry, Modern Equal Protection: A Conceptualization and Appraisal, 79 COLUM. L. REV. 1023, 1074–77 (1979). Resolution of this broader issue is beyond the scope of this Article, and I will assume that the fundamental rights branch of equal protection analysis is conceptually sound.

\(^ {15} \) Jacobus tenBroek stated his view that the Equal Protection Clause “was a confirmatory reference to the affirmative duty of government to protect men in their natural rights” to the full extent of such “natural rights”. Jacobus TENBROEK, THE ANTI-SLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT 221–22 (1951). Kenneth Karst suggested that the Equal Protection Clause be viewed as a vehicle for assuring “equal citizenship,” a constitutional value encompassing “respect, participation and responsibility” to and for all citizens.
sis, take a more limited view of such rights or desire to limit or eschew the notion altogether.16

In spite of this controversy and the lack of a clear test for fundamental rights, a persuasive case can be made that one right as yet unidentified by the courts and most other authorities should have the status of a "fundamental right" for Equal Protection purposes, even by the most restrictive standards of interpretation. This right is the right to the equal benefit of laws protecting personal security.

A. Fundamental Rights and the Equal Protection Clause

The Supreme Court first applied a "fundamental rights" analysis under the Equal Protection Clause in Skinner v. Oklahoma ex rel. Williamson.17

Kenneth Karst, The Supreme Court 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment, 91 HARV. L. REV. 1 (1977). He noted approvingly that the Court, "in identifying those fundamental interests whose invasion would trigger heightened judicial scrutiny of legislation," treated the clause broadly as a "substantive guarantee" of such values and as relating to "more than racial equality." Id. at 26. See also Terrance Sandalow, Judicial Protection of Minorities, 75 Mich. L. Rev. 1162, 1184 (1977) (asserting in general and in wide-ranging terms that "constitutional law must now be understood as the means by which effect is given to those ideas that from time to time are held to be fundamental in defining the limits and distribution of governmental power in our society"); LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 73–80 (1991).

16 John Hart Ely has suggested that the Court better serves equal protection values by invalidating classificatory statutes only when there is reason to infer that those disadvantaged by them have been "unable to participate effectively in the usual pluralist give-and-take." John Hart Ely, The Supreme Court 1977 Term—Foreword: On Discovering Fundamental Values, 92 HARV. L. REV. 5, 7 (1978). He seems to conclude that "fundamental rights" jurisprudence cannot be applied in a principled way independent of a judge's private values. Id. at 54–55.

Ira Lupu has argued that "[c]laims of nontextual substantive right [should] always be due process claims," maintaining that the Equal Protection Clause, on the other hand, "points to judicial protection against certain limited kinds of 'class legislation' and . . . no further." Ira Lupu, Untangling the Strands of the Fourteenth Amendment, 77 Mich. L. Rev. 981, 1055, 1075 (1979); See also Raoul Berger, Government by Judiciary 166–92 (1977); John E. Nowak, Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classifications, 62 Geo. L.J. 1071, 1093–94 (1974) (proposing that statutes limiting "the exercise of a fundamental right by a class of persons," unless the class is defined by race, be subject to an intermediate standard of review rather than "strict scrutiny"); J. Harvie Wilkinson III, The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality, 61 Va. L. Rev. 945, 1017 (1975) (criticizing the Court's "seemingly ad hoc elevation of fundamental rights and values").


17 316 U.S. 535 (1942).
In that case, an Oklahoma statute provided that persons who had been convicted two or more times of felonies involving moral turpitude could be subjected to involuntary sterilization.\(^{18}\) The statute provided an exception to this provision for "offenses arising out of the violation of the prohibitory laws, revenue acts, embezzlement, or political offenses."\(^{19}\) Justice Douglas, writing for the Court, declared that the legislation at issue "involves one of the basic civil rights of man," since "[m]arriage and procreation are fundamental to the very existence and survival of the race."\(^{20}\) He did not, however, go on to invalidate the imposition of sterilization in all cases as violative of the Due Process Clause;\(^{21}\) the holding was instead grounded exclusively on the Equal Protection Clause.

The Equal Protection Clause applied because the statute’s exception—for offenses such as tax violations and embezzlement—created two classes of felons that were treated differently. That is, people repeatedly convicted of embezzlement were exempt from sterilization, whereas people repeatedly convicted of larceny or fraud were subject to sterilization.\(^{22}\)

The Court declared that such a classification in the case of a sterilization law must be subjected to the strict scrutiny test\(^{23}\) and ultimately decided that the law could not pass the test. Strict scrutiny applied because the law implicated a fundamental civil right.\(^{24}\)

Procreation has remained a part of the Court’s fundamental rights jurisprudence under the Equal Protection Clause. In *Eisenstadt v. Baird*,\(^ {25}\) for example, the Court considered the validity of various Massachusetts statutes that in many cases prohibited the distribution of contraceptives to unmarried, but not to married, persons.\(^ {26}\) The Court invalidated this marital classification under the Equal Protection Clause, asserting "the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."\(^ {27}\) The *Eisenstadt* decision determined that the Massachusetts laws failed even the most minimal scrutiny under the Equal Protection Clause\(^ {28}\) and so did not specifically

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18 Id. at 536.
19 Id. at 537.
20 Id. at 541.
21 The due process argument had been advanced, but the Court expressly declined to address it, *id.* at 538, and noted that it would not use the facts of the case to "reexamine the scope of the police power of the States." *Id.* at 541.
22 Id. at 538–39.
23 Id. at 541.
24 Id. at 541.
26 The statutes generally allowed the distribution of contraceptives to married persons when provided or prescribed by a registered physician and to married or unmarried persons when their use was intended to prevent the spread of disease, as opposed to pregnancy. *Id.* at 441–42.
27 Id. at 453.
28 Id. at 447.
use the strict scrutiny test associated with classifications impairing fundamental rights. The Court's language clearly indicated the fundamental character of decisions regarding procreation, however, for equal protection purposes. Moreover, the Court cited Skinner with approval.29

In Shapiro v. Thompson,30 the Court acknowledged the fundamental right to interstate travel. The Court invalidated statutes of various states and the District of Columbia that conditioned the receipt of welfare benefits on residency requirements. The statutes essentially created two classes of potential welfare recipients: those who had been residents in their state for a year or more, and those who had been residents for less than a year.31 The Court, speaking through Justice Brennan, noted that "[t]he constitutional right to travel from one State to another . . . 'occupies a position fundamental to the concept of our Federal Union.'"32 The Court acknowledged that no particular provision of the Constitution contained an express mention of this fundamental right33 but declared its existence nonetheless. The Court then concluded that the statutes' one-year residency requirement "serves to penalize the exercise of that right" and, "unless shown to be necessary to promote a compelling governmental interest, is unconstitutional."34 The Court found that all the statutes failed the strict scrutiny test35 and, accordingly, struck them down as violative of equal protection.

Obviously, not all assertions of fundamental rights under the Equal Protection Clause find favor with the Court. One noteworthy example is the purported right to education, which the Court has repeatedly refused to recognize as fundamental. In San Antonio Independent School District v. Rodriguez,36 Mexican-American parents instituted a class action on behalf of all Texas schoolchildren who were indigent and resided in school districts having a low property tax base.37 The trial court found for the plaintiffs, holding in part that education is a fundamental right under the Equal Protection Clause, and that the Texas property-tax system of financing public education impaired the access of poor children to this fundamental right.38

The Supreme Court reversed, finding the lower court's fundamental rights analysis unpersuasive.39 Although the Court agreed that education is

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29 Id. at 453–54.
31 Id. at 627.
32 Id. at 630 (quoting United States v. Guest, 383 U.S. 745, 757–58 (1966)).
33 Id. ("We have no occasion to ascribe the source of this right to travel interstate to a particular constitutional provision.").
34 Id. at 634.
35 Id. at 634–42.
37 Id. at 4–5.
38 Id. at 18.
39 Id.
"perhaps the most important function of state and local governments,"\textsuperscript{40}

it cautioned that "the importance of a service performed by the State does
not determine whether it must be regarded as fundamental for purposes
of examination under the Equal Protection Clause."\textsuperscript{41} Rather, the key for
determining whether a right is fundamental for this purpose is whether
the right is "explicitly or implicitly guaranteed by the Constitution."\textsuperscript{42}
Finding no such explicit or implicit guarantee to education, the Court
deprecated to apply strict scrutiny to the property-tax finance system\textsuperscript{43} and
upheld it against the equal protection challenge.\textsuperscript{44}

No generally accepted rule exists for determining which rights should
be categorized as "fundamental" for equal protection purposes. In \textit{Skinner}, for example, the Court seemed to determine subjectively that pro-
creation is "one of the basic civil rights of man,"\textsuperscript{45} although procreation
is nowhere mentioned as such in the Constitution. The Court also subjec-
tively attached importance to the "subtle, far-reaching and devastating
effects"\textsuperscript{46} of sterilization. In \textit{Shapiro}, the Court was similarly unperturbed
by the lack of any mention in the Constitution of a fundamental right to
travel,\textsuperscript{47} and the one-year delay in welfare payments would not seem to
occasion the same kind of "far-reaching and devastating effects" as ster-
ilization.\textsuperscript{48}

Other authorities have noted the possibility of finding a fundamental
right to travel implicitly in specific provisions of the Constitution.\textsuperscript{49} How-

\textsuperscript{40} Id. at 29 (quoting Brown v. Board of Educ., 347 U.S. 483, 493 (1954)).
\textsuperscript{41} 411 U.S. at 30.
\textsuperscript{42} Id. at 33-34.
\textsuperscript{43} Id. at 44.
\textsuperscript{44} Id. at 55. The Court still maintains that education is not a fundamental right for
equal protection purposes. Nine years after \textit{Rodriguez}, in \textit{Plyler}, the Court again declared that
"public education is not a 'right' granted to individuals by the Constitution." 457 U.S.
at 221.
\textsuperscript{45} 316 U.S. 535, 541 (1942).
\textsuperscript{46} Id.
\textsuperscript{47} 394 U.S. 618, 630 (1969).
\textsuperscript{48} Although welfare payments are no doubt quite valuable to many recipients, there
are meaningful distinctions between the governmental actions in \textit{Shapiro} and \textit{Skinner}. The
residency requirements in \textit{Shapiro} did not by their own operation make anyone residing
outside the relevant state worse off after, as opposed to before, their adoption. The
impediment would have arisen only when a person outside the state undertook to travel
to that state. After all, as is commonly noted, a state might well be able to eliminate
welfare programs altogether consistent with the interstate right to travel. See, e.g.,
\textit{William B. Lockhart, et al., Constitutional Law: Cases—Comments—Questions}
1426 (7th ed. 1991). By contrast, the vasectomies and salpingectomies provided for in the
\textit{Skinner} statute were affirmative acts of the state worked directly upon those complaining
about them. The disability would have arisen immediately, whether or not a person ever
decided subsequently to procreate. Moreover, the government actions threatened in \textit{Skinner}
involve the kind of invasive procedures regarding one's physical person to which the Court
has accorded constitutional significance. See, e.g., \textit{Rochin v. California}, 342 U.S. 165
(1952).
\textsuperscript{49} See \textit{Tribe, supra} note 13, § 16-6 at 1455 n.3 (citing the Commerce Clause and the
Privileges and Immunities Clause of the Fourteenth Amendment).
ever, it is not abundantly clear why a right to travel should be “implicit” in certain provisions of the Constitution while a right to education should not be implicit in others. For example, the plaintiffs in Rodriguez suggested that a fundamental right to education might well be implicit in the right to speak or the right to vote,50 and yet Rodriguez and subsequent case law have consistently denied the existence of a fundamental right to education. The insistence of the Rodriguez Court that the key to discovering fundamental rights lies in assessing whether such a right is “explicitly or implicitly guaranteed by the Constitution”51 is undercut by Skinner, in which the discovery of the fundamental right to procreation was largely subjective. Locating the right to procreation in the constitutional text was of minimal importance.

The lack of a determinate test for fundamental rights can be readily criticized. Justice Harlan put forth one of the more prominent criticisms in his dissent to Shapiro.52 He considered strict scrutiny of laws impairing fundamental rights to be an exception to the Court’s general rule of minimal scrutiny under the Equal Protection Clause, and he worried that the fundamental rights analysis “creates an exception which threatens to swallow the standard equal protection rule. Virtually every state statute affects important rights.”53 Part of his concern seems to have been the potentially broad sweep of fundamental rights.

Harlan’s other concern was the “arbitrary or irrational” aspect of the fundamental rights approach, because he knew “of nothing which entitles this Court to pick out particular human activities, characterize them as ‘fundamental,’ and give them added protection.”54 He feared that the process of choosing which rights were fundamental would of necessity be largely arbitrary.55

Not all commentators consider the indeterminate scope of the fundamental rights branch of equal protection to be undesirable. For example, Laurence Tribe and Michael Dorf suggest that the process of determining whether a particular action is protected by a fundamental right depends on what level of generality is used to describe the asserted right.56 The authors acknowledge that determining the appropriate level of generality is an abstract enterprise that can result in more than one seemingly correct answer,57 but this atmosphere of ambiguity does not deter them from insisting that courts must engage “in the value-laden choice of a level of

51 Id. at 33.
52 394 U.S. at 655–63 (Harlan, J., dissenting).
53 Id. at 661.
54 Id. at 662.
55 See also Perry, supra note 14, at 1074–77.
56 See Tribe & Dorf, supra note 15, at 73.
57 See id. at 79–80.
B. The Fundamental Right of the Equal Benefit of Laws Protecting Personal Security

The question of which rights should qualify as fundamental is important because a state action that impairs a "fundamental right" must withstand strict scrutiny review. Strict scrutiny review is almost always fatal for statutes subjected to it.\textsuperscript{59}

Regardless of the approach one adopts for discerning fundamental rights under the Equal Protection Clause, a new fundamental right—the right to the equal benefit of laws protecting personal security—must be acknowledged. The recognition of this right would prevent the government from invidiously discriminating in protecting its citizens from societal violence unless such discrimination withstands strict scrutiny—that is, unless the discrimination is narrowly tailored to serve a compelling state interest.\textsuperscript{60}

To demonstrate why this right regarding personal security is fundamental, this Article adopts one of the most restrictive interpretations for the recognition of fundamental rights under the Equal Protection Clause. The interpretation was formulated by Professor Raoul Berger in two of his books, \textit{Government by Judiciary} and \textit{The Fourteenth Amendment and the Bill of Rights}. Even under Professor Berger's very restrictive interpretation, the right of the equal benefit of laws protecting personal security is fundamental for equal protection purposes.\textsuperscript{61} Any other approach to equal protection interpretation that acknowledges the fundamental rights branch analysis would have a larger scope than Professor Berger's approach.\textsuperscript{62} Accordingly, a right found to be fundamental under his approach should be viewed as fundamental under less restrictive approaches as well.

\textsuperscript{58} \textit{Id.} at 80.

\textsuperscript{59} The most famous observation in this respect may be Gerald Gunther's statement that strict scrutiny review could in some cases be viewed as "'strict' in theory and fatal in fact." Gerald Gunther, \textit{The Supreme Court 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection}, 86 \textit{Harv. L. Rev.} 1, 8 (1972).

\textsuperscript{60} \textit{See} Plyler v. Doe, 457 U.S. 202, 217 (1982).

\textsuperscript{61} This Article does not necessarily take the position that this restrictive approach of interpreting the Equal Protection Clause is correct for this or any other purpose. However, if the restrictive approach results in discerning this particular fundamental right, any less restrictive approach should do so as well.

\textsuperscript{62} \textit{See supra} notes 15–16 and accompanying text.
I. Raoul Berger's Approach to the Fourteenth Amendment

In Government by Judiciary and The Fourteenth Amendment and the Bill of Rights, Professor Raoul Berger sketched a particular view of the purposes of the Fourteenth Amendment that dictates a narrow approach to discerning fundamental rights. Under Professor Berger's view, the underlying purpose of Section 1 of the Fourteenth Amendment was indeed to protect fundamental rights. Berger believes, however, that the provision only protects those fundamental rights specifically listed in the Civil Rights Act of 1866.

The 1866 Act listed the following rights for protection:

the . . . right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property . . . .

According to Berger, the Act was intended only to protect the rights it mentioned by name, and it was only these specified rights that were to be considered "fundamental" and protected by Section 1 of the Fourteenth Amendment. Thus, Section 1 and the Equal Protection Clause should only

63 Berger, Government by Judiciary, supra note 16.
65 Professor Berger's work in this area is not limited to the two books cited in the text, see, e.g., Raoul Berger, Incorporation of the Bill of Rights in the Fourteenth Amendment: A Nine-Lived Cat, 42 Ohio St. L.J. 435 (1981); Raoul Berger, Incorporation of the Bill of Rights: A Reply to Michael Curtis' Response, 44 Ohio St. L.J. 1 (1983). This Article takes no position on the incorporation debate.
66 Professor Berger has not been completely alone in his position. See, e.g., Charles Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights?, 2 Stan. L. Rev. 5 (1949); James E. Bond, The Original Understanding of the Fourteenth Amendment in Illinois, Ohio and Pennsylvania, 18 Akron L. Rev. 435 (1985). Nonetheless, Professor Berger has been perhaps the most dedicated of the exponents of the approach he advances.
67 See Berger, The Fourteenth Amendment, supra note 64, at 40–41. Sometimes Berger's references support the idea that one or more of the particular clauses of Section 1 were designed to protect the rights considered "fundamental" under the 1866 Act. See id. at 10 (the Due Process Clause); Berger, Government by Judiciary, supra note 16, at 28 (the Privileges and Immunities Clause). Other references, such as Berger, The Fourteenth Amendment, supra note 64, at 41, suggest that Section 1 as a whole was to have this effect.
68 Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866).
69 Id.
apply to the rights to sue, to give evidence, to hold and convey real estate, and to the other rights explicitly named in the 1866 Civil Rights Act.\textsuperscript{71}

The basis for this approach is Berger's view of American political history in the years immediately preceding the adoption of the Fourteenth Amendment. Following the 1865 adoption of the Thirteenth Amendment, southern legislatures enacted statutory codes designed to keep the newly freed African-Americans in a state of virtual peonage.\textsuperscript{72} For example, some of these statutory codes, historically called "Black Codes," maintained pass systems that prohibited African-Americans from leaving their place of employment without a pass from their employer, imposed penalties on African-Americans who could not produce work permits or employment contracts on demand, restricted the extent to which African-Americans could testify in court, prohibited African-American ownership of firearms, and imposed other egregious limits on freedom.\textsuperscript{73}

Congress enacted the 1866 Civil Rights Act in reaction to the Black Codes.\textsuperscript{74} Congress wanted to invalidate in a single act of the federal legislature all the abuses of the Black Codes passed by the various southern legislatures. Indeed, the rights specifically listed in the 1866 Act appear to have been designed to correct the most outrageous practices under the codes. To many in Congress, however, it was unclear that the federal government had the constitutional authority to pass the 1866 Act. The Act pertained to the regulation of civil matters among residents of each state, and in 1866 no constitutional provision specifically allowed Congress to legislate on civil rights within a particular state.

In Berger's view, the Fourteenth Amendment was adopted in 1868 to "constitutionalize" the 1866 Act.\textsuperscript{75} The use of the word "constitutionalize" has two meanings in his theory: (1) the Amendment explicitly stated a constitutional basis for the Act and therefore retroactively provided the

\textsuperscript{71}BERGER, THE FOURTEENTH AMENDMENT, supra note 64, at 25, 41; BERGER, GOVERNMENT BY JUDICIARY, supra note 16, at 28.


\textsuperscript{73}See, e.g., RECONSTRUCTION DEBATES, supra note 70, at 171 (remarks of Rep. Windom on Mar. 2, 1866); Nieman, supra note 72, at 558–61, 571–75; Richardson, supra note 72, at 633–35.

\textsuperscript{74}See, e.g., BERGER, THE FOURTEENTH AMENDMENT, supra note 64, at 23; see also WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 48 (1988).

\textsuperscript{75}BERGER, GOVERNMENT BY JUDICIARY, supra note 16, at 23; see also Bond, supra note 66, at 443–45, 448.
constitutional authority for its enactment, and (2) by enshrining the principles of the Act in a constitutional amendment, the Act was insulated from legislative repeal. 76 Given the coincidence of purpose he perceives between the Fourteenth Amendment and the 1866 Act, Berger insists that Section 1 of the Fourteenth Amendment was intended to have no broader scope than the Civil Rights Act of 1866. Accordingly, applying the Equal Protection Clause (and the Due Process and Privileges and Immunities Clauses) to protect rights other than those specifically named in the 1866 legislation amounts to a judicial usurpation of legislative power. 77

In his writings, Berger cites speakers from the Congressional debates on Reconstruction to demonstrate that Section 1 of the Fourteenth Amendment was meant to do no more than constitutionalize the Civil Rights Act of 1866. The cited speakers readily refer to the specifically enumerated rights in the Act as "fundamental" civil rights and assert that it is these "fundamental" rights that the Act was meant to protect. 78 Berger's theory makes frequent use of the notion that the Fourteenth Amendment should be read to protect these legislatively derived "fundamental rights" 79 and is, at least to this facial extent, consistent in linguistic terms with the "fundamental rights" branch of current equal protection analysis developed by the courts. Berger's approach, however, implies the quite restrictive view that the scope of the "fundamental rights" so protected is limited to the rights stated in the Civil Rights Act of 1866.

2. The Equal Benefit of Laws Protecting Personal Security

This Article assumes for the purpose of argument the correctness of Professor Berger's view. Accordingly, the "fundamental rights" that the Equal Protection Clause protects are assumed to be those fundamental civil rights named in the Civil Rights Act of 1866.

Certain of the fundamental rights listed in the 1866 Act focused on rights of legal and economic capacity, such as the rights to sue, give evidence, and hold property. The treatment of freed African-Americans under the Black Codes seemed to warrant special protection of these kinds of rights. 80 African-Americans during the Reconstruction period, and those sympathetic to their cause, had yet another vital concern apart from legal and economic capacity—protection from societal violence.

76 See Berger, Government by Judiciary, supra note 16, at 23.
77 Id. at 407-18.
80 See, e.g., Foner, supra note 72, at 199-201 (especially regarding the restrictions that Black Codes placed on the ability of African-Americans to contract for their labor).
Freed African-Americans and their partisans during the Reconstruction period were frequently the victims of severe violence at the hands of their opponents. Law enforcement agencies and the courts in the southern states did not punish assailants of African-Americans similarly to assailants of whites and punished African-Americans more severely for crimes than whites. Congress was aware of the situation, and the Republicans were duly outraged. For this reason, the list of fundamental rights protected in the Civil Rights Act included the right to the “full and equal benefit of all laws and proceedings for the security of person and property.”

African-Americans continued to live in a climate of violence and physical oppression. An 1866 Joint House and Senate Committee Report on the progress of Reconstruction noted:

The feeling in many portions of the country towards emancipated slaves, especially among the uneducated and ignorant, is one of vindictive and malicious hatred. This deep-seated prejudice against color is assiduously cultivated by the public journals, and leads to acts of cruelty, oppression, and murder, which the local authorities are at no pains to prevent or punish.

Earlier in the year, speakers in Congress noted with indignation that in some localities houses had been burned and African-Americans had been

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81 See, e.g., Berger, The Fourteenth Amendment, supra note 64, at 85 (“the mischief was violence in the South, from which citizens must be protected . . . save the freedman from lynching”); id. at 111 (“The life of the emancipated black was being threatened and often taken in the South.”). See Barry Crouch, A Spirit of Lawlessness: White Violence; Texas Blacks, 1865–1868, in Emancipation and Reconstruction, supra note 72, at 126, 132 (“Texas whites often killed blacks for no obvious reason other than racial hatred or the satisfaction of sadistic fantasies.”).

82 See, e.g., Foner, supra note 72, at 121 (“In the face of this pervasive violence, local leaders of society and politics remained silent, reluctant to hold other whites responsible for crimes against blacks.”). The following passage appears in a study of the Florida “Black Codes”: “In Lake City two Negroes were convicted of stealing two boxes of goods from a railroad company and were fined $500. When they could not pay they were sold to the highest bidder. A few months later a White man was convicted of an unprovoked murder of a Negro; he was fined $225 and sentenced to one minute imprisonment. In Alachua County three freedmen were charged with violation of contract and were sentenced to be publicly whipped. They also forfeited their wages and had to pay court costs. In Marianna a White man was convicted of assaulting a freedwoman and fined five cents.” Richardson, supra note 72, at 636.

83 Nieman, supra note 72, at 568 (noting an observation by Ulysses S. Grant that some state courts punished freedmen for “offenses for which white persons are not punished in the same manner and degree”); Richardson, supra note 72, at 634 (listing a set of greater punishments for African-Americans than for whites for apparently similar or identical offenses).

84 Berger, The Fourteenth Amendment, supra note 64, at 111.

mourned.

The laws imposed by the southern states were termed in Congressional debate to be "barbaric" and the treatment the laws prescribed to be "inhuman." Members of Congress seemed especially moved by reports that violators of the pass system were subject to summary flogging and whipping merely for being in transit without a pass. Indeed, it was claimed during political discussions in the North that African-Americans could be summarily flogged for any infraction if they lacked the money to pay the established fine.

Perhaps most dramatically, in the spring of 1866, well-reported and much-reviled massacres of large groups of newly freed African-Americans by outraged white mobs occurred in Memphis in April and in New Orleans in June. Whites were at risk as well as African-Americans; it was claimed during the 1866 elections that Southerners were waging "a war of actual extermination by systematic murder of the Union men of the South." Such reports and events caused concern among sympathetic members of Congress for the physical safety of African-Americans and their allies. Especially galling to Congress was that the oppressors in these situations frequently escaped punishment:

Thousands and tens of thousands of harmless black men, from the Potomac to the Rio Grande, have been wronged and outraged by violence, and hundreds upon hundreds have been murdered . . . . The local authorities screen the murderers; the people protest against the punishment of white men for the murder of black men, and the murderers go unpunished.

The Joint Committee on Reconstruction complained that "local authorities are at no pains to punish" assaults and killings of African-Americans, that a military report to the President contained the observations that "outrages have been committed upon negroes which have been allowed to go unpunished," that "illegal combinations of men" had been organized

86 Id. at 131 (remarks of Rep. Eliot on Jan. 30, 1866); id. at 149 (remarks of Sen. Trumbull on Feb. 20, 1866).
87 Id. at 164 (remarks of Rep. Wilson on Mar. 1, 1866).
88 Id. at 171 (remarks of Rep. Windom on Mar. 2, 1866); id. at 199 (remarks of Sen. Trumbull on Apr. 4, 1866).
89 See Bond, supra note 66, at 443 n.52 (quoting an editorial in The Bedford Inquirer, a Pennsylvania newspaper).
90 Id. at 444; see also Reynolds, supra note 72.
91 Bond, supra note 66, at 446 (quoting a speech of Congressman Samuel Shellabarger reported in The Delaware Gazette, an Ohio newspaper).
92 See BERGER, THE FOURTEENTH AMENDMENT, supra note 64, at 111.
93 RECONSTRUCTION DEBATES, supra note 70, at 171 (remarks of Sen. Wilson on Mar. 2, 1866).
94 Id. at 94.
to drive African-Americans from their state, "and [that] such persons are allowed to act with impunity."\(^9\(^5\)

It was undoubtedly to meet these concerns that the Civil Rights Act of 1866 included the phrase "the full and equal benefit of all laws and proceedings for the security of person and property" within its list of protected rights. This "fundamental right" was then incorporated, under Berger's view, into the protections of Section 1 of the Fourteenth Amendment.

Among the provisions of Section 1, the Equal Protection Clause was probably designed to insure this fundamental right of equal benefit of laws protecting personal security. The similarity of the language between this phrase in the Act and the Equal Protection Clause would suggest as much, as commentators have asserted.\(^9\(^6\) Even assuming the restrictive approach to equal protection interpretation implicit in the Berger analysis of the Fourteenth Amendment, the Equal Protection Clause protects against government classifications that punish one person less than another for the same offense and classifications that punish less when the victim is of one class rather than another.

It is not necessary to adopt Professor Berger's approach to accept the validity of this finding. Even if one is skeptical of Berger's view that Section 1 of the Fourteenth Amendment did nothing more than constitutionalize the 1866 Civil Rights Act, the importance of the contemporary congressional statements identifying the "equal benefit of' laws 'for the security of person and property" as a fundamental right must be acknowledged.\(^9\(^7\) If the framers and ratifiers of the Fourteenth Amendment considered this kind of equal protection to be a fundamental right, one does not need to be a follower of Professor Berger to agree that it should be so considered in the context of modern equal protection analysis as well.

II. Hate Crimes and Homosexuals

The subject of hate crimes increasingly drew the attention of civil rights and other advocacy groups in the 1980s. Certain organizations, including the Anti-Defamation League of B'nai B'rith, the Southern Poverty Law Center, and the National Gay and Lesbian Task Force, began to

\(^9\(^5\) Id. at 149 (remarks of Sen. Trumbull on Feb. 20, 1866).
\(^9\(^6\) See, e.g., BERGER, THE FOURTEENTH AMENDMENT, supra note 64, at 144 ("When the framers and Ratifiers spoke of equal protection it was against such violence [flogging, murder and terrorism] that they meant to protect the helpless blacks."); BERGER, GOVERNMENT BY JUDICIARY, supra note 16, at 174 ("[The Equal Protection Clause] prohibits the hanging of a black man for a crime for which the white man is not to be hanged. It protects the black man in his fundamental rights . . . with the same shield which it throws over the white man." (quoting remarks of Sen. Howard)).
\(^9\(^7\) See supra notes 74–95 and accompanying text.
keep statistics and issue regular reports on the incidence and nature of hate crime. Legislative activity during this period, both at the state and national levels, reflected these concerns.

Throughout the 1980s, many states enacted state-wide hate crime statutes. At the end of the decade, the federal government adopted the Hate Crimes Statistics Act of 1990. Legislative efforts in Congress to adopt a substantive sentence-enhancement hate crime statute are also continuing. Although gay men and lesbians are among the more frequent victims of hate crimes, a significant number of the state enactments have excluded homosexual men and women from their coverage.

A. Anti-Homosexual Hate Crime as a Societal Phenomenon

Before discussing the statistical incidence of hate crime and reviewing representative anti-homosexual hate crimes, a brief specification of precisely what is meant by "hate crime" is in order. Commentators can refer indiscriminately to a varied array of behavior as "hate crimes." Nevertheless, analytical clarity is improved by defining specifically what one means by the phrase. The mere utterance of words or phrases to someone, communicated in a way not tending to instill fear or intimidation in the hearer, can under some conceptions of the phrase result in a "hate crime." This Article does not adopt such a broad approach. Instead, this Article adopts the definition promulgated by the FBI pursuant to its authority under the 1990 Hate Crime Statistics Act. The FBI's Uniform Crime Reports Section (the "UCR") has defined a hate crime as

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101 For example, the Los Angeles Times reported that Harvey Saferstein, the President of the California Bar Association, has compared "jokes against attorneys to hate speech against African-Americans" and that he "favors classifying such comments as hate crimes." Vicki Torres, Chief of Bar Association Asks End to Lawyer-Bashing, L.A. TIMES, July 6, 1993, at A1. Whether or not this reporting is an accurate reflection of Mr. Saferstein's intent, the usage in the newspaper article indicates at least the reporter's view that bad jokes can amount to hate crimes.

102 It has not been uncommon, particularly in the earlier stages of their data collection efforts, for advocacy groups to include incidents of "verbal abuse" among their hate crime statistics. See, e.g., NAT'L GAY & LESBIAN TASK FORCE, ANTI-GAY VIOLENCE, VICTIMIZATION & DEFAmATION IN 1989 app. A, table 1 (1990). While verbal abuse can in some cases constitute criminal behavior if it meets certain criteria, see, e.g., Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), it is not always clear in such reports that the catalogued incidents satisfied such criteria.

a "criminal offense committed against a person or property, which is motivated, in whole or in part, by the offender's bias against a race, religion, ethnic/national origin group, or sexual orientation group."\textsuperscript{104}

This approach requires the commission of a predicate crime for a "hate crime" to occur and does not allow for the creation of a new crime resulting merely from intimidating speech. Intimidating speech might in some cases be criminally punishable.\textsuperscript{105} This Article, however, focuses on statutes that provide supplemental punishment for violent crimes committed because of societal prejudice to the victim.

1. Statistical Overview

Currently available statistics on hate crime as a national phenomenon are of limited reliability. This is due in part to the relative newness of the national hate crime data collection effort. Regardless of these limitations, however, it appears from the information available that hate crime is widespread geographically throughout the United States and constitutes a significant and persistent element of national criminal activity. Hate crimes against homosexuals, in turn, constitute a substantial proportion of the national hate crime phenomenon.

a. General National Hate Crime Reporting

The FBI's first two yearly reports of national hate crime statistics were for calendar years 1991 and 1992. The reports listed 4755 hate crime offenses for 1991 and 8918 such offenses for 1992.\textsuperscript{106} These figures would appear to be very small when compared with national figures for all types of crime during the corresponding years indexed by the FBI.\textsuperscript{107} The total numbers of index crime offenses reported nationally by the UCR for 1991 and 1992\textsuperscript{108} as compared with the foregoing figures from the FBI's hate crime reports for those two years, are shown in Table 1.

\textsuperscript{104} FBI, U.S. DEP'T OF JUSTICE, HATE CRIME DATA COLLECTING GUIDELINES (1990), reprinted in Jacobs & Eisler, supra note 98, at 104.

\textsuperscript{105} For example, even under the United States Supreme Court's holding in \textit{R.A.V. v. City of St. Paul}, the criminalization of certain utterances would be permissible as long as the proscription were content-neutral. 112 S. Ct. 2538, 2550 (1992).


\textsuperscript{107} The FBI has been keeping statistics on national criminal activity through the UCR program since 1930, chiefly by tabulating information relating to specified "index crimes." FBI, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES 1992 1 (1993) [hereinafter 1992 UCR REPORT]. The current index crimes are murder and non-negligent manslaughter, forcible rape, robbery, aggravated assault, burglary, larceny-theft, motor vehicle theft, and arson. \textit{Id.}

The FBI's hate crime figures probably underestimate the actual incidence of hate crime. First, certain inefficiencies in enforcement result from the relative newness of the Hate Crime Statistics Act. The national UCR program has been in effect since 1930, whereas the first year of operation of the Hate Crime Statistics Act was 1991. Incomplete effectuation would seem normal in early years of the Act's operation.\textsuperscript{109}

Second, the FBI's statistics underestimate the incidence of hate crimes because it is evident that the reporting on which the statistics are based has been incomplete. Each report was less than five full pages in length, and each consisted merely of four paragraphs of text followed by four charts.\textsuperscript{110} The reports contained only the most minimal analysis and did not reflect numerical totals for all fifty states.\textsuperscript{111} Law enforcement agencies from only thirty-two states submitted data for the 1991 report, although there was increased involvement in 1992, with agencies from forty-one states and the District of Columbia reporting.\textsuperscript{112}

Even the data submitted by those states that did report numerical figures were probably unreliable: in the 1992 study, for example, several states reported figures that seem unrealistically low,\textsuperscript{113} and of the forty-two reporting states or jurisdictions in that study, thirteen registered participation by five or fewer law enforcement agencies state-wide.\textsuperscript{114}

To follow up on its initial 1991 report, the FBI in December 1992, published a hate crime statistics \textit{Resource Book},\textsuperscript{115} which compiled for the

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|}
\hline
\textbf{Year} & \textbf{Hate Crime Offenses} & \textbf{Index Crime Offenses} \\
\hline
1991 & 4755 & 14,872,883 \\
1992 & 8918 & 14,438,191 \\
\hline
\end{tabular}
\caption{Hate Crimes Reported to FBI and Index Crimes — 1991 and 1992} 
\end{table}


\textsuperscript{112} The nonparticipating states for the 1992 report were Alaska, Hawaii, Montana, Nebraska, New Hampshire, New Mexico, South Dakota, Vermont, and West Virginia. 1992 FBI REPORT, \textit{supra} note 106, at 5.

\textsuperscript{113} Id. Examples include Alabama (4 incidents), Kansas (3 incidents), Mississippi (0 incidents) and North Carolina, and North Dakota (1 incident each). These could compare with states such as Colorado (258 incidents), Iowa (37 incidents), and Missouri (158 incidents).

\textsuperscript{114} Id.

calendar year 1990 information from eleven states that are among those with the most highly developed hate crime reporting procedures.\textsuperscript{116} The \textit{Resource Book} was substantially more detailed than either the 1991 or 1992 statistical reports. The hate crime incidents reported by the eleven states in this publication totalled 4371.\textsuperscript{117} Even accounting for the different year, this eleven-state figure confirms the relative unreliability of the 1991 and 1992 nationwide totals calculated by the FBI. Moreover, it is worth noting that the detailed eleven-state \textit{Resource Book} report excluded such populous states as California, Illinois, and Texas.

Although the \textit{Resource Book} only pertains to eleven states, it tends to prove that hate crime as a phenomenon is geographically widespread. For example, in 1990, New York and New Jersey reported 1100 and 824 incidents, respectively;\textsuperscript{118} Pennsylvania reported 194;\textsuperscript{119} Florida reported 258;\textsuperscript{120} Minnesota reported 309;\textsuperscript{121} and Oregon reported 343.\textsuperscript{122} These figures indicate that the hate crime phenomenon is not narrowly localized in particular parts of the country.

Even though the 8918-offense figure from the 1992 FBI nationwide report seems relatively small when compared with total UCR crime figures for 1992, it still appears significant when compared with particular subsets of crime reported for 1992. For example, the nationwide total for the murder of African-American victims over the age of seventeen in 1992 was 9820 incidents;\textsuperscript{123} the number of murders reported in 1992 in the Southern United States region was 9195;\textsuperscript{124} and the number of murders for the year nationwide committed with weapons other than handguns was 10,051.\textsuperscript{125} The relative proximity of these numbers suggests that hate crimes constitute a significant factor in nationwide criminal behavior in light of the substantial underreporting that occurs.

The Hate Crimes Statistics Act has been criticized for perceived underinclusiveness of its protected categories and for definitional problems its enforcement may entail.\textsuperscript{126} One pair of commentators has gone so far as to declare their certainty that "the Act will fail to produce an accurate or comprehensive picture of hate crime in America."\textsuperscript{127} Such

\textsuperscript{116}The 11 states were Connecticut, Florida, Maryland, Massachusetts, Minnesota, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, and Virginia.

\textsuperscript{117}See Resource Book, supra note 115, at 12, 17, 24, 30, 37, 44, 50, 56, 61, 65, 69 (reflecting subtotals for each reported state).

\textsuperscript{118}Id. at 50, 44.

\textsuperscript{119}Id. at 61.

\textsuperscript{120}Id. at 17.

\textsuperscript{121}Id. at 37.

\textsuperscript{122}Id. at 56.

\textsuperscript{123}1992 UCR Report, supra note 107, at 16.

\textsuperscript{124}Id. at 211.

\textsuperscript{125}Id. at 18.

\textsuperscript{126}See generally Jacobs & Eisler, supra note 98.

\textsuperscript{127}Id. at 122.
conclusions may be overly pessimistic. But even accepting these criticisms, it does not follow that the phenomenon of hate crime is itself insignificant or trivial and does not require the conclusion that governments should do nothing to address the problem.

The federal effort under the Statistics Act is not the only national survey of hate crime statistics. Prominent among the private projects is the annual Audit of Anti-Semitic Incidents, which has been published by the Anti-Defamation League of B’nai B’rith (the “ADL”) throughout the past fifteen years. For 1993, the ADL reported 1867 anti-Semitic incidents, of which 788 were vandalism and 1079 were “harassment, threats or assault.” The greatest number of incidents occurred in New York, New Jersey, Florida, California, Massachusetts, Connecticut, Illinois, Ohio, and Pennsylvania. These nine states, located in geographically diverse sections of the country, accounted for 1408 of the 1867 incidents. The reporting of private projects also challenges the FBI’s statistics for hate crimes in 1992. For example, in 1992, the ADL’s Audit of Anti-Semitic Incidents reported a total of 1730 anti-Semitic incidents. The total figure in 1992 for anti-gay and -lesbian hate crimes reported by the National Gay and Lesbian Task Force (NGLTF) was 1898. By contrast, the 1992 FBI report lists 1084 anti-Semitic offenses and 928 anti-homosexual offenses for that year. These figures constitute less than two-thirds and less than half, respectively, of the above 1992 figures reported by the ADL and the NGLTF. In comparing the FBI figures with the private agency figures, it should be noted that the agencies have been monitoring hate crimes for substantial periods of time. Of course, there are incongruities between the three sets of figures (the FBI figures account for offenses whereas the agencies accounted for incidents, for example).

128 Underinclusiveness of protected categories can be addressed through amendment or interpretation. See infra part III.
130 Id. at 1.
131 Id.
132 Id. at 26.
136 As noted above, the history of the ADL Audits of Anti-Semitic Violence spans 15 years, and the NGLTF began monitoring anti-homosexual violence in 1985.
137 An offense can be defined as a specific type of conduct (such as “assault” or “vandalism”), whereas an incident can be viewed as one or more offenses that occur as a single unit of experience (a person who is assaulted while entering her car, as the assailant vandalizes the exterior of the car, has experienced one incident consisting of two offenses). See, e.g., 1992 NGLTF Report, supra note 134, at 47.
However, even allowing for such discrepancies, this comparison should constitute a further indication of the incompleteness of the FBI’s 8918-offense figure.

The current state of the hate crime record-keeping effort does not yet permit absolutely reliable figures for annual national totals for all types of hate crime. Yet it is evident that hate crime is a geographically widespread, persistent pattern of criminal behavior of significant proportions.

b. Reporting of Anti-Homosexual Hate Crime

The reporting of hate crimes against lesbians and gay men has been subject to the same logistical difficulties as the reporting of hate crimes in general. The data that are available, however, indicate that hate crimes against homosexuals, like those against other groups, are widespread, persistent, and significant.

NGLTF has been conducting the most detailed national review of hate crimes against homosexuals.\textsuperscript{138} From 1985 to 1989, NGLTF gathered information from a wide range of local community groups, researchers, and media sources to compile its own figures of anti-homosexual hate crime across the country.\textsuperscript{139} Since 1990, NGLTF reports have focused on key major metropolitan areas throughout the country.\textsuperscript{140} The 1993 report concentrates on Boston, Chicago, Denver, Minneapolis/St. Paul, New York City, and San Francisco.\textsuperscript{141} NGLTF focuses on these cities because “they are the sites of professionally staffed agencies that monitor anti-gay violence and provide assistance to lesbian, gay and bisexual crime survivors.”\textsuperscript{142}

The 1993 NGLTF survey reflected totals for anti-homosexual offenses in the six cities for the year as shown in Table 2.\textsuperscript{143}

Several points regarding these figures are necessary for clarification. For example, NGLTF has defined “harassment” as “using language or

\textsuperscript{138}NGLTF is a civil rights organization headquartered in Washington, D.C. with a current membership of 32,000. NGLTF POLICY INSTITUTE, ANTI-GAY/LESBIAN VIOLENCE, VICTIMIZATION & DEFAMATION IN 1993 (1994) [hereinafter 1993 NGLTF REPORT]. It was founded in 1973 to promote “freedom and full equality” for lesbians and gay men. NGLTF has been conducting annual surveys of anti-homosexual violence since 1985. See ANTI-GAY VIOLENCE, VICTIMIZATION & DEFAMATION IN 1989, supra note 102, at 1.

\textsuperscript{139}NGLTF POLICY INSTITUTE, ANTI-GAY/LESBIAN VIOLENCE, VICTIMIZATION & DEFAMATION IN 1990 4 (1991) [hereinafter 1990 NGLTF REPORT].

\textsuperscript{140}Id.

\textsuperscript{141}The 1990 report included Los Angeles among the cities surveyed, but Los Angeles has not been included in subsequent reports. Denver is a new addition, being emphasized in the 1993 report for the first time. The remaining five cities have been the subject of consistent focus during this period.

\textsuperscript{142}1993 NGLTF REPORT, supra note 138, at 6.

\textsuperscript{143}Id. at App. A.
gestures to show malice or hatred" and has defined a "threat" as "placing another person in reasonable fear of bodily harm."144 Not all incidents of "harassment," so defined, would constitute a crime under many state criminal codes. NGLTF has acknowledged the possibility that not all of its reported incidents and offenses would constitute crimes for FBI reporting purposes.145 Since not all incidents reported amount to conventionally defined criminal behavior, some might minimize the importance of the NGLTF findings.

Table 2 Breakdown of Anti-Homosexual Offenses — 1983

<table>
<thead>
<tr>
<th>Offense</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>Harassment</td>
<td>1665</td>
</tr>
<tr>
<td>Threats/Menacing</td>
<td>605</td>
</tr>
<tr>
<td>Bomb Threats</td>
<td>14</td>
</tr>
<tr>
<td>Physical Assault/Objects Thrown</td>
<td>710</td>
</tr>
<tr>
<td>Police Verbal or Physical Abuse</td>
<td>161</td>
</tr>
<tr>
<td>Vandalism</td>
<td>155</td>
</tr>
<tr>
<td>Arson</td>
<td>6</td>
</tr>
<tr>
<td>Murder (Anti-Gay)</td>
<td>7</td>
</tr>
<tr>
<td>Murder (Other)</td>
<td>18</td>
</tr>
<tr>
<td>Robbery</td>
<td>61</td>
</tr>
<tr>
<td>Kidnapping, Extortion, other</td>
<td>82</td>
</tr>
</tbody>
</table>

It would be unfair to substantially discount such results on this basis. Organizations such as NGLTF do not pretend that the figures they accumulate are a precise reflection of numbers of offenses or incidents that actually occur.146 Such figures can be at best approximations of criminal behavior patterns, since many factors combine to undermine precision. First, as will be developed later in this Article, hate crimes in general and anti-homosexual hate crimes in particular are greatly underreported, both to community organizations and to police.147 Second, there will always be difficulties in determining the anti-homosexual character of the attackers'

145 Id. at 4 n.1.
146 See, e.g., 1993 NGLTF REPORT, supra note 138, at 6 ("Neither police nor community-based agencies claims their data reflect all or even most of the anti-gay incidents that occur locally.").
147 The 1993 report by NGLTF indicates that the police departments of the six major cities reported a total of 322 anti-homosexual crimes for 1993, as opposed to NGLTF’s own national figures of 1813 incidents and over 3400 offenses. The report noted that the much lower number was due in part to the occurrence of some crimes outside city limits (the city police would not include such crimes, but the community groups would), as well as the non-criminal character of some of the incidents reported by the community groups. Id. at 10–11.
motivations. Third, reporting in this area may be affected by the subjective perceptions of those reporting, both victims and agency personnel.

While some reporting procedures may overstate criminal patterns (such as including some non-criminal behavior in incident reports), and others may understate them (such as the reluctance of victims to report and geographical limits on data received), general patterns nevertheless emerge. In particular, useful indications of the prevalence of societal hostility are likely to come to light, since the total figures from year to year are subject to the same logistical distortions.

With respect to the persistence of anti-homosexual hate crime, the 1993 NGLTF report contains a useful comparison of data from the five major cities that have consistently reported over the previous six years. (See Table 3.)

Table 3 Time Progression of Hate Crimes Against Homosexuals for Five Major Cities

<table>
<thead>
<tr>
<th>Year</th>
<th>Incidents</th>
</tr>
</thead>
<tbody>
<tr>
<td>1988</td>
<td>697</td>
</tr>
<tr>
<td>1989</td>
<td>949</td>
</tr>
<tr>
<td>1990</td>
<td>1389</td>
</tr>
<tr>
<td>1991</td>
<td>1822</td>
</tr>
<tr>
<td>1992</td>
<td>1898</td>
</tr>
<tr>
<td>1993</td>
<td>1548</td>
</tr>
</tbody>
</table>

Although the annual data appear to show an upward trend in the quantity of anti-homosexual incidents over the five years followed by a moderate downturn in 1993, NGLTF believes that this apparent pattern reflects a variety of factors. For example, the apparent increases from 1988 to 1992 may reflect increased activism by community groups in seeking out victims, and an increased readiness by victims to report these incidents. Similarly, the NGLTF has stated that it is not possible to infer a general downward trend from the apparent decline in 1993, and noted

148 See, e.g., id. at 10. The groups that report to NGLTF have developed objective criteria for determining when an incident was motivated by anti-homosexual prejudice, such as the character of any language or particular objects used in the attack, the location of the incident, and whether the victim was engaged in advocacy at the time of the attack. The FBI uses similar lists, see Jacobs & Eisler, supra note 98, at 108–12, although as noted by Jacobs and Eisler, such lists can be criticized.

149 See 1993 NGLTF Report, supra note 138, at 6 ("The consistent and ongoing nature of their monitoring efforts makes it possible to examine annual trends in reporting by victims.").

150 Id. at 9.

151 1992 NGLTF Report, supra note 134, at 3. Historically, the NGLTF has been reluctant to attribute increases in reported incidents solely to increasing frequency of attacks, acknowledging that increased willingness to report incidents has an important effect as well. E.g., NGLTF Policy Institute, Anti-Gay/Lesbian Violence, Victimization & Defamation in 1991 13 (1992) [hereinafter 1991 NGLTF Report]; 1990 NGLTF Report, supra note 139, at 4.
that while the number of incidents reported in that year declined, their severity increased.\textsuperscript{152}

Even though patterns in reported incidents may not necessarily or accurately reflect commensurate increases or decreases in the numbers of crimes actually committed, the yearly numbers indicate the persistence of hate crimes against homosexuals. NGLTF materials demonstrate that anti-homosexual hate crime is no less persistent, widespread, or significant than hate crime in general. The cities reflected in the reports are located in geographically diverse areas. The total number of 1993 incidents reported by NGLTF (1813) seems generally commensurate with the 1993 total reported by the ADL in its 1993 \textit{Audit of Anti-Semitic Incidents} (1867), and the same was true for the corresponding reports in 1992 (1898 and 1730, respectively).

2. Characteristics of Anti-Homosexual Violence

The foregoing numerical data demonstrate the widespread character and persistence of hate crimes against lesbians and gay men. The full significance of these types of hate crime cannot be described by a numerical overview. To gain a full appreciation of the nature of this kind of crime, it is also vital to review representative incidents.

a. Gruesome Nature of Violence Inflicted

Attacks against lesbians and gay men because of their homosexuality tend to be motivated by such extreme hatred that these incidents are unusually bloody or gruesome.\textsuperscript{153} According to one sociological study, "[a]n intense rage is present in nearly all homicide cases involving gay male victims. A striking feature . . . is their gruesome, often vicious

\textsuperscript{152}1993 NGLTF \textit{Report}, supra note 138, at 12.

\textsuperscript{153}At a 1980 hearing conducted by the San Francisco Board of Supervisors on anti-lesbian and -gay violence, a staff physician at a city medical center noted that bias-motivated attacks against lesbians and gay men are vicious in scope and the intent is to kill and maim . . . . Weapons include knives, guns, brass knuckles, tire irons, baseball bats, broken bottles, metal chains, and metal pipes. Injuries include severe lacerations requiring extensive plastic surgery; head injuries, at times requiring surgery; puncture wounds of the chest, requiring insertion of chest tubes; removal of the spleen for traumatic rupture; multiple fractures of the extremities, jaws, ribs, and facial bones [and many others].

\textbf{Gary D. Comstock, Violence Against Lesbians and Gay Men} 46 (1991) (quoting remarks of Dr. Stewart Flemming, of the emergency department at the Ralph E. Davies Medical Center in San Francisco).
nature. Seldom is the homosexual victim simply shot. He is more apt to be stabbed a dozen or more times, mutilated and strangled.\footnote{Brian Miller & Laud Humphreys, Lifestyles and Violence: Homosexual Victims of Assault and Murder, 3 Qualitative Soc. 169, 179 (1980), quoted in Kevin T. Berrill, Anti-Gay Violence and Victimization in the United States: An Overview, 5 J. Interpersonal Violence, 274, 279–80 (1990).}

Similarly, one New York City hospital official observed that “attacks against gay men were the most heinous and brutal I encountered. They frequently involved torture, cutting, mutilation, and beating, and showed the absolute intent to rub out the human being because of his [sexual] preference.”\footnote{Id. at 280 (quoting Melissa Mertz, Director of Victim Services at Bellevue Hospital).} Statements confirming this point by observers in other fields are not uncommon.\footnote{For example, in a 1965 study of autopsy findings by physicians, one psychiatrist is quoted as saying that “multiple and extensive wounds are not uncommon in the fury of” anti-homosexual murder. Comstock, supra note 153, at 47 (quoting Frank W. Kiel, The Psychiatric Character of the Assailant as Determined by Autopsy Observations of the Victim, 10 J. Forensic Sci. 269 (1965)). A Miami homicide detective said that a beating of two gay men in 1984 was “the worst beating I have ever seen.” Comstock, supra note 153, at 47 (quoting Gang Beats Two Gays, Wash. Blade, July 27, 1984, at 8).}


The murder of Schindler was unprovoked and especially brutal. Helvey later described how he had kneed Schindler in the groin, punched him in the face, and cradled Schindler’s neck and head in his left arm as he punched him repeatedly in the face. Helvey said he then brought Schindler down to the floor, where he stomped on his face and chest with his
feet. Schindler was so disfigured by the beating that his mother could recognize him only by the tattoos on his arms; the Navy said that his skull was battered, that most of his ribs were broken, and that his penis was cut. The physician who performed the autopsy said that Schindler's lungs were bruised and his liver was completely destroyed: "If you took a tomato and slushed it all up without damaging its skin, that's what it would be like." Seasoned medics at the base hospital later said they were sickened by the brutality of the beating. The brutal characteristics of Schindler's murder are consistent with many anti-gay hate crimes, wherein perpetrators evince "the absolute intent to rub out the human being because of his sexual preference."

Several well-publicized cases from recent years serve as further examples:

- In May 1988, Rebecca Wight and Claudia Brenner, a lesbian couple, were shot in cold blood by Stephen Ray Carr. The circumstances of the case were particularly gruesome, and Carr was ultimately convicted of first-degree murder.

- In May 1988, college freshman Richard Lee Bednarski murdered two gay men, Tom Trimble and Lloyd Griffen, in cold blood in the Dallas area. The case made national headlines, not only for the wanton character of the crime but also for callous remarks the trial judge made about the victims during Bednarski's sentencing.

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158 Sterngold, Motive in Killing, supra note 157.
159 See text and note at note 155, supra. Helvey never admitted in open court that he killed Schindler because he was gay and during oral testimony denied that such had been his motive. No national authority reviewing the case, however, has asserted that the motive was anything other than anti-gay hostility, and Helvey offered no other explanation.
160 See Victoria A. Brownsworth, Killer Sentenced to Life in Attack on Lesbian Hikers, WKLY. NEWS, June 7, 1989, at 12; Jennie McKnight, Appalachian Trail Killer Sentenced to Life, GAY COMMUNITY NEWS, June 4-10, 1989, at 3; see also Claudia Brenner, Eight Bullets, in HATE CRIMES: CONFRONTING VIOLENCE AGAINST LESBIANS AND GAY MEN 11-15 (Gregory M. Herek & Kevin T. Berrill eds., 1992) [hereinafter CONFRONTING VIOLENCE]. The two women were on a camping trip in a deserted area of Pine Grove State Park in Pennsylvania. On the second day of their trip, they were awakened by shotgun blasts fired by Carr. He fired eight bullets. Brenner was hit five times—in the arms, face, head, and neck. A shot through her cheek sliced her tongue and traveled down her throat. Wight was also hit and ultimately bled to death from a shot to the torso that ripped through her chest cavity. Brenner survived the attack and, after a remarkable 3.7-mile trek to obtain help while suffering from serious wounds, was instrumental in the successful prosecution of Carr for first-degree murder. Id.
161 See Lisa Belkin, Texas Judge Eases Sentence for Killer of Two Homosexuals, N.Y. TIMES, Dec. 17, 1988, at 8; Kevin Gerrity, On Life's Dark Underside, the Evil of Gay Bashing, KAN. CITY TIMES, Aug. 3, 1989, at A1, A13. Bednarski drove with a group of friends to a neighborhood of Dallas, Texas, known for its large homosexual population. Their express purpose was to pose as homosexuals so as to facilitate a physical assault of any gay men who might take an interest in them. They were invited into a car by Trimble and Griffen. Bednarski eventually ordered the two to undress. When both refused, Bednarski pulled out a gun, shoved it in Trimble's mouth, and squeezed the trigger three times. Meanwhile, Griffen tried to crawl away, but Bednarski stepped on him and fired,
• On January 21, 1990, Michael Taylor and Phillip Sarlo brutally beat and killed James Zappalorti in Staten Island, New York. Taylor later exclaimed that he and Sarlo had killed "only a gay."\(^{162}\)

The brutal and gruesome character of the Schindler, Wight/Brenner, Bednarski, and Zappalorti cases indicates the intensity of the hatred felt by elements of American society against homosexual men and women. Certainly hate crimes against homosexual men and women are not the only crimes involving gruesome brutality, but this feature characterizes much anti-lesbian and -gay violence.

b. Secondary Victimization

Victims of anti-homosexual hate crimes are frequently reluctant to report incidents or to fully prosecute incidents once they are reported\(^{163}\) because many lesbians and gay men fear that reporting and prosecution may result in exposure of their sexual orientation.\(^{164}\) Their fear is not simply a matter of weathering rejection and stigmatization by family, friends, and community groups.\(^{165}\) It also reflects a justifiable concern that once exposed, the lesbian or gay victim can face termination of employment, eviction from housing, denial of public accommodations, and loss of child custody.\(^{166}\) Lesbians and gay men, unlike most other minority groups, are not protected by major federal and state civil rights statutes.\(^{167}\)

Id. See 1990 NGLTF REPORT, supra note 139, at 12; Thomas J. Maier, Because He Was Gay?, N.Y. NEWSDAY, Nov. 4, 1990, at 8. After returning from the Vietnam War with what appeared to be a slight mental impairment, Zappalorti acknowledged his homosexuality and had begun dating other men, although he still lived with his parents in Staten Island. To have a secluded and private space of his own and to escape the taunts of "faggot" and "queer" by local youths, Zappalorti constructed a small hut in a clearing separated from his family's neighborhood by wooded swampland. It was at this hut that Zappalorti was cornered by Taylor and Sarlo, who repeatedly stabbed Zappalorti because they were outraged by his homosexuality. Id.

\(^{162}\) See, e.g., Kevin T. Berrill & Gregory M. Herek, Primary and Secondary Victimization in Anti-Gay Hate Crimes: Official Response and Public Policy, in CONFRONTING VIOLENCE, supra note 160, at 293 [hereinafter Berrill & Herek, Secondary Victimization].

\(^{163}\) See, e.g., Michael Collins, The Gay-Bashers, in CONFRONTING VIOLENCE, supra note 160, at 197 ("Many gay-bashing incidents are unreported or are reported to the gay organizations and not the police, out of fear by the victims of disclosure of their identities.").

\(^{165}\) Nevertheless, fear of consequences among family and friends can itself be a powerful disincentive for reporting. See Joyce Hunter, Violence Against Lesbian and Gay Male Youths, in CONFRONTING VIOLENCE, supra note 160, at 78.

\(^{166}\) See Berrill & Herek, Secondary Victimization, supra note 163, at 289.

\(^{167}\) For example, Title II of the Civil Rights Act of 1964 provided that all persons shall be entitled to "the full and equal enjoyment" of all public accommodations, free of "discrimination or segregation" only on the ground of race, color, religion or national
Discrimination against homosexuals in most areas of the country is entirely legal.

The consequences of exposure as a homosexual in many areas of the country, even today, can be destructive.168 Two scholars have termed the punitive societal reaction to exposure of a lesbian or gay man resulting from reporting a hate crime as “secondary victimization.”169 Secondary victimization occurs not only when social units (such as the workplace, the church, and the family) react punitively to the victim’s homosexuality but also when the criminal justice system itself responds to the report of an anti-lesbian or -gay hate crime by mistreating the victim.170 Indeed, a not insignificant portion of reported anti-homosexual hate crime is perpetrated by police officers.171 At the very least, police, prosecutors, and judges may view violence against homosexuals as insignificant, or even justified.172

These types of “secondary victimization” have two effects. First, they constitute harassment, and sometimes violence, against lesbians and gay men as incidents in themselves. Second, they effectively discourage the reporting of hate crimes by lesbian and gay victims. The fear of secondary victimization is acknowledged to be a major factor in the underreporting of anti-homosexual hate crimes.173


168 See Berrill & Herek, Secondary Victimization, supra note 163, at 289.

169 Id.


173 See, e.g., Richard Berk, Elizabeth A. Boyd, & Karl M. Hamner, Thinking More Clearly About Hate-Motivated Crimes, in CONFRONTING VIOLENCE, supra note 160, at 133.
Documented cases of failure to vindicate the rights of lesbian and gay victims are largely limited to failures to fully prosecute, since failures to report usually result in no documentary record of the incident. Some examples follow:

- Michael Taylor and Phillip Sarlo, the attackers of James Zappalorti, had previously been involved in anti-gay violence. A victim of one of their earlier gay-bashing incidents had declined to press assault charges, concerned about revealing his homosexuality.174

- The 1987 killing of Leslie Wan in Fort Lauderdale by a group of young men occurred in circumstances normally warranting a charge of murder, but the principal assailant was permitted to plead no contest. Activists inferred that prosecutors had accepted the plea because Wan's family did not want him to be identified as a gay man in the media.175

c. Seeking Out Victims

Another characteristic of anti-lesbian and -gay hate crimes is the frequency with which perpetrators actively seek out opportunities to commit violent attacks.176 Perpetrators will often plan to travel some distance to search out victims with whom they would otherwise not have come

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174 See Maier, supra note 162, at 8; Lucy Reyes, Zappalorti's Killers Will Spend Decades Behind Bars, OUTWEEK, Jan. 16, 1991, at 12. Both Taylor and Sarlo had been convicted for a robbery in April 1986, of a gay man in the South Beach section of Staten Island. After picking up the victim in an area where gay men often congregate, the two, with two other accomplices, brutally beat the victim with a tire iron until they believed him dead, removed the car keys from his body, shoved him into the trunk of his car, and took off in the victim's car on a joy ride. Although the four discussed whether to burn the car to render the victim unidentifiable, they simply abandoned the car on a curbside. The victim was rescued by a passerby hours later and was hospitalized with multiple skull fractures, a shattered nose and jaw, and a broken foot. Due to the victim's concern of exposure, a plea bargain was arranged solely on robbery charges. Id.

Sarlo was sentenced to 20 months in jail, and Taylor spent little more than a year in prison. Ultimately, Taylor and Sarlo pleaded guilty to Zappalorti's killing, and each received a sentence of slightly less than the maximum time of 25-years-to-life imprisonment. Id.

175 See Gay Basher Gets 10 Years, WASH. BLADE, Apr. 28, 1989, at 16; Cliff O'Neill, Broward Gay Basher Sentenced to 10 Years in State Prison, WKLY. NEWS, Mar. 22, 1989, at 3. David Schwartz verbally harassed Wan and two of his friends as they were leaving a Fort Lauderdale nightclub. Although Wan's companions were able to get inside their car, Schwartz and his accomplices attacked Wan, who was of slight build and weighed 100 pounds, kicking and beating him. Schwartz ultimately slammed Wan's head against the bumper of the car. Wan died two days later from massive brain hemorrhaging. Id.

Schwartz pled no contest, and one of his accomplices pled guilty to manslaughter. (The third attacker turned state's evidence and was not prosecuted.) Schwartz was sentenced in 1989 to 10 years' imprisonment with the possibility of parole. At the time, Florida prisoners spent an average of only 40 to 50% of their sentences behind bars. Id. at 27.

176 Not all anti-homosexual violence involves this "seeking-out" behavior, but enough of it does to have attracted the attention of researchers. See, e.g., Harry, supra note 170, at 118.
into contact. This pattern is consistent with certain other modes of hate-motivated behavior directed against other groups, but this behavior can also be contrasted with some types of hate crimes directed against social and ethnic minorities.

Racial hostility can sometimes take the form of retaliation for a member or members of a minority group moving into a previously all-white community. For example, the recent Howard Beach and Bensonhurst slayings occurred when African-American youths found themselves in predominantly white communities. In contrast, anti-homosexual hate crime perpetrators frequently leave their own communities to enter communities with large homosexual populations to seek opportunities to beat and assault gays as a "thrillingly brutal rite of passage."

Gary Comstock, a researcher on anti-lesbian and -gay violence, provided a telling description of this behavior pattern in his 1991 book, Violence Against Lesbians and Gay Men. Comstock quotes Charles McCabe, for many years a prominent columnist for The San Francisco Chronicle, who himself described the violence he and his friends had inflicted on gay men:

In retrospect [McCabe] confesses the "cruel and decidedly inhuman" nature of the practice and provides a description of its pattern. The boys worked as a gang of six or seven, targeting a single individual. Their action was not defensive, but an offensive seeking out of targets in an area isolated by its location and the time of day and frequented only by gay men, "an area where hundreds of homosexuals cruised nightly." Their attacks were not spontaneous reactions to unexpected encounters; rather, they had a plan whereby they would "break up into pairs or singles though always keeping an eye on each other during the cruising" so that when one made a contact "the rest . . . followed along." They were sustained in their efforts by their conviction, based on their "religious training . . . and the whispered prejudices of

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177 See, e.g., COMSTOCK, supra note 153, at 219 n.29 (quoting a San Francisco Police Department liaison with the gay and lesbian community, who said anti-homosexual attackers "are most often out-of-town toughs who come to the city expressly to hunt homosexuals, or city residents resentful of homosexuals sharing their neighborhoods and public transportation").


180 Maier, supra note 162, at 8. See generally Collins, supra note 164.

181 COMSTOCK, supra note 153.
[their] time," that they "were waging ... a kind of holy war ... [and] doing the world a favor." It was because the gay man "was so universally despised that aggression against him was viewed as a virtue." The boys feared no punitive consequences because the "homosexual had no weapon against [them] except his own guile or ability to buy [them] off." They knew that the "homosexual was totally vulnerable," that "all the cards were in [their] hands," including the cooperation of the "friendly cop."

McCabe says they operated with a sense of freedom, permission, and support to do whatever they wished to gay men: "Depending on the situation, we could either hoot and holler derisively, or we could beat up the guy, or we could take his watch and his money. In some cases we could, and did, do all three."182

Although McCabe was describing incidents that took place in the early 1930s, the same behavior patterns are evident in much anti-homosexual violence today, particularly the predatory seeking out of victims.183 Many victims of anti-homosexual hate crimes suffer much more than the hollers and petty theft referred to by McCabe, as the 1988 assault of Rod Johnson184 and similar incidents demonstrate.185

\[d.\] Moral Justification

Sometimes hate crimes against homosexual men and women are justified, even after the fact, in moral or quasi-religious terms.186 For example, a noted passage from Leviticus provides: "[i]f a man lies with a male as with a woman, both of them have committed an abomination; they shall be put to death, their blood is upon them."187 Although this

\[182\] \textit{Id.} at 19–20 (all alterations in original).

\[183\] \textit{See} \textit{JACK O’MALLY, COOK COUNTY [ILL.] STATE’S ATTORNEY, A PROSECUTOR’S GUIDE TO HATE CRIME VIII-8 (1994).}

\[184\] \textit{See} James Rupert, \textit{Beatings Said to Reflect Dark Side of Skinheads}, \textit{WASH. POST}, Dec. 19, 1988, at E1; Kara Swisher, \textit{Two Convicted of Assault on Gay Man}, \textit{WASH. POST}, Nov. 18, 1989, at B1. Johnson’s shoulder and arm were broken, and his skull was fractured, in an attack in Rock Creek Park in Washington, D.C. His attacker later said to police that he was one of a group of "skinhead" youths who made forays into Rock Creek Park and Georgetown looking for people, especially gay men, to beat up, this time with baseball bats. The attacker noted that even if Johnson had died, "I don’t think I would have felt any remorse about it ... I have a hatred for gays." The attacker and one of his accomplices were convicted of assault with intent to kill with a deadly weapon and armed robbery. \textit{Id.}

\[185\] \textit{See supra} notes 153–162 and accompanying text.

\[186\] Such moral justification need not be explicitly religion-based; it can be based on notions of what kind of behavior is innately gender-appropriate. \textit{See} Harry, \textit{supra} note 170, at 113, 116; \textit{see also} \textit{COMSTOCK, supra} note 153, at 224 n.67.

\[187\] \textit{COMSTOCK, supra} note 153, at 121 (quoting \textit{Leviticus} 20:13).
bibal source may not be broadly used to advocate the physical punishment of lesbians and gay men, the violent language creates the impression that violence is a legitimate consequence of their sexual behavior. While this moral or religious justification is not an exclusive aspect of anti-homosexual hate crime (for example, religious overtones can be present in anti-Semitic incidents), it remains a significant definitional trait.\[189\]

\[188\] Id. at 123.
\[189\] For example, on November 15, 1989, the home of Brad Evans in Springfield, Missouri was destroyed by arson. Southwest Missouri State University was that night beginning a run of performances of the play *The Normal Heart*, which concerns gay men living in New York City in the early 1980s at the start of the AIDS crisis. Certain local groups and individuals had complained bitterly over SMSU's production of the play.

Evans, 22 years old at the time and an SMSU student, formed a group to support the production of the play, and the destruction of his apartment appears to have been in retaliation for his activities with the group. Upon learning of the fire, Jean Dixon, the Missouri state representative for the area, said that the arson was "terrible" but called Evans a "Satan worshipper" and suggested he had set the fire himself. She later withdrew her statement about Satanism, saying she was not aware of being interviewed. Rick Harding, *Springfield's Shame*, *ADVOCATE*, Dec. 19, 1989, at 8, 9; Robert Keyes, [Fire Damages] Play Backer's Home, *SPRINGFIELD NEWS LEADER*, Nov. 16, 1989, at A1.

\[190\] See Berrill & Herak, *Secondary Victimization*, supra note 163. The authors consider this "homosexual panic" defense to be the most dramatic example of "blaming the victim." Id. at 295.

\[191\] See Susan Lumenello, *North Shore Murder Trial Ends with Conviction of Danvers Man*, *BAY WINDOWS*, Dec. 21-27, 1989, at 15. On May 31, Polio (aged 51 years) picked up Darrin Smiledge (aged 24) and Kenneth Tarantino (aged 22) while Smiledge and Tarantino were hitchhiking near Gloucester, Massachusetts. Witnesses saw the three men in a secluded area of Gloucester drinking beer together. Tarantino said he saw Polio put his hand on Smiledge's inner thigh, at which point Smiledge called Polio a "fag, a queer" and hit him in the face. Smiledge continued to beat Polio as Tarantino watched. The two then tied up Polio with a clothesline found in the car, placed him in the trunk of his car, and drove to a deserted area of North Beverly, Massachusetts. Id.

Smiledge then removed Polio from the trunk, strangled him to death with a clothesline while Tarantino watched, and dumped the body behind a theater in North Beverly. Upon his arrest, Smiledge told a deputy sheriff, "I killed that queer. Faggots have no right to live." Id.

\[192\] See Maier, supra note 162, at 8 (discussing how Zappalorti's attackers had sought out their victim). Also, the Schindler case contains an example of this pattern, because Terry Helvey at one point made the claim that he attacked Allen Schindler when Schindler made a pass at him. See Sterngold, *Killer of a Gay Sailor*, supra note 157, at A10. Helvey
f. Summary

Each of these characteristics is typical of hate crime against lesbians and gay men: gruesome and brutal execution of the crime, the threat of secondary victimization resulting in reduced likelihood of reporting and prosecution, "seeking out" behavior to intentionally locate and select the victim(s), an implicit moral or social justification for the violence, and defenses built on an alleged sexual advance. Although not all are present in all cases, and although there may be cases where none are present, each is a broad characteristic of the phenomenon.

B. Hate Crime Statutes and Homosexuals

State legislatures have enacted a multiplicity of statutes addressing hate-motivated violence and criminal conduct. In order to effectively address constitutional issues raised by these statutes, one must keep in mind the differences among the types of laws the states have adopted.

1. Hate Speech Statutes versus Hate Crime Statutes

State laws designed to address the hate crime phenomenon fall broadly into two categories: hate speech statutes and hate crime statutes. Recent United States Supreme Court cases have indicated that hate speech statutes rest on tenuous constitutional footing, whereas hate crime statutes, properly so called, are on much firmer ground.

Hate speech statutes are designed to redress harm inflicted when a person makes a statement or engages in expressive conduct that derides or devalues the hearer because of the hearer's race, color, religion, sexual orientation, or other analogous characteristic.

later admitted this statement was a lie. Id. Perhaps tellingly, Helvey had only made the initial statement about the sexual advance after it was suggested to him as a possibility by a Navy investigator. Sterngold, Motive in Killing, supra note 157, at A16.


194 Some laws against hate-motivated violence and other bias-motivated behavior have been enacted at county, city, or other local levels. For example, the law implicated in R.A.V. v. City of St. Paul, 112 S. Ct. 2538 (1992), was a municipal ordinance of the City of St. Paul, Minnesota. ST. PAUL, MINN., LEG. CODE § 292.02 (1990).


196 The types of harm addressed by hate speech statutes were described in a landmark article. See Richard Delgado, Words that Wound: A Tort Action for Racial Insults, Epithets
The most prominent example during the last few years of a hate speech statute was the city ordinance that the Supreme Court invalidated in *R.A.V. v. City of St. Paul*.197 In that case, a seventeen-year-old defendant was prosecuted for allegedly burning a cross on the front lawn of a neighboring African-American family.198 Rather than prosecute under arson or trespass laws, local officials prosecuted the defendant under the city’s Bias-Motivated Crime Ordinance,199 which provided:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.200

The ordinance was a hate speech ordinance because it was directed at speech or expressive conduct: the placement of “symbols or objects,” the writing of “graffiti,” and the utterance or writing of “characterizations” or “appellations.” The ordinance did not require that an act of physical violence take place in order for a violation to occur. The law could have been breached by a simple act of graphic communication, such as the placement on one’s own property of a provocative poster.201

All nine justices voted to strike down the ordinance, but a five-justice majority voted to do so on a rationale widely considered to break new ground in free speech law.202 The majority held that laws prohibiting even “unprotected” speech must be content-neutral in order to avoid presumptive invalidity under the First Amendment.203 The St. Paul ordinance at

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199 Id. (citing ST. PAUL, MINN., LEG. CODE § 292.02 (1990)).

200 Id. (quoting ST. PAUL, MINN., LEG. CODE § 292.02 (1990)).

201 See Brief for Petitioner at 20, *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992) (noting that under the ordinance a homeowner could be prosecuted for placing certain types of anti- or pro-choice placards on her own property).


203 See R.A.V., 112 S. Ct. at 2543 (previous opinions terming certain areas of speech
issue was not considered content-neutral and could not survive the presumption of invalidity; the Court therefore struck it down. Most states have not enacted hate speech statutes such as the one in R.A.V. Hate speech regulations have been more common on college campuses, but two federal district courts have invalidated provisions of campus speech codes on free speech grounds. Hate crime statutes, unlike hate speech statutes, are not by their terms directed at expressive statements. Instead, they increase the penalties applicable to those convicted of violent crimes when the crimes are motivated by hatred of or hostility to a societal group of which the victim is a member. After the Supreme Court handed down the R.A.V. decision, there was a question as to whether hate crime statutes could or should survive R.A.V.'s invalidation of hate speech statutes.

The Supreme Court resolved this issue, at least to a substantial extent, with its unanimous holding in Wisconsin v. Mitchell. Mitchell arose out of the beating of a white boy by a group of young African-American men who allegedly had chosen their victim because of his race. The Wisconsin authorities conducted their prosecution under a statute that increased the maximum penalty for a defendant who commits certain specified crimes if the defendant "intentionally selects" his victim because of the victim's "race, religion, color, disability, sexual orientation, national origin or ancestry."

Before the Supreme Court, the defendant's attorneys argued that the Wisconsin statute "punishes thought" because it "enhances penalties based upon the defendant's motives when those motives represent a viewpoint or belief" and therefore violated the First Amendment. The Supreme Court noted that judges traditionally have considered a wide variety of factors in sentencing, that a legislature is as entitled to consider such factors in drafting a statute as a judge is in sentencing, and that including motive as such a factor was no more objectionable in the case of a
Hate crime statutes in most cases stand on firmer constitutional footing than hate speech statutes, but hate crime statutes are not completely exempt from constitutional challenge. First, defendants remain free to challenge hate crime statutes under the free speech guarantees of state constitutions. Such constitutions may have different standards for protection of free speech. Second, the various state hate crime statutes are drafted in distinct ways. Many statutes use language similar to that of the Wisconsin statute upheld in Mitchell, which speaks of an "intentional selection of the victim" because of the listed traits. Not all states use the Mitchell formulation, however, and the language used in some state statutes might occasion First Amendment concerns even at the federal level. Finally, issues of equal protection arise in the context of which classes of persons are covered by hate crime statutes. One such issue is addressed in Part III.

2. Three Kinds of Hate Crime Statute

Hate crime statutes can be broken down into distinct subclasses. This Article adopts three broad categories for the classification of hate crime statutes: sentence-enhancement statutes, "new crime" statutes, and civil rights model statutes.

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213 Id.
214 Id. at 2201.
215 For example, in State v. Plowman, 838 P.2d 558 (Or. 1992), a case challenging the constitutionality of an Oregon hate crime statute, the Oregon Supreme Court was careful to address each of the defendant's claims under both the Oregon and federal constitutions. One example was the principal Florida hate crime statute, which requires penalty enhancement for any felony or misdemeanor, the commission of which "evidences prejudice based on the race, color, ancestry, ethnicity, religion, sexual orientation, or national origin of the victim." Fla. Stat. Ann. § 775.085(1) (West 1992). The use of the phrase "evidences prejudice" could be viewed as more directly implicating freedom of thought than the "intentional selection" language in the Wisconsin statute. However, in a recent opinion the Florida Supreme Court interpreted the more open-ended language to have the same meaning as the "intentional selection" phrase in the Wisconsin statute. State v. Stalder, 1994 W.L. 19548 (Fla., January 27, 1994), at 5.
216 See, e.g., Selbin, supra note 193, at 163–64 (listing three forms of "hate crimes statutes": "penalty enhancement statutes," "ethnic intimidation laws," and "harassment and intimidation laws" based on status); David D. Munster, Comment, R.A.V. v. City of St. Paul: The Future of Hate Speech Regulation, 70 Univ. of Detroit Mercy L. Rev. 347, 361–64 (1993) (listing "two primary groups" of "ethnic intimidation laws": "penalty-enhancing statutes" and laws that create "an entirely separate crime").
Sentence-enhancement statutes supplement previously enacted sections of the state criminal code and add an extra penalty if the referenced crimes are committed with the prohibited prejudice. Such statutes constitute a new section in the criminal code or serve as an additional factor for consideration in sentencing. They may be codified or enacted so as to add a new heading to the state's list of crimes, but they define no behavior to be criminal that was not criminal prior to enactment.

A "new crime" statute does not refer to previously enacted sections of the criminal code or to crimes defined elsewhere; it defines all the elements of the crime it is describing within its own terms. The effect of such a statute, like the one passed in Oregon, may well be additive, since it penalizes behavior that may be criminal under other statutes as well, but the drafting technique employed is one of stating all of the elements of a separate, or "new," crime. The distinction between these statutes and sentence-enhancement statutes is significant because a "new crime" statute—if not carefully drafted—could sweep sufficiently broadly to raise

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218 The principal Florida hate crime statute is one example:

The penalty for any felony or misdemeanor shall be reclassified as provided in this subsection if the commission of such felony or misdemeanor evidences prejudice based on the race, color, ancestry, ethnicity, religion, sexual orientation, or national origin of the victim:

(a) A misdemeanor of the second degree shall be punishable as if it were a misdemeanor of the first degree.
(b) A misdemeanor of the first degree shall be punishable as if it were a felony of the third degree.
(c) A felony of the third degree shall be punishable as if it were a felony of the second degree.
(d) A felony of the second degree shall be punishable as if it were a felony of the first degree.


219 The Florida statute, id., is an example of a new code section; California has a distinct penalty-enhancement clause in its sentencing statute for hate-motivated behavior. See CAL. PENAL CODE § 1170(b) (West 1985).

220 An example is subsection (1)(a) of the Oregon hate crime statute that applies to actions by two or more persons:

Two or more persons acting together commit the crime of intimidation in the first degree, if the persons:

(A) Intentionally, knowingly, or recklessly cause physical injury to another because of their perception of that person's race, color, religion, national origin or sexual orientation; or
(B) With criminal negligence cause physical injury to another by means of a deadly weapon because of their perception of that person's race, color, religion, national origin or sexual orientation.

OR. REV. STAT. § 166.165(1)(a) (1989).
the type of First Amendment concerns so detrimental in R.A.V. For example, if the word "physical" in subclause (A) of the Oregon statute were followed by the phrase "or emotional," or if the word "physical" were simply deleted, a defendant prosecuted under subclause (A) might argue that it is impermissibly directed at expression.\footnote{\textit{Cf.} R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2548 (1992) ("What makes the anger, fear, sense of dishonor, etc., produced by violation of [a hate speech statute] distinct from the anger, fear, sense of dishonor, etc., produced by other fighting words is nothing other than the fact that it is caused by a distinctive idea, conveyed by a distinctive message. The First Amendment cannot be evaded that easily.").}

A civil rights model hate crime statute does not enhance penalties for previously defined crimes and does not define \textit{specific} criminal behavior as a "new crime." Instead, it broadly criminalizes any violent deprivation of a victim's civil rights, usually broadly characterized as those rights guaranteed under the state or federal constitutions or laws.\footnote{\textit{See infra notes} \text{232} \& \text{233} and accompanying text.} Civil rights model statutes are in a separate category because in some cases these statutes do not refer to the categories of persons they protect.\footnote{\textit{A}} Their protection extends potentially to the legal rights of all persons, without reference to which particular kind of societal prejudice motivates the perpetrator.

\section*{3. Coverage of Homosexuals}

Thirty-four states currently have one or more hate crime statutes, which are either in the form of sentence-enhancement statutes\footnote{\textit{See infra notes} \text{232} \& \text{233} and accompanying text.} \text{244} \text{"new}

\begin{itemize}
\item No person, whether or not acting under color of law, shall by force or threat of force, willfully injure, intimidate or interfere with, oppress, or threaten any other person in the free exercise or enjoyment of any right or privilege secured to him or her by the Constitution or laws of this state or by the Constitution or laws of the United States because of the other person's race, color, religion, ancestry, national origin, or sexual orientation.
\end{itemize}

\texttt{CAL. PENAL CODE} \texttt{§ 422.6} (West 1988 \& Supp. 1993).
\texttt{D.C. CODE ANN.} \texttt{§§ 22-4003} (Supp. 1992); \texttt{FLA. STAT. ANN.} \texttt{§ 775.085} (West 1992); \texttt{ILL. ANN. STAT.} \texttt{ch. 38, para. 12-7.1} (Smith-Hurd 1992); \texttt{ILL. ANN. STAT.} \texttt{ch. 730, para. 5/5-3.2} (Smith-Hurd 1993 \& Supp. 1993); \texttt{IOWA CODE ANN.} \texttt{§ 716.6A} (West 1993); \texttt{MINN. STAT. ANN.} \texttt{§ 609.595. Subds. 1a, 2(b)} (West Supp. 1994); \texttt{MONT. CODE ANN.} \texttt{§ 45-5-222} (1991); \texttt{NEV. REV. STAT.} \texttt{§ 207.185} (1991); \texttt{N.H. REV. STAT. ANN.} \texttt{§ 651:6} (1992); \texttt{N.J. STAT. ANN.} \texttt{§§ 2C:33-4, 2C:44-3, 2C:43-7} (West Supp. 1993); \texttt{N.C. GEN. STAT.} \texttt{§ 14-3} (1993); \texttt{OHIO REV. CODE ANN.} \texttt{§ 2927.12} (Anderson 1993); \texttt{18 PA. CONS. STAT. ANN.} \texttt{§ 2710} (1993); \texttt{R.I. GEN. LAWS} \texttt{§ 11-5-13} (Supp. 1992); \texttt{TEX. PENAL CODE ANN.} \texttt{§ 12.47} (West Supp. 1994); \texttt{TEX. ANN. CODE CRIM. PROC. ART. 42.014} (West Supp. 1994); \texttt{VT. STAT. ANN. tit. 13, § 1455} (1992); \texttt{WIS. STAT. ANN.} \texttt{§ 939.645} (West Supp. 1992).
crime" statutes, or civil rights model statutes. Several states have more than one hate crime statute, so that the total number of hate crime statutes is forty-eight. These statutes vary in their substance beyond these three basic divisions. Indeed, within one of these divisions, there are numerous variations. Variation among the statutes is reflected in their different names; "Ethnic Intimidation" is the most frequent caption heading, although titles such as "Malicious Harassment" and "Malicious Intimidation" are also used.

Table 4 Number of Statutes Protecting Classes of Victims

<table>
<thead>
<tr>
<th>Category</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Race</td>
<td>41</td>
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<tr>
<td>Religion</td>
<td>41</td>
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<td>Sex or Gender</td>
<td>15</td>
</tr>
<tr>
<td>Disability</td>
<td>15</td>
</tr>
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<td>Ethnicity</td>
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<td>Creed</td>
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<tr>
<td>Age</td>
<td>5</td>
</tr>
<tr>
<td>Political Affiliation</td>
<td>3231</td>
</tr>
</tbody>
</table>


228 Idaho CODE § 18-7902 (1987); Mont. CODE ANN. § 45-5-221 (1991); Okla. STAT. ANN. tit. 21, § 850 (West 1993); Wash. REV. CODE ANN. § 9A.36.080 (West 1993).

229 Mont. CODE ANN. § 45-5-221 (1991); Okla. STAT. ANN. tit. 21, § 850 (West 1993).

230 There is no necessary connection between the various names and the subdivisions of hate crime statutes described in the text. For example, some "Ethnic Intimidation" statutes are sentence-enhancement statutes, and some are "new crime" statutes.

231 In addition, each of the following categories is listed in at least one hate crime statute, as follows: Nationality (CAL. PENAL CODE §§ 422.75, 1170.75 (West 1993); N.C. GEN. STAT. ANN. §§ 14-3, 14-401.14 (Michie Supp. 1992)); Marital Status (D.C. CODE...
One way in which the statutes vary is in the classes of victims they protect. Almost all the statutes contain a catalog of characteristics that, if the basis of the bias-motivated attack, trigger heightened punishment for the perpetrator. Of the forty-eight state hate crime statutes currently in force, Table 4 shows the protected characteristics and the corresponding number of statutes in which they appear.

Seven hate crime statutes do not explicitly list protected categories. Such statutes are generally civil-rights model statutes that simply penalize, for example, the violent deprivation of any right guaranteed by the state or federal laws or constitutions. Only fifteen states (including the District of Columbia) have hate crime statutes that explicitly protect homosexual men and women. Of the forty-one statutes that contain catalogs of protected traits, eighteen exclude sexual orientation, and the seven state statutes that do not
contain such catalogs presumably leave the question of whether lesbians and gay men are covered to statutory interpretation.

A civil rights model statute, penalizing violent interference with the exercise of another's rights under federal or state laws or constitutional provisions, could be interpreted to preclude protection of homosexuals, depending on the statutory environment of the state involved. If, for example, the anti-discrimination laws of the particular state do not prohibit discrimination on the basis of sexual orientation, and if the relevant state statutes do not establish rights on the part of victims to be free from societal aggression, this kind of statute could be interpreted, as a linguistic matter, to exclude homosexual men and women.

Many states have enacted hate crime statutes that explicitly exclude lesbians and gay men. Sometimes this exclusion is plainly intentional; other times, it is less clear.

III. Hate Crimes, Homosexual Exclusion, and Equal Protection

A hate crime statute that excludes lesbians and gay men from its protection discriminates against them by impairing their fundamental right to the equal benefit of laws protecting personal security. Such discrimination is unlikely to survive strict scrutiny; such a statute therefore violates the Equal Protection Clause. Hate crime statutes should be construed to include protection of homosexual men and women, where possible, to save their constitutionality. When such a construction is not possible, they should be struck down.

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236The eight states that provide protection against discrimination to lesbians and gay men were cited supra note 167, as were the federal provisions illustrating a lack of federal protection in this area. Indeed, the Hate Crime Statistics Act was the first federal law ever to include a "sexual orientation" provision. See 1990 NGLTF REPORT, supra note 139, at 3.

237The fact that state criminal law may prohibit assault, for example, would not necessarily imply a right to be free from assault, at least in constitutional terms. Cf. DeShaney v. Winnebago County Dep't. of Social Servs., 489 U.S. 189, 202 (1989) (state has no constitutional duty to protect against private violence, although presumably the assault and battery involved were contrary to state law).

238For example, a critical group of New York state legislators has been able to block hate crime legislation in that state, specifically because the legislation as drafted would protect homosexuals. See, e.g., John D. Hartigan, Don't Categorize Sodomy as Innocuous, GANNETT WESTCHESTER NEWSPAPERS, Sept. 3, 1990, at A1; Michael A. Riff, Combat All Crimes Prompted by Bigotry, GANNETT WESTCHESTER NEWSPAPERS, Sept. 3, 1990, at A1. It has also been asserted that the blockage of the legislation is due to other factors. See Where Republicans Stand on Hate Crime Legislation, N.Y. TIMES, Jan. 26, 1992, at E7. In Missouri, state legislators deleted coverage of sexual orientation in a hate crime statistics bill that had been initially drafted to include such coverage. See Senate Committee Deletes Gays from Hate Crimes Bill, LESBIAN GAY NEWS-TELEGRAPH, Mar. 1991, at 1.
A. Excluding Homosexuals from Protection Impairs a Fundamental Right

Constitutional doctrine and historical analysis strongly suggest the existence of the fundamental right to the equal benefit of laws protecting personal security. Excluding lesbians and gay men from a hate crime statute is invidious discrimination. Such discrimination is tantamount to denying them a fundamental right under the Equal Protection Clause.

I. Excluding Homosexuals Is Invidious Discrimination via the Criminal Law

Differential application of criminal justice and differential coverage of the criminal law were prominent among the injustices the Reconstruction Congresses designed the 1866 Civil Rights Act and the Fourteenth Amendment to redress.239 Situations in which the violators of freed African-Americans were punished less severely than assailants of whites, or were not punished at all, were of great concern to the Reconstruction Congresses.240 Such occurrences were among the reasons that the 1866 Act included the right to "the equal benefit of all laws and proceedings for the security of person and property."241 The right to the equal benefit of laws protecting personal security must be considered a fundamental right under the Amendment.

A hate crime statute that denies coverage to homosexuals works an injustice very similar to that worked during Reconstruction by the differential enforcement of criminal laws that were supposed to protect African-Americans. During Reconstruction, the assailant of a white would generally receive the punishment prescribed by law, while the assailant of a newly freed African-American might receive a lesser or no punishment. Under a modern hate crime statute that does not include homosexuals, the perpetrator of a hate crime against a Jew or an Arab242 will receive the punishment prescribed by the statute, while the perpetrator of a hate crime against a homosexual will receive no punishment.

239 See, e.g., RECONSTRUCTION DEBATES, supra note 70, at 171.
240 See id. at 94 (quoting S. REP. No. 112, 39th Cong., 1st Sess. (1866)).
241 Civil Rights Act of 1866, ch. 31, 14 Stat. 27, 27 (1866).
242 Note that virtually all hate crime statutes that specify protected characteristics cover victims with respect to that characteristic, regardless of the group to which they belong. In other words, the statutes protect against attacks because of the "race" or "religion" of the victim, rather than protecting against attacks because the victim is "African-American" or "Jewish." As a result, a crime can be a hate crime in these jurisdictions whether the victim is white or African-American, Arab or Jew. For this reason, the specification of protected characteristics in the statute does not itself work a differential enforcement of the criminal law and does not itself violate equal protection.
Of course, the attacker of the homosexual may nevertheless receive the general punishment for, say, assault, but this merely means that he receives a lesser punishment than the perpetrator of the same offense against the Jew or the Arab, in the same way a Reconstruction assailant of an African-American might have received some punishment, but less than he would have received had he assaulted a white. The Reconstruction Congresses surely did not think it just to allow unequal punishment of the two assailants just because the assailant of the African-American may have received some punishment.

It is also true that the 1866 Act by its terms only addressed inequalities suffered by African-Americans; the "equal benefit" of laws for the security of the person was stated to be equal to that "enjoyed by white citizens."\(^{243}\) It could thus be inferred that it is inappropriate to use the 1866 Act to advance the rights of other groups.

Such an inference, however, is unjustified. This Article uses the 1866 Act only as an indication of which rights the Framers of the Fourteenth Amendment considered "fundamental." The Act is useful only insofar as it discerns the fundamental character of the rights it protects, quite apart from the particular classes to which the Act referred upon its adoption. Indeed, the modern Fourteenth Amendment provides substantial protection against discrimination on the basis of sex,\(^{244}\) ethnic ancestry,\(^{245}\) and other categories\(^{246}\) that have nothing to do with race, notwithstanding the language in the 1866 Act. Furthermore, the other fundamental rights listed in the 1866 Act (such as the right to contract and hold property) are no less fundamental when enjoyed by groups other than African-Americans.

2. Equality of Application, Not Assertion of Absolute Right

The recognition of the right to equal benefit of laws protecting personal security arises out of an asymmetry in the treatment of gay men and lesbians. The asserted right is that gay men and lesbians receive equal treatment under hate crime laws, not that a particular level of protection is owed to them in the first instance. As such, the argument presented here is stated under the Equal Protection Clause rather than the Due Process Clause.

\(^{243}\)Civil Rights Act of 1866, ch. 31, 14 Stat. at 27.
\(^{244}\)See, e.g., Craig v. Boren, 429 U.S. 190 (1976) (applying intermediate scrutiny to classifications by gender under the Equal Protection Clause).
\(^{245}\)See, e.g., Korematsu v. United States, 323 U.S. 214 (1944) (applying strict scrutiny to classifications based on national origin under the Equal Protection Clause).
\(^{246}\)Governmental discrimination on the basis of status as an alien is generally thought to be impermissible under the Equal Protection Clause unless the discrimination satisfies a form of heightened scrutiny. See, e.g., NOWAK & ROTUNDA, supra note 13, § 14.12(a), at 702.
Cases such as *DeShaney v. Winnebago County Department of Social Services*, determining that the state has "no constitutional duty to provide substantive services for those within its border," are inapposite. In that case, the petitioner was a minor child who was beaten and permanently injured by his father. For a period of several months preceding the beating, Wisconsin social workers received numerous indications that the father was continually abusing his child but did nothing to remove the child from the home or to address the father's behavior.

The child and his mother sued the social services department, claiming that the department had violated the child's Fourteenth Amendment right not to be deprived of liberty without due process of law. The Court disagreed, stating that "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors." The Court stated that the purpose of the Due Process Clause "was to protect the people from the State, not to ensure that the State protected them from each other." The Court concluded that "a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause."

*DeShaney* is not inconsistent with the argument advanced here. This Article does not argue that lesbians and gay men must receive a certain degree of protection as an initial matter; rather, it argues that if other minorities that regularly suffer hate violence are protected, lesbians and gay men should receive the same degree of protection offered to them. The *DeShaney* result rests on the Due Process Clause, whereas the assertion here put forward is based on the Equal Protection Clause.

No argument is presented here that a state is required to enact a hate crime statute at all. This Article does not even suggest that hate crime statutes are a good idea, from a policy perspective. A state is free to

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248 Id. at 196 (quoting Youngberg v. Romeo, 457 U.S. 307, 317 (1982)).
249 Id. at 191.
250 Id. at 192–93.
251 Id. at 193.
252 Id. at 195.
253 Id. at 196.
254 Id. at 197.
255 The reasoning of *DeShaney* itself does not suggest that an equal protection challenge on similar facts would necessarily fail. Suppose that the social welfare authorities in *DeShaney* had routinely shown greater care and solicitude for non-retarded children and had only demonstrated the lack of attention shown there toward retarded children. Surely the *DeShaney* ruling would not preclude an equal protection argument on behalf of the retarded children. Cf. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) (invalidating under the Equal Protection Clause a zoning ordinance prohibiting the operation of a group home for the mentally retarded).
256 Other commentators addressing the constitutionality of hate crime statutes have not been so timid. *See*, e.g., Susan Gellman, *Sticks and Stones Can Put You in Jail, but Can*
punish hate crime assaults at any level, or conceivably not at all. However, once a state draws arbitrary lines by punishing assaults against some people but not others similarly situated, it deprives the unprotected of their right to the equal benefit of laws for personal security.

*Bowers v. Hardwick* is not inconsistent with the argument advanced here. *Hardwick* involved a facial challenge to a Georgia sodomy statute by Michael Hardwick, who was charged with violating the statute by engaging in sexual relations with another man in the privacy of his own bedroom. The Court of Appeals for the Eleventh Circuit ruled that the statute violated Hardwick's fundamental right to privacy under the Due Process Clause of the Fourteenth Amendment. The Supreme Court reversed, declaring that there was no "fundamental right to engage in homosexual sodomy." The *Hardwick* decision is often viewed as a substantial obstacle to the assertion of constitutional rights by homosexuals as a class.

The *Hardwick* Court addressed whether Georgia's sodomy statute was consistent with fundamental rights of privacy under the Fourteenth Amendment Due Process Clause. The Court specifically noted that Hardwick did not argue his case on equal protection grounds and implied that its opinion did not address possible relief under that clause.

Quite apart from the difference between the two clauses, the fundamental right asserted in *Hardwick*—a right to privacy covering homosexual conduct—is not at all the same right as the one asserted here. This Article advances an entirely different fundamental right of equal protection: the right to the equal benefit of laws protecting personal security. The indicia of this right's legitimacy are substantial and completely unaffected by *Hardwick*, even when the right is asserted by homosexual men or women.

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*Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, 39 U.C.L.A. L. Rev. 333, 381–93 (1991) (arguing against sentence-enhancing hate crime statutes as a policy matter as well as on constitutional grounds); Note, *Hate Is Not Speech*, supra note 195, at 1341 ("Statutes that enhance penalties for crimes committed because of the victim's race or similar characteristic are not only constitutional; they are necessary.")


258 Id. at 187–88.

259 Id. at 189.

260 Id. at 191.

261 See, e.g., High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 571 (9th Cir. 1990); Ben-Shalom v. Marsh, 881 F.2d 454, 464–65 (7th Cir. 1989); Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987).

262 *Hardwick*, 478 U.S. at 196 n.8.

263 At least one prominent commentator has noted the reliance of the *Hardwick* opinion on the Due Process Clause and asserted that homosexual men and women should still be able to obtain protection under the Equal Protection Clause. Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. Chi. L. Rev. 1161 (1988).
3. Scope of the Right

One important question remains: if the Constitution requires that homosexuals not be excluded from hate crime statutes, what is to prevent others such as dog-lovers or cat-lovers, Democrats or Republicans from claiming the same right? In other words, if one concedes the constitutional argument presented here, does not one embark on a "slippery slope" that has no rational ending point?

Justice Scalia is sensitive to this type of "slippery slope" argument. During oral argument in Wisconsin v. Mitchell, he suggested the possibility of a state including hate-crime protection for any victim who is attacked because he "believes in the hole in the ozone layer" or because he "believes that the earth revolves around the sun rather than vice-versa." Justice Scalia was addressing the issue of whether a state could constitutionally include such protection, not whether a victim could claim that a state is constitutionally required to include such protection. While in some sense sarcastic, the examples he used can be employed in querying the scope of the Equal Protection argument made here.

What is called for in this context is a bit of realism. This Article has demonstrated the widespread, persistent, and significant incidence of hate crimes against gay men and lesbians. They are widespread in the sense that they occur and are reported in every geographical region of the country. They are persistent in the sense that they have occurred and been reported now for close to ten consecutive years by national and regional lesbian and gay civil rights groups across the country. Anecdotal evidence describes the occurrence of such crimes as early as two generations prior to the beginning of organized record-keeping and suggests that hate crimes occurred before that as well. They are significant in that they can involve very serious crimes, including murder, and appear to occur in quantities broadly analogous to the incidence of hate crimes committed against other groups universally protected in hate crime statutes. Common threads run through the commission of much anti-homosexual hate crimes.

Hate crimes against lesbians and gay men are also significant because some agents of the justice system may consider them "insignificant,

266 See supra part II.A.1.b.
267 The NGLTF, for example, has been keeping records on anti-lesbian and anti-gay violence since 1985. See 1990 NGLTF REPORT, supra note 139, at 1.
268 See supra notes 181 & 182 and accompanying text.
269 Comparisons were earlier made, for example, concerning data for relevant periods compiled by the NGLTF and the ADL. See supra notes 98, 129-137, & 152 and accompanying text.
believing that such crimes primarily consist of fabricated incidents produced by the hysterical imaginations of homosexuals. Although some reported hate crimes may be exaggerated, a danger of exaggeration is no doubt present in all reported crime data, whether or not they have to do with hate crimes or homosexuals. Although the reporters of anti-gay and -lesbian hate crime statistics acknowledge the limitations of their data, no serious observer has for that reason challenged statements that such hate crimes are widespread, significant, and persistent. Such statements could not be made about hate crimes against people who “don’t believe in the hole in the ozone layer” or who “don’t believe the earth revolves around the sun.” Such statements could not even be made about attacks against Republicans or Democrats.

The fact is that the same “slippery slope” arguments about the ozone or earth-orbit believers, Democrats or Republicans, could have been made with respect to the Civil Rights Act of 1964. The 1964 Act initiated the modern era of civil rights protection in this century and is the source of the modern Title VII. Could one not have argued in 1964 that the Act was inadvisable because if we protect African-Americans and Jews against discrimination, the next thing you know ozone and earth-orbit believers, Democrats and Republicans, will claim the same protection?

Such an argument would not have been persuasive after a realistic and unbiased assessment of social conditions. Such an assessment would have required the conclusion that some groups in society have suffered a long history of discrimination, are at greater risk of discrimination, and stand to suffer more dire consequences from discrimination than others. It was imperative to protect these disadvantaged groups from such consequences. In this light, any “slippery slope” argument about ozone and earth-orbit believers, in the context of the 1960s civil rights movement, should have been seen as a diversion divorced from reality.

“Smoke screen” arguments such as those suggested by Justice Scalia’s Mitchell questioning should be resisted. The victimization of homosexual men and women by hate crimes is no less a social reality than the victimization of other minorities by hate crimes or the general societal discrimination experienced by many. Discrimination against lesbians and gay men by excluding them from hate crime protection is particularly serious, however, because it discriminates in allowing access to a fundamental right under the Equal Protection Clause.

The discrimination outlawed by the 1964 Civil Rights Act was also on a different footing than the right asserted here. Arguably, there is no

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270 See supra part II.A.2.b.
fundamental right to a particular job or to be served at a particular hotel or restaurant. The discrimination in those cases is invidious, but that may be solely because of the classifications used, not the fundamental character of any rights there involved. With hate crime statutes, however, a fundamental right is squarely implicated, rooted firmly in the policy and history of the 1866 Civil Rights Act, the Fourteenth Amendment and the Equal Protection Clause. Once the government undertakes to protect one class of persons from the same act of criminal violence more than another, it approaches a very serious threshold of legitimacy. If it does so by denying homosexuals hate crime protection while granting it to others, it has crossed the threshold into presumptive illegitimacy.

Other groups may make the same constitutional argument for themselves that is advanced here for lesbians and gay men. If any such group could show that hate crimes against its members across the country were widespread, persistent and significant, that a social history of hate crime against its members existed, that such incidents were tabulated and recorded, and that such incidents produced identifiable and distinct patterns of criminal behavior in perpetrators, then the social reality of their victimization would be established. Excluding such a group from hate crime protection while granting hate crime protection to others would indeed occasion strict review under the Equal Protection Clause. This review results from the very critical and very fundamental nature in our history of the right to the equal protection of a particular kind of law; the kind of law that provides for the security of the person and safety from violence.

4. Clear and Facial Discrimination

A hate crime statute that excludes homosexuals does so by its terms. The discrimination occurs either explicitly through a listing of traits not including sexual orientation or indirectly through judicial interpretation of a civil rights model statute. In either situation, discrimination has certainly occurred. The text of the statute, as written or interpreted, protects one class of persons and not another.

The effectiveness of a given statute in preventing hate crimes—even against gay men and lesbians—is irrelevant to assessing the facial discrimination worked by the statute. It is accordingly irrelevant what the actual experience of a particular statute may be in any particular case. It has been argued that hate crime statutes are unlikely to produce the effects for which they are designed, and the extent to which they in fact

273 All of these characteristics are true with respect to anti-homosexual violence, as discussed supra.
274 See Symposium, Penalty Enhancement, supra note 7, at 388–93.
function as deterrents is uncertain. 275 This is unimportant. What counts is the facial applicability of the statute to one group and not another. 276

5. Intentional Legislative Discrimination

Legislatures often intend to discriminate against lesbians and gay men when enacting limited hate crime statutes. For example, in the New York state legislature, a new hate crime statute has been repeatedly defeated by state legislators who have declared their desire, among other things, to avoid the protection of lesbians and gay men. 277 Similar events have been reported in the Missouri legislature, where a hate crime reporting statute was killed because its proponents insisted that sexual orientation be included in the bill’s terms for hate crime reporting. 278 In both states, previously enacted hate crime laws protect several other classes of victims from hate crimes but exclude lesbians and gay men. 279

Intentional discrimination by the legislature is particularly pernicious, but even when a legislature excludes homosexuals incidentally or inadvertently, the discrimination is no less clear and direct. The equal protection

275 It is of course broadly acknowledged that deterrence is one of the traditional justifications for punishment. See, e.g., WAYNE R. LAFAVE & AUSTIN W. SCOTT, CRIMINAL LAW § 1.5, at 24–25 (2d ed. 1986); Ernest van den Haag, Legal Punishment, 26 Am. CRIM. L. REV. 1789, 1795, 1799–1801 (1989). If one were to criticize hate crime statutes in particular because deterrence in general does not work, one would need to address much more of the criminal law than merely hate crime statutes, as the deterrence rationale underlies much of criminal justice theory. On the other hand, the Federal Sentencing Guidelines make significant use of the device of sentence enhancements, presumably at least in part because of their deterrent value. See, e.g., Michael Schechter, Sentencing Enhancements Under the Federal Sentencing Guidelines: Punishment Without Proof, 19 REV. L. & SOC. CHANGE 653 (1992).

276 This argument is not advanced just in the context of hate crimes. For example, in the aftermath of Brown v. Board of Educ., 347 U.S. 483 (1954), the Supreme Court decided a series of cases invalidating segregated facilities in a variety of contexts: public beaches and bathhouses, municipal golf courses, buses, parks, athletic contests, airport restaurants, courtroom seating and municipal auditoriums. See NOWAK & ROTUNDA, supra note 13, § 14.8(d)(2) at 626. It would not have mattered for equal protection purposes the extent to which such laws were actually enforced or the extent to which they actually resulted in racial segregation. The fact that the laws provided for unequal treatment on their face was enough to work the societal harm for purposes of Brown and its progeny.

Skinner v. Oklahoma, 316 U.S. 535 (1942), reinforces this point in a slightly different way. In Skinner, a state criminal statute by its terms provided for the sterilization of habitual violators of certain criminal laws but not others. The Supreme Court noted that the sterilization scheme impaired the fundamental right to procreation. Arguably, this would have been no less the case if in actual practice the sterilization procedure were only used on persons who for whatever reason (age, poor health, infertility) were much less apt to procreate anyway. What matters is not the extent to which the fundamental right may be actually impaired from case to case, but rather the official discrimination stated by the statute on its face.


278 See Senate Committee Deletes Gays From Hate Crimes Bill, supra note 238, at 1.

279 See Mo. ANN. STAT. §§ 574.090–.093 (Vernon 1993); N.Y. PENAL LAW § 240.30 (McKinney 1993).
doctrine developed in cases like Washington v. Davis, requiring inquiry into legislative motive, is also applicable when the discrimination is not stated in the statute but works through disparate impact. The exclusion of homosexuals from the hate crime statutes at issue here is not the result of disparate impact; it is stated in the statutes themselves.

B. The Exclusion of Homosexuals and Strict Scrutiny

A hate crime statute that excludes lesbians and gay men from its coverage invidiously discriminates against them and impair their fundamental right to the equal benefit of laws protecting personal security. It does not follow automatically from this, however, that such laws violate the constitutional guarantee of equal protection. Even invidious discrimination that impairs a fundamental right may still be upheld if it survives strict scrutiny review.

To survive strict scrutiny under the Equal Protection Clause, a statute must satisfy two criteria: (a) it must promote a “compelling state interest,” and (b) it must be “narrowly tailored” to promote that interest. It is unlikely that a hate crime statute that excludes homosexuals would satisfy either of these criteria.

After Bowers v. Hardwick, it is clear that discouragement of homosexual sexual conduct is a legitimate state interest. The Supreme Court held that states could criminalize “homosexual sodomy” and that such state action has a rational basis. The most credible purpose that a state would have for excluding homosexuals from hate crime statutes would be this desire to discourage homosexual behavior.

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280 426 U.S. 229 (1976). In Davis, the Supreme Court analyzed an employment examination used in hiring decisions for a municipal police force. Although the examination on its face was race-neutral, many more white applicants passed than African-American applicants. Id. at 237, 245. In upholding the use of the examination, the Court determined that state action having disparate impact against minorities did not require close scrutiny under the Equal Protection Clause unless the legislature acted with a discriminatory purpose. Id. at 246–48.

281 See, e.g., Nowak & Rotunda, supra note 13, § 14.3, at 575; Tribe, supra note 13, § 16-6, at 1451, § 16-7, at 1454.

282 See, e.g., Nowak & Rotunda, supra note 13, § 14.3, at 575.


284 478 U.S. at 196.

285 Other theoretical bases are possible as rationales for excluding such protection for homosexuals, but most attempts to succinctly state them demonstrate their insubstantiality. For example, one could characterize the state interest as “discouraging people from looking like homosexuals in public,” but this is unlikely to amount to even a legitimate state purpose for equal protection purposes. One could argue that the state purpose is simply to state a moral disapproval of homosexuality. However, this purpose is no more likely to pass strict scrutiny, when applied to hate crime statutes that exclude lesbians and gays, than the purpose posited in the text.
Although it is clear after *Hardwick* that discouraging homosexual behavior is a legitimate state purpose, it is equally clear that this is not a compelling state interest. State sodomy statutes are virtually never enforced against adult gay men and lesbians engaging in private, consensual, noncommercial sexual relations. These kinds of homosexual relations are now and for some time have been quite widespread. If the deterrence of these acts were indeed a compelling state interest, they would be prosecuted at least occasionally. Accordingly, the states have demonstrated by their own behavior that they have no compelling interest in discouraging homosexual sexual conduct. The use of hate crime statutes to discourage such conduct thus fails the first prong of strict scrutiny analysis under the Equal Protection Clause.

Furthermore, no hate crime statute that excludes homosexuals could be considered "narrowly drawn" to advance the state interest of discouraging homosexual sexual conduct. Clearly, no rational relationship exists between more readily allowing criminals to attack homosexuals and discouraging homosexuals from engaging in sexual behavior. One lesbian or gay man might be brutally attacked who had not had homosexual sex for twelve to eighteen months, while another lesbian or gay man might escape hate crimes altogether while having frequent homosexual relations. Furthermore, the link between one's sexual behavior and the protection from personal attack one receives from the criminal law is extremely attenuated.

IV. Conclusion

Even by the most restrictive interpretations of the Fourteenth Amendment, the Equal Protection Clause prohibits the discriminatory impairment of the fundamental right to the equal benefit of laws protecting personal security. Lesbians and gay men are subject to persistent, significant and widespread hate-motivated violence in our country. Yet many state hate crime statutes explicitly exclude them from the added protection such statutes provide to others. This exclusion impairs the fundamental right of lesbians and gay men to the equal benefit of laws protecting personal security and is not sufficiently supported by adequate state policies to withstand close scrutiny under the Equal Protection Clause.

Those statutes that explicitly exclude homosexuals, and those that are interpreted to exclude them, on their face violate the Equal Protection Clause. Statutes that do not contain explicit lists of protected traits must

286 See, e.g., *Hardwick*, 478 U.S. at 198 n.2 (Powell, J., concurring) ("It was conceded at oral argument that, prior to the complaint against respondent Hardwick, there had been no reported decision involving prosecution for private homosexual sodomy under this statute for several decades.").
be interpreted to protect gay men and lesbians in order to survive constitutional examination. Statutes that do contain explicit lists of protected classes must be amended or interpreted to include protection for lesbians and gay men. Statutes that are not so amended or interpreted should be invalidated. Although invalidation may seem a harsh result for statutes designed to protect minorities, the protection they offer embodies discrimination that impairs the fundamental rights of those who are excluded. Such interpretation or amendment of hate crime statutes is in the best interests of potential victims and would be most responsive to the commands of the Constitution.