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THE NOT-SO-GOLDEN YEARS: WHY HATE CRIME LEGISLATION IS FAILING A VULNERABLE AGING POPULATION

*Helia Garrido Hull**

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TABLE OF CONTENTS

| | |
|---|-----|
| INTRODUCTION..... | 388 |
| I. AGEISM IN AMERICA..... | 391 |
| A. Changing Age Demographics..... | 391 |
| B. A Vulnerable Sub-Population..... | 392 |
| C. Violent Victimization of the Elderly | 393 |
| II. HATE CRIMES..... | 394 |
| A. Background..... | 394 |
| B. Do Hate Crime Laws Require Hate? | 397 |
| C. Impact of Hate Crimes on Communities | 399 |
| III. STATE AND FEDERAL RESPONSE TO HATE CRIMES..... | 400 |
| A. Federal Hate Crime Laws..... | 400 |
| 1. <i>Hate Crime Statistics Act</i> | 401 |
| 2. <i>Hate Crimes Sentencing Enhancement Act</i> | 403 |
| 3. <i>Federal Legislation</i> | 405 |
| B. State Response to Hate Crimes..... | 409 |
| 1. <i>Racial Animus Approach</i> | 410 |
| 2. <i>Discriminatory Selection Approach</i> | 411 |
| 3. <i>Multiple Motive Approach</i> | 412 |
| IV. RECOMMENDATIONS..... | 413 |
| A. Establish a Uniform Approach to Hate Crimes | 413 |
| B. Include Age in the List of Protected Characteristics | 415 |
| CONCLUSION | 416 |

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INTRODUCTION

In 2007, a 101-year-old female was brutally attacked inside her apartment complex in New York.¹ Surveillance video revealed a much younger, muscular man holding the apartment complex door open for the victim, who was using a walker.² Once inside, the man hit the victim in the face, knocked her down, and stole her purse.³ One half-hour later, within ten blocks of the first incident, someone mugged an eighty-five-year-old female who used a walker.⁴ The evidence from both crime scenes convinced police officers that the same individual had committed both crimes.⁵ During an eight-week period in the summer of 2008, police reported at least a dozen violent attacks on elderly men and women in surrounding New York boroughs.⁶

In March 2007, two masked men slipped through a window of a mobile home in a retirement community in Zephyrhills, Florida and proceeded to beat and rape the sixty-eight-year-old female occupant.⁷ Three weeks later, in the same city, two men broke into another sixty-eight-year-old woman's home, robbed her, and forced her into a mini-van driven by a third person. The men proceeded to rape the victim before driving the van into a body of water and leaving the victim to die.⁸ Police charged a seventeen-year-old and two eighteen-year-old males with committing both attacks.⁹

In July 2008, a twenty-six-year-old male security guard knocked on a door to a home in Miami, Florida.¹⁰ When the sixty-three-year-old female owner opened the door, the man pushed her inside and attempted to rape her before running away.¹¹ Less than a month later, the same man broke into the same woman's home and again tried to rape her.¹² Three years earlier,

1. See Daniel G. Fish, *Attacks on Elderly Elevated to Hate Crimes*, N.Y.L.J., June 4, 2008, at 3.

2. See *id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. See WCBSTV.com, *Horror Video: Elderly Woman Savagely Mugged*, CBS BROADCASTING INC., Aug. 19, 2008, available at <http://wcbstv.com/elderly.woman.mugged.2.798085.html>.

7. See Gina Pace & Molly Moorhead, *Intruders Rape, Rob Woman*, 68, ST. PETERSBURG TIMES, Mar. 2, 2007, available at http://www.sptimes.com/2007/03/02/Pasco/Intruders_rape_rob_w.shtml.

8. See Firstcoastnews.com, *All Suspects in Zephyrhills Elderly Attack in Custody*, FIRST COAST NEWS, Mar. 29, 2007, <http://www.firstcoastnews.com/news/florida/news-article.aspx?storyid=79023>.

9. See *id.*

10. See David Ovalle, *Security Guard Accused of Attacking Women*, MIAMI HERALD, Aug. 15, 2008, available at 2008 WLNR 15317141.

11. See *id.*

12. *Id.*

the same man was arrested for attacking an elderly woman, but, as a first-time offender, he was not prosecuted after agreeing to enter a pre-trial intervention program.¹³

Between April and August 2008, three individuals ranging in age from seventy-six to eighty-eight were attacked in the Hyde Park area of Boston, Massachusetts.¹⁴ In the first attack, an eighty-eight-year-old woman was sexually assaulted by a man who entered her home located in an elderly housing complex, beat her, and attempted to rape her.¹⁵ In a second attack in the same neighborhood later that week, a seventy-six-year-old man suffered a broken jaw before being robbed.¹⁶ In a third attack several months later, an eighty-four-year-old man was beaten, choked to the point of unconsciousness, and robbed.¹⁷ Police charged a forty-year-old man with the third attack and believed that he had committed the other two.¹⁸

In September 2008, a ninety-two-year-old man was attacked outside a bank in Daytona Beach, Florida and was robbed of \$850.¹⁹ Surveillance video revealed that the victim was sitting on a bench in a plaza counting money when the assailant jumped out of a truck, beat the victim, and threw him to the ground before stealing his wallet and money.²⁰ A few days earlier in the same area, two elderly women were attacked within one hour.²¹ In the first incident, the seventy-six-year-old female victim had just walked out of the bank with an envelope full of cash when she was attacked from behind.²² In the second incident, a seventy-four-year-old female victim had just walked into her home when a man forced his way in behind her. After demanding money, the man threw the victim to the ground, breaking her pelvis.²³ Police officers charged the same thirty-year-old male with all three crimes.²⁴ Similar attacks continue to occur throughout the country.²⁵

13. *Id.*

14. See Milton Valencia, *Hyde Park Man, 40, is Accused of Beating, Robbing 84-Year-Old*, BOSTON GLOBE, Aug. 5, 2008, at 3, available at http://www.boston.com/news/local/articles/2008/08/05/hyde_park_man_40_is_accused_of_beating_robbing_84_year_old/.

15. *See id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. See Local6.com, *Arrest Made in Attacks on Elderly*, WKMG ORLANDO, Sept. 18, 2008, <http://www.local6.com/news/17507232/detail.html>.

20. See Channel 2 News, *2008-09-19 16:13:10*, NBC 2 WESH-ORLANDO, Sept. 19, 2008, available at 2008 WLNR 17884402 (discussing release of video depicting recent attack).

21. See WFTV.com, *Two Elderly Women Attacked Within One Hour in Daytona Beach*, WFTV ORLANDO, Sept. 17, 2008, <http://www.wftv.com/news/17498682/detail.html>.

22. *See id.*

23. *Id.*

24. *Id.*

25. See, e.g., Jonathan Allen, *Sex Offender Arrested, Charged in Assault of Elderly Woman*, THE HERALD (Rock Hill, SC), Jun. 8, 2008, available at

The brutal attacks outlined above share a disturbing, common theme: the deliberate selection of a victim based on the victim's perceived age-related vulnerability. These targeted attacks cause fear and apprehension within the elderly community. Despite a general decline in the overall rate of violent crime in America across all age groups, violent crime against the elderly has increased each year since 2003.²⁶ In response to attacks on the elderly, several states have elected to prosecute attacks against the elderly as hate crimes. This article examines the state and federal response to the observed increase in violent victimization of the elderly. Part I discusses ageism in America and the change in demographics that warrants a re-evaluation of policies intended to protect the elderly population. Part II addresses the purpose of hate crime laws and their application to vulnerable populations. Part III evaluates existing state and federal responses to violent crimes against the elderly and examines existing hate crime laws applicable to violence against the elderly. Part IV provides recommendations and concludes that uniform hate crime legislation is needed to protect vulnerable members of a rapidly expanding elderly population.

<http://www.heraldonline.com/109/story/610954.htm> (reporting that a twenty-four-year-old man broke into a Rock Hill, South Carolina home and sexually assaulted the sixty-nine-year-old female occupant); Kimm R. Montone & Jessica Durkin, *79-year-old Brutally Assaulted Downtown*, THE SCRANTON TIMES-TRIBUNE (Scranton, PA), Aug. 26, 2008, available at 2008 WLNR 16093802 (reporting that in August 2008, an unknown assailant stabbed a seventy-nine-year-old man in the neck a block from his Scranton, Pennsylvania home); Associated Press, *Cops Hunt Small Mob That Attacked, Robbed Elderly New York Couple*, FoxNews.com, Sept. 4, 2008, <http://www.foxnews.com/story/0,2933,417102,00.html> (reporting that in September 2008, several assailants followed a couple, who are in their 70s, from their business in New York to their home, then pulled them out of their car and beat them before fleeing with jewelry); Eyewitnessnews3.com, *Police Investigate Attack Of Elderly Woman*, WFSB HARTFORD, Apr. 28, 2008, <http://www.wfsb.com/news/16032110/detail.html> (reporting that a man broke into the home of an eighty-three-year-old-woman in Connecticut and attempted to sexually assault her); Examiner.com, *21-year-old Man Charged With 8 Brutal Attacks on Elderly*, Feb. 6, 2008, <http://www.examiner.com/a-1204647~21-year-old.html> (reporting that a 21-year-old man has been arrested and charged in connection with eight brutal attacks on elderly victims in California); Ann Kiel, *TBI Investigating Brutal Attack on Elderly Tellico Plains Woman*, 6WATE.com, Mar. 7, 2008, <http://www.wate.com/Global/story.asp?S=7983475> (reporting that a 91-year-old Tennessee woman was beaten and raped in her own home).

26. See Shannan M. Catalano, Ph.D., U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CRIMINAL VICTIMIZATION 2004, at 4 (2005), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cv04.pdf>; see also Michael Rand & Shannan Catalano, Ph.D., U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CRIMINAL VICTIMIZATION 2006, at 4 tbl.3 (Sept. 2007), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cv06.pdf> [hereinafter U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION 2006].

I. AGEISM IN AMERICA

A. Changing Age Demographics

In 2006, the oldest of 78.5 million “baby boomers,” the generation born between 1946 and 1964, turned sixty years old.²⁷ By 2030, all of the baby boomers will be sixty-five years of age or older.²⁸ As a result, the number of individuals sixty-five and over is expected to nearly triple between 2010 and 2050.²⁹ During that period, age categories that include individuals sixty-five and older are the only age categories that are expected to grow.³⁰ This increase in older populations will usher in a dramatic demographic shift in age distributions across America. By mid-century, the number of individuals sixty-five and over will increase from 12.97 percent of the population to 20.17 percent, while the number of individuals in all other age categories is expected to decline.³¹ In 2007, approximately one in eight Americans was sixty-five or older.³² By 2050, that number is expected to increase to one in four.³³ This increase mirrors a global shift in age demographics.³⁴

As the elderly population increases, individuals within that population are living longer. The oldest age sub-group, individuals eighty-five years of age and older, is growing at a faster rate than the total elderly population.³⁵ In 2000, for example, there were 4.2 million individuals eighty-five and over, accounting for approximately twelve percent of the total elderly popu-

27. U.S. CENSUS BUREAU, FACTS AND FIGURES, OLDEST BABY BOOMERS TURN 60 (Jan. 3, 2006), available at http://www.census.gov/Press-Release/www/releases/archives/facts_for_features_special_editions/006105.html.

28. U.S. CENSUS BUREAU, AN OLDER AND MORE DIVERSE NATION BY MIDCENTURY (Aug. 14, 2008), available at <http://www.census.gov/Press-Release/www/releases/archives/population/012496.html>.

29. U.S. CENSUS BUREAU, U.S. POPULATION PROJECTIONS, PROJECTIONS OF THE POPULATION BY AGE AND SEX FOR THE UNITED STATES: 2010 TO 2050 (2008), available at <http://www.census.gov/population/www/projections/summarytables.html> [hereinafter U.S. CENSUS BUREAU, U.S. POPULATION PROJECTIONS].

30. *Id.*

31. *Id.*

32. U.S. CENSUS BUREAU, U.S. STATISTICS IN BRIEF (2000-2007), available at <http://www.census.gov/compendia/statab/files/pop.xls>.

33. U.S. CENSUS BUREAU, U.S. POPULATION PROJECTIONS, *supra* note 29.

34. See World Health Org., *Elder Abuse and Alcohol Fact Sheet*, available at http://www.who.int/violence_injury_prevention/violence/world_report/factsheets/ft_elder.pdf (last visited Aug. 10, 2009) (noting that worldwide, the number of older people (60 or above) is expected to triple from 672 million to 1.9 billion by 2050).

35. Lisa Hetzel & Annetta Smith, U.S. CENSUS BUREAU, THE 65 YEARS AND OLDER POPULATION: 2000 (Oct. 2001), available at <http://www.census.gov/prod/2001pubs/c2kbr01-10.pdf>.

lation.³⁶ By 2050, the number of individuals aged eighty-five and over is expected to increase to almost twenty million and comprise more than eighteen percent of the elderly population.³⁷

B. A Vulnerable Sub-Population

Although not every individual over sixty-five years of age is vulnerable as a result of age-related impairments, approximately “[e]ighty-eight percent of those over 65 years of age have at least one chronic health condition.”³⁸ About thirty percent of those individuals over sixty have a hearing impairment, and that percent increases with age.³⁹ Peripheral vision is reduced with age, and serious vision impairments such as cataracts, glaucoma, and blindness affect between seven and fifteen percent of older adults.⁴⁰ Because bones become more brittle as individuals age, many older adults are at increased risk of suffering broken bones when assaulted.⁴¹ Even a relatively minor injury can cause serious and permanent damage in an elderly patient.⁴² In fact, falls are a leading cause of injuries, hospital admissions for trauma, and deaths in the elderly population.⁴³ Individuals suffering from one or more of these physical impairments are particularly vulnerable, which may help explain why they are targeted by criminals.

Compared with violent crime victims in other age groups, elderly victims of non-lethal violence are less likely to use self-protective measures, such as arguing with the offender, running away, calling for help, or attacking the defender.⁴⁴ In fact, individuals in the sixty-five and over age categories are the least likely of all age groups to use self-protective measures to protect themselves from the violent actions of others.⁴⁵

36. *Id.*

37. U.S. CENSUS BUREAU, U.S. POPULATION PROJECTIONS, *supra* note 29.

38. See CDC, HEALTHY AGING, CHRONIC DISEASES (Oct. 23, 2008), available at <http://www.cdc.gov/aging/info.htm> [hereinafter CDC, CHRONIC DISEASES].

39. See Suzanna Smith & Jennifer E. Gove, *Physical Changes of Aging*, Aug. 2005, available at <http://edis.ifas.ufl.edu/pdf/HE/HE01900.pdf>.

40. *See id.*

41. See World Health Org., *Abuse of the Elderly*, 2002, available at http://www.who.int/violence_injury_prevention/violence/world_report/factsheets/en/elderabusefacts.pdf.

42. *See id.*

43. CDC, CHRONIC DISEASES, *supra* note 38.

44. See U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CRIMES AGAINST PERSONS AGE 65 OR OLDER, 1992-97, at 2 (Feb. 7, 2000), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cpa6597.pdf> [hereinafter CRIMES AGAINST PERSONS AGE 65 OR OLDER]. Non-lethal violence is defined as rape, robbery, aggravated assault and simple assault. *Id.* at 25.

45. *See id.* at 2 (finding that individuals in the 65 plus age category were 20 percent “less likely to use self-protective measures” during an attack than individuals in the 50 to 65 year old age category).

C. Violent Victimization of the Elderly

Individuals in older age groups are generally the victims of fewer violent crimes than individuals in younger age groups.⁴⁶ Across the nation, however, older Americans are increasingly becoming the victims of violent crime.⁴⁷ Between 2003 and the end of 2006, violent victimization of individuals between fifty and sixty-five years of age increased from 10.6 incidents per 1000 persons to 13.1 per 1000 persons, a twenty-four percent increase.⁴⁸ During that same period, the incidence of violent crime against individuals sixty-five years of age and older increased from 2.0 per 1000 persons to 3.5 per 1000 persons, a seventy-five percent increase.⁴⁹ According to statistics released from the Center for Disease Control (CDC), in 2005, a total of 8,343 individuals sixty years of age and above died as the result of a violence-related injury.⁵⁰ In 2006, 48,272 individuals sixty years of age and older were the victim of a non-fatal injury as a result of violence.⁵¹ This amounts to approximately 1 in every 1000 individuals in that age range.⁵²

Violent crime victimization of the elderly increases the risk of nursing home placement, where the victim faces a significant risk of being subjected to additional harm.⁵³ In one national study, among seven types of abuse perpetrated against nursing home residents, physical abuse was the most common type reported.⁵⁴ Between one and two million Americans age six-

46. See, e.g., U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, VIOLENT VICTIMIZATION RATES BY AGE, 1973-2008 (Sept. 2, 2009), available at <http://www.ojp.usdoj.gov/bjs/glance/tables/vagetab.htm> ("Violent crimes included are homicide, rape, robbery, and both simple and aggravated assault."); U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION 2006, *supra* note 26.

47. See U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION 2006, *supra* note 26.

48. See *id.*

49. See *id.*

50. CDC, UNITED STATES VIOLENCE-RELATED INJURY DEATHS AND RATES PER 100,000 (2005), http://webapp.cdc.gov/sasweb/ncipc/mortrate10_sy.html (tag "violence-related" and "all injury;" enter "2005" to "2005" as year of report; select "60-85+" in the custom age group; submit request).

51. CDC, VIOLENCE-RELATED ALL INJURY CAUSES NONFATAL INJURIES AND RATES PER 100,000 (2006), <http://webappa.cdc.gov/sasweb/ncipc/nfirates2001.html> (tag "violence-related" and "all causes;" enter "2006" to "2006" as year of report; place "60-85+" in the custom age group; tag advance statistics; submit request).

52. See *id.*

53. See Marc Lach et al., *Violent Crime Victimization Increases the Risk of Nursing Home Placement in Older Adults*, 46 THE GERONTOLOGIST 583, 583 (2006), available at <http://gerontologist.gerontologyjournals.org/cgi/reprint/46/5/583>.

54. See National Center on Elder Abuse, *Elder Abuse Prevalence and Incidence*, (2005), http://www.ncea.aoa.gov/ncearoot/Main_Site/pdf/publication/FinalStatistics050331.pdf (citing DEP'T OF HEALTH AND HUMAN SERVS., U.S. ADMINISTRATION ON AGING, NATIONAL OMBUDSMAN REPORTING SYSTEM DATA TABLES (2003)).

ty-five or older have been injured, exploited, or otherwise mistreated by someone that they depended upon for care and protection.⁵⁵

The increase in violent crime against the elderly is particularly disturbing in view of the fact that the overall rate of violent crimes against individuals in all age groups has declined over this same time period.⁵⁶ Yet, with the exception of local outrage, the increase in violent victimization of the elderly has received little attention on the state or national level. This is likely due to the fact that early studies reported that the number of individuals sixty-five and over who are victims of violent crime is relatively low, statistically, compared to the number of individuals victimized in other age groups.⁵⁷ However, in view of the demographic shift in age categories expected in the near future, the number of violent crimes perpetrated against older Americans is likely to increase significantly.

II. HATE CRIMES

A. Background

In the United States, hate crime laws originated to address violence and intimidation associated with racial and religious animus among racial and ethnic groups.⁵⁸

Congress first attempted to address the problem by passing The Civil Rights Act of 1871, which was intended to protect African-American individuals' right to vote, to hold office, to serve on juries, and to receive equal protection of laws—rights that were being denied to many blacks through racially motivated violence and intimidating actions perpetrated by the Ku Klux Klan.⁵⁹ The Act failed to achieve Congress' intent and tension be-

55. *See id.*; *see also* MINORITY STAFF OF SPECIAL INVESTIGATIONS DIV. OF H.R. COMM. ON GOVERNMENT REFORM, 107TH CONG., ABUSE OF RESIDENTS IS A MAJOR PROBLEM IN U.S. NURSING HOMES 6 (Comm. Print July 30, 2001), *available at* http://www.cbsnews.com/htdocs/pdf/waxman_nursing.pdf (reporting that the number of nursing homes cited for abuse against residents tripled between 1996 and 2000).

56. According to data released by the Department of Justice, the incidence of violent crime in America declined slightly between 2006 and 2007. *See* U.S. DEP'T OF JUSTICE, 2007 CRIME IN THE UNITED STATES (Sept. 2008), *available at* http://www.fbi.gov/ucr/cius2007/offenses/violent_crime/index.html.

57. *See, e.g.*, CRIMES AGAINST PERSONS AGE 65 OR OLDER, *supra* note 44.

58. *See* U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE, A POLICYMAKER'S GUIDE TO HATE CRIMES (Mar. 1997), *available at* <http://www.ncjrs.gov/pdffiles1/bja/162304.pdf> [hereinafter POLICYMAKER'S GUIDE]; *see also* U.S. DEP'T OF JUSTICE, FBI, *A Byte Out of FBI History: Imperial Kleagle of the Klu Klux Klan in Custody* (Mar. 11, 2004), *available at* <http://www.fbi.gov/page2/march04/kkk031104.htm> (discussing the rise of the Klu Klux Klan and bias-motivated crimes).

59. *See generally* PBS, *Jim Crow Stories, The Enforcement Acts (1870-71)*, http://www.pbs.org/wnet/jimcrow/stories_events_enforce.html (last visited Aug. 12, 2009).

tween groups increased. Widely publicized acts of violence carried out by members of the Ku Klux Klan—including the lynching of African Americans, cross burnings designed to drive African Americans out of predominantly white areas, and vandalism of synagogues—led Congress to pass landmark laws, including the Civil Rights Acts of 1964⁶⁰ and 1968.⁶¹ Although initially focused on changing the social status of African Americans, the civil rights movement evolved to expand rights for and to reduce violence against other racial and ethnic minorities.⁶² By the 1970s, the women's rights movement and the gay and lesbian rights movement emerged, bringing with them concepts of victims' rights and secondary victimization that lent support to development of anti-hate crime legislation.⁶³

In 1981, the Anti-Defamation League drafted model hate crime legislation containing proposals that addressed institutional vandalism and bias motivated crimes, civil actions for both types of crime, data collection, and law enforcement training.⁶⁴ However, during the ensuing decade, the incidence of reported violence based on race, religion, sexual orientation, ethnicity, and other characteristics appeared to increase.⁶⁵ In 1984, Alan Berg, a popular Jewish radio host who espoused controversial liberal views, was executed by a white supremacist organization called the White Nationalists.⁶⁶ Two years later, three black men were attacked in a “predominately white, middle-class, Italian-American neighborhood” in New York “by a group of white teenagers [who] yell[ed] racial slurs” at the men.⁶⁷ One of

60. See generally Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000e to 2000e17 (2006)). The landmark law barred unequal application of voter registration requirements, outlawed discrimination in public accommodations engaged in interstate commerce, prohibited state and municipal governments from denying access to public facilities based on race, religion, gender, or ethnicity, encouraged desegregation of public schools, and prevented discrimination by government agencies that receive federal funding. *Id.* However, the law did not directly address bias-motivated crime. *Id.*

61. See generally Fair Housing Act of 1968, Pub. L. No. 90-284, 82 Stat. 81 (1968) (codified at 42 U.S.C. §§ 3601-3619 (2006)).

62. See generally, William J. Krouse, *Hate Crime Legislation*, CONGRESSIONAL RESEARCH SERVICE, July 18, 2007, at 4, available at <http://lieberman.senate.gov/documents/crs/hatecrime.pdf>.

63. *Id.*

64. See generally Anti-Defamation League, *Hate Crime Laws: ADL Approach to Hate Crime Legislation*, 2001, available at http://www.adl.org/99hatecrime/text_legis.asp [hereinafter Anti-Defamation League, *Hate Crime Laws*]. See also Krouse, *supra* note 62, at 6.

65. See Krouse, *supra* note 62, at 9.

66. See Clarissa Pinkola Estés, *The Ironies: White Supremacist Convicted in Slaying of Alan Berg, Dies*, THE MODERATE VOICE, May 30, 2007, <http://themoderatevoice.com/13149/the-ironies-man-convicted-of-slaying-alan-berg-dies/>.

67. See History.com, *Man Chased to His Death in Howard Beach Hate-Crime*, A&E TELEVISION NETWORKS, Dec. 20, 1986, <http://www.history.com/this-day-in-history.do?action=tdih ArticleCategory&id=53345>.

the black men “was chased into traffic . . . and died after being hit by a car,” another was “severely beaten,” while the third man “escaped without serious injury.”⁶⁸ The media coverage of these and other incidents of hate crimes brought the problem into the national discourse and ignited heated political debate on means to address the problem at both the state and federal levels.⁶⁹ In response, more than half of the states enacted some form of hate crime legislation.⁷⁰ The federal government was slow to respond, in part, due to the absence of any empirical evidence that the incidence of hate crime had increased. Although a few states collected information of hate crimes, the data was insufficient to accurately assess the extent of hate crimes on a national level.⁷¹ The federal government responded by passing legislation that urged states to record data on certain crimes and to voluntarily report that data to federal law enforcement agencies.⁷² The government also passed legislation that allowed federal courts to enhance penalties for certain enumerated federal offenses.⁷³ As a result of this limited action, federal prosecution of hate crimes is carried out under outdated laws that make it almost impossible for federal prosecutors to successfully litigate hate crimes. Federal inaction has left states to formulate their own hate crime legislation, which has resulted in multiple and inconsistent approaches to prosecuting individuals for effectively committing the same offense.

Today, hate crime remains a serious societal problem. In 2006, “the FBI reported 7,722 incidents of hate crimes . . . , of which about 52 percent were directed at people because of their race; 19 percent, because of the victims’ religion; 16 percent because of their sexual orientation; and 13 percent because of their ethnicity or national origin.”⁷⁴ Under the current system, violent crimes against many groups, including the elderly, are not recorded or reported in most jurisdictions.

68. *Id.*

69. See generally JACK LEVIN & JACK MCDEVITT, *HATE CRIMES: THE RISING TIDE OF BIGOTRY AND BLOODSHED* 1-8, 75, 86-87 (1993).

70. See generally VALERIE JENNESS & KENDAL BROAD, *HATE CRIMES: NEW SOCIAL MOVEMENTS AND THE POLITICS OF VIOLENCE* 40-41 (1997).

71. See generally Krouse, *supra* note 62, at 6.

72. Hate Crime Statistics Act, Pub. L. No. 101-275, 104 Stat. 140 (1990) (codified at 28 U.S.C. § 534 (2006)) (cited in Krouse, *supra* note 62, at 8-10).

73. Hate Crime Sentencing Enhancements Act of 1994, Pub. L. No. 103-322, § 280003, 108 Stat. 2096 (codified at 28 U.S.C. § 994 (2006)) (cited in Krouse, *supra* note 62, at 10-11).

74. See generally Nat’l Crime Prevention Council, *Hate Crime: Information and Resources Regarding Hate Crimes and Bias*, <http://www.ncpc.org/topics/hate-crime> (last visited Aug. 12, 2009).

B. Do Hate Crime Laws Require Hate?

“The term ‘hate crime’ was coined in the 1980s . . . to describe a series of incidents directed at Jews, Asians, and African-Americans.”⁷⁵ Traditional notions of hate crimes conjure images of violence or intimidation motivated by a defendant’s hatred for or prejudice against the victim. In theory, hate crime laws protect against crimes motivated by enmity or animus against a protected class.⁷⁶ However, legal definitions of what constitutes a hate crime vary. For example, The Hate Crimes Statistics Act defines hate crimes as: “crimes that manifest evidence of prejudice based on race, religion, sexual orientation, or ethnicity, including where appropriate the crimes of murder, non-negligent manslaughter; forcible rape; aggravated assault, simple assault, intimidation; arson; and destruction, damage or vandalism of property.”⁷⁷

The Department of Justice defines hate crimes as “offenses motivated by hatred against a victim based on his or her race, religion, sexual orientation, handicap, ethnicity, or national origin.”⁷⁸ According to the International Association of Chiefs of Police, “a hate crime is a criminal offense committed against persons, property or society that is motivated, in whole or in part, by an offender’s bias against an individual’s or a group’s race, religion, ethnic/national origin, gender, age, disability or sexual orientation.”⁷⁹

Under 18 U.S.C. § 245, the primary law under which federal prosecution of hate crimes is carried out, a victim is not expressly required to present evidence of the defendant’s bias or animus.⁸⁰ However, courts have interpreted the statute to require proof of animus.⁸¹ Section 245 prohibits the use of force or threat of force, to injure, intimidate, or interfere with any person based on the person’s “race, color, religion, or national origin,” while the person is engaged in certain federally protected activities.⁸²

75. U.S. DEP’T OF JUSTICE, NATIONAL INSTITUTE OF JUSTICE, HATE CRIME (Nov. 6, 2007), <http://www.ojp.usdoj.gov/nij/topics/crime/hate-crime/welcome.htm>.

76. See generally POLICYMAKER’S GUIDE, *supra* note 58, at ix.

77. See generally Hate Crime Statistics Act, *supra* note 72.

78. See generally POLICYMAKER’S GUIDE, *supra* note 58, at ix.

79. See generally Nancy Turner, *Responding to Hate Crimes: A Police Officer’s Guide to Investigation and Prevention*, International Association of Chiefs of Police, <http://www.theiacp.org/PublicationsGuides/LawEnforcementIssues/Hatecrimes/RespondingtoHateCrimesPoliceOfficersGuide/tabid/221/Default.aspx> (last visited Aug. 12, 2009).

80. 18 U.S.C. § 245(b) (2006).

81. See, e.g., *United States v. Makowski*, 120 F.3d 1078, 1081 (9th Cir. 1997) (noting that racial animus must be a motivating factor in the use or threat of force in a prosecution under 18 U.S.C. § 245(b)).

82. See 18 U.S.C. § 245 (2006). This Section provides in pertinent part:

Under the Violent Crime Control and Law Enforcement Act of 1994, a hate crime is defined as “a crime in which the defendant intentionally selects a victim, or in the case of a property crime, the property that is the object of the crime, because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person.”⁸³ The Anti-Defamation League (ADL) model legislation on hate crimes, which has been adopted by a majority of states, provides that “a person commits a Bias-Motivated Crime if, by reason of the actual or perceived race, color, religion, national origin, sexual orientation or gender of another individual or group of individuals” he violates a provision for some statutorily proscribed criminal conduct.⁸⁴

The lack of a unified definition of what qualifies as a hate crime has led to the untenable result of loci dependant liability for individuals committing the same type of offense against the same type of victim.

(b) Whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with . . .

(2) any person because of his race, color, religion or national origin and because he is or has been –

(A) enrolling in or attending any public school or public college;

(B) participating in or enjoying any benefit, service, privilege, program, facility or activity provided or administered by any State or subdivision thereof;

(C) applying for or enjoying employment, or any perquisite thereof, by any private employer or any agency of any State or subdivision thereof, or joining or using the services or advantages of any labor organization, hiring hall, or employment agency;

(D) serving, or attending upon any court of any State in connection with possible service, as a grand or petit juror;

(E) traveling in or using any facility of interstate commerce, or using any vehicle, terminal, or facility of any common carrier by motor, rail, water, or air;

(F) enjoying the goods, services, facilities, privileges, advantages, or accommodations of any inn, hotel, motel, or other establishment which provides lodging to transient guests, or of any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility which serves the public and which is principally engaged in selling food or beverages for consumption on the premises, or of any gasoline station, or of any motion picture house, theater, concert hall, sports arena, stadium, or any other place of exhibition or entertainment which serves the public, or of any other establishment which serves the public and (i) which is located within the premises of any of the aforesaid establishments or within the premises of which is physically located any of the aforesaid establishments, and (ii) which holds itself out as serving patrons of such establishments

Id.

83. See generally Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 280003, 108 Stat. 1796 (1994) (codified in part at 28 U.S.C. § 994 (2006)).

84. See generally Anti-Defamation League, *Hate Crime Laws*, *supra* note 64.

C. Impact of Hate Crimes on Communities

While debate continues regarding who should be protected under hate crime laws, most commentators agree that sentence enhancement penalties are proper to address the effect of hate crimes on victims, members in the victim's group, and society as a whole.⁸⁵ According to the Anti Defamation League:

Hate crimes demand a priority response because of their special emotional and psychological impact on the victim and the victim's community. The damage done by hate crimes cannot be measured solely in terms of physical injury or dollars and cents. Hate crimes may effectively intimidate other members of the victim's community, leaving them feeling isolated, vulnerable and unprotected by the law. By making members of minority communities fearful, angry and suspicious of other groups—and of the power structure that is supposed to protect them—these incidents can damage the fabric of our society and fragment communities.⁸⁶

In enacting federal legislation on hate crimes, Congress recognized the “unique emotional psychological impact on the victim and the community” that results from hate crimes.⁸⁷ The American Psychological Association recognizes that “the experience of criminal and violent victimization has profound psychological consequences.”⁸⁸ In *Wisconsin v. Mitchell*, the United States Supreme Court noted that hate crime “is thought to inflict greater individual and societal harm . . . bias-motivated crimes are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest.”⁸⁹ Where an individual is victimized based on a particular physical characteristic, it is often unsettling to the victim because there is nothing he or she can do to alter the situation.⁹⁰ In many instances, both the victim and the entire class of individuals sharing

85. Frederick M. Lawrence, *The Punishment of Hate: Toward A Normative Theory of Bias-Motivated Crimes*, 93 MICH. L. REV. 320, 349 (1994) (arguing that bias crimes ought to receive punishment that is more severe than that imposed for parallel crimes); Troy A. Scotting, Comment, *Hate Crimes and the Need for Stronger Federal Legislation*, 34 AKRON L. REV. 853, 865 (2001) (noting that hate crimes merit higher punishment than do parallel crimes).

86. See generally Anti-Defamation League, *Hate Crimes Laws: Introduction*, 2001, <http://www.adl.org/99hatecrime/intro.asp>.

87. See 135 CONG. REC. S3784 (1989) (daily ed. Mar. 8, 1989) (statement of Sen. Simon); see also Hate Crime Statistics Act, Pub. L. No. 101-275, 104 Stat. 140 (1990) (codified at 28 U.S.C. § 534 (2006)).

88. See Ruth Ullman Paige, *Reports of the American Psychological Association for the Legislative Year 2004*, 60 AMERICAN PSYCHOLOGIST 436, 505 (2005).

89. 508 U.S. 476, 487-88 (1993).

90. See U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *Violent Victimization Rates by Age, 1973-2008* (Sept. 10, 2006), available at <http://www.ojp.usdoj.gov/bjs/glance/tables/vagetab.htm>.

the physical characteristic in the community are negatively affected.⁹¹ Members of the same group may feel vulnerable because they are within the “targeted” group, and they have no control over that reality.⁹² For the elderly population, this is particularly true.

In a 2003 study, researchers found that the “reasons for feeling vulnerable to hate crime for the general population . . . were, in descending order, race, religion, age, ethnic origin, gender, sexual orientation and physical disabilities.”⁹³ In contrast, the study revealed that the elderly are concerned with becoming targets for hate crime due to their age more than any other characteristic.⁹⁴ Thus, when a defendant targets an elderly victim, members within the elderly community suffer secondary impacts of the crime because they have no way of changing the characteristic that was targeted: age.

III. STATE AND FEDERAL RESPONSE TO HATE CRIMES

Currently, there is no federal statute that expressly prohibits crimes motivated by hate, and related statutes that have been used to prosecute such crimes are either too narrow or are antiquated and need revision. The federal government’s failure to address hate crimes directly has left states to address the issue on an individual basis, which has resulted in a patchwork of inconsistent, contradictory laws.

A. Federal Hate Crime Laws

Originally incorporated into the 1968 Civil Rights Act, 18 U.S.C. § 245 remains the main federal statute used to prosecute hate crimes. Section 245 serves to prevent and punish the violent interference with an individual’s exercise of specified civil rights when the interference is motivated by the person’s “race, color, religion, or national origin.”⁹⁵ However, convicting an individual of a hate crime under Section 245 has proven difficult. To succeed, prosecutors must first prove that the defendant was motivated to act because of the victim’s race, color, religion, or national origin.⁹⁶ Next, the prosecutor must prove that the criminal action resulted because of the victim’s participation in one of the protected activities.⁹⁷ These activities

91. See U.S. DEP’T OF JUSTICE, FBI, TRAINING GUIDE FOR HATE CRIME DATA COLLECTION (1996), available at <http://www.fbi.gov/ucr/traingd99.pdf>.

92. See generally Turner, *supra* note 79.

93. IDAHO STATE POLICE STATISTICAL ANALYSIS CENTER, ELDERLY VICTIMS OF CRIME 5 (July 2004), http://www.isp.state.id.us/pgt/Research/documents/Elderly_Victimization.pdf.

94. *Id.*

95. See 18 U.S.C. § 245(b)(2) (2006).

96. See, e.g., *United States v. Nelson*, 277 F.3d 164, 188-89 (2d Cir. 2002).

97. See, e.g., *id.*

include enrollment in public education, participation in state programs, obtaining private or state employment, participation in jury service, interstate travel, and use or enjoyment of public accommodations.⁹⁸ The requirements of Section 245 significantly limit its effectiveness in prosecuting hate crimes. As a result, the provision is rarely used to prosecute hate crimes.

Other statutes indirectly protect groups from hate crimes in limited circumstances.⁹⁹ However, those statutes provide little aid to federal prosecutors seeking to convict an individual of a hate crime because, in the absence of a conspiracy, state actor, housing violation, or violation of another federal statute, prosecutors must try hate crimes cases within the restrictive requirements of Section 245.

1. *Hate Crime Statistics Act*

In response to a perceived increase in hate crimes in the late 1980s, Congress passed the Hate Crime Statistics Act (HCSA) in 1990, which created a federal system for keeping track of bias-motivated incidents.¹⁰⁰ The Act directs the U.S. Attorney General to acquire and publish annual data about crimes that “manifest evidence of prejudice based on race, religion, sexual orientation, or ethnicity.”¹⁰¹ The Act was amended in 1994 to add disability as a class of prejudice-based crime.¹⁰² In 1996, the Act was amended again to require annual reporting of these crimes.¹⁰³ State and local law enforcement agencies voluntarily submit data on crimes to the Federal Bureau of Investigation (FBI), and that data is compiled into a national repository under the Uniform Crime Report (UCR) Program.¹⁰⁴

Under the UCR program, law enforcement agencies collect and report details about an offender’s motivation associated with “murder and non-

98. See 18 U.S.C. § 245(b)(2).

99. See, e.g., 18 U.S.C. § 241 (punishing conspiracies that interfere with federal rights, but inapplicable to lone offenders); § 242 (punishing deprivations of federal rights committed by government officials, but inapplicable to private citizens who commit hate crimes); 42 U.S.C. § 3631 (providing for criminal sanctions against status-based deprivations of housing rights); The Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, 1902 (1994) (codified at 42 U.S.C. § 13701 (2006)) (providing a federal civil remedy for victims of gender-based violent crimes); The Church Arson Prevention Act of 1996, Pub. L. No. 104-155, 110 Stat. 1392 (1996) (codified at 18 U.S.C. § 247 (2006)) (extending federal criminal jurisdiction to certain cases of religious vandalism).

100. See generally Hate Crime Statistics Act, Pub. L. No. 101-275, 104 Stat. 140 (1990) (codified at 28 U.S.C. § 534 (2006)).

101. *Id.* § 534(b)(1).

102. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 280003, 108 Stat. 1796 (codified in part at 28 U.S.C. § 994 (2006)).

103. Church Arson Prevention Act, Pub. L. No. 104-155, § 7, 110 Stat. 1392, 1394 (1996) (codified at 18 U.S.C. § 247 (2006)).

104. See U.S. DEP’T OF JUSTICE, FBI, *Uniform Crime Reports*, <http://www.fbi.gov/ucr/ucr.htm> (last visited Aug. 12, 2009).

negligent manslaughter, forcible rape, aggravated assault, simple assault, and intimidation (crimes against persons); and robbery, burglary, larceny-theft, motor vehicle theft, arson, and destruction/damage/vandalism (crimes against property).¹⁰⁵ Currently, the FBI only records data related to a victim's race, religion, sexual orientation, ethnicity or national origin, and disability.¹⁰⁶

The need to determine offender motivation for committing a crime complicates the reporting process under the UCR.¹⁰⁷ Moreover, the HCSA is hampered by the fact that different agencies utilize different definitions for what constitutes a hate crime. As a result of these different approaches, there has been a marked "disparity between figures supplied by law enforcement agencies and those compiled by various private organizations."¹⁰⁸ In 1994, for example, the FBI reported that the number of officially reported hate crime incidents dropped by nearly one-third, despite the fact that 6 percent more agencies had recorded hate crime incidents than during the previous year.¹⁰⁹ Furthermore, many incidents of hate crime are never reported to law enforcement. In a recent study, investigators found that between 2000 and 2003, "an average of 191,000 hate crime incidents involving one or more victims occurred annually," but only an average of 92,000 were reported annually to law enforcement.¹¹⁰ Of those incidents reported to law enforcement, only a fraction were reported to the FBI and included in the FBI's annual UCR reports.¹¹¹ For example, the FBI reported 8,063 bias-motivated criminal incidents in 2000,¹¹² 9,730 incidents in 2001,¹¹³ 7,462 incidents in 2002,¹¹⁴ and 8,706 incidents in 2003.¹¹⁵ The large disparity in statistics makes it difficult to predict whether the problem of hate crimes has increased, decreased, or remained the same. Today, 13,241 state and local

105. U.S. DEP'T OF JUSTICE, FBI, *Hate Crime Statistics, Methodology* (Oct. 2008), <http://www.fbi.gov/ucr/hc2007/methodology.htm>.

106. See U.S. DEP'T OF JUSTICE, FBI, *Hate Crime Statistics, Victim Type by Bias Motivation* (Oct. 2008), http://www.fbi.gov/ucr/hc2007/table_08.htm.

107. POLICYMAKER'S GUIDE, *supra* note 58, at 6.

108. *Id.* at 8.

109. *Id.*

110. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, HATE CRIME REPORTED BY VICTIMS AND POLICE (Nov. 2005), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/hcrvp.pdf>.

111. See *infra* notes 112-15 and accompanying text.

112. U.S. DEP'T OF JUSTICE, FBI, SECTION 1: HATE CRIME STATISTICS, 2000 5, available at http://www.fbi.gov/ucr/cius_00/hate00.pdf.

113. U.S. DEP'T OF JUSTICE, FBI, SECTION 1: HATE CRIME STATISTICS, 2001 5, available at <http://www.fbi.gov/ucr/01hate.pdf>.

114. U.S. DEP'T OF JUSTICE, FBI, SECTION 1: HATE CRIME STATISTICS, 2002 5, available at <http://www.fbi.gov/ucr/hatecrime2002.pdf>.

115. U.S. DEP'T OF JUSTICE, FBI, SECTION 1: HATE CRIME STATISTICS, 2003 5, available at <http://www.fbi.gov/ucr/03hc.pdf>.

law enforcement agencies contribute data on hate crimes under the UCR,¹¹⁶ but that data is limited based on the different manner in which individual officers conduct victim interviews and record information. Moreover, many state hate crime statutes do not address age-based victimization, and that impacts the type of information law enforcement officials obtain from victims.¹¹⁷

State and federal criminal statutes “define and establish penalties” for crimes such as assault, battery, rape, theft, and others; however, prosecution of individuals who perpetrate these crimes against elderly individuals is rare.¹¹⁸ Such prosecutions may be “hampered by . . . victims’ fear of retaliation,” or lack of capacity to describe the crime or perpetrator, or by the requirement to show that the accused was motivated to act because of the victim’s age or vulnerability.¹¹⁹ Elderly victims may also be reluctant to report a hate crime out of a fear that they will be re-victimized, that law enforcement agencies will fail to respond appropriately; or, they may fail to report the crime because they feel ashamed or humiliated for being victimized.¹²⁰ As a result, it is nearly impossible under the current system to accurately assess the incidence of violent victimization of the elderly.

2. *Hate Crimes Sentencing Enhancement Act*

In 1994, Congress passed the Hate Crimes Sentencing Enhancement Act (HCSEA) as a federal complement to state hate crime penalty-enhancement statutes.¹²¹ The HCSEA increases the penalty for an underlying criminal offense by three levels where the evidence demonstrates that the crime occurred “because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person.”¹²² However, the HCSEA is limited because it only applies to cases tried in federal courts, to a small number of underlying offenses, and to a limited number of protected groups. Age-related bias crimes are not subject to the sentence enhancement provisions.

116. U.S. DEP’T OF JUSTICE, FBI, *Hate Crime Statistics, Agency Hate Crime Reporting by State, 2007* (Oct. 2008), http://www.fbi.gov/ucr/hc2007/table_12.htm (reporting that 13,241 law enforcement agencies contributed data to the UCR in 2007).

117. See U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *Law Enforcement Statistics* (July 9, 2009), <http://www.ojp.usdoj.gov/bjs/lawenf.htm>.

118. U.S. ADMIN. ON AGING, NAT’L CTR. ON ELDER ABUSE, *Is Elder Abuse a Crime?* (Aug. 26, 2008), http://www.ncea.aoa.gov/NCEARoot/Main_Site/FAQ/Basics/Crime.aspx.

119. *Id.*

120. Turner, *supra* note 79.

121. See generally Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 280003, 108 Stat. 1796, 2096 (1994) (codified in part at 28 U.S.C. § 994 (2006)) (passing the Hate Crimes Sentencing Enhancement Act as part of the Violent Crime Control and Law Enforcement Act of 1994).

122. *Id.*

Section 3A1.1 of the Federal Sentencing Guidelines provides for penalty enhancements where the offense constitutes a hate crime¹²³ or is perpetrated against a “vulnerable victim.”¹²⁴ Under Section 3A1.1(a), where the crime is committed “because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person,” courts are instructed to increase the penalty of the underlying offense by three levels.¹²⁵ However, under Section 3A1.1(b), where the defendant knew or should have known that the victim was “unusually vulnerable due to age, physical or mental condition, or who [was] otherwise particularly susceptible to the criminal conduct,” courts are instructed to increase the penalty of the underlying offense by only two levels.¹²⁶ In that situation, the defendant cannot be prosecuted for a hate crime and the court has no authority to enhance the sentence on that basis.

The division drawn between Sections 3A1.1(a) and (b) creates a distinction without a difference and provides less protection for elderly victims of crime without justification. For example, under Section 3A1.1(a), a defendant who victimizes a disabled man faces a longer sentence and the stigma of being charged with a hate crime. However, if that same defendant targets an elderly disabled man, the defendant may or may not be subject to the enhanced penalty provision and stigma. Absent proof that that the elderly man was targeted because he was disabled and not because he was elderly, Section 3A1.1(a) is inapplicable. Given that a large segment of the elderly population suffers from one or more age-related disabilities, courts and prosecutors face the daunting task of establishing the real motivation behind the action.¹²⁷ To a lesser degree, the same problem arises with respect to victimization based on other protected characteristics when the victim is also elderly. For example, if an individual robs an Asian teenager based on some stereotype he holds regarding the victim’s Asian identity, the defendant may be prosecuted for a hate crime and will be subject to the corresponding penalty enhancement under Section 3A1.1(a). However, if the same person commits the same offense against a frail, elderly Asian man, should the defendant be penalized to a lesser degree because the victim was frail or to a higher degree because the man was Asian? Is the victim subject to more physical and psychological harm from the robbery because he is

123. U.S. SENTENCING GUIDELINES MANUAL § 3A1.1(a) (2008).

124. *Id.* § 3A1.1(b).

125. *Id.* § 3A1.1(a).

126. *Id.* § 3A1.1(b) cmt. 2.

127. Matthew Brault, *Disability Status and the Characteristics of People in Group Quarters: A Brief Analysis of Disability Prevalence Among the Civilian Noninstitutionalized and Total Populations in the American Community Survey*, U.S. CENSUS BUREAU, Feb. 2008, at tbl. 1, available at <http://www.census.gov/hhes/www/disability/GQdisability.pdf> (reporting that forty-one percent of the population sixty-five years of age and older were disabled in 2008).

frail or because he is Asian? To effect the purpose of hate crime laws, i.e. to protect vulnerable populations and communities from the unique harms inherent in being victimized based on an immutable characteristic, courts and juries must assess which scenario results in the greater harm. The distinction drawn between Section 3A1.1(a) and (b) serves no purpose and should be eliminated.

3. *Federal Legislation*

Critics have argued that 18 U.S.C. § 245 is outdated because it fails to incorporate crimes motivated by the victim's gender, sexual orientation, or disability, and it only has limited application in federal courts.¹²⁸ In recognition of the inadequacies of existing federal hate crime laws, a number of bills have been proposed. The Hate Crimes Prevention Act (HCPA), later renamed the Local Law Enforcement Hate Crimes Prevention Act (LLEHCPA or "Matthew Shepard Act"), has been introduced in substantially similar form in each Congress since 1999.¹²⁹ Like its predecessors, the LLEHCPA seeks to eliminate the excessive restrictions of existing federal law requiring proof that victims were attacked because they were engaged in certain federally protected activities. The LLEHCPA seeks to: (1) expand the scope of the existing law to cover crimes committed against persons because of their sexual orientation, gender, gender identity, or disability in cases involving interstate commerce; and (2) extend protection beyond the limited number of federally protected activities listed in Section 245.¹³⁰ The legislation would also allow the federal government to provide technical support to state, tribal, and local law enforcement to investigate and prosecute hate crimes.¹³¹ Despite widespread support, the Act has faced opposition and delay for more than a decade. One primary criticism of the Act is that it promotes disproportionate justice for victims of certain crimes and

128. *Id.*; see also Int'l Human Rights Law Group, *Race Matters: Expert Briefing for the United Nations Committee on the Elimination of Racial Discrimination*, 14-17 (Mar. 21, 2001), [available at](http://www.globalrights.org/site/DocServer/IHRLG_CERD_Expert_Briefing_2001.pdf?docID=209) http://www.globalrights.org/site/DocServer/IHRLG_CERD_Expert_Briefing_2001.pdf?docID=209.

129. See, e.g., H.R.1592, 110th Cong. (2007).

130. See *id.*; S. 1105, 110th Cong. (2007); see also Human Rights Campaign, *The Local Law Enforcement Hate Crimes Prevention Act / Matthew Shepard Act*, Oct. 6, 2008, <http://www.hrc.org/5660.htm>.

131. See H.R. 1592; S. 1105.

leaves other groups unprotected, including the elderly.¹³² As such, say critics, the bill provides unequal protection under the law.¹³³

The failure of LLEHCPA was due in no small part to the Bush Administration's staunch opposition to expanding existing hate crime legislation to cover crimes motivated by a victim's sexual orientation, gender, gender identity, or disability.¹³⁴ However, President Obama made the expansion of hate crime laws a priority of his administration.¹³⁵ He has announced a plan to "strengthen federal hate crimes legislation, expand hate crimes protection by passing the Matthew Shepard Act, and reinvigorate enforcement at the Department of Justice's Criminal Section."¹³⁶ The policy reversal led many commentators to predict that LLEHCPA's reintroduction in the 111th Congress would be successful. In 2009, hate crime legislation was introduced in both the House and Senate and was ultimately signed into law as part of the National Defense Authorization Act for Fiscal Year 2010 by President Obama on October 28, 2009.¹³⁷ The new law gives the Attorney General the power to investigate crimes of violence where the perpetrator selects a victim because of the victim's actual or perceived color, religion, national origin, gender, sexual orientation, gender identity, or disability.¹³⁸ The Attorney General is also authorized to provide technical, forensic, prosecutorial, financial or any other form of assistance in the criminal investigation or prosecution of any covered crime.¹³⁹ Further, the new law provides for the appropriation of funds in 2010, 2011 and 2012 to the Department of Justice to provide personnel to assist state, local, and tribal law

132. See, e.g., OFFICE OF MGMT. AND BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY: 15 H.R. 1592 – LOCAL LAW ENFORCEMENT HATE CRIMES PREVENTION ACT OF 2007 (May 3, 2007), available at <http://www.whitehouse.gov/omb/legislative/sap/110-1/hr1592sap-h.pdf>.

133. See Susan Wunderlink & Collin Hansen, *House Adds Homosexuality to Hate-Crimes Protections*, CHRISTIANITY TODAY, May 4, 2007, <http://www.christianitytoday.com/ct/2007/mayweb-only/118-52.0.html>.

134. See, e.g., OFFICE OF MGMT. AND BUDGET, *supra* note 132.

135. See, e.g., EXECUTIVE OFFICE OF THE PRESIDENT, ISSUES: CIVIL RIGHTS (2009), http://www.whitehouse.gov/issues/civil_rights/.

136. See, e.g., The National Policy Institute, "*Hate Crimes*" Law on Obama's Agenda, Jan. 23, 2009, <http://www.nationalpolicyinstitute.org/2009/01/23/hate-crimes-law-on-obamas-agenda/>.

137. See Pub. L No. 111-84, 123 Stat 2190 (Oct. 28, 2009). On April 29, 2009, the House passed H.R. 1913, the Local Law Enforcement Hate Crimes Prevention Act of 2009. On July 16, 2009, the Senate voted to add hate crime legislation to the National Defense Authorization Act for Fiscal Year 2010 (S.1390). A companion bill, H.R. 2647, the National Defense Authorization Act for Fiscal Year 2010, was adopted by both the House and Senate and was signed into law by President Obama. The hate crimes provision of the bill was re-named the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act.

138. See H.R. 2647, 111th Cong. § 4704(a)(1)(C) (2009).

139. *Id.*; § 4704(b)(1).

enforcement agencies to prosecute covered hate crimes.¹⁴⁰ A companion bill would amend the Internal Revenue Code to allow victims of hate crimes to claim unemployment insurance for loss of employment directly resulting from being victimized by hate crime.¹⁴¹

While the new hate crime legislation is needed to address the inadequacies inherent in the existing federal framework, policymakers still fail to recognize that the rapidly expanding elderly population warrants similar protections from hate crimes. To date, violent crime motivated by age is not part of the national discourse. With the rapidly changing age demographics, a uniform approach to hate crime prosecution is required. The nation will be more racially and ethnically diverse, as well as much older, by mid-century. "In 2006, non-Hispanic whites accounted for 81 percent of the U.S. older population."¹⁴² "Blacks made up 9 percent, Asians made up 3 percent, and Hispanics . . . accounted for 6 percent of the older population."¹⁴³ By 2050, this is expected to shift, at which time the elderly population is expected to be comprised of "61 percent non-Hispanic white, 18 percent Hispanic, 12 percent black, and 8 percent Asian."¹⁴⁴ While the older population is expected to grow across all racial and ethnic groups, the largest growth is expected in the Hispanic and Asian populations.¹⁴⁵ The older Hispanic population is expected to grow from over two million to fifteen million in 2050, eclipsing the older black population by 2028.¹⁴⁶ The older Asian population is also projected to increase from just over one million in 2006, to seven million by 2050.¹⁴⁷ Within these populations, there are millions of individuals that some argue are vulnerable and in need of protection because of their gender, gender identity, or disability.¹⁴⁸

"There are an estimated 8.8 million gay, lesbian, and bisexual (GLB) persons in the U.S."¹⁴⁹ "The number of same-sex couples in the U.S. grew by more than 30 percent from 2000 to 2005, from nearly 600,000 couples in 2000 to almost 777,000 in 2005."¹⁵⁰ One 2003 study revealed that "97 per-

140. § 4706.

141. H.R. 262, 111th Cong. (2009).

142. NAT'L CTR. FOR HEALTH STATISTICS, OLDER AMERICANS 2008: KEY INDICATORS OF WELL BEING, POPULATION 4 (2008), available at http://www.agingstats.gov/agingstats_dotnet/Main_Site/Data/2008_Documents/Population.pdf.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. See Human Rights Campaign, *supra* note 130.

149. Gary J. Gates, *Same-sex Couples and the Gay, Lesbian, Bisexual Population: New Estimates from the American Community Survey*, THE WILLIAMS INSTITUTE, Oct. 2006, at 1, available at <https://www.law.ucla.edu/williamsinstitute/publications/SameSexCouplesandGLBpopACS.pdf>.

150. *Id.*

cent of U.S. counties have a senior in a same-sex partnership [and n]early three in five U.S. counties (1,847) have more same-sex partnered seniors per capita than the national average of one in a thousand people.”¹⁵¹

With regard to gender identity, there are no concrete statistics on the number of transgender people in the United States. However, “[e]stimates on the number of *transsexual* people, which ignore the broader transgender population, range anywhere from 0.25 to 1 percent of the U.S. population.”¹⁵² The actual number is likely higher, however, because the study does not “account for people who have not yet undergone, cannot (for medical, financial, safety or other reasons) or choose not to undergo sex reassignment surgeries.”¹⁵³

“The chances of having a disability increase with age . . .”¹⁵⁴ As of 2005, “18.1 million people 65 and older, or 52 percent, had a disability. Of this number, 12.9 million, or 37 percent, had a severe disability. For people 80 and older, the disability rate was 71 percent, with 56 percent having a severe disability.”¹⁵⁵

Collectively, these facts demonstrate that as the nation becomes older and more racially and ethnically diverse, issues related to sexual orientation, gender, gender identity, and disability will become more prevalent. It will become increasingly difficult to divine the particular motivation that led to a violent act against the elderly. When a gay, elderly, African American is victimized, will it be clear what motivated the attack? When a white, Jewish, disabled elderly female is robbed, is the offender guilty of a hate crime, guilty of attacking a vulnerable victim, or only guilty of the underlying robbery? These questions will present significant problems for courts in the future in the absence of a uniform approach to prosecuting hate crimes.

151. The Urban Institute, *Gay and Lesbian Families in the Census: Gay and Lesbian Seniors* (2003), available at http://www.urban.org/UploadedPDF/900627_Checkpoints_Seniors.pdf.

152. Human Rights Campaign, *Transgender Population and Number of Transgender Employees*, <http://www.hrc.org/issues/transgender/9598.htm> (last visited Aug. 12, 2009).

153. *Id.*

154. See U.S. DEP'T OF COMMERCE, U.S. CENSUS BUREAU, NUMBER OF AMERICANS WITH A DISABILITY REACHES 54.4 MILLION (Dec. 18, 2008), available at http://www.census.gov/Press-Release/www/releases/archives/income_wealth/013041.html.

155. *Id.* The U.S. Census defines severe disability as a disability that renders a person unable to perform one or more functional activities or social roles. See John McNeil, *Population Profile of the United States: Disability*, U.S. CENSUS BUREAU, July 8, 2008, <http://www.census.gov/population/www/pop-profile/disabil.html>.

B. State Response to Hate Crimes

To date, all but five states have enacted some form of hate crime legislation.¹⁵⁶ The exceptions include Arizona, Georgia, Indiana, South Carolina, and Wyoming.¹⁵⁷ All states that have enacted hate crime legislation address crimes motivated by the victim's race, religion, or ethnicity.¹⁵⁸ In addition, thirty-one states have statutes that address sexual orientation; thirty-one address disability; twenty-seven address gender; eleven address transgender/gender-identity; and five address political affiliation.¹⁵⁹ Only ten states have hate crime statutes that address age-based victimization.¹⁶⁰ Thirty-one states and the District of Columbia have statutes creating a civil cause of action, in addition to the criminal penalty, for similar acts.¹⁶¹ Twenty-seven states have enacted reporting statutes that require law enforcement officials to collect data on the commission of hate crimes.¹⁶² Thirty-three states and the District of Columbia have enacted a penalty enhancement statute.¹⁶³

As a result of "status provisions" in hate crime laws, not all forms of violence are recognized as hate crimes. While people harmed because of their color, ethnicity, or national origin, or because they are gay, female, or disabled have been increasingly recognized on the state level as victims of hate crime, other groups, including the elderly, have not. However, individuals within these protected classes age along with the rest of the population and eventually become part of the elderly population. States must determine where the dividing line exists between crimes perpetrated against an

156. See Anti-Defamation League, *Anti-Defamation League State Hate Crime Statutory Provisions*, Aug. 2008, available at http://www.adl.org/99hatecrime/state_hate_crime_laws.pdf (noting that Arizona, Georgia, Indiana, South Carolina, and Wyoming do not have laws that criminalize bias-motivated violence or intimidation).

157. See *id.*

158. See *id.*

159. See *id.*

160. See *id.* District of Columbia (D.C. CODE ANN. § 22-4001 (LexisNexis 2009) and D.C. CODE ANN. § 22-4003 (LexisNexis 2009)), Florida (FLA. STAT. ANN. § 775.085 (LexisNexis 2009) and FLA. STAT. ANN. § 877.19 (LexisNexis 2009)), Iowa (IOWA CODE ANN. § 729A.2 (West 2009)), Louisiana (LA. REV. STAT. ANN. § 15:1204.2B(4) (2009)), Minnesota (MINN. STAT. ANN. § 609.749 (West 2009)), Nebraska (NEB. REV. STAT. ANN. § 28-111 (LexisNexis 2009)), New York (N.Y. PENAL LAW § 485.05 (Consol. 2009)), Oregon (OR. REV. STAT. ANN. § 181.550 (West 2009)); Texas (TEX. PENAL CODE ANN. § 12.47 (Vernon 2009) and TEX. CODE CRIM. PROC. ANN. art. 42.014 (Vernon 2009)); Vermont (VT. STAT. ANN. tit. 13, § 1455 (2009)).

161. See Anti-Defamation League, *Anti-Defamation League State Hate Crime Statutory Provisions*, Aug. 2008, available at http://www.adl.org/99hatecrime/state_hate_crime_laws.pdf.

162. See *id.*

163. *Id.*

elderly person because he is black, gay, or disabled, etcetera, and crimes committed simply because the person's age makes him vulnerable.

The federal government's limited involvement in hate crime prosecution has left states to develop their own approaches to addressing hate crimes. States have typically responded in one of three ways. Some states criminalize actions, or enhance the existing penalty for an action, where the offender selected the victim based on a protected characteristic.¹⁶⁴ Other states have adopted a more narrow view and only criminalize actions, or enhance the existing penalty for an action, upon proof that the offender was motivated by hate or bias toward the victim or the group to which the victim is a member.¹⁶⁵ Still other states have adopted a hybrid approach and penalize actions based on evidence that the offender selected the victim "because of" or "by reason of" the victim's characteristics. Each approach is addressed briefly below.

1. *Racial Animus Approach*

States that have adopted the "racial animus" approach require evidence that the offender was motivated by bias, hatred, or bigotry before the offender can be found guilty of committing a hate crime.¹⁶⁶ Under this approach, a prosecutor must show that the offender's motivation for committing the crime was his or her bias toward, or hatred of, one or more protected characteristics of the victim.¹⁶⁷ The primary benefit of this approach is that it removes crimes of opportunity¹⁶⁸ from prosecution by requiring some showing of actual bias or animus toward the victim or the group to which the victim is a member. To date, less than half the states that have

164. See ALASKA STAT. § 12.55.155 (2009); ME. REV. STAT. ANN. tit. 17-A, § 1151(8)(B) (2009); NEV. REV. STAT. § 193.1675 (2008); TEXAS CODE CRIM. PROC. ANN. art. 42.014 (Vernon 2009); VA. CODE ANN. § 18.2-57 (2009); WIS. STAT. ANN. § 939.645 (West 2009).

165. See ALA. CODE § 13A-5-13 (2009); ARIZ. REV. STAT. ANN. § 13-702 (2009); FLA. STAT. ANN. § 775.085 (West 2009); KAN. STAT. ANN. § 21-4716(c)(2)(C) (2008); MONT. CODE ANN. § 45-5-222 (2008); NEB. REV. STAT. § 28-111 (2008); N.H. REV. STAT. ANN. § 651:6 (2009); R.I. GEN. LAWS § 12-19-38 (2008); VT. STAT. ANN. tit. 13, § 1455 (2009).

166. See, e.g., FLA. STAT. ANN. § 775.085 (2009); MASS. GEN. LAWS ANN. ch. 22C § 32 (2009); N.H. REV. STAT. ANN. § 651:6 (2009).

167. See, e.g., *Freudenberger v. State*, 940 So. 2d 551, 554 (Fla. Dist. Ct. App. 2006) (noting that Florida's hate crime statute applies "only to bias-motivated crime").

168. Crimes of opportunity are "crimes that are committed because of the happenstance of an attractive opportunity." CrimeUSA.com, *Avoiding Crimes of Opportunity*, Feb. 12, 2009, <http://www.crimeusa.com/Avoiding-Crimes-of-Opportunity-n-25.html>.

enacted hate crime legislation require proof that the offender was motivated by bias or animus toward the victim.¹⁶⁹

Prosecuting crimes of opportunity as hate crimes is less likely when the victim is elderly. This is because there is a distinct difference, for example, between robbing a youth and robbing an elderly person of the same object. While the youth may present the object in a way that entices the robber to take a chance at obtaining the object, the robber faces the real risk that the youth will resist the robbery and actually harm the robber. Conversely, in many instances, an elderly person presents limited or no risk and therefore presents a much easier target, based on physical and mental vulnerabilities that often accompany advanced age. Perpetrators of crimes against the elderly intentionally select their victims because of the victim's status as members of the elderly population. Thus, when examining violent crimes against the elderly, courts should discount the argument that racial animus is required to establish a hate crime. As discussed below, many courts have adopted this view.

2. *Discriminatory Selection Approach*

States that have adopted the “discriminatory selection” approach require evidence that the offender selected the victim on the basis of certain prohibited characteristics.¹⁷⁰ Read literally, these types of statutes do not require evidence of bias, hatred, or bigotry for an offender to be convicted of a hate crime. Because the defendant's motivation is not an issue, the prosecutor is not required to prove that the violent act resulted from hatred

169. See ARIZ. REV. STAT. ANN. § 13-702(C)(15) (2009) (requiring malice); ARK. CODE ANN. § 16-123-106 (West 2009) (requiring proof defendant was motivated by animosity); CONN. GEN. STAT. ANN. §§ 53a-181j, 53a-181k, 53a-181l (West 2009) (penalizing conduct based on bigotry or bias); D.C. CODE ANN. § 22-3701 (LexisNexis 2009) (requiring evidence of defendant's prejudice toward the victim); FLA. STAT. ANN. § 775.085 (West 2009) (requiring evidence of defendant's prejudice); GA. CODE ANN. § 17-10-17 (2009) (requiring evidence of bias or prejudice); HAW. REV. STAT. ANN. §§ 706-662(6), 846-51 (LexisNexis 2009) (requiring evidence of defendant's hostility); MASS. GEN. LAWS ANN. ch. 22C, § 32 (West 2009) (requiring conduct motivated by bigotry or bias); MISS. CODE ANN. § 99-19-305(2)(b) (West 2009) (requiring evidence of malicious actions); N.H. REV. STAT. ANN. § 651:6(I)(g) (2009) (requiring evidence of hostility); OHIO REV. CODE ANN. § 2927.12 (West 2009) (requiring evidence of prejudice); 18 PA. CONS. STAT. ANN. § 2710 (West 2009) (requiring evidence of malicious intent); R.I. GEN. LAWS § 12-19-38 (2009) (requiring evidence of hatred or animus); TEX. PENAL CODE ANN. § 12.47 (Vernon 2009); TEX. CODE CRIM. PROC. ANN. art. 42.014 (Vernon 2009) (requiring evidence of defendant's bias or prejudice); VT. STAT. ANN. tit. 13, § 1455 (2009) (requiring evidence of defendant's malicious motivation).

170. See, e.g., DEL. CODE ANN. tit. 11, § 1304(a)(2) (2006); LA. REV. STAT. ANN. § 14:107.2 (2009); ME. REV. STAT. ANN. tit. 17-A, § 1151(8)(B) (2009); R.I. GEN. LAWS § 12-19-38 (1998); TEXAS CODE CRIM. PROC. ANN. § 42.014 (Vernon 2009); VA. CODE ANN. § 18.2-57(B) (West 2009); WIS. STAT. ANN. § 939.645(1)(b) (West 2008).

of, or animus toward, the victim. All that is required is a showing that the victim was selected based on his or her membership in a protected group.¹⁷¹

Under this approach, someone who intentionally targets an elderly individual *because* the person is elderly would be guilty of a hate crime and subject to a sentence enhancement. Similarly, someone who targets an elderly individual based on the real or perceived belief that the elderly individual is frail, less likely to fight back, or unwilling to report being victimized, would also commit a hate crime. Under New York's hate crime law, for example, a person who attacks an elderly person based on a belief that the person is weak or frail, is less likely to resist, and is therefore an easier target, can be prosecuted for a hate crime even without a showing that the person harbored any animus toward the elderly individual.¹⁷² This approach is particularly useful in protecting the elderly because it allows the state to pursue convictions of individuals who specifically choose to victimize the elderly based on the perception that it would be easier and less risky to commit a crime against a member of this group.

3. *Multiple Motive Approach*

States that have adopted the "Multiple Motive" (also called Mixed Motive) approach require evidence that the defendant committed the crime "because of" or "by reason of" the person's characteristics.¹⁷³ This approach is a hybrid of the racial animus and discriminatory selection approaches because it requires proof that the offender committed the crime "because of" or "by reason of" the victim's characteristics, which may or may not have elements of the other two approaches.¹⁷⁴

171. See, e.g., *Carfagno v. Commonwealth*, 576 S.E.2d 765, 768 (Va. Ct. App. 2003) (finding that evidence that defendant used racial epithets in addressing two victims, with whom he had no prior relationship, supported finding that defendant assaulted victims because of their race).

172. See *Fish*, *supra* note 1.

173. See, e.g., ALASKA STAT. § 12.55.155(c)(22) (2009); CAL. PENAL CODE § 422.6 (West 2009); COLO. REV. STAT. ANN. § 18-9-121 (West 2008); 720 ILL. COMP. STAT. 5/12-7.1 (2009); IOWA CODE ANN. § 729A.2 (West 2008); KY. REV. STAT. ANN. § 532.031 (West 2009); MONT. CODE ANN. § 45-5-221 (2007); NEB. REV. STAT. § 28-111 (2009); NEV. REV. STAT. § 193.1675 (2009); N.Y. PENAL LAW § 240.31 (2009); N.C. GEN. STAT. § 14-3(c) (2009); OHIO REV. CODE ANN. § 2927.12 (West 2009); ORE. REV. STAT. ANN. § 166.155(1)(c) (West 2007); W. VA. CODE § 61-6-21 (2009).

174. See, e.g., *State v. Hatcher*, 524 S.E.2d 815, 817 (N.C. Ct. App. 2000) (noting that North Carolina's hate crime law contained no "limiting requirement that the defendant harbor animosity toward a race or ethnic group"); *In re M.S.*, 896 P.2d 1365, 1377 (Cal. 1995) (noting that nothing in the text of California's hate crime statute "suggests the legislature intended to limit punishment to offenses committed exclusively or even mainly because of the prohibited bias").

IV. RECOMMENDATIONS

Hate crimes can occur in a variety of circumstances, to people of all ages and backgrounds, and can be motivated by single or multiple reasons. Existing state and federal laws are inadequate to protect vulnerable individuals and communities from the unique harms caused by hate crimes and should be changed. To provide an appropriate level of protection and prevent unjust outcomes, state and federal officials should adopt a uniform approach that allows for the equivalent prosecution for equivalent actions, regardless of where or when the offense occurs.

A. Establish a Uniform Approach to Hate Crimes

Because courts have taken distinct approaches to prosecuting hate crimes, two people may commit identical crimes against identical victims in different jurisdictions and be subjected to different, if any, penalties. This situation exists because the ability of a court to find someone guilty under a hate crime statute is largely determined by the method of analysis the court employs and the characteristics the state or federal statute seeks to protect. This results in unequal protection and makes protection from hate crime location dependant. To remedy this problem, state and federal officials should agree to establish a uniform rule on hate crimes that clearly articulates the mental state required for prosecution, and the specific characteristics that are protected. While reaching such an agreement will no doubt prove difficult, the certainty such a uniform rule would bring to courts, victims, and potential offenders merits such collaboration. In deciding whether the prosecution for a hate crime should require evidence that the offender was motivated by animus, or evidence that the offender simply selected the victim based on a particular characteristic, state and federal officials should be guided by prior precedent, majority sentiments, and common sense.

In *Wisconsin v. Mitchell*,¹⁷⁵ the United States Supreme Court considered the constitutionality of a Wisconsin statute that enhanced the maximum penalty for an offense whenever the defendant “[i]ntentionally selects the person against whom the crime . . . is committed . . . because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person.”¹⁷⁶ That provision was modeled after the Anti-defamation League’s model legislation, and does not require proof that the offender was motivated by animus. In unanimously upholding Wisconsin’s statute because it addressed discriminatory conduct rather than discriminatory thought, the Court implicitly acknowledged that proof of animus toward the

175. 508 U.S. 476 (1993).

176. *Id.* at 480 (quoting WIS. STAT. § 939.645(1)(b) (1987)).

victim is not required to convict someone of a hate crime or to increase the sentence resulting from such conviction. The majority of states have agreed with this approach, as more than two-thirds of state hate crime statutes do not expressly require proof that the defendant was motivated by hatred, bias, or bigotry toward the victim. As the Ninth Circuit Court of Appeals has noted, the relaxed standard is much more conducive to protecting individuals from being victimized because they sweep “more broadly than the common, colloquial meaning of the phrase ‘hate crime.’”¹⁷⁷

If racial animus is required, crimes against the elderly may be prosecuted as hate crimes only if the prosecutor can establish that the offender was motivated to act based on some animus he felt toward the victim or the racial class to which the victim belonged. However, if the court utilizes the more relaxed discriminatory-selection approach, prosecutors may be more willing to bring actions against offenders where the evidence demonstrates that the victim was selected based on his or her age. If a multiple motive approach is adopted, a similar result is expected.

State and federal authorities should adopt language that forces courts to adopt the discriminatory-selection approach when analyzing hate crime statutes. Doing so will provide the maximum protection for victims by encouraging prosecutors to pursue actions against individuals that deliberately target victims based on real or believed perceptions of victim characteristics. Elder-related crimes present unique challenges for law enforcement because many elders feel isolated and are often reluctant to report crimes for fear of retribution. Moreover, some elders “may be poor witnesses, because they cannot remember details or can become confused as to what happened or who committed the crime against them.”¹⁷⁸ Omitting the requirement that prosecutors prove animus will make prosecuting such crimes easier, may convince some victims to come forward due to the greater chance of conviction, and will serve as a direct deterrent to would-be offenders.

In promulgating uniform hate crime legislation, state and federal officials should remain cognizant of Section 3A1.1 of the federal sentencing guidelines. Under the guidelines, when an individual deliberately targets a person based on the person’s race, religion, ethnicity, or national origin a sentencing court may increase a defendant’s sentence by three levels. However, when an offender targets an elderly individual based on the perception that the person is vulnerable, the guidelines only permit a sentencing court to increase a defendant’s sentence by two levels. In order for the adjustment to apply, the defendant must have known or should have known about the victim’s unusual vulnerability, and the defendant must have committed a

177. *Winarto v. Toshiba Am. Elec. Components, Inc.*, 274 F.3d 1276, 1289 (9th Cir. 2001).

178. Paul Hodge, *Innovative Programs to Protect Elders*, AMERICAN SOCIETY ON AGING, <http://www.asaging.org/at/at-201/innovative.html> (last visited Oct. 16, 2009).

federal crime.¹⁷⁹ This distinction should be removed because in each situation the goal of enhancement is to protect vulnerable individuals and vulnerable populations. There is simply no difference in the harm that results when a victim is targeted because he or she is gay or because he or she is elderly. In many instances, the physical injury to the elderly victim will be greater. Moreover, because studies show that the elderly fear becoming targets of hate crimes based on their age, age-based victimization instills a sense of fear and unease within the elderly community that is at least equivalent to that experienced by the African American, gay, or disabled communities as a result of hate crimes.¹⁸⁰ In fact, given the unique physical and mental challenges many elderly endure, it is likely that hate crimes motivated by age do far more damage to the elderly than is currently recognized.

B. Include Age in the List of Protected Characteristics

The primary impediment to addressing hate crimes against the elderly is the outdated assumption that the incidence and consequences of violent victimization are a problem of younger populations.¹⁸¹ This view is widely held despite the paucity of data on violence-related injuries among the elderly. Although federal statistics show that the elderly are the victims of violent crimes less often than individuals in other age groups,¹⁸² the statistics are based on incomplete data,¹⁸³ and most states do not have statutes that criminalize age-based hate crimes.¹⁸⁴ Moreover, studies show that elderly victims of violent crimes are less likely to report the incident.¹⁸⁵ Collectively, these facts suggest that the real picture of violent victimization in elderly populations has yet to emerge.

Currently, only eight states have hate crime laws that include age as a protected category.¹⁸⁶ These states include the District of Columbia, Florida, Iowa, Minnesota, Nebraska, New York, Texas, and Vermont.¹⁸⁷ Of these states, only four are ranked among the top twenty states based on their

179. See U.S. SENTENCING GUIDELINES MANUAL § 3A1.1(b) (2007).

180. See *supra* note 93.

181. U.S. DEP'T OF JUSTICE, *supra* note 110.

182. *Id.*

183. See *supra* notes 108-117 and accompanying text.

184. See Anti-Defamation League, *supra* note 156; see also *supra* note 160.

185. See *supra* note 79.

186. *Id.*

187. *Id.* Three states: Florida, Louisiana, and Oregon, mandate the reporting of data regarding crimes directed against individuals or groups based on age. See *e.g.*, FLA. STAT. ANN. § 877.19 (LexisNexis 2009) (mandating reporting of crimes based on victim's age); LA. REV. STAT. ANN. § 15:1204.2B(4) (2009) (same); OR. REV. STAT. ANN. § 181.550 (West 2009) (same).

total population of individuals sixty-five years of age and older.¹⁸⁸ Thus, with limited exceptions, states with the largest concentrations of elderly Americans do not have mechanisms in place to adequately address hate crimes perpetrated against the elderly. This is problematic based on current population demographics and will become more problematic as the country ages.

The exponential growth of the nation's older population has profound implications for health care and other senior services and presents challenges for the nation's law enforcement infrastructure to protect them from abusive and criminal acts.¹⁸⁹ "[C]rimes against the elderly are particularly abhorrent and heinous because the victims are extremely vulnerable and the consequences of many crimes have a much greater impact and a more lasting effect on an elder victim's life than on a younger adult's" life.¹⁹⁰

If a primary goal of hate crime laws is to protect vulnerable individuals and communities from the unique harms associated with such crimes, that goal is met by including age as a protected characteristic in all hate crime laws. It makes no sense to protect a frail individual from physical and psychological harm because the individual is a woman or African American, or Jewish, but not to protect the frail individual who is uniquely vulnerable due to age. In many cases, the elderly person will actually suffer greater injury, and therefore, at least an equivalent level of protection should be afforded. Thus, hate crime statutes should uniformly include protection for individuals based on age.

CONCLUSION

An inevitable consequence of life is aging. While not everyone falls into the category of being female, African American, Jewish, gay, transgendered or disabled, anyone fortunate to live long enough will eventually fall into the category of being elderly. Age-related impairments render many elderly individuals uniquely vulnerable to victimization, yet federal law and most state laws fail to recognize this vulnerability. As a result, the elderly are not adequately protected from hate crimes. State and federal authorities should work to create uniform hate crime legislation that uniformly penalizes criminal acts motivated by the victim's age.

188. The four are Florida (1), Iowa (5t), Vermont (12t) and Nebraska (18). See U.S. CENSUS BUREAU, PERCENT OF THE TOTAL POPULATION WHO ARE 65 YEARS AND OVER (2008), available at http://factfinder.census.gov/servlet/GCTTable?_bm=y&-geo_id=01000US&-ds_name=PEP_2008_EST&-redoLog=false&-mt_name=PEP_2008_EST_GCTT4R_U40SC&-format=U-40Sc.

189. See Paul D. Hodge, *Elder Abuse: A National Scandal*, United States Senate Hearings of the Subcommittee on Aging, available at http://www.genpolicy.com/articles/Elder_Abuse_Senate_Testimony.pdf.

190. *Id.*