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I. INTRODUCTION

Late evening on April 4, 2011, Anthony Jenkins, his cousin David, his sister Ashley, and his wife Alexis drove to the rural Kentucky home of Kevin Pennington.1 Upon arriving, Ashley and Alexis got out of the new white pickup truck and went to Kevin’s door.2 Despite the fact that Kevin had rebuffed Ashley’s romantic advances and despite her insistence that he shouldn’t be gay, Kevin considered himself friends with Ashley and was not surprised to see her.3 The two women lured Kevin out into the truck with the promise of drugs, and Kevin acquiesced, not knowing the truck belonged to Anthony or that Anthony and David were inside the vehicle.4 Once inside, Kevin immediately noticed the two men in front, but they were wearing clothing to conceal themselves and had disabled the truck’s interior light.5 Ashley explained that they were friends, and the group began to drive with an unsuspecting Kevin in tow.6 Eventually realizing the true identities of the two men, Kevin demanded to be let out of the vehicle.7 Ignoring Kevin’s pleas, David began threatening to sexually assault him.8 The threats continued as the group drove up a mountain to a secluded part of Kingdom Come State Park.9 Isolated in a wooded area, David and Anthony threw Kevin to the ground and began stomping his head, while Ashley and Alexis encouraged the men by yelling a variety of incitements, including “kill that faggot.”10 Kevin lost consciousness,
and after eventually coming to, he overheard Anthony searching for a tire iron and David discussing what to do with his body. Realizing he was about to be killed, Kevin jumped off the nearby cliff into the pitch-black abyss, completely unaware of the cliff’s height. Fortunately, Kevin survived the fall, and he waited forty-five minutes after the truck pulled away before venturing out of hiding to an unmanned ranger station. After another two hours of waiting, he broke into the ranger station to call for help.

This case marked the first time the Department of Justice filed charges under the sexual orientation provision of the 2009 Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act (“Shepard–Byrd Act”). Ashley and Alexis pleaded guilty, and although they “testified that they and the men had agreed in advance to lure Kevin into the truck, drive him to a deserted area and beat him because of his sexual orientation,” ultimately David and Anthony were acquitted on the hate crime charge. While the reasons for this outcome were many, this case illustrates, though does not necessarily resolve, the difficulties facing hate crime prosecutions.

This Note explores these constitutional and practical difficulties of the federal Shepard–Byrd Act using Kevin’s case, United States v. Jenkins, as an example. It argues that proponents of hate crime legislation should continue to press for state laws because constitutional and practical problems limit the effectiveness of the Act. Although this Note tends to focus on crimes against lesbian, gay, bisexual, and transgender (“LGBT”) people in part because of the history of Matthew Shepard, in part because of the particulars of Jenkins, and most importantly because sexual orientation and gender identity protections remain the biggest divergence between state and federal hate crime laws, the arguments made are applicable to hate crimes more generally.

Part II provides context for this issue by examining the background of the Shepard–Byrd Act and hate crimes generally. Part III delves into the constitutional restraints on hate crime legislation. Part IV considers practical difficulties facing hate crime prosecutions and the interplay of state and federal prosecutions. Part V concludes.

11. Id.
12. Id. (“I was going to be dead one way or another, so I jumped.”).
13. Id.
14. Id.
16. 18 U.S.C. § 249(a)(2) (2012). This law is the most sweeping federal hate crime legislation passed in decades. See infra Part II.B.
19. See infra Part II.B.
II. HATE CRIME BACKGROUND

Hate crimes remain a persistent problem in the United States, as shown by the FBI's annual data on hate crime prevalence throughout the country. In 2012, law enforcement agencies reported\(^\text{20}\) a total of 5,796 hate crimes,\(^\text{21}\) compared to 8,759 incidents in 1996 (the first year the FBI published such statistics).\(^\text{22}\) This decrease in the number of hate crimes reported is consistent with the general decrease in violent crime over the same time period.\(^\text{23}\) However, while the overall number of hate crimes has decreased, the types of hate crimes have not decreased uniformly, and in some instances have actually increased. For example, of the 8,759 incidents in 1996, only 1,016 (or 11.6\%) were on the basis of sexual orientation.\(^\text{24}\) In 2012 by contrast, 1,135 of the 5,796 incidents (19.6\%) were on that basis.\(^\text{25}\) This represents an 8\% increase in the proportion of hate crimes based on sexual orientation. Moreover, in absolute terms, the number of hate crimes based on sexual orientation has remained constant even as violent crime more generally has fallen dramatically.\(^\text{26}\)

It is unclear how much of this proportional increase is due to improved recognition and reporting by law enforcement (i.e. reporting a crime as hate-motivated instead of as a simple assault) rather than an actual increase in crimes on the basis of sexual orientation. Not all crimes are reported, and even those that are reported may be inaccurately characterized by police. It is thus difficult to know the true prevalence of hate crimes.\(^\text{27}\) As a comparison to official police reports, a June 2013 report by the Pew Research Center suggests that approximately thirty percent of LGBT individuals had been threatened or physically attacked because


\(^{24}\) HATE CRIME STATISTICS, supra note 22, at 7.


\(^{26}\) See Crime in the United States 2012, Table 1, supra note 23.

\(^{27}\) See infra note 58 (discussing the Hate Crimes Statistics Act).
of their sexual orientation or gender identity at some point in their lifetimes.\textsuperscript{28} Thus regardless of whether looking through the lenses of crimes reported or community perceptions, hate crimes remain a concern. Accordingly, difficulties with enforcing hate crime statutes also remain important.

A. Justifications of Hate Crime Statutes

As a preliminary matter, however, one might question why we punish hate crimes distinctly from other crimes such as assault or murder. After all, virtually every hate crime involves a separate crime punishable by existing law.\textsuperscript{29} Indeed, this question has animated debate over the enactment of seemingly duplicative federal hate crimes legislation.\textsuperscript{30} Without rehashing the debates in their entirety, the main points are summarized below to provide context for the discussion of how we ought to effectively enforce hate crime laws.

The typical justifications for punishing hate crimes as separate crimes are threefold. First, because the criminal defendant acts with a motivation of hatred, bias, or prejudice, the moral culpability of the wrongdoer is greater than that of a person who commits a crime without that motivation. Therefore the punishment ought to be proportionally greater.\textsuperscript{31} Second, hate crimes target more than a single victim; they target a community.\textsuperscript{32} Unlike a violent act resulting from an argument or drug deal, a crime targeted at a person because of a particular characteristic sends shockwaves through the entire community sharing that characteristic, instilling fear and unease.\textsuperscript{33} Arguably, the resulting harm of a hate crime is greater than the harm of its non-hate crime equivalent. Finally, existing criminal law has proven ineffective at deterring hate-motivated crimes, and therefore additional deterrence is warranted.\textsuperscript{34}

Opponents of hate crime legislation generally make four arguments against such laws. First, they argue that existing laws are sufficient and that hate crime laws
only add to the problem of over-criminalization. 35 Second, by singling out certain
groups, hate crime laws inevitably imply that crimes against certain groups are
more serious than crimes against non-protected groups, even if motivated by the
same level of hatred. 36 Third, they contend that hate crime laws are inefficacious,
perhaps even counter-productive by provoking retaliation against protected groups.37
Finally, opponents often raise First Amendment constitutional challenges to hate
crime laws, arguing that valid speech against certain groups is suppressed or
chilled by hate crime legislation.38

As a practical matter, proponents of hate crime legislation have prevailed—
Shepard–Byrd’s enactment ensured that hate crime laws have become another tool
in the federal prosecutor’s belt, and the vast majority of states have enacted hate
crime laws of some variety.39 Given the relative success of hate crime legislation
proponents, this Note will analyze Shepard–Byrd’s enforcement thus far, identify
its limitations, and suggest increased reliance on state laws to overcome these
limitations. Before discussing the future of this important piece of legislation,
however, it is first important to examine the legal landscape prior to Shepard–
Byrd’s passage to understand why the law was enacted in the first place.

B. Legislation Overview

As of January 2014, forty-five states have enacted hate crime statutes.40 Of those
states, forty-four cover racially-, ethnically-, and religiously-motivated crimes.41
Beyond these categories, there is less unanimity regarding which classes to protect
through hate crime legislation. Thirty states protect disability.42 Another thirty
states cover sexual orientation.43 Twenty-seven states cover gender,44 while only
fifteen cover gender identity.45 Thirteen states protect age, and only five cover

35. See Bernard P. Haggerty, Hate Crimes: A View from Laramie, Wyoming’s First Bias Crime Law, The Fight
against Discriminatory Crime, and a New Cooperative Federalism, 45 HOWARD L.J. 1, 54–55 (2001) (examining
the over-criminalization critique of hate crime legislation).
36. See Susan Gellman, Sticks and Stones Can Put You in Jail, But Can Words Increase Your Sentence?
the problem of deciding which groups ought to receive hate crime protections).
37. See Haggerty, supra note 35, at 52–54 (discussing arguments that hate crime laws are ineffective).
38. See, e.g., Glenn v. Holder, 690 F.3d 417, 417–18 (6th Cir. 2012) (dismissing First Amendment claims of
religious leaders challenging constitutionality of Shepard–Byrd). See generally discussion infra Part III.A.
39. See infra Part II.B.
41. Id. The Utah statute does not cover particular groups but is rather tied to crimes violating constitutional or
civil rights. Id.
42. Id.
43. Id.
44. Id.
45. State Hate Crimes Laws, HUMAN RIGHTS CAMPAIGN (Jun. 19, 2013), http://hrc-assets.s3-website-us-east-
l.amazonaws.com/files/assets/resources/hate_crimes_laws_022014.pdf.
political affiliation.\textsuperscript{46} In addition, the District of Columbia has a broad law covering each of these groups.\textsuperscript{47} Finally, thirty states and D.C. require data collection for all reported hate-crimes.\textsuperscript{48} Given this patchwork of state laws, it is important to realize that very few are recent enactments. Following the early 2000s, it appears that states have largely lost the impetus to pass new hate crime laws—for example, twenty-seven of the thirty-one laws covering sexual orientation discrimination are over a decade old.\textsuperscript{49}

On the federal level prior to Shepard–Byrd, Congress made several attempts at addressing the problem of hate crimes. The most important modern enactments\textsuperscript{50} are the Civil Rights Act of 1968,\textsuperscript{51} the Hate Crimes Statistic Act of 1990,\textsuperscript{52} and the Violent Crime Control and Law Enforcement Act of 1994.\textsuperscript{53} These three laws formed an important foundation for the passage of the Shepard–Byrd Act. However, their deficiencies ultimately led to the passage of this most recent legislation.

The Civil Rights Act of 1968 was a landmark statute enacted in the wake of Martin Luther King, Jr.’s assassination. Among its many provisions, it criminalized a new class of hate-motivated acts.\textsuperscript{54} Particularly, the Act designates a hate crime only if the offense was committed both because of the victim’s race, color, religion, or national origin and because the victim was engaged in one of the statutorily listed activities.\textsuperscript{55} This dual-intent requirement makes the law a cumbersome tool. For example, it potentially covers an attack against a Black person eating at a lunch counter,\textsuperscript{56} but it would not cover the same attack outside the eating establishment. Additionally, defendants could readily admit the attack was because of the victim’s race but argue that the victim’s presence at a lunch counter was not a motivating factor. Without proving that the defendant acted with both

\begin{itemize}
  \item \textsuperscript{46} Anti-Defamation League State Hate Crime Statutory Provisions, supra note 40.
  \item \textsuperscript{47} Id.
  \item \textsuperscript{48} Id.
  \item \textsuperscript{49} State Hate Crimes Laws, supra note 45.
  \item \textsuperscript{50} The Ku Klux Klan Act of 1871 was a Reconstruction-era attempt at curbing racial violence. 17 Stat. 18 (1871) (codified as amended at 42 U.S.C. § 1985 (2012)). Although the statute remains on the books today, it was predicated on congressional authority granted under Section 5 of the Fourteenth Amendment. Consequently, the Supreme Court decisions in The Slaughterhouse Cases, 83 U.S 36 (1871), and The Civil Rights Cases, 109 U.S. 3 (1883), have severely limited the Act’s intended scope. These cases narrowly interpreted the Privileges and Immunities Clause of the Fourteenth Amendment and limited the Fourteenth Amendment’s application to state action, respectively. But see Griffin v. Breckenridge, 403 U.S. 88 (1971) (upholding the constitutionality of § 1985(3) under the Thirteenth Amendment and Commerce Clause). Nevertheless, because § 1985 tracks the language of the Fourteenth Amendment, it remains narrow in scope.
  \item \textsuperscript{52} Pub. L. No. 101-275, § 1, 104 Stat. 140, 140 (1990).
  \item \textsuperscript{54} See 18 U.S.C. § 245(b)(2).
  \item \textsuperscript{55} See id.
  \item \textsuperscript{56} See id. § 245(b)(2)(F).
\end{itemize}
intents, a prosecutor could not obtain a conviction. Accordingly, the Act has proved to be rather limited in scope.\footnote{Despite these restrictive requirements, prosecutors still occasionally employ the law successfully. See, e.g., United States v. Nelson, 277 F.3d 164, 168–69 (2d Cir. 2002).}

In the early 1990s, Congress again turned its attention to hate crimes and passed two pieces of legislation. The Hate Crime Statistics Act authorized the Attorney General to gather statistical information on a wide variety of hate crimes for informational purposes, but it did not create any new substantive crime or civil cause of action.\footnote{Pub. L. No. 101-275, § 1(b), 104 Stat. 140, 140 (1990) (codified at 28 U.S.C. § 534).} The second enactment came as part of the Violent Crime Control and Law Enforcement Act of 1994, which directed the U.S. Sentencing Commission to promulgate new sentencing guidelines and amend existing sentence enhancements for hate crimes.\footnote{Pub. L. No. 103-322, § 280003, 108 Stat. 1796, 2096 (1994); see also U.S. SENTENCING GUIDELINES MANUAL § 3A1.1 (providing the current sentence enhancement, as amended).} Because the sentence enhancement can only be employed when an underlying federal crime is committed, its enactment did not expand the substantive scope of any federal criminal law prohibitions, which by their nature are more limited than state crimes and exclude many basic offenses where hate might be a motive. As such, while both the Statistics Act and sentence enhancement displayed some Congressional willingness to address the problem of hate crimes, they did not significantly alter the scope of substantive federal protection.


The criminal portions of the Shepard–Byrd Act fall under two main provisions.\footnote{A third provision criminalizes conduct described in § 249(a)(1)–(2) but is based on Congressional authority to regulate maritime and territorial jurisdictions. See 18 U.S.C. § 249(a)(3) (maximizing the jurisdic-}

\begin{enumerate}
\item Section 249(a)(1) penalizes anyone who “willfully causes bodily injury to
any person . . . because of the actual or perceived race, color, religion, or national origin of any person.”

Section 249(a)(2) criminalizes similar bodily injury on the basis of “[the] actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability of any person,” where interstate or foreign commerce is implicated. A purely textual reading of the statute reveals an oddity, namely that religion and national origin appear in both provisions. This leads to the obvious question of why a prosecutor would ever employ the latter provision, which contains an additional jurisdictional element, in cases involving a victim’s religion or national origin. The answer lies in the constitutional underpinnings of the law. Section 249(a)(1) was enacted pursuant to Congress’s Thirteenth Amendment enforcement power while § 249(a)(2) was enacted pursuant to Congress’s Commerce Clause power. As will be discussed in more detail below, § 249(a)(1) is limited to categories recognized as racial groups when the Thirteenth Amendment was adopted in 1865. Thus, the repetition of religion and national origin in § 249(a)(2) is designed to capture under Congress’s Commerce Clause authority those religions and national origins the framers of the Thirteenth Amendment would not have viewed as racial groups. This dichotomy thus plays an important role in enforcement of Shepard–Byrd.

Finally, it is important to remember that in the context of any federal criminal legislation, the Department of Justice is not acting as a local prosecutor. The DOJ has a professed “backstop policy” in all criminal civil rights prosecutions where the Department “defer[s] prosecution in the first instance to State and local law enforcement officials, except in highly sensitive cases in which the Federal interest in prompt Federal investigation and prosecution outweighed the usual justifications of the backstop policy.” Furthermore, the DOJ “would not bring a Federal prosecution following a State prosecution arising from the same incident unless the matter involved a ‘substantial Federal interest’ that the State prosecution had left ‘demonstrably unvindicated.’” Thus even when the factual predicate might support a conviction under the Act, the DOJ may be limited from bringing charges. Given Congress’s intention to expand hate crimes protection against a back-

64. 18 U.S.C. § 249(a)(1) (2012). The provision also criminalizes attempts at causing bodily injury where certain specified dangerous weapons are involved. See id.

65. Id. § 249(a)(2). Section 249(a)(2)(B) more thoroughly describes the jurisdictional commerce limitation.


67. See infra Part III.A.

68. Holder Testimony, supra note 66, at 171.

69. Id. In addition to being Department policy, this requirement is also statutorily mandated. 18 U.S.C. § 249(b).
ground of more limited federal laws, it is now necessary to examine more fully the limitations on that expansion and the problems such limitations present for future hate crimes prosecutions.

III. CONSTITUTIONAL LIMITATIONS TO HATE CRIME LEGISLATION

Historically, the First Amendment has been the typical avenue for constitutional challenges to hate crime legislation, but Shepard–Byrd, as federal legislation, presents an additional constitutional problem. Because the federal government is one of limited powers, there are potential federalism challenges to any criminal law Congress passes, including Shepard–Byrd. Both of these considerations have influenced the drafting of the Act, and both are discussed in turn below beginning with federal authority to enact criminal law.

A. Federalism Challenges

Unlike states, which have plenary authority to enact criminal laws pursuant to their police power, the federal government is limited to its constitutionally granted powers. The two primary criminal provisions of Shepard–Byrd—§ 249(a)(1) and § 249(a)(2)—reflect this limitation and are predicated on separate sources of Congressional authority. These two sources—the Commerce Clause for § 249(a)(2) and the Thirteenth Amendment for § 249(a)(1)—are discussed below.

1. Commerce Clause

The Commerce Clause gives the federal government the power to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” This implicates huge swaths of activity, theoretically giving the federal government immense regulatory authority. As such, defining the scope of this authority has proven contentious since our nation’s founding.

For our purposes, the turning point in modern Commerce Clause doctrine was United States v. Lopez, where for the first time in almost sixty years the Supreme Court struck down a federal law because it exceeded Congress’s authority under

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70. See supra note 62 and accompanying text.
72. M’Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819) (“We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended.”).
73. See, e.g., Gonzales v. Raich, 545 U.S. 1 (2005) (assessing congressional authority to criminalize purely intrastate marijuana production).
75. U.S. CONST. art. I, § 8, cl. 3.
76. See, e.g., M’Culloch, 17 U.S. (4 Wheat.).
the Commerce Clause.78 At issue in Lopez was the Gun-Free School Zones Act, which criminalized gun possession in any school zones.79 The Court reasoned that “possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce,” and the statute contained “no requirement that his possession of the firearm have any concrete tie to interstate commerce.”80 Then, following its warning shot in Lopez, the Court struck down another statute in United States v. Morrison.81 This time the Court invalidated a civil remedy for gender-based violence.82 In doing so the Court “reject[ed] the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce.”83 The Court further stated that “[t]he regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States.”84 Against this renewed assertion of federalism principles, the future of federal criminal law looked considerably more modest.

Then, perhaps unexpectedly, the Court halted this momentum in Gonzales v. Raich.85 Here the Court upheld federal drug laws criminalizing marijuana manufacture, possession, and distribution as applied to California citizens who locally grew marijuana for personal medical usage only.86 The Court distinguished prior cases by stating “[u]nlike those at issue in Lopez and Morrison, the activities regulated by the [federal drug laws] are quintessentially economic.”87 Moreover, the Court admonished over-reliance on Lopez and Morrison, stating that such a “myopic focus . . . overlook[ed] the larger context of modern-era Commerce Clause jurisprudence preserved by those cases.”88 Thus this trio of cases attempts to draw a line that marks the boundaries of Congress’s authority to regulate private violent activity. While the line is somewhat ambiguous, it appears that Congress cannot, under the Commerce Clause, regulate noneconomic activity such as violence unless there is a statutory requirement that the activity have some effect on commerce.

Section 249(a)(2) differs, however, from the statutes at issue in Raich, Lopez, 78. See Lisa Yumi Gillette, Lawyers, Guns, and Commerce: United States v. Lopez and the New Commerce Clause Doctrine, 46 DePaul L. Rev. 823, 823 (1997) (detailing the doctrinal shift of Lopez following decades of the Court’s constant enlargement of Congress’s commerce authority). Although during that period the Supreme Court had struck down one statute as beyond Congress’s commerce authority, it later overruled that decision. Id.
79. Lopez, 514 U.S. at 551.
80. Id. at 567.
82. Id. at 627.
83. Id. at 617.
84. Id. at 618.
85. 545 U.S. 1 (2005).
86. Id. at 33.
87. Id. at 25.
88. Id. at 23.
and Morrison because it contains an explicit jurisdictional element limiting its application to conduct resulting from or otherwise affecting interstate or foreign commerce.\footnote{89} As the Court noted in Lopez, such jurisdictional elements support the constitutionality of such laws.\footnote{90} Indeed, Congress reenacted the statute at issue in Lopez, adding a jurisdictional element, and subsequently circuit courts have upheld the law’s constitutionality.\footnote{91} Of course, even as these elements save the constitutionality of statutes such as § 1249(a)(2), they are intended to be coterminal with Congress’s constitutional authority. Hence a narrow interpretation of the constitutional authority narrows the statutory scope of these laws as well. This leaves individual applications of § 1249(a)(2) open to federalism challenges. No circuit court has yet ruled on the constitutionality of any applications of § 1249(a)(2), but if courts follow Lopez and Morrison with a skepticism towards federal criminalization of violent acts, § 1249(a)(2) may well end up rather narrow in scope.

2. Thirteenth Amendment

Compared to the more traditional Commerce Clause, the Thirteenth Amendment is an unlikely source of useful Congressional power to enact criminal law. By its terms, “[n]either slavery nor involuntary servitude, except as punishment for a crime . . ., shall exist in the United States, or any place subject to their jurisdiction.”\footnote{92} Like all of the Civil War Amendments, it includes a provision giving Congress “power to enforce this article by appropriate legislation.”\footnote{93} Nonetheless, with the extinction of legalized slavery in the United States, the practicality of this provision seems to be questionable.\footnote{94}

Surprisingly, the provision has been of great import for two reasons. First, in a small but important respect, the language of the Thirteenth Amendment is broader than that of the Fourteenth. Although § 5 of the Fourteenth Amendment gives Congress enforcement power over the more general right to equal protection, the Fourteenth Amendment is limited by its text and interpretation as applying only to state action.\footnote{95} The Thirteenth Amendment, by contrast, targets private conduct in

92. U.S. CONST. amend. XIII.
93. Id. § 2.
95. See U.S. CONST. amend. XIV § 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”) (emphasis added); United States v. Stanley (Civil Rights Cases), 109 U.S. 3, 13–15 (1883) (requiring Congress to target state action when acting pursuant to its Fourteenth Amendment enforcement power).}
the form of slavery. Given the wide swath of purely private conduct that is discriminatory in nature but beyond the realm of state action, this distinction is crucial to the Constitutional legitimacy of Shepard–Byrd, which by its nature targets private conduct. Second, judicial interpretation of the Amendment has extended the scope of Congress’s enforcement authority beyond the strict power to eliminate slavery to include the power “rationally to determine what are the badges and incidents of slavery, and . . . to translate that determination into effective legislation.” In other words, this allows Congress to proscribe private conduct involving racial subjugation that does not rise to the level of outright slavery. The Court has reasoned that without such power, freedom would be a mere “paper guarantee,” and that otherwise “the Thirteenth Amendment made a promise the Nation cannot keep.”

In applying this doctrine, two United States Courts of Appeals have upheld the constitutionality of 18 U.S.C. § 249(a)(1). In Maybee, the defendant challenged the constitutionality of § 249(a)(1) and argued that the badges-and-incidents-of-slavery doctrine could not save § 249(a)(1) because other courts applying the doctrine had only upheld statutes requiring motivations based on both race and enjoyment of a public benefit. In essence, Maybee argued that the broad sweep of § 249(a)(1) simply went too far beyond prior statutes upheld under the Thirteenth Amendment. The Eighth Circuit rejected the challenge on the basis that the prior cases explicitly emphasized that the courts were “not holding that both (and in particular [the public benefit requirement]) are necessary to uphold [a] statute’s constitutionality.” The court noted, however, that while § 249(a)(1) swept more broadly than previous statutes, Maybee offered no particular reasons why the law was beyond the scope of Congress’s Thirteenth Amendment powers. In emphasizing that Maybee’s challenge was narrow, arguing only that prior enactments had reached the limits of Congress’s Thirteenth Amendment authority, the court left the door open for a future attack on § 249(a)(1).

In the second case involving a constitutional challenge to § 249(a)(1), United States v. Hatch, the Tenth Circuit rejected a broader challenge to the statute. The court noted that “if Congress rationally determines that something is a badge or incident of slavery, it may broadly legislate against it through

96. See U.S. Const. amend. XIII (prohibiting slavery and involuntary servitude without regard to state action).
98. Id. at 443.
99. See United States v. Hatch, 722 F.3d 1193, 1209 (10th Cir. 2013); United States v. Maybee, 687 F.3d 1026, 1031 (8th Cir. 2012).
100. Maybee, 687 F.3d at 1031.
101. Id. (citing United States v. Nelson, 277 F.3d 164, 190 n.25 (2d Cir. 2002)).
102. Id.
103. See id. at 1030–31.
104. 722 F.3d at 1193.
Section 2 of the Thirteenth Amendment.\textsuperscript{105} Despite unanimously upholding the constitutionality of § 249(a)(1), the court noted that the recent Supreme Court precedents of \textit{City of Boerne},\textsuperscript{106} \textit{Lopez},\textsuperscript{107} and \textit{Morrison},\textsuperscript{108} although not directly addressing the Thirteenth Amendment, may have nonetheless undermined the century-old “badges and incidents of slavery” doctrine by reestablishing firm federalism norms.\textsuperscript{109} But because that doctrine had never been explicitly overruled, the court decided to “leave it to the Supreme Court to bring Thirteenth Amendment jurisprudence in line with the structural concerns that prompted the limits announced in \textit{City of Boerne, Lopez, and Morrison}.”\textsuperscript{110} The defendants in \textit{Hatch} have since filed a writ of certiorari in the Supreme Court and attracted some amici in support of their position.\textsuperscript{111} Given the absence of a circuit split on the issue, it remains unclear if the Supreme Court will grant certiorari.

Despite possible future litigation in other circuits and perhaps even the Supreme Court, the constitutional foundations of § 249(a)(1) appear firm as courts continually reject Thirteenth Amendment-based challenges. Though reliance on the Thirteenth Amendment to enact crimes somewhat removed from slavery has generated some criticism,\textsuperscript{112} no court has yet adopted this reasoning to strike down § 249(a)(1). Assuming this trend continues, one might expect federal prosecutors to employ this broader provision more frequently than its commerce-based counterpart, § 249(a)(2), which as discussed above, faces more complicated constitutional foundations.

\textbf{B. First Amendment Challenges}

The First Amendment is the second avenue of constitutional challenges to hate crime legislation. As a general rule, the First Amendment\textsuperscript{113} protects any individu-
al’s speech from government censorship or criminalization, subject to some judicially established exceptions.\textsuperscript{114} Of these exceptions, the most relevant to hate crimes involves so-called “fighting words.”\textsuperscript{115} In \textit{Chaplinsky}, the Supreme Court upheld a conviction under a New Hampshire breach-of-the-peace statute on the basis that among the “well-defined and narrowly limited classes of speech” outside of First Amendment protection are “insulting or ‘fighting’ words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”\textsuperscript{116} Importantly for the present discussion, this definition includes threats.\textsuperscript{117} Against these background principles, the Supreme Court established the basic framework for assessing First Amendment free speech claims in the context of hate crimes in two cases: \textit{R.A.V. v. City of St. Paul}\textsuperscript{118} and \textit{Virginia v. Black}.\textsuperscript{119}

Although one might expect threat-based hate crimes to be easily upheld as constitutional because they only criminalize “fighting words,” in \textit{R.A.V.} the Supreme Court struck down a local ordinance which provided that:

\begin{quote}
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.\textsuperscript{120}
\end{quote}

The Supreme Court recognized that as a matter of state statutory interpretation, the Minnesota Supreme Court limited the language in the ordinance as precisely applying only to fighting words falling outside the protection of the First Amendment.\textsuperscript{121} Nevertheless, in a 5-4 decision authored by Justice Scalia, the Court invalidated the ordinance because St. Paul impermissibly engaged in content-based discrimination by selectively proscribing certain threats (i.e., those “on the basis of race, color, creed, religion or gender”) while leaving other threats untouched.\textsuperscript{122} In the Court’s view, “[s]electivity of this sort creates the possibility that the city is seeking to handicap the expression of particular ideas,” and hence such laws run

\begin{flushleft}
\textsuperscript{114} See, e.g., Schenk v. United States, 249 U.S. 47, 52 (1919) (“The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.”).


\textsuperscript{116} Id. at 571–72.

\textsuperscript{117} Id. at 573; see also Watts v. United States, 394 U.S. 705, 707–08 (1969) (per curiam) (upholding a statute criminalizing a “true threat”); accord R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992) (“[T]hreats of violence . . . are outside the First Amendment . . .”). As of writing, the Supreme Court is slated to hear a case clarifying the line between threats and non-threats. See United States v. Elonis, 730 F.3d 321 (3d Cir. 2013). cert. granted, 134 S. Ct. 2819 (2014).

\textsuperscript{118} 505 U.S. 377 (1992).

\textsuperscript{119} 538 U.S. 343 (2003).

\textsuperscript{120} R.A.V., 505 U.S. at 380, 396.

\textsuperscript{121} Id. at 380–81.

\textsuperscript{122} Id. at 392–94.
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afoul of the First Amendment.123 After disposing of St. Paul’s other arguments for preserving the ordinance, the Court held the ordinance to be unconstitutional.124 In concluding dicta, the Court suggested that “[a]n ordinance not limited to the favored topics . . . would have precisely the same beneficial effect” as the unconstitutional ordinance without “displaying the city council’s special hostility towards the particular biases thus singled out,” which “is precisely what the First Amendment forbids.”125

A law matching the Court’s suggestion was at issue in Virginia v. Black, where a defendant raised a First Amendment challenge to a Virginia statute that criminalized cross-burning “with the intent of intimidating any person or group of persons.”126 Although the Court fractured, largely due to a separate provision of the statute regarding evidentiary presumptions,127 there was general agreement that such a content-neutral statute, independent of other constitutional defects, was valid under the First Amendment.128 Indeed, stitching the splintered opinions together, the Court appears unanimous on that point.129 The Justice O’Connor majority130 easily distinguished R.A.V. on the grounds that the Virginia statute proscribed all intimidating cross-burning without regards to why such conduct was intimidating.131 Justice Souter, writing for Justices Kennedy and Ginsburg, agreed with the majority’s distinction between statutes that make content-based judgments (as in R.A.V.) and those that do not.132 However, the Souter trio felt that cross-burning in particular did not fit neatly into the latter category.133 Finally, Justice Thomas felt that cross-burning, without the specific qualification at issue in R.A.V., was purely conduct outside the purview of the First Amendment altogether.134

A final complication in this area is Wisconsin v. Mitchell.135 Decided only a year

123. Id. at 394.
124. Id. at 396.
125. Id.
127. The statute at issue provided that cross-burning “shall be prima facie evidence of an intent to intimidate.” Id. (quoting Va. Code Ann. § 18.2-423 (1996)).
128. Id. at 363 (rejecting an R.A.V.-type claim).
129. See id. at 363 (majority opinion); id. at 368 (Stevens, J., concurring); id. at 368 (Scalia, J., concurring in part, concurring in the judgment in part, and dissenting in part); id. at 380–82 (Souter, J., concurring in the judgment in part and dissenting in part); id. at 388 (Thomas, J., dissenting).
130. Justice O’Connor was joined by Chief Justice Rehnquist and Justices Stevens, Scalia, and Breyer. Id. at 347.
131. See id. at 362 (majority opinion) (reasoning that the Virginia statute did not single out a “victim’s race, gender, or religion . . ., ‘political affiliation, union membership, or homosexuality’”) (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992)). Justice Stevens, who had written separately in R.A.V, also wrote separately to reiterate his opposition to the R.A.V. framework. Id. at 368 (Stevens, J., concurring).
132. Id. at 382–84 (Souter, J., concurring in the judgment in part and dissenting in part).
133. Id.
134. Id. at 388 (Thomas, J., dissenting).
following *R.A.V.* *Mitchell* involved a Wisconsin sentence-enhancement statute which provided greater penalties for any crime where a defendant “[i]ntentionally selects the person against whom the crime . . . is committed . . . because of the actor’s belief or perception regarding the race, religion, color, disability, sexual orientation, national origin or ancestry of that person.”136 Although ostensibly violating *R.A.V.*, the Court unanimously upheld the sentence enhancement on the grounds that it criminalized motive, rejecting the Wisconsin Supreme Court’s view that it punished specific “bigoted beliefs.”137 But whatever the tension or inconsistency between *R.A.V.* and *Mitchell*,138 the Court in *Virginia v. Black* provided a clear path forward for enacting hate crime legislation in light of the First Amendment. *R.A.V.* and *Black* thus establish the basic First Amendment do’s and don’ts for drafters of hate crime legislation: hate crime statutes targeting threats should not distinguish on the basis of the threat’s content.

The convergence of First Amendment law with the other constitutional considerations raised above placed Congress in something of a catch-22 regarding the Shepard–Byrd Act. Per *Virginia v. Black*, if Congress decides to criminalize hateful threats, it cannot distinguish between types of threats based on specific characteristics.139 Yet for § 249(a)(1), distinctions on the basis of “race, color, religion, or national origin” are precisely what give Congress the authority to enact the law under the Thirteenth Amendment.140 Furthermore, eliminating the distinctions in either § 249(a)(1) or § 249(a)(2) would result in a statute that criminalized willfully causing bodily injury (or threatening to cause bodily injury) with the intent to intimidate in the context of interstate commerce. Such a statute is distant from the underlying goal of targeting hate crimes and appears closer to a more generalized federal crime of assault. In short, constitutional restraints force Congress to choose between prohibiting a broader swath of undesirable conduct (including threats) and targeting more directly the problem that Congress is trying to remedy—namely that crimes are being committed because of a person’s membership in a particular class of individuals.

Given this “choice,”141 Congress plainly chose the latter. Section 249(a) avoids the First Amendment pitfalls that have plagued state legislation by limiting criminalization to “willfully causing bodily injury” and attempting to cause such

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136. WIS. STAT. ANN. § 939.645 (West 2013).
139. See *Black*, 538 U.S. at 362–63 (referring to race, gender, religious affiliation, political affiliation, and sexuality).
140. See supra notes 64–67 and accompanying text.
141. In reality it is extremely unlikely that Congress seriously considered enacting a broad federal crime that would seemingly encompass significantly more than hate crimes. The First Amendment was the overwhelming concern during enactment. See Holder Testimony, supra note 66, at 177; see also infra note 143 and accompanying text.
injury with certain dangerous weapons. 142 Yet even given this more limited scope of criminalized conduct that does not include threats, First Amendment concerns were still paramount in Congress.143 Section 4710 of the National Defense Authorization Act for Fiscal Year 2010144 provides six interpretive rules for § 249.145 Of these six, four involve the First Amendment.146 In particular, § 4710(3) states that the Act should not be construed to cover religion, speech, expression, or association “if such exercise [thereof] was not intended to (A) plan or prepare for an act of physical violence; or (B) incite an imminent act of physical violence against another.”147 Such interpretive rules are unnecessary assurances because the Act itself does not criminalize threats, yet Congress apparently included them to assuage lingering fears that the Act would suppress speech.148

Despite the fact that Shepard–Byrd does not extend to threats, a group of pastors sued to enjoin enforcement of Shepard–Byrd over First Amendment concerns.149 The Sixth Circuit affirmed the District Court’s dismissal for lack of standing, noting that “[p]laintiffs have not demonstrated an intent to violate the Hate Crimes Act or offered sufficient evidence that they will nonetheless face adverse law enforcement action.”150 Although the case was resolved on standing grounds and the court never reached the merits, the fact that plaintiffs could not establish a likelihood of adverse law enforcement action due to their speech strongly suggests that First Amendment concerns were overblown and that limiting the Act to bodily injury precludes any valid First Amendment problems.

In sum, hate crime statutes raise a complicated set of First Amendment concerns, and potentially rely on impermissible content-based distinctions. However, Shepard–Byrd avoids these pitfalls because it does not extend to threats, and all First Amendment challenges have so far been unsuccessful.

IV. JENKINS AND THE FUTURE OF SHEP ARD–BYRD

Against this complex constitutional background, the Jenkins cousins were acquitted of all hate crime charges despite luring Kevin Pennington to a remote Kentucky location and beating him within an inch of his life “because of his sexual

144. The Shepard–Byrd Act was passed as a rider the Defense Authorization Act. Id. §§ 4701–13, 123 Stat. at 2835–44.
145. Id. § 4710, 123 Stat. at 2841–42.
146. Id.
147. Id.
148. See id. (restricting the Act’s application from “exercise of religion . . . , speech expression, or association” so as not to “infringe[] any rights under the First Amendment”).
150. Id. at 419.
orientation.\textsuperscript{151} Their acquittal had the practical effect of precluding appellate review of several of the constitutional issues raised above, notably the Commerce Clause issue. As previously discussed, because § 249(a)(2) contains an explicit commerce jurisdictional element,\textsuperscript{152} there is little doubt that the statute is a facially valid exercise of Congress’s authority to regulate interstate commerce.\textsuperscript{153} The primary concern, therefore, is not that the Act is unconstitutional per se, but rather that as the Supreme Court continues its trajectory of enforcing strong federalism norms at the expense of a more expansive vision of Congressional authority under the Commerce Clause, the realm of constitutional applications of § 249(a)(2) also shrinks.

In light of this problem, scholars have looked to other sources of constitutional authority, primarily the Fourteenth Amendment, to justify laws such as the Shepard–Byrd Act.\textsuperscript{154} Although this argument has not gained much traction in the courts, it merits a brief mention. The basic premise is that by enforcing the Fourteenth Amendment’s equal protection guarantee, Congress can proscribe discrimination in its various forms. The fundamental obstacle this argument faces is that the Fourteenth Amendment states “No State shall . . . .”\textsuperscript{155} Thus although Congress has the power under Section 5 of the Amendment to enforce the equal protection guarantee “by appropriate legislation,”\textsuperscript{156} the amendment as a textual matter is targeted at state action, rather than private actors. Notably, the Supreme Court invalidated a civil remedy provision in the Violence Against Women Act in part because the Fourteenth Amendment could not reach purely private conduct of domestic violence.\textsuperscript{157} This seemingly forecloses any justification of the Shepard–Byrd Act, which prohibits private bias-motivated violence, on Fourteenth Amendment grounds.

Although this is the current state of the law, the Court has been far from unanimous in supporting a robust state action requirement. On one hand, broad conceptions of state action have sometimes led Justices to conclude that Congress could proscribe seemingly private conduct under the Fourteenth Amendment.\textsuperscript{158} On the other hand, some Justices have abandoned the state action requirement

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\textsuperscript{151} See Press Release, supra note 17.
\textsuperscript{153} The Supreme Court in \textit{United States v. Morrison} strongly suggested that a jurisdictional element would have saved the civil remedy in the Violence Against Women Act, although it did not outright conclude such a provision would be dispositive. 529 U.S. 598, 611–12 (2000); see also supra Part III.A.1.
\textsuperscript{155} U.S. CONST. amend. XIV, § 1.
\textsuperscript{156} Id. § 5.
\textsuperscript{157} \textit{Morrison}, 529 U.S. at 619–27.
\textsuperscript{158} See, e.g., Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 279–86 (1964) (Douglas, J., concurring) (arguing that private discrimination in public accommodations was rooted in state enforcement of background property rights); Shelley v. Kraemer, 334 U.S. 1, 19 (1948) (holding that privately created racially-restrictive covenants implicated state action at the point of judicial enforcement).
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altogether. But until either of these views achieves a majority on the Court, the Fourteenth Amendment is not likely to justify Congressional enactment of Shepard–Byrd.

It is useful then to consider instances where courts have upheld the application of § 249(a)(2) on Commerce Clause grounds. The trial court in Jenkins did uphold the validity of the statute as applied under the Commerce Clause. The court relied in its ruling on the fact that the case involved a kidnapping which included travel on U.S. Highway 119. The court was reluctant in its holding, however, and noted that “the Jenkinses never used the car or the road to leave the state.”

It further noted:

If wholly intrastate non-economic activity can be transformed into conduct that the federal government may punish simply because the defendant used a car or a road to get there, the Interstate Commerce Clause continues to cast a very large shadow, indeed, and very little activity remains in the exclusive province of the police powers of the state.

Despite its apparent unhappiness with the result, the court upheld the application of the law because it felt constrained by “the current prevailing constitutional precedents in this Circuit as applied to these facts.”

In reaching this conclusion, the Jenkins court relied in part on another district court ruling in United States v. Mullet. Although it was not binding precedent, that case involved a group of individuals charged under § 249(a)(2) for forcefully cutting the hair of several Amish individuals in violation of their religious beliefs. Faced with a similar Commerce Clause challenge, the Mullet court easily found it sufficient that “the Defendants used scissors and hair clippers, which had traveled from out of state into Ohio, to carry out the assault” and that “the defendants lured a victim by using the mail system and used motor vehicles to facilitate each assault.” Mullet and his co-defendants have filed an appeal, setting up the First Circuit court opinion on the constitutionality of § 249(a)(2).

While there is reason to believe the trial courts in both Jenkins and Mullet were
correct and that the Sixth Circuit will affirm in the Mullet appeal,\footnote{For example, the Jenkins court noted that unlike the statute in Lopez, § 249(a)(2) contains a jurisdictional element tying the crime to commerce. See 909 F. Supp. 2d at 773.} this does not end the inquiry. Jenkins may have been the exceptional case in that it involved a kidnapping and travel. By contrast, many hate crimes occur on a much more localized level, making it more difficult for a federal prosecution to satisfy the jurisdictional commerce element. Even if there is an arguable case for commerce jurisdiction, prosecutors may fear the possibility of an adverse ruling and be reluctant to pursue charges and devote resources towards obtaining a conviction that would ultimately be overturned. Until more caselaw develops, some uncertainty will remain, and we can expect defendants to continue making these as applied challenges to § 249(a)(2).

Despite these difficulties, the DOJ has been pursuing prosecutions under § 249(a)(2), and it has been successful in achieving plea bargains in a number of these cases.\footnote{See, e.g., Press Release, U.S. Dep't of Justice, Two Atlanta Men Plead Guilty to Federal Hate Crime Against Gay Man (Apr. 18, 2013), http://www.fbi.gov/atlanta/press-releases/2013/two-atlanta-men-plead-guilty-to-federal-hate-crime-against-gay-man [hereinafter Atlanta Press Release]; Press Release, U.S. Dep't of Justice, Michigan Man Pleads Guilty to Federal Hate Crimes Charge (Aug. 29, 2012), http://www.fbi.gov/detroit/press-releases/2012/michigan-man-pleads-guilty-to-federal-hate-crimes-charge [hereinafter Michigan Press Release].} In one Michigan plea deal, the defendants merely punched the victim in the face while at a convenience store.\footnote{Michigan Press Release, supra note 170.} In an Atlanta plea bargain, the defendants assaulted the victim after he left a grocery store, while another defendant filmed the attack and uploaded the video to the internet.\footnote{Atlanta Press Release, supra note 170.} These cases are examples of the DOJ stretching the Commerce Clause to its outer limits, with the only apparent commerce nexus in the latter case being that a video (which itself was not part of the crime) was uploaded to the internet. It seems probable that had either of these cases gone to trial, judges would have looked skeptically at federal authority to prosecute these cases in light of Lopez and Morrison.\footnote{Cf. supra notes 163–64 and accompanying text.}

Even with these prosecutorial successes, however, it must be reiterated that federal prosecutors necessarily have more limited resources than their state counterparts collectively do. Placing constitutional considerations aside, in the years between the enactment of Shepard–Byrd and the first prosecution under the sexual orientation provision in Jenkins, thousands of hate crimes occurred.\footnote{See Uniform Crime Reports, Federal Bureau of Investigation, http://www.fbi.gov/about-us/cjis/ucr/ucr-publications#Hate (last visited Oct. 26, 2014) (publishing yearly reports on the incidence of hate crimes).} Given this vast number, it is impossible to expect federal prosecutions even in all cases where there is a substantial federal interest. As such, federal prosecutions alone could not suffice even if jurisdiction were not an issue in many cases. Effective state prosecution is still a necessity.

With these practical limitations on Shepard–Byrd, state laws are a necessary foundation on which the Act can build. It is simply impossible to rely on
Shepard–Byrd as a primary means for achieving justice in all hate crimes cases. Thus it is appropriate and necessary to continue pushing for inclusive hate crime laws in the states. A notable example is Ohio, which is currently considering amending its hate crime statute.\(^\text{175}\) The recent push to include sexual orientation and gender identity-based crimes in the Ohio law resulted from a particularly violent assault of a man outside a Cleveland gay bar.\(^\text{176}\) The facts of that incident do not indicate a particularly compelling interstate nexus (although again, there was a video of the attack uploaded to the internet).\(^\text{177}\) The defendants were not charged with any enhanced bias-related charge,\(^\text{178}\) underscoring the importance of having comprehensive state laws, particularly where the federal government cannot intervene as a legal or practical matter.

Although public attention has largely turned away from hate crimes since the passage of Shepard–Byrd, some advocacy groups have noted the continued importance for inclusive state hate crime laws. The Human Rights Campaign (“HRC”) noted that Shepard–Byrd “was neither perfect nor fail safe” and argued that “[s]tate-level advocacy to pass hate crimes laws is still necessary in order to ensure that all hate crimes are prosecuted fully.”\(^\text{179}\) Noting that “most hate crimes will continue to be prosecuted at the state level,” the HRC advocates that state laws should (1) “enumerate[] sexual orientation and gender identity as protected characteristics” and (2) “cover[] non-violent hate crimes or hate crimes committed solely against another’s property.”\(^\text{180}\) The former would close the biggest gap between state and federal law, and the latter would cover harmful conduct not prohibited by Shepard–Byrd.

Pursuing state-level change is also achievable. While few states have recently enacted or amended their hate crime laws, such laws tend to be politically popular. For example, a 2007 Gallup poll taken after the House of Representatives passed a version of the Shepard–Byrd Act concluded that nearly seventy percent of Americans supported the bill, including broad majorities across various demographics.\(^\text{181}\) A 2009 study similarly found that majorities in all fifty states supported hate


\(^{178}\) Shaffer, supra note 176.

\(^{179}\) HUMAN RIGHTS CAMPAIGN, A GUIDE TO STATE LEVEL ADVOCACY FOLLOWING ENACTMENT OF THE MATTHEW SHEPARD AND JAMES BYRD, JR. HATE CRIMES PREVENTION ACT 9 (2011).

\(^{180}\) Id. at 10.

crime laws protecting sexual orientation.\footnote{182} Furthermore, while there has been little movement in the states on this issue recently, a small handful of states have newly expanded their hate crime statutes.\footnote{183} Overall, public support does not always translate into legislation, but these polls and anecdotal successes credit the idea that expansion of hate crime laws is a feasible goal for advocates.

Nevertheless, state laws are not a panacea. Some practical limitations that plagued the
Jenkins prosecution are universal to hate crimes prosecutions generally. For example, it can be difficult to prove that the defendant committed the crime

\textit{because of} the victim’s membership in a statutorily protected class. The prosecution in Jenkins had the testimony of Ashley and Alexis who stated directly that the four attacked Kevin “because of his sexual orientation.”\footnote{184} Compared to the usual method of proving intent indirectly through inferences, for example by presenting evidence of the defendant’s use of slurs during the attack, this evidence was rock solid. Yet by acquitting the Jenkinses, the jury apparently did not believe the attack was because of Kevin’s sexual orientation. Evidence that David Jenkins had previously propositioned Kevin\footnote{185} was used to confuse jurors into thinking he was tolerant of Kevin’s homosexuality.\footnote{186} The logic that a person ostensibly interested in a same-sex relationship would not act out of homophobia is appealing to a jury in its simplicity but ultimately fails to take into account the complexities of relationships and internalized homophobia. The problem was a cultural unfamiliarity with the issues, and the necessary response to these concerns requires a more difficult shift in cultural attitudes that the law cannot easily dictate. These cultural issues can be mitigated to some degree by prosecutorial awareness and effective presentation to the jury, and more recent successes indicate the Department of Justice learned a valuable lesson in Jenkins.

Yet if cultural tolerance and a reduction in hate crimes is the ultimate endgame, both federal and state hate crime laws offer important, if imperfect, protections in the meantime. The numerous limitations discussed above suggest that federal law cannot go it alone, and state laws should be expanded to cover current deficiencies.

V. CONCLUSION

The Department of Justice first became involved in the Jenkins case after local prosecutors in rural Kentucky seemed unwilling to treat the case seriously as a hate
crime. 187 If that fact shows the necessity of the federal law, the constitutional issues raised by the case show the importance of having effective state laws in the first place. State and federal hate crime law should be complementary, each supporting the other to produce an effective regime of criminal justice. 188 As this Note has demonstrated, however, it would be foolish to rely solely on the Shepard–Byrd Act for numerous constitutional and practical reasons. As long as hate crimes continue to be a problem, a more complete set of state laws are needed to reinforce Shepard–Byrd. Accordingly, in Ohio and other states which lack protections for sexual orientation, gender identity, and various other categories, inclusion of these groups is necessary to ensure that these virulent crimes are deterred and justly punished. As Kevin Pennington and countless other victims demonstrate, the stakes are too high otherwise.

187. See Estep, supra note 1.
188. For an article exploring the practical difficulties in implementing federal-state cooperation, see Kami Chavis Simmons, Subverting Symbolism: The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act and Cooperative Federalism, 49 AM. CRIM. L. REV. 1863 (2012).