

Crimes Against America's Homeless: Is the Violence Growing?

Testimony of

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Mr. Chairman, Members of the Committee and Subcommittee, thank you for the opportunity to speak today on the subject of crimes against the homeless. My name is Erik Luna, and I am a law professor at Washington and Lee University School of Law and an adjunct scholar with the Cato Institute.¹ I specialize in criminal law, criminal procedure, and allied areas of law and public policy. It is an honor to participate in today's hearing with such a distinguished group of witnesses and before an audience that includes some of the leading researchers and activists on this issue.

The plight of America's homeless is truly heartbreaking and has only become worse in recent years as a result of the nation's financial crisis and the rise of home foreclosures and evictions. As someone who has been fortunate enough to have gainful employment, a roof over my head, and food on my table, I can only imagine the desolate lives of those who have lost their jobs or are unemployable, who live on the streets and seek shelter under bridges or in cardboard boxes, and whose next meal is wholly dependent on the charity of strangers. This is all the more tragic when one recognizes that the ranks of the homeless are strewn with desperate mothers and their children, people suffering from mental illnesses and addictions, and military veterans who had put their lives on the line for this nation. The happenstance that has left many people homeless underscores the proverb "there but for the grace of God go I"—and the compassion and tireless efforts of advocates for the homeless, including those in this room, confirm the essentially goodhearted nature of the American people.

Against this background, it is hard not to be flabbergasted and repulsed by the crimes of violence committed against the homeless, as described in media accounts and the recent report by the National Coalition for the Homeless (NCH).² People doused with gasoline and set ablaze, beaten with pipes and bats, and stabbed with knives and broken bottles—all exemplifying the cruelty that man can inflict upon his fellow man. The same can be said of the brutal acts that propelled the federalization of other so-called "hate crimes": the murders of Matthew Sheppard in Wyoming and James Byrd, Jr. in Texas, and the attack on the National Holocaust Museum in Washington, D.C. and killing of museum security guard Stephen Johns.³

These events greatly disturbed conscientious citizens across the nation. No decent American could argue against the investigation, prosecution, conviction, and punishment of those who commit such crimes. Of course, that was never a question before this august body, nor was it a genuine issue of debate among scholars, policy analysts, and the general public. Instead, the problems concerned the alleged necessity, the potential consequences, and the ultimate constitutionality of the Hate Crimes Prevention Act (HCPA). On these points, I believe the law's opponents had, and still have, the better arguments.

The HCPA is not directly at issue today. Instead, the hearing is premised on two identical bills, S. 1765 and H.R. 3419, which would amend a twenty-year-old statute to include "homeless status" as a protected class for purposes of federal law enforcement's tracking of hate crimes

¹ All opinions expressed and any errors herein are my own.

² See NATIONAL COALITION FOR THE HOMELESS, HATE CRIMES AGAINST THE HOMELESS: AMERICA'S GROWING TIDE OF VIOLENCE (Aug. 2010) [hereinafter "AMERICA'S GROWING TIDE"]; Eric Lichtblau, *Killings of Homeless Rise to Highest Level in a Decade*, N.Y. TIMES, Aug. 18, 2010.

³ See Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, §§ 4701-13, 123 Stat. 2190, 2835-44 (2009).

across the nation.⁴ As a general matter, I have no objections to these bills in and of themselves. In fact, I strongly encourage the gathering and dissemination of statistical data and other relevant information as a means to enlighten policy judgments on criminal justice. If anything, the bills do not go far enough to ensure full and accurate information about the commission of and response to crimes motivated by legislatively identified animus or bias—a point that I will return to at the close of my testimony.

Before then, however, I would like to discuss two issues: (1) the collection of hate crime statistics, including hate crimes against the homeless; and (2) the justification for federalizing hate crimes, including those against the homeless. The first issue goes to the heart of the bills under consideration by federal lawmakers and is a problem with hate crime statistics in general. The second issue, though not directly before Congress, looms over this entire hearing.

1. THE HATE CRIME STATISTICS ACT AND CRIMES AGAINST THE HOMELESS

Enacted in 1990, the Hate Crime Statistics Act directs the U.S. Attorney General to acquire data “about crimes that manifest evidence of prejudice based on race, religion, sexual orientation, or ethnicity.” It also requires that the Attorney General “establish guidelines for the collection of such data including the necessary evidence and criteria that must be present for a finding of manifest prejudice and procedures for carrying out the purposes” of the law.⁵ The Attorney General subsequently delegated these responsibilities to the Director of the F.B.I., who then tasked the Uniform Crime Reporting (UCR) Program with the duty of establishing the necessary guidelines and procedures for collecting hate crime data.

The UCR guidelines describe a hate crime as a “criminal offense committed against a person or property which is motivated, in whole or in part, by the offender’s bias.”⁶ In turn, bias is defined as a “preformed negative opinion or attitude toward a group of persons based on their race, religion, disability, sexual orientation, or ethnicity/national origin.” The guidelines then provide a series of criteria that might support a finding of bias. Some of the listed items seem commonsensical, like the presence of bias-related markings at the scene of the crime (e.g., a swastika painted on the door of a synagogue). Others are less obvious or might raise serious legal questions if used at trial, such as whether a “substantial portion of the community where the crime occurred perceived that the incident was motivated by bias.”⁷ It is hard to imagine the evidentiary basis (let alone constitutional argument) for admitting testimony or documents about popular sentiment in order to prove that a crime has been committed.

The guidelines also provide vignettes intended to demonstrate the appropriate classification of hate crimes. One example involved a white male attacking a Japanese-American male, who suffered severe lacerations and a broken arm:

The incident took place in a parking lot next to a bar. Investigation revealed that the offender and victim had previously exchanged racial insults in the bar, the offender having initiated

⁴ Hate Crimes Against the Homeless Statistics Act, S. 1765, 111th Cong. (2009); Hate Crimes Against the Homeless Statistics Act, H.R. 3419, 111th Cong. (2009).

⁵ Hate Crimes Statistics Act, Pub. L. No. 101-275, 104 Stat. 140 (1990) (codified at 28 U.S.C. § 534 (2006)).

⁶ FEDERAL BUREAU OF INVESTIGATION, U.S. DEPARTMENT OF JUSTICE, HATE CRIME DATA COLLECTION GUIDELINES 2 (rev. ed. 1999).

⁷ *Id.* at 5-6.

the exchange by calling the victim by a well-known and recognized epithet used against the Japanese and complaining that the Japanese were taking away jobs from Americans. An Anti-Asian/Pacific Islander [hate crime] would be reported based on the difference in race of the victim and offender, the exchange of racial insults, and the absence of other reasons for the attack.⁸

This vignette raises several constitutional issues if it involved an actual hate crime prosecution—whether the white male is being punished on account of his speech or thoughts, for instance, and whether the race-based elements of the prosecution violate equal protection. It also raises questions of policy and practice: Does the existence of a hate crime depend on who made the first racial insult or whose slur was more notorious? Might it hinge on who won the fight?

But consistent with the congressional mandate, the UCR guidelines make clear that their purpose is for data collection only. “Hate crimes are not separate, distinct crimes, but rather traditional offenses motivated by the offender’s bias.”⁹ Moreover, the guidelines acknowledge the inherent difficulty in determining whether an offense should count as a hate crime:

Because motivation is subjective, it is difficult to know with certainty whether a crime was the result of the offender’s bias. Therefore, before an incident can be reported as a hate crime, sufficient objective facts must be present to lead a reasonable and prudent person to conclude that the offender’s actions were motivated, in whole or in part, by bias.¹⁰

The guidelines also offer a number of cautions—the need for case-by-case assessment of the facts, the potential for misleading or even feigned facts, the possibility of mistaken perceptions, and the reality that subsequent findings may undercut an initial classification.¹¹ All told, the guidelines attempt to provide some type of standards for data collection and a basis for subsequent scrutiny of this information.

None of this necessarily guarantees accurate classification. Offenders have all sorts of motivations, conscious and unconscious, including cynical beliefs about those who are in some way different from themselves. When hate crimes turn on one-word slurs or non-verbal expressions, the classifier is placed in the position of guesstimating the level of bias in the sometimes murky, often adrenalin-filled circumstances of a criminal episode. Moreover, the standard of proof vaguely resembles “probable cause”—the amount of evidence needed to conduct a search and seizure, for instance¹²—rather than the constitutionally mandated standard for conviction at trial. But again, this is of no constitutional moment when the goal is to categorize data rather than condemn defendants. Moreover, the inherent limitations of these statistics are (or should be) understood and acknowledged by policymakers; and as long as errors in classification are random, the data provided under the Hate Crime Statistics Act might still give a reasonable overall picture with all caveats attached.

⁸ *Id.* at 7.

⁹ *Id.* at 1.

¹⁰ *Id.* at 4.

¹¹ *See id.* at 6.

¹² *See* U.S. CONST. amend. IV; *Brinegar v. United States*, 338 U.S. 160, 175-76 (“Probable cause exists where ‘the facts and circumstances within their [the officers’] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that’ an offense has been or is being committed.”).

A far larger problem lies with the statistics provided by advocacy groups, who use disparate or loose standards, or no real standards at all, in the gathering and presentation of data. Policymakers often cite these statistics, and sometimes officials act in reliance upon this information without meaningful scrutiny.¹³ Among others, the U.S. Justice Department's Bureau of Justice Assistance has recognized the "widespread disparities between the hate crime data provided by public interest groups," calling upon government actors and private groups to work together on a "standard definition and reporting protocol for hate crimes."¹⁴ To my knowledge, no such accord has been reached, and to be blunt, integrity and consistency in empirical claims have not been a strong suit for some advocates and scholars, who can claim that hate crimes are either an "epidemic" or "rare" depending on the demands of their audience.¹⁵

For instance, when federal statistics showed a decline in hate crimes, some of the groups that had campaigned for the Hate Crime Statistics Act suddenly denounced the federal data collection scheme. Others resorted to anecdotalism or simply proclaimed that hate crimes were on the rise. As for the statistics that advocacy groups provide, some groups count all incidents as "hate crimes"—even if they do not amount to a criminal offense or only involve bias-motivated comments, and regardless of the source of information.¹⁶ Unfortunately, some of these problems appear to exist in the NCH's reports on hate crimes against the homeless.¹⁷ Although its documents are well intentioned and laudable in many parts, the NCH repeatedly conflates two potentially overlapping but importantly distinct concepts: crimes against the homeless and *hate crimes* against the homeless.

For instance, the NCH's most recent report contains a table for the years 1999-2009, listing in one column *FBI Defined Hate Crime Homicides* and in the other column *Fatal Attacks on Homeless Individuals*.¹⁸ According to the report, "The table shows that over the past eleven years, there are more than double the amount of *homeless hate crime deaths* than there are for all

¹³ See, e.g., JAMES B. JACOBS & KIMBERLY POTTER, HATE CRIMES: CRIMINAL LAW & IDENTITY POLITICS 52 (1998). In fact, the call of today's hearing was as follows:

Last month, the National Coalition for the Homeless released their annual report on hate crimes against the homeless population.... The report shows that the killing of homeless people has risen to the highest level in a decade.... The goal of this hearing is to discuss the rising trend of violence against this population and what response the federal government can have to it. Specifically, we will talk about the importance of collecting accurate uniform data on this and how such data can provide helpful and useful information to state and local law enforcement, policy makers and NGO's.

¹⁴ BUREAU OF JUSTICE ASSISTANCE, U.S. DEPARTMENT OF JUSTICE, A POLICYMAKER'S GUIDE TO HATE CRIMES xv (1997) [hereinafter "POLICYMAKER'S GUIDE"].

¹⁵ See, e.g., Christopher Chorba, *The Danger of Federalizing Hate Crimes: Congressional Misconceptions and the Unintended Consequences of the Hate Crimes Prevention Act*, 87 VA. L. REV. 319, 332-34 (2001); JACOBS & POTTER, *supra* note 13, at 46-50, 53-55.

¹⁶ See, e.g., POLICYMAKER'S GUIDE, *supra* note 14, at 8-10; JACOBS & POTTER, *supra* note 13, at 46-50; *see also infra* note 30.

¹⁷ See AMERICA'S GROWING TIDE, *supra* note 2; NATIONAL COALITION FOR THE HOMELESS, HATE, VIOLENCE, AND DEATH ON MAIN STREET USA: A REPORT ON HATE CRIMES AND VIOLENCE AGAINST PEOPLE EXPERIENCING HOMELESSNESS 2008 (Aug. 2009) [hereinafter "HOMELESSNESS 2008"]; NATIONAL COALITION FOR THE HOMELESS, HATE, VIOLENCE, AND DEATH ON MAIN STREET USA: A REPORT ON HATE CRIMES AND VIOLENCE AGAINST PEOPLE EXPERIENCING HOMELESSNESS 2007 (Apr. 2008).

¹⁸ AMERICA'S GROWING TIDE, *supra* note 2, at 12; *see also id.* at 49 ("In 2009, the National Coalition for the Homeless reported that one hundred fifteen homeless people were victims of hate crimes, forty-three of which resulted in death."). *But see id.* at 10 (acknowledging that "we could not always identify the motive for each attack based on our sources"); HOMELESSNESS 2008, *supra*, at 13 (same).

current protected people.”¹⁹ The table shows no such thing, however, but instead compares homicides motivated by racial bias, religious bias, etc., versus fatal attacks on homeless individuals, which may or may not have been motivated by homeless status and, in fact, may or may not have been homicides at all. The NCH report includes the following accounts of what it apparently believes to be homeless hate crime deaths:

The body of Ora James Light, a fifty-one year-old homeless man, was found under Interstate 4. Light’s abandoned body was found with multiple stab wounds. An eighteen year-old male, Tyler Sturdivant, originally denied any connection to Light but later admitted that he killed Light in self-defense.

Anthony Chatteron, forty, was killed by three men after a verbal argument. Chatteron believed that the men had stolen from him. Chatteron died at the scene after suffering from trauma to his upper body. The men fled the scene and took off in a car with a female driver. The police have not identified the suspects.

Allan McKibben was a homeless man in a wheelchair. He was found dead by a train station, without his prosthetic leg. His face had been scratched and his tongue was severely bitten. Besides that, McKibben also had injuries to his collarbone and spine. Advocates believe that the circumstances of McKibben’s death indicate foul play; however, officials believe that some of his injuries may have been sustained before his death.

Seventeen year-old Carlos Molina-Alvarez is charged with first-degree murder in the killing of a homeless man after repeatedly hitting him with a rock. The homeless man, Karl Chilcoat, fifty-two, suffered a crushed skull from the multiple blows from the heavy object. The attack seems to be unprovoked. Alvarez will stand trial as an adult.

Los Angeles police are investigating the suspicious death of a homeless man who was found with burns marks on his upper body and face. Investigators are trying to determine whether the man suffered the burns before or after his death. Locals say the homeless man was a frequent resident of the area.

While sleeping in a tent, Edward Matthews, forty-six, was fatally shot in the head. It is thought that the perpetrator may be the same individual who shot another homeless man, sixty, in the mouth eight months earlier. Both attacks appeared unprovoked and occurred in the early morning hours.²⁰

These stories have two things in common: (1) they are extremely sad, and (2) they contain no facts indicating that the incidents were motivated by bias against the homeless. In four of the incidents, no charges were filed, let alone suspects apprehended. The other two incidents had not resulted in convictions, and assuming the cases do go to trial, at least one is likely to involve a claim of self-defense. To be clear, the authors of the report may have additional information—maybe suspects have been apprehended in all of the incidents, maybe the two charged defendants have been convicted, and maybe there is evidence that would lead a reasonable and prudent person to conclude that the actions were motivated, in whole or in part, by bias. But this information is not contained in the report.

Moreover, many of the incidents listed in the report (both lethal and non-lethal) are loaded with speculation or acknowledgements that the facts and motives remain unclear:

¹⁹ *Id.* (emphasis added).

²⁰ *Id.* at 20–26.

- “The attack seemed unprovoked, according to police.”
- “The motive behind the attacks remains unknown, but police presumed that the violence was directly related to the victims’ homelessness.”
- “The attack seems to be unprovoked.”
- “There does not seem to be a clear purpose for the attacks besides his housing status, as his possession were not taken.”
- “Police are continuing to investigate the motive behind [the victim’s] stabbing spree. The only immediate connection between the victims appears to be their homelessness.”
- “Both attacks appeared unprovoked and occurred in the early morning hours.”
- “Police say the young men intended to rob the homeless man who seemed like an easy target.”
- “The motive remains vague, and the relation between the male attackers and the homeless man is unknown. It is believed that there was a prejudice against the homeless man because of his social position.”
- “The motive and exact purpose of the beatings remains unknown.”
- “The seemingly unprovoked attack on the homeless has peaked the attention of local law enforcement as this type of activity has been on the rise.”
- “The precise motive behind the attack remains unclear yet police believe that the attack was unprovoked and premeditated.”
- “A homeless couple was ambushed by an unknown aggressor behind a building downtown... Officers are unsure whether the couple was intoxicated or in shock, as they were both incoherent upon arrival of the police. Investigators are unsure [of] the motivation behind the attack.”²¹

In one incident listed as a non-lethal attack, the victim himself said, “I don’t think this guy did this to me because I’m homeless,”²² undermining the episode’s classification as a hate crime. Again, the authors of the report may have additional information that goes beyond speculation and demonstrates that the incidents were not only crimes, but crimes motivated by bias against the homeless. But the report itself is short on such information.

The NCH report might also lead the reader to wonder exactly what behaviors the authors believe to be criminal or should be criminalized. For instance, the report lists the following incident under the category of “non-lethal beatings”:

Police are investigating a Craigslist.com ad posted in the “Rants & Raves” section of the website. The author threatens to beat up homeless “punks” in San Luis Obispo. Police believe the poster to be male. According to his post, he plans to drive “all you out of my city” and threatened homeless residents with a “rude awakening” when he and fifteen friends start to follow homeless people under bridges and into shelters. “We will be beating you and making sure you know we won’t take it anymore,” the post reads. It goes on to say, “I have nothing to lose, and only the peace and sanctity of my home town to gain.” Police are searching the internet for the IP address of the computer in the hopes of locating whoever posted the comments. Even more disturbing, the author writes, “This is no joke. This is an

²¹ *Id.* at 20, 22-24, 26, 30, 32-33, 35, 39.

²² *Id.* at 31.

all out threat and warning. You will be dealt with.” The post concludes with, “Down with Prado. Down with the Shelter. Down with gutter punks alike.” These are all references to homeless shelters in the area. According to police, no acts of physical violence have been carried out in connection with the posting.²³

To be perfectly clear, I find this “ad” repugnant. The posting might provide a reason for law enforcement to conduct a preliminary inquiry, within constitutional boundaries, to ensure that the poster(s) does not engage in acts of violence. But what is equally clear is that no “beating” has been committed and that any prosecution based on the posting alone would violate the Constitution. The report also describes publications, visual depictions, and video games that allegedly facilitate the social stigmatization of the homeless. Although I have not seen these materials firsthand²⁴ (and, quite frankly, I have no desire to do so), the words and images detailed in the report are certainly crude and callous. But based on the report’s descriptions, I am reasonably confident that the First Amendment protects the materials.²⁵ If the report is seeking to raise public awareness and, in particular, alert parents about the existence of these materials, the goal is wholly unobjectionable. If instead the report is seeking to prompt government action—as is intimated by the inclusion of a citizen’s letter hoping that “the biggest nation in the world can succeed in getting this atrocity banned”²⁶—then the objective is censorship.

2. THE PROBLEMS OF FEDERALIZING HATE CRIMES

In all honestly, it seems unlikely to me that advocates for the homeless would ask lawmakers to ban speech that, although grotesque, is protected by the Constitution. What I do believe is that these well-meaning advocates will eventually call upon Congress to add “homeless status” to the HCPA—and for all I know, the lobbying process may have already begun. The first panelist at today’s hearing, Rep. Eddie Bernice Johnson, has stated her intention to introduce legislation that would extend hate crimes protection to the homeless.²⁷ Likewise, the NCH report specifically states its purpose to create “a commitment by lawmakers to combat the hate crimes and violent acts against people who experience homelessness,” its disappointment that homeless status was not added to the HCPA, and its recommendation that the “U.S. Department of Justice should issue guidelines, for law enforcement agencies on how to investigate and prosecute bias-motivated crimes against people experiencing homelessness.”²⁸ If advocates and policymakers do not seek to add homelessness to the HCPA, they can disabuse me of my belief during today’s hearing. If not, I think it is important to reiterate the problems of federalizing hate crimes, with reference to the potential addition of homelessness as a protected class.

A preliminary question is whether the HCPA filled a genuine need. For years now, some politicians, scholars, advocates, and journalists have referred to hate crimes as an “epidemic” or accepted this characterization, regardless of whether the statistics have shown an increase or

²³ *Id.* at 31.

²⁴ The only possible exception is the television show *South Park*, which I have watched on occasion.

²⁵ See, e.g., *United States v. Stevens*, 130 S.Ct. 1577 (2010); *Brandenburg v. Ohio*, 395 U.S. 44 (1969).

²⁶ AMERICA’S GROWING TIDE, *supra* note 2, at 86.

²⁷ “Congresswoman Eddie Bernice Johnson Votes to Close Gaps in Hate Crimes Law,” Apr. 29, 2009, *available at* <http://ebjohnson.house.gov/index.cfm?sectionid=21§iontree=18,21&itemid=192> (last visited Sept. 29, 2010).

²⁸ See AMERICA’S GROWING TIDE, *supra* note 2, at 10, 48, 63.

decrease in bias-motivated violence.²⁹ After 2001, the number of hate crime incidents reported by the Federal Bureau of Investigation has remained roughly the same—an average of 7,556 hate crime incidents per year—despite an increase in the number of reporting agencies and, of course, a continually growing American population.³⁰ Although we may agree that the number of hate crimes is too high (as compared to some baseline) and that every act of violence is disconcerting, the data do not show an *epidemic*, at least as the term is commonly understood (i.e., a rapid increase in the incidence of something).

Nonetheless, this type of language was used to argue in favor of the HCPA, with, for instance, U.S. Attorney General Eric Holder describing “the scourge of the most heinous, bias-motivated violence.”³¹ General Holder testified that “we have a significant hate crime problem in the country,” that the federal government “has a strong interest in protecting people from violent crimes motivated by such bias and bigotry,” and that the legislation was “vital,” “crucial,” and “necessary” to serve that interest.³² These claims are belied by the fact that every crime that might be prosecuted under the HCPA is already more than well covered in state penal codes. There is no evidence that state and local law enforcement fail to prosecute vigorously bias-motivated crimes under traditional criminal statutes or pursuant to hate crime provisions that now exist in most jurisdictions. Nor is there evidence that offenders who commit bias-motivated crimes get off easy in state criminal justice systems.

As was repeatedly noted during last year’s hearing, those responsible for the murders of Matthew Sheppard and James Byrd, Jr.—the HCPA’s namesakes—were quickly apprehended and prosecuted by local law enforcement. These brutal killers were convicted and sentenced to death or life imprisonment. There is absolutely nothing that the HCPA could have added to these cases; indeed, had the murderers of James Byrd, Jr. been tried in federal court, they would not have been eligible for capital punishment. Under questioning, General Holder conceded that there was no trend of under-enforcement or poor prosecution of hate crimes in the states. The best he could do was cite a handful of cases “where a state or a local jurisdiction has failed to act in a way that I think we would all think that [a] locality should.”³³

After the hearing, Senator Sessions looked into these cases and found that each had been pursued by local enforcement.³⁴ Most of the cases resulted in convictions and imprisonment;

²⁹ See, e.g., JACOBS & POTTER, *supra* note 13, at 45–64; Chorba, *supra* note 15, at 332–33; Debbie Howlett, *Some Fear Lack of Action Will Lead To Hate “Epidemic,”* USA TODAY, Oct. 12, 1999, at 6A.

³⁰ See Federal Bureau of Investigation, “Uniform Crime Reports: Hate Crime Statistics,” available at <http://www.fbi.gov/ucr/ucr.htm#hate> (last visited Sept. 29, 2010). During 2001, there was a spike in the number of reported hate crime incidents (up to 9,730), “presumably as a result of the heinous incidents that occurred on September 11.” FEDERAL BUREAU OF INVESTIGATION, HATE CRIME STATISTICS, 2001 (foreword) (2002). Also, it should be noted that the term “incident” employed by the UCR Program is different from that used by some advocacy groups, which classify as a hate crime *incident* an apparently bias-motivated event regardless of whether it amounts to a criminal offense. See *supra* note 16 and accompanying text. In contrast, the UCR Program uses the term *incident* to refer to crimes only, in recognition that “a hate crime may involve multiple offenses, victims, and offenders.” FEDERAL BUREAU OF INVESTIGATION, HATE CRIME STATISTICS, 2008, at 2 (2009), available at <http://www.fbi.gov/ucr/hc2008/documents/methodology.pdf>.

³¹ See Sen. Patrick J. Leahy Holds a Hearing on the Matthew Shepard Hate Crime Prevention Act of 2009, C.Q. TRANS., available on Westlaw at 2009 WL 1804153 [hereinafter “Hearing Transcript”]; Statement of Eric H. Holder, Jr., Hate Crimes Legislation, C.Q. TRANS., June 25, 2009, available on Westlaw at 2009 WL 1816543 [hereinafter “Holder Statement”].

³² *Id.*

³³ Hearing Transcript, *supra* note 31.

³⁴ 155 Cong. Rec. S7667–07, 7672–7677 (statement of Sen. Sessions).

those that did not were due to weaknesses in evidence not weak law enforcement efforts. Moreover, Senators Coburn and Sessions asked General Holder in writing how many hate crimes prosecutions he knew of that had gone unprosecuted in the state criminal justice systems. The Justice Department responded that it could not provide the number of cases in which state or local jurisdictions had failed to prosecute hate crimes.³⁵ So what has happened since the HCPA came into effect? This statute—intended to deal with the “epidemic” of hate crimes and the “scourge” of bias-motivated violence, and described as “vital,” “crucial,” and “necessary” to serve the federal government’s “strong” interest in this area³⁶—has generated a grand total of zero federal prosecutions.

I have every reason to believe that adding “homeless status” to the HCPA would have a similar underwhelming impact. This opinion is based on, *inter alia*, the NCH report, which contains no indication that state and local law enforcement is failing to investigate and prosecute crimes of violence against the homeless. To the contrary, where there is evidence of a crime and known perpetrator(s), prosecutors appear to be charging defendants with homicide and assault and obtaining convictions and prison terms. By all accounts, the primary obstacle to greater enforcement is the failure of homeless victims to report crimes committed against them, a problem that has nothing to do with the absence of “homeless status” among the list of protected classes in the HCPA.

In addition to being superfluous, the HCPA—either in its current form or with the addition of homeless status—presents significant policy and constitutional questions. Here, however, I will only briefly discuss a pair of issues, beginning with the primary consequentialist argument for federalizing hate crimes. Some have claimed that the HCPA will “deter violent acts” and “protect our communities from violence based on bigotry and prejudice.”³⁷ The very name of the law suggests deterrence: The Hate Crimes *Prevention* Act. This consequentialist claim is hard to accept, given that the vast majority of crimes (and, to date, all hate crimes) are prosecuted in state criminal justice systems. The murderers of James Byrd, Jr. and Matthew Shepard committed their heinous crimes despite the existence of state homicide statutes that carried the ultimate sanction—the death penalty. It seems naïve to think that the existence of a federal hate crimes law would have prevented these brutal killings.

The typical offender characteristics and/or the circumstances under which hate crimes occur make it especially unlikely that the possibility of federal prosecution will have any impact on behavior. Deterrence requires that a potential offender not only know of a criminal prohibition and attached punishment, but also believe that the costs outweigh the benefits from violating the law and then apply this understanding to his decision-making at the time of the crime. As noted in a Justice Department publication, however, the majority of offenders “merely are individuals who believe racial and ethnic stereotypes and act upon spur-of-the-moment impulses,” with alcohol or drug use being a frequent factor.³⁸ Needless to say, these are hardly the type of well-informed, rational actors that might be deterred by a change in the U.S. Code. In the case of violence against the homeless, the vast majority of offenders were young males and,

³⁵ See *id.* at S7674.

³⁶ See *supra* notes 31–32 and accompanying text.

³⁷ See *Holder Statement*, *supra* note 31.

³⁸ POLICYMAKER’S GUIDE, *supra* note 14, at 21.

in particular, teenage boys,³⁹ who are less susceptible to deterrence due to cognitive deficiencies and limited capacity for moral judgment.⁴⁰ As the Supreme Court noted a few months ago, “Because juveniles’ lack of maturity and underdeveloped sense of responsibility ... often result in impetuous and ill-considered actions and decisions, they are less likely to take a possible punishment into consideration when making decisions.”⁴¹

In fact, the HCPA might perpetuate rather than ameliorate inter-group animosities. Some offenders are driven by ideologies of racism, xenophobia, anti-Semitism, and so on; and as a general rule, they hate the federal government.⁴² By prosecuting them under a federal law that singles out the precise groups they hate, such offenders become martyrs for their cause in a proceeding that they believe confirms their suspicions. And by making their ideologies the focal point of trial, a prosecutor may be encouraging rather than deterring like-minded bigots.⁴³ In turn, the ordinary exercise of prosecutorial discretion—bringing charges in one case but not another—will lead to claims of group-based favoritism in hate crimes prosecutions, which has already occurred at the state level.⁴⁴ This can only stoke the flames of intergroup animosity rather than reducing the likelihood of future bias-motivated offenses.

Although the HCPA raises serious constitutional questions—including issues of free speech, due process, double jeopardy, and equal protection—I will focus here on concerns of federalism and the purported authority of Congress to enact virtually any prohibition it chooses, including bias-motivated crimes. Grounded in the text and context of the U.S. Constitution,⁴⁵ federalism limits the powers of national government and prevents federal interference with the core internal affairs of the individual states.⁴⁶ Among the areas that the Framers sought to

³⁹ See AMERICA’S GROWING TIDE, *supra* note 2, at 9, 17; Eric Lichtblau, *Attacks on Homeless Bring Push on Hate Crimes Laws*, N.Y. TIMES, Aug. 8, 2009.

⁴⁰ See *Graham v. Florida*, 130 S.Ct. 2011, 2028 (2010).

⁴¹ *Id.* at 2028–29 (citations omitted). The Court’s conclusion is supported by research on the effect of youthfulness on self-control, reasoning ability, and judgment. See, e.g., Barry C. Feld, *Unmitigated Punishment: Adolescent Criminal Responsibility and LWOP Sentences*, 10 J. L. & FAM. STUD. 11, 45–61 (2007).

⁴² See, e.g., POLICYMAKER’S GUIDE, *supra* note 14, at 23–24.

⁴³ See, e.g., David Rittgers, *Hate Crime Legislation Would Backfire*, CHRISTIAN SCI. MONITOR, July 10, 2009; Craig L. Ulrich, *Hate Crime Legislation: A Policy Analysis*, 36 HOUS. L. REV. 1467 (1999); see also JACOBS & POTTER, *supra* note 13, at 108–09.

⁴⁴ See *Statement of Timothy Lynch, Hate Crimes*, C.Q. TRANS., Apr. 17, 2007, available on Westlaw at 2007 WL 1143756:

[T]he men and women who will be administering the hate crime laws (e.g. police, prosecutors) will likely encounter a never-ending series of complaints with respect to their official decisions. When a U.S. Attorney declines to prosecute a certain offense as a hate crime, some will complain that he is favoring the groups to which the accused belongs (e.g. Hispanic males). And when a U.S. Attorney does prosecute an offense as a hate crime, some will complain that the decision was based upon politics and that the government is favoring the groups to which the victim belongs (e.g. Asian Americans). This has happened in some of the jurisdictions that have enacted hate crime laws at the local level. For example, when then New York City Mayor David Dinkins characterized the beating of a black man by white Jewish men as a hate crime in 1992, the Jewish community was outraged. Jewish community leaders said the black man was a burglar and that some men were attempting to hold him until the police could take him into custody. The black man did not want to go to jail, so he resisted—and the Jewish men fought back. Incidents such as that illustrate that actual and perceived bias in the enforcement of hate crime laws can exacerbate intergroup relations.

⁴⁵ Specifically, federalism was enshrined in the U.S. Constitution by enumerating the powers of the federal government, see U.S. CONST. art. 1, §8; and by declaring that all other powers were “reserved to the States respectively, or to the people.” U.S. CONST. amend X.

⁴⁶ See, e.g., THE FEDERALIST NO. 45, at 292–93 (James Madison).

reserve to the states was “the ordinary administration of criminal and civil justice.”⁴⁷ The Constitution mentioned only a handful of crimes in its text, all of which were consistent with the design and limits of federalism.⁴⁸ It was unthinkable to the Framers that the federal government would adopt a full-scale penal code, let alone displace or substantially interfere with the state criminal justice systems.⁴⁹ As Chief Justice John Marshall opined, Congress “has no general right to punish murder committed within any of the States,” and “it is clear that Congress cannot punish felonies generally.”⁵⁰ In more recent times, the Supreme Court has reiterated these limitations on federal involvement in local criminal justice matters, given that the “[s]tates possess primary authority for defining and enforcing the criminal law.”⁵¹ Constitutional concerns are thus raised whenever Congress effects “a significant change in the sensitive relation between federal and state criminal jurisdiction.”⁵²

Unfortunately, Congress has assumed such power over criminal matters, occasionally with a nod to an enumerated power, usually the regulation of interstate commerce.⁵³ As a conceptual matter, the HCPA can be viewed as an iteration of “overcriminalization.” This term refers to the constant expansion of criminal justice systems, through the creation of novel crimes, harsher punishments, broader culpability principles, and heightened enforcement, often in the absence of moral or empirical justification and without regard for statutory redundancy or jurisdictional limitations.⁵⁴ Although much of this expansion has occurred at the state level, the most virulent form of overcriminalization—and certainly the most criticized⁵⁵—has occurred in the federal system. Congress has slowly but surely obtained a general police power to enact virtually any offense, adopting repetitive and overlapping statutes, criminalizing behavior that is already well-covered by state law,⁵⁶ creating a vast web of regulatory offenses,⁵⁷ and extending federal jurisdiction to all sorts of deception⁵⁸ or wrongdoing⁵⁹ virtually anywhere in the world.⁶⁰ At last

⁴⁷ THE FEDERALIST NO. 17, at 120 (Alexander Hamilton).

⁴⁸ See U.S. CONST. art. 1, §8, cl. 6 (counterfeiting); U.S. CONST. art. 1, §8, cl. 10 (piracy, felonies on the high seas, offenses against the law of nations); U.S. CONST. art. 3, §3 (treason).

⁴⁹ See, e.g., RUSSELL CHAPIN, UNIFORM RULES OF CRIMINAL PROCEDURE FOR ALL COURTS 2 (1983).

⁵⁰ Cohens v. Virginia, 19 U.S. 264, 426, 428 (1821).

⁵¹ United States v. Lopez, 514 U.S. 549, 561 n.3 (1995).

⁵² *Id.*

⁵³ Apparently, the provisions criminalizing violence committed because of race, color, religion, or national origin are also premised on the Thirteenth, Fourteenth, and Fifteenth Amendments. See Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, §§ 4707–08, 123 Stat. 2190, 2836 (2009). Although beyond the scope of my testimony, these claims are constitutionally dubious—for instance, the Fourteenth and Fifteenth Amendments seem to have little relevance to hate crimes committed by private citizens, given that the former only prohibits state action and the latter is concerned solely with the right to vote.

⁵⁴ Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703 (2005).

⁵⁵ See, e.g., ABA CRIMINAL JUSTICE SECTION, THE FEDERALIZATION OF CRIMINAL LAW 59–78 (1999) (providing bibliography).

⁵⁶ One example is Congress’s enactment of a federal “carjacking” statute. See 18 U.S.C. § 2119 (2000) (imposing federal criminal liability on those who take motor vehicles by force, violence, or intimidation); Commonwealth v. Jones, 267 Va. 284, 286 (2004) (detailing Virginia’s common law definition of robbery, which prohibits the taking of any property of another by violence or intimidation); Spencer v. Commonwealth, 42 Va. App. 443, 448 (2004) (“carjacking is a species of robbery”).

⁵⁷ See, e.g., United States v. Park, 421 U.S. 658, 663–64, 670–73 (1975); see generally Paul Rosenzweig, *The Over-Criminalization of Social and Economic Conduct*, 7 HERITAGE FOUND. LEGAL MEM. 1, 3–12 (2003).

⁵⁸ See, e.g., 18 U.S.C. § 1001(a)(2) (2000) (criminalizing false statements made pursuant to “any matter” within any branch of the federal government); 18 U.S.C. § 1341 (2000) (proscribing various fraudulent transactions utilizing the Postal Service or private interstate mail carriers); 18 U.S.C. § 1343 (2000) (prohibiting similar fraudulent transactions over interstate wire, radio, and television signals); 18 U.S.C. § 1346 (2000) (defining “scheme or artifice to defraud” under § 1341 and § 1343

count, there were about 4,500 federal crimes on the books,⁶¹ with the largest portion instituted over the past four decades.⁶²

The scope of the HCPA is as breathtaking as any prior feat of congressional overcriminalization. Unlike civil rights statutes—which required either state action (e.g., abuses of force by local police) or the victim’s involvement in a federally protected activity (e.g., serving on a jury),⁶³ and which were enacted during periods when there was good reason to believe that state officials would neither enforce nor abide by the law—the HCPA federalizes private acts of violence perpetrated “because of the actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability of any person.”⁶⁴ By the law’s terms, virtually every sexual assault could be a federal crime, for instance, given that such crimes are committed “because of” the victim’s gender and the assailant’s gender and gender preferences. Although many supporters disavowed any such intention,⁶⁵ apparently some Justice Department officials refused to disclaim this remarkably broad but textually straightforward construction of the law’s coverage.⁶⁶ Under this interpretation, the addition of homeless status to the HCPA could federalize most acts of violence committed against the homeless. Not unlike the fact that burglars victimize “housed individuals” precisely because they have homes, the sad reality is that the homeless tend to be victimized because they do not have homes and must live on the streets.

Regardless of interpretation, however, the HCPA flouts the constitutional precept that the federal government has limited, enumerated powers. To be permissible under the commerce clause, a non-economic criminal statute must involve conduct that substantially affects interstate commerce.⁶⁷ This cannot be “based solely on that conduct’s aggregate effect on interstate commerce” through a “but-for causal chain from the initial occurrence of violent crime ... to every attenuated effect upon interstate commerce.”⁶⁸ To hold otherwise would abolish the very idea of federalism and obliterate any line between national and local power.⁶⁹ Moreover, the

as including a plan to “deprive another of the intangible right to honest services”); *see also* Jeffrey Standen, *An Economic Perspective on Federal Criminal Law Reform*, 2 BUFF. CRIM. L. REV. 249, 289 (1998) (citing over three hundred federal proscriptions against fraud and misrepresentation).

⁵⁹ *See, e.g.,* United States v. Welch, 327 F.3d 1081, 1090–1103 (10th Cir. 2003) (upholding a federal felony indictment for violation of Utah’s commercial bribery statute, a misdemeanor under state law).

⁶⁰ *See, e.g.,* Pasquantino v. United States, 544 U.S. 349 (2005) (affirming a defendant’s federal conviction for violating Canadian tax law through the use of interstate wires); United States v. McNab, 331 F.3d 1228 (11th Cir. 2003) (upholding federal conviction for violation of Honduran fishing regulations); Ellen Podgor & Paul Rosenzweig, *Bum Lobster Rap*, WASH. TIMES, Jan. 6, 2004, at A14 (criticizing the *McNab* prosecution and noting that the Honduran government believed that its laws had not been violated and had filed an amicus curiae brief in support of the *McNab* defendants).

⁶¹ *See* JOHN S. BAKER, JR., REVISITING THE EXPLOSIVE GROWTH OF FEDERAL CRIMES (2008), *available at* http://www.heritage.org/Research/LegalIssues/upload/Im_26.pdf (last visited Sept. 29, 2010).

⁶² *See* ABA CRIMINAL JUSTICE SECTION, *supra* note 55, at 7.

⁶³ *See* 18 U.S.C. §§ 242, 245.

⁶⁴ 18 U.S.C. § 249(b).

⁶⁵ *See, e.g.,* *Hearing Transcript*, *supra* 31.

⁶⁶ *See, e.g.,* Letter of the U.S. Commission on Civil Rights to the Hon. Joseph Biden, Jr., et. al., Regarding S. 909, June 16, 2009, *reprinted at* 155 Cong. Rec. S7509-06, S7514; *Testimony of Gail Heriot, Hate Crimes Legislation*, CONG. TESTIMONY, June 25, 2009, *available on Westlaw at* 2009 WLNR 12255630.

⁶⁷ *See* United States v. Morrison, 529 U.S. 598, 608–18 (2000); United States v. Lopez, 514 U.S. 549, 558–68 (1995).

⁶⁸ *Morrison*, 529 U.S. at 615, 617.

⁶⁹ *See id.* at 615-18; *see also* *Lopez*, 514 U.S. at 564-68.

enumeration of congressional powers in Article I, § 8 of the U.S. Constitution would be unnecessary if a nominal impact on interstate commerce could trigger federal jurisdiction. In light of the historical background and accepted canons of interpretation, a construction of the commerce clause “that makes the rest of § 8 superfluous simply cannot be correct.”⁷⁰ As the Supreme Court concluded in *United States v. Morrison*,

The 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. Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.⁷¹

This description applies squarely to the fundamentally non-economic, intrastate violence covered by the HCPA. The law merely asks that the offender, the victim, or the relevant act somehow touch a channel, facility, or instrumentality of interstate commerce—using a telephone or freeway might suffice, for instance—and it allows federal jurisdiction if the act simply “affects” commerce in some oblique way (i.e., no need for “substantial effects”).⁷² The federalization of crimes of violence against the homeless would be just as constitutionally troublesome. But as noted, there is no evidence that such crimes are going unprosecuted in the states or that federal law enforcement has had any impact on hate crimes in general.

This brings me back to the point raised at the beginning of my testimony, namely, the bills at issue today do not go far enough to ensure full and accurate information about the commission of and response to crimes motivated by legislatively identified animus or bias. I have no objection to homeless status being added to group characteristics in the Hate Crime Statistics Act. Once again, I am in favor of collecting and disseminating empirical data as a means to inform policy judgments on criminal justice. Given the aforementioned problems with the existing data on hate crimes against the homeless, the information gathered pursuant to the proposed bills could be enlightening. What is missing from our collective knowledge, however, is whether the HCPA is justified by the failure of state and local officials to prosecute cases of violence that fall within the definition of a hate crime. For instance, Justice Department officials stated the following in response to separate queries by Senators Tom Coburn and Jeff Sessions:

The Department does not have access to precise statistics of hate crimes that have gone unprosecuted at the State and local level, and we are unaware of any source for such comprehensive information of unprosecuted offenses generally.⁷³

The Department is unable to provide an exact number of cases in which State, local or tribal jurisdictions have failed to prosecute hate crimes because we are not aware of such compilation of data.⁷⁴

As mentioned above, the best that the Justice Department has been able to provide is a handful of cases that it believes were under-prosecuted. To remedy this sort of information gap, Senator Orrin Hatch has previously proposed a study to look into the question of state default.

⁷⁰ *Lopez*, 514 U.S. at 589 (Thomas, J., concurring).

⁷¹ *Morrison*, 529 U.S. at 618.

⁷² 18 U.S.C. § 249(b).

⁷³ 155 Cong. Rec. S7667-07, 7674 (response to Sen. Coburn’s question).

⁷⁴ *Id.* (response to Sen. Session’s question).

Maybe this study would show a trend of under-enforcement by state and local prosecutors and insufficient punishment for crimes of violence, evincing a need for some type of action. Or maybe it would affirmatively demonstrate that state and local officials are assiduously fulfilling their obligations, that bias-motivated offenders are receiving just and effective punishment, and that the HCPA is entirely unnecessary. Either way, the American people and their elected representatives would be in a better position to evaluate this contentious area of criminal justice policy.

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Again, thank you for the opportunity to speak today. I look forward to answering any questions you may have.