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Jennifer Jolly-Ryan
Northern Kentucky University

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Strengthening Hate Crime Laws in Kentucky

BY JENNIFER JOLLY-RYAN*

I. INTRODUCTION

Violent acts motivated by prejudice against persons and groups due to race, ethnicity, religion, national origin, gender, sexual orientation, disability, or age, commonly known as "hate crimes," are the "embodiment of

*I Professor of Legal Writing, Northern Kentucky University, Salmon P. Chase College of Law. B.A. 1977, J.D. 1984, Northern Kentucky University. In addition to Basic Legal Skills, Professor Jolly-Ryan teaches Discrimination Law and is a Commissioner on the Kentucky Commission on Human Rights. The opinions expressed in this Article are the author's and not necessarily those of the Kentucky Commission on Human Rights. Thanks to Professor Martin J. Huelsmann, member, Kentucky Criminal Justice Council; Beverly Watts, Executive Director, Kentucky Commission on Human Rights; the members of the Kentucky Commission on Human Rights; Rachel LeJeune; and Jennifer Edwards.

1 See Terry A. Maroney, The Struggle Against Hate Crime: Movement at a Crossroads, 73 N.Y.U. L. REV. 564 (1998). The groups protected varies greatly from state to state. The definition may include threats, intimidation, harassment, or attacks on property motivated by such bias, as well as acts in which the victim is not actually a member of the targeted group, but is perceived as such. See id. at 564 n.3. See also Erika L. Orr, The Hate Crimes Act: Broadening the Scope of Culpability, 85 ILL. B.J. 564 (1997); In re B.C., 680 N.E.2d 1355, 1359 (Ill. 1997). Pure "hate speech," unaccompanied by an actual or implied threat of violence, while thought to promote violent hate crimes, does not come within the definition and raises significant First Amendment concerns which have been the subject of many other books and law review articles. See, e.g., MONROE H. FREEDMAN & ERIC M. FREEDMAN, GROUP DEFAMATION AND FREEDOM OF SPEECH: THE RELATIONSHIP BETWEEN LANGUAGE AND VIOLENCE (1995); LAURA LEDERER & RICHARD DELGADO, THE PRICE WE PAY: THE CASE AGAINST RACIST SPEECH, HATE PROPAGANDA, AND PORNOGRAPHY (1995); Mari J. Matsuda, Public Response to Racist Speech: Considering the Victim's Story, 87 MICH. L. REV. 2320

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intolerance.³

Hate crimes . . . leave deep scars not only on the victims, but on our larger community. They weaken the sense that we are one people with common values and a common future. They tear us apart when we should be moving closer together. They are acts of violence against America itself.³

In 1998, the Kentucky Legislature began to heal the scars imposed by hate crimes, scars that have left both individuals and communities victimized, by enacting the Commonwealth’s first hate crime statute.⁴ In (1989). The Hate Crimes Prevention Act of 1997 defines a “hate crime” as “a crime in which the defendant intentionally selects a victim, or in the case of a property crime, the property that is the object of the crime, because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person.” H.R. 3081, 105th Cong. (1997).

³ Id. (quoting President Clinton, Radio Address on Hate Crime (June 7, 1997)).
(1) A person may be found by the sentencing judge to have committed an offense specified below as a result of a hate crime if the person intentionally because of race, color, religion, sexual orientation, or national origin of another individual or group of individuals violates a provision of any one (1) of the following:
(a) KRS 508.010, 508.020, or 508.025;
(b) KRS 508.050 or 508.060;
(c) KRS 508.100 or 508.110;
(d) KRS 509.020;
(e) KRS 510.040, 510.050, 510.060, 510.070, 510.080, 510.090, 510.100, or 510.110;
(f) KRS 512.020, 512.050, or 512.060;
(g) KRS 513.020, 513.030, or 513.040; or
(h) KRS 525.020, 525.050, 525.060, 525.070, or 525.080.
(2) At sentencing, the sentencing judge shall determine if, by a preponderance of the evidence presented at the trial a hate crime was a primary factor in the commission of the crime by the defendant. If so, the judge shall make a written finding of fact and enter that in the court record and in the judgment rendered against the defendant.
(3) The finding that a hate crime was a primary factor in the commission of the crime by the defendant may be utilized by the sentencing judge as the sole factor for denial of probation, shock probation, conditional discharge,
doing so, the Kentucky Legislature has made clear that it intends to take a stand against the violence resulting from hate and intolerance. By taking this first step, the Legislature has left itself open to future opportunities to strengthen the law in a very reasonable fashion. Those central to its enactment and enforcement acknowledge that the 1998 version of Kentucky’s Hate Crimes Act is simply a starting place for more comprehensive legislation after further study. The purpose of this Article is to hopefully aid in that study and to urge the adoption of stronger hate crime laws in Kentucky during the next legislative session. Other state legislatures undergoing revision or adoption of hate crime laws may also benefit from Kentucky’s experience and the analysis contained in this Article.

Recognizing that the Kentucky Legislature has taken the first of multiple steps in adopting effective hate crime laws, this Article focuses upon the most problematic facet of the current statute: the absence of any specific penalty enhancement for hate crimes. There are many other issues which should be addressed by the Kentucky Legislature, but they are beyond the scope of this Article.

This Article briefly reviews the history of the 1998 Kentucky Hate Crimes Act’s adoption and its essential provisions. I will contend that although Kentucky has taken the necessary first step, hate crime laws in Kentucky need to be strengthened if they are to be effective. Specific penalty enhancement provisions must be incorporated within the Hate Crimes Act and must replace the purely discretionary sentence enhancements it now contains. The addition of penalty enhancement would

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or other form of nonimposition of a sentence of incarceration.

(4) The finding by the sentencing judge that a hate crime was a primary factor in the commission of the crime by the defendant may be utilized by the Parole Board in delaying or denying parole to a defendant.

Id. (emphasis added).

5 See infra note 77 and accompanying text.

6 For example, gender, age, and disability are not included as protected classes under the statute. See K.R.S. § 532.031(1) (Michie 1990 & Supp. 1998). If specific penalty enhancements are adopted, the Kentucky Legislature will need to address the categories of crimes for which a penalty can be enhanced and at what stage of the proceedings evidence of hate motivation is introduced. The Legislature will also need to determine whether the judge or jury should hear evidence concerning motivation. The jury could determine the motivation of the defendant, just as it does in discrimination cases under Title VII (which makes it unlawful for an employer to discriminate against an employee “because of such individual’s race, color, religion, sex, or national origin.”). 42 U.S.C. § 2000e-2(a)(1) (1988).
make Kentucky's hate crime laws consistent with the Anti-Defamation League ("ADL") Model Law, as well as with the forty other states with penalty enhancement provisions in their hate crime laws. By providing for specific penalty enhancements, the legislature will strengthen Kentucky's hate crime laws and thereby deter their commission while also addressing injuries to the community at large. It will also provide necessary notice to a person charged with a hate crime that the sentence will be enhanced if the requisite motivation is proved at trial.

II. KENTUCKY HATE CRIME STATISTICS AND REPORTS

Nationwide and in Kentucky, hate crimes either are on the rise or have been reported more efficiently in recent years. In 1996, "[l]aw enforcement agencies across the country reported 5396 hate crimes based on race, 1401 based on religion, 1016 on sexual orientation, [and] 940 on ethnic background." At a time when violent crime in general is declining, the number of reported hate crimes is increasing. "The number of reported hate crimes [in the United States in 1996] was up 9.2 percent from 1995 and 33.2 percent from 1994." Many people have noted that the number of hate crimes actually committed may be much higher as, historically, the FBI has not compared hate crime statistics from year to year and local law enforcement agencies in most states have not been required to collect or report hate crime statistics. Moreover, many believe that the number of hate crimes actually committed may be much higher than the official statistics would indicate, as many crimes which could be classified as hate crimes go unreported to local authorities.

In Kentucky, the number of hate crimes reported in the past is somewhat unreliable. It appears that many of these problems have been resolved, as the state police have created new forms and reporting procedures. Whether it is because of better reporting mechanisms or an increase in reported hate crimes that always have existed in Kentucky, one thing is clear: the number of hate crimes reported in Kentucky is on the

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9 See id. The FBI issues its report on hate crimes in four-year cycles. The most current report was issued in 1996.
10 See Michael Quinlan, Hate-Crime Data from Kentucky Didn’t Reach FBI, COURIER-JOURNAL (Louisville, Ky.), June 20, 1996, at A1.
rise.11 In any event, the raw numbers cannot tell the stories of fear and intimidation forever living in the hearts and minds of the victims. Examples of hate crimes in Kentucky have been well-publicized. The stories behind the raw statistics show the need for effective hate crime legislation in Kentucky.

- A family’s new home near Louisville, Kentucky was destroyed by fire and a firefighter was killed. Investigators believed that there was a racial motive for the arson because the owners of the home were white foster parents of two African-American children. Shortly after the fire, investigators found a statuette of a small African-American boy holding a fishing rod, swinging from a tree with a clothesline around its neck. One week prior to the fire, police officers had staked out the house looking for a dark pick-up truck. The driver and passengers were white and had been yelling racial slurs at the family.12

- On the Fourth of July holiday, a Kentucky couple found a cross burning on their front lawn.13

- A nineteen-year-old Korean woman was threatened and told to leave the country while being called a “Jap” and “Puerto Rican.” Her harasser was a teenage boy who pulled up beside her on a Lexington, Kentucky street. The boy followed her for five minutes in his car and nearly hit her when he stopped his car and threw it into reverse.14

- A black family living in Western Kentucky found hate letters scattered across their lawn. Two weeks before, four black Paducah police officers received hate letters in the mail.15

- Christian students were shot and killed at their high school in Paducah, Kentucky while attending a prayer group. Observers reported that the boy who fired the shots had taunted and ridiculed the students for praying openly.16

11 From 1995 to 1996, reported hate crimes increased in Kentucky from 81 to 109. See Reno Endorses Hate-Crime Bill, supra note 7, at A18.
14 See id.
15 See Family Determined to Stay Despite Hate Letters; But Kentuckians to Be More Cautious, EVANSVILLE COURIER, Sept. 22, 1997, at A8 (explaining that the letters did not constitute a hate crime because Kentucky had no hate crime law and no federal law was violated because the letters contained no threats).
16 See Editorial, ST. LOUIS POST-DISPATCH, Dec. 13, 1997, at A36. It was not widely discussed in the media whether this crime was motivated by anti-religious
A young black man was shot on the streets of Covington, Kentucky. Police reported that the suspected assailant was white and that before firing the shot shouted, "I'm going to kill you, monkey nigger." FBI officials investigated the case against the white male, but did not prosecute under federal hate crime law because the incident "failed to meet the stringent criteria." There were no hate crime laws on the books in Kentucky in 1997 and the man stood charged only of assault.

A cross made of two broom handles was placed on the front lawn of a black man's home in Covington, Kentucky and set on fire. A pointed cardboard hat with a white sheet draped over it, swastikas, and sheets with the letters "KKK" painted on them were found at the scene.

A black man was hit on the head with a beer bottle while sitting in his car in the parking lot of a pizzeria in Kentucky. His attackers were two white men who repeatedly slammed him into the frame of his car when he tried to get away. The attackers were heard to say to the victim, "Get the f**k out of here, you f***ing nigger," and "F*** Martin Luther King."

A black family who had moved into an all-white neighborhood in Western Kentucky immediately began to hear racial slurs yelled from cars passing their home at night, and dozens of racist fliers were thrown into their yard. The fliers claimed that by being African-American, the family had lowered property values. Signed by a group calling itself "Last Rites," the hate fliers suggested that the family return to Africa, gave them thirty days to leave the neighborhood, and threatened, "Not even the police can protect you."

bias, which could be classified as a hate crime. One writer suggested that the boy who fired the shots had been left out and harassed by the Christian students. Id. See also Letters, DETROIT NEWS, Dec. 24, 1997, at A6.


See id.


Hate Crime Violence, RACE REL. REP., May 15, 1999, at 2 (citing the ASHLAND INDEPENDENT, Feb. 27, 1999 (expletives deleted)).

Your honor, I have four kids; my baby doesn’t want to go to bed and sleep (alone), and one daughter is in therapy. My wife has post-traumatic stress. When we moved on (Ky.) 94, all we wanted was the God-given right as Americans to buy a house. I wish I’d never bought it... We would ask for you to send a message to Calloway County, to Western Kentucky and to Bill Clinton’s doorstep that all hate crimes will be punished to the full extent of the law.33

Hate crimes do much more than injure their direct victims, and the damage done cannot be measured solely in terms of physical injury or dollars and cents. Other members of the victim’s community often feel intimidated, isolated, vulnerable, and unprotected by the law. “By making members of minority communities fearful, angry and suspicious of other groups—of the power structure that is supposed to protect them—[hate crimes] can damage the fabric of our society and fragment communities.”24

III. 1998 Kentucky Hate Crimes Act
—AN OVERVIEW

A. History of Adoption of the 1998 Kentucky Hate Crimes Act

In response to the escalating numbers of hate crimes reported and the unique injury suffered by the victims and community at large, most states have adopted some form of hate crime legislation.25 In the absence of meaningful criminal penalties for their commission, hate crimes essentially go unaddressed. Until 1998, Kentucky was one of a handful of states that did not have hate crime legislation. Arizona, Georgia, Hawaii, Indiana, New Mexico, South Carolina, and Wyoming remain among those states.26 In 1998, the Hate Crimes Act was enacted by the Kentucky Legislature.

23 Id.
During its 1998 Session, the Kentucky Legislature revisited the issue of whether to adopt a hate crime bill. The Kentucky Legislature reintroduced proposed hate crime legislation on January 15, 1998. As originally proposed, the legislation was designed to create the new crime of "ethnic intimidation" and, if adopted, would have specifically enhanced penalties for certain criminal offenses by one degree if race was a factor in the commission of the offense. The proposed bill would also have created the new crime of "institutional vandalism," and would have allowed victims of institutional vandalism and ethnic intimidation to collect compensatory and punitive damages in a civil trial. Moreover, a victim of ethnic intimidation would have been eligible for crime victim compensation. This initial House bill, with specific penalties for the commission of hate crimes, was referred to the House Judiciary Committee, where it remained. A second House bill, introduced on January 29, 1998, met with
greater success. Entitled “An Act Relating to Criminal Justice Matters,” House Bill 455 simply proposed to “prohibit ethnic intimidation,” and listed fourteen other reforms to Kentucky’s criminal justice system.

House Bill 455 was sponsored by twenty-five Kentucky legislators. Unlike earlier versions of hate crime legislation in Kentucky, House Bill 455 received the enthusiastic and unwavering support of both Governor Paul Patton and Attorney General Ben Chandler. The 1998 hate crime legislation originated as part of Governor Patton’s expansive proposal to reform the state’s criminal justice system.

Governor Patton’s proposed crime package was spurred by the burning of an African-American church in Kentucky by suspected racist arsonists. In 1996, a church in Providence, Kentucky, with a predominantly African-American congregation, was burned to the ground at the hands of arsonists. Prior to the Kentucky church fire, forty-two predominantly African-American churches in nine southern states had been burned by arsonists.

(sponsored by Representatives P. Hatcher, Jr. and J. Crenshaw).


36 See id.


38 See Patton, supra note 27, at A10.


40 Tom Loftus, Kentucky’s Church-Arson Response Group Has First Test, COURIER-JOURNAL (Louisville, Ky.), July 24, 1996, at A8 [hereinafter Loftus, Kentucky’s Church-Arson Response Group]. In 1996, the nation’s attention was focused upon violence motivated by racism, as approximately 67 churches with black congregations had been burned in 1995 and 1996. See Fox Butterfield, Old
Two other churches in Louisville, Kentucky, with predominantly African-American congregations, were burned in the 1990s: Apostolic Faith Assembly Church and Asbury Chapel AME Church. The federal government was criticized by some civil rights activists and clergy members in Kentucky for moving too slowly to apprehend the individuals responsible for the burning of African-American churches throughout the South.

In 1996, clergy and high ranking officials from several southern states attended a White House meeting to address the recent church fires throughout the South. Governor Patton and Attorney General Chandler attended the White House meeting and vowed to support legislation in the

Fears and New Hope: Tale of Burned Black Church Goes Far Beyond Arson, N.Y. TIMES, July 21, 1996, at A12. Subsequent investigations of the fires and over 100 arrests led federal officials to the conclusion that racial hatred was but one of several factors motivating the church arsonists. Two Ku Klux Klansmen were prosecuted and pled guilty to conspiracy charges in connection with the burning of two South Carolina churches. But black men were also charged with the burning of black churches. One-third of the people arrested in the burnings were black. Forty-one percent (41%) of the churches burned were attended by predominately black congregations and the rest were predominately white. Forty-four percent (44%) of the fires were started by juveniles. See Pierre Thomas, Blacks Are a Sizeable Minority in Church Arsons, Records Show, COURIER-JOURNAL (Louisville, Ky.), Sept. 15, 1996, at A2. In Kentucky, out of the 18 churches that were burned, two were attended by a predominantly black congregation. See Cynthia Eagles, 16 of 18 Churches Hit by Arsonists Were White; Race Not Viewed as Factor in Fires at 2 Black Churches, COURIER-JOURNAL (Louisville, Ky.), Jan. 15, 1997, at B4.


As director of The Justice Resource Center in Louisville, Kentucky, Coleman wrote:

I, along with other ministers, feel these church burnings are not accidental but a symbol of hatred toward people of color. It's amazing how the Justice Department and the Federal Bureau of Investigation can prioritize other concerns and the burning of churches, cross burnings and Klan activities are very seldom remedied.

In focusing upon hate activities in the state of Kentucky, Coleman reported that "[i]t is not unusual for citizens in the Commonwealth of Kentucky to wake up and read headlines addressing Klan activities, cross burnings, and other hate activities. The perpetrators are very seldom caught. The same seems true not only locally, but throughout the nation." Id.

See Patton, supra note 27, at A10.
1998 session to increase penalties for racially motivated church arson and hate crimes in general. The Governor stated that the adoption of hate crime legislation in Kentucky was now a high priority and that he planned to establish "lines of communications" with local, state and federal agencies involved with combating and reporting hate crimes throughout the state. In addition, Governor Patton formed a group of state officials to discuss "ways to communicate with the people of Kentucky about how we need to pull together to combat this larger problem in society of hate crimes." In the summer of 1997, the Governor ordered a study done in anticipation of revamping Kentucky's system of criminal justice, which included addressing hate crimes in the Commonwealth. This study resulted in proposed legislation introduced to the House Judiciary Committee in February of 1998.

Governor Patton's sweeping anti-crime package envisioned the creation of new hate crime and church arson offenses to be included in the state's penal code. House Bill 455 received great support. However, there was not universal support for increasing the criminal penalties for people convicted of hate crimes. After much debate, the House Judiciary Committee rejected attempts to delete the section in the House bill dealing with hate crimes. On March 2, 1998, the Kentucky House of Representatives passed an expansive anti-crime package by a vote of ninety-three to zero. The House bill was predominantly a "get tough on crime" bill. Its major provisions practically eliminated the possibility of

44 See Loftus, Kentucky's Church-Arson Response Group, supra note 40, at A8. Shortly after the White House meeting, Governor Paul Patton was quoted as saying, "We will be forcefully supporting [hate crime legislation at] the next opportunity." Patton, supra note 27, at A10.
45 See Patton, supra note 27, at A10.
46 Id. (quoting Governor Patton).
47 See Tom Loftus, Criminal Justice Bill Heads to House; Committee Rejects Effort to Weaken Hate-Crime Section, COURIER-JOURNAL (Louisville, Ky.), Feb. 25, 1998, at B4 [hereinafter Loftus, Criminal Justice Bill Heads to House].
49 See Garrett, supra note 39, at B1.
50 See Loftus, Criminal Justice Bill Heads to House, supra note 47, at B4. One of the sponsors of House Bill 455, State Representative Mike Bowling, reportedly stated, "As you can tell, the Bill is popular," but predicted passage on the House floor where attempts would be made to amend the bill in many ways. Id.
51 See House Bill 455, supra note 48.
parole for violent criminals and increased sentences for sex offenders. However, a portion of the House bill did provide specific penalties for hate crime offenses.\(^5^2\)

House Bill 455 was adopted by the Kentucky Senate by a vote of thirty-one to zero,\(^5^3\) but did not escape substantial amendment. Specific enhancement of penalties for the commission of hate crimes were entirely eliminated. Sexual orientation was added to the list of factors protected by hate crime legislation, while gender, age, and disability were deleted classifications.\(^5^4\)

**B. Overview of Pertinent Provisions of the 1998 Kentucky Hate Crimes Act**

Hate crimes, as defined by the Kentucky Hate Crimes Act, include only those crimes listed in the Penal Code,\(^5^5\) which are intentionally committed "because of race, color, religion, sexual orientation, or national origin of another individual or group of individuals."\(^5^6\) In contrast to the ADL Model Legislation, gender is not included as a protected classification under the Kentucky Hate Crimes Act.\(^5^7\) The Hate Crimes Prevention Act of 1999,\(^5^8\) approved by the United States Senate,\(^5^9\) adds gender, disability, and sexual orientation to its coverage. The trend is to broaden the classifications covered by hate crime statutes. Approximately twenty states' statutes


\(^{53}\) See House Bill 455, supra note 48.

\(^{54}\) See H.R. 455, Reg. Sess. (Ky. 1998).

\(^{55}\) See id. See also House Bill 298, available on Legislative Research Comission Webpage (visited Sept. 30, 1999) <http://www.lrc.state.ky.us/record/98rs/HB298.htm>.


\(^{59}\) See S. 1217, 106th Cong. (1999) (incorporating the Hate Crimes Prevention Act as tit. IX, Hate Crimes Prevention, of Senate Bill 1217 passed on July 22, 1999).
enacted over the past several years have included gender, disability, and sexual orientation as protected classes. The crimes included in the 1998 Kentucky Hate Crimes Act are assault, menacing, wanton endangerment, criminal abuse, kidnapping, sex offenses, property damage, rioting, disorderly conduct, and harassment. The Act also creates the offense of institutional vandalism, which criminalizes damaging, defacing, or desecrating objects that are venerated by a particular group. Why the punishment for hate crimes is limited to the particular crimes outlined above is unclear. The Kentucky Legislature could consider including all categories of crimes within the hate crime laws.

There are no specific enhanced penalties outlined in the Act for hate crimes. However, the Act does provide an opportunity for a judge to exercise discretion during the sentencing phase of a criminal trial, if the judge finds that the crime was motivated primarily by the victim’s race, color, religion, sexual orientation, or national origin.

The Act provides in part:

[A]t sentencing, the sentencing judge shall determine if, by a preponderance of the evidence presented at the trial a hate crime was a primary factor in the commission of the crime by the defendant. If so, the judge shall make a written finding of fact and enter that in the court record and in the judgment rendered against the defendant.

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60 See ADL Statutory Provisions, supra note 26. It has been strongly urged that numerous types of violent crimes against women should be classified as hate crimes, because victims of rape and domestic violence, “like victims of other hate crimes, are interchangeable in the eyes of their attackers.” Marguerite Angelari, Hate Crime Statutes: A Promising Tool For Fighting Violence Against Women, 2 AM. U. J. GENDER & L. 63, 66 (1994) (citation omitted).


62 See id. § 532.031(1)(b) (citing id. §§ 508.050 and 508.060).

63 See id. § 532.031(1)(c) (citing id. §§ 508.100 and 508.110).

64 See id. § 532.031(1)(d) (citing id. § 509.020).

65 See id. § 532.031(1)(e) (citing id. §§ 510.040, 510.050, 510.060, 510.070, 510.080, 510.090, 510.100, and 510.110).

66 See id. § 532.031(1)(f) (citing id. §§ 512.020, 512.050, and 512.060).

67 See id. § 532.031(1)(h) (citing id. § 525.020).

68 See id. (citing id. § 525.060).

69 See id. (citing id. § 525.070).

70 See id. § 532.031.

71 Id. § 532.031(2).
Upon finding that a hate crime is a primary factor in the commission of the crime, the judge may use that finding as the sole factor for refusing the defendant probation, shock probation, conditional discharge, or other alternatives to incarceration. In addition, if the judge makes the written finding that a hate crime was a primary factor in the commission of the crime, the Parole Board may later use the finding to deny or delay parole to a defendant.

For the first time, victims of hate crimes in Kentucky are allowed to seek compensation from the state. However, there is no provision in the current Act for the award of civil or punitive damages. In contrast, the ADL Model Hate Crimes Legislation allows a victim of a hate crime to pursue a civil action and an award of special and general damages, including damages for emotional distress, punitive damages, and/or reasonable attorney fees and costs. The burden of proof in the civil action is that of any other civil action.

IV. STRENGTHENING HATE CRIME LAWS IN KENTUCKY

Kentucky’s current Hate Crimes Act should be viewed as merely a beginning for future, more effective hate crime legislation. It appears that is what the Kentucky Legislature intended. Although its enactment was not without controversy, the current Act has been viewed as an acorn from

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72 See id. § 532.031(3).
73 See id. § 532.031(4).
74 See id. § 346.055.
75 See ADL Model Legislation, supra note 57.
76 Several issues posed obstacles to the passage of the original hate crime bill, which contained much tougher penalties for hate crimes. See H.R. 455, Reg. Sess. (Ky. 1998). First, there was resistance about the idea of hate crimes in general. A debate arose in the Legislature concerning whether it should make any difference, in imposing a criminal penalty, that a person commits a crime with a motivation based upon hatred for a member of a protected class. If so, should separate hate crimes be established in the Kentucky Penal Code for the commission of a bias-motivated offense, or should the statute provide for merely penalty enhancements for crimes that are already on the books? Second, there was some dispute over what categories of persons should be included. For example, should gender, disability, or age be included as a protected class under the statute? Should some rapes be considered a hate crime? Although the final version of the Hate Crimes Act includes sexual orientation as a hate crime category, its inclusion was met with much controversy. It has been suggested that the original bill, with much stronger penalties, was weakened as a compromise to include sexual orientation as a
which a mighty oak can grow. As part of the 1998 Kentucky Hate Crimes Act, the legislature established the Kentucky Criminal Justice Council to conduct long-range planning and make recommendations to both the Governor and the General Assembly on criminal justice policy and the structure of the current system. The Council’s broad membership represents the judiciary, law enforcement agencies, defense bar, prosecuting bar, academia, and advocate groups in Kentucky. A portion of the Council’s legislative charge was to: (1) investigate the problem of gang activity in Kentucky and (2) study the impact of the current hate crime statute. The Kentucky Criminal Justice Council is working in tandem with the Kentucky Commission on Human Rights (“KCHR”), which is endorsing specific penalty enhancements. The KCHR is in the process of supplying additional anecdotal information about the occurrence of hate crime activity in Kentucky. Such long-range planning and impact study is a prerequisite to the passage of an effective hate crime bill in Kentucky. Information gathered between legislative sessions can form the basis for
much stronger hate crimes laws in Kentucky. The object of this section is to provide additional information and a basis for strengthening the Kentucky Hate Crimes Act.

A. Separate Bias Motivated Offenses for Hate Crimes or Specific Penalty Enhancements for Existing Crimes Motivated By Hate Bias?

In enacting the 1998 Kentucky Hate Crimes Act, the Kentucky Legislature had a choice between the creation of a "new crime" statute which would criminalize separate bias motivated offenses, or the enhancement of existing sentencing options for existing offenses.83 A "new crime" statute does not refer to previously enacted sections of the criminal code or to crimes defined elsewhere. It defines all the elements of the crime it describes within its own terms.84 "New crime" versions of hate crime statutes have met with the most successful First Amendment challenges, as they often impinge upon protected speech.85 In R.A.V. v. City of St. Paul,86 the United States Supreme Court warned that it would strike down any limit upon the freedom of speech that singles out only certain types of hate speech. For example, a state could constitutionally prohibit statements that constitute "fighting words" in general, but could not prohibit "fighting words" aimed at African-Americans.87 The Supreme Court has reasoned that such proscriptions are impermissibly content-based.88

In contrast to a "new crime" statute, a sentence enhancement statute merely supplements previously enacted sections of the state's criminal

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83 Technically, there is a third choice for legislators contemplating the enactment of a hate crime statute. A civil rights model hate crime statute does not enhance penalties for previously defined crimes. Nor does it define specific criminal behavior as a "new crime." It broadly criminalizes any violent deprivation of a victim's civil rights. These rights are protected under federal and state constitutions. Civil rights model statutes are in a separate category from the previous two choices because they usually do not define the protected classes. The protection afforded to victims for these crimes extend to all persons, without reference to the kind of social prejudice that motivates the perpetrator. See Anthony Winer, Hate Crimes, Homosexuals and the Constitution, 29 HARV. C.R.-C.L. L. REV. 387 (1994).

84 See id.


87 See id.

code and is purely derivative of existing criminal law. A sentence enhancement statute may increase a sentence by a certain length of time, or it may increase a crime up to the next level.\textsuperscript{89} For example, a sentence enhancement statute may increase a misdemeanor to a felony or a lower felony to a higher one. It can mandate a sentence enhancement or provide discretion to the sentencing judge to increase a criminal penalty if it is determined that the crime was committed with the requisite hate motivation. A sentence enhancement statute, by criminalizing hate crimes, does not define any behavior as criminal which was not criminal prior to the enactment of the statute.

Sentence enhancement statutes are generally upheld against constitutional challenges, as they are seen as punishing the existing, underlying criminal conduct rather than punishing protected First Amendment speech.\textsuperscript{90} For example, the statute upheld by the United States Supreme Court against a First Amendment challenge in \textit{Wisconsin v. Mitchell}\textsuperscript{91} was purely a sentence enhancement statute. Rather than creating a new crime, the statute merely increased the possible penalty for an existing crime. Mitchell's battery conviction originally carried a maximum two year sentence. Because the jury found that Mitchell had selected his victim on the basis of his race, the trial judge could have increased the maximum period of imprisonment by up to five years. He doubled Mitchell's sentence to four years.\textsuperscript{92}

The Kentucky Legislature chose to enact a weakened form of a sentence enhancement scheme in the new Hate Crimes Act. The Legislature created neither specific and separate offenses in the Penal Code for bias motivated crimes, nor specific enhanced penalties for existing crimes. The Act simply gives a judge the discretion to do what was already authorized under pre-existing law: to deny probation, shock probation, conditional discharge, or any other form of incarceration.\textsuperscript{93} Kentucky's statutory hate crime provisions should easily withstand any First Amendment challenge made on the basis that the hate crime law seeks to punish individuals because of their point of view. However, the current discretionary scheme in Kentucky has serious flaws. First, because of their discretionary nature, Kentucky's hate crime provisions may seldom be applied.

\textsuperscript{89} See Spillane, \textit{supra} note 85.
\textsuperscript{90} See \textit{Mitchell}, 508 U.S. at 476.
\textsuperscript{91} See \textit{id}.
\textsuperscript{92} See \textit{id}.
\textsuperscript{93} See K.R.S. § 532.031(3) (Michie 1990 & Supp. 1998).
Second, the Act fails to provide notice to criminal defendants in Kentucky that they may be subject to an enhanced sentence.

B. The Adoption of Nondiscretionary, Specific Penalty Enhancements for Existing Crimes Send a Strong Message Against Hate Crimes

Currently, the commission of a hate crime in Kentucky, no matter how heinous, does not subject the offender to a specific criminal penalty. A sentence enhancement is totally within the sentencing judge’s discretion. In reality, the Act provides little more than the discretion a sentencing judge already possesses in denying probation or parole due to aggravated circumstances in the commission of the crime. As it stands, Kentucky’s Hate Crimes Act has few teeth to deter or punish hate crimes committed within the state.

This weakness in the penalty provision of the Hate Crimes Act has been identified as a major concern. By failing to provide for specific penalties attached to hate crime offenses, “the statute fails to provide a clear and strong message that hate crime is unacceptable in our community.” Hate crime laws should seek to deter hate motivated behavior, reassure hate victims of their value, and “symbolically heal[] the wounds in the social fabric that are created by hate-motivated acts.”

It has been argued that hate crime statutes give special rights to only certain classes of persons, and therefore impinge upon the right to equal protection under the law. However, the special rights argument against hate crime laws is greatly undermined because penalty enhancement statutes can be applied against members of any group.

Indeed, Wisconsin’s Hate Crime Statute was constitutionally applied to enhance the criminal penalty imposed upon Todd Mitchell, a nineteen-year-old black male. Mitchell was part of a group of black males who

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94 See id. § 532.031.
95 KCJC Interim Report, supra note 79, at 22.
96 Shirley Abrahamson et al., Words and Sentences: Penalty Enhancement for Hate Crimes, 16 U. ARK. LITTLE ROCK L.J. 515, 524 (1994) (citation omitted).
nearly beat to death a fourteen-year-old white male before stealing the British Knight sneakers from his feet. Todd Mitchell was heard to say, just prior to the beating, “Do you all feel hyped up to move on some white people?”, and “There goes a white boy, go get him!” A jury found Mitchell, the only member of the group who was not a juvenile, guilty of battery and theft. In addition, the jury returned a separate verdict under the penalty enhancement statute, finding that the black nineteen-year-old, Mitchell, had intentionally selected his victim on the basis of his white race.

Opponents of hate crime laws, and specifically of penalty enhancement provisions, also argue that a crime is a crime. The law should not punish one criminal more severely than another, simply because the first criminal’s actions were motivated by hate and bias for a particular group. However, all crimes are not treated alike under the law. For example, the law considers the underlying motivation for a crime in differentiating between involuntary manslaughter, reckless homicide, and first degree murder. The law recognizes that an assault is not always only an assault against the direct victim and that a harsher penalty should be imposed based upon the victim’s status. For example, an assault against a police officer is considered more heinous than an assault against a civilian, as it represents an assault against society. The penalty for the crime is enhanced because of the status of the victim, the motivation behind the crime, and the injury to society. Similarly, a hate crime symbolizes an attack not only on the individual, but on the larger community. It is the unique injury to the larger community which justifies an enhanced penalty for hate crimes and a strong message, through strong legislation, that hate crimes will not be tolerated.

C. The Adoption of Nondiscretionary, Penalty Enhancements for Hate Crimes Would Promote Judicial Economy and Needed Guidance to Those Charged with Enforcing Hate Crime Laws

Under the current Kentucky Hate Crimes Act, an accused is not initially charged or indicted with a specific hate crime. An accused may not know that he is subject to an enhanced penalty in the form of denial of

99 Id. at 809.
100 See id.
101 See Karen Samples, Should We Impose Tougher Penalties for Offenses Against Certain Victims?, CINCINNATI ENQUIRER, Nov. 29, 1998, at D1.
102 See supra note 61 and accompanying text; see also Samples, supra note 101.
probation or parole until long after the opportunity to enter a plea or to weigh the potential sentence has passed. The future of the accused greatly depends upon the perceptions and inclinations of the particular judge who presides over the trial. The Hate Crimes Act allows for consideration of the defendant’s motivation only at the sentencing stage, and merely allows for the denial of probation or parole by the sentencing judge based upon a preponderance of the evidence standard.103

Under the current Kentucky Hate Crimes Act, a criminal proceeding is bifurcated. The finder of fact during the guilt or innocence phase is the jury; at sentencing, it is the judge.104 The bifurcation of the procedure and lack of any specific penalty enhancement provisions create some difficult problems for the criminal justice system, the accused, and the victim in implementing the Kentucky Hate Crimes Act.

The Act presents a major hurdle in classifying any crime a hate crime. In effect, the Act requires much duplication of effort in all criminal proceedings and confusion in applying the burden of proof: First, the jury makes an initial determination of guilt or innocence under a reasonable doubt standard. Second, the judge then must determine, by a preponderance of the evidence, whether hate was a primary motivating factor in the commission of the crime and if so, make a finding in the record.105

In contrast to the guilt finding stage of a criminal proceeding, the Act is written in nondiscretionary terms when it mandates that a judge presiding in a criminal proceedings “shall” make a written finding in the record as to whether the crime was motivated by hate against one of the classified groups.106 Hate-bias motivation is treated as an aggravating circumstance, providing the sentencing judge with discretion to deny probation, parole, or other alternatives to incarceration.107 The decision whether to deny probation or parole based upon a hate-bias motivation need only be made if there is a finding on the record that a hate crime was committed,108 creating a disincentive for application of the Kentucky Hate Crimes Act.

104 The Supreme Court of Kentucky has held that the constitutional right to a trial by jury is limited to the determination of guilt or innocence. See Mitchell v. Commonwealth, 781 S.W.2d 510 (Ky. 1989). Consideration of any future consequences such as treatment, commitment, probation, shock probation, and parole has no place in the jury’s finding and may serve to distort it. See id.
106 See id.
107 See id. § 532.031(3).
108 See id. § 532.031(2).
Courts are unlikely to impose a sentence enhancement, or even a prospective denial of probation or alternative incarceration for hate crimes, without more specific statutory authority and consistent burdens of proof. Hate crime laws must be used by law enforcement, prosecutors, judges, and juries if they are to have any impact.\textsuperscript{109} Hate crimes statutes must clearly define the boundaries of the law if they are going to be imposed by those in a position to enforce them.\textsuperscript{110}

It should be made clear to prosecutors in Kentucky pursuing enhanced penalties against an accused that they must not only prove the elements of the underlying crime by proof beyond a reasonable doubt, but also the additional element of hate-bias motivation.\textsuperscript{111} Under the current Act, the prosecution need not prove a hate-bias motivation as an element of a hate crime beyond a reasonable doubt. The sentencing judge uses a preponderance of the evidence standard in deciding whether to grant or deny probation or alternatives to incarceration.\textsuperscript{112} Providing specific enhanced penalties within the Kentucky Hate Crimes Act, rather than the present discretion in incarceration alternatives, would clarify that motivation is an essential element of a hate crime which must be proven beyond a reasonable doubt. First, the prosecution would need to prove the underlying crime beyond a reasonable doubt. Second, the prosecution would need to prove the element of motivation beyond a reasonable doubt in order to find a defendant guilty of a hate crime subject to penalty enhancement.

No evidence of expressions or associations should be introduced at trial unless that evidence is specifically related to the crime charged. Moreover, the Act must not be used to "investigate or punish constitutionally protected thoughts, opinions, beliefs, expressions, or associations."\textsuperscript{113} For example, the mere association of the defendant with a skinhead group would not alone be sufficient evidence of motivation. On the other hand, the nature of the crime, along with the defendant's statements to others, may provide sufficient evidence of motive. For instance, the painting of a

\textsuperscript{109} See Spillane, supra note 85, at 24.

\textsuperscript{110} The Kentucky State Police favored the first version of the Kentucky Hate Crimes Act, which contained specific penalty enhancement provisions by bumping up each offense by one degree if found to be a hate crime. See\textsuperscript{KCJC Law Enforcement Issues Committee Summary, supra note 76.}


\textsuperscript{112} See K.R.S. § 532.031(2) (Michie 1990 & Supp. 1998).

\textsuperscript{113} Denton, supra note 111.
swastika on the side of a Jewish family's home is evidence of a direct assault upon the fact that the family is Jewish and implies that the offender engaged in the criminal conduct because of what the swastika symbolizes. Some indicators used by prosecutors in determining whether a crime is bias motivated include: (1) common sense (as in the swastika example); (2) language used by the suspect during the commission of the crime (racial slurs, etc.); (3) the severity of the attack or mutilation of the victim; (4) lack of provocation for the crime; (5) contact or prior history between the victim and suspect; (6) previous history of similar incidents in the same area; and (7) absence of any other apparent motive (e.g., battery without a robbery).

As the boundaries of hate crime laws in Kentucky become more clearly defined, there will be less resistance to them. Those charged with the enforcement and prosecution of hate crimes will better recognize hate crimes and fairly apply the law. In turn, well defined, specific penalties for hate crimes "provides an impetus for law enforcement" and the judicial system "to be more vigilant" in remedying the problem of hate crimes in our society. "[N]ew methods of apprehension, more contact within the community, and an increased sensitivity toward hate crime victims" will develop.

D. The Adoption of Nondiscretionary Penalty Enhancement for Hate Crimes Would Provide Notice of Criminal Penalties for Hate Crimes to Those Accused of Hate Crimes

Hate crime statutes are vulnerable to challenges based upon the Due Process Clause of the United States Constitution if they are not clearly drafted so as to provide notice of the boundaries of the law. Although enhancement statutes are constitutional on the basis that the commission of an underlying crime is being punished rather than free speech, they

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114 See Spillane, supra note 85, at 24.
115 See id.
116 Id. at 25.
117 Id.
118 Id.
119 U.S. CONST. amend. V. "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." See also id. amend. XIV, § 1. "[N]or shall any state deprive any person of life, liberty, or property, without due process of law . . . ." Id.
must also clearly define when bigoted behavior will be punished under the
law. "The due process clause requires that a criminal statute give clear
notice of what activity is proscribed and provide adequate guidelines to
prevent arbitrary law enforcement actions."121

Stiffer penalties for hate crimes "discourage potential hate crime
perpetrators from committing such crimes."122 If hate crime laws are to
have any deterrent effect, their gravity must impact behavior. Potential
offenders must have notice that Kentucky's system of justice takes hate
crimes seriously. Such notice would be provided through specific sentence
enhancement provisions contained in the Kentucky Hate Crimes Act.

It is recommended that the penalty for the underlying crime be bumped
up at least one degree if it is found that the motivation for the crime was
hate-bias. If the degree of criminal liability is enhanced by simply one
degree over that imposed for the commission of the underlying offense,123
many issues of notice would be resolved. For example, a Class A misde-
meanor would be bumped up to a Class D felony if a hate crime was
committed. An indictment would be involved, giving further notice of the
enhanced sentences for a hate crime.124

V. CONCLUSIONS AND RECOMMENDATIONS

Although the Kentucky Legislature should be commended for taking
a first step against hate crimes, the objectives of the 1998 hate crime

121 Anti-Defamation League, 1999 Hate Crime Laws Constitutional Challenges
constitutionality.html>.

122 Spillane, supra note 85, at 25.

123 The ADL Model Hate Crime Statute recommends that the degree of criminal
liability be at least one degree more serious than that imposed for commission of
the underlying offense. It provides in part that “[a] Bias-Motivated Crime under
this code provision is a ___ misdemeanor/felony (the degree of criminal liability
should be at least one degree more serious than that imposed for commission of the
underlying offense).” ADL Model Legislation, supra note 57. The Wisconsin
statute upheld in Mitchell, after defining hate crimes in subsection (1), provides:

(a) If the crime committed under sub. (1) is ordinarily a misdemeanor other
than a Class A misdemeanor, the revised maximum fine is $10,000 and the
revised maximum period of imprisonment is one year in the county jail (b)
If the crime under sub. (1) is ordinarily a Class A misdemeanor, the penalty
increase under this section changes the status of the crime to a felony and
the revised maximum fine is $10,000 and the revised maximum period of
imprisonment is 2 years.

Mitchell, 508 U.S. at 481 n.1.

legislation are not being met in Kentucky, perhaps because of the discretionary nature of the Act’s penalty enhancement provisions. A recent survey of prosecutors in Kentucky revealed that prosecutors had little experience with the new Hate Crimes Act.25

Arizona, Georgia, Hawaii, Indiana, New Mexico, South Carolina, and Wyoming are the only other states which have not adopted specific penalty enhancement provisions for the commission of hate crimes.26 It is recommended that Kentucky join the overwhelming majority of states which have specific penalty enhancement in their hate crime laws.

By adopting stiffer penalties for hate crimes, the Legislature will send a strong message that hate crimes are not tolerated in Kentucky. In clarifying the law, the Legislature will provide needed guidance to those charged with enforcing hate crime laws. Hate crime laws will become more effective for the benefit of the individual victim and victimized community. In turn, hate crime laws will deter bias motivated crimes, as potential perpetrators will have necessary notice of the severity of punishment.

The Legislature should make clear to those charged with a crime in Kentucky that sentence enhancement will attach when a person commits a crime within the statute,27 and intentionally selects the victim or property that is damaged in whole or in part because of the actor’s belief or perception28 that the victim belonged to a particular group.29 Specifically, the penalty for the underlying crime should be enhanced by at least one degree if it is determined that it constitutes a hate crime.

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25 See id.
28 See ADL Model Legislation, supra note 57. In addition to providing specific penalty enhancement for hate crimes, the proposed language would make two significant changes in the current statute. First, a hate-bias motivation would no longer have to be the primary or sole motivation for the crime, but a motivation. Second, the actor’s belief or perception is what is important; not whether the victim actually was a member of a particular group delineated in the statute. This language is both part of the ADL Model Legislation as well as the Wisconsin hate crime statute upheld by the United States Supreme Court in Wisconsin v. Mitchell.
29 The ADL Model Legislation protects the following classifications: race, color, religion, national origin, sexual orientation, and gender. See id. The Wisconsin Statute includes race, religion, color, disability, sexual orientation, national origin or ancestry. See Wis. Stat. Ann. § 939.645(1)(b) (West 1996).