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To Enhance or Not to Enhance: Civil Penalty Enhancements for Parents of Juvenile Hate Crime Offenders

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Notes

TO ENHANCE OR NOT TO ENHANCE: CIVIL PENALTY ENHANCEMENT FOR PARENTS OF JUVENILE HATE CRIME OFFENDERS

*No one is born hating another person because of the colour of his skin, or his background, or his religion. People must learn to hate, and if they can learn to hate, they can be taught to love, for love comes more naturally to the human heart than its opposite.*¹

I. INTRODUCTION

Mr. and Mrs. Smith are firm believers in their pro-choice stance on abortion.² Together they attend rallies to actively torment pro-life Catholics. They allow their seventeen-year-old daughter, Hannah, to participate in the rallies and express her hatred through violent action.

At a pro-life rally, Hannah grabs a girl's neck, throws her to the ground, and stabs her in the chest with a knife. Hannah leaves the girl on the ground where she is later discovered and saved by a passerby. Afterwards, the girl and other Catholics purposely conceal their faith.

In an unrelated incident, local homosexuals fear for their safety and intentionally hide their sexuality because of sixteen-year old James Jenkins. Purposefully targeting another boy because of his sexual preference, James strangles the boy, drags him by his neck, and attempts to hang him. Unlike Hannah, James learns to hate homosexuals from his friends, and not his parents, Mr. and Mrs. Jenkins.

At their trials, the juries find beyond a reasonable doubt that Hannah's and James's crimes were motivated by hatred for Catholics and homosexuals, respectively. State law allows for a penalty enhancement for such "hate crimes," and Hannah and James were sentenced accordingly.

Following Hannah's and James's convictions for hate crime, the victims file civil suits against the juveniles' parents pursuant to the

¹ THE OXFORD DICTIONARY OF QUOTATIONS 493 (Elizabeth Knowles ed., Oxford Univ. Press 5th ed. 1999) (quoting Nelson Mandela's Long Walk to Freedom).

² Although this situation is fictional, it presents an introduction to the topics and legal issues discussed in this Note.

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state's parental liability law. To encourage parents to supervise their children, this law holds parents liable for damages resulting from their juveniles' willful and wanton conduct up to \$4,000.

The victims' attorneys argue for a civil penalty enhancement against Hannah's and James's parents because the crimes were motivated by a bias against Catholics and homosexuals. In support of their argument, the attorneys urge that the penalty enhancement reflects the severity of Hannah's and James's hate crimes. Second, the attorneys contend that the increased penalty would encourage the parents to exert more supervision and control over Hannah and James, leading to a decrease in juvenile hate crime.

Finally, the victims' attorneys argue that juveniles possess a diminished responsibility, and that the juvenile offenders' parents should be held more accountable for their hate crimes. But the court rejects the attorneys' arguments, holding that current parental liability laws do not allow for the application of civil penalty enhancements to the parents of juvenile hate crime offenders.

Laws that subject offenders to increased punishments show recognition by legislatures that hate crimes are distinct from other violent crimes.³ Similarly, parental liability laws indicate legislative intent to encourage parents to supervise juveniles, and suggest that parental failure to keep juveniles from committing crimes may be a legitimate basis to expose parents to liability.⁴

But the best way to combat hate crime, as opposed to other types of juvenile crime, would be a combination of enhanced penalty and parental liability laws, particularly where the law already provides for additional criminal punishment for hate crime offenders.⁵ In particular, an enhanced penalty for the parents of juvenile hate crime offenders would reflect criminal law's treatment of hate crime as distinct from other violent crime.⁶ Similarly, the threat of an additional penalty would further encourage parents to supervise juveniles to prevent crime—hate

³ See *infra* Part II.A.3 (detailing the three different types of hate crime legislation).

⁴ See *infra* Part II.D (explaining the purpose of parental liability statutes).

⁵ See *infra* Part IV (adding a sentence enhancement feature to existing parental liability laws for parents of a juvenile hate crime offender).

⁶ See *infra* notes 67-68 and accompanying text (defining penalty enhancement statutes and indicating which states have a penalty enhancement for hate crime offenders).

crime in particular – thus increasing the effectiveness of current parental liability laws.⁷

Part II of this Note begins with a broad overview of hate crime, penalty enhancement statutes, juvenile delinquency, and parental liability laws.⁸ Next, Part III of this Note analyzes the application of a civil penalty enhancement to the parents of juvenile hate crime offenders.⁹ Finally, Part IV adds a civil penalty enhancement to existing parental liability laws for parents of juvenile hate crime offenders.¹⁰ The enhanced penalty will reduce hatred by providing parents with an opportunity to learn acceptance, teach acceptance to their children, and improve parenting skills. Thus, a reduction of this learned behavior will decrease the overall number of hate crimes committed by adults and most importantly juveniles, who would maintain and continue to act upon a particular hatred without the enhanced penalty.

II. AN OVERVIEW OF HATE CRIME, PENALTY ENHANCEMENT STATUTES, JUVENILE DELINQUENCY, AND PARENTAL LIABILITY LAWS

A review of hate crime, penalty enhancement statutes, juvenile delinquency, and parental liability laws demonstrates a critical problem faced by victims of juvenile hate crime: current parental liability laws inadequately address the origins of this learned behavior and reflect the severity of hate crimes.¹¹ Part II.A exemplifies these inadequacies through an exploration of the nature of hate crime, federal and state statutes, and relevant constitutional challenges to the laws.¹² Part II.B explains the concept of penalty enhancements and the constitutional challenges to increased sentences, while Part II.C examines the prevalence of juvenile delinquency, the jurisdiction of juvenile justice

⁷ See *infra* Part IV.A (explaining the possible additional penalties for parents of juvenile hate crime offenders).

⁸ See *infra* Part II (showing that hate crime is inherently more severe than ordinary crime, as recognized through enhanced penalty statutes, however, the overview indicates that current parental liability laws do not reflect the same mentality, even though juveniles are common hate crime offenders).

⁹ See *infra* Part III (analyzing the strengths and weaknesses of hate crime legislation and parental liability laws as they apply to parents of juvenile hate crime offenders).

¹⁰ See *infra* Part IV (presenting the additional penalty for parents of juvenile hate crime offenders).

¹¹ See *infra* Part II (providing an overview of hate crime, penalty enhancement statutes, juvenile delinquency, and parental liability laws); *infra* Part IV (proposing the addition of a sentence enhancement feature to existing parental liability laws).

¹² See *infra* Part II.A (describing hate crime as inherently more violent than other violent crime because of the increased effects on victims and society).

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systems, and theories of juvenile misconduct.¹³ Finally, Part II.D presents various forms of legislation that hold parents accountable and relevant constitutional challenges to parental liability laws.¹⁴

A. *The Background of Hate Crime*

As the victims of a hate crime, Hannah's and James's victims suffer severe psychological and physical effects, even when compared to the victims of other violent crimes.¹⁵ Accordingly, various forms of hate crime legislation may punish Hannah and James solely because their crimes were committed because of a bias.¹⁶ Part II.A.1 provides a broad overview of hate crime and Part II.A.2 explains that the effects of hate crimes on the victims and society are inherently more severe compared to the impacts of other violent crime.¹⁷ Finally, Part II.A.3 presents various forms of federal and state hate crime legislation.¹⁸

1. The Nature of Hate Crime

A hate crime is a crime committed against a victim who is selected out of hatred for a particular "race, religion, sexual orientation, or ethnicity."¹⁹ It is described as a "doubly depraved act" because of the

¹³ See *infra* Part II.B (indicating that states allow an increase in hate crime offenders' sentences because of the severity of a hate crime); *infra* Part II.C (demonstrating the necessity for parental liability laws which protect victims of juvenile crime from juveniles unable to satisfy a judgment).

¹⁴ See *infra* Part II.D (discussing how challenges to parental liability laws will likely be unsuccessful because such laws do not violate the Equal Protection or Due Process clauses nor are they overbroad).

¹⁵ See *infra* notes 28-33 and accompanying text (stating that the increased effects on hate crime victims include suppressing religious beliefs, decreased self-esteem, and isolating victims).

¹⁶ See *infra* Part II.A.3 (presenting legislation that provides a punishment for hate crime offenders).

¹⁷ See *infra* Part II.A.1 (indicating that hate is passed on through generations and that juveniles are common hate crime offenders); *infra* Part II.A.2 (explaining that the victim is more likely to suffer increased psychological harm and the community is more likely to fear victimization after hate crime).

¹⁸ See *infra* Part II.A.3 (providing the text of current bills in the House of Representatives as well as the three forms of hate crime legislation: penalty enhancement statutes, new crime laws, and civil rights statutes).

¹⁹ Hate Crimes Statistics Act of 1990, Pub. L. No. 101-275, § (b)(1), 104 Stat. 140 (1990). An offense committed in Salem, Oregon provides an example of a hate crime. Lori A. Spillane, *Hate Crime: Violent Intolerance*, PROSECUTOR, 1995, at 20, 22. Three members of a group known as the "American Front" targeted, fire-bombed, and killed Hattie Cohens, an African-American lesbian, and her roommate, Brian Mock, a gay white man. *Id.* IND. CODE § 10-13-3-1 (2005) defines a bias crime as:

act's discriminatory motivation and the inherent violence in such an attack.²⁰ Humans more easily accept others that possess similar, if not the same, characteristics as themselves.²¹ As a result, firmly rooted elements of human society—hatred and prejudices—have been passed from generation to generation, and tension, distrust, and hatred exist among individuals against groups that possess different traits.²² Hate crime occurs when these biases are expressed through violent action.²³

[A]n offense in which the person who commits the offense knowingly or intentionally: (1) selected the person who was injured; or (2) damaged or otherwise affected property; by the offense because of the color, creed, disability, national origin, race, religion, or sexual orientation of the injured person or of the owner or occupant of the affected property or because the injured person or owner or occupant of the affected property was associated with any other recognizable group or affiliation.

Id.; see *In re Christopher M.*, 26 Cal. Rptr. 3d 61, 68 (Ct. App. 2005) (convicting a juvenile of a hate crime after the minor taped his friends robbing a Hispanic man at gunpoint, thereafter admitting that the crime was motivated by hate). For the purpose of this Note, the term "hate crime" is broad and is synonymous with bias-motivated crime, ethnic intimidation, malicious harassment, and malicious intimidation. See also Steven Bennett Weisburd & Brian Levin, "On the Basis of Sex": Recognizing Gender-Based Bias Crimes, 5 STAN. L. & POL'Y REV. 21 (1994) (arguing that gender should not be included, but in a separate category of bias crimes); U.S. DEP'T OF JUSTICE, HATE CRIME DATA COLLECTION GUIDELINES 1, 2 (Oct. 1999), available at <http://www.fbi.gov/ucr/hatecrime.pdf> [hereinafter HATE CRIME DATA] which defines a hate crime as a bias crime. A "bias crime" is further defined as one that is "[a] criminal offense committed against a person or property which is motivated, in whole or in part, by the offender's bias against a race, religion, disability, sexual orientation, or ethnicity/national origin; also known as Hate Crime." HATE CRIME DATA, *supra*, at 2.

²⁰ Brief of Petitioner-Appellant at 20-1, *Wisconsin v. Mitchell*, 508 U.S. 476 (1994) (No. 92-515). The brief explains that the defendant's attack on the victim was wrong because of the violence; however, the act was also punishable because of the defendant's discriminatory motive. *Id.*; see *infra* note 75 and accompanying text (further describing the case of *Wisconsin v. Mitchell* where the Court upheld Wisconsin's hate crime penalty enhancement statute).

²¹ Craig L. Uhrich, Comment, *Hate Crime Legislation: A Policy Analysis*, 36 HOUS. L. REV. 1467, 1497 (1999).

²² Robert J. Boeckmann & Carolyn Turpin-Petrosino, *Understanding the Harm of Hate Crime*, 58 J. SOC. ISSUES 207 (2002); Uhrich, *supra* note 21, at 1497. However, more exposure to the hated characteristic may help eliminate negative attitudes toward that trait. *Id.* Familiarity breeds acceptance and reduces hate. *Id.*; see TEX. CODE CRIM. PROC. ANN. art. 42.014(b) (2006) (requiring a hate crime offender to attend educational classes to develop tolerance and acceptance of others who possess different characteristics).

²³ HATE CRIME DATA, *supra* note 19, at 7-8. There is an important distinction between a hate crime and an ordinary crime. *Id.* at 4. To be a hate crime, the offense must have been motivated by a particular characteristic, but the simple fact that a victim possessed a particular characteristic is insufficient to categorize the crime as hate crime. *Id.* Evidence such as bias-related drawings, comments at the scene of the crime, or different characteristics between the victim and offender, are objective indicia of a hate crime. *Id.* at 5. One example is if a group of Caucasian individuals assaulted a black individual while

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Among minors, who are arrested for a minimum of at least half of bias related offenses,²⁴ hate crime commonly occurs when young individuals transform radical beliefs into violent acts.²⁵ Organized groups also commit hate crimes, but the frequency of hate crimes within organized groups as compared to individual offenses is uncertain.²⁶ But regardless of the identity of the offender, throughout the past century this nation has experienced a vast number of heinous and widely publicized hate crimes that have had a severe impact on not only the victims, but society as well.²⁷

the individual passed through a predominately white residential neighborhood and witnesses stated that the individual was attacked because of his race. *Id.* at 8. Conversely, a lack of objective factors precludes the following situation from being categorized as a hate crime. *Id.* at 7. For example, a white juvenile took a purse from a Jewish woman, pushed her over, and made a derogatory statement against Jews. *Id.* However, little was known about the offender's beliefs and if his motivation was purely to steal the purse or was motivated because the victim was Jewish. *Id.*; see James B. Jacobs & Kimberly A. Potter, *Hate Crimes: A Critical Perspective*, 22 CRIME & JUST. 1, 20-29 (1997) (providing a definition and examples of other bias motivated crimes such as anti-black, anti-ethnic, and anti-female).

²⁴ Spillane, *supra* note 19, at 22. More specifically, there is evidence indicating that young males commit more hate crimes than young females. Cynthia R. Clausen, *Addressing Juvenile Hate Crimes in Kentucky*, 8 KY. CHILD. RTS. J. 19 (2000); Kristine Olson, *The Government and the Community: A Coordinated Response to Hate Crime in America*, 45 FED. LAW. 47 (1998); see Annie Steinberg et al., *Youth Hate Crimes: Identification, Prevention, and Intervention*, 160 AM. J. PSYCHIATRY 979, 979 (2003) (noting that youth and juveniles constitute an overwhelming number of hate crime offenders). However, Steinberg admits that evidence is limited due to "the lack of definitive data collection" on juvenile hate crime offenders. Steinberg, *supra*, at 980. The absence of data is attributable to the states that do not include the ages of hate crime offenders in data reports. *Id.* Evidence on adult hate crime offenders indicates that an individual with a criminal history is more likely to commit more severe hate crime. *Id.* at 984. Perpetrators of violent hate crime likely have a difficulty with substance abuse and are "economically marginalized." *Id.* However, there is a lack of definitive data to conclude that an adult hate crime offender is from a particular socioeconomic status, faith, or ethnicity. *Id.* But see Megan Sullaway, *Psychological Perspectives on Hate Crime Laws*, 10 PSYCHOL. PUB. POL'Y & L. 250, 277 (2004) (referencing data from the Los Angeles Police Department that ran contrary to the notion that juveniles are the most common offenders of hate crimes).

²⁵ Steinberg, *supra* note 24, at 989. Such acts of violence from extremist ideas may be motivated by thrill and retaliation. Sullaway, *supra* note 24, at 277.

²⁶ Spillane, *supra* note 19, at 20. Organized groups committed to prejudice include the Ku Klux Klan, the Order, White Aryan Resistance, and groups of skinheads. Jacobs & Potter, *supra* note 23, at 29. These groups "recruit white males, women and children who have not realized their American dream." Clausen, *supra* note 24, at 19.

²⁷ See James W. Clarke, *Without Fear or Shame: Lynching, Capital Punishment and the Subculture of Violence in the American South*, 28 BRIT. J. POL. SCI. 267, 270 (1998) (explaining the brutal murder of Henry Lowry who was set on fire while still breathing); Kristen M. Jasket, Note, *Racists, Skinheads and Gay-Bashers Beware: Congress Joins the Battle Against Hate Crime by Proposing the Hate Crimes Prevention Act of 1999*, 24 SETON HALL LEGIS. J. 509, 511

2. The Effect of Hate Crime on Victims and Society

Hate crime has effects on both victims and society that are absent in other violent crime.²⁸ First, the commission of hate crime has serious consequences for victims.²⁹ Specifically, hate crime offenders target

(describing the grotesque murder of James Byrd, Jr. who was beaten, chained, and dragged to death, and had his arms and head detached from his body solely because of his race); Uhrich, *supra* note 21, at 1468 (discussing the October 7, 1998 death of Matthew Shepard, who was beaten by two men in Laramie, Wyoming, after finding out that Matthew was gay).

²⁸ Susan Gellman, *Sticks and Stones Can Put You in Jail, But Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, 39 UCLA L. REV. 333, 340 (1991); see Boeckmann & Turpin-Petrosino, *supra* note 22, at 209 (noting empirical research that demonstrates the “impact of hate crime victimization exceeds that of ordinary crime victimization”). A hate crime victim is more likely to be beaten, tortured, and hospitalized than a victim of a general, unbiased violent crime. Heidi M. Hurd & Michael S. Moore, *Punishing Hatred and Prejudice*, 56 STAN. L. REV. 1081, 1085 (2004); Weisburd & Levin, *supra* note 19, at 23. However, Hurd and Moore urge that the argument that hate crime results in greater physical injury is flawed. Hurd & Moore, *supra*, at 1085. The authors fail to see a justification for an enhanced punishment based on an increased injury because it uses the “defendant’s hate/bias motivation as a proxy for a victim’s greater harm—and not as an indication of the defendant’s culpability.” *Id.* at 1086. Hate crimes stigmatize victims who subsequently manifest a belief in the stereotype and experience deterioration in self worth. *Id.*; see Boeckmann & Turpin-Petrosino, *supra* note 22, at 218 (noting that penalty enhancement laws are necessary because “of the unique harms assumed to be created by crimes motivated by hate”). Increased psychological harm includes decreased self-esteem, lowered sense of security, and decreased trust. Hurd & Moore, *supra*, at 1087; Scott D. McCoy, *The Homosexual-Advance Defense and Hate Crime Statutes: Their Interaction and Conflict*, 22 CARDOZO L. REV. 629, 650-52 (2001). Again opponents reject this argument because all violent crimes cause the victim to suffer psychological trauma. Hurd & Moore, *supra*, at 1087. Further empirical studies attempt to demonstrate a greater psychological harm from hate crime but the studies do not directly compare the trauma of victims of a hate motivated assault to the trauma of assault victims. *Id.* at 1088.

²⁹ State v. Plowman, 838 P.2d 558, 563 (Or. 1992). The court referenced the legislative history of the Oregon hate crime statute and stated that in enacting the statute:

[T]he legislature determined that the potential for harm is greater when . . . causing physical injury to a victim because of the perception that the victim belongs to one of the specified groups creates a harm to society distinct from and greater than the harm caused by the assault alone. Such crimes—because they are directed not only toward the victim but, in essence, toward an entire group of which the victim is perceived to be a member—invite imitation, retaliation, and insecurity on the part of persons in the group to which the victim was perceived by the assailants to belong. Such crimes are particularly harmful, because the victim is attacked on the basis of characteristics, perceived to be possessed by the victim, that have historically been targeted for wrongs. Those are harms that the legislature is entitled to proscribe and penalize by criminal laws.

Id. at 563-64; see Uhrich, *supra* note 21, at 1507 (discussing the psychological effects of hate crime on victims); *infra* Part II.B.1 (discussing the enactment of penalty enhancing statutes

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victims because of a particular sexual preference, religious belief, or an immutable characteristic beyond the victims' control, such as skin color.³⁰ As a result, victims may experience a decreased sense of self worth or identity.³¹ Further, victims receive the message that their presence in a community is unacceptable, and in response, often suppress their beliefs.³² Ultimately, hate crime isolates its victims from society because friends and acquaintances may refuse to associate with the victims for fear of their own safety.³³

In addition to its significant effects on victims, hate crime imposes even greater effects on the community.³⁴ Hate crime promotes retaliation by groups that possess the targeted characteristic, thus making revenge a goal of the targeted group.³⁵ Hate crime also

because of the effect that hate crime has on victims and society to warrant an increased penalty when the crime is motivated by hate for a particular characteristic).

³⁰ Gellman, *supra* note 28, at 340; McCoy, *supra* note 28, at 652; Weisburd & Levin, *supra* note 19, at 24; see *In re Joshua H.*, 17 Cal. Rptr. 2d 291, 299-300 (Ct. App. 1994) (emphasizing the effects that targeting an immutable characteristic has on the victim).

³¹ Gellman, *supra* note 28, at 340; Weisburd & Levin, *supra* note 19, at 23; see Michael S. Degan, Comment, "Adding the First Amendment to the Fire": Cross Burning and Hate Crime Laws, 26 CREIGHTON L. REV. 1109, 1113 (1993) (discussing the psychological effects, such as "high blood pressure, sleep disorders, post-traumatic stress disorders, [and] hypertension" that hate crime has on victims).

³² Degan, *supra* note 31, at 1113. Hate crime offenders threaten a victim's sense of safety because the victims targeted characteristic is likely permanent. Uhrich, *supra* note 21, at 1506. A threatened sense of safety has caused some victims to take action such as moving to another community so that they are not as noticeable. Sullaway, *supra* note 24, at 264; see Boeckmann & Turpin-Petrosino, *supra* note 22, at 209. Examples of messages sent to victims by offenders include "I don't like you gays" and "[y]ou Jews will no longer control the United States government; we will root you out and destroy you." *Id.* Additionally, hate crimes often make victims suppress their beliefs. Hurd & Moore, *supra* note 28, at 1087; McCoy, *supra* note 28, at 650-52.

³³ Uhrich, *supra* note 21, at 1507 (indicating that the purpose of hate crime legislation is to "send the message that the victim, and those similarly situated, are valued by society and that society will defend victims of violent crimes").

³⁴ Gellman, *supra* note 28, at 340; McCoy, *supra* note 28, at 652.

³⁵ Brief of Petitioner-Appellant, *supra* note 20, at 24-25. Scholars have divided hate crime offenders into categories based on their motive, such as thrill and reactive, and have sought to expand the typology to include retaliation. Boeckmann & Turpin-Petrosino, *supra* note 22, at 216. Specifically, hate crimes motivated by retaliation "stem from a primary concern with reciprocating or paying back for a prior hate crime incident. This category is particularly relevant to identifying and prosecuting hate crime criminals from areas in which intergroup relations are strained and tensions are high." *Id.* As to revenge as a goal, see *State v. Plowman*, 838 P.2d 558, 564 (Or. 1992); Jack McDevitt, Jack Levin & Susan Bennett, *Hate Crime Offenders: An Expanded Typology*, 58 J. SOC. ISSUES 303 (2002); *supra* note 29 and accompanying text (discussing *Plowman* and why hate crimes are worse than crimes without a bias motivation).

interferes with the stability and safety of the community.³⁶ In particular, a community may fear victimization after an offender discovers the community's sympathetic attitude towards victims.³⁷

Furthermore, the surrounding community suffers increased psychological trauma similar to that suffered by victims.³⁸ The community experiences feelings such as sympathy, empathy, insecurity, isolation, and depression.³⁹ Penalty enhancements are retributive and address this harm because they convey society's disapproval of hate crime.⁴⁰ Federal and state legislatures have recognized these effects of hate crime on victims and society and have enacted and strengthened hate crime legislation in response.⁴¹

3. Hate Crime Legislation

Within the past twenty years, federal and state legislatures have recognized the need to punish and deter hate crime offenders.⁴²

³⁶ Hate Crimes Prevention Act of 2005, H.R. 259, 109th Cong. (2005). Hate crime produces two types of victims, direct and indirect. Gellman, *supra* note 28, at 342. The latter victims may, but do not necessarily, possess the targeted characteristic. *Id.* For instance, an attack on a Catholic instills a fear of future attacks in other Catholics as well as other races and religions within the community. *Id.* Ultimately, "bigotry-related crime affects society as a whole, by distancing non-bigoted majority group members from disempowered groups." *Id.*

³⁷ Gellman, *supra* note 28, at 342; Jasket, *supra* note 27, at 540-41. For instance, an assault on a minority instills fear in other minorities despite the message that the offender intended to convey. Brief of Petitioner-Appellant, *supra* note 20, at 25. Consequently, minorities consciously avoid vulnerable situations such as refraining from moving into a neighborhood dominated by a majority. *Id.*

³⁸ Hurd & Moore, *supra* note 28, at 1090.

³⁹ *Id.* Hurd and Moore question the legitimacy of this argument for enhanced sentences based on the effects that hate crimes have on the community. *Id.* at 1091. The primary objection is whether or not the community suffers more harm from a hate crime than a crime motivated without a bias. *Id.*; see *supra* note 36 (providing the behavioral changes that hate crimes cause members of the community).

⁴⁰ Eric J. Grannis, Note, *Fighting Words and Fighting Freestyle: The Constitutionality of Penalty Enhancement for Bias Crimes*, 93 COLUM. L. REV. 178, 222 (1993).

⁴¹ Hate Crimes Prevention Act of 2005, H.R. 259, 109th Cong. (2005); Gellman, *supra* note 28, at 340; McCoy, *supra* note 28, at 655. Congressional findings indicate that existing federal laws are inadequate to address the problems caused by hate crime. Hate Crimes Prevention Act of 2005, H.R. 259, § 2; see *infra* note 49 and accompanying text (presenting current federal bills introduced in the House and Senate that seek to ensure prosecution of hate crimes and provide federal assistance to local governments enforcement of hate crime laws); *infra* notes 66-71 and accompanying text (providing different hate crime state statutes).

⁴² See Spillane, *supra* note 19, at 21 (noting that prior to 1980, five states enacted a statute punishing hate crime and by 1995 more than a majority of states had legislation punishing the heinous acts).

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Specifically, Congress responded to this need by enacting the Hate Crime Statistics Act in 1990.⁴³ This Act requires the Attorney General to obtain data and create guidelines regarding crime that resulted from intolerance for a particular religion or characteristic.⁴⁴ The Act also provides some punishment for committing a hate crime.⁴⁵

Congress also enacted the Hate Crime Prevention Act, which criminalized hate crime and originated from 1969 congressional civil rights legislation.⁴⁶ The statute provides a one year sentence for any offender who intimidates or injures another based on a specific characteristic or religion while the victim seeks employment, enjoys a benefit, or enrolls in a public institution.⁴⁷ The government must demonstrate that the crime was committed while the victim was engaged in a federally protected activity.⁴⁸ Currently, four bills before the House

⁴³ Hate Crimes Statistics Act of 1990, Pub. L. No. 101-275, § (b)(1), 104 Stat. 140 (1990).

⁴⁴ *Id.* The requirement of collecting data took place from 1990-1994. *Id.* However, the Violent Crime Control and Law Enforcement Act of 1994 was the Act that broadened the characteristics to include disability. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994). The Act was codified as amended in numerous titles of the United States Code. *Id.* Throughout the years that the FBI gathered and reported statistics, the number of hate crime increased, although the data collected included reports from a greater number of police departments. *Id.* Statistics from “almost 2,800 police departments in 32 states” in 1991 indicated that 4,558 hate crimes were committed that year. ADL.org, *Hate Crimes Laws*, <http://www.adl.org/99hatecrime/federal.asp> (last visited Jan. 31, 2007) [hereinafter ALD.org]. In 1992, the FBI reported 7,442 hate crimes from 6,181 agencies and from “42 states and the District of Columbia.” *Id.* Data from 1994 indicated there were 7,587 hate crimes from 7,356 police departments. *Id.* There were 7,947 hate crimes reported in 1995 from 9,584 agencies in the United States. *Id.* Finally, in 1996 the FBI reported 8,759 hate crimes from 11,355 law enforcement agencies throughout the nation. *Id.* Two years later, the number of hate crimes reported decreased to 7,755. UFBI, <http://www.fbi.gov/pressrel/pressrel99/ucr98.htm> (last visited Jan. 31, 2007). Before the turn of the century, 12,122 agencies reported 7,876 hate crimes. *Id.* Throughout 2000, agencies reported 8,152 hate crimes. *Id.* In 2001, data reported by 11,987 law enforcement agencies indicated that 9,276 hate crimes were committed. *Id.* Data from 2002 indicated that 1,868 out of 12,073 agencies reported 7,462 hate crime incident reports. *Id.* However in 2003, 1,967 out of 11,909 agencies reported 7,489 hate crimes. *Id.* States such as Hawaii have similar statutes that require the gathering and reporting of hate crime data on national origin, gender identity or expression in addition to those required in the federal reporting guidelines that expanded to include disability. See HAW. REV. STAT. §§ 846-51 to 54 (2004) (hate crime reporting).

⁴⁵ See *supra* notes 43-44 and accompanying text; *infra* notes 46-50 and accompanying text (providing federal hate crime legislation).

⁴⁶ Federally Protected Activities, 18 U.S.C. § 245 (2000); Jasket, *supra* note 27, at 519.

⁴⁷ 18 U.S.C. § 245.

⁴⁸ *Id.*; ADL.org, *supra* note 44. The statute defines a federally protected activity as (A) enrolling in or attending any public school or public college; (B) participating in or enjoying any benefit, service, privilege, program, facility or activity provided or administered by any State or

of Representatives and Senate propose amendments to existing federal hate crime legislation.⁴⁹ But in addition to federal hate crime legislation,

subdivision thereof; (C) applying for or enjoying employment, or any prerequisite thereof, by any private employer or any agency of any State or subdivision thereof, or joining or using the services or advantages of any labor organization, hiring hall, or employment agency; (D) serving, or attending upon any court of any State in connection with possible service, as a grand or petit juror, (E) traveling in or using any facility of interstate commerce, or using any vehicle, terminal, or facility of any common carrier by motor, rail, water, or air; (F) enjoying the goods, services, facilities, privileges, advantages, or accommodations of any inn, hotel, motel, or other establishment which provides lodging to transient guests, or of any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility which serves the public and which is principally engaged in selling food or beverages for consumption on the premises, or of any gasoline station, or of any motion picture house, theater, concert hall, sports arena, stadium, or any other place of exhibition or entertainment which serves the public, or of any other establishment which serves the public and (i) which is located within the premises of any of the aforesaid establishments or within the premises of which is physically located any of the aforesaid establishments, and (ii) which holds itself out as serving patrons of such establishments.

18 U.S.C. § 245. *See* United States v. Johns, 615 F.2d 672 (5th Cir. 1980) (chapter of the Ku Klux Klan was convicted for intimidating and interfering with members of the NAACP's efforts to secure better employment by firing shots at the homes and cars of NAACP members); United States v. Griffin, 525 F.2d 710, 712 (1st Cir. 1975) (the defendant was convicted under 18 U.S.C. § 245(b) for purposely interfering with black children's right to attend school without knowing the extent of that right); United States v. Price, 464 F.2d 1217 (8th Cir. 1972) (demonstrating a federally protected activity). *But see* United States v. DeLaurentis, 491 F.2d 208, 209 (2d Cir. 1974) (where one defendant was charged with a violation of § 245(b) for interfering with members of a labor unions' right not to participate in a concerted labor activity; however, the charge was dismissed because the jury disagreed).

⁴⁹ Thomas.loc.gov, *Thomas Legislative Information on the Internet*, <http://thomas.loc.gov/cgi-bin/query/bdquery> (last visited Jan. 31, 2007). First, the House proposed the Hate Crimes Prevention Act of 2005 "[t]o enhance Federal enforcement of hate crimes." Hate Crimes Prevention Act of 2005, H.R. 259, 109th Cong. (2005). This bill provides an amendment to 18 U.S.C. § 245 to imprison, fine, or both imprison and fine anyone who willfully injures another with a firearm because of the victim's "actual or perceived race, color, religion, or national origin." *Id.* The bill further provides the same punishment for anyone who injures another based on the victim's perceived "religion, gender, sexual orientation, or disability." *Id.* One stipulation is that the circumstances must include the offender or victim's participation in foreign or interstate commerce, otherwise the offender may not be prosecuted under the proposed amendment to the statute. *Id.* Also, it proposed a bill to provide federal assistance to state and local governments to further the enforcement of hate crime laws. Local Law Enforcement Hate Crimes Prevention Act of 2005, H.R. 2662, 109th Cong. (2005). The bill proposes to provide state and local governments with additional personnel for the enforcement of hate crime laws. *Id.* § 6. The bill further seeks to offer "technical, forensic, prosecutorial, or any other form of assistance in the criminal investigation or prosecution" of hate crime. *Id.* § 4(a)(1).

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states have responded by enacting statutes that punish hate crime offenders.⁵⁰ State legislation has generally regulated either hate speech or hate crime.⁵¹ Since speech-based hate statutes punish an individual for offensive statements directed at another because of a particular characteristic or religion, they have been struck down by the Supreme Court because they are inconsistent with freedom of speech.⁵² In *R.A.V. v. City of St. Paul, Minnesota*,⁵³ the Supreme Court found that Minnesota's speech-based hate statute violated the First Amendment of the United States Constitution and declared it unconstitutional.⁵⁴ Specifically,

Proposed in the House, the Hate Crime Statistics Improvement Act of 2005, H.R. 1193, 109th Cong. (2005), broadens the necessary reporting characteristic-based crimes to include gender. Currently, the Hate Crime Statistics Act only includes race, religion, sexual orientation, and ethnicity. *Id.* Finally, the Senate introduced the Local Law Enforcement Enhancement Act of 2005, S. 1145, 109th Cong. (2005), which expands the duties of the federal sentencing commission. The bill includes amendments similar to the House bill and the Hate Crime Statistics Improvement Act of 2005, H.R. 1193. *Id.* However, the Senate bill added to the sentencing commission's current duty of enhancing the penalty for an adult who recruits a juvenile to commit a crime. *Id.* The amendment requires the Commission to investigate (without providing the exact method) the frequency of adults who recruit juveniles to commit hate crime. *Id.* § 8. Further, the bill obligates the Commission to enhance the penalty for an adult who enlisted a juvenile to commit a hate crime. *Id.*

⁵⁰ See *infra* notes 57-60 and accompanying text (providing a further description of state hate crime legislation).

⁵¹ Anthony S. Winer, *Hate Crimes, Homosexuals, and the Constitution*, 29 HARV. C.R.-C.L. L. REV. 387, 419 (1994); see Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2338 (1989) (discussing hate speech and the effect of hate speech on the victim).

⁵² Winer, *supra* note 51, at 419; see Boeckmann & Turpin-Petrosino, *supra* note 22, at 209 (defining hate speech as "speech that (1) has a message of racial inferiority, (2) is directed against a member of a historically oppressed group, and (3) is persecutory, hateful, and degrading"); *infra* notes 54-56 and accompanying text (striking a hate based speech statute).

⁵³ 505 U.S. 377 (1992).

⁵⁴ *Id.* In *R.A.V. v. City of St. Paul*, the petitioner, a juvenile, along with a couple of teenagers, assembled a cross out of broken chair legs and burned it in the yard of a neighboring black family. *Id.* at 380. The individuals were charged under St. Paul's Bias-Motivated Crime Ordinance, which provided:

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

Id. The petitioner brought a challenge against the statute alleging that the statute was overbroad and violated the First Amendment because it was content based and facially invalid. *Id.* The Court held the statute unconstitutional because it was overbroad and regulated areas of protected speech. *Id.* at 391. The Court reasoned that the ordinance "prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses." *Id.* at 381. The ordinance was content based and was not within any First

speech-based hate statutes invariably conflict with the First Amendment because the statutes regulate protected speech.⁵⁵ In contrast, hate crime statutes are more likely to withstand constitutional challenges because the statutes regulate conduct instead of speech.⁵⁶

In fact, almost every state has a hate crime statute that either provides a criminal penalty or a penalty enhancement for the commission of a hate crime.⁵⁷ The breadth of hate crime statutes vary among states, but most state statutes generally fit into one of three different categories.⁵⁸ First, some statutes may provide a sentence

Amendment exception that allowed regulation of speech. *Id.* at 394. The ordinance was not a justifiable content-based fighting words statute because the ordinance prohibited words “that communicate messages of racial, gender, or religious intolerance” instead of an “intolerable . . . mode of expressing whatever idea the speaker wishes to convey.” *Id.* at 393. Further, the ordinance was not aimed at the secondary effects, which justify content-based regulation of speech. *Id.* at 394. Finally, the ordinance was not narrowly tailored to achieve a compelling governmental interest of protecting members of a group that historically faced discrimination because there was a less restrictive alternative. *Id.* at 395.

⁵⁵ Winer, *supra* note 51, at 419. Alternatively, the statute would likely be upheld if it regulated obscenity, defamation, or commercial speech, areas of speech unprotected or less protected under the First Amendment. *Id.*

⁵⁶ See *State v. Plowman*, 838 P.2d 558 (Or. 1992). In *Plowman*, Plowman and three others, beat one individual and punched another who fell to the ground at a store in Portland. *Id.* at 560. After being informed that the store clerk called the police, Plowman shouted “[t]hey’re just Mexicans’ and ‘[t]hey’re just . . . wetbacks.’” *Id.* Subsequently, Plowman and the other offenders were charged with first degree assault and assault in the fourth degree under Oregon’s hate crime statute. *Id.* The statute was challenged under two sections of the Oregon Constitution and the Due Process Clause of the Constitution. *Id.* The Oregon statute provided a criminal punishment when two or more persons acted in concert to “[i]ntentionally, knowingly, or recklessly cause physical injury to another because of their perception of that person’s race, color, religion, national origin or sexual orientation.” *Id.*; OR. REV. STAT. § 166.165(1)(a)(A) (2003). Plowman argued that the phrase involving race, religion, national origin or sexual orientation was “void for vagueness.” *Plowman*, 838 U.S. at 562. The Court upheld the statute because the language was clear and it indicated what conduct was prohibited. *Id.* The Court further noted that the statute “proscribes and punishes committing an act, not holding a belief” or punishes speech because one can commit an assault without speaking. *Id.* at 563; see also *Roberts v. U.S. Jaycees*, 468 U.S. 609, 628 (1984) (stating that “violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection”); Winer, *supra* note 51, at 419.

⁵⁷ See *infra* note 61 (providing the states that have a penalty enhancement statute); *infra* note 62 (indicating which states define hate crime as a new crime); *infra* note 63 (presenting the states that have a civil rights statute). The states that do not have a statute that penalizes hate crimes are Arkansas, Georgia, Hawaii, Kansas, New Jersey, Pennsylvania, and South Carolina.

⁵⁸ Winer, *supra* note 51, at 419. Race, religion and ethnicity are included in most state statutes. Shirley S. Abrahamson et al., *Words and Sentences: Penalty Enhancement for Hate Crimes*, 16 U. ARK. LITTLE ROCK L. REV. 515, 522 (1994); ADL.org, *supra* note 44. However, less consistency exists among states regarding the inclusion of gender, sexual orientation,

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enhancement for a crime motivated by a bias.⁵⁹ Many of these statutes resemble the Anti-Defamation League's model penalty enhancement statute for bias-motivated crime, which increases the sentence for an already defined crime.⁶⁰ A second type of statutes define hate crime as a

age, and or disability in the corresponding hate crime statute. ADL.org, *supra* note 44. However, under any hate crime statute, the prosecution has the difficult burden to prove a bias motivation. Spillane, *supra* note 19, at 24-25. Elements such as common sense, the suspect's language, including racial slurs, "[s]everity of the attack (particular types of mutilation), [l]ack of provocation, [c]ontact or prior history between the victim and suspect, [p]revious history of similar incidents in the same area, [and] [a]bsence of any other apparent motive (e.g., battery without robbery)" aid the prosecution in fulfilling its burden. *Id.* at 24.

⁵⁹ See ALA. CODE § 13A-5-13(a)(3)(b) (2005) (crimes motivated by victim's race, color, religion, national origin, ethnicity, or physical or mental disability); ALASKA STAT. § 12.55.155(c)(22) (2005) (factors in aggravation and mitigation); ARIZ. REV. STAT. § 13-702(C)(15) (LexisNexis 2005) (sentencing; definition); CAL. PENAL CODE § 422.75 (West 2005) (enhanced penalties for hate crime); CONN. GEN. STAT. § 53a-40a (2005) (persistent offenders of crimes involving bigotry or bias); DEL. CODE ANN. tit. 11, § 4209(e)(v) (2005) (classification of offenses; sentences); FLA. STAT. § 775.085 (2005) (evidencing prejudice while committing offense; reclassification); GA. CODE ANN. § 17-10-17 (2005), *invalidated by* *Botts v. State*, 604 S.E.2d 512 (Ga. 2004) (enhanced sentence where defendant intentionally selected victim or property as object of offense because of bias or prejudice); KAN. STAT. ANN. § 21-4716 (2004), *invalidated by* *State v. Gould*, 23 P.3d 801 (Kan. 2001) (mitigating and aggravating factors); MD. CODE ANN., CRIM. LAW § 10-306 (West 2005) (penalty); MISS. CODE ANN. § 99-19-305 (2005) (enhanced penalty sentencing procedure); MONT. CODE ANN. § 45-5-222 (2005) (sentence enhancement); NEB. REV. STAT. § 28-111 (2005) (enhanced penalty); NEV. REV. STAT. § 207.185 (2004) (additional penalty); N.H. REV. STAT. ANN. § 651:6 (2005) (extended term of imprisonment); N.M. STAT. ANN. § 31-18B-3 (West 2005) (hate crimes); N.Y. PENAL LAW § 485.10 (McKinney 2005) (sentencing); N.C. GEN. STAT. § 14-3 (2005) (felonies and misdemeanors); OHIO REV. CODE ANN. § 2927.12 (West 2005) (ethnic intimidation); R.I. GEN. LAWS § 12-19-38 (2004) (hate crimes sentencing act); TENN. CODE ANN. § 40-35-114(22) (2005) (enhancement factors); TEX. CODE CRIM. PROC. ANN. art. 42.014 (Vernon 2005) (requiring attendance in an educational program to further tolerance and acceptance of others); UTAH CODE ANN. § 76-3-203.3 (2005) (penalty for hate crime); VT. STAT. ANN. tit. 13, § 1455 (2005) (hate-motivated crimes); VA. CODE ANN. § 18.2-57 (2005) (assault and battery); WIS. STAT. § 939.645 (2005) (penalty).

⁶⁰ ADL.org, *supra* note 44. The ADL's penalty enhancement model statute for bias motivated crimes provides:

A person commits a Bias-Motivated Crime if, by reason of the actual or perceived race, color, religion, national origin, sexual orientation or gender of another individual or group of individuals, he violates Section ____ of the Penal Code (insert code provisions for criminal trespass, criminal mischief, harassment, menacing, intimidation, assault, battery and or other appropriate statutorily proscribed criminal conduct).

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).

Hate Crimes Laws, http://www.adl.org/99hatecrime/text_legis.asp (last visited Jan. 31, 2007). *But see* Gellman, *supra* note 28, at 355-58 (providing the evolution of the ADL model

new crime.⁶¹ These statutes are independent and specifically prohibit crime motivated by a person's bias.⁶² A third type of hate crime statutes are civil rights statutes that provide a penalty for the interference of a victim's enjoyment of constitutionally protected rights.⁶³ Civil rights

statute and argues that the statute is vague for numerous reasons including a lack of a culpable mental state).

⁶¹ See CAL. PENAL CODE § 422.55 (West 2005) (hate crime defined); COLO. REV. STAT. § 18-9-121 (2005) (bias-motivated crimes); CONN. GEN. STAT. § 53a-181j (2005) (intimidation based on bigotry or bias in the first degree); IDAHO CODE ANN. § 18-7902 (2005) (malicious harassment defined); 720 ILL. COMP. STAT. 5/12-7.1 (2005) (hate crime); IND. CODE ANN. § 10-13-3-1 (West 2005) (bias crime defined); KY. REV. STAT. ANN. § 532.031 (West 2005) (findings on hate crime); LA. REV. STAT. ANN. § 107:2 (2005) (hate crimes); MD. CODE ANN., CRIM. LAW § 10-301 (West 2005) (hate crimes); MASS. GEN. LAWS ch. 265, § 39 (2005) (assault or battery for purposes of intimidation); MICH. COMP. LAWS § 750.147b (2005) (ethnic intimidation); MINN. STAT. § 609.2231(4) (2005) (assault in the fourth degree); MO. REV. STAT. § 557.035 (2005) (crimes motivated by race, color, religion, national origin, sex, sexual orientation or disability of the victim); MONT. CODE ANN. § 45-5-221 (2005) (malicious intimidation or harassment relating to civil or human rights); N.C. GEN. STAT. § 14-401.14 (2005) (ethnic intimidation); N.D. CENT. CODE § 12.1-14-04 (2005) (official oppression; elections; civil rights); OKLA. STAT. tit. 21, § 850 (2005) (malicious intimidation or harassment because of race, color, religion, ancestry, national origin or disability); OR. REV. STAT. ANN. §§ 166.155, 165 (West 2003) (intimidation in the second degree); S.D. CODIFIED LAWS § 22-19B-1 (2005) (actions constituting harassment); WASH. REV. CODE § 9A.36.080 (2005) (malicious harassment); see also Winer, *supra* note 51, at 424 (providing new crime statutes).

⁶² Spillane, *supra* note 19, at 20 (noting that this category of hate crime legislation conflicts the most with the First Amendment because the prosecution includes issues related to protected speech). For instance, Connecticut's statute defines intimidation based on bigotry or bias as:

- (a) A person is guilty of intimidation based on bigotry or bias in the first degree when such person maliciously, and with specific intent to intimidate or harass another person because of the actual or perceived race, religion, ethnicity or sexual orientation of such other person, causes serious physical injury to such other person or to a third person.
- (b) Intimidation based on bigotry or bias in the first degree is a class C felony.

CONN. GEN. STAT. § 53a-181j (2005). In Connecticut, a Class C felony is punishable for up to ten years. *Id.* § 53a-35. Other crimes punishable as a Class C felony punishable for up to ten years include bribery of a juror and bribery received by a juror. *Id.* § 53a-181j. Specifically, for illustration purposes, Connecticut punishes a person for bribing a juror if that person "offers, confers or agrees to confer upon a juror any benefit as consideration for the juror's decision or vote." *Id.* § 53a-152. Therefore, bribery and hate crime are both punishable for up to ten years in Connecticut. *Id.*

⁶³ See CAL. PENAL CODE § 422.6 (West 2005) (interference with exercise of civil rights because actual or perceived characteristics of victim); IOWA CODE § 729.5 (2005) (violation of individual rights); KAN. STAT. ANN. § 21-4003 (2004) (crimes involving personal rights); ME. REV. STAT. ANN. tit. 17, § 2931 (2005) (interference with constitutional and civil rights is prohibited); MASS. GEN. LAWS ch. 265, § 37 (2005) (violations of constitutional rights); MICH. COMP. LAWS ANN. § 750.147b (civil action for ethnic intimidation); TENN. CODE ANN. § 39-17-309 (2005) (exercise of civil rights and intimidation); UTAH CODE ANN. § 76-3-203.3 (2005) (penalty for hate crime, civil rights violation); W. VA. CODE ANN. § 61-6-21 (West 2005)

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statutes protect the right to engage in certain activities instead of punishing offenders because the motivation for the crime was based on a particular characteristic.⁶⁴ Among penalty enhancement statutes, new crime laws, and civil rights statutes, penalty enhancement statutes are the only statutes that increase hate crime offenders' punishment solely because hate crime is more severe than ordinary violent crime.⁶⁵

B. *Penalty Enhancement*

Some states recognize the inherent severity of hate crime, like Hannah's and James's, and provide an increased sentence beyond that of the underlying crime if a jury determines beyond a reasonable doubt that the crime was committed because of a bias motivation.⁶⁶

(prohibiting violations of an individual's civil rights); WYO. STAT. ANN. § 6-9-102 (2005) (discrimination prohibited; penalties); Winer, *supra* note 51, at 387. Some civil rights statutes provide a civil cause of action regardless of the outcome of the criminal trial. Mich. Comp. Laws § 750.147b (2005). Specifically, Michigan allows recovery in the amount of \$2,000 or three times the amount of damages, whichever is greater. *Id.*

⁶⁴ For example, Tennessee's statute provides, "...it is the right of every person regardless of race, color, ancestry, religion or national origin, to be secure and protected from fear, intimidation, harassment and bodily injury caused by the activities of groups and individuals." TENN. CODE ANN. § 39-17-309 (2005). Section (b) defines the offense of intimidating others from exercising civil rights if one:

- (1) Injures or threatens to injure or coerces another person with the intent to unlawfully intimidate another from the free exercise or enjoyment of any right or privilege secured by the constitution or laws of the state of Tennessee;
- (2) Injures or threatens to injure or coerces another person with the intent to unlawfully intimidate another because that other exercised any right or privilege secured by the constitution or laws of the United States or the constitution or laws of the state of Tennessee;
- (3) Damages, destroys or defaces any real or personal property of another person with the intent to unlawfully intimidate another from the free exercise or enjoyment of any right or privilege secured by the constitution or laws of the state of Tennessee;
- or (4) Damages, destroys or defaces any real or personal property of another person with the intent to unlawfully intimidate another because that other exercised any right or privilege secured by the constitution or laws of the United States or the constitution or laws of the state of Tennessee.

Id. Further the statute indicates that a violation of this section is a class D felony. *Id.* Tennessee law provides that a class D felony is punishable for not less than two and no more than twelve years in prison. *Id.* § 40-35-111. Many of the state civil rights statutes that contain such a penalty resemble the language of the Federal Hate Crimes Prevention Act.

⁶⁵ Spillane, *supra* note 19, at 20.

⁶⁶ See *supra* note 59 and accompanying text (identifying the states that provide an enhanced penalty for a hate crime).

1. Application of an Enhanced Penalty Statute

If a state has adopted a penalty enhancement statute for hate crime, offenders will be subject to an increased punishment.⁶⁷ The purpose of an enhanced penalty is not to punish the act, or the offender's intention, but the hatred that motivated the offender to create and act on the intention.⁶⁸ As a result, to implement the increased punishment for hate crime, the prosecution must not only prove the elements of the underlying offense, such as battery,⁶⁹ but must also prove a bias or motivation of hate.⁷⁰ For example, a sentence enhancement may

⁶⁷ *Id.*; see *Dobbins v. State*, 605 So. 2d 922, 923 (Fla. Dist. Ct. App. 1992). The court stated that indicators such as the relationship between the offender and victim, as well as the conversation during the offense, demonstrate the selection of a victim based on a particular characteristic and will support an increased sentence. *Id.* However, if a fight arose over a dispute for a woman or money, derogatory comments regarding race or religion would be insufficient to support an enhanced penalty. *Id.* Notably, mistake is not a possible escape to an enhanced penalty. HATE CRIME DATA, *supra* note 19, at 6. Specifically, if an offender mischaracterizes the victim's sexuality, race, religion or the like, the misperception does not affect classifying the crime as a hate crime. *Id.* Illustrative of this point is a situation where a heterosexual patronized a gay bar and was attacked by teenagers under the misperception that the heterosexual was gay. *Id.* However, the teenagers will still be subject to the relevant hate crime or penalty enhancement statutes because the offense was motivated by an anti-gay sentiment. *Id.*

⁶⁸ *Hurd & Moore*, *supra* note 28, at 1128-29.

⁶⁹ Gregory R. Nearpass, Comment, *The Overlooked Constitutional Objection and Practical Concerns to Penalty-Enhancement Provisions of Hate Crime Legislation*, 66 ALB. L. REV. 547, 563-64 (2003); see *Parke v. Raley*, 506 U.S. 20 (1992); *Taylor v. United States*, 495 U.S. 575 (1990); *Rummel v. Estelle*, 445 U.S. 263 (1980) (providing an example of the application of a sentence enhancement for other purposes, including recidivists); see also ARK. CODE ANN. § 5-4-501 (West 2005) (habitual offender statute); *Baxter v. State*, 922 S.W.2d 682 (Ark. 1996) (the habitual offender statute provides a sentence enhancement following conviction if one was previously convicted of a felony).

⁷⁰ Nearpass, *supra* note 69, at 563-64. Also applicable to determining a bias for a conviction under an ordinary hate crime law, the Hate Crime Data provides a list that is not exhaustive, of fourteen possible pieces of objective evidence to indicate if a crime was motivated by bias. HATE CRIME DATA, *supra* note 19, at 4. The evidence includes:

1. The offender and the victim were of different race, religion, disability, sexual orientation, and/or ethnicity/national origin. For example, the victim was black and the offender was white.
2. Bias-related oral comments, written statements, or gestures were made by the offender which indicate his/her bias. For example, the offender shouted a racial epithet at the victim.
3. Bias-related drawings, markings, symbols, or graffiti were left at the crime scene. For example, a swastika was painted on the door of a synagogue.
8. A substantial portion of the community where the crime occurred perceived that the incident was motivated by bias.
10. The incident coincided with a holiday or a date of particular significance relating to a race, religion, disability, sexual orientation, or ethnicity/national origin, e.g., Martin Luther King Day, Rosh Hashanah.

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upgrade the classification of an offense from a second degree offense to a first degree offense or a Class C felony to a Class B felony.⁷¹ Alternatively, some states increase the duration of a sentence by one to three years.⁷² The failure of judicial challenges to enhanced penalty hate crime statutes demonstrate the courts' general acceptance of increased punishments for hate crime offenders.⁷³

2. Constitutional Challenges to Penalty Enhancement Statutes

Hate crime penalty enhancement statutes have been challenged on numerous constitutional grounds.⁷⁴ First the statutes do not violate the First Amendment; the Supreme Court has ruled that such laws are content neutral and do not regulate protected speech.⁷⁵ Equal Protection

Id. at 5.

⁷¹ Wisconsin v. Mitchell, 530 U.S. 466, 494 (1994).

⁷² Two main provisions of California's penalty enhancement for hate crime state:
(a) Except in the case of a person punished under Section 422.7, a person who commits a felony that is a hate crime or attempts to commit a felony that is a hate crime, shall receive an additional term of one, two, or three years in the state prison, at the court's discretion. (b) Except in the case of a person punished under Section 422.7, or subdivision (a) * * * of this section, any person who commits a felony that is a hate crime, or attempts to commit a felony that is a hate crime, and who voluntarily acted in concert with another person, either personally or by aiding and abetting another person, shall receive an additional two, three, or four years in the state prison, at the court's discretion.

CAL. PENAL CODE § 422.75 (West Supp. 2005); see *supra* notes 61-65 and accompanying text (describing the different forms of hate crime legislation and providing the corresponding state statutes, including penalty enhancement statutes).

⁷³ McCoy, *supra* note 28, at 654; see Lu-in Wang, *The Transforming Power of "Hate": Social Cognition Theory and the Harms of Bias-Related Crime*, 71 S. CAL. L. REV. 47, 80 (1997); Terry A. Maroney, Note, *The Struggle Against Hate Crime: Movement at a Crossroads*, 73 N.Y.U. L. REV. 564, 568 (1998) (arguing that the surge of legislation, police activity, judicial reaction, and scholarly interest, reflects society's disapproval of hate crime).

⁷⁴ See *infra* notes 75-79 and accompanying text (providing cases that involve challenges based on the First Amendment, Equal Protection, Due Process, vagueness, and overbreadth).

⁷⁵ *Mitchell*, 508 U.S. at 484; Grannis, *supra* note 40, at 213. Penalty enhancement statutes are content neutral because the statutes are viewpoint and subject-matter neutral. ERWIN CHERMERINSKY, CONSTITUTIONAL LAW 1058 (Aspen Pub. 2005). For example, the statutes do not prohibit anti-abortion demonstrations and permit pro-abortion demonstrations. *Id.* If the statutes regulated speech, the regulation would be permissible only if the statute regulated areas of unprotected and less protected speech, such as obscenity, fighting words, incitement of illegal activity, and commercial speech. *Id.* at 1150. Specifically, in *Mitchell*, the Court rejected a First Amendment challenge to Wisconsin's penalty enhancement provision. 508 U.S. at 484. *Mitchell* argued that the statute violated the First Amendment because it punished "offenders' bigoted beliefs" through enhancing the penalty because of a discriminatory motive. *Id.* at 485 However, the Court upheld the

challenges are unsuccessful because penalty enhancement statutes do not seek to protect a certain class.⁷⁶ Alternatively, the statutes do not violate procedural due process if the jury makes the determination beyond a reasonable doubt that the crime was motivated because of a bias—a legitimate reason for enhancing an offender’s penalty.⁷⁷ Enhanced penalty statutes may also be challenged as unconstitutionally vague, such as where they fail to define subject activity, are unconstitutionally broad, or where they encompass constitutionally protected activities.⁷⁸ Unsuccessful challenges to enhanced penalty

statute against the challenge because the Constitution does not preclude the sentencing judge from considering motives or beliefs in determining a punishment. *Id.* at 486; see George L. Blum, Annotation, *Validity, Construction and Effect of “Hate Crimes” Statutes, “Ethnic Intimidation” Statutes, or the Like*, 22 A.L.R. 5TH § 61, at 261 (2005) (providing additional cases involving challenges to penalty enhancement statutes based on the First Amendment).

⁷⁶ The Fourteenth Amendment guarantees that all persons similarly situated should be treated alike. BLACK’S LAW DICTIONARY 5 (8th ed. 2004). Further, discriminatory legislation must survive rational basis scrutiny unless the statute discriminates against a protected class which subjects the law to a higher level of scrutiny, intermediate or strict. CHEMERINSKY, *supra* note 75, at 618; BLACK’S LAW DICTIONARY, *supra*, at 577. In *State v. Ladue*, the defendant argued that the respective state’s hate motivated crime penalty enhancement statutes provided special protection for certain classes of victims based on race, sex, or national origin. 631 A.2d. 236, 237 (Vt. 1993). However, the court disagreed and stated that the statute does not treat similarly situated victims differently. *Id.* Instead the statute provides the same protection as if they were targeted because of a certain characteristic. *Id.* In *State v. Mortimer*, the court accepted the government’s legitimate interest in increasing the punishment for hate motivated crimes to “prevent the conduct from occurring at all.” 641 A.2d 257, 267 (N.J. 1994). Therefore, the statute was upheld against the Equal Protection challenge. *Id.*; see Blum, *supra* note 75, § 5 (discussing challenges to penalty enhancement statutes based on Equal Protection).

⁷⁷ See *Apprendi v. New Jersey*, 530 U.S. 466, 472 (2000). In *Apprendi*, the trial judge applied the enhanced penalty statute to Apprendi’s punishment after the determination by a preponderance of the evidence that the crime was motivated by a racial bias. *Id.* at 470. Subsequently, Apprendi challenged New Jersey’s hate crime penalty enhancement statute and argued that it violated his Fourteenth Amendment due process rights. *Id.* Notably, the challenge was not based on the substance of the statute, but the procedures required to determine an enhanced penalty. *Id.* at 472. The statute allowed the judge to determine bias motivation and subject a defendant to an enhanced penalty. *Id.* The Supreme Court relied on the due process clause of the Fifth Amendment and the “jury trial guarantees of the Sixth Amendment” to determine that “any fact . . . that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.” *Id.* at 476. Subsequently, the Court’s decision required that a jury, not a judge, determine bias beyond a reasonable doubt to subject a defendant to an enhanced penalty for a hate motivated crime. *Id.* Therefore, New Jersey’s hate crime enhancement procedure was “an unacceptable departure from the jury tradition that is an indispensable part of our criminal justice system.” *Id.* at 497; see also Blum, *supra* note 75, § 3 (discussing challenges to penalty enhancement statutes based on Due Process).

⁷⁸ A vague law precludes a reasonable person from determining what speech is permitted and what speech is prohibited. CHEMERINSKY, *supra* note 75, at 1085.

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statutes demonstrate the constitutionality of penalty enhancements hate crime statutes and the desire to deter both juveniles and adults from committing hate crimes through an increased punishment.⁷⁹

C. *Juvenile Delinquency*

The severity of Hannah's and James's hate crimes determines which criminal justice system, the juvenile or adult, will process the case.⁸⁰ Part II.C.1 provides a definition of juvenile delinquency.⁸¹ Part II.C.2 examines the jurisdiction of the juvenile system.⁸² Finally, Part II.C.3 presents various theories that explain the causes of juvenile delinquency, which is necessary in examining possible parental liability.⁸³

1. Defining "Juvenile Delinquent"

A "juvenile delinquent" is a minor who displays antisocial behavior for which an adult who engaged in the same misconduct would be subject to a criminal penalty.⁸⁴ The likelihood that juveniles will engage

Alternatively, an overbroad law regulates substantially more speech than the Constitution permits. *Id.* at 1087; see *Richards v. State*, 643 So. 2d 89, 90 (Fla. Dist. Ct. App. 1994) (upholding the penalty enhancement statute against a vagueness challenge because "the statute clearly contains as one of its essential elements that the defendant was bias-motivated in committing the crime charged in that he or she intentionally selected the crime victim because of the victim's race, color, ethnicity, religion, or national origin"); *Dobbins v. State*, 605 So. 2d 922 (Fla. Dist. Ct. App. 1992) (rejecting a vagueness and overbreadth challenge to the penalty enhancement statute because the statute did require that the racial slurs be related to the commission of a crime); *Botts v. State*, 604 S.E.2d 512, 538 (Ga. 2004) (striking Georgia's hate crime penalty enhancement statute because the statute failed to provide offenders with notice of the prohibited conduct); see also *Blum, supra* note 75, at § 4 (discussing challenges to penalty enhancement statutes based on vagueness and overbreadth).

⁷⁹ See *supra* notes 74-78 and accompanying text (explaining the constitutional challenges to penalty enhancement statutes).

⁸⁰ See *infra* note 104 (indicating that juveniles will likely be punished in the adult system for more serious crimes such as murder).

⁸¹ See *infra* Part II.C.1 (defining juvenile delinquency and explaining the origins of juveniles' hatred).

⁸² See *infra* Part II.C.2 (examining the goals of the juvenile system in addition to jurisdiction of the juvenile system).

⁸³ See *infra* Part II.C.3 (providing theories such as the biological, anomie, cultural deviance, and control).

⁸⁴ BLACK'S LAW DICTIONARY 884 (8th ed. 2004). Although reports indicated that the 1999 rate of 16.2% of arrests for violent crime for individuals under eighteen was low, Congress argued that the rates were still too high. *Juvenile Justice and Delinquency Prevention*, 42 U.S.C. § 5601 (2000). Additional reports indicate that juvenile crime rates are expected to double by 2010, which will result in a dramatic increase. Tammy Thurman, *Parental Responsibility Laws/Are They the Answer to Juvenile Delinquency?* 5 J.L. & FAM. STUD. 99, 100 (2003); see James C. Backstrom & Gary L. Walker, *The Prosecutor in Juvenile Justice: Advocacy*

in delinquency increases as parental supervision decreases.⁸⁵ Research indicates that a dysfunctional family and truancy also contribute to juvenile delinquency, but economic resources are not determinative of the presence or absence of juvenile delinquency.⁸⁶ Those factors, *inter alia*, help explain why minors participate in deviant behavior, including hate crime, of which juveniles are common offenders.⁸⁷

Juvenile hate crime is usually a consequence of violence and prejudice.⁸⁸ Juveniles may possess a prejudice against anyone who is of a different race, has a dissimilar religious belief, or a different sexual preference.⁸⁹ These prejudices are commonly learned and accepted by juveniles from their parents.⁹⁰ Also, juveniles will likely adopt the same prejudice and develop a similar hatred when the juveniles' peers support

in the Courtroom and Leadership in the Community, PROSECUTOR, May-June 2004, at 37 (noting that juvenile crime statistics include juveniles from all backgrounds and the prediction that in 2010 juveniles will compose 22% of the population).

⁸⁵ Howard Davidson, *No Consequences – Re-examining Parental Responsibility Laws*, 7 STAN. L. & POL'Y REV. 23, 24 (1995). Specifically, delinquents influence minors who are, overall, "good kids." *Id.* Delinquency results from inadequate supervision in a household with two working parents. *Id.*

⁸⁶ Backstrom & Walker, *supra* note 84, at 44; Earl F. Martin & Marsha Kline Pruett, *The Juvenile Sex Offender and the Juvenile Justice System*, 35 AM. CRIM. L. REV. 279, 296-97 (1998); Davidson, *supra* note 85, at 24. Statistics from Miami indicate that an overwhelming 71% of juveniles charged with a criminal offense had been truant from school. Janet Stroman, *Holding Parents Liable for their Children's Truancy*, 5 U.C. DAVIS J. JUV. L. & POL'Y 47, 48 (2000). Many factors cause juvenile misconduct, however a lack of parental supervision contributes to juvenile delinquency and each factor has a different solution. Davidson, *supra* note 85, at 29. Other factors that have been linked to juvenile delinquency include "poverty, disorganized communities, media violence, [and] drugs." Jerry E. Tyler et al., *Parental Liability Laws: Rationale, Theory, and Effectiveness*, 37 SOC. SCI. J. 1, 14 (2000).

⁸⁷ Jacobs & Potter, *supra* note 23, at 21; *see supra* notes 21-26 and accompanying text (discussing common hate crime offenders); *see also* Andrew M. Gilbert & Eric D. Marchand, *Splitting the Atom or Splitting the Hairs – The Hate Crimes Prevention Act of 1999*, 30 ST. MARY'S L.J. 931, 974 (noting that juvenile involvement in the commission of hate crime is increasing); FBI.gov, *Crime in the United States 2002*, http://www.fbi.gov/ucr/cius_02/html/web/arrested/04-table41.html (last visited Jan. 31, 2007) (providing arrest statistics on a variety of crimes committed by persons under 15, 18, 21, and 25 years old).

⁸⁸ Steinberg, *supra* note 24, at 983. Statistics from 1995-2000 on juvenile hate crime indicates that juveniles committed 969 or 16.5% of hate crimes committed within five years. *An Analysis of NIBRS Hate Crime (1995-2000)*, <http://www.as.wvu.edu/~jnolan/incao.htm> (last visited Jan. 31, 2007). Further, this was the highest percentage among four age groups: under 18, 18-24, 25-39, and over 40. *Id.*

⁸⁹ Steinberg, *supra* note 24, at 983. Steinberg argues that juvenile hate crime offenders carry out "prejudicial beliefs and emotions concerning people who are perceived as different." *Id.*

⁹⁰ Prejudice, the most commonly racial prejudice, is learned from an older generation. Uhrich, *supra* note 21, at 1497. Children likely adopt the same prejudices as their parents. *Id.*; *see supra* note 22 and accompanying text (which provides that prejudices are firmly rooted in society and passed down through generations).

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a particular bias.⁹¹ Finally, adults with a bias motivation may recruit juveniles to perform illegal conduct such as hate crime.⁹² Regardless of the source, just like adults, if juveniles commit a crime because of a bias, they can be convicted of a hate crime or subject to increased penalty for an already defined crime.⁹³ Whether the adult or juvenile criminal justice system will prosecute juvenile hate crime offenders depends on the severity of the hate crime itself.⁹⁴

2. Jurisdiction of the Juvenile Justice System

In response to the increase in juvenile delinquency, federal and state legislatures have reacted in different ways.⁹⁵ Congress has sought to expand jurisdiction over juvenile delinquents and prosecute juveniles as adults in federal court.⁹⁶ State legislatures have increased the duration of

⁹¹ Steinberg, *supra* note 24, at 983. The prejudice is held among a group of juveniles and not just one juvenile. *Id.* Particularly, a prejudice held by a group becomes “widely shared and enduring element of the culture in which it occurs.” *Id.* Prejudices held among a group “pose a particular threat to young people, who are the most impressionable members of society. Violence and prejudice have become unavoidable in schools; rather than a refuge from hate attacks, schools have become fertile ground for violent bigotry.” *Id.*

⁹² Uhrich, *supra* note 21, at 1473. The Senate recognized this recent phenomena and proposed a bill that provided that the Federal Sentencing Commission shall “amend the Federal sentencing guidelines to provide sentencing enhancements . . . for adult defendants who recruit juveniles to assist in the commission of hate crimes.” Local Law Enforcement Enhancement Act of 2005, *supra* note 49, § 8.

⁹³ See *In re Vladimir P.*, 670 N.E.2d 839, 844 (Ill. App. Ct. 1996) (convicting a juvenile for aggravated assault and a hate crime because evidence indicated beyond a reasonable doubt that the defendant threw a knife at a boy by reason of the victim’s religion); ADL.org, *supra* note 44 (discussing a Texas verdict that convicted a juvenile of a hate crime because the juvenile and three others burned a cross on the victim’s lawn, hung a noose on a tree, and spray painted a racial epithet on the victim’s driveway).

⁹⁴ Spillane, *supra* note 19, at 4; see, e.g., MINN. STAT. § 260B.101 (2005); Backstrom & Walker, *supra* note 84, at 40 (presenting the factors that warrant the transfer of a juvenile to adult court which include “the seriousness of the crime, the threat to public safety, the age of the juvenile, the juvenile’s criminal history and other relevant factors”).

⁹⁵ Davidson, *supra* note 85, at 23; see Juvenile Justice System Structure and Process, http://ojjdp.ncjrs.org/ojstatbb/structure_process/case.html (last visited Jan. 31, 2007) [hereinafter Juvenile Justice System] (diagramming how a delinquency case is processed within the juvenile system).

⁹⁶ Laura K. Langley, *Giving Up On Youth: The Danger of Recent Attempts to Federalize Juvenile Crime*, 25 J. JUV. L. 1 (2005). The original notion against prosecuting juveniles was reversed in the Federal Juvenile Delinquency Act. 18 U.S.C. § 5032 (2000). The Federal Juvenile Delinquency Act requires a showing by the Attorney General of one of three factors to prosecute a juvenile in federal court that:

- (1) the juvenile court or other appropriate court of a State does not have jurisdiction or refuses to assume jurisdiction over said juvenile with respect to such alleged act of juvenile delinquency, (2) the State does not have available programs and services adequate for the needs

penalties and decreased the age at which juveniles may be transferred to an adult court.⁹⁷

The decision to transfer a juvenile to the adult system also determines with whom the juvenile will serve a sentence. Separate courts and facilities to incarcerate juvenile delinquents and adult criminals have existed for over a century.⁹⁸ The first juvenile court was established in Illinois pursuant to the state's Juvenile Court Act of 1899.⁹⁹ One original goal of the separate facilities was to prevent subjection of juveniles to the abuses and risks within the adult system.¹⁰⁰ Subsequently, juveniles were also granted the same basic due process rights that adults are afforded in the criminal system.¹⁰¹ If a juvenile is

of juveniles, or (3) the offense charged is a crime of violence that is a felony or an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), or section 1002(a), 1003, 1005, 1009, or 1010(b)(1), (2), or (3) of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 953, 955, 959, 960(b)(1), (2), (3)), or section 924(b), (g), or (h) or (x) of this title, and that there is a substantial Federal interest in the case or the offense to warrant the exercise of Federal jurisdiction.

Id.; Langley, *supra* at 3; see United States v. Male Juvenile, 280 F.3d 1008 (9th Cir. 2002); United States v. David H., 29 F.3d 489 (9th Cir. 1994); United States v. Rombom, 421 F. Supp. 2d 1295 (S.D.N.Y. 1976) (involving decisions of which system to prosecute a juvenile).

⁹⁷ Langley, *supra* note 96, at 1.

⁹⁸ The juvenile court created the issue of which system to punish juveniles who commit crimes. Kimberly Burke, Notes & Comments, *All Grown Up: Juveniles Incarcerated in Adult Facilities*, 25 J. JUV. L. 69 (2005).

⁹⁹ Illinois Juvenile Court Act of 1899, § 1, Ill. Laws 131 (repealed 1965). Initially the first juvenile court focused on civil matters rather than criminal law. Tyler et al., *supra* note 86, at 3. Consequently, the emphasis was protection rather than punishing the child for their misconduct. *Id.* Subsequently, all but three states established a juvenile court by 1917, which sought to further the focus on civil protection instead of criminal punishment. *Id.*; see FLA. STAT. § 985.201 (2005). The statute provides the jurisdiction of a circuit court in the proceeding of a delinquency case and additional conditions such as age that would require the court to relinquish control over the child. *Id.* § 985.201.

¹⁰⁰ Burke, *supra* note 98, at 70. Most importantly, the juvenile system prevents nonviolent juveniles from being housed in the same facility as violent adult criminals because the lack of separation is "self-destructive and self-defeating." *Id.* at 69; see FLA. STAT. § 985.215. The statute explicitly provides that juveniles should not be placed in the same cell as adults and any contact should only result from an accident. Burke, *supra* note 98, at 70. A rationale for separation and risk of integration is that the rate of juvenile suicide is eight times higher among those housed in adult facilities than juvenile centers. *Id.* at 72. Another risk of integration is a greater possibility of juveniles being harassed or abused by adult inmates. *Id.*

¹⁰¹ Tyler et al., *supra* note 86, at 3; see *In re Gault*, 387 U.S. 1 (1967). The decision in *Gault* ensures that juveniles are afforded Constitutional rights when prosecuted in the juvenile system. *Gault*, 387 U.S. at 13. Specifically, the court stated that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." *Id.* Therefore, since 1967, among

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convicted in an adult court, the juvenile must serve a sentence in an adult prison.¹⁰² As a result, the Juvenile Justice and Delinquency Prevention Act of 1974 created standards to encourage consistency among states when placing juveniles in adult prisons.¹⁰³ Finally, an underlying purpose of the juvenile system is rehabilitation and to convert juveniles into law abiding citizens through clinical processes.¹⁰⁴ Accordingly, the juvenile system has implemented solutions tailored to

other rights, juveniles are afforded the right to counsel, the right to cross examine and confront witnesses, and the privilege against self incrimination. Tyler et al., *supra* note 86, at 3.

¹⁰² See Juvenile Justice System, *supra* note 95 (noting that the prosecutor makes the ultimate decision to prosecute the juvenile within the criminal or juvenile system). See generally Monya A. Bunch, Note, *Juvenile Transfer Proceedings: A Place for Restorative Justice Values*, 47 HOW. L.J. 909, 910 (2004). For the more serious crimes, the answer is obvious; however, many cases are not so clear cut. Burke, *supra* note 98, at 69. Following a conviction in an adult court, juveniles are then automatically transferred to adult prisons. *Id.* at 71. For example, a female juvenile was indicted by a grand jury for numerous robberies and then transferred to an adult detention facility pending trial. *State ex rel. Powers v. Schwartz*, 355 So. 2d 460 (Fla. Dist. Ct. App. 1978). The petitioner argued that the judge had a non-discretionary duty to keep her in the Youth Hall because the adult facility subjected her to cruel and unusual punishment. *Id.* at 461. However, the court disagreed and held that the judge had a duty to keep the indicted juvenile ineligible for bail or pretrial release in the adult facility. *Id.*; see also *State Dep't of Children & Families v. Morrison*, 727 So. 2d 404 (Fla. Dist. Ct. App. 1999) (dealing with the transfer of a juvenile to adult court); *Postell v. State*, 383 So. 2d 1159 (Fla. Dist. Ct. App. 1980). But see FLA. STAT. § 985.233 (2005). The statute provides the criteria to determine when to impose juvenile sanctions instead of adult sanctions. *Id.* Specifically, the court considers factors such as the effect of the crime on the community, the maturity of the juvenile, and the offender's criminal history. *Id.*

¹⁰³ 42 U.S.C. § 5633 (2000); Burke, *supra* note 98, at 70. The statute provides that juveniles should not be placed in an adult facility unless the juvenile is accused of a nonstatus offense and the detention should not exceed six hours for the purpose of "processing or release; while awaiting transfer to a juvenile facility; or in which period such juveniles make a court appearance." 42 U.S.C. § 5633(a)(13) (2000). Other guidelines include the prohibition of detaining juveniles in an adult facility who are aliens, dependents, or who violated a court order. *Id.* § 5633(a)(11); see FLA. STAT. § 985.215 (providing Florida's guidelines for the detention of a juvenile following the commission of a crime).

¹⁰⁴ See *In re Gault*, 387 U.S. at 15-16 (noting that "[t]he child was to be 'treated' and 'rehabilitated' and the procedures, from apprehension through institutionalization, were to be 'clinical' rather than punitive"). Further, the juvenile system includes educational programs designed to encourage juveniles to become productive members of society following release. Burke, *supra* note 98, at 72. However, juveniles who commit serious crimes such as murder, may be incapable of rehabilitation and would not benefit from educational programs inherent in the juvenile system. *Id.* at 74. Therefore, courts detain the juveniles in adult facilities. *Id.* For example, a juvenile was sixteen when he was convicted of voluntary manslaughter and conspiracy and was sentenced to two to four years in an adult facility. *Commonwealth v. Lucas*, 622 A.2d 325, 326 (Pa. 1993). Burke argues that the combination of age and commission of a heinous crime may indicate that the juvenile system's programs would not be effective. Burke, *supra* note 98, at 74.

respective offenses to address and correct the causes of juvenile delinquency.¹⁰⁵

3. Theories of Juvenile Delinquency

Scholars have developed various theories regarding causes of juvenile delinquency.¹⁰⁶ These theories evolved from disciplines such as biology, psychology, sociology, and anthropology.¹⁰⁷ First, biological theorists have reasoned that there is a connection between biological processes and delinquency.¹⁰⁸ These theorists recommend medicine and rehabilitation as resolutions to juvenile delinquency.¹⁰⁹ Conversely, the anomie theory stresses that juveniles' simultaneous desires and inabilities to conform to the majority result in delinquency.¹¹⁰ The underlying presumption of the anomie theory is that juveniles will perform any act necessary to obtain the status of the dominant culture.¹¹¹ Alternatively, the cultural deviance theory explains that the juvenile is part of a subculture accepting of deviant behavior.¹¹² A major presumption of this theory is that parental influence is an important factor in determining whether juveniles will engage in delinquency.¹¹³

¹⁰⁵ Burke, *supra* note 98, at 72; Langley, *supra* note 96, at 3; see Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 143 (1998) (noting that separate facilities existed for juveniles and adults because juveniles are more vulnerable and therefore different correctional responses needed to be administered). *But see* Bunch, *supra* note 103, at 910 (suggesting that the goals of the juvenile system have changed and are now more similar to the adult system because of a focus on punishment); Scott & Grisso, *supra*, at 137 (arguing that the juvenile system's initial goal of rehabilitation is diminishing and the next step is to abolish the juvenile justice system because its current goals are the same as the adult system).

¹⁰⁶ Linda A. Chapin, *Out of Control? The Uses and Abuses of Parental Liability Laws to Control Juvenile Delinquency in the United States*, 37 SANTA CLARA L. REV. 621, 665 (1997).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* The biological theory proposes that there is a causal connection between biological abnormalities and delinquent behavior. Thurman, *supra* note 84, at 102. Further, the biological theory parallels past criminology studies that sought to predict criminal behavior based on an individual's physiology. *Id.*

¹⁰⁹ Chapin, *supra* note 106, at 665.

¹¹⁰ *Id.* at 666.

¹¹¹ Thurman, *supra* note 84, at 102. Juveniles resort to illegitimate means to obtain desired results. Chapin, *supra* note 114, at 666. For example, a juvenile who cannot purchase a car will steal a car to obtain the success enjoyed by the majority. *Id.*

¹¹² Chapin, *supra* note 106, at 667.

¹¹³ Juveniles learn deviant behavior through association with a particular subculture. *Id.* Additionally, "[u]nder some circumstances hate crimes may be viewed as mischievous juvenile acts committed by youngsters seeking a thrill or peer approval." Boeckmann & Turpin-Petrosino, *supra* note 22, at 208; Clausen, *supra* note 24, at 19.

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Another theory, the control theory, proposes that there is a correlation between the strength of juveniles' bonds with society and the probability of engaging in delinquency.¹¹⁴ This theory states that juvenile delinquency is a result of juveniles' weak bonds to conventional society.¹¹⁵ First, this theory emphasizes minors' close attachment, or lack thereof, to parents, teachers, and peers.¹¹⁶ Effective communication and spending time with others help to develop these attachments that impact whether or not juveniles will engage in delinquency.¹¹⁷ The second element, commitment, proposes that juveniles committed to convention are more likely to obey the law.¹¹⁸ Conversely, juveniles less committed to convention engage in deviant behavior because they have little to lose from antisocial activity.¹¹⁹ The involvement element indicates that normal activities, such as attending school or possessing a hobby, reduce the time available for delinquency.¹²⁰ Similarly, studies indicate that juveniles with high academic involvement and achievement in reading, writing, and arithmetic were less likely to participate in delinquency than juveniles that were less successful in school.¹²¹ The last element relates to juveniles' beliefs in the rules of the deviant subculture and

¹¹⁴ Chapin, *supra* note 106, at 667-68. A major presumption of this theory is that parental influence is an important factor to determine whether juveniles will engage in delinquency. *Id.* at 669. Therefore, the greater the attachment between parents and juveniles, the less likely that juveniles will become delinquent. *Id.* See generally Bruce Watt et al., *Juvenile Recidivism: Criminal Propensity, Social Control and Social Learning Theories*, 11 PSYCHIATRY PSYCHOL. & L. 141 (2004) (providing information on the control theory).

¹¹⁵ Chapin, *supra* note 106, at 667-68; see Robert Richard Lyerly & James K. Skipper, Jr., *Differential Rates of Rural-Urban Delinquency: A Social Control Approach*, 19 CRIMINOLOGY 385 (1981) (attempting to explain through the social control theory the differing rates of juvenile delinquency between urban and rural areas).

¹¹⁶ Chapin, *supra* note 106, at 668. Based on the attachment element, a child is supposed to learn "socially acceptable behavior" from their parents. Michael D. Wiatrowski et al., *Social Control Theory and Delinquency*, 46 AM. SOC. REV. 525 (1981).

¹¹⁷ Watt et al., *supra* note 114, at 145.

¹¹⁸ Chapin, *supra* note 106, at 668. This element, commitment, has been said to be related to the aspiration of pursuing higher education and if pursued, the juvenile will not likely engage in delinquent behavior. Wiatrowski et al., *supra* note 116, at 525.

¹¹⁹ Watt et al., *supra* note 114, at 145.

¹²⁰ Chapin, *supra* note 106, at 668. Thus, the prediction is that socially active juveniles are less likely to engage in delinquency. Watt et al., *supra* note 114, at 145; see Angela J. Huebner & Sherry C. Betts, *Exploring the Utility of Social Control Theory for Youth Development: Issues of Attachment, Involvement, and Gender*, 34 YOUTH & SOC'Y 123 (2002).

¹²¹ Watt et al., *supra* note 114, at 145; see Laurie A. Drapela, *Does Dropping Out of High School Cause Deviant Behavior: An Analysis of the National Education Longitudinal Study*, 26 DEVIANT BEHAVIOR 47 (2005) (studying the impact that dropping out of school has on the probability a juvenile will participate in delinquency).

subsequent violation of those rules.¹²² Deviant subcultures possess prejudices for a particular race, religion, gender, or ethnicity, and appeal to juveniles because the group's "ideals provide a kind of external superego."¹²³ The control theory implies that parents' actions may be a contributing cause to juvenile delinquency, and that legislatures have enacted parental liability laws to encourage parental supervision and reduce juvenile delinquency.¹²⁴

D. Parental Liability Laws

Parental liability provides Hannah's and James's victims with redress against their parents for the hate crimes they committed as juvenile delinquents.¹²⁵ Part II.D.1 explores various methods for imposing liability on parents and Part II.D.2 discusses constitutional challenges to parental liability statutes.¹²⁶

1. Forms of Parental Liability Legislation

Primarily, parental liability statutes are a reaction to the increase in juvenile delinquency.¹²⁷ The imposition of liability on parents can be

¹²² Chapin, *supra* note 106, at 665; *see supra* note 26 and accompanying text (providing deviant subcultures especially those that participate in hate crimes, such as the Ku Klux Klan, the Order, and the White Aryan Resistance).

¹²³ Steinberg et al., *supra* note 24, at 984.

¹²⁴ Chapin, *supra* note 106, at 668. *But see* Tyler et al., *supra* note 86, at 6. Tyler points out that the problem with the social control method is that the theory only addresses how to reduce juvenile delinquency without providing a solution on how to handle its effects. *Id.* The theory implies that a way to eliminate juvenile delinquency is to confine juveniles to a schedule of school, then immediately lock them in their rooms, force them to attend church on Sunday, go straight home, and start the process over. *Id.* Even in an ideal world this routine is not desirable. *Id.* Conversely, a high amount of parental control may encourage a child to rebel or be uncontrollable. *Id.* Tyler argues that this theory fails to provide an explanation for juvenile delinquency and does not address the effects of such repressive measures. *Id.* However, parental liability laws are one way to address the problem of juvenile delinquency. *See infra* notes 197-224 and accompanying text (providing how parental liability laws are consistent with the control theory).

¹²⁵ Thurman, *supra* note 84, at 99. "The law has an important role to play in helping to ensure that parents protect their children from violence and in holding parents accountable when they have had the ability to control their children's behavior, but failed to do so." Davidson, *supra* note 85, at 28.

¹²⁶ *See infra* Part II.D.1 (imposing liability on parents through criminal sanctions or civil liability based on theirs such as strict liability, misaction, inaction or negligence); *infra* Part II.D.2 (providing challenges to parental liability laws based on the Due Process and Equal Protection clauses of the United States Constitution and respective state constitutions).

¹²⁷ Chapin, *supra* note 106, at 631; Thurman, *supra* note 84, at 99. Other countries such as Australia and England recognize the increased need to hold parents accountable for the misconduct of juveniles and have reacted accordingly. Tyler et al., *supra* note 86, at 2. Parental liability laws have been described as an impulsive reaction within state

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explained by legal theories such as strict liability, misaction, inaction, or negligence.¹²⁸ These legal theories provide the basis for the imposition of a criminal penalty on parents for juvenile misconduct, an action for civil damages, or both.¹²⁹

A state may hold parents criminally responsible for the misconduct of their children through a “contributing to the delinquency of a minor” statute.¹³⁰ The rationale behind such statutes is that the family is the

legislatures to juveniles increased involvement with weapons, gangs, and violence. *Id.* at 4. Tyler questions if the laws actually reduce juvenile delinquency, and argues that the initial response is in the affirmative. *Id.* at 9. Admittedly, punishing the parents instead of the child causes one to wonder if parental liability “serves the community or the child.” *Id.*; see Naomi R. Cahn, *Pragmatic Questions About Parental Liability Statutes*, 1996 WIS. L. REV. 399 (providing further explanation for the purpose of parental liability statutes).

¹²⁸ Thurman, *supra* note 84, at 103. First, liability is imposed regardless of fault, similar to strict liability. Commonly, parents receive sanctions under truancy or curfew statutes with the purpose of encouraging parents’ cooperation with school and community officials to eliminate the juvenile’s skipping school or staying out after a designated time. *Id.* Second, misaction warrants the imposition of liability. *Id.* Misaction involves parents’ knowing or willful actions that contribute to the delinquency of a minor. *Id.* Parental misaction includes abuse, rejection, or teaching a juvenile how to commit a crime. *Id.* A final legal theory is based on inaction or negligence. *Id.* The statutes impose liability on parents for the failure to act and the most relevant statutes are improper supervision or neglect. *Id.* Under this theory, liability is imposed when a parent “entrusted their child with a dangerous instrument or if the parents were aware of their child’s vicious propensities.” Eve M. Brank et al., *Parental Responsibility Statutes: An Organization and Policy Implications*, 7 J.L. & FAM. STUD. 1, 3 (2005). This is the view reflected at common law. *Id.*

¹²⁹ Thurman, *supra* note 84, at 99. One argument is that the imposition of a penalty to hold parents accountable for juvenile delinquency is a “quick-fix” reaction to the increase in juvenile delinquency because the laws are the only “known” way to control juvenile delinquency. Tyler et al., *supra* note 86, at 8.

¹³⁰ Eunice A. Eichelberger, Annotation, *Criminal Responsibility of Parent for Act of Child*, 12 A.L.R. 4TH 673 (1994); see Kathryn J. Parsley, *Constitutional Limitations on State Power to Hold Parents Criminally Liable for the Delinquent Acts of Their Children*, 44 VAND. L. REV. 441 (1991) (discussing challenges to criminal liability laws based on the vagueness doctrine and right to privacy); ALA. CODE § 12-15-13 (2006) (causing, etc., of delinquency, dependency or need of supervision of children); ARIZ REV. STAT. § 13-3613 (LexisNexis 2006) (contributing to delinquency and dependency; classification; procedure); CAL. PENAL CODE § 272 (West 2007) (contributing to delinquency of persons under 18 years; persuading, luring, or transporting minors 12 years of age or younger). Alternatively, parents can also be held liable under an endangering the welfare of a child statute. Davidson, *supra* note 85, at 23-24. Endangering the welfare of the child involves a situation where the parent knows that a child is being abused and fails to protect the child. *Id.* Subsequently, laws allow for a criminal punishment and recourse in a juvenile civil court in the form of a child protective action. *Id.*; KY. REV. STAT. ANN. § 530.060 (West 2004). The Kentucky statute provides:

(1) A parent, guardian or other person legally charged with the care or custody of a minor is guilty of endangering the welfare of a minor when he fails or refuses to exercise reasonable diligence in the control of such child to prevent him from becoming a neglected, dependent or

primary influence in the lives of juveniles, and that the family is in the best position to encourage youth to become constructive members of society.¹³¹ In 1903, Colorado was the first state to enact a statute that provided a penalty for contributing to the delinquency of a minor.¹³² Since then, all fifty states have enacted a similar statute providing a felony or misdemeanor for parents of juvenile delinquents.¹³³ Under these laws, parents are penalized when a lack of supervision causes juvenile delinquency.¹³⁴ But in contrast to tort liability, under a

delinquent child. (2) Endangering the welfare of a minor is a Class A misdemeanor.

Id. § 530.060.

¹³¹ Parsley, *supra* note 130, at 446. The role of the family is to demonstrate the importance of obedience to authority. *Id.* Therefore, supporters argue that juvenile delinquency results from an absence of parental control and guidance. *Id.*

¹³² Williams v. Garcetti, 853 P.2d 507 (Cal. 1993); Thurman, *supra* note 84, at 103. The original Colorado law provided that contributing to the delinquency of minors was punishable as a misdemeanor with a maximum one year imprisonment and/or a \$1,000 fine. Brank et al., *supra* note 128, at 4. Now, the statute provides that contributing to the delinquency of a minor is a class 4 felony which is punishable for two to four years in prison and one year of parole. COLO. REV. STAT. § 18-6-701 (2005); *id.* § 18-1.3-401.

¹³³ James N. Kourie, Annotation, *Mens Rea or Guilty Intent as Necessary Element of Offense of Contributing to Delinquency or Dependency of Minor*, 31 A.L.R. 3D 848 (2004); see Brank et al., *supra* note 128, at 26 (providing a table with all the states that have a contributing to the delinquency of a minor statute).

¹³⁴ Some of the most common applications of the statutes include juveniles' failure to observe a city curfew, selling liquor, and illegal operation of a motor vehicle. See *People v. Walton*, 161 P.2d 498 (Cal. Dist. Ct. App. 1945); *People v. Ferello*, 268 P. 915 (Cal. Dist. Ct. App. 1928); *Reeves v. State*, 143 S.E. 462 (Ga. Ct. App. 1928). In *Walton*, the ordinances imposed a criminal penalty on the parents of a juvenile under sixteen who allowed the "minor to remain, stroll upon, use, loiter on or be upon any street or public place between the hours of 9 p.m. and 4 a.m. of the following day, unless accompanied by an adult having the care and custody of such minor, or unless the minor had in his possession a permit issued by the sheriff showing the necessity of such minor to so use such street or public place." *Walton*, 161 P.2d at 500. *Walton's* son was a sixteen-year-old who was out on the street between the hours indicated in the ordinance. *Id.* at 499. Subsequently, *Walton* was charged with a violation of the ordinance. *Id.* In *Ferello*, the mother was convicted of contributing to the delinquency of her minor daughter for encouraging the daughter to sell liquor. *Ferello*, 268 P. at 916. Similarly, in *Reeves*, the court upheld the mother's indictment for a misdemeanor that resulted from their thirteen-year-old's illegal operation of a motor vehicle. *Reeves*, 143 S.E. at 462. The father was not with the child, however, the mother was a passenger in the car. *Id.* Therefore, the presumption was that the mother knew that her child was not legally licensed to drive and that the mother aided and abetted in her son's commission of a crime. *Id.*; see also *Ala. State Bar v. Quinn*, 926 So. 2d 1018 (Ala. 2005) (disbarring Quinn, an attorney, based on his conviction of a serious crime, to wit causing delinquency by smoking marijuana with minors); *State v. J.L.* 945 So. 2d 884, 889 (La. Ct. App. 2006) (upholding the defendants conviction for contributing to the delinquency of a minor based on the performance of a sexually immoral act); *State v. Ramirez*, No. 13-04-30, 13-04-31, 2005 WL 696868 (Ohio Ct. App. 2005); *State v. Rayfield*, 631 S.E.2d 244 (S.C. 2006) (defendant was convicted of contributing to the delinquency of a minor).

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contributing statute, parents must possess the necessary mental state, such as influencing, helping, or soliciting delinquents to be liable.¹³⁵

Additionally, victims may institute a civil suit against a delinquent's parents.¹³⁶ Common law, the *Restatement (Second) of Torts*, and state statutes, each address the issue of holding parents responsible for the misconduct of juveniles.¹³⁷ Historically, common law did not allow victims to recover against juvenile offenders' parents for juveniles' intentional acts.¹³⁸ However, exceptions to this rule have evolved.¹³⁹ Parents may be held liable for their minors' misconduct if the parents either acted or failed to act.¹⁴⁰ Absent participation, liability could be imposed on parents based on master-servant or principle-agent relationships between the parents and juveniles.¹⁴¹ But a suit could not be brought against the juveniles in an individual capacity.¹⁴² Rather, in

¹³⁵ Brank et al., *supra* note 128, at 10-11; Chapin, *supra* note 106, at 639; Kourie, *supra* note 133, § 4; *see* Ind. Code § 35-46-1-8(a) (2005) (providing that "[a] person at least eighteen (18) years of age who knowingly or intentionally encourages, aids, induces, or causes a person less than eighteen (18) years of age to commit an act of delinquency (as defined by IND. CODE § 31-37-1 or § 31-37-2) commits contributing to delinquency, a Class A misdemeanor").

¹³⁶ Davidson, *supra* note 85, at 26.

¹³⁷ B. C. Ricketts, Annotation, *Validity and Construction of Statutes Making Parents Liable for Torts Committed by Their Minor Children*, 8 A.L.R. 3d 612 (2005).

¹³⁸ Harris v. Traini, 759 N.E.2d 215, 224 (Ind. Ct. App. 2002). The foundation of common law was the refusal to find liability without fault. Gilbert Geis & Arnold Binder, *Sins of Their Children: Parental Responsibility for Juvenile Delinquency*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 303, 309 (1991); *see* Bebry v. Zanauskas, 841 A.2d 282, 286 (Conn. App. Ct. 2004) (reiterating that common law does not impose vicarious liability on the parents for the torts of their minors); Jeffrey L. Skaare, Note, *The Development and Current Status of Parental Liability for the Torts of Minors*, 76 N.D. L. REV. 89, 92 (2000) (discussing the historical roots of the common law tradition); *see also* Chapin, *supra* note 106, at 629-30 (providing the common law limitations on parental tort liability).

¹³⁹ *See supra* note 138 and accompanying text (describing the common law exceptions).

¹⁴⁰ More specifically, common law allowed recovery against parents "(1) where the parent entrusts the child with an instrumentality which, because of the child's lack of age, judgment, or experience, may become a source of danger to others; (2) where the child committing the tort is acting as the servant or agent of its parents; (3) where the parent consents, directs, or sanctions the wrongdoing; and (4) where the parent fails to exercise control over the minor child although the parent knows or with due care should know that injury to another is possible." Wells v. Hickman, 657 N.E.2d 172, 176 (Ind. Ct. App. 1995). Also, common law imposed liability due to the failure to act when the parents were aware of the child's dangerous propensities and failed to exercise reasonable control over the children to prevent misconduct. Ricketts, *supra* note 137, § 1(a); *see* Chapin, *supra* note 106, at 629-30.

¹⁴¹ South *ex rel.* South v. McCarter, 119 P.3d 1, 8 (Kan. 2005). Common law rejected the imposition of liability based on the existence of a parent child relationship. Ricketts, *supra* note 137, § 1(a).

¹⁴² Davidson, *supra* note 85, at 26.

contrast to common law, but similar to the current trend in statutes, the *Restatement* focuses on the parental duty to control juveniles.¹⁴³

Parental liability statutes focus on encouraging parents to supervise their juveniles and reduce juvenile delinquency.¹⁴⁴ Many states impose

¹⁴³ RESTATEMENT (SECOND) OF TORTS § 316 (2005). The *Restatement* provides:

A parent is under a duty to exercise reasonable care so to control his minor child as to prevent it from intentionally harming others or from so conducting itself as to create an unreasonable risk of bodily harm to them, if the parent (a) knows or has reason to know that he has the ability to control his child, and (b) knows or should know of the necessity and opportunity for exercising such control.

Id. However, some parents are not able to control their children. Davidson, *supra* note 85, at 29. The inability to control one's minor is an ongoing debate which questions the value of parental liability laws. *Id.*

¹⁴⁴ The phenomena of enacting statutes to provide redress against parents for victims of juvenile crime started in Hawaii in 1846. HAW. REV. STAT. § 577-3.5 (2004); Andrew C. Gratz, Comment, *Increasing the Price of Parenthood: When Should Parents Be Held Civilly Liable for the Torts of Their Children?*, 39 HOUS. L. REV. 169, 190 (2002). Over time, states adopted similar statutes that added elements to Hawaii's, such as Louisiana's limitation on the amount of damages recoverable from the parents. Gratz, *supra*, at 190. Next, Louisiana enacted a vicarious liability statute that was in direct conflict with common law. *Id.* The relevant Louisiana statute provides, "[t]he father and the mother and, after the decease of either, the surviving parent, are responsible for the damage occasioned by their minor or unemancipated children, residing with them, or placed by them under the care of other persons, reserving to them recourse against those persons." LA. CHILD. CODE ANN. art. 2318 (2004). The statutory language appeared to impose strict liability on parents, however, judgments entered against the parents indicated that an element of willful or negligent conduct of the minor is required to obtain damages. Ricketts, *supra* note 137, § 5(a); see *Ryle v. Potter*, 413 So. 2d 649, 651 (La. Ct. App. 1982) (imposing strict liability on parents of a minor who shot a B-B gun at a friend who sustained serious head injuries); *Polk v. Trinity Universal Ins. Co.*, 115 So. 2d 399 (La. Ct. App. 1958) (holding the minor's father liable for the negligent acts of his minor child, utilizing a dangerous instrumentality); see also ALA. CODE § 6-5-380 (2005) (liability of parents for destruction of property by minor); ALASKA STAT. § 34.50.020 (2005) (liability for destruction of property by minors); ARIZ. REV. STAT. Ann. § 12-661 (2005) (liabilities of parents or legal guardians for malicious or willful misconduct of minors); ARK. CODE ANN. § 9-25-102 (West 2005) (parental liability); CAL. CIV. CODE § 1714.1 (West 2005) (liability of parents and guardians for willful misconduct of minor); COLO. REV. STAT. § 13-21-107 (2005) (damages for destruction or bodily injury caused by minors); CONN. GEN. STAT. § 52-572 (2005) (parental liability for torts of minors); DEL. CODE ANN. tit. 21, § 6105 (2005) (liability of parent, guardian or employer for negligence of minor); FLA. STAT. ANN. § 741.24 (2005) (civil action against parents); GA. CODE ANN. § 51-2-3 (2005) (liability of parent or guardian for willful torts by minor children); HAW. REV. STAT. § 577-3.5 (2004) (property damage, parental responsibility); IDAHO CODE ANN. § 6-210 (2005) (recovery of damages for economic loss willfully caused by minor); 740 ILL. COMP. STAT. 115/3 (2005) (parental responsibility law); IND. CODE § 34-31-4-1 (2005) (limited liability of parents for damages caused by child); IOWA CODE ANN. § 613.16 (West 2005) (parental responsibility for actions of children); KAN. STAT. ANN. § 38-120 (2004) (recovery from parents for malicious or willful acts by certain children); KY. REV. STAT. ANN. § 610.180 (West 2005) (financial penalty when children found delinquent); LA. CHILD. CODE ANN. art. 2318 (2004) (acts of minor); ME. REV. STAT.

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liability on the parents when juveniles act intentionally, willfully, or maliciously.¹⁴⁵ These statutes resemble a form of strict liability because the parents are liable regardless of whether they acted reasonably.¹⁴⁶ In some situations, liability is imposed based on the parents' knowledge of misconduct.¹⁴⁷ However, the scope of liability varies because some states

ANN. tit. 14, § 304 (2005) (liability of parents or legal guardians for damage by children); MD. CODE ANN., CTS. & JUD. PROC. § 3-8A-28 (West 2005) (liability for acts of child); MASS. GEN. LAWS ANN. ch. 231 § 85G (West 2005) (parents' liability for willful acts of minor children); MICH. COMP. LAWS ANN. § 600.2913 (West 2005) (malicious or willful destruction of property by minors); MINN. STAT. ANN. § 540.18 (West 2005) (damage by minor, responsibility of parent, guardian, and minor); MISS. CODE ANN. § 94-13-2 (West 2005) (child's property damage, parental liability); MO. ANN. STAT. § 537.045 (West 2005) (parent or guardian liable for damages by minor); MONT. CODE ANN. § 40-6-237 (2005) (destruction of property by minor); NEB. REV. STAT. § 43-801 (2005) (destruction of property); NEV. REV. STAT. § 41.470 (2005) (imposition of liability for minor's willful misconduct); N.J. STAT. ANN. § 2A:53A-15 (West 2005) (liability of parent or guardian for willful destruction of property by infant under eighteen); N.M. STAT. ANN. § 32A-2-27 (West 2005) (injury to person or destruction of property); N.Y. GEN. OBLIG. LAW § 3-112 (McKinney 2005) (liability of parents and legal guardians having custody of an infant for certain damages caused by such infant); N.C. GEN. STAT. ANN. § 1-538.1 (West 2005) (strict liability for damage to person or property by minors); N.D. CENT. CODE § 32-03-39 (2003) (parental responsibility for minor children); OHIO REV. CODE ANN. § 2307.70 (West 2005) (parental liability for minor child's acts); OKLA. STAT. ANN. tit. 23, § 10 (West 2005) (recovery of damages by political subdivisions from parents of children under age of eighteen); OR. REV. STAT. ANN. § 30.198 (West 2003) (parental liability); 23 PA. CONS. STAT. ANN. § 5502 (West 2005) (liability of parents); R.I. GEN. LAWS § 9-1-3 (2004) (liability of parents for torts of minors); S.C. CODE ANN. § 20-7-8940 (2004) (civil liability for injury to state property); S.D. CODIFIED LAWS § 25-5-15 (2005) (parental liability for willful acts of child); TENN. CODE ANN. § 37-10-101 (West 2005) (damages for personal injuries or destruction of property); TEX. FAM. CODE ANN. § 41.001 (Vernon 2005) (liability of parents for conduct of child); UTAH CODE ANN. § 78-11-20 (West 2005) (liability of parent or legal guardian); VT. STAT. ANN. tit. 15, § 901 (2004) (parents' liability for damages); VA. CODE ANN. § 8.01-44 (West 2005) (action against parent for damage to private property by minor); WASH. REV. CODE ANN. § 4.24.190 (West 2005) (action against parent for willful injury to person or property by minor); W. VA. CODE ANN. § 55-7A-2 (West 2005) (parental liability for willful, malicious or criminal acts of children); WIS. STAT. ANN. § 895.035 (West 2005) (parental liability for acts of minor child); WYO. STAT. ANN. § 14-2-203 (2005) (parental liability for property damage of certain minors).

¹⁴⁵ See generally 740 ILL. COMP. STAT. 115/3 (2005) (providing that "[t]he parent or legal guardian of an unemancipated minor who resides with such parent or legal guardian is liable for actual damages for the willful or malicious acts of such minor . . ."); *Thompson v. Park River Corp.*, 830 N.E.2d 1252, 1256 (Ohio Ct. App. 2005). The Ohio Court of Appeals refused to hold the parents liable for the acts of their minor child because there was no indication that the child acted willfully and maliciously. *Thompson*, 830 N.E.2d at 1265.

¹⁴⁶ Brank et al., *supra* note 128, at 3. Victims can recover against parents without proving that the parents were at fault. *Id.* Further, the parents cannot "argue that they attempted to supervise their child properly." *Id.* at 3-4.

¹⁴⁷ See *Stewart v. Swartz*, 106 N.E. 719 (Ind. Ct. App. 1914). The court held a parent liable under the Indiana parental responsibility statute for the child's intentional placement of a

hold parents responsible for property damage, personal injuries, or both.¹⁴⁸ Other differences in the scope of liability include the amount of damages recoverable from parents and the maximum age of juveniles for which parents may be accountable.¹⁴⁹ Statutes of different states provide different minimum ages but almost all statutes do not extend liability over age seventeen.¹⁵⁰ Despite the variations of the statutes among the

rope across a street when the parent knew of the child's actions. *Id.* at 720. In *Shepard by Shepard v. Porter*, 679 N.E.2d 1383 (Ind. Ct. App. 1997), the court refused to impose liability under the parental responsibility statute because the parents were unaware of the son's propensity to start fires. *Id.* at 1389.

¹⁴⁸ Gratz, *supra* note 144, at 190. Some statutes provide liability for personal injuries, property damage, or both. *Id.*; see OHIO REV. CODE ANN. § 2307.70 (West 2005) (providing recovery for both property and personal injuries). *But see* MISS. CODE ANN. § 93-13-2 (2005) (allowing recovery specifically for property damage without mentioning recovery for personal injuries suffered).

¹⁴⁹ Gratz, *supra* note 144, at 191. Texas allows parents to be held liable up to \$25,000. TEX. FAM. CODE ANN. § 41.002 (Vernon 2005); *see also* IND. CODE § 34-31-4-1 (2005) (providing that the maximum amount of recovery is \$5,000 for each separate incident against more than one person); *Parent and Child*, IND. L. ENCYCL., 2005, § 37; Brank et al., *supra* note 128, at 19 (indicating that the amount of damages recoverable under each state's statute imposing civil liability on parents); Chapin, *supra* note 106, at 632 (stating that the average amount recoverable against parents is \$2,500). Another variation among parental liability statutes includes requiring parents to attend parenting classes or imposing a term of imprisonment. Tyler et al., *supra* note 86, at 14.

¹⁵⁰ *See* D.C. CODE § 16-2301(4) (2005) (defining a minor as an individual under age 21); ME. REV. STAT. ANN. tit. 14, § 304 (2005) (imposing liability on parents when the child is between 7 and 17); MONT. CODE ANN. § 40-6-237 (2005) (indicating that liability is imposed on parents for a person under the age of 18); TEX. FAM. CODE ANN. § 41.001 (Vernon 2005) (providing the range for the imposition of liability on parents is 10-18); VA. CODE ANN. § 8.01-44 (West 2005) (which does not provide an age range, instead it imposes parental liability for the acts of a minor). Ironically, South Dakota has a statute that imposes liability and another statute that abrogates parental liability. *See* *Miller v. Stevens*, 256 N.W. 152, 154 (S.D. 1934) (holding that the sole existence of the parent child relationship does not justify imposing liability on the parents for the misconduct of a minor). South Dakota's parental liability statute provides:

Any person, firm, association, private or public corporation, including the State of South Dakota and its political subdivisions, suffering damages to real, personal, or mixed property, or personal injury, through the malicious and willful act or acts of a minor child or children under the age of eighteen years while residing with their parents, shall have therefor a cause of action against and recover of the parents of such child or children. In each case the amount of recovery against one or both of the parents shall be limited to actual damages of fifteen hundred dollars and the taxable court costs, and does not apply to damages proximately caused through the operation of a motor vehicle by the minor child or children. If the issue is disputed, any determination that a parent is not responsible for the full amount of actual damages and costs authorized by this section shall be justified in a specific finding, in writing or on the record.

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states, all of the statutes maintain a common goal—to reduce juvenile delinquency.¹⁵¹ However, parental liability laws must first withstand constitutional scrutiny before they can achieve the desired goal.¹⁵²

2. The Constitutionality of Parental Liability Statutes

Parental liability statutes are the legal reaction to reducing juvenile delinquency, but such laws are not a viable solution unless the statutes are upheld against challenges under the Due Process and Equal Protection clauses of the U.S. Constitution and under state constitutions.¹⁵³ In general, attempts to challenge the constitutionality of parental liability statutes are unsuccessful.¹⁵⁴ In Florida, the argument that parental liability statutes violate substantive due process provisions of the Constitution and respective state constitutions was rejected in *Stang v. Waller*.¹⁵⁵ In *Stang*, the court indicated that the statute met the requirements inherent in substantive due process and was not unreasonable or arbitrary, but rather was a reasonable means to achieve a legitimate state goal.¹⁵⁶ Specifically, the court further emphasized that reducing juvenile delinquency through parental liability statutes was a legitimate state interest.¹⁵⁷

Parental liability statutes have also withstood Equal Protection challenges.¹⁵⁸ For example, a Nebraska statute was upheld because the

S.D. CODIFIED LAWS § 25-5-15 (2005). *But see id.* § 25-5-14. South Dakota's statute abrogating parental liability states that "[e]xcept as provided by § 25-5-15, neither parent nor child is answerable as such, for the act of the other." *Id.*

¹⁵¹ Chapin, *supra* note 106, at 631; Thurman, *supra* note 84, at 99.

¹⁵² *See infra* notes 153-61 and accompanying text (providing cases that involved unsuccessful challenges to parental liability laws based on the Due Process and Equal Protection clauses of the United States Constitution and the constitution of the respective state).

¹⁵³ *See infra* notes 155-57 and accompanying text (providing an unsuccessful challenge to Florida's parental liability statute based on the substantive due process clause of the United States Constitution and Illinois constitution); *infra* notes 158-60 and accompanying text (describing an unsuccessful challenge to Nebraska's parental liability law based on the Equal Protection clause of the United States Constitution and Nebraska constitution).

¹⁵⁴ *Vanthournout v. Burge*, 387 N.E.2d 341, 343 (Ill. App. Ct. 1979); Skaare, *supra* note 138, at 103.

¹⁵⁵ 415 So. 2d 123, 124 (Fla. Dist. Ct. App. 1982); Skaare, *supra* note 138, at 105-06.

¹⁵⁶ *Stang*, 415 So. 2d at 123-24; Skaare, *supra* note 138, at 105.

¹⁵⁷ *Stang*, 415 So. 2d at 124; Skaare, *supra* note 138, at 105.

¹⁵⁸ In *Distinctive Printing & Packaging Co. v. Cox*, the plaintiff sought to recover damages pursuant to the state's parental liability statute from the defendants because their son set fire to the plaintiff's property. 443 N.W.2d 566, 569 (Neb. 1989). The plaintiff alleged that the statute violated the Equal Protection clauses of both the Federal and Nebraska Constitutions. *Id.*

defendants failed to demonstrate that there was not a rational basis to treat parents differently depending on whether juveniles caused personal injury or property damage.¹⁵⁹ The court stated that parental liability statutes are rationally related to the goals of compensating victims and eliminating juvenile delinquency.¹⁶⁰ Subsequently, parental liability laws like hate crime legislation and penalty enhancement statutes will almost always withstand constitutional scrutiny; however there is an inconsistency among the laws and a necessity to modify existing parental liability laws.¹⁶¹

The history of hate crime legislation indicates that it may be necessary to distinguish hate crime from other violent crime and subject hate crime offenders to an increased penalty.¹⁶² Further, parental

¹⁵⁹ *Id.* at 572. The argument was that the parental liability statute created a classification because it limited the amount of personal damages recoverable against parents but not the amount of property damages recoverable. *Id.* at 569-70. The Nebraska parental liability statute provides that:

The parents shall be jointly and severally liable for the willful and intentional infliction of personal injury to any person or destruction of real and personal property occasioned by their minor or unemancipated children residing with them, or placed by them under the care of other persons; *Provided*, that in the event of personal injuries willfully and intentionally inflicted by such child or children, damages shall be recoverable only to the extent of hospital and medical expenses incurred but not to exceed the sum of one thousand dollars for each occurrence.

NEB. REV. STAT. § 43-801 (2005). However, there was not a fundamental right at issue, so the statute was only subject to rational basis review. *Cox*, 443 N.W.2d at 570.

¹⁶⁰ *Cox*, 443 N.W.2d at 570; *Hayward v. Ramick* 285 S.E.2d 697, 699 (Ga. 1982); *Alber v. Nolle*, 645 P.2d 456 (N.M. Ct. App. 1982); *Buie v. Longspaugh*, 598 S.W.2d 673 (Tex. Ct. App. 1980); *Watson v. Gradzik*, 373 A.2d 191 (Conn. C.P. 1977). In *Distinctive*, the defendants also challenged the statute's imposition of vicarious liability based on the due process clauses of the Federal and State Constitution. *Cox*, 443 N.W.2d at 572. However, the court rejected the challenge because imposing full or partial responsibility on the parents is similarly a reasonable means to achieve a legitimate state interest. *Id.* In *Bryan v. Kitamura*, 529 F. Supp. 394 (D. Haw. 1982), the court held that vicarious liability did not infringe on a parent's due process rights. *Id.* at 398-400. Notably, parents have a fundamental right to control the upbringing of their children and do not commit a crime for raising a juvenile to be a racist. See *Troxel v. Granville*, 530 U.S. 57 (2000) (establishing that the right of parents to control the upbringing of their juvenile is a fundamental right); *Pierce v. Soc'y of Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923). However, subjecting parents to civil liability for juvenile misconduct should encourage parents to appropriately exercise their fundamental right to control the upbringing of their juvenile.

¹⁶¹ See *supra* notes 75-79 and accompanying text (including constitutional challenges to penalty enhancement statutes).

¹⁶² See *supra* note 60 and accompanying text (providing an enhanced penalty statute for hate crime offenders).

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liability laws imply that encouraging parents to supervise juveniles is a legitimate reason to subject parents to liability for juvenile crime.¹⁶³ Therefore, an enhanced penalty for parents of juvenile hate crime offenders may be appropriate when an additional criminal punishment is already imposed on hate crime offenders.¹⁶⁴ Part III analyzes the addition of an enhanced penalty to parental liability laws when juveniles commit hate crime.¹⁶⁵

III. PARENTS SHOULD BE SUBJECT TO A PENALTY ENHANCEMENT WHEN
THEIR JUVENILE COMMITS A HATE CRIME

At trial, Hannah and James each receive an enhanced penalty for the hate crime they committed out of their hatred for Catholics and homosexuals.¹⁶⁶ Hannah's and James's victims bring civil suits against their parents to compensate for the juveniles' willful and wanton misconduct.¹⁶⁷ However, Hannah's and James's victims discover that the existing parental liability statute failed to reflect the severity of hate crime and do not provide for an increased penalty against Mr. and Mrs. Smith and Mr. and Mrs. Jenkins.¹⁶⁸ As a result, these laws have failed to appropriately punish and possibly prevent future hate crimes.

Part III of this Note explains why an enhanced civil penalty for parental liability is necessary when juveniles commit hate crime.¹⁶⁹ Specifically, Part III.A analyzes the strengths and weaknesses of hate crime legislation and penalty enhancement statutes, while Part III.B addresses the current benefits of parental liability laws.¹⁷⁰ Part III.C. explores the current defects of parental liability laws and Part III.D highlights the flaws of such laws as applied to parents of juvenile hate

¹⁶³ See *supra* Part II.D (indicating that the purpose of parental liability is to encourage parents to supervise juvenile delinquents).

¹⁶⁴ See *infra* Part IV.A (adding a civil penalty enhancement to existing parental liability laws for parents of juvenile hate crime offenders).

¹⁶⁵ See *infra* Part III.

¹⁶⁶ See *supra* note 70 and accompanying text (providing objective criteria to help determine whether the crime was committed because of a bias).

¹⁶⁷ See *supra* note 145 and accompanying text (indicating that victims can bring a suit against a juvenile's parents pursuant to the parental responsibility statute when the juvenile acts intentionally, willfully, or maliciously).

¹⁶⁸ See *infra* Part IV (adding an additional penalty to existing parental liability laws for parents of juvenile hate crime offenders).

¹⁶⁹ See *infra* Part III.

¹⁷⁰ See *infra* Part III.A (establishing that hate crime laws are necessary to reflect the severity of hate crime and more appropriately punish hate crime offenders); *infra* Part III.B (providing that parental liability laws are necessary to encourage parents to supervise juveniles, but inappropriately reflect the severity of juvenile hate crime).

crime offenders.¹⁷¹ Finally, Part III.E explains why parents should be subject to an increased penalty when their juveniles commit hate crime.¹⁷²

A. *Strengths of Hate Crime and Penalty Enhancement Legislation*

Independent legislation for hate crime is necessary to demonstrate that hate crime is distinguishable from other violent crime.¹⁷³ Enhanced penalties are necessary to provide a punishment proportional to the damage inflicted by hate crime.¹⁷⁴ Specifically, enhanced penalties more appropriately reflect the disproportionate effects of hate crime.¹⁷⁵ Statutes that merely define hate crime as a stand-alone crime fail to impose a punishment that mirrors the offense.¹⁷⁶ Hate crime victims suffer increased psychological and physical effects compared to victims of ordinary battery.¹⁷⁷ The surrounding community also experiences increased trauma following a hate crime—heightened disturbances that are absent after the commission of a simple battery.¹⁷⁸ Subjecting hate crime offenders to the same law or punishment as offenders who commit battery is a blatant disregard of the inherent severity of hate crime.¹⁷⁹

Because hate crime is more devastating than other violent crimes, the punishment, to be proportionate, must be correspondingly more severe.¹⁸⁰ Increased sentences function as deterrents because hate crime

¹⁷¹ See *infra* Part III.C (advocating a change in parental liability laws).

¹⁷² See *infra* Part III.E.

¹⁷³ See *supra* notes 61-62 and accompanying text (providing state statutes that define hate crime as a new crime and provide a separate penalty). The failure to provide a civil remedy or statute that criminalizes hate crimes constitutes a legislature's acceptance of crime against a particular religion or characteristic, such as race. Gellman, *supra* note 28, at 341. But see Anne B. Ryan, Comment, *Punishing Thought: A Narrative Deconstructing the Interpretive Dance of Hate Crime Legislation*, 35 J. MARSHALL L. REV. 123, 143 (2001) (arguing that hate crime offenders should only be punished for the underlying offense and not for the bias motivation).

¹⁷⁴ See *infra* notes 180-86 and accompanying text (analyzing the strengths of enhanced penalties).

¹⁷⁵ See *supra* Part II.B.1 (describing state hate crime penalty enhancement statutes).

¹⁷⁶ See *supra* notes 61-62 and accompanying text (providing an example of a statute that defines a hate crime as a new crime).

¹⁷⁷ See *supra* notes 28-33 (presenting the psychological effects that hate crime victims suffer).

¹⁷⁸ See *supra* notes 34-41 and accompanying text (providing increased effects suffered by the community after a hate crime).

¹⁷⁹ See *supra* Part II.A.2 (explaining that hate crime is more severe than other violent crime).

¹⁸⁰ FREDERICK M. LAWRENCE, PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW 9-10 (1999); McCoy, *supra* note 28, at 650-55; Wang, *supra* note 73, at 52-53; Konor Cormier, Comment, *Increase the Peace Means Increase the Penalty?: The Impact of the James Byrd, Jr. Hate*

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offenders are less likely to feel remorse and more likely to be repeat offenders.¹⁸¹ Statistics from Wisconsin, a state that has a penalty enhancement statute, are indicative of this notion.¹⁸² Specifically, the number of hate crime offenses regularly exceeded thirty-nine from 1994-2001, but from 2002-2004, the number never surpassed its earlier high of thirty nine offenses and has remained steady, demonstrating the overall deterrent effect of penalty enhancement statutes.¹⁸³ Enhanced penalty statutes further protect the public via increased periods of incarceration.¹⁸⁴ Such increases are necessary to promote a sense of security, and are justified by a decrease in the social harms of retaliation, a breakdown in community cohesiveness, and disassociation among society.¹⁸⁵ Enhanced penalties also meet the goal of retribution because they convey society's disapproval of hate crime.¹⁸⁶

Crimes Act in Texas, 34 TEX. TECH. L. REV. 343, 348-49 (2003). In *In re Joshua H.*, 17 Cal. Rptr. 2d 291, 299-300 (Ct. App. 1994), the court stated that:

The "basis" for punishing violent crimes directed against members of a racial, religious, or other specified group more severely than randomly inflicted violent crimes is that such crimes inflict greater injury upon the victim and society at large and existing criminal statutes and penalties have been inadequate to stop them. This is "the very reason" those particular acts of violence are additionally punishable.

Id.

¹⁸¹ Brief of Petitioner-Appellant, *supra* note 20, at 24-25.

¹⁸² See *infra* note 183 and accompanying text (demonstrating the deterrent effect a penalty enhancement statute has on the prevalence of hate crime).

¹⁸³ Specifically, the prevalence of hate crime in Wisconsin, a state that has a hate crime penalty enhancement statute, has never exceeded sixty-eight offenses in a single year. OFFICE OF JUSTICE ASSISTANCE, STATISTICAL ANALYSIS CENTER CRIME AND ARRESTS IN WISCONSIN: HATE CRIME 111, 212 (2005), available at <http://oja.state.wi.us/docview.asp?docid=4191&locid=97> (last visited Jan. 31, 2007). Wisconsin's penalty enhancement statute when into effect May 3, 1988. WIS. STAT. § 939.645 (2005). Wisconsin experienced the most hate crime in 1992 and the least in 1993. *Id.* However, the state experienced 41 incidents in 1991, 68 incidents in 1992, 20 incidents in 1993, 39 incidents in 1994, 54 incidents in 1995, 42 incidents in 1996, 57 incidents in 1997, 58 incidents in 1998, 50 incidents in 1999, 51 incidents in 2000, 62 incidents in 2001, 35 incidents in 2002, 36 incidents in 2003, and 39 incidents in 2004. *Id.* For a comparison to a state with a larger population, Colorado experienced 123 incidents in 1996, 118 incidents in 1997, 124 incidents in 1998, 146 incidents in 1999, 98 incidents in 2000, 133 incidents in 2001, 96 incidents in 2002, 81 incidents in 2003, and 59 incidents in 2004. Crime in Colorado, http://cbi.state.co.us/dr/cic2k4/supplemental_reports/hate_crime.htm (last visited Jan. 31, 2007). Despite population differences, it is important to note that Colorado does not have an enhanced penalty statute for the commission of hate crimes that function to deter offenders from acting on a bias motivation. COLO. REV. STAT. § 18-9-121 (2005) (bias-motivated crimes). Instead it has a statute that treats a hate crime as a new crime. *Id.*

¹⁸⁴ Reply Brief of Petitioner-Appellant, *supra* note 20, at 15.

¹⁸⁵ Hurd & Moore, *supra* note 28, at 1091-92. Some argue that those who retaliate deserve the punishment, but those who caused the retaliation do not deserve to be punished more.

Hate crime legislation has been upheld against numerous challenges, indicating that the laws are a constitutional means to achieve the desired goal of reducing hate crime.¹⁸⁷ Hate crime laws can achieve the desired goal of ending hatred and do not punish thought.¹⁸⁸ Penalty enhancement statutes appropriately punish hate crime offenders for conduct that is distinguishable from the actions of other violent crime offenders.¹⁸⁹

In addition, hate crime offenders and violent crime offenders should not be equally punished for their actions.¹⁹⁰ Admittedly, although all offenders are equally responsible for their actions, hate crime and penalty enhancement statutes are necessary to reflect a central tenet of criminal law: proportional punishment.¹⁹¹ Because hate crime is more severe than violent crime, the punishment should be harsher.¹⁹²

Hate crime legislation, consisting of an increased punishment for hate crime, should reduce the prevalence of hate crime, thereby

Id. Implicit in the second harm is that the failure to appropriately punish hate crime will result in a weakened society, including lessened order and civility. *Id.* However, this argument is questioned because ordinary crimes can have the same effect on community stability. *Id.* Finally, the effects of the last social harm depend on how society responds to hate crime. *Id.* Primarily, hate crime causes society to associate more closely with a particular sexuality, gender, or race. *Id.* at 1094. However, critics believe that hate crime laws contribute to social conflicts. Ryan, *supra* note 173, at 143; Sullaway, *supra* note 28, at 251. Social conflicts cited include proving bias motivation because of the difficulty of demonstrating a connection between prejudicial attitudes and behaviors, "punishment of ideas and attitudes in violation of First Amendment rights, the elevation of hate motives above other criminal motives as more severe, the creation of a special victim class, the risk of providing mitigating factors by which an offender can argue for reduced penalties, and increased intergroup tension as a result of these laws." Sullaway, *supra* note 24, at 251.

¹⁸⁶ Grannis, *supra* note 40, at 222.

¹⁸⁷ See *supra* notes 52-56 and accompanying text (providing constitutional challenges to hate crime legislation).

¹⁸⁸ Robert J. Corry, Jr., *Burn this Article: It is Evidence in Your Thought Crime Prosecution*, 4 TEX. REV. L. & POL. 461, 487 (2000).

¹⁸⁹ See *supra* notes 173-79 and accompanying text (arguing that hate crime offenders deserve an enhanced penalty compared to other violent crime offenders).

¹⁹⁰ Anthony M. Dillof, *The Importance of Being Biased*, 98 MICH. L. REV. 1678, 1682 (2000). The argument is that an assault without a bias motivation is just as wrong as an assault committed because of a hatred for a particular race, religion or ethnicity. *Id.*

¹⁹¹ The proportional punishment argument is supported by states that increase the punishment as the severity of the offence increases. States increase the punishment for a battery to reflect the severity of the offense. For example, aggravated battery in Illinois is categorized as a Class one, two, or three felony depending on the amount of injury inflicted on the victim and the punishment increases accordingly. 720 ILL. COMP. STAT. 5/12-4 (2005).

¹⁹² McCoy, *supra* note 28, at 650-52; see *supra* notes 28-41 (providing the increased effects of hate crime on victims and society).

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decreasing the number of victims and communities that suffer from the heightened effects of hate crime.¹⁹³ Similarly, parental liability laws that encourage parents to exert control over juveniles will likely lead to a reduction in juvenile hate crime when the law provides an appropriate punishment.¹⁹⁴

B. Current Benefits of Parental Liability Laws

Parental liability laws encourage parental supervision and reduce juvenile delinquency because the amount of control parents exert on juveniles relates to the probability that juveniles may engage in willful and wanton misconduct.¹⁹⁵ Additionally, because of parental liability laws, victims of juvenile crime are able to seek redress against the juveniles' parents, and victims are protected from irresponsible and judgment proof delinquents.¹⁹⁶

Moreover, because a lack of parental control is a cause of juvenile hate crime, parental liability laws are necessary to encourage parents to supervise juveniles and help reduce juvenile hate crime.¹⁹⁷ There are theories that attempt to explain juvenile delinquency, including hate crime that are classified as biological, anomie, cultural deviance, and control.¹⁹⁸ These theories pose solutions that more appropriately address the *cause* of juvenile hate crime than parental liability laws.¹⁹⁹ However,

¹⁹³ See Grannis, *supra* note 40, at 197 (noting the effect increased punishment should have on hate crime, through "reduc[ing] the undesirable phenomenon and the resulting disproportionate victimization"); *supra* note 183 (showing the deterrent effect Wisconsin's penalty enhancement statute has on hate crime offenders).

¹⁹⁴ See *supra* note 183 and accompanying text (providing that enhanced penalties have a deterrent effect and encourage compliance, thus, enhanced penalties may encourage parents to further supervise their children due to the threat of additional penalties); *infra* Part IV (adding an additional penalty to existing parental liability laws).

¹⁹⁵ See *infra* notes 197-224 and accompanying text (analyzing the parallels between the control theory and parental liability laws).

¹⁹⁶ See *infra* notes 225-29 and accompanying text (analyzing the strengths of current parental liability laws).

¹⁹⁷ Tyler et al., *supra* note 86, at 7; see *infra* notes 197-224 and accompanying text (further discussing the relationship between the control theory and parental liability laws).

¹⁹⁸ The biological theory proposes that there is a link between biological abnormalities and juvenile delinquency. Chapin, *supra* note 106, at 665. Another theory, the anomie theory, maintains that juveniles pursue illegitimate modes to obtain a legitimate result. *Id.* at 666. The cultural deviance theory provides that juveniles engage in delinquency, including hate crime, because juveniles associate with delinquent peers. *Id.* at 667.

¹⁹⁹ Although parents may be a biological cause of juvenile delinquency, parental liability laws inadequately provide a solution to the biological theory. Parents cannot change the biological makeup of their children, which is unlike their ability to exert more control over their children, which is exactly what parental liability laws seek to encourage. A solution for the anomie theory's explanation for juvenile delinquency would be educating juveniles

the control theory provides the social justification for parental liability laws—what the government views as the contributing factors of juvenile delinquency and juvenile hate crime—supervision, and control.²⁰⁰ Parental liability laws are thus a legal solution, rooted in the control theory, for reducing juvenile hate crime.²⁰¹

More specifically, the control theory, through four elements, demonstrates that parental liability laws are necessary: attachment, commitment, involvement, and belief.²⁰² The first element, attachment, is the most important in illustrating the desirability for parental liability laws.²⁰³ It relates to the bonds juveniles have with their parents.²⁰⁴ A lack of support and identity results in adolescents' use of prejudices "to project unacceptable feelings" resulting in "an intolerance of others and indignation at the attributed faults."²⁰⁵ Hatred conveys the juveniles' feelings of inadequacy due to an absence of parental attachment.²⁰⁶ The stronger the parental bonds, the easier it is for minors to develop identities, and the more control parents have over juveniles, the less

about the legal means to obtain a desired result. The education would teach a juvenile legitimate modes to obtain the desired result, such as working to buy a car instead of stealing the car. Again, parental liability laws encourage control, which does not necessarily entail educating the delinquent juvenile. Finally, parental liability laws inadequately provide a solution to the cultural deviance theory. A somewhat simplified solution to this theory is to remove the child from his deviant peers. This requires control, but the sequence of events appears inconsistent with parental liability laws. The child is removed because the parents exerted control, but parental liability laws should not punish parents who exert control.

²⁰⁰ The alternative question is whether or not the laws are effective and there is a lack of empirical, research strongly supporting either position. Tyler et al., *supra* note 86, at 6. Opponents of the laws argue that the laws are counterproductive because they unfairly disadvantage the poor through imposing a fine on a family who struggles financially. *Id.* at 8. Further, opponents argue there is no reason to punish parents for not controlling uncontrollable juveniles. *Id.* at 6.

²⁰¹ See generally Chapin, *supra* note 106; Steinberg, *supra* note 24; Tyler et al., *supra* note 86; *supra* Part II.C.3 (explaining the theories of juvenile delinquency).

²⁰² See *supra* notes 114-24 and accompanying text (presenting the elements of the control theory).

²⁰³ See *supra* note 116 and accompanying text (providing that a juvenile learns socially acceptable behavior from the juvenile's parents).

²⁰⁴ Steinberg, *supra* note 24, at 985. Juveniles need parents to discuss fears, apprehensions, and uncertainties inherent in adolescence. *Id.* Attachment also relates to the bonds between juveniles and teachers as well as juveniles and their peers. *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 986-87; see Rand D. Conger, *Social Control and Social Learning Models of Delinquent Behavior*, 14 CRIMINOLOGY 17 (1976). The research from this study reveals that "particular parental behaviors which influence the reinforcing value of the home appear to have the primary influence on delinquent behavior in the parent-child bond." *Id.*; see also Christopher A. Kierkus & Douglas Baer, *A Social Control Explanation of the Relationship Between Family Structure and Delinquent Behaviour*, 44 CAN. J. CRIMINOLOGY 425 (2002).

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likely juveniles will engage in delinquent behavior, including hate crime.²⁰⁷ Conversely, the weaker the bond, the more likely it is that juveniles will lack identities; the less control parents have over delinquents, the more likely it is that minors will participate in hate crime.²⁰⁸ Parents' abilities to exert an appropriate amount of control over juveniles is a reflection of attachment between parents and their juveniles as well as a necessity for parental liability laws.²⁰⁹

The second element, commitment, indicates that juveniles conform to laws because they are uncertain of the consequences.²¹⁰ This element is the most difficult to reconcile with the necessity for parental liability laws because it is unclear why parents need to further supervise minors who refrain from engaging in hate crime.²¹¹ However, uncertainty of the consequences is not an absolute guarantee for abstention from juvenile crime. Further, continuous parental commitment to supervision reinforces juveniles' commitments to conformity and avoidance of behavior with consequences; it may also further encourage juveniles to behave in socially acceptable ways and recognize that hatred is inherently immoral.²¹² Parents in particular are in a position to explain why it is wrong to hate, to describe the consequences of acting upon a bias motivation, to convey the effects hate crime has on victims and society, and to discuss why retaliation is not a solution to prior victimization.²¹³ As a result, parental liability laws for juvenile hate crime are essential for minors because minors are inherently less mature than adults.²¹⁴ These laws encourage parents to control juveniles, which

²⁰⁷ See C. Burt, *The Causal Factors of Juvenile Crime*, 3 BRIT. J. PSYCHOL. 1 (1923). The results of the study revealed that the parent-child bond is an environmental factor that has a significant influence on the likelihood that juveniles will engage in delinquent behavior. *Id.*

²⁰⁸ See *supra* notes 116-17 and accompanying text (addressing the attachment element of the control theory).

²⁰⁹ See *supra* note 116 and accompanying text (learning how to behave appropriately in society depends on a juvenile's attachment with peers, teachers, and parents).

²¹⁰ See *supra* note 118 and accompanying text (introducing the commitment element of the control theory).

²¹¹ See *supra* notes 119-21 and accompanying text (indicating that an educated juvenile is less likely to engage in criminal behavior); Part II.D.1 (providing that the purpose of parental liability laws is to encourage parents to supervise a juvenile delinquent).

²¹² See *supra* note 118 and accompanying text (stating that commitment may include explaining and educating a juvenile about the consequences of inappropriate behavior).

²¹³ See *supra* notes 28-41 (expanding on the increased effects that a hate crime instills in the victim and society).

²¹⁴ See *infra* note 247 (indicating that parents need to be held liable for juvenile misconduct because a juvenile lacks the cognitive development that most adults possess).

require a certain level of commitment within parent-child relationships.²¹⁵

The third element, involvement, reduces juveniles' free time.²¹⁶ Juveniles are less likely to engage in hate crime because of frustration and boredom when parents encourage involvement in extracurricular activities.²¹⁷ In such a situation, juveniles acquire the social involvement necessary to understand the inaccuracy of stereotypes about various races, genders, and religions.²¹⁸ An absence of involvement can represent a failure of parents to exert control and encourage parental supervision.²¹⁹

The last element of the control theory, belief, indicates that once juveniles become members of deviant subcultures they surrender previously held moral beliefs in favor of the prejudices held by the hate group.²²⁰ But juveniles would be less likely to look for acceptance in deviant peer groups and commit hate crime if parents would provide the necessary guidance and discipline.²²¹ Parents who supervise adolescents are better able to monitor those with whom the juveniles associate.²²² Thus, the more parental control exerted, the less likely the minors will befriend others who possess racial, religious, or gender prejudices, and who are likely to engage in hate crime.²²³ Due to juveniles' diminished responsibility and the desire to provide hate crime victims with redress,

²¹⁵ See *supra* note 118 and accompanying text (addressing the commitment element of the control theory).

²¹⁶ See *supra* note 120 and accompanying text (addressing the benefits to participating in social activities).

²¹⁷ Steinberg, *supra* note 24, at 985.

²¹⁸ *Id.*

²¹⁹ See *supra* Part II.D.1 (providing that the primary goal of parental liability laws is to encourage parents to supervise juveniles because of the threat that the parents may be held liable).

²²⁰ See *supra* notes 122-23 and accompanying text (introducing the belief element of the control theory).

²²¹ See *supra* note 123 and accompanying text (indicating that juveniles who associate with deviant subcultures gradually accept and act on the prejudices of the corresponding groups).

²²² See Cheryl Ann Banachowski-Fuller, Peer Influences, Parental Bonds, School Bonds, and Perceived Peer Pressure to Commit Delinquent Behavior, 58 Dissertation Abstracts Int'l Section A: Humanities and Soc. Sci. 2398 (Dec. 1997) (North Carolina State University). Specifically, research indicates that "the effect of associating with many delinquent friends on perceived peer pressure is reduced if parents are supportive." *Id.*

²²³ See *supra* Part II.C.3 (providing the theories of juvenile delinquency which include the biological, anomie, cultural deviance, and control).

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the penalty should fall on the juveniles' parents when juveniles engage in delinquency.²²⁴

Parental liability laws are also highly beneficial for the victims of juvenile hate crime.²²⁵ The statutes place losses resulting from hate crimes on the parents instead of on the victims and protect the victims from juveniles that are less responsible and unable to satisfy a judgment.²²⁶ Parents are encouraged "[t]o exercise power or influence over" their children.²²⁷ Therefore, increased supervision leads to a decrease in "juvenile delinquency, vandalism, and malicious mischief."²²⁸ Parental liability laws are also constitutional means that serve a government's legitimate purpose of reducing juvenile delinquency.²²⁹ However, existing laws are defective.²³⁰

C. Present Defects of Parental Liability Laws

Specifically, despite the benefits of parental liability laws, further examination reveals inherent flaws.²³¹ First, limits imposed on recovery

²²⁴ See *supra* notes 144-52 (addressing parental liability that allows victims to recover against a juvenile's parents).

²²⁵ See *infra* note 238 and accompanying text (indicating that parental liability laws allow victims to bring a suit for damages against the parents of juvenile delinquents to protect the victim from judgment proof juveniles).

²²⁶ *Wells v. Hickman*, 657 N.E.2d 172 (Ind. Ct. App. 1995); *Hyman v. Davies*, 453 N.E.2d 336 (Ind. Ct. App. 1983); *Scott & Grisso*, *supra* note 105, at 172. Skaare argues that the best solution is to force the parents of juvenile delinquents to pay the victim's damages rather than making the victim pay for the loss. Skaare, *supra* note 138, at 107. The legislative history of parental civil liability statutes is also indicative. *Brank et al.*, *supra* note 128, at 7. A Nebraska Senator noticed the necessity of a statute to reduce the amount of property damage when youth who destroyed a woman's property were sent to rehab and the victim was without a remedy to repair the destroyed items. *Id.* Subsequently, a statute that provided parental liability for property damage provided redress and decreased property destruction. *Id.* at 8.

²²⁷ See *Covell v. Olsen*, 840 N.E.2d 555 (Mass. App. Ct. 2006) (noting that parents can be held liable for negligent supervision because the parents have a duty to prevent juveniles from intentionally or negligently injuring others); see also *Hyman*, 453 N.E.2d at 338; *Gratz*, *supra* note 152, at 190 (stating that parental responsibility statutes may "curb juvenile crime"); *supra* note 152 and accompanying text (providing the parental liability laws of the states).

²²⁸ Skaare, *supra* note 138, at 107; see *Sutherland v. Roth*, 407 So. 2d 139, 140 (Ala. App. 1981).

²²⁹ *Distinctive Printing & Packaging Co. v. Cox*, 443 N.W.2d 556, 572 (Neb. 1989).

²³⁰ See *infra* notes 231-34 and accompanying text (providing the defects in existing parental liability laws).

²³¹ *Thurman*, *supra* note 84, at 106. Other critiques include that the laws will increase the number of emancipated minors when parents relinquish parental rights because of an inability to control delinquents. *Id.* The law does not guarantee that the imposition of a penalty on parents for juvenile misconduct will cause parents to exert more control over

cause parental liability laws to become less effective.²³² Imposing a \$5,000 judgment against parents of juvenile hate crime offenders who struggle to provide for their family will not further encourage parents to supervise their juveniles.²³³ Likewise, the problem is not solved when parents only pay damages without exerting more control over their juvenile hate crime offenders.²³⁴

D. Flaws of Parental Liability Laws as Applied to Parents of Juvenile Hate Crime Offenders

Existing parental liability laws are ineffective and inadequately encourage parents of juvenile hate crime offenders to further supervise.²³⁵ Currently, parental liability statutes limit recovery to a certain amount of damages, such as \$2,500, regardless of the crime committed by juveniles.²³⁶ Yet, the statutes fail to reflect the inherent severity of hate crime as compared to violent crime already recognized in enhanced penalty hate crime statutes.²³⁷

Subjecting parents of juvenile hate crime offenders to the same parental liability laws when their juveniles commit an assault or battery inadequately redresses a victim for the juveniles' commission of a hate

delinquents. Davidson, *supra* note 95, at 24; see Brank et al., *supra* note 128, at 16-17 (presenting additional arguments in opposition to parental liability laws).

²³² Davidson, *supra* note 85, at 26. For example, some statutes only allow victims to recover against parents for property damage or personal injuries. *Id.*; see ALASKA STAT. § 34.50.020 (2004); HAW. REV. STAT. § 577-3.5 (2005) (liability for destruction of property by minors). *But see* ALA. CODE § 6-5-380 (2005); ARIZ. REV. STAT. ANN. § 12-661 (2005) (providing recovery for personal and property damage). Also, as Tyler notes, there is no purpose to imposing a \$5,000 fine on parents to hold them accountable for juvenile misconduct when the parents already struggling to provide for the family. Tyler et al., *supra* note 86, at 8; see *infra* Part IV (providing that the penalty imposed should be tailored to the reason why there is a lack of control instead of simply imposing a fine).

²³³ See *supra* notes 195-232; *infra* notes 234-83 (stating that an additional penalty that increased the amount of damages recoverable against parents of juvenile hate crime offenders will likely not further encourage parents to supervise juvenile hate crime offenders).

²³⁴ Tyler et al., *supra* note 86, at 5.

²³⁵ See *infra* notes 236-44 and accompanying text (discussing the flaws of existing parental liability laws).

²³⁶ See *supra* note 145 and accompanying text (providing the text of a parental liability statute under which hate crime, although more severe than violent crime, can still be classified as willful and wanton conduct).

²³⁷ See *supra* Part II.B.1 (discussing enhanced penalties and why an increased sentence is necessary for the commission of a hate crime). The belief is that the enhanced penalty will also function as a further deterrent to juvenile and adult commission of hate crime.

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crime.²³⁸ Parents should be subject to a different penalty depending on whether their juveniles commit hate crime or other violent crime.²³⁹ Enhanced penalties are necessary to reflect the notion that hate crime is different from other violent crime because of the increased effects hate crimes have on the victims and society.²⁴⁰ Increasing a penalty against parents would likely decrease the number of hate crimes committed by juveniles because penalty enhancements in general correlate to lower hate crime rates.²⁴¹ To reflect the enhanced criminal hate crime penalty that seeks to function as a deterrent, parental liability laws should include similar recognition.²⁴² However, imposing additional fines on parents who do not know how to properly parent their child or children inadequately addresses the problem.²⁴³ Instead, the more appropriate would be to require the parents to attend parenting classes to learn how to supervise and become better role models.²⁴⁴

E. *Application of an Enhanced Penalty to Parental Liability Laws for Juvenile Hate Crime*

Adult or juvenile hate crime offenders should receive heightened penalties to appropriately punish their actions, further deter bias

²³⁸ See Hurd & Moore, *supra* note 28, at 1134. Hurd and Moore argued that the penalty for the commission of an assault was an insufficient punishment for the commission of an assault with a bias motivation, stating that “current penalties do not give highly culpable defendants their due.” *Id.* at 1135.

²³⁹ See *infra* Part IV.A (providing the text of the additional punishment).

²⁴⁰ See *supra* Part II.A.1; *supra* Part II.B.1 and accompanying text (discussing enhanced penalties and why increased sentences are necessary for the commission of hate crime).

²⁴¹ See *supra* note 183 (demonstrating through Wisconsin’s hate crime statistics that enhanced penalty statutes function as a deterrent and reduce the prevalence of hate crime).

²⁴² See *infra* Part IV (adding a sentence enhancement feature to existing parental liability laws to reflect the severity of juvenile hate crime).

²⁴³ See *supra* Part III.A (addressing the strengths and weaknesses of hate crime legislation).

²⁴⁴ Requiring parents of juvenile hate crime offenders to attend parenting classes may teach parents the skills necessary to curb juvenile hate crime. Chapin, *supra* note 106, at 654. California amended its “contributing to the delinquency of a minor” statute to require parents to exercise reasonable care, supervision, protection, and control over their minor child. CAL. PENAL CODE § 272 (West 2006). Subsequently, the City Attorney’s Office of Los Angeles has used the statute to force parents to attend parenting classes to reduce juvenile delinquency. Williams v. Garcetti, 853 P.2d 507 (Cal. 1993); Chapin, *supra* note 106, at 654. The Los Angeles parental diversion program was maintained through public resources, not by the parents themselves. Chapin, *supra* note 106, at 662. Therefore, along with the additional penalty, parents of juvenile hate crime offenders that are required to attend parental training classes will not be responsible for the respective cost. *Id.*; see *infra* Part IV (including parenting classes as one additional punishment).

motivations, and reflect the inherent severity of hate crime.²⁴⁵ However, to become whole, the juvenile hate crime victims' only option is to bring a civil cause of action against the juveniles' parents.²⁴⁶ Juveniles are not completely culpable for their actions, and among other causes of delinquency, parents are often to blame in some part for juvenile delinquency because of their lack of control over juvenile offenders.²⁴⁷ Because hatred, such as racism and bigotry, is generally learned, parents that teach juveniles such hatred to the point it leads to violence should be held liable.²⁴⁸

An enhanced penalty for parents is a law that more appropriately encourages parents to supervise juvenile hate crime offenders.²⁴⁹ Ultimately, a parental liability law with an enhanced penalty against the parents more appropriately reflects and addresses the additional bias motivation inherent in the hate crime committed by juveniles.²⁵⁰

IV. ENHANCED PENALTY FOR PARENTS OF JUVENILE HATE CRIME OFFENDERS

Penalty enhancement statutes correctly recognize that hate crimes are more severe than other violent crime and deserve increased punishment.²⁵¹ However, current parental liability laws fail to reflect the inherent severity of hate crime punished within the criminal law.²⁵² This Note proposes the addition of a penalty enhancement feature for parents of juvenile hate crime offenders.²⁵³

²⁴⁵ See *supra* Part II.B. Steinberg notes that the "penalties for hate crime offenders must reflect the truly reprehensible nature of their acts." Steinberg, *supra* note 24, at 986.

²⁴⁶ See *supra* Part II.D.1 (including the state parental liability statutes).

²⁴⁷ See *supra* Part II.C.3 (proving various causes of and theories behind juvenile delinquency).

²⁴⁸ Steinberg, *supra* note 24, at 979.

²⁴⁹ See *supra* Part II.B (providing the states that enacted an enhanced penalty for the commission of a hate crime and examples of a state statute).

²⁵⁰ See *supra* notes 152 and accompanying text (addressing parental liability laws and providing the parental liability laws of the fifty states).

²⁵¹ See *supra* Part II.B.1 (pointing out the increased severity of hate crime compared to other violent crime).

²⁵² See *supra* note 150 and accompanying text (allowing recovery for different amounts, depending on the state).

²⁵³ See *infra* notes 254-58 (providing the text of the hate crime penalty enhancement feature).

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A. *Proposed Enhancement Feature*

The following penalty enhancement feature is a suggested addition to existing parental liability statutes to further encourage parents to supervise their juvenile and reduce juvenile hate crime.²⁵⁴

(A) A parent, parents, or legal guardian of an unemancipated minor under the age of eighteen (18) is liable for actual damages to persons or property and is subject to an additional penalty if:

(1) the juvenile intentionally selected the victim because of the victim's actual or perceived disability, gender, nationality, race or ethnicity, religion, sexual orientation, or association with a person or group with one or more of these actual or perceived characteristics;²⁵⁵

(2) *the additional penalty for juvenile's crime is determined by:*

(a) the amount of supervision the parent actually exerted over the juvenile; AND

(b) the age of the offender;

(1) twelve (12) years of age and under requires proof a preponderance of the evidence that the parents taught the hatred;

(2) thirteen (13) to fifteen (15) requires proof by clear and convincing evidence that the parents taught the hatred;

(3) sixteen (16) to seventeen (17) requires proof beyond a reasonable doubt that the parents taught the hatred.

²⁵⁴ The enhancement feature is based on CAL. PENAL CODE § 422.55 (West 2005) (defining a hate crime) and MO. REV. STAT. § 537.045 (2005) (parent or guardian liable for damages by minor). The italicized text is the author's contribution. The first provision in the statute would solely subject the parents to liability for a juvenile's ordinary crime. The subsequent provision includes the enhancement feature to indicate that hate crime is distinct from violent crime and an additional punishment is necessary.

²⁵⁵ The definition of a hate crime is taken from CAL. PENAL CODE § 422.55 (West 2005), which is reflective of most statutes.

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(B) *The punishment shall include one or more of the following:*

- (1) *parenting classes;*²⁵⁶
- (2) *family counseling;*
- (3) *educational classes; or*²⁵⁷
- (4) *additional fines.*

(C) Upon a finding that the child is uncontrollable and continues to engage in delinquent behavior, the parents are exempt from the imposition of any penalty under this statute.²⁵⁸

B. Commentary

The proposed penalty enhancement feature adopts the standard definition of hate crime and establishes a separate provision to indicate that hate crime is distinct from violent crime.²⁵⁹ Like existing parental liability statutes, the enhancement does not preclude subjecting juveniles to a criminal punishment for the hate crime nor does it prevent parents from being held liable for their own negligence.²⁶⁰ The enhancement is

²⁵⁶ See *supra* note 244 and accompanying text (discussing parenting classes).

²⁵⁷ See TEX. CODE CRIM. PROC. ANN. art. 42.014 (Vernon 2005) (requiring hate crime offenders to attend education classes to familiarize and promote tolerance of different characteristics). The enhancement feature includes educational classes because juveniles are not completely responsible for their actions. Further, hate is a learned behavior commonly taught by parents. If parents are taught tolerance, their children may also become more accepting.

²⁵⁸ *Id.* Texas's statute provides that:

On a finding by the juvenile court or probation department that a child's parents or guardians have made a reasonable good faith effort to prevent the child from engaging in delinquent conduct or engaging in conduct indicating a need for supervision and that, despite the parents' or guardians' efforts, the child continues to engage in such conduct, the court or probation department shall waive any sanction that may be imposed on the parents or guardians at any sanction level.

Id. The addition of a similar provision to the enhancement feature should avoid imposing an additional penalty on parents whose minor is uncontrollable.

²⁵⁹ See *supra* Part IV.A (providing the text of the sentence enhancement feature).

²⁶⁰ See *supra* Part II.C (describing juvenile delinquency).

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an addition to existing parental liability laws and will apply to all parents or legal guardians of juvenile hate crime offenders.²⁶¹

The additional penalty is determined by a combination of factors to reflect the severity of hate crime.²⁶² The amount of supervision parents actually exert will help determine the appropriate additional sanction.²⁶³ For example, if the parents did not supervise, an examination into the failure to exercise parental authority will determine the additional punishment.²⁶⁴ If the parents tried to supervise, further inquiry into why the attempt was unsuccessful will assist with the imposition of an appropriate increased penalty.²⁶⁵ Different levels of proof that the parents taught the hatred are required for different ages because parents' accountability should change as minors mature and become more independent.²⁶⁶ Specifically, victims have the burden to prove by a preponderance of the evidence that parents taught their children twelve and under to hate.²⁶⁷ Preponderance of the evidence is the standard for children twelve and under because it is likely more probable than not that parents taught the juveniles to hate.²⁶⁸ However, the origin of hatred among juveniles thirteen through fifteen is less obvious, and as a result, the burden is increased to clear and convincing evidence.²⁶⁹ Finally, the standard is beyond a reasonable doubt for juveniles sixteen and seventeen because it is less certain that parents, not outside influences or life experience, are the roots of a juvenile's hatred.²⁷⁰

²⁶¹ See *supra* note 254 and accompanying text (adding the enhancement feature to all civil parental liability laws).

²⁶² See *infra* text accompanying notes 262-71 (explaining how the additional penalty is determined).

²⁶³ See *supra* notes 255-58 (providing possible additional penalties).

²⁶⁴ See *supra* notes 256-57 (providing the possible additional punishments).

²⁶⁵ See *supra* text accompanying note 256-57 (imposing an additional penalty of parenting classes, family counseling, educational classes or additional fines).

²⁶⁶ See *supra* text accompanying notes 255-56 (providing that twelve years of age and under requires proof by a preponderance of the evidence that the parents taught the hatred).

²⁶⁷ See *supra* text accompanying note 255 (providing that proof by a preponderance of the evidence is required for children twelve and under).

²⁶⁸ Preponderance of the evidence is defined as "... superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other." BLACK'S LAW DICTIONARY 1220 (8th ed. 2004).

²⁶⁹ Clear and convincing evidence is more than a preponderance but less than beyond a reasonable doubt. BLACK'S LAW DICTIONARY 596 (8th ed. 2004). The standard requires that "[e]vidence indicating that the thing to be proved is highly probable or reasonably certain." *Id.*

²⁷⁰ Beyond a reasonable doubt "is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that

Therefore, the amount of supervision parents actually exerted and the juvenile's age will help determine the additional penalty.²⁷¹

The enhanced penalty for parents of juvenile hate crime offenders includes alternative sanctions to address both the purpose and flaws of parental liability statutes, encouraging supervision, and increasing effectiveness.²⁷² The additional penalty provides a solution that directly addresses the absence of supervision which allows juveniles to commit hate crimes.²⁷³ For example, to encourage supervision due to an inability to parent, the enhanced penalty will require the parents to attend parenting classes with the juvenile to assist in the development of solid parent-child relationships.²⁷⁴ For another family, an absence of control may be due to communication problems or unstable relationships between parents enabling the juvenile to associate with a deviant subculture.²⁷⁵ Therefore, family counseling may be an appropriate remedy to increasing supervision over juvenile hate crime offenders.²⁷⁶ If a court determines that the parents taught the juveniles to hate, parents may be required to attend educational classes to promote tolerance for the targeted characteristic.²⁷⁷

In addition to holding parents liable for damages for their own negligence, the enhanced penalty includes the possibility of additional damages. However, the enhancement should not and is not intended to disadvantage the already disadvantaged by imposing an additional fine

condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge." BLACK'S LAW DICTIONARY 1293-94 (8th ed. 2004).

²⁷¹ See *supra* notes 255-56 and accompanying text (providing the various additional punishments).

²⁷² See *supra* Part III.B; Tyler et al., *supra* note 86, at 9-11 (pointing out the flaws and situations that contribute to the ineffectiveness of parental liability laws).

²⁷³ Importantly, the statute seeks to encourage parents to exert an appropriate level of control over their children because studies indicate that this will lead to a reduction in juvenile delinquency. Tyler et al., *supra* note 86, at 13. However, juvenile delinquency increases at both ends of the spectrum, low and high levels of control. *Id.*

Attending parenting classes without juveniles only increases the juvenile's ability to engage in delinquent behavior. *Id.* If the only parent of the house has to attend classes, again the juvenile is left unsupervised and able to engage in misconduct, which may further subject the parent to increased liability. *Id.* at 2. In the United States, some of the most common forms of punishment imposed in the under parental liability statutes include "compulsory counseling or education programs," money, or jail sentence. *Id.*

²⁷⁵ See *supra* Part IV.A (indicating that counseling may be an appropriate additional sanction for this situation).

²⁷⁶ See *supra* Part IV.A (including counseling as an option for an additional punishment).

²⁷⁷ See *supra* note 258 (providing the text of Texas's statute that waives liability upon the finding of a parents good faith attempts to prevent a child from engaging in delinquency).

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on parents who struggle to provide for the family.²⁷⁸ But an additional fine reflects the criminal law's treatment of hate crime and may be appropriate in some situations or as a last resort. Nonetheless, limiting the additional penalty to those included in the enhancement feature addresses the flaws of current liability laws for parents of juvenile hate crime offenders.²⁷⁹

Further, the increased penalty is consistent with the goal of encouraging parents to supervise their juveniles and reduce juvenile delinquency.²⁸⁰ The enhancement feature recognizes that some juveniles are entirely uncontrollable.²⁸¹ Also, the statute would not encourage parents to supervise juveniles if the parents will continually be subject to an enhanced penalty because of uncontrollable juveniles.²⁸² Therefore, the enhancement feature waives the penalty upon a finding that the juveniles were completely uncontrollable.²⁸³

The penalty enhancement feature is meant to address major issues among hate crime legislation, penalty enhancement statutes, juvenile delinquency, and parental liability laws. The statute is reflective of the severity of hate crime, the necessity of an increased punishment, the desire to reduce juvenile hate crime, and to further hold parents accountable for juvenile hate crime offenders.

V. CONCLUSION

Hate crime is inherently more demoralizing than other violent crimes. Its offenders torture victims because of a prejudice against a characteristic beyond the victims' control. As a result, the surrounding

²⁷⁸ The enhancement feature is designed to address the flaws of parental liability laws pointed out by Tyler and increase the effectiveness of the laws. For instance, the statute will not impose a \$5,000 fine on a parent or parents who cannot provide food for the family. Tyler et al., *supra* note 86, at 8. Further the imposition of a fine is discouraged because the fine may not appropriately punish the family who is able to pay. Specifically, "having economic resources can become a poor substitute for the love and affection that the delinquent child needs." *Id.* at 11.

²⁷⁹ See *supra* Part IV.A (providing the only four possible additional penalties of the enhancement feature).

²⁸⁰ See *supra* note 144 and accompanying text (indicating the purpose of parental liability laws).

²⁸¹ Juveniles are considered uncontrollable when the parents repeated good faith attempts to control the juveniles are unsuccessful. Further, the statute is not meant to imply that bad children result from bad parents. Tyler et al., *supra* note 86, at 5.

²⁸² See *supra* Part IV.A (including the text of the sentence enhancement feature).

²⁸³ This notion is based on a Texas's statute that waives sanctions on parents or guardians. See *supra* note 285 (proving Texas's waiver of parental liability upon a finding of good faith).

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community is forced to conceal the targeted characteristic. Therefore, enhanced penalty statutes are necessary to provide a punishment proportional to the crime. Parental liability laws fail to include this recognition; in response, this Note proposes a penalty enhancement feature to correct the inherent flaws in current parental liability statutes. Enhanced penalties more appropriately reflect the severity of hate crime and provide a punishment that directly addresses the quality of supervision that allows juveniles to commit hate crime.

For example, the enhancement feature more appropriately reflects the severity of Hannah's and James's hate crimes and encourages their parents to further supervise them. The court applies the penalty enhancement feature to Mr. and Mrs. Smith and Mr. and Mrs. Jenkins. As a result, Mr. and Mrs. Smith attend educational classes because they taught Hannah a hatred for Catholics. The classes expose Mr. and Mrs. Smith to Catholics in order to facilitate familiarity and acceptance that will be passed on to Hannah. At the civil trial against Mr. and Mrs. Jenkins, the court imposes an additional fine and demands family counseling even though Mr. and Mrs. Jenkins did not teach James his hatred. The additional fine reflects the enhanced penalty in criminal statutes and the family counseling should improve communication among the family and encourage James's parents to supervise with whom James associates. Hannah and James learned to hate, but because they learned to hate, they can also be taught to tolerate.

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