

**HATE CRIME LAW & SOCIAL CONTENTION: A COMPARISON OF
NONGOVERNMENTAL KNOWLEDGE PRACTICES IN CANADA &
THE UNITED STATES**

by

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A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF
THE REQUIREMENTS FOR THE DEGREE OF

DOCTOR OF PHILOSOPHY

in

The Faculty of Graduate Studies

(Law)

THE UNIVERSITY OF BRITISH COLUMBIA
(Vancouver)

August 2008

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ABSTRACT

Hate crime laws in both Canada and the United States purport to promote equality using the language of antidiscrimination law. National criminal codes in both countries authorize enhanced punishment for crimes motivated by “sexual orientation” but not “gender identity” or “gender expression.” Cities and states in the United States have also adopted hate crime laws, some of which denounce both homophobic and trans-phobic crimes. Hate crime penalty enhancement laws have been applied by courts in both Canada and the United States to establish a growing jurisprudence. In both countries, moreover, other hate crime laws contribute to official legal knowledge by regulating hate speech, hate crime statistics, and conduct equivalent to hate crimes in schools, workplaces, and elsewhere.

Yet, despite the proliferation of hate crime laws and jurisprudence, governmental officials do not control all legal knowledge about hate crimes. Sociological “others” attend criminal sentencing proceedings and provide support to hate crime victims during prosecutions, but they also frame their own unofficial inquiries and announce their own classification decisions for hate-related events. In both Canada and the United States, nongovernmental groups contend both inside and outside official governmental channels to establish legal knowledge about homophobic and trans-phobic hate crimes.

In two comparable Canadian and American cities, similar groups monitor and classify homophobic and trans-phobic attacks using a variety of information practices. Interviews with representatives of these groups reveal a relationship between the practices of each group and hate crime laws at each site.

The results support one principal conclusion. The availability of local legislative power and a local mechanism for public review are key determinants of the sites and styles of

nongovernmental contention about hate crimes. Where police gather and publish official hate crime statistics, the official classification system serves as both a site for mobilization, and a constraint on the styles of contention used by nongovernmental groups. Where police do not gather or publish hate crime statistics, nongovernmental groups are deprived of the resource represented by a local site for social contention, but their styles of contention are liberated from the subtle influences of an official hate crime classification system.

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ACKNOWLEDGEMENTS

This project would have been impossible without the willing participation of the groups and individuals that provided interviews. I heartily thank the groups and their representatives for their indispensable contributions of time and information.

Also indispensable were the members of my Ph.D. Thesis Committee: Professors William Black and Christine Boyle of the Faculty of Law, Julian Dierkes of the Institute for Asian Research, and Renisa Mawani of the Department of Sociology. Professor John Torpey, now of the City University of New York also provided invaluable input and support.

I also had the benefit of support and guidance from my fellow students, in particular recent graduate Dr. Dawn Mills, and from longtime friend and collaborator Edward Ohnemus.

Finally, I am grateful for the employment, companionship, and inspiration provided by the Lummi Nation Victims of Crime Program throughout the course of my graduate studies.

Thanks to all of you for your contributions; I accept full responsibility for any mistakes.

DEDICATION

To my family, Dr. Toi Geil and Heath Geil-Haggerty, for your years of sacrifice and support during this project.

And, to the memory of Matthew Shepard.

1 Introduction

1.1 Statement of the Problem

In the fall of 1998 two youths beat Matthew Shepard to death outside Laramie, Wyoming. County police completed the (voluntary) government form labeling the killing a “hate crime” motivated by “sexual orientation.” The state Division of Criminal Investigation forwarded this information to the FBI, which included the killing in its annual hate crime statistics. The prosecutor challenged the label before the killers’ trial, contending the event was not a hate crime. The point seemed moot, since state law did not recognize hate crimes. Yet, the “hate crime” label for the Shepard killing was, and remains, subject to contention.¹

Chapter 4 of this thesis sets out two similar cases. First, in the fall of 2001 a group of youths beat Aaron Webster to death in Vancouver, British Columbia. Vancouver Police Department investigators gave the crime an early “hate crime” label, but their statements to the media were equivocal. Unlike police investigators in Wyoming, Vancouver Police were never called upon to apply a definitive “hate crime” label, because they do not participate in a systematic hate crime statistics and reporting program. Unlike Wyoming, however, a national hate crime sentencing law was available to Crown prosecutors. The outcome of traditional criminal justice labeling was split. One judge labeled the killing a hate crime motivated by Webster’s sexual orientation and enhanced a juvenile killer’s disposition. Crown prosecutors declined to seek enhanced penalties for two of the adult killers.

¹ At the time of the Shepard killing local residents labeled the killing a hate crime and a lynching. See Bernard P. Haggerty, *Hate Crimes: A View from Laramie, Wyoming’s First Bias Crime Law, the Fight Against Discriminatory Crime, & a New Cooperative Federalism*, 45 HOW. L. J. 1, at 9-10 n.25 (citing references) (2001). The County Sheriff investigators who completed the FBI hate crime incident report labeled the killing a hate crime for official statistical purposes, but the local prosecutor, lacking any applicable hate crime statute, denied the killing was a hate crime. See Haggerty, *id.*, at 39. Years later, in an interview with television news reporters, Shepard’s killers denied they were motivated by anti-gay bias. See Casey Charles, *Panic in the Project: Critical Queer Studies & the Matthew Shepard Murder*, 18 LAW & LITERATURE 225 (2006) (reviewing literature arising from Shepard killing).

Second, in the summer of 2005, three young men attacked Micah Painter in Seattle, Washington. Police labeled the attack “malicious harassment” under Washington law and a “hate crime” motivated by Painter’s sexual orientation under the federal statistics law. Prosecutors charged the attackers with malicious harassment and they were found guilty and sentenced for the crime.

These three events illustrate the dynamics of a field of social contention that has emerged since the enactment of hate crime laws in both Canada and the United States.² A comparison of the events themselves reveals some similarities. Webster, Painter, and Shepard, were all gay men, and each was attacked by a group of young men with at least some evidence of homophobic motivation. Thus, each attack was at least arguably an act of hate-related, specifically homophobic, violence.

Each event triggered immediate contests to ascribe a social meaning according to a series of legal labels. Each event set off a sequence of criminal investigations, charging decisions, prosecutions, and sentencing proceedings. These traditional criminal justice contests were framed by similar, though not identical, legal texts, practices, and cultures.

Nevertheless, participants at each site contended for and against a “hate crime” label. In Seattle and Vancouver, the attackers’ penalties varied at least in part according to a “hate crime” label.³ Police and Prosecutors in Seattle successfully fixed the “malicious harassment” label authorized by state statute. Canadian law authorizes a sentencing premium for homophobic hate crimes, but police, prosecutors, and judges in Vancouver divided different labels among Webster’s killers. One judge applied a “hate crime” label during Youth Court disposition; the

² The concept of social contention used here is taken from the work of Alberto Melucci, Doug McAdam, and others. See Alberto Melucci, *CHALLENGING CODES: COLLECTIVE ACTION IN THE INFORMATION AGE* (1996); Alberto Melucci, *NOMADS OF THE PRESENT: SOCIAL MOVEMENTS & INDIVIDUAL NEEDS IN CONTEMPORARY SOCIETY* (1989); *DYNAMICS OF CONTENTION* (Doug McAdam, *et al.* eds., 2001).

³ Shepard’s killers both received life without parole; Painter’s three attackers were sentenced to prison; and, of Webster’s attackers one adult received six years for manslaughter, one adult was acquitted, and one youth received the maximum three years. Factors other than a “hate crime” label influenced the actual penalties differently in each case, but the focus here is on the knowledge associated with the labeling, rather than punishment. The Shepard case is introduced further in Chapter 2, and the Painter and Webster cases are compared in Chapter 4.

Crown did not seek a “hate crime” label at sentencing in two later cases. Because Wyoming had no hate crime statute, judges and juries were never asked to fix a hate crime label, although the prosecutor sought to fix the label “not a hate crime.”

The laws and practices that constitute the field of criminal justice influence ideas, especially ideas about violence—in both Canada and the United States. Yet, in all three cases here, both governmental agencies and nongovernmental social groups sought to establish knowledge outside the traditional criminal charges, verdicts, and sentences.

Adding to the courtroom forum and surrounding criminal justice mechanisms, legislatures in both countries have authorized ongoing hate crime labeling for official statistics. In the United States a national Hate Crime Statistics Act encourages, but does not require, police to gather hate crime statistics. Some state and local governments require police to gather hate crime statistics, but not all police agencies participate. These police-generated statistics are supplemented by a National Crime Victims Survey, which gathers hate crime statistics from telephone interviews with victims. Canada has no national hate crime statistics law, although some police agencies gather and report hate crime statistics according to local policies. As in the United States, a General Social Survey has counted hate crimes using telephone interviews with crime victims throughout Canada. The terminology of “hate crime” labeling varies between countries, and even within each country similar hate-related incidents may be processed by different hate crime statistics systems, subject to local variations.

Finally, however, even beyond the official criminal justice and statistics labeling systems, nongovernmental groups participate in “hate crime” labeling. All three of the attacks presented above triggered contention outside the official labeling systems. In Seattle, Vancouver, and Laramie, reporters, priests, politicians, families—all struggled to ascribe meaning to the killings.

Legislatures have changed criminal penalties and the definitions of crimes before—hate crime laws did not establish the first sentence enhancement factors, for example. Likewise, hate

crime statistics laws are not the first examples of systematic, ongoing governmental inquiry. What is new⁴ in the cases introduced in the following Chapters is the emerging role of nongovernmental social groups contending to establish knowledge in both official and unofficial “hate crime” labeling inquiries.

Like their governmental counterparts, nongovernmental groups engage in both occasional, *ad hoc*, labeling and systematic, ongoing hate crime inquiry. How do these groups participate in individual hate crime labeling decisions? What is their role in the broader hate crime labeling systems? Do differences in hate crime inquiry practices matter to governmental and nongovernmental groups? These questions serve as the background for the research questions investigated here.

In an earlier article,⁵ I documented the mobilization to institute a formal hate crime law and labeling system in Laramie after the Shepard killing. The outcome seemed modest—a city ordinance requiring police to gather and report hate crime statistics. On the other hand, as Professor Beth Loffreda’s book⁶ narrates, the mobilization gave some participants an opportunity for empowerment and learning. Furthermore, a body of literature appeared, documenting, commemorating, and analyzing the “aftermath” or “wake” of the Shepard killing. One of Professor Loffreda’s reviewers emphasized the passage of the local hate crime reporting law:

Losing Matt Shepard ends with the political push, ultimately successful, to pass a bias-crimes ordinance in Laramie. At the time of the murder, a hate-crimes bill was stalled in the state legislature, for all the familiar reasons, and the killing swayed few if any lawmakers’ votes. Soon after the murder, the Laramie City Council issued a proclamation expressing its sympathy to Matthew Shepard’s parents and urging that “the healing process” begin—pop psychology become politics—but a handful of citizens, straight and gay, wanted a more concrete

⁴ Jenness & Grattet document the new process by which “hate crime” has become “a specific policy domain” and “a meaningful category.” Valerie Jenness & Ryken Grattet, *MAKING HATE A CRIME: FROM SOCIAL MOVEMENT TO LAW*, at 7, 8 (2001). Specifically, they describe: “the process by which the meanings and practices that constitute hate crime stabilize, become cognitively taken for granted by actors, and attain a high level of normative consensus.” Jenness & Grattet, *id.* While scholars have studied how “Hate crime” has joined the official “lexicon” of police, few have examined the corresponding processes by which nongovernmental social groups develop their own “hate crime” lexicon and participate in the official hate crime classification processes of police.

⁵ See Haggerty, *supra* note 1.

⁶ Beth Loffreda, *LOSING MATT SHEPARD: LIFE & POLITICS IN THE AFTERMATH OF ANTI-GAY MURDER* (2000).

response. Eventually the council passed a measure calling for police training and better record-keeping. The detective who developed the case against the killers, himself a model of compassion and forensic intelligence, dismissively characterized it a “feel-good” gesture. Yet in Laramie—a town so conservative that a gay assistant professor feared acknowledging her sexuality for fear of jeopardizing her chance for tenure; a place so fearful of gay-bashing that the phone number for the AIDS hotline is unlisted, to discourage threatening calls—this tiny political step makes a difference. It puts Laramie on record as committed to protecting the most basic liberties of gay men and lesbians. In these times, and in this place, that’s cause for cheer.⁷

Criminologists will ask whether hate crime laws work—whether they deter or prevent crimes. Critical criminologists may ask how police, prosecutors, and judges accommodate hate crime laws in their routines. But, as both Professor Loffreda and her reviewer suggest, the social practice of hate crime knowledge production has serious consequences beyond the accumulation and reporting of official data, and beyond the identification and punishment of crimes. Even a minor, local hate crime reporting law, “makes a difference,” by putting a community “on record” against intolerance. The social mobilization to enact such a law may have transformative effects on communities and individuals. But, what “difference” do hate crime laws make to groups in society? What transformative effects do hate crime laws facilitate? Do hate crime laws have any broader social consequences? Once they are enacted, do hate crime laws matter to society? Do they matter to groups that monitor homophobic or trans-phobic hate crimes in particular? These broader social consequences of hate crime laws will be examined in the Chapters that follow.

This Chapter will introduce the analytical framework, research questions and answers, and research methods employed in the remainder of the thesis.

1.2 Analytical Frame

The primary analytical framework here will be the logic of cross-national comparison.⁸ The comparative analysis will include two parts: (1) an analytical legal comparison; and, (2) a

⁷ David L. Kirp, *Chronicle of a Death Foretold*, THE NATION, Nov. 20, 2000 (reviewing Loffreda, *id.*), available online at <http://www.thenation.com/doc/20001120/kirp> (accessed Mar. 24, 2008).

⁸ The comparative analysis used here was shaped in the class “Cross-National Comparisons in the Social Sciences” taught by Professor Julian Dierkes at the University of British Columbia Institute for Asian Research.

qualitative social comparison.⁹ The legal comparison will introduce the similarities and differences in the hate crime law and labeling systems in the United States and Canada, and the qualitative social comparison will analyze the corresponding similarities and differences in the information practices of nongovernmental social groups that monitor homophobic and transphobic hate crimes in each country.

Preceding the two comparative components will be a brief historical and conceptual introduction. This discussion will not present a thorough historical analysis tracing the origins of hate crime law; instead, it will set out historical examples of social contention related to intolerance to demonstrate the concepts applied later. While a thorough historical analysis relying on archival data would be a worthwhile exercise,¹⁰ the limited historical introduction will serve primarily to set the stage for the legal and social comparisons that follow.

The methods employed to analyze legal and social differences in the hate crime field are described briefly below.

1.2.1 The Comparative Method

Very different thinkers such as Mill,¹¹ Durkheim,¹² and Weber¹³ have all applied a similar logic of comparison to social problems. John Stuart Mill articulated an early and influential statement of the logic of comparative studies.¹⁴ In the late nineteenth and early twentieth century, both Emile Durkheim¹⁵ and Max Weber¹⁶ gave particular attention to the

⁹ See, e.g., Gary King, *et al.*, *DESIGNING SOCIAL INQUIRY: SCIENTIFIC INFERENCE IN QUALITATIVE RESEARCH* (1994); Charles C. Ragin, *THE COMPARATIVE METHOD* (1987).

¹⁰ See, e.g., Theda Skocpol, *STATES & SOCIAL REVOLUTION* (1979) (comparative historical analysis of revolutions).

¹¹ John Stuart Mill, *A SYSTEM OF LOGIC: RATIOCINATIVE & INDUCTIVE, BEING A CONNECTED VIEW OF THE PRINCIPLES OF EVIDENCE & THE METHODS OF SCIENTIFIC INVESTIGATION*, at 253-66 (Longmans Green & Co. 1941).

¹² E. Durkheim, *THE RULES OF SOCIOLOGICAL METHOD*, at 125-46 (8th ed. 1938).

¹³ *THE METHODOLOGY OF THE SOCIAL SCIENCES: MAX WEBER*, at 164-88 (Edward A. Shils & Henry A. Finch eds., 1949).

¹⁴ Mill, *supra* note 11, at 253-66.

¹⁵ Durkheim, *supra* note 12, at 125-46.

¹⁶ Weber, *supra* note 13, at 164-88.

development and application of comparative methods in the social sciences.¹⁷ In recent decades, scholars continue to build upon growing theoretical and practical traditions in comparative studies. Recent scholarship has brought greater specificity both to the logic and practice of causal inference and to the larger field of comparative social research as a system.¹⁸

The logic of comparison used here can be described in Mill's terms as an application of the method of differences, or a combined method of similarities and differences. Specifically, the legal systems used to classify hate crimes will be analyzed for their differences and similarities in an effort to explain differences and similarities in social contention related to hate crime labeling decisions in two cities in Canada and the United States. Although the comparative analysis will be structured around a logic of causal inference, the conclusions reached will be limited to correlations at most.

Introductory comments about both the analytical legal comparison and the concept of social contention follow.

1.2.2 The Analytical Legal Comparison

Chapters 3 and 4 will present a cross-national comparison of hate crime law and labeling systems in Canada and the United States. While her focus is more historical than legal, Theda Skocpol's study of social revolutions illustrates this kind of comparison.¹⁹ Skocpol analyzes two sets of national examples—three with and three without successful social revolutions—to explain what caused the similarities and differences in outcomes.²⁰ The comparison here will be less ambitious; it will trace only the differences and similarities in hate crime labeling systems in

¹⁷ See generally Neil J. Smelser, *Comparative Methods in the Social Sciences* (1976) (reviewing applications of comparative method).

¹⁸ See, e.g., King, *et al.* & Ragin, *supra* note 9.

¹⁹ See Skocpol, *supra* note 10.

²⁰ *Id.* at 36 (citing Mill).

two countries. Although the comparison here will necessarily differ from Skocpol's, her cautionary remarks remain relevant:

[T]he comparative method cannot define the phenomenon to be studied. It cannot select appropriate units of analysis or say which historical cases should be studied. Nor can it provide the causal hypotheses to be explored. All of these must come from the macro-sociological imagination, informed by the theoretical debates of the day, and sensitive to the patterns of evidence for sets of historical cases.²¹

In other words, “[C]omparative [] analysis is no substitute for theory. Indeed, it can be applied only with the indispensable aid of theoretical concepts and hypotheses.”²²

Other scholars have compared aspects of the Canadian and American legal systems.²³ Each researcher obeys a different imperative. In addition to differences in the method of comparison, each researcher chooses a comparative method for a different reason, and the “why” of each comparison necessarily influences its “how.”

This study likewise has its own reasons, which necessarily influence its methods. A qualitative social comparison was selected for two reasons. First, although there is disagreement about the consequences, current hate crime scholarship reveals a near consensus—both legal concepts like hate crime, and specific hate-related events, are socially constructed. Therefore, a quantitative comparison of the numerical outcomes of this subjective social process would be misleading. Second, since the sites chosen here apply different hate crime laws and statistics policy, a quantitative comparison is also impractical.

²¹ *Id.*, at 39.

²² *Id.*

²³ See, e.g., Drew S. Days, III, *Canadian Constitution: Civil Rights in Canada: An American Perspective*, 32 AM. J. COMP. L. 307 (1984) (comparing approaches to “rights”); W. R. Lederman, *A Comparison of Principal Elements of the Legal Systems & Constitutions of Canada and the United States*, 11 AM. J. COMP. L. 286 (1962) (comparing “legal systems”); Seymour Martin Lipset, *CONTINENTAL DIVIDE: THE VALUES & INSTITUTIONS OF THE UNITED STATES & CANADA* (1991) (comparing “values and institutions”); Norbert MacDonald, *DISTANT NEIGHBORS: A COMPARATIVE HISTORY OF SEATTLE & VANCOUVER* (1987) (comparing local history of cities); Herbert Arthur Smith, *FEDERALISM IN NORTH AMERICA: A COMPARATIVE STUDY OF INSTITUTIONS IN THE UNITED STATES & CANADA* (1923) (comparing “Federalism”); see also Harold Stannard, *THE TWO CONSTITUTIONS: A COMPARATIVE STUDY OF BRITISH & AMERICAN CONSTITUTIONAL SYSTEMS* (1950) (comparing U.S., British constitutional systems); Alexis de Tocqueville, *DEMOCRACY IN AMERICA* (Arthur Goldhammer Tr. 2004) (comparing nineteenth century political systems in US, England, France).

Chapter 3 will present some historical perspective alongside an analytical comparison of current law relevant to the classification of hate crimes in each country. This general organizational model has been followed by several scholars.²⁴ Comparative scholars have identified the use of historical context as a common analytical tool. While the thesis will not trace the entire historical processes by which hate crime classification systems developed in Canada and the United States, some “process tracing” will be evident in the analytical legal comparison.²⁵ The minimal legal history provided will help explain the similarities and differences between the two countries’ current hate crime law and labeling systems.

The choice to combine an analytical legal comparison with a social comparison in the hate crime field necessarily reflects a choice of theoretical orientation which will determine the evidence revealed. Nevertheless, the organization of the cross-national legal comparison will not deviate substantially from the norm among similar studies. What is novel here is the focus on hate crime classification systems and their relationship to nongovernmental social contention in the hate crime field.

1.2.3 The Concept of Social Contention

After providing a legal context, the study will examine the social construction of knowledge in the everyday practices of social groups that contribute to knowledge of hate crimes by contending in the hate crime field. The theoretical framework will combine the concept of “social contention” presented in the works of Doug McAdam and Alberto Melucci.²⁶

In McAdam’s model of social contention, traditional institutional practices shape the

²⁴ See generally *id.* note 23 (collecting examples).

²⁵ See COMPARATIVE HISTORICAL ANALYSIS IN THE SOCIAL SCIENCES, ch. 10, at 363 (Mahoney & Rueschemeyer, eds. 2003) (defining “process tracing”); see *id.*, at 365 (noting benefits of process tracing where, “explanatory and outcome variables are separated by long periods of time.”).

²⁶ Combining the works of McAdam, *et al.* and Melucci is not my original idea. See Mario Diani, *The Terrestrial Emporium of Contentious Knowledge*, 8 MOBILIZATION: AN INTERNATIONAL JOURNAL, 109-12 (2001) (reviewing McAdam, *et al.*, *supra* note 2).

behavior of social groups, which in turn shape institutional behavior. McAdam calls this dynamic, “the mutually constitutive relationship between institutionalized and contentious politics.”²⁷ He defines contention as “interaction between makers of claims and others, [] recognized by those others as bearing on their interests, and bring[ing] in government as mediator, target, or claimant.”²⁸ While contention involves the state, it can appear as either “Contained contention”—“established actors employing well established means of claims making”; or “Transgressive contention”:

at least some parties to the conflict are newly self-identified political actors, and/or [] at least some parties employ innovative collective action. (Action qualifies as innovative if it incorporates claims, selects objects of claims, includes collective self-representations, and/or adopts means that are either unprecedented or forbidden within the regime in question).

The “dynamic model” of contention²⁹ is summarized as “the interactive attribution of opportunity and threat, appropriation of existing institutions and organizations, the framing or reframing of allies and enemies, goods and bads, and a combination of innovative and contained forms of collective action.”³⁰

Melucci applies a definition of contention broader than McAdam’s in two ways. First, Melucci incorporates social movement practices before any “political contestation” occurs:

Sometimes the movements . . . reveal new possibilities, another face of reality. When they act, something has already been said by this very action; at once, the message has been incorporated into the social arena and the debates may commence. Whether or not the issues become topics for political contestation depends on the extent to which they can be taken up by politically relevant agents or otherwise translated into political agendas for the public.³¹

Second, Melucci includes practices during an “invisibility” phase:

movements can and certainly do disappear. But . . . a great deal of important activity takes place during the invisibility phase. . . . New problems and questions

²⁷ See Doug McAdam, *Harmonizing the Voices: Thematic Continuity across the Chapters*, in *SILENCE & VOICE IN THE STUDY OF CONTENTIOUS POLITICS*, at 223 (Ronald R. Aminzade, *et al.*, eds. 2001).

²⁸ *Id.*

²⁹ McAdam, *et al.*, *supra* note 2, at 38.

³⁰ *Id.*, at 51.

³¹ Melucci 1996, *supra* note 2, at 183.

are posed. New answers are invented and tested, and reality is perceived and named in different ways. All these experiences are displayed publicly only within particular conjunctures and only by means of the organizing activities described by resource mobilization theory. But none of this public activity would be possible without the laboratory experiences of the submerged networks.³²

Although their definitions of contention appear to disagree, both McAdam and Melucci agree that innovation in contention can be more important than formal outcomes. As McAdam notes, “however modest their immediate substantive impacts, popular struggles may still have an enduring effect through the *contentious innovations* they pioneer.”³³

While this study will examine social contending by nongovernmental groups, it will also necessarily examine the governmental institutions that label hate crimes, in both law and statistics. Of primary interest will be the unintended impact of institutional hate crime labeling systems on how social groups contest labeling decisions. McAdam emphasizes such unintended consequences—“the inadvertent creation of ‘free space’ by state authorities,” and broadly, “the role that state authorities play in shaping the spatial locus of popular protest.”³⁴ This study will examine innovations in how social groups gather, process, and present information about hate crimes. Melucci emphasizes this kind of knowledge practice:

Knowledge is a crucial resource for new conflictual actors, both because it is a focus of major conflicts (those over the appropriation and control of knowledge and information, and over the instruments of production and circulation of these), and because only in knowledge can the texture of social relationships be disclosed. . . . In mass society, in which the rigid separation between cultures and ways of life is disappearing, ideology tends to become the principal channel of consensual manipulation. Escaping from ideology to the production of knowledge . . . becomes a key resource for collective action.³⁵

Because, “The cognitive frames and the relations which enable us to *make experience* out of reality depend on the information available to us,” Melucci asks scholars to “join the debate

³² Melucci 1989, *supra* note 2, at 207-08 (emphasis added).

³³ McAdam, in Aminzade, *et al.*, *supra* note 27, at 238 (emphasis added).

³⁴ *Id.*, at 231.

³⁵ Melucci 1989, *supra* note 2, at 223-24.

about the ways in which reality is constructed[.]”³⁶

Adopting Melucci’s imperative, this study uses a broad definition social contention to examine how social groups contribute to the production of knowledge about hate crimes. The need for such an examination of nongovernmental knowledge-production in the hate crime field is evident from a brief review of existing literature.

1.3 Contribution to Existing Literature

This thesis aims to make both theoretical and practical contributions to existing scholarship. First, it fills a practical gap in existing scholarship by examining the social construction of knowledge about hate crimes using a cross-national comparative method. Although a comparative method has been used to study hate crime knowledge production, within³⁷ and between³⁸ police departments, cross-national comparative studies are absent from the literature. Even studies in the broader field of policing practice rarely assume a cross-national perspective, and the few existing cross-national policing studies limit themselves to theory-building and the identification of description typologies of policing systems.³⁹

Second, recent studies about hate crime knowledge production show evidence of either a bias favoring the interpretations of police authorities, or at least a perspective over-emphasizing the importance of governmental institutions like the police departments. Typical American studies of hate crime knowledge production to date have focused on how police departments

³⁶ *Id.*, at 226 (emphasis in original).

³⁷ See Benjamin Bowling, *Violent Racism: Victimization, Policing & Social Context* (1998); Elizabeth A. Boyd, *et al.*, “Motivated by Hatred or Prejudice”: *Categorization of Hate-Motivated Crimes in Two Police Divisions*, 30 *LAW & SOC.’Y REV.* 819 (1996).

³⁸ See Susan E Martin, “A cross-burning is not just and Arson”: *Police Social Construction of Hate Crimes in Baltimore County*, 33 *CRIMINOLOGY* 303, at 311 (1995).

³⁹ See, e.g., Jennifer Brown & Frances Heidensohn, *GENDER & POLICING: COMPARATIVE PERSPECTIVES* (2000); Andreas Glaeser, *DIVIDED IN UNITY: IDENTITY, GERMANY & THE BERLIN POLICE* (1999); R. I. Mawby, *COMPARING POLICING ISSUES: THE BRITISH & AMERICAN EXPERIENCE IN INTERNATIONAL PERSPECTIVE* (1990).

apply hate crime laws to identify hate crimes.⁴⁰ Such studies depend on negotiated access for the purpose of participant research from within a police agency, and, arguably, on funding from institutional sources aligned with police agencies. Although Canadian scholarship has exhibited more independence from police authority, it has likewise examined knowledge production from a perspective that emphasizes the importance of policing institutions.⁴¹ Less common are studies about the emergence and diffusion of hate crime law in society as a conceptual “domain,”⁴² studies about how nongovernmental social movements shape discourse about hate crimes,⁴³ and analyses of hate crime data from unofficial sources.⁴⁴ By examining the production of “unofficial” knowledge about hate crimes by social groups outside the police, this thesis presents a perspective that is under-represented in the emerging field of hate crime studies.

Third, the thesis addresses theoretical questions that have been neglected, or at best addressed by implication only, in studies of hate crime and policing. Hate crime law can be seen both in history and in theory as a blend of concepts: social mobilization, civil rights, victims’ rights, equality, crime, deviance, policing, governance. Situated at the intersection between sub-disciplines in both law and sociology, hate crime law thus offers researchers an opportunity to reconcile observable mechanisms of knowledge production with theories of knowledge. The dialog between theory and data, between “ideas and evidence,”⁴⁵ in this thesis will generate

⁴⁰ Jeanine Bell, POLICING HATRED (2002); Elizabeth A. Boyd, *et al.*, “Motivated by Hatred or Prejudice”: Categorization of Hate-Motivated Crimes in Two Police Divisions, 30 LAW & SOC.’Y REV. 819 (1996); *see also* Susan E Martin, “A cross-burning is not just and Arson”: Police Social Construction of Hate Crimes in Baltimore County, 33 CRIMINOLOGY 303, at 311 (1995) (describing comparative methodology of separate study).

⁴¹ Richard V. Ericson, A STUDY OF DETECTIVE WORK (1981); Richard V. Ericson & Kevin D. Haggerty, POLICING THE RISK SOCIETY (1997); Kevin D. Haggerty, MAKING CRIME COUNT (2001).

⁴² Barbara Perry, IN THE NAME OF HATE: UNDERSTANDING HATE CRIMES (2001); Jenness & Grattet, *supra* note 4.

⁴³ T. A. Maroney, *The struggle against hate crime: a movement at a crossroads*, 73 N.Y.U. L. REV. 564 (1998); Mary Ellen Faulkner, A CASE STUDY OF THE INSTITUTIONAL RESPONSE TO ANTI-GAY/LESBIAN VIOLENCE IN TORONTO (Ph.D. dissertation, Univ. of Toronto, 1999); *see also* Jennifer Anne Petersen, FEELING IN THE PUBLIC SPHERE: A STUDY OF EMOTION, PUBLIC DISCOURSE, & THE LAW IN THE MURDERS OF JAMES BYRD JR. & MATTHEW SHEPARD (Dissertation, Univ. of Texas Austin, Aug. 2006), available online at <http://www.lib.utexas.edu/etd/d/2006/petersend46798/petersend46798.pdf> (accessed Jan. 18, 2008); Miriam Smith, LESBIAN & GAY RIGHTS IN CANADA: SOCIAL MOVEMENTS & EQUALITY-SEEKING: 1971-1995 (1999).

⁴⁴ Gary David Comstock, VIOLENCE AGAINST LESBIANS & GAY MEN (1991) (surveying smaller Canadian and American studies alongside Comstock’s own survey).

⁴⁵ *See* Ragin, *supra* note 9.

observations about how and why social groups come to know about equality by contending with official knowledge production in the hate crime field.

Specifically, the study provides preliminary answers to the call for a theory of knowledge applicable to the present era of “preventative surveillance” by policing agencies.⁴⁶ For, in addition to serving as merely another frame in which to create legal knowledge, the hate crime labeling process can be seen as a process of discipline by surveillance. Jean-Paul Brodeur’s brief review of leading work on policing practice critiques the authors’ failure to articulate a theory of knowledge.⁴⁷ Indeed, Brodeur suggests that a focus on the theoretical underpinnings for the production of legal knowledge is “on the cutting edge of research,” to the extent it can “embed coercion into the wider context of surveillance.”⁴⁸ Consistent with Brodeur’s suggestion, this thesis articulates a theory of knowledge that envisions a contested meaning for hate crime labeling decisions. Looking beyond the institutional apparatuses that announce official legal classification decisions, what is revealed is a model of dynamic social contention in which nongovernmental social groups participate in the social construction of knowledge about hate crimes, and ultimately inequality.

In my prior work,⁴⁹ I explored the inquiry power as a constitutional basis for laws requiring police to conduct an official hate crime statistical inquiry in the United States. But, social groups outside law-making channels conduct inquiries too—by monitoring both police agencies and hate crime perpetrators. And, the knowledge that arises from this dynamic contributes to our collective knowledge of hate crimes and equality.

⁴⁶ Jean-Paul Brodeur, *Richard V. Ericson & Kevin D. Haggerty, Policing the Risk Society*, 1998 CAN. J. CRIM. 455, 456 (book review); see also Jean-Paul Brodeur, *Disenchanted criminology*, 1999 CAN. J. CRIM. 131 (placing criminological research in context with the production of knowledge).

⁴⁷ Brodeur 1998, *id.* at 456.

⁴⁸ *Id.*, at 463.

⁴⁹ See Haggerty, *supra* note 1.

1.4 Research Goals & Questions Posed

This thesis has both theoretical and practical goals. The theoretical goal is to describe the dynamic interaction between a hate crime law and labeling system and the nongovernmental social groups that contend in the hate crime field. The description will illustrate the dynamics by which social groups help to shape knowledge about legal concepts like hate crime and equality. The practical outcome of the thesis will be: (1) to provide information to governmental decisionmakers in Canada, the United States, and elsewhere, considering changes to their hate crime laws and reporting systems; and, (2) to facilitate self-examination and innovation among nongovernmental groups that monitor and contest official hate crime labeling decisions.

The general research question posed is introduced in the statement of the problem above: Do hate crime laws matter? This question will be analyzed from two perspectives: doctrinal and social.

The specific social research questions and hypotheses tested are described in more detail in the introduction to Chapter 5. But, the basic question posed is the same as the question that arose in the aftermath of the Shepard killing: Do hate crime laws matter? Specifically, do hate crime laws matter to groups that monitor homophobic or trans-phobic crimes? A comparative analysis is used to frame this question more specifically: Do differences in the practices of nongovernmental groups that contend in the hate crime field correspond to differences in hate crime laws?

Because this complex social question cannot be answered without first delineating its legal context, a comparison of hate crime doctrine will be required. The basic doctrinal question posed is: What are the similarities and differences in legal principles relevant to homophobic and trans-phobic hate crimes in Canada and the United States? The analytic legal comparison set out in Chapter 3 will answer this question.

To be even more specific, and to address theoretical concerns about the social construction of legal knowledge, both the doctrinal and the social dimensions of the analysis will analyze the role of hate crime statistics and reporting laws. By isolating a difference in hate crime statistics and reporting laws, the study will attempt to answer the precise question raised in the course of contention surrounding the Laramie Bias Crime Ordinance: does a law that merely requires police to gather and report hate crime statistics make any difference in society?

The questions posed and a brief summary of answers provided throughout the thesis are reviewed sequentially in the “roadmap” set out in the concluding section of this Chapter. Before proceeding to a conclusion, however, a brief description of the social research methods will be provided next.

1.5 Research Methods

The research methods for the doctrinal legal comparison of Chapter 3 are easily summarized—basic legal research techniques were used to describe and compare hate crime law and related concepts in Canada and the United States. The research methods used for the sociological comparison were more complex. However, both the doctrinal legal comparison and the social comparison are founded on a handful of critical methodological choices designed with the research questions in mind. The first of these critical choices was the selection of sites for comparison.

1.5.1 Site Selection

Vancouver, British Columbia and Seattle, Washington were chosen as the primary sites for comparison based on their basic social and legal similarity, with the exception of one key variable: unlike Seattle, Vancouver police do not gather and publicly report official hate crime

statistics. This key variation in legal context was isolated to determine whether a law requiring the collection and reporting of hate crime statistics makes a difference in the behavior of nongovernmental groups that monitor hate crimes.

Two steps were taken to verify the comparability of Seattle and Vancouver. First, other studies in the social sciences were consulted to verify the general comparability of Vancouver and Seattle as sites of research. Several such studies confirmed that, despite some unavoidable differences, Seattle and Vancouver represent similar social and legal settings.⁵⁰

Second, information was gathered about hate crimes and groups that monitor hate crimes at each site. This information was used to construct an initial pairing evaluation. This evaluation was performed to verify the availability of a measurable history of homophobic or trans-phobic hate-related events, and a range of nongovernmental groups monitoring or contesting hate crime labeling decisions at each site. This pairing evaluation was performed based on resources available on the world-wide web, and it confirmed that sufficient, comparable data would be available in Vancouver and Seattle.

The result of the preliminary pairing evaluation was a list that paired comparable groups in Seattle and Vancouver, based on their roles in social contention, or at least some form of information practice, related to homophobic or trans-phobic crimes. The pairs of groups that participated in the study are listed in Appendix A.

1.5.2 Data Collection

The doctrinal legal comparison did not involve significant data collection. The social research component used an interview procedure as its primary data source. The interviews

⁵⁰Dan Zuberi, *DIFFERENCES THAT MATTER: SOCIAL POLICY & THE WORKING POOR IN THE UNITED STATES & CANADA* (2006); Angin, Zeynep, *DIASPORAS OF DIFFERENCE: TURKISH COMMUNITIES IN GERMANY, CANADA, & THE UNITED STATES*, Appendix: Methodology, at 203-14, (Ph.D. Dissertation, 2003), cited at <http://md1.csa.com/htbin/ids65/procskel.cgi> (last accessed Oct. 15, 2004); Michael J. Broadway, *A Comparison of Patterns of Urban Deprivation Between Canadian & U.S. Cities*, 21 *SOCIAL INDICATORS RESEARCH* 531 (1989).

were conducted according to a script meant to prompt for each group's information practices both broadly conceived and in response to hate-related events. Interview questions elicited information about the groups' interactions with each other, but they were not constructed to support a formal social networks analysis. Instead they were designed to elicit information describing the groups' ways of gathering, processing, and presenting information about hate crime labeling decisions, including their interactions with the official hate crime statistics production process. Each interview was videotaped and reproduced on a DVD. A chapter outline of each interview is provided in Appendix A. The interview procedures, including the interview script, were approved according to guidelines for human subject research in place at the University of British Columbia. The interview script is set out in Appendix C.

Interviews were videotaped primarily to facilitate feedback.⁵¹ Once the interviews were complete, they were edited into a short composite film that contrasted the practices of groups at each site. The same informants that provided interviews were then invited to view the composite video and provide their feedback in a final recorded session at each site. These feedback sessions provided the informants an opportunity to learn from each other and to reflect on differences and similarities in their practices. The informants were also encouraged to critique the material presented for accuracy and to provide their impressions about the important similarities and differences that they observed. The feedback sessions are also outlined in Appendix A. The information from these feedback sessions, along with the initial interview data forms the core of the social data analyzed here.

Secondary data for each group included documents provided during the interviews and materials drawn from other sources such as newspaper accounts of hate-related events. In addition to the nongovernmental groups, interviews were conducted with representatives of

⁵¹ See, e.g., Joseph Tobin, *et al.*, *PRESCHOOL IN THREE CULTURES* (1989) (videotaped observations presented across sites to observe subjects' reactions and encourage reflection on practice).

police hate crime units in Seattle and Vancouver. These interviews used a similar script, but at the request of the officers they were not recorded. Therefore data for the police hate crime units consists of email correspondence, written responses to questions, and interview notes, along with documents provided in response to public record requests. The modified interview script used for police representatives is also set out in Appendix C.

The interviews began in the spring of 2005 and concluded with feedback sessions in early winter, 2006. Most of the documentary materials were gathered at the time of the interviews, although a few significant items that appeared afterward are included in the analysis.

1.6 Conclusion—A Roadmap for the Thesis

The five Chapters that follow analyze the complex, dynamic process in which governmental officials and nongovernmental social groups produce legal knowledge about hate-related events. The bulk of the thesis proceeds according to a similar logic of comparison designed to explore the similarities and differences in hate crime law and corresponding social behavior in Vancouver and Seattle.

The lone exception to this comparative framework appears in Chapter 2, which introduces some of the historical concepts that influence current Canadian and American understandings of legal and social inquiry in the hate crime field. Chapter 2 illustrates the concept of social contention by citing a few historical examples of challenges to intolerance that are posed in legal terminology. Chapter 2 lays the foundation for the subsequent analysis by explaining the importance of legal sites of contention and their relationship to styles of contention used by groups in society to respond to acts of intolerance. Chapter 2 concludes by discussing the need for research about intolerance toward sexual minorities, in light of the historical silencing of knowledge about their experiences.

The doctrinal component of the thesis appears primarily in Chapter 3, which provides an analytical comparison of hate crime law and equality in Canada and the United States. A more complete summary of the doctrinal analysis is set out in the introduction to Chapter 3. The overall goal of the doctrinal analysis is to describe the official, legal classification system that applies to hate-related events, particularly those motivated by sexual orientation or gender identity or expression. The similarities and differences revealed in this doctrinal comparison provide the context for the subsequent analysis of social research data. In other words the doctrinal analysis set the stage for a determination of whether, and how, differences in hate crime classifications systems matter to nongovernmental groups in each country.

Chapter 3 begins by noting two themes in social contention about hate-related events: (1) a focus on the discretion of law enforcement officials to establish or withhold knowledge about inequality in society, and (2) a tension in the adoption of a new vocabulary of antidiscrimination in criminal law. To set the stage for an analysis of hate crime laws themselves, Chapter 3 compares legislative powers, judicial review, equality rights, and freedom of expression in Canada and the United States. A summary of equality rights and freedom of expression in the two countries is set out in Table 3.1.

Against this backdrop, Chapter 3 proceeds with an analysis of each country's national hate crime penalty enhancement law. Both nations' laws authorize enhanced penalties for crimes motivated by "sexual orientation"; neither regime expressly extends to crimes motivated by "gender identity" or "gender expression." In addition to the national laws, some attention is given at this point to state hate crime laws in the United States. Canadian provinces have no similar laws. Four aspects of the national texts authorizing hate crime penalty enhancements are given particular attention: (1) the antidiscrimination terminology used to define prohibited motives; (2) the standard of proof applicable to the sentence enhancement factor for a hate crime; (3) the degree of biased motivation or causation required to trigger an enhanced penalty; and, (4)

the relationship between hate crime penalty enhancement laws and defenses in the nature of self-defense or provocation—in other words claims of “gay panic” or “homosexual advance.” Also addressed is the applicability of hate crime penalty enhancement laws to youth or juvenile court proceedings.

What is revealed in this analysis is a basic similarity in the texts of national hate crime penalty enhancement laws. Despite seemingly significant differences in approaches to equality and the constraints that freedom of expression imposes on equality rights, the two national hate crime laws utilize facially neutral antidiscrimination language to authorize enhanced penalties, regardless of the disadvantaged or minority position of the victim in society. Based on their formally neutral text, the United States Supreme Court has held that hate crime laws do not generally violate the constitutional equality rights of those receiving enhanced penalties, although constitutional limits have been imposed on the procedural aspects of hate crime laws. Interpretive rules set out in the United States Sentencing Guidelines resolve most questions about the meaning of the antidiscrimination terminology used in the hate crime penalty enhancement provision. Canadian courts have not definitively reviewed their national hate crime penalty enhancement law for compliance with constitutional equality. Because Canada does not have a body of administrative sentencing guidelines, the antidiscrimination terminology used in the Sentencing Principles for bias, prejudice or hate remains subject to interpretation by individual courts imposing sentences and reviewing sentences on appeal. In both countries, the application of hate crime penalty enhancements in juvenile proceedings is subject to scholarly, judicial, and legislative debate.

Chapter 3 next surveys court decisions in both countries that have considered homo- or trans-phobic motives in the context of criminal penalties. This analysis proposes a trend in court decisions beginning with early cases that characteristically considered biased motives only as mitigating factors or as defenses to alleged crimes against gays, lesbians, or transgendered

persons. The premise of this trend analysis is that both Canada and the United States adopted their national hate crime penalty enhancement laws at roughly the same time and that therefore court decisions ought to gradually embrace the idea of hate crime penalties to an increasing degree during the transition period from before to after the adoption of the national laws. Cases decided shortly before the enactment of national laws seem to confirm this premise—as the adoption of national hate crime laws approached, courts tended to pay increasing attention to biased motives in crime. And, cases arising after the adoption of national laws show a continuing trend toward expressly considering biased motives in sentencing decisions, although this trend is more evident in Canadian than American decisions.

After introducing the background legal environment of hate crime laws in the two countries, and after surveying court decisions directly considering enhanced penalties for hate crimes, Chapter 3 concludes with an analysis of “other” hate crime laws. These “other” hate crime laws include hate speech and propaganda laws, hate crime statistics laws, civil and human rights laws that authorize remedies for some hate-related conduct, and school harassment and bullying laws. With the notable exception of hate speech and propaganda laws, these “other” hate crime laws do not authorize criminal penalties for hate-related conduct. Nonetheless, they do contribute significantly to the overall legal classification system that gives social meaning to, and establishes knowledge about, hate crimes.

Chapter 3 concludes with a summary of similarities and differences between Canadian and American hate crime classification systems. This summary is encapsulated in Table 3.2.

While Chapter 3 provides a comparative analysis of hate crime laws in the two countries, this analysis is abstract. Chapter 4 is more tangible. The groups represented in the interviews identified recent cases in both Seattle and Vancouver that they considered homophobic hate crimes. Chapter 4 compares these cases to illustrate the operation of hate crime laws in practice in the two countries. Both cases arose from physical assaults against gay men—in Vancouver

the killing of Aaron Webster, and in Seattle the non-fatal attack on Micah Painter. Both cases resulted in criminal prosecutions in which hate crime penalty enhancements were at least considered or discussed by the sentencing judges. In sum, the prosecutions studied confirm the general premise of the Chapter 3 trend analysis that courts are willing to at least consider enhanced penalties for homophobic hate crimes in appropriate cases.

More importantly, both of the cases compared in Chapter 4 triggered social contention by nongovernmental groups seeking to classify the attacks as hate crimes. Informants for the interviews participated in an array of social contention directly related to the criminal prosecutions. And, in both cases those interviewed also engaged in contention to label the events as hate crimes outside the official legal proceedings. Because both the Seattle and Vancouver prosecutions occurred during the course of the social research for this study, and because they were discussed at length in the interviews, a comparison of the two cases serves as an ideal bridge between the doctrinal legal comparison of Chapter 3 and the subsequent analysis of interview data.

The social data gathered during and after the interviews is summarized and compared in Chapter 5. The presentation of data is organized by pairing groups with similar roles at each site. The information practices of six pairs of groups are compared: (1) anti-violence groups based in lesbian, gay, bisexual, and transgender (LGBT) community centers; (2) anti-violence groups organized on an *ad hoc* basis; (3) school safety and education groups; (4) family support groups; (5) transgender rights groups; and, (6) police hate crime units.

In both Vancouver and Seattle, anti-violence groups housed in community centers and organized on an *ad hoc* basis engage most directly in social contention in the hate crime field. At the time of the interviews in 2005 and early 2006, (LGBT) community centers in both Vancouver and Seattle had established grant-funded anti-violence programs. Both programs were temporary and both ended shortly after the interviews. During its six-month lifetime, the

Vancouver program provided support and advocacy for hate crime victims, and it concluded with a Final Report that analyzed recent cases of homo- and trans-phobic violence and detailed the results of a survey showing the prevalence of violence among LGBT people. The Final Report reveals that the project was created in part as a response to the Aaron Webster killing. The Seattle project had a nine-month duration and was designed both to provide resources and referrals for victims of hate crimes and to increase education and awareness about hate crimes. Like its Vancouver counterpart, the proposal for the Seattle project was triggered by the Micah Painter attack and another similar attack in Seattle's Ballard neighborhood. Rather than a final report or an independent survey, however, the Seattle project culminated in a city council proceeding to publicly review the procedures used by Seattle police to classify hate crimes for statistical and investigative purposes.

In both Seattle and Vancouver *ad hoc* anti-violence groups were formed in response to the Painter and Webster attacks. The Vancouver group, which still exists, organized and publicized a community survey that gauged both the details of hate crimes in the LGBT community and the trends in the characteristics of perpetrator groups over the past five years. The survey was motivated both by the Webster killing and by the refusal of Vancouver police to publicly report their own hate crime data. In Seattle, *ad hoc* organizing took the form of an online bias crime forum that prompted viewers to attend court proceedings and other activities related to the Micah Painter prosecutions and sentencing proceedings. A further *ad hoc* response appeared in Seattle, however, after police were seen to have inadequately responded to the Ballard attack. A resident frustrated by what he saw as an inadequate neighborhood response to the attack obtained copies of police hate crime reports over a five-year period, and in conjunction with the community-centered anti-violence project intern issued a Report analyzing and critiquing police hate crime classification practices. This Report resulted in public hearings in the City Council.

A comparison of contention by anti-violence groups gives the most direct answers to the research questions posed. Differences in hate crime laws, particularly at a local level, do matter to groups in society. Specifically, differences in social contention by both community and *ad hoc* anti-violence initiatives in Seattle and Vancouver are closely correlated to two key variables: (1) local legislative standards governing police hate crime classification decisions; and, (2) a mechanism for the publication and public review of police hate crime statistics. In Seattle, where both local legislative standards and public review are available, nongovernmental groups tend to focus their contention on reviewing police classification decisions and presenting their complaints in a local legislative forum. In Vancouver, where public statistics and a local legislative forum are unavailable, nongovernmental groups are not motivated to focus their contention either in a governmental forum or according to official legal standards. Whereas Seattle groups practice *contained* contention, Vancouver groups practice *uncontained* contention in the hate crime field.

Data from school safety, family support, and transgender rights groups tend to confirm the findings from the anti-violence groups. The school safety groups serve as an apt basis for triangulating the data from the anti-violence groups. Because laws and policies regulating school harassment and bullying are structured similarly in Vancouver and Seattle, very similar, parallel sites of contention about homo- and trans-phobic school violence exist at both locations. The data from school safety groups in Seattle and Vancouver disclose practices that are very similar in both style and content. Groups in both cities advocate for local school board policies, and state or provincial legislation, designed to prohibit harassment motivated by sexual orientation or gender identity in schools. While the resulting laws and policies are not identical, the similarity in social contention at these local sites tends to verify the findings from the anti-violence groups.

The family support groups in Vancouver and Seattle were chapters of the same organization, Parents and Friends of Lesbians and Gays (PFLAG). As such, they were organized

according to almost identical principles. Despite some variations in degree, they also engaged in similar advocacy activities. Transgender rights organizers in Seattle and Vancouver likewise shared many common traits, but their differences tend to confirm the findings from the anti-violence groups. The Seattle group's organizers had successfully advocated local laws prohibiting "gender identity" discrimination and authorizing enhanced penalties for municipal offences motivated by "gender identity." After the conclusions of the interviews, moreover, the Seattle group issued a report thoroughly surveying trans-phobic violence in the region. These activities had no visible counterpart in Vancouver, and the difference tends to verify the important role of local lawmaking authority in shaping the contentious practices of nongovernmental groups.

Chapter 5 concludes by comparing the policies and practices of police hate crime units. Police agencies employ specialized hate crime units in both Vancouver and Seattle. Data from interviews and other sources confirm the basic difference in knowledge practices of these groups. The Seattle Police Department is subject to local legislation requiring it to compile and report hate crime statistics. Seattle Police are also subject to local legislative oversight—the Seattle City Council has the authority to create criminal offences and to authorize enhanced penalties for hate crimes under the municipal code. The Vancouver Police Department is not subject to any of these constraints, and they do not publish their hate crime statistics or otherwise subject their hate crime classification decisions to routine public review.

The data set out in Chapter 5 and the results of the analytical legal comparison from Chapters 3 and 4 are joined in a concluding analysis of results in Chapter 6. This final Chapter synthesizes the similarities and differences in legal systems and nongovernmental social contention in the hate crime field. Tables 6.3 and 6.4 attempt isolate the important variables disclosed along two axes: (1) the legal classification system, including local legal standards and the availability of public review for hate crime classification decisions; and, (2) social

contention, including contained or uncontained sites of contention and reactive or ongoing styles of contention. In these terms, a correlation is shown between the availability of local legislative standards and public review of hate crime classification decisions and reactive contention contained by the existing local legal system and its standards. Conversely, where local legislative standards and public review of hate crime statistics are non-existent, nongovernmental groups contend in an uncontained manner, although their style of contention may also tend to be reactive.

Chapter 6 elaborates on these variables by emphasizing three aspects of the dynamic nature of social contention in the hate crime field. First, Figure 6.1 illustrates the potential for a multiplier effect with a series of successive triggering events. Where a new hate-related event appears during an existing contentious episode, nongovernmental social contention appears to undergo a multiplier effect resulting in mobilizing energy greater than the sum of two events more separated in time.

Second, contention in the hate crime field establishes important intermediary roles among both governmental and nongovernmental organizations. Police hate crime units fulfill different intermediary roles that coincide with differences in local legal standards and the availability of public review for hate crime classification decisions. In Vancouver, where police maintain a close proprietary control over their hate crime data, police officials serve as gatekeepers to law reform in the hate crime field. Thus, Vancouver police were able to channel their internal hate crime data into successful advocacy for the addition of “sexual orientation” as a prohibited ground of discrimination in Canadian hate propaganda laws. In Seattle, by contrast, police are stripped of this gatekeeper role, because they do not exercise proprietary control over hate crime data. In their place local legislators in the City Council become official brokers of legal recognition in the hate crime field.

These official, governmental brokers have their corresponding nongovernmental intermediaries. In Seattle, local legislative oversight and publicly available hate crime data serve as local sites of nongovernmental legal contention in the hate crime field. Because these sites are available to them, social groups in Seattle use them to contend for particular hate crime classification decisions or for systematic change. In the process of this contention, the representatives of these groups gain both skills and notoriety. This process facilitates the formation of a class of local, nongovernmental intermediaries or brokers in the hate crime field. Vancouver, on the other hand, is relatively lacking in similar skills-building and brokerage activities between local governmental and nongovernmental groups in the hate crime field. It is possible that nongovernmental groups in Vancouver experience offsetting opportunities to build skills and notoriety in their relationships with each other. The interview informants did not, however, view Vancouver's relative lack of local sites of contention in the hate crime field as an advantage.

Third, the same factors that influence the dynamics of social contention in the hate crime field also serve as mobilizing influences among nongovernmental groups that monitor hate crimes. Whether it is the actual formation of a new organization or the creation of a new initiative like a community survey, hate-related events tend to trigger mobilization among nongovernmental groups. The trajectory of mobilization in response to hate related-events is powerfully shaped by the availability or unavailability of local sites of legal contention.

Official hate crime labeling inquiries, and the laws that shape them, matter to the nongovernmental social groups that monitor homo- and trans-phobic hate crimes in Canada and the United States. These groups participate in the production of legal knowledge in the hate crime field. Chapter 6 concludes with a summation findings and a listing of significant questions deserving of further research.

Knowledge about hate crimes comes from a complex, dynamic process that combines both official governmental inquiry and nongovernmental social contention. The remainder of the thesis is not meant to test the truthfulness of knowledge about any particular hate-related event or even the desirability of hate crime laws necessarily. Instead, it aims to reveal how nongovernmental groups mobilize and contend in the hate crime field. Specifying and analyzing governmental and nongovernmental information practices in response to events suggesting homo- and trans-phobic bias should empower not only policy makers and legal theorists, but also the groups themselves. Equipped with an understanding of the dynamics of social contention in the hate crime field, it is hoped that all involved may better prevent future atrocities.

2 Hate Crimes, Social Contention & Legal Knowledge

This Chapter attempts to identify the key ideas that constitute our contemporary understanding of hate crime law as it applies to homophobic and trans-phobic violence. What follows is not a thorough tracing¹ of the origins of hate crime law but rather a set of examples roughly combining legal histories and literary references about violence and inequality. I suggest that no single origin exists for the concepts embedded in our understanding of hate crimes and that the field of hate crime law is therefore best introduced with reference to concrete examples. The Chapter begins by considering the 1998 killing of gay college student Matthew Shepard in Laramie, Wyoming as a typical “event” triggering mobilization, contention, and legal inquiry in the hate crime field. The remaining discussion will draw upon a handful of illustrations from more distant history to generate a simple model for understanding the social contention of nongovernmental social groups that monitor hate-related events today.

2.1 Matthew Shepard—a Case of Hate Crime Law & Social Contention

A recent retrospective in Laramie’s daily newspaper interprets the local legal outcome of the Matthew Shepard killing by presenting the statements of two local Police officials:

Nearly seven years ago, a gay college freshman named Matthew Shepard was tied to a fence and beaten into a coma. He died five days later. His murderers were convicted and sentenced to life in prison.

....

After the attack, the Laramie City Council implemented a new policy requiring all police to receive training on hate crime investigations. Additionally,

¹ The idea of a “trace” appears in Derrida’s deconstructive imperative: “the idea of the sign [] must be deconstructed, . . . the signified is ordinarily and essentially [] trace, [] it is *always already in the position of the signifier*.” Jacques Derrida, *OF GRAMMATOLOGY*, at 73 (Spivak Tr., 1976) (emphasis in original); *see also* Jacques Derrida, *WRITING & DIFFERENCE* (Bass Tr. 1978). Jennifer Beard utilizes a similar approach, tracing the concept of development in western imperial identity formation from origins in the texts of churchmen, including Augustine. *See* Jennifer Beard, *THE POLITICAL ECONOMY OF DESIRE: LAW, DEVELOPMENT & THE NATION* (2006).

the police chief must monitor the number of hate crimes committed each year and submit the results to the City Council.

In 2004, one hate crime was reported in Laramie. Police Commander Dale Stalder said a gay man was assaulted by his sister's boyfriend. The man suffered minor injuries. "The boyfriend told him the reason he was doing it was because of his sexual orientation," Stalder said. "The investigation really supported that, so we classified it as a (hate) crime."

Stalder said he was surprised by the results of a recent University of Wyoming survey, which indicates 30 percent of students believe there is a homophobic climate on campus. "I thought it would be lower," Stalder said. "We're getting a different impression here at the PD. We don't feel like we have that issue. I don't see it in the reports."

Hate crimes — which are perpetrated out of prejudice for a race, religion, national origin or sexual orientation — are fairly uncommon in Laramie, Stalder said.

In 2002 and 2003, no hate crimes were reported. However, there was a surge in cases in the months following the 9/11 attacks. "We had about 10 cases where minority groups felt like someone was targeting them," Stalder said. "People were on edge. In that case, I think people were over-reporting it."

[Laramie Police Chief] Deutsch, who will present the latest hate crime data to the City Council on Tuesday, also said the city is undeserving of the homophobic stereotype. "It could have happened anywhere at anytime, in a small city or big city," Deutsch said. "I've found it almost offensive that people have stereotyped us as this redneck, backward type of city." Someday, the rest of the world may see the city in a different light.

But it will take time, Deutsch said. "You never want to forget, and you always want to memorialize something like this," Deutsch said. "But at some point, I hope there's a separation between what happened in our community and the nature of our community."²

The content of this account is typical. Both local and national journalists continue to reinterpret the Shepard killing, frequently as a dialog among elite participants in the criminal justice system.³ Accounts like these provide a glimpse of the official legal knowledge of hate crimes.

² Angela Brooks, *Fighting the Laramie stereotype*, LARAMIE BOOMERANG, May 3, 2005. More immediate "aftermath" or "wake" scholarship and journalism includes: *Writing the Book of Matthew*, OUT, March, 1999; Bernard P. Haggerty, *Hate Crimes: A View from Laramie, Wyoming's First Bias Crime Law, the Fight Against Discriminatory Crime, & a New Cooperative Federalism*, 45 HOW. L. J. 1 (2001); Tony Kushner, *Matthew's Passion*, THE NATION, Nov. 9, 1998, *reprinted sub nom.* NECESSARY INCIVILITIES, in HARPER'S MAGAZINE, Jan. 1999, at 24; Beth Loffreda, LOSING MATT SHEPARD: LIFE & POLITICS IN THE AFTERMATH OF ANTI-GAY MURDER (2000); FROM HATE CRIMES TO HUMAN RIGHTS: A TRIBUTE TO MATTHEW SHEPARD (Mary E. Swigonski, *et al.*, eds., 2001); Melanie Thernstrom, *The Murder: The Crucifixion of Matthew Shepard*, VANITY FAIR, Mar. 1999, at 209; JoAnn Wypijewski, *Report, A Boy's Life: For Matthew Shepard's Killers, what does it take to pass as a man?* HARPER'S MAGAZINE, Sept. 1999, at 61.

³ Two local print news sources maintain web links to archived articles that reference Shepard. WESTWORD, a Boulder, Colorado weekly, provides a searchable archive of all of its stories dating to before the Shepard killing. See <http://www.westword.com/> (accessed Feb. 24, 2006). The LARAMIE BOOMERANG also maintains a web archive, but its content was not available online at the time of Shepard's killing, and its online archive omits articles before 2002. See <http://www.laramieboomerang.com/index.asp> (accessed Feb. 24, 2006).

And, a handful of fascinating studies have examined the information practices used to arrive at official hate crime labeling decisions.⁴

But, just as the victims of hate crimes are mentioned only indirectly in official hate crime statistics, the voices of victims are filtered, or even effaced, in a scholarly analysis of hate crime statistics. What is generally missing from hate crime scholarship is an analysis of the hate crime labeling process among nongovernmental groups with a stake in the labeling decision. Few scholars have examined the consequences of hate crime labeling practices for nongovernmental groups that monitor hate crimes. Little is known about the role of nongovernmental groups that contest hate crime labeling decisions or about the effects of official labeling practices on social mobilization among nongovernmental groups. The illustrations that follow will attempt to lay a foundation for a study of such groups.

2.2 Hate Crimes & Social Contention—Historical Challenges to Intolerance

Even a brief sampling of contention in the aftermath of the Shepard killing reveals important patterns in knowledge-producing practices. The criminal labeling affixed after a series of trials, convictions, and sentences represents the routine knowledge production of the criminal justice system. Criminal proceedings result in *ad hoc* labeling—an assessment of guilt on a case-by-case basis. Hate crime statistics, on the other hand, represent a more systematic, or ongoing

⁴ Ellen Faulkner's recent work provides an excellent example of the long-range impact of current knowledge-producing practices among LGBT groups. See Ellen Faulkner, *Homophobic Hate Propaganda in Canada*, 5 J. HATE STUDIES 63 (2006/07) (Special Issue on Hate and Communication, Gonzaga University School of Law, Institute for Action Against Hate) (comparing Canadian and American hate speech laws). The most frequently cited resource in her recent article about homophobic hate propaganda in Canada is the news clipping archive maintained by an Ontario LGBT group. See, e.g., Faulkner, *id.*, at 89 n.6 (referencing "large source of data [] obtained from news clippings archived at the Coalition for Lesbian and Gay Rights Ontario."). It is notable that Faulkner's data are drawn primarily from Ontario groups or national groups based on Ontario. Thus, the examination of Western Canadian groups here represents a needed addition to existing literature.

inquiry.⁵ A parallel terminology might be applied to the corresponding *ad hoc* or ongoing contention of nongovernmental groups that contest official governmental accounts.

But, to begin to understand the dynamics of contention in the field of hate crimes today, it will be useful to identify some of the historical antecedents to the development of “hate crime” classification systems. What we consider “hate crimes” today would have been known by different terminology even a few decades ago. Our current hate crime laws cannot be traced in unbroken lines to ancient legal principles. Even our understanding of equality has changed significantly in recent decades. Therefore, by definition, social contention about the classification of hate-related events as “hate crimes” is only a recent phenomenon. Nevertheless, some of the core concepts related to hate crimes and social contention appear in the historical record.

In terms of homophobic violence, historian John Boswell provided one of the best histories, “using gay people as a case study of intolerance.”⁶ Boswell’s seminal study resorted to indirect literary references, because of the relative lack of evidence from other historical sources. He expressly cautioned against relying on legal texts alone, because they “may be grossly misleading if one does not comment on the extent to which such laws are honored, supported, or generally approved.”⁷ Despite his caution, Boswell examined some legal texts in their capacity as literary evidence. On the other hand, even Boswell’s thorough study was able to uncover only a few examples of social contention on behalf of gay people or in the name of tolerance toward homosexuality. Thus, Boswell’s examples do not disclose the kinds of social contention or

⁵ Contention and inquiry may also be classed by the persistence of the knowledge produced, as unrecorded versus recorded or *epigraphic* knowledge, or by its mode, *epistolary*, i.e., presented in an open letter. A further division of inquiry types separates those seeking particular, material reparation from those seeking pure ideological redress. See John Torpey, *MAKING WHOLE WHAT HAS BEEN SMASHED, ON REPARATIONS POLITICS* (2006).

⁶ John Boswell, *CHRISTIANITY, SOCIAL TOLERANCE, & HOMOSEXUALITY: GAY PEOPLE IN WESTERN EUROPE FROM THE BEGINNING OF THE CHRISTIAN ERA TO THE FOURTEENTH CENTURY*, at 30 (1980) (hereinafter Boswell); Boswell’s study inaugurated its own line of research. See, e.g., *THE BOSWELL THESIS: ESSAYS ON CHRISTIANITY, SOCIAL TOLERANCE, & HOMOSEXUALITY* (Mathew Kuefler ed., 2006) (introducing components of “Boswell Thesis” and collecting essays elaborating on Boswell’s original concepts).

⁷ Boswell, *id.*, at 22. Boswell’s caution spoke to “restrictive statutes,” but the same can be said of today’s more supportive statutes, including laws authorizing criminal penalties for homophobic hate crimes.

mobilization for legal equality that we would recognize today. In sum, Boswell presents a long series of examples from laws, literature, and theology, expressing some social tolerance toward homosexuality, but rapidly changing to official, legal intolerance around the Twelfth Century.

Taking my cue from Boswell, I likewise provide three examples from the literary record that indirectly reveal ideas about social intolerance. Each example contains an appeal loosely related to social tolerance and equality, and each invokes legalistic principles in response to a violent triggering event. None of the examples relates directly to homosexuality, but all three illustrate the use of legal classification to challenge acts of intolerance. Because each challenge is situated in a different social and legal context, a comparison will serve to introduce the dynamics of social mobilization and social contention in response to acts of intolerance. This brief analysis will be used to introduce the key concepts that remain important in the study of social contention about hate crimes today. Briefly stated, these concepts include both the important intermediary roles assumed by governmental and nongovernmental groups and the sites and styles of social contention and mobilization employed to classify and challenge acts of intolerance. Today, as in the distant past, challenges to social intolerance produce both knowledge and knowledge practices, among both governmental and nongovernmental groups.

Boswell, an expert linguist and historian, was unable to locate significant direct evidence of the practices of nongovernmental groups opposed to social intolerance. Nonetheless, like Boswell, I can set out a few examples to introduce the dynamics of today's social contention in the hate crime field. Unlike Boswell's subjects, however, today's social groups are available for direct study, and their practices are examined in greater detail in the concluding Chapters.

Of the three examples that follow, the first, from Dante, establishes the important role of written laws, even in Medieval Europe, in the condemnation of group intolerance. The two additional

examples, from St. Augustine and St. Patrick illustrate the use of legalistic rhetoric to condemn intolerance in response to discrete events.

2.2.1 Dante, the Sowers of Discord & *De Scandalis Magnatum* (ca. 1310)

The Cohen Committee's influential 1966 report on hate propaganda in Canada traced the history of both social intolerance and its regulation to early English laws.⁸ The Cohen Report documented early examples of social inequality and intolerance in Medieval England, from the Eleventh Century onward:

[T]he eloquent champions of freedom of religion and conscience, freedom of speech and writing, in 17th century England, like John Milton and John Locke, denied such freedoms to atheists, Roman Catholics and Mohammedans [sic] on the ground that they could not be trusted to be loyal to the English crown, the English way of life, and English society.⁹

The Committee's account of intolerance cited the advent of the African slave trade when, in both 1596 and 1601, Elizabeth I repeatedly attempted to expel all "negars and Blackamoors" because, "of which kinde of people there are already here too manie."¹⁰ British scholar Benjamin Bowling provides similar examples: "The massacre of 30 Jews in a riot in London after the coronation of Richard I in 1189 was followed by similar attacks in York, Bury St. Edmunds, Norwich and Lincoln until the small Jewish community was expelled in 1290."¹¹

Against the backdrop of Medieval English social intolerance, the Cohen Report juxtaposed a 1275 law known as *De Scandalis Magnatum*, one of the earliest attempts to regulate

⁸ *The Report to the Minister of Justice of the Special Committee on Hate Propaganda in Canada* (Ottawa: Queen's Printer, 1966) (hereinafter *Cohen Report*).

⁹ *Cohen Report, id.*

¹⁰ *Cohen Report, id.*

¹¹ Benjamin Bowling, *VIOLENT RACISM: VICTIMIZATION, POLICING & SOCIAL CONTEXT*, at 24 (1998) (citation omitted).

group intolerance.¹² Canadian Bruce P. Elman situates *De Scandalis Magnatum* in the legislative history of today's hate crime laws:

One of the earliest attempts at dealing with group defamation through the criminal law occurred in England in 1275. The law, known as *De Scandalis Magnatum*, prohibited the spreading of false rumors that might sow discord between the King and the Noblemen of the Realm. This law is not only of historical interest. Its offspring, the crime of "Spreading False News," can be found in section 181 of the Criminal Code [of Canada]. It was upon this legislative provision that the prosecution of holocaust denier Ernst Zundel was based. . . .

An early prosecution for promoting hatred against Jews occurred in 1732 in the case of *R. v. Osborn*. The defendant in this case had published a false accusation that the Jews of London killed a Jewish woman and her illegitimate child because of her alleged promiscuity with a Christian. Riots occurred as a result of this libel, and Jews were attacked and beaten. Ultimately, Osborn was convicted of publishing a libel that occasioned a breach of the peace.¹³

Knowledge about *De Scandalis Magnatum* experienced a surprisingly rapid diffusion through Medieval Europe. The villains whose behavior gave rise to the English statute appeared in Italian poetry only about thirty years after it took effect. In 1310, Dante used vivid imagery to identify the Brit who best illustrated his category "Sowers of Discord Between Kinsmen":

I saw it there; I seem to see it still—
 a body without a head, that moved along
 like all the others in that spew and spill.
 It held the severed head by its own hair;
 swinging it like a lantern in its hand;
 and the head looked at us and wept in its despair.
 It made itself a lamp of its own head,
 and they were two in one and one in two;
 how this can be, He knows who so commanded.
 And when it stood directly under us
 it raised the head at arm's length toward our bridge
 the better to be heard, and swaying thus
 it cried: "O living soul in this abyss,
 see what a sentence has been passed upon me,
 and search Hell for one to equal this!
*When you return to the world, remember me:
 I am Bernard de Born, and it was I
 who set the young king on to mutiny,*

¹² *Cohen Report, supra* note 8, at 7 (identifying *De Scandalis Magnatum* as first English hate crime law).

¹³ Bruce P. Elman, ch. 7, at 151, in *UNDER THE SHADOW OF WEIMAR: DEMOCRACY, LAW, & RACIAL INCITEMENT IN SIX COUNTRIES* (Louis Greenspan & Cyril Levitt, eds., 1993) (citations omitted). Osborn was prosecuted for libeling a group: "certain Jews lately arrived from Portugal and living near Broad Street." See *Cohen Report, supra* note 8, at 43 (quoting Osborn).

*son against father, father against son
as Achitophel set Absalom and David;*
and since I parted those who should be one
in duty and in love, I bear my brain
divided from its source within this trunk;
and walk here where my evil turns to pain,
an eye for an eye for all eternity:
thus is the law of Hell observed in me.¹⁴

The villain classified as a “Sower of Discord” by Dante was Bertrand de Born, “a great knight and master of the troubadours of Provence.”¹⁵ He is said to have instigated a quarrel between Henry II of England and his son Prince Henry, called ‘The Young King’ because he was crowned within his father’s lifetime.¹⁶ In the second Cantic of the Divine Comedy, the Purgatorio, Dante expresses his admiration for the both Henry II and his successor Edward I:

See Henry of England seated there alone,
the monarch of the simple life: his branches
came to good issue in a noble son.¹⁷

In 1300, the setting of the Comedy, “The Young King,” Henry III has died, and his son Edward I is King of England. Dante classifies Henry III among the “Negligent Rulers,” in Purgatory because, though “pious,” he “attended so many masses daily that he never got around to governing his kingdom.”¹⁸ “Edward I, however, [] crowned a glorious reign with an enduring reform of English law.”¹⁹

Before he died in 1278, Henry II proclaimed *De Scandalis Magnatum*, prohibiting: “false rumors that might sow discord between the King and the Noblemen of the Realm.”²⁰ The law apparently sought to prevent the kind of discord that Bertrand de Born had sown within the royal family. Dante’s sympathy with Edward I is understandable. He praises England’s “noble son”

¹⁴ Dante Alighieri, THE DIVINE COMEDY, INFERNO, XXVIII, lines 118-43 (Norton, John Ciardi Tr., 1970) (emphasis added).

¹⁵ Provence was located in present-day France; therefore, Bertrand de Born was technically a “Brit” only from the point of view of the English Kings who then ruled much of Western Europe.

¹⁶ Dante, *supra* note 14, at 149 n.119.

¹⁷ Dante, *id.*, PURGATORIO, VII, lines 130-32.

¹⁸ Dante, *id.*, at 225 n.130.

¹⁹ *Id.*

²⁰ *De Scandalis Magnatum*, (1275); see *Cohen Report*, *supra* note 8.

because he has transcended the division sown into his own royal family, between his father and grandfather—perhaps due to the protections of the statute *De Scandalis Magnatum*—and begun a glorious reign of peace, stability, and government under law. Meanwhile, in Dante’s Florence, families have warred on each other for decades, alternately expelling each other, destroying each other’s palaces, issuing special decrees against whole blood lines, and declaring decrees of heresy.²¹ Dante himself languishes in a “long exile” in France, forced to flee his own country’s strife. Receiving reports from England, Dante clearly came to admire the stability and peace represented in England’s “noble son” Edward I, and his reign of law. Central to Dante’s vision of inter-group harmony in Florence are the organized English laws, including *De Scandalis Magnatum*, which restored governmental stability after a period of inter-group strife.

Dante’s Canto about “Sowers of Discord” is not the one true source of hate crime law in either Canada or the United States.²² Moreover, *De Scandalis Magnatum* privileged harmony among only a handful of elites in English society. Nevertheless, Dante’s poem documents the rapid diffusion of legal concepts about violence and inequality over time, across the geography of Europe, and through society. And, Dante’s use of English law to support his classification of those who would promote social division in European society represents a powerful early example of the use of legalistic rhetoric in response to inter-group intolerance. The following two examples illustrate the use of legalistic rhetoric in response to discrete instances of inter-group violence.

2.2.2 Augustine’s Sermon on Lynching (ca. 390)

Augustine of Hippo, later St. Augustine, was a citizen of Roman North Africa; he received a formal education, traveled and lived overseas in Italy, taught rhetoric, and eventually

²¹ Dante, *supra* note 14, at 53.

²² Dante traces his label “Sowers of Discord” to recent English law and history, but he adds an older reference from Judeo-Christian Dogma: “Achitophel [who] set Absalom [against] David.” Dante, *id.*, at 149 n.137.

returned to North Africa to become Bishop in Hippo Regius. Augustine adopted a “life-time of philosophical discipline, spent in modestly rejecting false opinions,” modeled after the Academics of the Roman lawyer Cicero.²³ In addition to his weekly sermons, many of which were transcribed and survive, Augustine assumed the role of arbiter or “legal agent” in disputes and intermediary between the people and the Roman provincial government. He used the sanctions available to him to teach a respect for law, and the “quick and uncorrupted” settlements demanded from him, in turn, influenced his writing and sermons.²⁴

Augustine rigorously quelled discord among his intimates, for example, he “had written verses on the table to prohibit malicious gossip.”²⁵ Despite his support for the suppression of heretics, Augustine disliked the local military bullies: “His congregation plainly agreed; for they once lynched the commander of their garrison.”²⁶ Augustine’s biographer places this lynching in context with the defective Roman administration in the province:

Corn was the basis of wealth in Hippo. . . . Corn filled the countryside with its most depressed and violent elements—the serf-like tenant farmer and the seasonal laborer. Corn, above all, attracted the unwelcome attention of the Imperial administration. An official charged with the compulsory purchase of grain resided at Hippo; too much of the harvest drained away into his state warehouses for transport to Rome and to the army. Even Augustine, in the *City of God*, dared to wish that things had been better arranged; while *his congregation, especially the local traders, showed their opinion by lynching the commander of the local garrison. . . .*²⁷

In response to this lynching, Augustine preached a sermon combining legal and theological principles to both condemn intolerance and reinforce his quasi-governmental role as an intermediary between his parishioners and the Imperial government:

²³ Peter Brown, *AUGUSTINE OF HIPPO: A BIOGRAPHY*, at 80 (1967) (footnote omitted).

²⁴ *Id.*, at 140, 195-97, 226. Augustine’s biographer notes that, “Catholics were in the minority . . . For Donatism, not Catholicism, was the established church of Numidia.” Brown, *id.*, at 226.

²⁵ *Id.*, at 409 (footnote omitted). Augustine performed weekly sermons, but these were recorded by “the shorthand writer” and constitute a body of epigraphic knowledge. Augustine’s devotion to epigraphic knowledge production appears most powerfully in his library work. As the Empire was collapsing he spent the last three years of his life perfecting his library, including the 93 that he wrote. *Id.*, at 427-30.

²⁶ *Id.*, at 421 (citing Sermon 302, 16); *see also* John M. Rist, *AUGUSTINE: ANCIENT THOUGHT BAPTIZED*, at 194 n.114 (1994) (citing condemnation of lynching in Sermon 302). Augustine did not use the term “lynching”; the classification was apparently adopted by his Twentieth Century biographers.

²⁷ Brown, *supra* note 23, at 191-92 (emphasis added) (footnotes omitted).

“But that bad man did so many things, oppressed so many people, reduced so many to beggary and penury.”

There are judges to deal with him, there are the authorities to deal with him. The state is well ordered; for the authorities that exist have been ordained by God (Rom. 13:1). What business is it of yours to vent rage like that? What authority have you received Consider a man destined for the scaffold, and condemned, the sword already hanging over him; it is not permissible for him to be struck down by anyone among the various ranks of the authorities, but only by the one who is employed for this; the executioner is employed for this; . . . If the shorthand writer strikes the condemned man, already destined for the scaffold, isn't he killing both a condemned man and also condemning himself as a murderer?

. . . . Why do you want to render a very difficult account for someone else's death, when you don't bear the burden of authority? God has saved you from being a judge; why grab someone else's responsibility? Give an account just of yourself.

“But that soldier did such dreadful things to me.” I would like to know, if you were a soldier, whether you wouldn't be doing the same sort of things yourself. . . . I mean it isn't being a soldier that prevents you doing good, but being evil minded. . . .

. . . . We want the soldiers to listen to what Christ commanded; let us also listen ourselves. I mean he isn't Christ for them and not for us; or their God and not ours. Let us all listen, and live harmoniously in peace.

Brothers and sisters, I'll say it more bluntly, and as far as the Lord grants me, freely: It's only bad people who vent their rage on bad people. The obligations of authority are another matter. Because the judge is frequently compelled to unsheathe the sword, and he would prefer not to strike. As far as he is concerned, you see, he was willing to pass a sentence short of bloodshed; but perhaps he didn't want law and order to be undermined. It was the concern of his profession, of his authority, of his duty. . . .

In a word, brothers and sisters, why are we carrying on so long? We are all Christians; I up here also bear a burden of a greater danger. . . . [Y]ou all know that it's your needs which compel me to go where I would much rather not; to dance attendance, to stand outside the door, to wait while the worthy and the unworthy go in, to be announced, to be scarcely admitted sometimes, to put up with little humiliations, to beg, sometimes to obtain favor, sometimes to depart in sadness. Who would want to endure such things, unless I was forced to? Look, as a concession to me, give me a holiday from this business. I beg you, I beseech you, don't let anybody force me to it; I don't want to have to deal with the authorities. . . .

. . . . My brothers and sisters, I urge you, I beseech you by the Lord and his gentleness, be gentle in your lives, be peaceful in your lives. ***Peacefully permit the authorities to do what pertains to them, of which they will have to render an account to God and to their superiors. As often as you have to petition them, make your petitions in an honorable and quiet manner. Don't mix with those who do evil and rampage in a rough and disorderly manner; don't desire to be present at such goings on even as spectators.***²⁸

²⁸ Saint Augustine (Augustine of Hippo) *Sermon 302: On the Birthday of Saint Lawrence* (circa 400 A.D.), in 8 THE WORKS OF SAINT AUGUSTINE: A TRANSLATION FOR THE 21ST CENTURY, at 300 ¶¶ 10-22, 300-312 Notes (John E. Rotelle ed. 1994) (emphasis added) (reprinting Augustine's Sermon on Lynching with references); *see also generally*, THE WORKS OF SAINT AUGUSTINE, Vol. I: *the Confessions* (John E. Rotelle, ed. 1990) (chronicling Augustine's conversion, and indicating views about "hatred").

The legal and social regulation of intolerance and inequality in Augustine’s Rome are unfamiliar to us, and we would not recognize Augustine as a champion of social equality by today’s standards.²⁹ Still, his admonitions against rampage and his appeals to lawful authority provide a leading example of contention against violent intolerance.

On the other hand, Augustine did resist inequality in Roman society in North Africa, especially when, in the “last politically unstable years of Augustine’s life,” raids for “slave-trading in free citizens” had undergone a “revival.”³⁰ Augustine “spent much money trying to mitigate” the sale of citizens into slavery.³¹ Slave taking among Roman citizens was not confined to Augustine’s North Africa. A similar practice was encountered by St. Patrick in Ireland, at about the same time. Despite the separation of distance, Augustine and Patrick utilized similar responses to slave-taking. The final example of a legalistic response to intolerance comes from Patrick’s condemnation of slave taking in Ireland.

2.2.3 Patrick’s Letter to the Soldiers of Coroticus (ca. 420)

Augustine and Patrick both worked in “Western” Roman provinces—Ireland was part of Britannia and Hippo Regius was on the Northern coast of Numidia.³² But, Ireland was much more remote than Numidia, and Roman influence arrived there later. Augustine’s Numidia was brought under Roman “Rule” by 133 B.C. and England by 117 A.D. And, though Patrick and others introduced Roman religion, Ireland was never under direct Roman “Rule.”³³ Like

²⁹ For example, when Rome put down an uprising by a Moorish Count, Augustine labeled the Donatist clergy who allied with the rebels “monstrous” enemies of “Roman order.” He used his position to preach against the united “Heretics, Jews and Pagans.” Brown, *supra* note 23, at 230-31. Augustine revealed his understanding of social and marital equality when he dismissed his slave-concubine, who was the mother of his son Adeodatus, in exchange for a better engagement. *Id.*, at 213 n.24 (1994).

³⁰ *Id.*, at 237 n.37 (citing authorities).

³¹ *Id.*, at 237.

³² I take my basic geographic and historical understanding of Augustine and Patrick in the Roman Empire from a standard text. See THE OXFORD HISTORY OF THE ROMAN WORLD (John Boardman, *et al.* eds. 1986); see generally *id.*, at 143-45, Map 3, The Roman Empire (Western Provinces).

³³ See *id.*, at 152-53, Map 4, The Growth of Roman Rule.

Augustine, Patrick was technically born in a province of Rome, but unlike Augustine Patrick lived through Rome's disintegration.

Beyond their different geo-political contexts, Patrick's personal experiences as a young adult were far different than Augustine's. Patrick was himself captured and taken to Ireland as a slave as a young adult. He later escaped, entered the priesthood, and eventually returned as the first true Bishop of Ireland. While Augustine was an administrator and a prodigious scholar in the established church in North Africa, Patrick was mostly occupied with establishing and administering the new church in Ireland.³⁴

Of the relatively few texts available,³⁵ the most important here is a letter Patrick sent to protest the taking of slaves from among his converts.³⁶ Patrick's Letter is not the same kind of contention as Augustine's Sermon on Lynching. Patrick's editors describe the slave-taker, Coroticus as, "one of those local rulers on imperial territory who, after the breakdown of Roman Rule, defended as best they could the remnants of Roman civilization against the 'barbarians.'"³⁷

By the time Patrick eventually made his way back to Ireland as its Bishop, Coroticus had come to power on the British coast, from which he launched reprisal raids along the adjacent coast of Ireland. In one such raid he killed and enslaved a number of Patrick's newly baptized Christians. Patrick, a former slave himself, first sent a letter directly to Coroticus, who merely jeered. In response, Patrick sent this second letter, addressed to the Soldiers of Coroticus:

I, Patrick, a sinner, unlearned, resident in Ireland, declare myself to be a bishop. Most assuredly I believe that what I am I have received from God. And so I live among barbarians, a stranger and exile from the love of God. . . .

2. With my own hand I have written and composed these words, to be given, delivered, and sent to the Soldiers of Coroticus; I do not say, to my fellow citizens, or to

³⁴ Patrick's work is described as follows: "In adapting the organisation of the Roman Church to the conditions of Ireland, where there were no cities, [Patrick] seems to have made the tuatha (states) his dioceses; the episcopal sees, called civitates, were probably organized on a quasi-monastic pattern. Being himself a lover of monasticism, he transmitted this love to the Irish." Boardman, *et al.*, *id.*, at 6-7 (footnotes omitted). Though not a prolific scholar, Patrick wrote his own *Confession*, in the form of an open letter apparently influenced by Augustine's *Confessions*.

³⁵ See ANCIENT CHRISTIAN WRITERS: THE WORKS OF THE FATHERS IN TRANSLATION, No. 17 *The Works of St. Patrick & St. Secundinus Hymn of St. Patrick*, at 41-47 (Ludwig Bieler Tr., 1953) (reprinting Letter).

³⁶ See Bieler Tr., *id.*, at 11-13 (describing the context of the Letter).

³⁷ *Id.* In Britain this situation had existed since the withdrawal of Roman troops in 407. *Id.*, at 11.

fellow citizens of the holy Romans, but to fellow citizens of the demons, because of their evil works. Like our enemies, they live in death, allies of the Scots and the apostate Picts. Dripping with blood, they welter in the blood of innocent Christians, whom I have begotten into the number of God and confirmed in Christ!

3. The day after the newly baptized, anointed with chrism, in white garments (had been slain)—the fragrance was still on their foreheads when they were butchered and slaughtered with the sword by the above-mentioned people—*I sent a letter* with a holy presbyter whom I had taught from his childhood, clerics accompanying him, *asking them to let us have some of the booty, and of the baptized they had made captives. They only jeered them.*

....

7. Wherefore, then, I plead with you earnestly, ye holy and humble of heart, it is not permissible to court the favour of such people, nor to take food or drink with them, nor even to accept their alms, until they make reparation to God in hardships, through penance, with shedding of tears, and set free the baptized servants of God and handmaidens of Christ, for whom He died and was crucified.

....

10. Did I come to Ireland without God, or according to the flesh? Who compelled me? I am bound by the Spirit not to see any of my kinsfolk. Is it of my own doing that I have holy mercy on the people who once took me captive and made away with the servants and maids of my father's house? I was freeborn according to the flesh. I am the son of a decurion. . . .

....

12. *I am hated.* What shall I do Lord? *I am most despised.* Look Thy sheep around me are torn to pieces and driven away, and that *by those robbers, by the orders of the hostile-minded Coroticus.* Far from the love of God is the man who hands over Christians to the Picts and Scots. . . .

....

16. Therefore, I shall raise my voice in sadness and grief: O you fair and beloved brethren and sons whom I have begotten in Christ, countless in number, what can I do for you? I am not worthy to come to the help of God or men. The wickedness of the wicked hath prevailed over us. We have been made, as it were, strangers. Perhaps they do not believe that we have received one and the same baptism, or have one and the same God as father. For them it is a disgrace that we are Irish. Have ye not, as is written, one God? Have ye, every one of you, forsaken his neighbor.

....

19. Where, then, will Coroticus with his *criminals*, rebels against Christ, where will they see themselves, they who distribute baptized women as prizes—for a miserable temporal kingdom, which will pass away in a moment? As a cloud or smoke that is dispersed by the wind, so shall the deceitful wicked perish at the presence of the Lord; but the just shall feast with great constancy with Christ, they shall judge nations, and rule over wicked kings for ever and ever. Amen.

20. I testify before God and His angels that it will be so as He indicated to my ignorance. It is not my words that I have set forth in Latin, but those of God and the apostles and prophets, who have never lied. . . .

21. *I ask earnestly that whoever is a willing servant of God be a carrier of this letter, so that on no account it be suppressed or hidden by anyone, but rather be read before all the people, and in the presence of Coroticus himself.* May God inspire them sometime to recover their senses for God, repenting, however late, *their heinous deeds*—

murderers of the bretheren of the Lord!—and to set free the baptized women whom they took captive, in order that they may deserve to live to God, and be made whole, here and in eternity! Be peace to the Father, and to the Son, and to the Holy Spirit. Amen.³⁸

Like Augustine’s Sermon, Patrick’s letter is expressly performative; he asks his followers to read it in public. And, like Augustine’s Sermon, the Letter is also obviously meant to record the series of episodic performances. Patrick must have retained a copy as a remembrance of the knowledge established—namely to document the killings and slave-takings along with his labeling of the soldiers as “criminals,” their deeds as “heinous.” On the other hand, in contrast to the other two texts, the Letter does not appear to propose any ongoing, systematic inquiry into violent inequality. The Letter, moreover, has no governmental force. Patrick’s letter certainly states his understanding of Roman Law—citizens are not to be taken slaves, and Christians are baptized into citizenship. Augustine held to the same understanding. But, unlike Augustine, Patrick does not pretend to have any authority to intercede with governmental authorities. Indeed, Coroticus would likely claim the same variety of governmental authority as the garrison soldier lynched by Augustine’s parishioners. But, unlike Augustine, Patrick had no governmental offices to visit, and so having no earthly intermediary role he offers his contention up in the form of a prayer.

2.3 Legal Inquiry & the Sites & Styles of Social Contention

Tracing the concepts used by Augustine, Patrick, and Dante to our current understanding of hate crime law is neither practical nor necessary here. The selections suffice to illustrate the concepts governing social contention and hate crime law today.

Augustine’s Sermon exhorts his congregation to rely on the legally established mode of dispute resolution—a complaint lodged by their intermediary (Bishop Augustine) with the

³⁸ See Bieler Tr., *supra* note 35, at 41-47 (emphasis altered, footnotes omitted). If space permitted, Augustine of Canterbury, who is said to have penned the first laws of England (ca. 600 A.D.), would present another model of social contention via a quasi-governmental intermediary.

Imperial governing authorities. Patrick, lacking any available Imperial authority, appeals directly to the slave takers. But, his medium is an open Letter, meant to be read to his converts. Augustine therefore submits to the containment of the legally constituted Imperial government; whereas, Patrick’s Letter has no point of reference in Imperial authority and therefore takes the form of a spiritual appeal. Unlike Augustine, Patrick is unconstrained by any fixed role in the Imperial government.

Both Augustine and Patrick are reacting to an individual case and affixing a label to an act of group violence with an element of inequality. Dante, on the other hand, condemns the Sowers of Discord within an integrated moral code. Dante’s condemnation of group incitement is part of a classification system, not a response to any single triggering event.

From these historical examples, a simple matrix of variables may be constructed to describe the structure of social contention in relation to a legal system that classifies acts of group violence or inequality. Either nongovernmental social contention or governmental legal inquiry may be classified according to two general “types”: Systematic and *Ongoing*, or Episodic and *Reactive*.³⁹ And, each example of social contention may be characterized as either *Contained* or *Uncontained* within a legal system. Table 2.1 sets out these preliminary variables.

Table 2.1—Legal Inquiry Type & Sites & Styles of Social Contention

Legal Inquiry	Social Contention (Site)	Social Contention (Style)
Single Case/Database	Contained/Uncontained	Reactive/Ongoing

To illustrate in more current terms, a nongovernmental social group might contend for a particular legal label in response to an individual hate-related event by holding a rally in support

³⁹ Both governmental and nongovernmental groups may be said to “contend.” The analysis here is limited to nongovernmental groups.

of the victim. If this is the only response, then the contention could be classed as reactive rather than systematic or ongoing. If the groups involved in the same rally further present victim impact statements in Court, then they will have contended within an episodic or reactive legal inquiry, the trial or sentencing proceeding.

While the types of social contention are surely more diverse, these types will serve as a preliminary model for the comparisons performed in the subsequent Chapters.

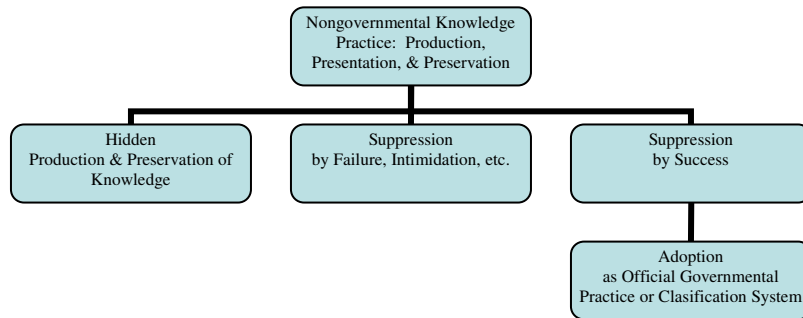
The historical examples drawn from Augustine, Patrick, and Dante are useful for one additional purpose. Like the statements of the Laramie police officials that began this Chapter, each of these historical examples hints at nongovernmental social groups whose voices are either filtered or obliterated in the surviving texts. The silencing of these voices deserves some attention for both ethical and analytical reasons.

2.4 Legal Knowledge & the Silencing of Social Contention

An historian wishing to know how nongovernmental social groups coped with homo- and trans-phobic violence would face two significant challenges. First, legal knowledge, in its modern form, enjoys the privilege of a systematic, written record. The practices of, and knowledge produced by, official governmental actors leave a formidable body of texts. Nongovernmental social groups, by contrast, appear only obliquely in the annals of official legal knowledge. And, because of their marginal resources, many such groups leave little, if any, historical records of their own. Unless a nongovernmental group succeeds in transmitting its ideas or its organization into official governmental practice, its forms of knowledge are apt to

become extinct.⁴⁰ Figure 2.1 illustrates three possible avenues for the suppression of nongovernmental legal knowledge.

Figure 2.1—Suppression of Nongovernmental Legal Knowledge



Second, accurate legal knowledge of intolerant activities is distorted when the law either authorizes or requires the intolerance. A persistent theme emerges from literature examining the history of social intolerance, and especially intolerance against sexual minorities: knowledge of both legal and extra-legal violence has been neglected and even suppressed. How many killings? How many victims and survivors? What were their names? How many attackers? What were their names? These questions are impossible to answer precisely because recorded legal knowledge is filtered by the official, legal intolerance of the past.

In his groundbreaking study of the social history of anti-gay intolerance in Europe, John Boswell emphasized the “most fundamental” disadvantage to students of anti-gay intolerance: “the longevity of prejudice against gay people and their sexuality has resulted in the deliberate falsification of historical records concerning them well into the [twentieth] century, rendering accurate reconstruction of their history particularly difficult.”⁴¹ In addition to outright censorship of history, moreover, Boswell cited a related, more subtle, problem: translators and “lexicographers” documenting the lives of gay people have reinterpreted, disguised, and

⁴⁰ See generally Doug McAdam, *Harmonizing the Voices: Thematic Continuity across the Chapters*, in *SILENCE & VOICE IN THE STUDY OF CONTENTIOUS POLITICS*, at 222 (Ronald R.Aminzade, *et al.*, eds. 2001) (addressing silence).

⁴¹ Boswell, *supra* note 6, at 17.

distorted the meaning of legal texts and other sources of knowledge.⁴² These and other problems caused Boswell to rely on data from a broad range of literary sources rather than legal texts alone.⁴³

While attitudes toward sexual minorities in Canada and the United States have changed, bias remains.⁴⁴ In his recent examination of homophobic violence in Canada, Douglas Victor Janoff confronted the same problems with biased, distorted, and even suppressed data.⁴⁵ Remarkably, Janoff's data came not from ancient history but from the immediate historical period of 1990 to 2005. In spite of his ten years of extremely thorough research, Janoff was forced to rely heavily on accounts of homophobic violence from newspapers and other extra-legal sources. Comparing Janoff's "necrology" of deaths due to homophobic violence with the sources available reveals that only about one-fifth of the killings appeared in any official legal account such as a court decision. The necrology reports 121 killings, and the book details many more non-fatal attacks. Nevertheless, Janoff is able to cite only about twenty court decisions, many exonerating the attackers or failing to condemn their prejudiced motives. Even with the citations provided by Janoff, some of the decisions he cites are not publicly available in either electronic or print databases because they were not officially reported. No comparable study of homophobic violence has been produced in the United States,⁴⁶ but such a study would undoubtedly encounter the same difficulties with biased, distorted, and suppressed data.

⁴² Boswell, *id.*, at 20-22 (collecting examples).

⁴³ *See id.*, at 22.

⁴⁴ Boswell decried the "serious scholarly problem" caused by current prejudices: "it is unlikely that at any time in Western history have gay people been the victims of more widespread and vehement intolerance than during the first half of the twentieth century, and drawing inferences about homosexuality from observations of gay people in modern Western nations cannot be expected to yield generalizations more accurate or objective than inferences made about Jews in Nazi Germany or blacks in the antebellum South." Boswell, *supra* note 6, at 23.

⁴⁵ Douglas Janoff, *PINK BLOOD: HOMOPHOBIC VIOLENCE IN CANADA* (2005). Janoff is not alone. Recent studies of forced sexual sterilization, medical experimentation, and eugenics practiced against lesbians and gays and other "sexual perverts" have encountered similar difficulties. Compare Nancy Ordovery, *AMERICAN EUGENICS: RACE, QUEER ANATOMY, & THE SCIENCE OF NATIONALISM* (2003), with Angus McLaren, *OUR OWN MASTER RACE: EUGENICS IN CANADA, 1885-1945* (1990).

⁴⁶ *But see* Gary David Comstock, *VIOLENCE AGAINST LESBIANS & GAY MEN* (1991) (surveying smaller Canadian and American studies alongside Comstock's own survey).

Despite the analytical challenges, contemporary knowledge practices of nongovernmental social groups that monitor homo- and trans-phobic hate crimes have been studied to a limited degree.⁴⁷ So far, however, three important details are missing from this scholarship. First, as Chapter 1 revealed, a preponderance of the research remains focused on governmental actors and institutions—very few studies examine the knowledge practices of nongovernmental social groups. Second, since homo- and trans-phobic violence have only recently received official legal condemnation, research to date tends to focus on the hate crimes themselves, rather than the consequences of hate crime laws for groups in society. Finally, partly because most of these studies examine a single case—or a single site—, they conclude without articulating a coherent model by which the knowledge practices of nongovernmental groups may be analyzed.

The production of legal knowledge outside official governmental channels is worth studying for its own sake. However, this thesis goes one step beyond the mere preservation of historically important data. The following Chapters use a cross-national comparison to isolate a single difference in hate crime classification systems to analyze the resulting differences in social contention by nongovernmental groups. While the observations presented are of inherent interest, the most significant result of the analysis may not be the answer to the specific experimental question, but rather the model used to arrive at the answer.

⁴⁷ See Maria M. Gomez, *DISCRIMINATION & EXCLUSION: AN INTERDISCIPLINARY APPROACH TO HATE CRIME POLITICS* (Ph.D. dissertation, New School Univ., 2006); Jennifer Anne Petersen, *FEELING IN THE PUBLIC SPHERE: A STUDY OF EMOTION, PUBLIC DISCOURSE, & THE LAW IN THE MURDERS OF JAMES BYRD JR. & MATTHEW SHEPARD* (Dissertation, Univ. of Texas Austin, Aug. 2006), available online at <http://www.lib.utexas.edu/etd/d/2006/petersend46798/petersend46798.pdf> (accessed Jan. 18, 2008); María Mercedes Gómez, *Crímenes de odio en los Estados Unidos. La distinción analítica entre excluir y discriminar*, 29 *DEBATE FEMINISTA* 158 (México, 2004) (reviewing North American hate crime literature from Latin American feminist perspective); Haggerty, *supra* note 2; Mary Ellen Faulkner, *A CASE STUDY OF THE INSTITUTIONAL RESPONSE TO ANTI-GAY/LESBIAN VIOLENCE IN TORONTO* (Ph.D. dissertation, Univ. of Toronto, 1999); T. A. Maroney, *The struggle against hate crime: a movement at a crossroads*, 73 *N.Y.U. L. REV.* 564 (1998). Surprisingly, no significant academic study of homo- or trans-phobic hate crimes in either Vancouver or Seattle has been conducted.

The goal is not to critically assess the effectiveness of responses to hate crimes by governmental or nongovernmental groups.⁴⁸ Nor is the goal to examine the experiences of hate crime victims themselves.⁴⁹ Instead this study examines the problem of homo- and trans-phobic hate crimes from a more theoretical perspective. In place of an attempt to assess the effectiveness of responses to hate crimes according to a necessarily artificial standard, this study simply compares the knowledge-producing practices of similar nongovernmental groups at different sites, operating under only slightly different legal classification systems.

Before exploring the practices of nongovernmental social groups, Chapter 3 will compare the contemporary legal principles that apply to the hate crime field in Canada and the United States. This analytical comparison will be followed in Chapter 4 with a study of two nearly contemporaneous cases from the two countries.

⁴⁸ *But see* Faulkner, *id.*, Introduction, at 1 (Toronto case study with goal of “critically assessing the effectiveness of” governmental and nongovernmental “institutional responses.”).

⁴⁹ *See* Faulkner, *id.*

3 Hate Crime Law & Equality in Canada & the U.S.: An Analytical Comparison

3.1 Introduction

This Chapter presents a comparative analysis of hate crime law in Canada and the United States, with a particular focus on the antidiscrimination language used to classify hate crimes in the statutes that authorize enhanced criminal penalties. In each country hate crime offences and criminal sentencing proceedings are part of a larger hate crime classification system that produces and certifies legal knowledge about discriminatory crimes and hate-related events.

Both official governmental bodies and nongovernmental groups in each country apply legal labels according to a complex and dynamic mixture of knowledge practices. This system of labeling and knowledge production has emerged as a recognized field of legal inquiry in both Canada and the United States. The historical and conceptual origins of the hate crime field are discussed in Chapters 1 and 2, and the participation of nongovernmental groups in official hate crime inquiry is addressed in Chapter 5. The official governmental labeling addressed here includes two components: (1) criminal proceedings such as charging decisions, jury verdicts, and sentencing decisions; and, (2) the processing and classification of knowledge about hate crimes separate from the purposes of criminal punishment.

Hate crime laws include both substantive offences penalizing discriminatory conduct and codified sentencing principles authorizing increased penalties for crimes motivated by discrimination. Less familiar are hate crime laws that structure and facilitate the creation of official legal knowledge about hate crimes outside of criminal proceedings. These “other” hate crime laws establish governmental statistics programs and define hate-related conduct in school

settings and elsewhere. Hate crime statistics laws notably structure knowledge both within and beyond criminal law enforcement.

The discussion here addresses hate crimes motivated by sexual orientation or gender identity or expression, or alternatively homophobic or trans-phobic hate crimes.¹ Because a study of homophobic and trans-phobic hate crimes presents ample complexity, crimes motivated by sex, gender, and other biases are addressed here only to provide context for an analysis within the overall hate crime field.²

Chapter 2 introduced hate crime classification as a form of legal inquiry, citing the “aftermath” of the Matthew Shepard killing as an example.³ One outcome of the contention arising from the killing was a local law establishing a systematic, ongoing hate crime inquiry within the agencies of local government and policing. This kind of hate crime classification system provides a model for the comparative legal analysis used here.⁴ Specifically, this Chapter presents an analytical comparison of the equality rights, formal hate crime laws, and official hate crime statistics and other legal labeling mechanisms, that embody the official hate crime classification system in each country.

Chapter 4 will compare recent prosecutions in the aftermath of hate-related incidents in Seattle and Vancouver. The cases were identified as significant by the groups interviewed for the study. Although the crimes were separated by a few years, the sentencing decisions were rendered at about the same time, and courts in both cities applied the general principles of hate

¹ The terms are from Douglas Victor Janoff, *PINK BLOOD: HOMOPHOBIC VIOLENCE IN CANADA*, at 158 (2005). Alternative labels exist. Cynthia Petersen uses the terms “heterosexist violence” and “queer-bashing.” See Cynthia Petersen, *A Queer Response to Bashing: Legislating Against Hate*, 16 *QUEENS L. J.* 237, 252 n.1 (1991) (explaining choice of terms). Petersen critiques the under-inclusion of anti-lesbian (“lesbophobic”) violence in hate crime research, concluding: “Clearly, more research is warranted in this area.” Petersen, *id.*, at 240. Here, the term “homophobic” is used for anti-gay and anti-lesbian, and “trans-phobic” encompasses gender identity or expression biases, including discriminatory attitudes against Male-to-Female and Female-to-Male trans-gendered persons.

² *But see, e.g.*, Helen Zia, *It’s a Crime: Will Gender be Included in the Federal Hate Crime Legislation*, in *WHAT IS A HATE CRIME?* (Romen Espejo ed., 2002).

³ See *supra*, Chapter 2, at 31 n.2 (collecting citations).

⁴ For a critical analysis of civil rights reform legislation more generally, and at the state level in the United States, see Peter Cicchino, *et al.*, *Sex, Lies & Civil Rights: A Critical History of the Massachusetts Gay Civil Rights Bill*, 26 *HARV. CIVIL RIGHTS-CIVIL LIBERTIES L.REV.* 549 (1991).

crime law to specific allegations of homophobic violence. The case comparison will therefore provide both a practical illustration of the hate crime laws analyzed in this Chapter and a context for the interviews analyzed in Chapters 5 and 6.

3.2 Analytical Legal Comparison

Hate crime laws have assumed a significance both as part of the routines of criminal law enforcement and as an ingredient in our broader, collective understanding of social and legal equality. Specifically, hate crime laws are significant because of how they import the language of antidiscrimination law into the field of criminal law. In the resulting dynamic, criminal law enforcement becomes a mechanism for the production of official legal knowledge about discrimination and inequality. Two initial observations will introduce this *egalitarian* role of hate crime laws.

First, the codification of hate crime laws has added something new to legal discourse about crimes. In both Canada and the United States, criminal codes, arrests, and prosecutions have always been significant sources of the public's knowledge of law. In recent times, though, hate crime laws have altered the knowledge producing practices of police, prosecutors, and judges. And, hate crime laws have shaped the knowledge produced by government officials other than police—government statisticians and school personnel, for example.

Decades ago, before we acquired a hate crime vocabulary, American legal scholar Kenneth Culp Davis published a pair of studies examining basic concepts of administrative law in criminal law enforcement. In his *Preliminary Inquiry*,⁵ Davis noticed the extraordinary discretion of police and prosecutors—in particular the “negative power to withhold

⁵ Kenneth Culp Davis, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY*, *Preface*, at v-vi (1969).

prosecution.”⁶ Inevitably, hate crime laws ask police, prosecutors, and judges to define equality in practice. So, in the hate crime field, law enforcement discretion has become a tremendous “negative power” to withhold knowledge about inequality.

Davis’s research about the discretionary inaction of governmental officials did not address homophobic or trans-phobic discrimination by police, or hate crimes as we know them today.⁷ But his recommendations for “guiding rules,” and “gentle checking,”⁸ in the administration of criminal laws are profoundly relevant in the field of hate crime law. Laws that require judges to consider homophobic or trans-phobic bias in sentencing decisions also gently require police and prosecutors to examine conduct they may have otherwise disregarded. Hate crime statistics laws, which play no direct role in investigations or prosecutions, nevertheless guide law enforcement decisions as police investigators analyze incidents for hate-related motives. Even hate crime laws administered outside police departments educate the public and establish expectations about how officials do, or should, define equality.

By interjecting basic concepts of administrative law into official law enforcement decisions, hate crime laws perform the functions Professor Davis recommended. Whenever a police officer is required to ask about biased motives or compile hate crime statistics, whenever prosecutors, judges, and defence lawyers argue about aggravating factors in sentencing, whenever a journalist reports these events—each of us receives a gentle reminder. In addition to

⁶ *Id.*, at 188. Davis observed: “The extreme decentralization of power has been planned by no one; it has simply grown out of the gigantic false assumption, deliberately fostered by some policemen . . . , that of course the police do not make policy.” *Id.*, at 88. The “habit” of denying the reality of police policy is based on what Davis identified as a compartmental thinking about law. “Unfortunately, our traditional legal classifications—‘administrative law,’ ‘the administrative process,’ and ‘administrative agencies’—have customarily excluded police and prosecutors.” *Id.*, at 222. In response, Davis sought a transfer of “know-how” from federal agencies to local police and prosecutors. *Id.*

⁷ Davis’s more focused study, “Police Discretion,” incorporated interviews with police officers. Kenneth Culp Davis, *POLICE DISCRETION* (1975). Davis observed: “The police often make their own law and enforce it. Police-made law, with no statutory foundation, is a rather important phenomenon.” *Id.*, at 16. He recommended public rulemaking by police agencies, “to educate the public in the reality that the police make vital policy.” *Id.*, at 90-91.

⁸ Davis, *POLICE DISCRETION*, *id.*, at 147-48.

criminal penalties and other remedies, hate crime laws harness the *tutelary* power⁹ of criminal law to teach an official meaning of equality. The principles of official hate crime inquiry thereby delimit the discretion of governmental officials who establish knowledge about legal equality.

Second, hate crime laws have interjected a particular vocabulary of equality rights into the criminal laws of both Canada and the United States. The codification of hate crime laws has compelled government officials, including police, prosecutors, and judges, to articulate a new and more explicit terminology denouncing the discriminatory motives of those who commit crimes.

It will come as no surprise therefore, that social contention about hate-related events and hate crime laws reveals the same two themes: (1) a focus on the discretion of law enforcement officials to withhold knowledge about inequality; and, (2) a tension in the adoption of a new vocabulary of antidiscrimination in criminal law. The following discussion provides a framework for examining social contention about hate crimes by comparing the legal texts that collectively establish and define hate crime as an official legal inquiry or classification system in Canada and the United States.

A comparison of entire national legal systems will not be attempted.¹⁰ Instead, the focus will be on those laws and court decisions that consider enhanced criminal penalties for hate-related events or that otherwise classify those events for official purposes. A comparison of governmental powers, equality rights, and freedom of expression will be set out to provide a context for the analysis of hate crime laws in the two countries.

The focus on hate crime penalty enhancement laws is justified here in part because studies of social mobilization have not focused on the mobilizing dynamic triggered by hate

⁹ See Joseph Tussman, *GOVERNMENT & THE MIND* (1977) (“tutelary” power of law).

¹⁰ Others have attempted such an analysis. The seminal comparative work is Seymour Martin Lipset, *CONTINENTAL DIVIDE: THE VALUES & INSTITUTIONS OF THE UNITED STATES & CANADA* (1991). Critics have discredited some, but not all of Lipset’s theses. See, e.g., Edward Grabb, *et al.*, *The Origins of American Individualism: Reconsidering the Historical Evidence*, 24 *CAN. J. SOCIOLOGY* 511 (1999) (critiquing Lipset’s premises); Douglas Baer, *et al.*, *The Values of Canadians & Americans: A Rejoinder*, 69 *SOCIAL FORCES* 273 (1990).

crime classification decisions.¹¹ One of the best Canadian studies of social mobilization among lesbian and gay liberation and equality-seeking groups is Miriam Smith's *Lesbian & Gay Rights in Canada: Social Movements & Equality-Seeking*. Smith noted the important role that the *Charter*¹² played in the dynamics of social contention among gay and lesbian rights groups. Yet, even Smith's thorough comparison of these social movements before and after the *Charter* fails to address in any significant detail the mobilizations triggered by hate crimes against lesbian and gay people.¹³ The apparent omission of mobilization related to hate crimes is understandable given the timing of her research. While Smith was able to obtain data for an analysis of mobilization before and after the *Charter*, her book addressed events up to 1995 only and could therefore hardly be expected to analyze mobilization before and after the 1996 effective date of the Canadian Sentencing Principles for bias, prejudice or hate. Nonetheless, Smith's methodology provides a useful basis for delimiting the analytical comparison set out in this Chapter.

Smith's analysis examined, in part, the effects of the *Charter*'s entrenchment of equality rights on, "social movement framing and strategy . . . in the context of each movement."¹⁴ The analysis here focuses on the effects of the Sentencing Principles for bias, prejudice or hate, rather than the *Charter*. But, the utility of Smith's analysis lies not in its focus on the *Charter* but on its use of an important codification event as the fulcrum for a before-and-after analysis of laws and their effects on social movements. Thus, following Smith's lead, this Chapter attempts a before-and-after analysis of national hate crime penalty enhancement laws codified almost simultaneously in Canada and the United States.

¹¹ See, e.g., Miriam Smith, *LESBIAN & GAY RIGHTS IN CANADA: SOCIAL MOVEMENTS & EQUALITY-SEEKING: 1971-1995* (1999) (generally omitting mobilizing influences of hate crimes).

¹² *Canadian Charter of Rights & Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 (hereinafter *Charter*).

¹³ Smith addresses mobilization in response to hate-related events primarily in the Quebec context, and primarily as an exception to her general observations about social mobilization. Smith noticed a "different path" in Montreal, based on "discourse . . . of violence and harassment toward lesbians and gays, and in particular an unsolved string of murders of gay men that occurred between 1989 and 1992." See Smith, *id.*, at 128 (footnote omitted).

¹⁴ Smith, *id.*, at 144.

Chapter 4 examines cases from each country that apply the hate crime laws roughly ten years after the codification of national legislation. These cases will therefore represent the endpoint for the before-and-after analysis. In this Chapter, an attempt is made to begin with the earliest cases mentioning homo- or trans-phobic motives for crimes in each country. Chapter 5 follows with an analysis of social groups and their knowledge practices in the hate crime field at the same ten-year benchmark. While a comprehensive longitudinal analysis will not be attempted, it is hoped that Chapters 4 and 5 will nevertheless provide a picture of the consequences of hate crime penalty laws—and other hate crime laws—on the social mobilization and contention of nongovernmental groups.

The comparative legal analysis that follows will be divided into four sections. The first section describes the distribution of *governmental powers* relevant to hate crime law. This discussion addresses primarily national and sub-national lawmaking powers and the availability of *judicial review*. The second section will introduce *equality rights*, including constitutional equality rights, particularly as they relate to criminal penalties. This section will also explain how *freedom of expression* constrains equality rights in the hate crime field in each country. The third section will synthesize the laws and judicial decisions that define the field of hate crime law in each country, with particular attention to *hate crime sentence enhancements* for homophobic and trans-phobic crimes. Finally, the fourth section will describe the significant *other hate crime laws*, particularly laws regulating hate crime statistics and reporting, that contribute to legal knowledge about hate crimes. A comparative analysis of legal principles will be incorporated throughout the discussion, and a concluding summary will analyze the most significant similarities and differences in hate crime laws in the two countries.

3.2.1 Governmental Powers

3.2.1.1 Division of Legislative Powers

Laws mark the divisions of power among governmental units in both Canada and the United States, and these divisions shape the hate crime field differently in each country. In both countries, governmental powers are divided both between and within governmental units. The divisions of power within governmental units, or separation of powers, are addressed here only incidentally. In both countries, however, legislative powers are divided between national and sub-national governments. Canadian provinces and American states share legislative powers with their respective national governments. Cities and other municipal bodies also share some lawmaking powers in both countries.

While Canadian and American governments exercise a similar set of lawmaking powers in the hate crime field, the location of power is not the same in the two countries. As the analysis of interview data in Chapter 5 will demonstrate, the location of lawmaking power bears an important relationship to the dynamic contention of governmental agencies and nongovernmental groups that together create knowledge in the hate crime field.

A brief comparison will reveal the basic differences in the division of powers that are important to an understanding of hate crime law in Canada and the United States.

3.2.1.1.1 Canada

In Canada, the *Constitution Act, 1867*, established the divisions of national and provincial legislative power.¹⁵ The national legislative powers most relevant here are set out in § 91:

[T]he exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

....

¹⁵ *Constitution Act, 1867* (U.K.), 30 & 31 Victoria, c. 3. *See id.*, § 3 (authorizing Queen to proclaim, “One Dominion under the Name of Canada.”).

27. *The Criminal Law*, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

....

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.¹⁶

The *Constitution Act, 1867*, § 92 enumerates the relevant provincial powers:

In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

....

13. *Property and Civil Rights in the Province.*

14. *The Administration of Justice in the Province*, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

15. The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.

16. Generally all Matters of a merely local or private Nature in the Province.¹⁷

Whereas the *Constitution Act, 1867*, divided lawmaking powers between the provinces and the national Parliament, the *Constitution Act, 1982*, promulgated the *Canadian Charter of Rights & Freedoms (Charter)*. The *Charter* expressly constrains the conduct of both Parliament and the provinces by entrenching rights, including equality rights, in a constitutional text.¹⁸ The *Constitution Act, 1982*, which incorporated the *Charter*, contained an express supremacy clause: “The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.”¹⁹

Thus, the *Charter* provided the mechanism by which courts may review hate crime laws for

¹⁶ *Constitution Act, 1867*, § 91(27) (emphasis added).

¹⁷ *Constitution Act, 1867*, § 92(13)-(16) (emphasis added). The term “civil rights” as used in § 92(13) is not the same as the term “civil rights” used colloquially in the United States, although technically the term may be used to refer to matters such as the enforcement of contracts or remedies for torts in both countries.

¹⁸ *Charter*, § 32(1)(a) & (b). Strictly speaking, the *Charter* recognizes “*principles* of fundamental justice” in § 7 as the pre-requisite for any deprivation of “life, liberty and security of the person.” See also, *Charter, id.*, preamble (founding “principles” recognizing supremacy of God and “rule of law”). The “Equality Rights” articulated in § 15 might be among the “principles of fundamental justice” recognized by § 7, but they are characterized as “rights” rather than “principles.” Equality Rights are addressed in section 3.2.2 below.

¹⁹ *Constitution Act, 1982*, § 52(1). The Canadian Constitution includes principles beyond the text of the *Charter*. See *id.*, § 52(2).

constitutionality. Perhaps more important, the *Charter* also established a powerful model for the language of equality rights to be used in subsequent statutes, including hate crime laws.

The *Charter* did not, however, alter the basic distribution of lawmaking powers relevant here.²⁰ The distribution of powers set in the *Constitution Act, 1867*, remains essentially unchanged in the fields of criminal law, civil rights, and the administration of justice.

3.2.1.1.2 United States

Adopted in 1789, the written Constitution of the United States distributed lawmaking powers between the state and national governments. The national powers most relevant here are set out among the legislative powers assigned to Congress in Article I:

The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;

. . . .

To regulate commerce with foreign nations, and *among the several states*, and with the Indian tribes;

. . . .

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.²¹

But the Constitution granted only limited powers to the national government; the states expressly reserved un-enumerated powers to themselves: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.”²² Aside from those powers granted to the national government, and subject to limits

²⁰ The *Charter* recognizes the power of both Parliament and the provinces to enact legislation “notwithstanding” the legal rights and equality rights principles of the *Charter*. *Charter*, § 33(1). These notwithstanding clauses are subject to formal, procedural limits, however. See *Charter*, § 33(2)-(5). And, the notwithstanding powers have rarely been used.

²¹ U.S. CONST. Art. I, § 8, cl. 1, 3, 18.

²² U.S. CONST. AMEND. X. The Tenth Amendment reservation of state powers was ratified by the states in 1791 as one of the first ten amendments. These ten amendments constitute the Bill of Rights, and unlike the Canadian Bill of Rights, which will be discussed shortly, they established constitutional principles binding on both state and national governments.

expressed in the Bill of Rights and elsewhere in the Constitution, each state maintains its own separate sovereignty.²³

Because general criminal lawmaking powers are not expressly addressed in the United States Constitution,²⁴ each state may enact its own criminal laws, and the Congress may make criminal laws only to the extent of its other assigned powers. Congress therefore has no general power to mandate penalties for hate crimes. Congress may however enact hate crime laws that are “necessary and proper” to the regulation of interstate commerce or related to some other national lawmaking power.

Although the states granted the national government powers in only limited areas, the Supremacy Clause recognized the superiority of laws “made in pursuance” of national authority:

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, *shall be the supreme law of the land*; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.²⁵

Therefore, any civil or criminal hate crime laws enacted by Congress within the scope of its constitutional powers become part of “the supreme law of the land.”

At first, the Constitution also did not expressly authorize Congress to legislate for the purpose of social equality. The powers of Congress were, however, expanded by three Amendments ratified in the years following the Civil War. The Civil War Amendments altered the balance of powers between the national and state governments by banning slavery, granting equal citizenship rights to freed slaves, and prohibiting race discrimination in federal elections. These three Amendments explicitly granted Congress additional powers to enforce equality

²³ To coordinate the recognition of laws between states, the Constitution provides a Full Faith and Credit Clause:

Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

U.S. CONST. art. IV, § 1 (emphasis added).

²⁴ The Constitution expressly authorizes Congress to enact criminal laws for counterfeiting, art. I, § 8, cl. 6, for “piracies and felonies committed on the high seas, and offenses against the law of nations,” art. I, § 8, cl. 10, for the District of Columbia and military bases, art. I, § 8, cl. 17, and for treason, art. III, § 3, cl. 2.

²⁵ U.S. CONST, art. VI, cl. 2 (emphasis added).

rights by “appropriate legislation.”²⁶ Judges and scholars continue to dispute the scope of the legislative powers conferred by the Civil War Amendments, but Congress undeniably acquired some authority to enact criminal and civil rights laws vindicating the equality rights articulated in the three Amendments.

3.2.1.1.3 Analysis

The analysis of interview data in Chapter 5 will reveal the overwhelming importance of one difference in the distribution of lawmaking powers in Canada and the United States: The location of criminal lawmaking power varies radically between the two countries.²⁷ With relatively minor exceptions, Canadian criminal law is made nationally and administered provincially; whereas, American criminal law is made and administered at every level of government—municipal, state, and federal. The constitutions of both countries contemplate geographical variations in the administration of hate crime laws. Predictably, however, the content of state hate crime laws varies widely throughout the United States and even within states from city to city. And, although the United States Code establishes a uniform federal criminal law, this extends only to conduct falling within the limited powers of Congress.

²⁶ See U.S. CONST. AMENDS. XIII, § 2; XIV, § 5; XV, § 2.

²⁷ While it was written before the *Charter*, one commentator from the 1970s succinctly contrasted the criminal law in Canada and the United States in a way that remains salient today:

[T]he Dominion Parliament, under the provisions of the British North America Act, has established a unitary system of criminal law, which is applied in all ten provinces through provisions of the Canadian Criminal Code. Although the administration of criminal justice is left to the provinces, their legislatures do not exercise the comprehensive and largely independent law-making powers of the fifty states. Each provincial court is thus interpreting the same code of criminal law and related parliamentary measures such as the Canadian Bill of Rights. Accordingly, judicial decisions at this level would be expected to attract greater national attention from the bench and the bar in other parts of the country.

Otis H. Stephens, Jr., *Equal Justice & Counsel Rights in the United States & Canada*, in *COMPARATIVE HUMAN RIGHTS*, at 161, 167-68 (Richard Claude, ed., 1976).

Social mobilization among gay rights groups covers a substantial cross-section of legal reform efforts, including hate crime laws.²⁸ In the United States, these numerous topics of legal reform are tapped as resources for mobilization at the most local levels of government:

Although marches on Washington and efforts to eliminate the ban on gays in the military have captured much of the publicity, the attention of most lesbian and gay activists has been monopolized by the political attempts to gain basic rights for gays in cities and states. The repeal of sodomy laws, the legalization of same-sex marriages, domestic partner benefits, hate crime laws, school programs and policies, and antidiscrimination legislation are all major goals of the gay movement, and they are also the source of intense political battles that have been and continue to be fought almost exclusively at the state and local levels.²⁹

Because of the many local legislatures available for such battles, the number of discrete pieces of hate crime legislation submitted for contention has been large.³⁰ The number of local measures submitted in the year following the Shepard killing is telling: “By August 1999, apparent reaction to the Shepard murder led to the introduction of at least 77 progay hate crime bills.”³¹

The availability of multiple, local sites for making hate crime laws shapes the behavior of both governmental agencies and nongovernmental groups in the United States. Agencies and social groups both understand that local lawmaking may be used to constrain the discretion of police and to demand the collection and publication of hate crime statistics, for example. Conversely, because of the relative unavailability of local lawmaking sites, Canadian groups and government officials must behave differently, and therefore influence hate crime laws differently, than their American counterparts.

The analysis of knowledge practices among nongovernmental groups examined in Chapter 5 identifies the location of hate crime lawmaking power as a key variable in the dynamics of contention about hate-related events. Therefore, differences between Canadian and

²⁸See James W. Button, *et al.*, *The Politics of Gay Rights at the Local & State Level*, in *THE POLITICS OF GAY RIGHTS*, at 269-89 (Craig A. Rimmerman, *et al.*, eds., 2000).

²⁹*Id.*, at 269.

³⁰See Donald P. Haider-Markel, *Lesbian & Gay Politics in the States: Interest Groups, Electoral Politics, & Policy*, in Rimmerman, *et al.*, *id.*, at 290.

³¹*Id.*, at 301 (citing Appendix collecting references); *see id.*, at 326-46 Appendix B.

American lawmaking powers are worth emphasizing. Canadian criminal law is made by the national Parliament and administered by provincial authorities; whereas, American criminal law is made and administered at every level of government. National criminal law in the United States is limited to crimes in interstate commerce or with some other connection to a national lawmaking power; whereas, the Canadian Parliament defines practically all crimes. Lawmaking by cities and other local governments likewise varies significantly between the two countries. Local lawmaking in the hate crime field will be explored in more detail in Chapter 5 and in the Results set out in Chapter 6.

3.2.1.2 Judicial Review

In both Canada and the United States, courts review legislation and other governmental action for compliance with a constitution.³² In general, the power of judicial review for constitutionality has grown in both Canada and the United States as the recognition of equality rights has expanded. Just as the *Charter* expanded the authority of Canadian courts to review legislation for compliance with equality rights, more than a century earlier, the Fourteenth Amendment expanded the powers of American courts to review legislation and other forms of state action for compliance with the new Equal Protection Clause.

American courts have issued a far larger volume of constitutional equality decisions than their Canadian counterparts, but for reasons unrelated to differences in judicial review. First, American courts have been applying the same basic constitutional text, the Equal Protection Clause, for more than a century; whereas, the § 15 equality rights of the *Charter* have been in effect for only about two decades. Second, the Fourteenth Amendment states a very general and facially neutral equality standard; whereas, the *Charter*, § 15, embodies a much more specific set

³² The United States Supreme Court recognized the availability of judicial review more than two hundred years ago in *Marbury v. Madison*. *Marbury v. Madison*, 5 U.S. (1 Cr.) 137 (1803). Canadian courts have long recognized the availability of constitutional judicial review. *See generally* Reference re Secession of Quebec, [1998] 2 S.C.R. 217 (per curiam) (summarizing history of Canadian constitutionalism and judicial review).

of equality rights. As a result, American courts have been forced to develop a broad jurisprudence defining constitutional equality. Canadian courts, by contrast, can resolve many constitutional equality claims by reference to the more detailed language of the *Charter*.

Nevertheless, hate crime laws in both countries are subject to judicial review for compliance with constitutional equality rights. Courts in both countries have issued a body of decisions defining the role of hate crime penalty laws within the constitutional division of governmental powers and interpreting the constitutional rights of those charged with hate crimes. Courts in both countries have similarly reviewed hate crime laws for compliance with constitutional principles of free expression. While Canadian and American courts have reached significantly different conclusions regarding penalties for hate-related expression, they have reached similar results for laws penalizing hate-related conduct.

Although judicial review is available in both Canada and the United States, the theory and mechanisms of judicial review vary between the two countries. An exhaustive study of differences in judicial review is not necessary to the analysis here.³³ Nevertheless, judicial review remains a critical feature of legal contention about hate crime laws in both countries, and cases applying judicial review appear throughout the discussion that follows.

3.2.2 Equality Rights

Hate crime laws interject an antidiscrimination discourse into criminal punishment. The particular language embodied in hate crime statutes is necessarily influenced by the vocabulary of equality rights available when and where they are enacted. To differing degrees, hate crime laws in both Canada and the United States have also been influenced by constitutional

³³ Judicial review by Canadian and American courts has been analyzed elsewhere. See Claire L'Heureux-Dube, *Realizing Equality in the Twentieth Century: the Role of the Supreme Court of Canada in Comparative Perspective*, 1 INT'L J. CONST. L. 35 (2003); Joel Bakan, *Strange Expectations: A Review of Two Theories of Judicial Review* (1990) 35 MCGILL L.J. 439. The failure of judicial review as a mechanism for the recognition gay civil rights in Canada before the *Charter* is documented in Jeff Richstone & J. Stuart Russell, *Shutting the Gate: Gay Civil Rights in the Supreme Court of Canada* (1981) 27 MCGILL L.J. 92.

protections for free expression. Therefore, a brief comparison of equality rights and free expression in Canada and the United States is necessary to establish the context for a comparison of hate crime laws.

3.2.2.1 Equality Rights Texts

In both Canada and the United States equality rights appear in written constitutional and statutory texts. A thorough analysis of antidiscrimination as a principle³⁴ of constitutional law in Canada and the United States will not be attempted here.³⁵ Instead, this section will compare the basic texts that articulate equality rights in each country. A comparison of these texts reveals important differences, and some important similarities, in the vocabulary of legal equality in the two countries. In both countries, equality rights, including antidiscrimination principles, are incorporated into written civil rights and human rights laws, sometimes with greater detail than the constitutional texts themselves. A vocabulary of equality rights also appears in the text of hate crime laws, and hate crime laws do not always use the same language as either constitutions

³⁴ In his preface to the Court's decision in *Law v. Canada*, Iacobucci J. applied the language of "anti-discrimination jurisprudence" and "principles" to mean the judicial "guidelines" used to "analyze a discrimination claim under the *Charter*." See *Law v. Canada (Minister of Employment & Immigration)*, [1999] 1 S.C.R. 497, ¶¶ 4-5; compare *Canada (House of Commons) v. Vaid*, [2005] 1 S.C.R. 667, ¶ 90 (concluding, Canadian Human Rights Act "anti-discrimination norms" apply to employees of Parliament). Thus, the use of the term "Anti-Discrimination Principle" in Canadian constitutional law might be misleading.

³⁵ *But see, e.g.*, Jed Rubenfeld, *The Anti-Antidiscrimination Agenda*, 111 YALE L. J. (2002) (citing thread in recent U.S. Supreme Court cases, including new constitutional ideology toward affirmative action and antidiscrimination); Paul Brest, *The Supreme Court 1975 Term Forward: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. (1976) (tracing history of antidiscrimination principle, especially in context with race discrimination in U.S.); K.G. Jan Pillai, *Neutrality of the Equal Protection Clause*, 27 HASTINGS CONST. L. Q. 89 (1999) (addressing neutral laws; noting U.S. Supreme Court's abandonment of "anti-caste" principle for color-blind principle; advocating verified "impartiality" test in place of neutrality); Andrew Koppelman, *ANTIDISCRIMINATION LAW & SOCIAL EQUALITY* (1996) (reviewing theories of equality in antidiscrimination law, process-based versus result-based theories, case studies, political theories); Kai Nielsen, *Radical Egalitarianism Revisited*, 15 WINDSOR Y.B. ACCESS TO JUST. 121 (1996) (examining equality rights beyond the "difference principle" including tabulation of egalitarian concepts); Colleen Sheppard, *Study Paper in Litigating the Relationship Between Equity & Equality* (Ont. Law Reform Comm'n, 1993) (summarizing Canadian equal rights law under *Charter*, § 15, collecting authorities for alternative approaches to equality rights); Kenneth H. Fogarty, *EQUAL RIGHTS & THEIR LIMITS IN THE CHARTER* (1987) (reviewing theoretical bases for equality, including comparative law guidance from U.S. experience).

Perhaps the best articulation of the parallel between antidiscrimination laws and hate crime laws, in Spanish language literature, is provided by Professor María Mercedes Gómez. See María Mercedes Gómez, *Usos jerárquicos y excluyentes de la violencia*, in MÁS ALLÁ DEL DERECHO. JUSTICIA Y GÉNERO EN AMÉRICA LATINA, at 19, 37-55 (Cristina Motta & Luisa Cabal eds., 2005) ("Beyond the Law: Justice & Gender in Latin America") (English language description available online at <http://www.red-alas.org/english/> (accessed Feb. 29, 2008)).

or civil and human rights laws. The equal rights language of hate crime penalty laws will be analyzed in section 3.2.3 below, and other hate crime laws, including human rights, civil rights, and hate crime statistics laws will be analyzed in section 3.2.4. But, because hate crime laws exist alongside constitutional and statutory texts defining equality rights, these equality rights texts are addressed here first.

3.2.2.1.1 Canada

Before 1982 no Canadian constitutional text articulated general equality rights.³⁶ In 1960 Parliament enacted the Canadian Bill of Rights, a statute that recognized rights and freedoms, including equality rights, already in existence under Canadian law:

It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,

- (a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;
- (b) the right of the individual to equality before the law and the protection of the law;
- ...;
- (d) freedom of speech³⁷

The rights enumerated in the Canadian Bill of Rights resemble those contained in the American Bill of Rights.³⁸ However, the Canadian Bill of Rights was not a constitutional document, and it did not fundamentally alter the powers of either Parliament or provincial legislatures. Specifically, a saving clause exempted matters within the exclusive legislative authority of provinces from the application of the Bill of Rights.³⁹ Hence, with minor exceptions, Canadian courts recognized no change in equal rights doctrine after the enactment of the Bill of Rights.⁴⁰

³⁶ The *Charter* came into force in 1982. The equality principles of § 15 appeared in the text of the *Charter*, but they did not come into force until 1985.

³⁷ *Canadian Bill of Rights*—1960, c. 44 1960, c. 44, s. 3; 1970-71-72, c. 38, s. 29; 1985, c. 26, s. 105; 1992, c. 1, s. 144(F); see App. III to R.S., 1985. See also, *id.*, §§ 1(c) (religion), (e) (assembly & association), (f) (press).

³⁸ Compare U.S. CONST. AMENDS. I-VIII.

³⁹ See *Canadian Bill of Rights*, § 5(3).

⁴⁰ The one notable exception is *R. v. Drybones*, where the Supreme Court applied the Bill of Rights to invalidate a provision of the Indian Act that criminalized intoxication for Aboriginal Canadians but not others. *R. v. Drybones*,

The *Constitution Act, 1982*, established the current written constitution for Canada. Its first part, the *Canadian Charter of Rights & Freedoms (Charter)*, specifies equality rights more broadly and with greater precision than the Canadian Bill of Rights:

(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.⁴¹

The Supreme Court of Canada has since declared “sexual orientation” a ground of discrimination “analogous” to those expressly prohibited under the *Charter*, § 15.⁴² The Court does not currently recognize “gender identity” or “gender expression” as constitutionally prohibited grounds of discrimination.

The Supreme Court’s equality rights decisions are based on a judicial analysis applicable to *Charter* claims. In *Law v. Canada*, a 1994 decision, the Supreme Court articulated the “guidelines for analysis” applicable to discrimination claims based on the equality provisions of the *Charter*, § 15.⁴³ The framework for a *Charter* discrimination claim is drawn from the Court’s earliest cases interpreting § 15:

[T]he *Andrews* decision established that there are three key elements to a discrimination claim under s. 15(1) of the *Charter*: differential treatment, an enumerated or analogous ground, and discrimination in a substantive sense involving factors such as prejudice, stereotyping, and disadvantage. . . . [T]he determination of whether each of these elements exists in a particular case is

[1970] S.C.R. 282, 2 D.L.R.3d 473. The majority of Justices, per Ritchie, J., agreed that, “an individual is denied equality before the law if it is made an offence punishable by law, on account of his race, for him to do something which his fellow Canadians are free to do without having committed any offence or having been made subject to any penalty.” *id.*, at 297.

⁴¹ *Charter* § 15. Rights and freedoms are later guaranteed, “equally to male and female persons.” *Charter* § 28.

⁴² *Egan v. Canada*, [1995] 2 S.C.R. 513.

⁴³ *Law v. Canada*, *supra* note 34, ¶ 88. The *Law* case was not a human rights tribunal appeal but a *Charter* challenge to a statute after it was applied by an administrative agency. *See generally* Melina Buckley, *Transforming Women’s Future: A 2004 Guide to Equality Rights Theory & Law* (Alison Brewin, ed., West Coast Legal Education & Action Fund, 2004) (distinguishing the analysis applicable to human rights tribunal decisions).

always to be undertaken in a purposive manner, taking into account the full social, political, and legal context of the claim.⁴⁴

Courts applying the guidelines must: (1) use a “purposive and contextual” approach focusing on the “strong remedial purpose” of § 15 and avoiding a “formalistic or mechanical” analysis; (2) locate the relevant “comparison group” based on the pleadings and the impugned legislation; and, (3) consider both the subjective and objective reasonableness of harm to a claimant’s dignity. The “list of factors is not closed,” but the Court has identified four important “contextual” factors:

- (A) Pre-existing disadvantage, stereotyping, prejudice, or vulnerability experienced by the individual or group at issue. . . .
- (B) The correspondence, or lack thereof, between the ground or grounds on which the claim is based and the actual need, capacity, or circumstances of the claimant or others. . . .
- (C) The ameliorative purpose or effects of the impugned law upon a more disadvantaged person or group in society. . . .
- and
- (D) The nature and scope of the interest affected by the impugned law.⁴⁵

When a discrimination claim is based on an “enumerated” ground, for example “sex,” a Court may simply analyze the contextual factors and render a decision based on “judicial notice and logical reasoning.” When the alleged ground of discrimination is not “enumerated” in § 15, a claimant may seek to prove the discrimination alleged is “analogous” to the grounds listed.⁴⁶

Unlike the Canadian Bill of Rights, the *Charter* is a constitutional text; its terms expressly bind both Parliament and provincial legislatures.⁴⁷ Despite its binding authority, however, the *Charter* itself recognizes limits on equality rights. Courts review restrictions on equality rights according to the standard set out in the *Charter*, § 1: “The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such

⁴⁴ Law, *id.*, ¶ 30 (citing *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143).

⁴⁵ Law, *id.*, ¶ 88.

⁴⁶ Law, *id.*, ¶¶ 29, 44 (reviewing cases considering analogous grounds).

⁴⁷ See *Charter*, § 32(1).

reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”⁴⁸

Both Parliament and the provincial legislatures have enacted human rights legislation, which also includes antidiscrimination language. Because of the “comprehensiveness” of this human rights legislation, Canadian Courts do not recognize a common law tort of discrimination.⁴⁹ Instead, though *Charter* challenges to state action remain available, the remedies for private discrimination available in human rights agencies are practically exclusive.⁵⁰

The Canadian Human Rights Act (CHRA) prohibits discrimination in fields within the legislative authority of Parliament. The CHRA specifies grounds of prohibited discrimination slightly broader than those expressly named in the *Charter*, § 15:

For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted.⁵¹

The CHRA has been amended since its enactment. For example, a 1998 amendment expressly authorized claims of discrimination based on multiple grounds.⁵² A Private Member’s Bill in the Session of Parliament ending in 2007 would have added “gender identity or expression” to the grounds of discrimination prohibited by the CHRA, but this Bill failed.⁵³

⁴⁸ *Charter*, § 1.

⁴⁹ See *Seneca College of Applied Arts & Technology v. Bhadauria*, [1981] 2 S.C.R. 181 (holding Ontario Human Rights Code forecloses tort action for discrimination).

⁵⁰ The *Charter* authorizes direct lawsuits to enforce its provisions, including the equality rights provisions. “Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.” *Charter*, § 24(1).

⁵¹ *Canadian Human Rights Act*, § 3(1), R.S., 1985, c. H-6 (hereinafter CHRA). The CHRA was amended to include “sexual orientation” as a prohibited ground of discrimination in 1996 (Bill S-2).

⁵² “For greater certainty, a discriminatory practice includes a practice based on one or more prohibited grounds of discrimination or on the effect of a combination of prohibited grounds.” CHRA, *id.*, § 3.1, 1998, c. 9, s. 11.

⁵³ See Bill C-326, First Session, Thirty-ninth Parliament, 55 Elizabeth II, 2006, House of Commons of Canada, First Reading, June 19, 2006.

Each province enacts its own human rights laws, and since provinces legislate exclusively in matters related to local property and civil rights, provincial human rights laws are significant. Provincial human rights laws therefore provide important contributions to the language of equality rights in Canada. For example, the British Columbia code generally prohibits discrimination against persons or classes of persons based on specified prohibited grounds:

because of the race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex or sexual orientation of that person or class of persons.⁵⁴

Like the CHRA, the provincial human rights codes all create some form of human rights agency to hear complaints and grant remedies. At least one province has enacted a “Civil Rights” Act authorizing lawsuits in court for acts of discrimination, but this Act does not apply to discrimination based on “sexual orientation.”⁵⁵ Thus, like the CHRA, provincial human rights laws are enforced primarily within human rights agencies.

Canadian courts have addressed discrimination motivated by “sexual orientation” under the equality rights language of both provincial and national human rights codes. Specifically, Canadian courts have held that “sexual orientation” must be included within the grounds of

⁵⁴ *Human Rights Code*, § 8(b), R.S.B.C. 1996, c. 210 (banning discrimination in public accommodations). Effective January 1, 2008, age has been added as a prohibited ground of discrimination. See Bill 31—2007: *Human Rights Code (Mandatory Retirement Elimination) Amendment Act*, 2007, S.B.C. 2006, c. 21. The Northwest Territories *Human Rights Act* includes both “sexual orientation” and “gender identity” among prohibited grounds of discrimination. See *Human Rights Act*, S.N.W.T. 2002, c. 18, § 5(1).

⁵⁵ See, e.g., *Civil Rights Protection Act (B.C.)*, S.B.C. 1981-12-1 to -4 (effective Apr. 21, 1997), R.S.B.C. 1996 c. 49 s. 1-5 (authorizing tort action and offence for “interference with the civil rights” by promoting “hatred or contempt” or “superiority or inferiority . . . on the basis of colour, race, religion, ethnic origin or place of origin”). The definition section of the Civil Rights Protection Act sets out grounds apparently taken verbatim from the Criminal Code Hate Propaganda sections. See Criminal Code, § 318(4). But, while the Criminal Code has been amended to add “sexual orientation” as a prohibited ground, the BC Act has not. Moreover, even with the narrower list of prohibited grounds, reported cases applying the Civil Rights Protection Act are scarce. *But see, e.g.,* Maughan v. University of British Columbia, 2003 BCSC 1367, [2003] B.C.J. No. 2080 (B.C. Supreme Ct.) (Brown J.) (striking some but not all claims under Act for failing to allege sufficient facts); LaFleur v. Royal & SunAlliance Insurance Co. of Canada, 2001 BCSC 856, [2001] B.C.J. No. 1220 (Supreme Ct.) (Drost J.) (dismissing complaint, including action under Act for failure to allege sufficient facts); Brochu v. Nelson, [1986] B.C.J. No. 998 (Supreme Ct.) (McKenzie J.) (dismissing action “at the threshold” for failing to prove prohibited act by “balance of probabilities”). One case is noteworthy here because it referred to the Civil Rights Protection Act in its analysis of Sentencing Principles for bias, prejudice or hate. See R. v. Gabara, [1997] B.C.J. No. 3090, ¶ 35 (Prov. Ct.) (Sundhu Prov. Ct. J.) (citing Act’s tort remedies and damages for the infringement of “civil rights” in support of sentencing premium for racial bias under Criminal Code, § 718.2).

discrimination prohibited by both national and provincial human rights laws; whereas, Discrimination based on “gender identity” or “gender expression” is not yet expressly prohibited by most provincial or national human rights laws.⁵⁶

Although Canadian cities pass bylaws, they do not normally legislate in the field of equality, and they do not pass local hate crime laws.⁵⁷

3.2.2.1.2 United States

The United States Constitution did not originally specify general equality rights. In addition to altering the balance of powers between states and the national government, however, the Civil War Amendments added a vocabulary of equality rights to the constitutional text. The Equal Protection Clause of the Fourteenth Amendment is most significant here because it established constitutional equality rights binding on the states:

*No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*⁵⁸

The Supreme Court has construed the Due Process Clause of the Fifth Amendment to impose an analogous equal protection obligation on the federal government.⁵⁹

⁵⁶ A 1992 Ontario Court of Appeal case held that the *Canadian Human Rights Act* violated the *Charter* by failing to prohibit “sexual orientation” discrimination. *Haig & Birch v. The Queen*, [1992] O.J. No. 1609, 9 O.R. (3d) 495. The Court therefore read “sexual orientation” into the Act’s prohibited grounds of discrimination. In 1998 the Supreme Court held that a provincial human rights law failing to prohibit “sexual orientation” discrimination violated § 15. *Vriend v. Alberta*, (1998) 156 DLR (4th) 385.

⁵⁷ Canadian Municipal governments do engage in legal contention related to hate crimes. For example a major human rights case establishing precedent for the suppression of internet hate propaganda arose from a formal human rights complaint filed by an agency of the Toronto, Ontario municipal government. *See Citrion v. Zundel*, [2002] C.H.R.D. No. 1, No. T.D. 1/02 (CHRT); *see Citrion, id.*, ¶¶ 4-7 (summarizing complaint by Toronto Mayor’s Committee on Community & Race Relations, along with private citizen); *see also id.*, n.49 (noting testimony of former Toronto Mayor regarding municipal agency mandate). Canadian cities also issue Resolutions condemning hate-related conduct. But, unlike the codes of some American cities, municipal bylaws in Canada do not generally address hate-related conduct.

⁵⁸ U.S. CONST. AMEND. XIV, § 1 (emphasis added).

⁵⁹ *Bolling v. Sharpe*, 347 U.S. 497 (1954) (construing U.S. CONST. AMEND. V). Constitutional equality appears in the Thirteenth Amendment (abolishing slavery), and the Fifteenth, Nineteenth, and Twenty-Sixth Amendments

While the Fourteenth Amendment was ratified in response to racial discrimination against African Americans, the term “equal protection of the laws” is expressed in neutral terms without specifying race or any other particular grounds of prohibited discrimination. The Fourteenth Amendment, furthermore, articulates no detailed standard for applying the Equal Protection Clause to particular disputes or particular kinds of discrimination. Because the Fourteenth Amendment has remained unchanged for nearly one hundred and fifty years, American courts have generated a significant body of jurisprudence interpreting its text.

Courts apply one of three categories of scrutiny to review governmental classifications for compliance with the Equal Protection Clause.⁶⁰ The level of scrutiny alone does not determine the validity of a law, however.⁶¹ The United States Supreme Court has applied its most lenient level of scrutiny, a rational basis test, to invalidate state laws that expressly discriminate based on sexual orientation.⁶² On the other hand, the Court has not required states to pass laws affirmatively banning sexual orientation discrimination. And, like its Canadian counterpart, the United States Supreme Court has not definitively invalidated laws that discriminate based on gender identity or expression.

(banning racial, gender, and age discrimination in federal elections). *See* U.S. CONST. AMENDS. XIII, XV, XIX, XXVI.

⁶⁰ *See* *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938) (suggesting “more searching judicial inquiry” for anti-minority classifications); *see generally*, Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL L. REV. 341 (1949) (discussing tiered analysis of fundamental rights claims). The lowest tier is a rational basis test—the government must prove the classification is rationally related to a legitimate governmental interest. Intermediate scrutiny applies to gender classifications: “For a gender-based classification to withstand equal protection scrutiny, it must be established at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.” *Nguyen v. INS*, U.S. Sup. Ct. No. 99-2071 (June 11, 2001) (citations and quotation marks omitted) (applying equal protection component of Fifth Amendment Due Process Clause to classification in federal legislation). Race classifications receive strict scrutiny. *See* *Parents Involved in Community Schools v. Seattle School District No. 1*, U.S. Sup. Ct. No. 05-908 (June 28, 2007).

⁶¹ *See* *Adarand Constructors, Inc., v. Peña*, 515 U.S. 200, at 229-230 (1995) (emphasizing level of scrutiny does not always determine outcome of judicial review).

⁶² *See* *Romer v. Evans*, 517 U.S. 620, 634 (1996). The Court has applied the same standard to invalidate state laws interfering with liberty in “private, consensual homosexual conduct.” *Lawrence v. Texas*, U.S. Sup. Ct. No. 02-102 (June 26, 2003) (holding “statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual”). The Court declined to invalidate the Texas sodomy statute based on equal protection principles.

American courts do not interpret and apply the Equal Protection Clause by themselves. Since the Civil War era, the Congress has implemented constitutional equality rights in a series of Civil Rights Acts and other laws that elaborate on the Equal Protection Clause by articulating specific prohibited grounds of discrimination.⁶³ In addition to establishing governmental agencies in the civil rights field, the Civil Rights Acts have typically authorized criminal prosecutions and civil rights lawsuits in federal courts for discriminatory conduct.

The model type of civil rights act remains current, and two relevant civil rights proposals currently pending in Congress adhere to the general type of civil rights legislation. The first proposal would amend the federal criminal laws in the civil rights field to authorize prosecutions against anyone “willfully” injuring others, “because of the actual or perceived religion, national origin, gender, sexual orientation, gender identity or disability of any person.” This Bill, named for Matthew Shepard, has passed a vote in the House of Representatives and has been introduced in the Senate.⁶⁴ The Act would not alter the power of states to define and prosecute hate crimes under their own laws, but it would increase the number of hate crimes eligible for prosecution in federal court.

The second proposal would authorize a private action in federal court for homo- and trans-phobic employment discrimination. The House of Representatives recently held hearings on this Bill, the Employment Non-Discrimination Act (ENDA).⁶⁵ ENDA would ban employment discrimination against “any individual . . . because of such individual’s actual or

⁶³ Beginning with the Civil Rights Act of 1866, April 9, 1866, ch 31, 14 Stat. 27, and ending with the Civil Rights Act of 1991, Nov. 21, 1991, P. L. 102-166, 105 Stat. 1071, 42 USCS § 1981 nt., Congress has enacted nine statutes with the name “Civil Rights Act.” Congress has passed several other acts that use the term “Civil Rights” in their titles. A large number of federal statutes address civil rights without referring to the term in their titles.

⁶⁴ The Matthew Shepard Local Law Enforcement Hate Crimes Prevention Act of 2007, S.1105, 110th Congress, 1st Sess. (introduced in Senate Apr. 12, 2007); H.R. 1592 (identical legislation passed in the House by a vote of 237 to 180, May 3, 2007).

⁶⁵ See H.R.3685, Employment Non-Discrimination Act (ENDA) (passed in House by vote of 235 to 184; introduced in Senate Nov. 13, 2007) (House version amended to omit ban on “gender identity” discrimination).

perceived sexual orientation[.]”⁶⁶ It would expressly prohibit the collection of “statistics on actual or perceived sexual orientation.”⁶⁷

States likewise enact civil rights and human rights laws, and these laws vary widely across the country. For instance, the Washington Law Against Discrimination guarantees a right to be free from discrimination based on grounds broader than federal civil rights laws:

The right to be free from discrimination because of race, creed, color, national origin, sex, *sexual orientation*, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a disabled person is recognized as and declared to be a civil right.⁶⁸

The state statute authorizes both complaints to a state Human Rights Commission and citizen suits to enforce its terms in state court.⁶⁹

Besides state legislation, American cities enact civil rights and human rights laws. The equality rights language used in these laws is too diverse to catalog here, but even municipal laws may expand equality rights. The Seattle Municipal Code prohibits discrimination in employment and other city-regulated activities based on a definition even broader than the Washington state statute:

“Discrimination” means any conduct, whether by single act or as part of a practice, the effect of which is to adversely affect or differentiate between or among individuals or groups of individuals, because of race, color, creed, religion, ancestry, national origin, age, sex, marital status, parental status, *sexual orientation*, *gender identity*, political ideology, participation in a Section 8 program, the presence of any disability or the use of a trained dog guide or service animal by a disabled person.⁷⁰

The Seattle Municipal Code also authorizes several municipal civil rights agencies with varying inquiry and enforcement powers.

⁶⁶ *Id.*, § 4(a)(1) & (2).

⁶⁷ *Id.*, § 9.

⁶⁸ RCW § 49.60.030(1), as amended by 2006 c 4 § 3 (effective 2007).

⁶⁹ *See id.*, § 49.60.030(2) (authorizing “civil action . . . together with the costs of suit including reasonable attorney’s fees”).

⁷⁰ Seattle Municipal Code § 14.06.020(L) (Definitions); § 14.04.040 (prohibiting unfair practices by private employers); *see also* § 3.110.260(A), (B)(1) (prohibiting discrimination by city agencies).

3.2.2.1.3 Analysis

The texts, and even the court interpretations, defining equality rights in Canada and the United States seem simple enough on their face. The similarities and differences in these texts seem finite and, at first, easily understood. Yet, the theoretical approaches that underlie and accompany the application of equality rights in the two countries constitute a substantial literature. Therefore, after delineating several of the more obvious textual differences in equality rights texts in Canada and the United States, the following analysis will survey the differences in theoretical approaches to equality in the two countries.

Several significant differences appear in the texts and interpretations of equality rights in Canada and the United States. First, Canadian constitutional equality has been articulated in the *Charter* in much greater detail, and much more recently, than its American counterpart. The *Charter*, § 15, specifies particular grounds of prohibited discrimination, and it authorizes the recognition of additional analogous grounds of discrimination.⁷¹ The American Equal Protection Clause is much older, and it defines constitutional equality in general terms of “equal protection” without specifying any particular grounds of prohibited discrimination. The neutral vocabulary invites courts to apply the Equal Protection Clause to all governmental classifications; yet, the text provides no formal mechanism for the recognition of particular grounds of prohibited discrimination. As a result, American courts apply evolving standards and levels of scrutiny that vary according to the types of discriminatory classifications challenged. Canadian courts, by contrast, are bound by particular grounds of prohibited discrimination and authorized to recognize additional grounds deemed analogous to those listed.

⁷¹ See Law, *supra* note 34, at ¶¶ 29, 44 (reviewing cases considering analogous grounds).

Second, the constitutional and statutory texts defining equality rights vary between the two countries.⁷² Beginning with the Civil War, Congress has enacted laws creating federal civil rights agencies and authorizing civil rights lawsuits and prosecutions in federal court to remedy prohibited discrimination. States and even cities have adopted similar civil rights laws. Many American civil rights laws also authorize remedies in administrative agencies. In Canada, the national and provincial governments have enacted human rights codes that prohibit discrimination and authorize administrative remedies, but civil rights litigation in Canadian courts is not generally part of the Canadian legislative model. Thus, while American equality is implemented significantly through civil rights litigation against both private parties and governmental entities in courts, in Canada discrimination claims against private entities are administered by human rights agencies.

Third, while new analogous grounds of discrimination have been engrafted onto equality rights texts in both countries, the content of equality differs. In Canada, both provincial courts and the Supreme Court have mandated the recognition of “sexual orientation” as a ground of discrimination prohibited by human rights codes. American courts have not likewise mandated an affirmative, nationwide ban on sexual orientation discrimination in either federal or state laws. To date, American courts have merely invalidated legislation that discriminates based on sexual orientation in an irrational manner or in a manner that violates the privacy rights of persons accused of crimes, for instance.

⁷² The focus here is on the texts that define equality rights in each country. An alternative analysis would compare constitutional “cultures” or “sub-cultures” in the field of equality. See, e.g., David Schneiderman, *Social Rights and “Common Sense”: Gosselin through a media lens*, in *POVERTY: RIGHTS, SOCIAL CITIZENSHIP, & LEGAL ACTION*, ch. 3, at 57-73 (Margot Young, et al., eds., 2007) (examining “constitutional culture” of Canada in the context of social rights and poverty). Schneiderman defines a constitutional culture as: “those norms and values, reflected in constitutional text or in other instruments or institutional apparatus, which give expression to the . . . organizing principles for Canadian law and society. These, admittedly, may not be shared equally among all Canadians.” Schneiderman, *id.*, at 57. Schneiderman identifies several specific sources of cultural evidence, including, “legislative schemes, media reports, or opinions of cultural leaders such as the Supreme Court of Canada.” *Id.* (footnote omitted).

Fourth, the Canadian *Charter*, § 15(2), expressly authorizes laws to ameliorate past discrimination by favoring the historically disadvantaged. Because no equivalent text appears in the Fourteenth Amendment, American courts have struggled to articulate the constitutional standards applicable to “affirmative action” laws. These differences appear in each country’s theoretical approaches to equality, which will be addressed next.

In addition to the textual differences in equality rights laws, theoretical approaches to equality rights vary significantly between the two countries. Theoretical approaches to equality are significant to this study because hate crime laws in both Canada and the United States incorporate legal language defining equality using antidiscrimination terminology. The antidiscrimination terminology used in hate crime penalty enhancement laws has been the focus of criticism because of its inclusion of some, but not all, forms of discrimination among prohibited motives. This criticism is analyzed later, along with a comparison of the hate crime texts themselves.

But, before leaving the topic of equality rights, it will be useful to describe the role of theoretical approaches to equality in Canadian and American legal discourse. By way of introduction, my earlier work arising from the Matthew Shepard killing proposed a particular theory of equality appropriate to the hate crime field in the United States. This theory focused on the distinction between group-based remedies for past discrimination:

[W]hatever their validity in other areas, group remedies are foreign to criminal law. A group is not punished because one of its members commits a crime, and punishment does not depend on the group membership of a victim. Unlike the equitable remedies available in desegregation cases, hate crime laws overlay an anti-discrimination policy on the personal protections of the Fourth, Fifth, Sixth, and Eighth Amendments. . . .

Interesting questions, beyond the scope of this article, arise about whether group-specific regulation (affirmative action) is permissible in the areas of employment discrimination, civil rights remedies, and even hate speech. However, in the context of hate crime laws themselves, neutrality is required.⁷³

⁷³ Bernard P. Haggerty, *Hate Crimes: A View from Laramie, Wyoming’s First Bias Crime Law, the Fight Against Discriminatory Crime, & a New Cooperative Federalism*, 45 HOW. L. J. 1, at 45-46 (2001) (footnotes omitted).

To explain, theories of equality in the United States tend to focus on group-based remedies for past discrimination because of the unique American experience with racial discrimination. My earlier article cited the Supreme Court cases, beginning even before the leading case of *Brown v. Board of Education*, in which the Supreme Court has struggled to articulate a coherent theory of equality applicable to remedies for racial discrimination.⁷⁴ I concluded that over the course of the Twentieth Century, the Supreme Court’s approach shifted from an “individual” right to equality, to group-based remedies, and back to an emphasis on the “personal” nature of equality rights.⁷⁵ Group-specific, equitable remedies for past discrimination remain available under the Court’s approach, but only upon a strict showing of “particularized findings of past discrimination.”⁷⁶ The rhetorical struggle to articulate a coherent theory of equality applicable to group-specific remedies continues along similar lines in the United States.⁷⁷

This rhetorical struggle to define an appropriate theory of equality rights in the United States has been characterized as a riddle of neutrality, which asks: “if the goal is to avoid identifying people by a trait of difference, but the institutions and practices make that trait matter, there seems to be no way to remedy the effects of difference without making difference matter yet again.”⁷⁸ Martha Minow resolves this riddle by settling on the “social-relations approach”—“learning to take the perspective of another,” and maintaining a “relational focus.”⁷⁹ Iris Marion Young’s approach to equality rights is best described as a focus on “oppression and domination.”⁸⁰ Adopting the communicative ethics approach of Habermas,⁸¹ Young argues for a

⁷⁴ See Haggerty, *id.*, at 45-46 nn.200-07 (collecting cases).

⁷⁵ See Haggerty, *id.*, at 45, 45 nn.199-203.

⁷⁶ See *id.*, at 45 (quoting *Regents Univ. Cal. v. Bakke*, 438 U.S. 265, 299 (1978) (Powell, J., concurring in part and dissenting in part)).

⁷⁷ See Haggerty, *id.*, at 46 nn.208-09 (citing U.S. literature).

⁷⁸ Martha Minow, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, & AMERICAN LAW*, at 75 (1990).

⁷⁹ *Id.*, at 379.

⁸⁰ Iris M. Young, *JUSTICE & THE POLITICS OF DIFFERENCE*, at 8-9 (1990).

⁸¹ *Id.*, at 33-34, 42.

“group differentiated participatory public,”⁸² and a “democratic cultural pluralism.”⁸³ Despite their theoretical appeal, these approaches have not been adopted by the United States Supreme Court.

Theoretical approaches to equality in Canadian academic discourse do not differ significantly from their American counterparts. Citing Minow’s work, Coleen Sheppard notes the “difference dilemma” and joins the call for a “contextual, results-oriented approach,” with the goal to, “retain the beneficial effect of differential treatment without contributing to [] potential social stigma.”⁸⁴ In the gender context, this approach considers four questions: (1) what social inequity is being ameliorated, and whether statutes can be worded in formally neutral terms that primarily benefit women; (2) is it possible to extend beneficial treatment to both men and women; (3) is it possible to eradicate the source rather than the symptoms of the inequity; and, (4) is “creative structuring of remedies” possible.⁸⁵ Sheppard analyzes these questions and finds that the new equality provisions of the *Charter*, §§ 15(1)&(2), 28, and the § 1 interpretation provision, can accommodate them all, in theory. In a separate work Sheppard notes that concerns with costly and protracted affirmative action litigation led drafters to add the *Charter*, §15(2) special program provisions.⁸⁶

Donna Greschner focuses on the Supreme Court of Canada’s decision in *Law v. Canada*., noting that the Court denied the equality claim presented in the case. Greschner nevertheless finds two important principles established by the decision: the “essential human dignity” test for disadvantage necessary to make out a discrimination claim; and, the need for an “examination of context and of the effects of law and policy,” to determine discrimination.⁸⁷ Greschner

⁸² *Id.*, at 95.

⁸³ *Id.*, at 174.

⁸⁴ Colleen Sheppard, *Grounds of Discrimination: Towards an Inclusive & Contextual Approach*, 80 CAN. BAR REV., at 217, 221 (2001).

⁸⁵ *Id.*, at 219-20.

⁸⁶ Sheppard, *supra* note 35, at 45-46.

⁸⁷ Donna Greschner, *The Purpose of Canadian Equality Rights*, 6 REV. CONST. STUDIES 291, at 316-19 (2002).

reconciles the Law decision with her concept of “full membership” and “full belonging” within identity groups situated in society.⁸⁸ In a more practical vein, Gwen Brodsky and Shelagh Day argue for an approach that extends the availability of government benefits programs where they are found to violate the equality provisions.⁸⁹ Their framing “recognizes [] a difference between equalizing up and equalizing down.”⁹⁰ Finally, as Greschner points out, unlike the United States Constitution, the Canadian *Charter* contains several multiculturalism provisions and “protects belonging in the human family (by virtue of containing human rights), identity groups and political communities.”⁹¹

This short survey does not pretend to exhaust academic arguments related to theories of equality in either Canada or the United States. Still, the authorities surveyed here are sufficient to support a simple observation about the state of equality in the two countries. While Canadian courts have not fully embraced the theories of equality offered by legal academics,⁹² the Charter does reflect a conscious choice to transcend the formally neutral approach to equality that prevails in the Supreme Court of the United States. To summarize, academic approaches to equality do not vary substantially between the United States and Canada. Judicial approaches to equality rights on the other hand vary significantly, and these variations track differences between the two countries’ constitutional equality texts—the Equal Protection Clause of the Fourteenth Amendment and the Charter, §15. The Supreme Court of the United States currently employs a formally neutral approach to constitutional equality rights. While the Supreme Court of Canada does not embrace all of the available academic theories of equality, it does recognize a more substantive approach to equality rights than its American counterpart.

⁸⁸ *Id.*, at 320-21.

⁸⁹ Gwen Brodsky & Shelagh Day, CANADIAN CHARTER EQUALITY RIGHTS FOR WOMEN: ONE STEP FORWARD OR TWO STEPS BACK? at 86-87 (1989).

⁹⁰ *Id.*, at 92.

⁹¹ Greschner, *supra* note 87, at 304, 306.

⁹² *See*, Sheppard, *supra* note 35, at 60, 65 (citing examples of rational basis or similarly situate test creeping into analysis of Canadian court decisions).

Yet, the overall, national content of equality rights may be less important than the dynamics of equality rights within each country's cultural setting.⁹³ In the context of sexual minority rights, Canada and the United States share a common “Western” culture, democracy and human rights, and similar societies and economies. Also, sexual orientation discrimination “displays a degree of universality” in both countries.⁹⁴ Canadian and American legal protections for sexual minorities have both been characterized as embracing an “Intermediate Recognition Model.” However, because of variations due to federalism, some American states embrace a “Mixed Recognition Model.”⁹⁵ The recognition of rights varies even within states, moreover, and several major cities with more protective laws for sexual minorities, “might even be fairly assigned to the expansive recognition model.”⁹⁶ While variations do appear in Canadian human rights laws, Canada does not exhibit such a geographical “pluralism” in human rights protection.⁹⁷

Furthermore, despite the apparent differences in equality rights, American and Canadian legal systems remain surprisingly similar. Even though both the models of enforcement and the distribution of enforcement powers vary between the two countries, the resulting vocabulary of legal equality remains similar. Although the text of the American Equal Protection Clause remains the same after a century and a half, American courts and legislators have extended its general principle of equality to include most of the kinds of discrimination prohibited under the Canadian *Charter* and human rights codes. And, while American law has not embraced an affirmative, nationwide ban on “sexual orientation” discrimination, such a ban has been adopted in several states and has been proposed in Congress. Finally, while neither country's courts or

⁹³ See Robert WINTEMUTE, *SEXUAL ORIENTATION & HUMAN RIGHTS: THE UNITED STATES CONSTITUTION, THE EUROPEAN CONVENTION, & THE CANADIAN CHARTER* (1995).

⁹⁴ *Id.*, at 229-30.

⁹⁵ See Eric Heinze, *SEXUAL ORIENTATION: A HUMAN RIGHT, AN ESSAY ON INTERNATIONAL HUMAN RIGHTS LAW*, at 106-11 (1995). Heinze describes this classification as including decriminalization of consensual same-sex practices and some general laws banning sexual orientation discrimination, but falling short of “Affirmative Assimilation.” See *id.*, at 107-11.

⁹⁶ See *id.*, at 111 n.34, 113.

⁹⁷ See *id.*, at 113.

lawmakers have adopted a nationwide ban on “gender identity” discrimination,⁹⁸ a ban on “gender identity” discrimination has been proposed in both countries.

In both Canada and the United States, constitutional protections for freedom of expression may conflict with equality rights. Conflicts between free expression and equality appear acutely in the regulation of hate speech. These conflicts are resolved with very different outcomes in the two countries. Hate speech is not the focus of this study. Nevertheless, an examination of hate speech illustrates the legal limits of laws that impose criminal penalties for hate-related conduct in each country. Therefore, a brief discussion of the application of free expression and equality rights to hate speech laws appears in the next section.

3.2.2.2 Free Expression Constraints on Equality

Hate crime laws are subject to constitutional limits in both Canada and the United States. In both countries, free expression principles constrain the use of laws to enforce equality. Both the constitutional texts and judicial interpretations of free expression and equality vary between the two countries. The differences in Canadian and American free expression principles are paralleled in dramatically different hate speech and hate propaganda laws. On the other hand, free expression principles have not significantly limited the application of hate crime penalty laws in either country.

3.2.2.2.1 Canada

The statutory free expression provisions of the Canadian Bill of Rights remain valid, but Canada’s constitutional protection for free expression now appears in the *Charter*:

2. Everyone has the following fundamental freedoms:
 - a) freedom of conscience and religion;

⁹⁸ The analysis here suggests Canadians will adopt “gender identity” as a prohibited ground, if at all, beginning with court decisions and extending uniformly to provincial and federal human rights codes. Americans on the other hand will adopt the new ground, if at all, via legislation, but only if courts do not invalidate the new legislation.

- b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
- c) freedom of peaceful assembly; and
- d) freedom of association.⁹⁹

As with equality rights, the *Charter*'s free expression protections are subject to a "reasonable limits" standard.¹⁰⁰

The application of free expression as a constraint on equality in Canada is best illustrated by the leading Canadian hate speech case. In *R. v. Keegstra*,¹⁰¹ the Supreme Court recognized the harm of discriminatory speech, even when it is unaccompanied by violent conduct:

The offence does not require proof that the communication caused actual hatred. . . . The intention of Parliament was to prevent the risk of serious harm and not merely to target actual harm caused. The risk of hatred caused by hate propaganda is very real. . . . [D]enigration of persons on the basis of their ethnic identity or other group membership in and of itself, as well as in its other consequences, can be an irreversible harm[.]¹⁰²

Prosecutions for Hate Propaganda in Canada will be addressed along with other hate crime laws later. But, for present purposes it is important to note that the Supreme Court of Canada has affirmed convictions under the Hate Propaganda sections of the Criminal Code, despite the recognized constitutional value of free expression. In *Keegstra* the Court specifically held that the ban on the willful promotion of hatred infringed the § 2(b) free expression provisions of the *Charter*, but that the infringement was justified as a reasonable limit in a free and democratic society under § 1.¹⁰³

⁹⁹ *Charter*, § 2.

¹⁰⁰ *See Charter*, § 1.

¹⁰¹ *R. v. Keegstra*, [1990] 3 S.C.R. 697. *See also* *R. v. Andrews*, [1990] 3 S.C.R. 870 (companion case to *Keegstra*).

¹⁰² *See Mugesera v. Canada (Minister of Citizenship & Immigration)*, [2005] 2 S.C.R. 100, ¶ 102 (citing *Keegstra*).

¹⁰³ Soon after *Keegstra*, in *Zundel*, the Court declared the "spreading false news" provision of the Criminal Code unconstitutional as a violation of the *Charter* § 2(b) and unjustified under § 1. *R. v. Zundel*, [1992] 2 S.C.R. 731 (opinion of McLachlin, J) (invalidating Criminal Code § 181 pursuant to § 2(b)). Specifically, the Court found that the section was overbroad for the "objective of social harmony," that it caused more than a "minimal impairment" out of proportion to its free expression impacts, and that therefore, it could not be justified under § 1 of the *Charter*. *Zundel*, *id.*, ¶¶ 56, 68, 70. The Court reasoned: "If a limitation on rights is established, the onus shifts to the Crown to show that the legislation is justified under s. 1, where the benefits and prejudice associated with the measure are weighed." *Id.*, ¶ 37. The Court expressly refused to apply "the U.S. doctrine of shifting purposes" to the false news section: "To convert s. 181 into a provision directed at encouraging racial harmony is to go beyond any permissible shift in emphasis and effectively rewrite the section." *Id.*, ¶ 45. "Justification under s. 1 requires more than the general goal of protection from harm common to all criminal legislation; it requires a specific purpose so pressing

Even before the *Charter*, equality rights interacted with free expression to limit the availability of criminal penalties in Canada. The Supreme Court reversed a “seditious libel” conviction in the 1951 case *Boucher v. the King*.¹⁰⁴ The defendant had published a pamphlet complaining about the persecution of Jehovah’s Witnesses in Quebec. Many of the acts condemned in the pamphlet would constitute hate crimes by a contemporary understanding in either Canada or the United States.¹⁰⁵ The Court unanimously agreed that the jury instructions defining seditious libel were inadequate because they did not incorporate the Criminal Code protections for “good faith” condemnation of “hatred.”¹⁰⁶

Boucher pre-dated even the Canadian Bill of Rights, and as with equality rights analysis, the *Charter* has since altered the legal analysis applicable to freedom of expression. Today, unless it is communicated directly via physical violence, hate speech falls within the *Charter*’s § 2(b) protection for freedom of expression.¹⁰⁷ But, even though hate speech may constitute protected expression under § 2(b), Parliament and the courts may impose restrictions, and even criminal penalties, for hate speech so long as they are balanced by reasonable limits necessary in a free and democratic society, as set out in § 1. Under this § 1 balancing test, the Court generally

and substantial as to be capable of overriding the *Charter*’s guarantees.” *Id.*, ¶ 46. The Court held that, unlike the propaganda sections which were supported by extensive findings in the Cohen Report and elsewhere, no available evidence explained why Parliament retained § 181. *See id.*, ¶¶ 48-49. While the section may have served “legitimate purposes” the Court concluded it served, “no objective of pressing and substantial concern.” *Id.*, ¶ 51.

¹⁰⁴ [1951] S.C.R. 265.

¹⁰⁵ *See id.*, at 285 (opinion of Rand, J., summarizing, *inter alia*, assaults, destruction of bibles, mob violence).

¹⁰⁶ *Id.*, at 277-85 (opinion of Rand, J.) (construing Criminal Code § 133A). Rand, J. held Criminal Code 133A protected the pamphlet as “primarily a burning protest,” intended as “an earnest petition” for the protection of a religious minority. He quoted the Code provision protecting the “good faith” condemnation of “hatred”:

WHAT IS NOT SEDITION.—No one shall be deemed to have a seditious intention only because he intends in good faith,-

....

(c) to point out, in order to their removal, matters which are producing or have a tendency to produce feelings of hatred and ill-will between different classes of His Majesty’s subjects.

Id., at 289-90 (quoting § 133A). According to Rand, J., the trial judge “virtually ignored” the defense of good faith. The majority also applied the good faith exemption to hold that the pamphlet could not have proven a seditious intention against the administration of justice or the courts. *Id.*, at 290-92.

¹⁰⁷ *See Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825.

approves of restrictions on violent or terroristic expression.¹⁰⁸ And, as will be seen in the discussion of other hate crime laws later, the Canadian Criminal Code does authorize criminal penalties for hate propaganda.

3.2.2.2.2 United States

In the United States, the First Amendment contains constitutional free expression principles applicable to both the state and national governments:

Congress shall make no law . . . abridging the freedom of speech, . . . or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.¹⁰⁹

The Supreme Court of the United States applied the First Amendment to hate speech laws at about the same time as the Canadian decision in *Keegstra*—but with a different outcome.

Soon after hate crime and hate speech laws became common, the United States Supreme Court defined the free expression constraints applicable to such laws in *Wisconsin v. Mitchell*¹¹⁰ and *R.A.V. v. St. Paul*.¹¹¹ In *Mitchell*, the Court approved a state statute authorizing an enhanced penalty for hate crimes, and in *R.A.V.* the Court invalidated a city ordinance banning cross-burning, on free expression grounds. These two decisions establish the free expression limits on both hate crime and hate speech laws. Hate speech laws violate the First Amendment's free speech provisions if they prohibit only one particular form of discriminatory expression—for example cross-burning.¹¹² State laws may punish conduct combined with expression, for

¹⁰⁸ See *R. v. Keegstra*, *supra* note 101 (Dickson, C.J., § 1 balancing “preferable course” for laws limiting free expression, liberally defined); *Suresh v. Canada (Minister of Citizenship & Immigration)*, [2002] 1 S.C.R. 3.

¹⁰⁹ U.S. CONST. AMEND. I. The free expression principles of the First Amendment were adopted a century earlier than even the Equal Protection Clause and have therefore accumulated a very large body of jurisprudence.

¹¹⁰ 508 U.S. 489 (1993).

¹¹¹ 505 U.S. 377 (1992).

¹¹² The Supreme Court has since held that a state statute banning cross-burning does not violate the First Amendment so long as it criminalizing cross-burning “carried out with an intent to intimidate.” *Virginia v. Black*, 538 U.S. 343 (2003). The case was brought to challenge to the constitutionality of a state cross-burning statute, which, as in *R. v. Zundel*, was incorporated into a jury instruction in a criminal trial. See *Virginia v. Black*, *id.*, at 363 (plurality op. of O’Connor, J.).

example cross-burning, when it is committed for the purpose of intimidation.¹¹³ And, hate crime sentencing laws do not violate the First Amendment so long as they punish harms distinct from speech.¹¹⁴

Unlike Canada, the United States has few federal laws directly criminalizing hate speech and no law prohibiting “hate propaganda.” Thus, most Supreme Court cases defining the permissible reach of hate speech laws arise from challenges to state statutes or municipal ordinances.¹¹⁵ The United States Code does contain a provision criminalizing incitement to genocide.¹¹⁶ The genocide statute, however, does not authorize a private right of action; the only statutory remedy for incitement to genocide is a federal criminal prosecution.¹¹⁷ And, based on free speech doctrine, the federal courts have construed the genocide statute quite narrowly.¹¹⁸

3.2.2.2.3 Analysis

The application of equality rights and freedom of expression to criminal penalties for hate crimes is addressed in more detail in the next section. For present purposes, however, Table 3.1

¹¹³ See *Virginia v. Black*, *supra* note 112. The reasoning of the Justices in *Virginia v. Black* illustrates the application of equality and free expression principles in the context of hate speech:

The First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation. Instead of prohibiting all intimidating messages, Virginia may choose to regulate this subset of intimidating messages in light of cross burning’s long and pernicious history as a signal of impending violence. Thus, just as a State may regulate only that obscenity which is the most obscene due to its prurient content, so too may a State choose to prohibit only those forms of intimidation that are most likely to inspire fear of bodily harm. A ban on cross burning carried out with the intent to intimidate is fully consistent with our holding in *R. A. V.* and is proscribable under the First Amendment *Id.*, (op. of O’Connor, J.). The Majority remanded, but Souter, J., concluded the statute could not be saved under strict scrutiny: “Since no *R. A. V.* exception can save the statute as content based, it can only survive if narrowly tailored to serve a compelling state interest, *id.*, at 395-396, a stringent test the statute cannot pass; a content-neutral statute banning intimidation would achieve the same object without singling out particular content.” *Virginia v. Black*, *id.* (op. of Souter, J.).

¹¹⁴ See 16B C.J.S. CONSTITUTIONAL LAW § 964 (2005 & Supp. 2006) (collecting cases).

¹¹⁵ See, e.g., *R.A.V.*, *supra* note 111 (St. Paul city ordinance); *Virginia v. Black*, *supra* note 112 (state cross-burning statute).

¹¹⁶ 42 U.S.C.A. § 1091 (c) (2000 & Supp. 2007).

¹¹⁷ See *id.*, § 1091(b); *Manybeads v. United States*, 730 F.Supp. 1515, 1521 (D. Arizona 1989) (citing § 1092 “Exclusive remedies”).

¹¹⁸ See, e.g., *Manybeads*, *id.*, at 1521. Although the federal genocide law does not preempt state and local genocide laws, they are subject to the free speech constraints of the First Amendment.

summarizes the differences and similarities in equality rights and free expression in Canada and the United States.

Table 3.1—Equality Rights & Free Expression

	Canada	United States
Constitutional Equality Rights	<ul style="list-style-type: none"> • <i>Charter</i>, § 15 • “equal protection and equal benefit of the law . . . without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.” 	<ul style="list-style-type: none"> • Fourteenth Amendment Equal Protection Clause • “equal protection of the laws”
Equality Rights Legislation	<ul style="list-style-type: none"> • National CHRA • Provincial Human Rights Codes • No Municipal Human Rights Laws 	<ul style="list-style-type: none"> • Federal Civil Rights Acts • State Civil & Human Rights Laws • Municipal Civil & Human Rights Laws
Sexual Orientation Discrimination	<ul style="list-style-type: none"> • Prohibited by <i>Charter</i> (Analogous Ground) • Mandatory inclusion in federal & provincial codes 	<ul style="list-style-type: none"> • Discriminatory Legislation Generally Prohibited (Rational Basis Scrutiny) • No mandatory inclusion in state or federal Laws
Gender Identity or Expression Discrimination	<ul style="list-style-type: none"> • Not Prohibited by <i>Charter</i> (Not Analogous Ground) 	<ul style="list-style-type: none"> • Not Generally Prohibited (Rational Basis Scrutiny)
Free Expression	<ul style="list-style-type: none"> • <i>Charter</i>, § 2 	<ul style="list-style-type: none"> • First Amendment Free Speech Clause
Hate Speech Laws	<ul style="list-style-type: none"> • Criminal Code, §§ 318, 319 (“Sexual Orientation” a Prohibited Ground) • No Local Hate Speech Laws 	<ul style="list-style-type: none"> • No National Hate Speech Laws • State & Municipal Intimidation Laws (“Sexual Orientation” & “Gender Identity” Sometimes Prohibited Grounds)

As Table 3.1 indicates, Canadian and American legal systems share significant similarities. There are, however, important differences in both the content and the location of activity in the two legal systems.¹¹⁹

The *Charter* specifies prohibited grounds of discrimination, and Canadian courts have recognized “sexual orientation” as a ground of constitutionally-prohibited discrimination. Therefore the *Charter* requires both national and provincial human rights laws to prohibit discrimination based on “sexual orientation.” The Fourteenth Amendment articulates a standard of equality with no specific prohibited grounds of discrimination. American courts have invalidated laws that expressly discriminate based on “sexual orientation.” But, the United States Constitution does not require national or state governments to prohibit discrimination based on “sexual orientation.” Discrimination based on “gender identity” or “gender expression” remains lawful throughout much of Canada and the United States.

In both Canada and the United States, criminal conduct motivated by prohibited grounds of discrimination is punished relatively unrestrained by constitutional freedom of expression. Hate-related speech, however, is far more protected in the United States than in Canada. Canada therefore employs much more robust hate propaganda laws, and these laws include “sexual orientation” as a prohibited bias.

In addition to the content of equality and free expression principles, the location of legal activity differs considerably in the two countries. Canadian cities have no power to define equality rights in either antidiscrimination legislation or hate speech laws. Subject to the limits of the constitutional standards, American cities legislate actively in the field of equality, and although they are subject to the strict constraints of the First Amendment, they pass laws

¹¹⁹ See generally, Abigail Jones Southerland, *The Tug of War Between First Amendment Freedoms & Antidiscrimination: A Look at the Rising Conflict of Homosexual Legislation*, 5 REGENT J. INT’L L. 183, at 190-95 (2007) (cautioning Americans against borrowing Canadian approach to free expression and “antidiscrimination”).

penalizing hate speech—some of which include “sexual orientation” and “gender identity” as prohibited biases.

These variations in content and location of legal activity provide the necessary context for an examination of hate crime penalty enhancement laws in the next section.

3.2.3 Enhanced Penalties for Homophobic & Trans-phobic Hate Crimes

A comparison of national cultures would likely reveal variations in general legal philosophy between the two countries. But, in the area of hate crime penalties, judges, legislators, and other policy makers in Canada and the United States have produced a surprisingly similar body of law, over roughly the same time span. In recent decades courts in both countries have begun to incorporate the denunciation of discriminatory conduct into their sentencing decisions. Even homophobic and trans-phobic motives have been considered in criminal cases in both countries for some time.

Until recent decades, however, both Canadian and American judges lacked a standard vocabulary to incorporate homophobic and trans-phobic bias into their decisions imposing criminal punishment. Therefore, finding older court decisions that expressly address homophobic and trans-phobic motives can be difficult. In both Canada and the United States, discriminatory motives have been considered in reported cases addressing criminal defenses loosely phrased “gay panic,” “homosexual advance,” or “homosexual assault.” Because of changes in legal terminology, analyzing these older decisions presents serious problems. Nevertheless, courts in these cases addressed behavior that today might constitute homophobic or trans-phobic hate crimes.

The Hate Crime Statistics Act of 1990 (HCSA), the first national hate crime law in the United States, identified certain crimes motivated by “sexual orientation” as hate crimes.¹²⁰ The HCSA did not authorize criminal penalties or other legal remedies. While the Canadian Parliament enacted “hate propaganda” laws in the 1970s,¹²¹ these laws were only recently amended to address expressive conduct motivated by “sexual orientation.”¹²² In the mid-1990s, however, national criminal laws in both Canada and the United States were amended to authorize enhanced penalties for discriminatory crimes. Beginning in the mid-1990s, therefore, both nations’ laws authorized enhanced criminal penalties for crimes motivated by “sexual orientation.” Because of their near contemporaneous enactment, these hate crime penalty laws provide a logical benchmark for an analysis of sentencing trends in both countries.

Hate speech laws, while similarly conspicuous when applied, are excluded from the analysis here for several reasons. First, hate speech laws in Canada and the United States have been compared elsewhere.¹²³ The role of hate speech as a mobilizing agent in social movements has similarly been examined in some detail elsewhere.¹²⁴ Thus, the need for a further examination of hate speech laws in the Canada and the United States is minimal.

Second, despite significant differences in free expression doctrine in the two countries, the outcome of hate speech prosecutions may be the same in practice. Even in Canada, where

¹²⁰ See 28 U.S.C.A § 534 notes (2006) (codifying Pub. L. 101-275, Apr. 23, 1990, 104 Stat. 140, as amended Pub. L. 103-322, Title XXXII, § 32096, Sept. 13, 1994, 108 Stat. 2131; Pub. L. 104-155, § 7, July 3, 1996, 110 Stat. 1394 (Hate Crime Statistics Act)).

¹²¹ See Criminal Code §§ 318 & 319 (codifying Bill C-3, *An Act to Amend the Criminal Code*, R.S.C. 1970 (1st Supp.), c. 11, amending R.S.C. 1970 (Royal Assent June 11, 1970)).

¹²² See Criminal Code § 319, R.S.C., 1985, c. C-46 (formerly Criminal Code, § 281.2, R.S.C. 1970, c. C-34), as amended by Bill C-250, *An Act to Amend the Criminal Code (hate propaganda)*, passed by the House of Commons of Canada on Sept. 17, 2003.

¹²³ See Ellen Faulkner, *Homophobic Hate Propaganda in Canada*, 5 J. HATE STUDIES 63 (2006/07) (Special Issue on Hate and Communication, Gonzaga University School of Law, Institute for Action Against Hate) (comparing Canadian and American hate speech laws); William G. Buss, *A Comparative Study of the Constitutional Protection of Hate Speech in Canada & the United States: A Search for Explanations*, in CONSTITUTIONAL DIALOGUES IN COMPARATIVE PERSPECTIVE (Sally Kenney, et al., eds., 1999); see generally James Warren Grayson, *The Role of Government & the Constitutional Protection of Equality & Freedom of Expression in the United States & Canada* (LL.M. Thesis, Univ. of B.C., 1996); Evelyn Kallen, ETHNICITY & HUMAN RIGHTS IN CANADA, at 261-67 (2nd ed. 1995) (distinguishing libertarian versus egalitarian values).

¹²⁴ See David A. J. Richards, *FREE SPEECH & THE POLITICS OF IDENTITY* (1999) (analyzing role of hate speech in mobilization of civil rights groups).

hate speech is regulated by long-standing Criminal Code Hate Propaganda provisions, the distinction between hate speech and hate crimes attracts a large volume of literature.¹²⁵ Yet, even the most vehement critics of the Canadian approach to hate speech admit that Canadian law enforcement authorities have not taken significant steps to enforce the hate propaganda provisions against homophobic hate speech. As one such commentator has emphasized, “How rigorously the new federal law proscribing speech critical of homosexuality will be enforced—and what real effect it will have on speech—remains to be seen.”¹²⁶ The reluctance of police agencies to lay charges in hate speech cases before the addition of “sexual orientation” to the hate propaganda provisions is well documented.¹²⁷ And, even hate propaganda cases involving other prohibited grounds are extremely rare.¹²⁸ In an important article, a group of Canadian law enforcement officials themselves contrast the “apparent obstacles, difficulties and uncertainties” of hate propaganda prosecutions with the recently adopted Criminal Code Sentencing Principles for bias, prejudice or hate.¹²⁹ Indeed, even the most libertarian opponents of Canadian hate speech law concede that hate speech actually inciting “violent hate crimes” should give rise to criminal penalties.¹³⁰ So, in Canada, pragmatic law enforcement considerations have limited hate speech prosecutions relative to cases invoking the Sentencing Principles for bias, prejudice or hate.

¹²⁵ See, e.g., Note, *The “Privilege of Speech” in a “Pleasantly Authoritarian Country”: How Canada’s Judiciary Allowed Laws Prohibiting Discourse Critical of Homosexuality to Trump Free Speech & Religious Liberty*, 38 VAND. J. TRANSNAT’L L. 443 (comparing Canadian and American approaches to homophobic hate speech).

¹²⁶ See *id.*, 38 VAND. J. TRANSNAT’L L. at 464.

¹²⁷ See Faulkner, *supra* note 123, at 93 n.33 (noting December, 1996 case of homophobic pamphlets distributed in Victoria, B.C., where, “The RCMP was unwilling to lay charges since lesbians, gays, and bisexuals are not a protected group under the Criminal Code. In addition, they concluded that the distribution of religion-based hate literature in good faith is protected.”).

¹²⁸ See Craig S. Macmillan, *et al.*, *Criminal Proceedings as a Response to Hate: The British Columbia Experience*, 45 CRIM. L. Q. 419, 445 (2002) (noting canvass of Canadian jurisdictions showing “no, or very few, cases in which prosecutions for hate propaganda have been undertaken.”).

¹²⁹ See Macmillan, *et al.*, *id.*, at 445 (analyzing police hate crime data, and data-collection practices, through the year 2000); see also *id.*, at 451 n.67 (noting officers instructed in training “not to make arrests” under B.C. Civil Rights legislation, R.S.B.C. 1996, c. 49, § 1(1) (authorizing summary conviction for promotion of hatred based on race and other factors but not “sexual orientation”)).

¹³⁰ See *supra* note 125, 38 VAND. J. TRANSNAT’L L. at 491-92, 492 n.324 (distinguishing speech inciting to hate crimes from speech merely damaging to human dignity).

Third, and perhaps most important, the overall research strategy here ties a key similarity in hate crime sentence enhancement laws to a key difference in hate crime statistics laws in the two countries, without reference to hate speech laws. Both the interview questions and answers analyzed in Chapter 5 and the case studies presented in Chapter 4 concentrate on notorious examples of hate crimes rather than hate speech alone. And, while groups in both locations were clearly opposed to homo- and trans-phobic hate speech, the key cases cited in the interviews were physical assaults that led to criminal prosecutions and hate crime sentencing decisions.

For all of these reasons, hate speech laws will be examined only to a limited degree below, under the heading “Other Hate Crime Laws.” Laws that impose criminal penalties for hate-related conduct, rather than hate speech alone, are analyzed next.

3.2.3.1 Hate Crime Penalty Enhancement Laws

Before surveying the two countries’ hate crime laws, four points of clarification are in order. First, serious objections to the use of criminal law to punish some, but not all, discriminatory conduct have been raised. These objections will be discussed below, along with the antidiscrimination language used in legal texts authorizing enhanced penalties for hate crimes in each country.

Second, in reality, the term “hate crime” is a misnomer. No hate crime law in Canada or the United States requires proof of generalized “hate.” The key elements of proof in both Canadian and American hate crime penalty laws are: the existence of a prohibited bias; the requisite degree or quantum of motivation associated with the prohibited bias; and, the degree or quantum of proof required for punishment, i.e., beyond a reasonable doubt or by a preponderance of evidence. Each of these elements is addressed separately below.

Whether separate proof of a general hateful character is required is determined in the first instance by the express language of a given hate crime penalty law. As is revealed below, in both countries a hate crime penalty appears to require only proof of a prohibited bias as a characteristic of the offence, not the offender. So long as the offender was motivated by a prohibited bias at the time of the offence, the threshold requirement has been met. In other words, proof of an offender's generally hateful attitudes is not expressly required for the imposition of punishment in either country.

Third, the discussion here does not distinguish between discreet hate crime offenses and hate crime sentence enhancement laws. For instance, as described below, Washington state law does not include a sentence enhancement provision for discriminatory motives. Instead, a Malicious Harassment conviction is simply processed through a statutory "Sentencing Grid" that assigns a sentencing range depending on the defendant's "offender score" and the "seriousness level" of the crime.¹³¹ The seriousness of the discriminatory motives is embedded in the definition of Malicious Harassment and reflected in the "seriousness level" assigned to the offense. Similarly, the United States Code has for more than a century contained a discreet offense for the deprivation of federally-protected rights under the color of law, when motivated by racial discrimination.¹³² A more recent example of a discreet discriminatory crime defined without reference to a sentence enhancement statute is set out in the Church Arson Prevention Act of 1996, which penalizes damage to religious property because of race.¹³³ But, unlike Washington state law, the United States Code contains no separate offense incorporating "sexual orientation" as a prohibited bias—instead, only the United States Sentencing Guidelines are available for the punishment of homophobic bias in the commission of federal crimes. Because the societal significance of discreet hate crime offences and hate crime sentence enhancement

¹³¹ See RCW 9.94A.510, Table 1—Sentencing grid.

¹³² See 18 U.S.C. § 242 (Deprivation of rights under color of law).

¹³³ See 18 U.S.C. § 247(c).

laws are substantially similar, I collapse these two types of hate crime law into one category for the purposes of analysis.¹³⁴

Fourth, as already mentioned, hate speech laws are mostly excluded from the analysis of hate crime penalty enhancement laws here. American courts and legislators have adopted a convention distinguishing between “hate crimes” and “hate speech.”¹³⁵ This distinction, largely necessitated by First Amendment limitations, defines a hate crime as, “a crime in which the offender’s conduct was motivated by hatred, bias, or prejudice, based on [a prohibited bias motivation].”¹³⁶ On the other hand, “hate speech” laws punish discriminatory utterances apart from any accompanying criminal conduct: “Statutes which . . . simply punish the utterance of racist or bigoted speech, or the commission of bigoted acts substantially equivalent to speech, have been distinguished as ‘hate speech laws.’”¹³⁷ National laws in both Canada and the United States impose criminal penalties for hate speech. The Canadian Criminal Code Hate Propaganda provisions apply nationwide and authorize punishment for discriminatory utterances, even where no other conduct is alleged. The United States Code likewise includes a provision authorizing criminal penalties for advocacy of genocide on discriminatory grounds. Both would be considered “hate speech laws” by American standards. The Canadian Hate Propaganda provisions were amended in 2004 to include “sexual orientation” as a prohibited bias motive. The American genocide statute does not include “sexual orientation.” More importantly, however, the American genocide statute has been construed as unenforceable on First Amendment free expression grounds. Because of the significant differences in principles of free expression, therefore, penalties for hate speech are difficult to compare across the Canada-United States border.

¹³⁴ See, e.g., Ryan D. King, *The Context of Minority Group Threat: Race, Institutions, & Complying with Hate Crime Law*, 41 LAW & SOC’Y REV. 189, at 192 (2007) (collapsing “substantive” hate crime laws and hate crime “penalty enhancement” laws into a single category for analysis).

¹³⁵ See generally Faulkner, *supra* note 123 (comparing Canadian and American hate crime laws).

¹³⁶ See 15 AM. JUR. CIVIL RIGHTS, § 21 (collecting citations).

¹³⁷ 15 AM. JUR. CIVIL RIGHTS, § 21 Observation.

Canadian and American hate speech laws are addressed briefly as “other hate crime laws” later in a later section. Hate speech laws are otherwise excluded from the analysis for two primary reasons. First, the significant legal differences in Canadian and American hate speech law, largely due to differences in free expression principles, makes a comparison of hate speech laws unwieldy. Second, however, hate speech laws are excluded from the analysis here for methodological reasons. The significant cases cited by the interviewees and analyzed in Chapter 4 involve crimes rather than merely speech. To be sure, interview subjects at both sites cared deeply about the problem of homo- and trans-phobic hate speech. Nevertheless, the most notorious contentious events at both locations involved the commission of crimes that went beyond mere speech.

By contrast, laws that authorize criminal penalties for discriminatory conduct, as opposed to discriminatory speech, are directly relevant to the analysis here. Almost simultaneously, national legislatures in both Canada and the United States expressly authorized enhanced penalties for crimes motivated by “sexual orientation.” To date neither has expressly authorized enhanced punishment for crimes motivated by “gender identity” or “gender expression.”¹³⁸ American states and municipal governments have also enacted statutes authorizing enhanced penalties for homophobic, and to a limited extent, trans-phobic¹³⁹ crimes.

Therefore, what follows will be an examination of the legal texts that authorize enhanced criminal penalties for crimes motivated by sexual orientation or gender identity or expression in Canada and the United States.

¹³⁸ Canadian lawmakers have since reinforced principles of equality applicable to homophobic violence. In 2000, the Sentencing Principles were amended to add a “common law partner” to the aggravating factor for spousal abuse. *Modernization of Benefits & Obligations Act*, S.C. 2000, c. 12, s. 95 (amending Criminal Code § 718.2(a)(ii)). This change was motivated by *Charter* equality rights: “This enactment extends benefits and obligations to *all* couples who have been cohabiting in a conjugal relationship for at least one year, in order to reflect values of tolerance, respect and equality, consistent with the *Canadian Charter of Rights and Freedoms*.” *Id.*

¹³⁹ See Anne C. DeCleene, *The Reality of Gender Ambiguity: A Road toward Transgender Health Care Inclusion*, 16 *LAW & SEXUALITY* 123 (2007) (surveying trans-inclusive state laws, including state hate crime laws).

3.2.3.1.1 Canada

The Canadian Criminal Code establishes uniform, national Sentencing Principles for crimes motivated by bias, prejudice or hate:

718.2 Other sentencing principles

A court that imposes a sentence shall also take into consideration the following principles:

(a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,

(i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor¹⁴⁰

The Sentencing Principles included the prohibited bias “sexual orientation” when they became effective in 1996. A proposal in the current Session of Parliament would create a separate crime of mischief against property if, “motivated by bias, prejudice or hate based on religion, race, colour, national or ethnic origin or sexual orientation. . . . against any identifiable group[.]”¹⁴¹

The same Bill would ban institutional vandalism motivated by listed biases.¹⁴² This legislation would expand the types of conduct subject to hate crime penalties, but outside the Criminal Code Sentencing Principles. It would not expand the prohibited biases to include “gender identity.”

Because the *Constitution Act, 1867*, gives Parliament an exclusive power to define crimes, Canadian provinces and cities do not enact hate crime penalty laws. Neither Parliament nor the provincial legislatures have created agencies to establish formal guidelines for the implementation of the Sentencing Principles. Instead, Canadian courts apply the Sentencing Principles on a case-by-case basis, subject to an evolving body of judicial precedent.

¹⁴⁰ 1995, c. 22, s. 6; 1997, c. 23, s. 17; 2000, c. 12, s. 95(c); 2001, c. 41, s. 20.

¹⁴¹ BILL C-384 1st Session, 39th Parliament, House of Commons of Canada, 55 Elizabeth II, 2006 (adding a proposed Criminal Code § 430(4.11)). The Bill uses the definition of “identifiable group” from the hate propaganda provisions of the Criminal Code: “(4) In this section, ‘identifiable group’ means any section of the public distinguished by colour, race, religion, ethnic origin or sexual orientation.” Criminal Code, § 318(4), R.S., 1985, c. C-46, s. 318; 2004, c. 14, s. 1. Parliament added “sexual orientation” as a prohibited bias effective in 2004. Note that the hate propaganda provisions do not expressly authorize courts to recognize analogous “identifiable groups.”

¹⁴² See *id.*, Criminal Code § 430(4.11)(a)-(c) (proposed).

3.2.3.1.2 United States

Federal sentencing practices in the United States are regulated by an administrative agency, the United States Sentencing Commission. A 1994 statute directed the Sentencing Commission to add a mandatory minimum penalty enhancement for hate crimes.¹⁴³ The Commission accordingly adopted a hate crime Sentencing Guideline establishing both a standard of proof and degree of bias required for imposing an increased penalty:

§3A1.1. Hate Crime Motivation or Vulnerable Victim

(a) If the finder of fact at trial or, in the case of a plea of guilty or *nolo contendere*, the court at sentencing determines beyond a reasonable doubt that the defendant intentionally selected any victim or any property as the object of the offense of conviction because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person, increase by 3 levels.¹⁴⁴

Several attempts have been made to expand the current federal hate crime laws. The newest proposal, named for Matthew Shepard,¹⁴⁵ would add a new criminal section to the existing civil rights laws to authorize hate crime prosecutions in federal court. The Act would apply to persons who “willfully” injure or attempt to injure others, “because of the actual or perceived religion, national origin, gender, sexual orientation, gender identity or disability of any person,”¹⁴⁶ or “because of the actual or perceived race, color, religion, or national origin of any person.”¹⁴⁷ Federal prosecutions would be subject to limits. First, only a few, particularly violent crimes would be subject to prosecution in federal court. Second, some connection to the commercial or civil rights powers of Congress would be required for a federal prosecution.

¹⁴³ *Violent Crime Control and Law Enforcement Act of 1994*, Pub. L. 103–322, title XXVIII, § 280003, Sept. 13, 1994, 108 Stat. 2096.

¹⁴⁴ United States Sentencing Guidelines Manual, § 3A1.1 (November 1, 2006) (available online at <http://www.ussc.gov/2006guid/g12006.pdf> (accessed Sept. 14, 2007)). While gender is a prohibited bias, the commentary to § 3A1.1, also pursuant to instructions from Congress, articulates a limit applicable to this bias only: “Do not apply subsection (a) on the basis of gender in the case of a sexual offense.” *Id.*, Commentary, Application Note 1. In other words, sex crimes are hate crimes when they are motivated by an anti-African American bias, for example, but not when they are motivated by an anti-woman bias.

¹⁴⁵ See The Matthew Shepard Local Law Enforcement Hate Crimes Prevention Act of 2007, S.1105, 110th Congress, 1st Sess. (introduced in Senate Apr. 12, 2007).

¹⁴⁶ *Id.*, 18 U.S.C. § 249(a)(2)(A) (proposed)

¹⁴⁷ *Id.*, § 249(a)(1) (proposed).

Third, a federal prosecution would be available only upon a two-part certification by the Attorney General:

- (1) such certifying individual has reasonable cause to believe that the actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, or disability of any person was a motivating factor underlying the alleged conduct of the defendant; and
- (2) such certifying individual has consulted with State or local law enforcement officials regarding the prosecution and determined that—
 - (A) the State does not have jurisdiction or does not intend to exercise jurisdiction;
 - (B) the State has requested that the Federal Government assume jurisdiction;
 - (C) the State does not object to the Federal Government assuming jurisdiction; or
 - (D) the verdict or sentence obtained pursuant to State charges left demonstratively unvindicated the Federal interest in eradicating bias-motivated violence.¹⁴⁸

Yet, even if the proposed federal legislation were enacted, most American hate crimes would remain within the prerogative of state and local legislators and law enforcement officials. Most American states, and some local municipalities, have enacted hate crime penalty laws. State hate crime laws in the United States are too complex and diverse to describe in detail here.¹⁴⁹ Generally, however, these laws fall into two categories. Most states use a sentencing enhancement model which, like the federal Sentencing Guidelines, authorizes or requires enhanced penalties for particular predicate offenses found to be motivated by a prohibited bias. A second group of states have created discreet offenses which, like the federal civil rights crimes, incorporate a biased motive as an element of the offense.

¹⁴⁸ Matthew Shepard Act, *id.*, § 7(a), quoting proposed 18 U.S.C. § 249(b)(1) & (2). On May 3, 2007, the House of Representatives passed the same Bill (H.R. 1592) by a vote of 237 to 180. The Senate passed the same version but as an amendment to the annual Department of Defense budget bill, and in late 2007 the hate crime legislation was removed from the bill by a Defense Authorization Conference Committee.

¹⁴⁹ Perhaps the most comprehensive survey of hate crime authorities in the United States, including both state and federal statutes and judicial opinions, is *Hate Crimes Law*, by Professor Lu-in Wang. Lu-In Wang, *HATE CRIMES LAW* (1994). First published before the adoption of federal sentence enhancement provisions for hate crimes, her introduction and overview of federal laws relevant to hate crimes nevertheless illustrates the close relationship between federal criminal penalties in the field of “civil rights” and hate crimes. *See id.*, ch. 2., at 2-1 to 2-26. Appendix B sets forth a Jurisdictional Review of State Statutory Provisions Relevant to “Hate Crimes.” Her survey is useful not only because it is comprehensive, but because it necessarily establishes a useable taxonomy for variations in hate crime laws throughout the United States. Her three categories of state hate crime laws are (1) laws criminalizing “ethnic intimidation” or “malicious harassment” (2) mandatory penalty enhancements for crimes motivated by bias, and (3) discretionary sentence enhancements for bias. *See id.*, § 10.03. For simplicity I have collapsed ethnic intimidation and malicious harassment laws into one category.

Both the state of Washington and the city of Seattle have adopted hate crime penalty laws in the second category.¹⁵⁰ The state statute creates the offense “Malicious Harassment”:

Malicious harassment — Definition and criminal penalty.

(1) A person is guilty of malicious harassment if he or she maliciously and intentionally commits one of the following acts because of his or her perception of the victim’s race, color, religion, ancestry, national origin, gender, sexual orientation, or mental, physical, or sensory handicap:

- (a) Causes physical injury to the victim or another person;
- (b) Causes physical damage to or destruction of the property of the victim or another person; or
- (c) Threatens a specific person or group of persons and places that person, or members of the specific group of persons, in reasonable fear of harm to person or property. . . .¹⁵¹

The Seattle Municipal Code creates a municipal offense, also called “Malicious Harassment,” but with a list of additional prohibited biases:

SMC 12A.06.115 Malicious harassment.

A. A person is guilty of malicious harassment if he or she maliciously and intentionally commits one (1) of the following acts because of his or her perception of another person’s gender identity, marital status, political ideology, age, or parental status:

[threatens or causes personal injury or property damage].¹⁵²

¹⁵⁰ The Washington State Sentencing Guidelines do not expressly authorize aggravated sentences for bias or prejudice. *See* Adult Sentencing Guidelines Manual 2006 (Washington Sentencing Guidelines Commission, 2006); *see* Guidelines Manual, *id.*, § I, at 21-23 (available online at http://www.sgc.wa.gov/PUBS/Adult_Manual/On_Line/Sentence_Options.htm (accessed Nov. 11, 2007)). Enhanced penalties are authorized for offenses involving domestic violence or violent offenses against women known to be pregnant, for example, but not for bias motivations generally. *Id.* Thus, in Washington hate crime penalties are processed through separate criminal prosecutions for Malicious Harassment. Note however that Malicious Harassment is listed in the Guidelines Manual as a Class C Felony, with a “Seriousness Level” of IV. *See* Guidelines Manual, Appendix A, Felony Table. Thus, Malicious Harassment may be subject to an aggravated sentence in the appropriate circumstances—but not for hate-related bias.

¹⁵¹ RCW 9A.36.080 [1993 c 127 § 2; 1989 c 95 § 1; 1984 c 268 § 1; 1981 c 267 § 1.]. In addition to the elements of the offense set out in the quoted text, the Malicious Harassment statute sets out standards for the reasonableness of a victim’s fear, limitations on the use of evidence of an accused’s expressions and associations, and examples of racial and religious malicious harassment.

¹⁵² Seattle Municipal Code § 12A.06.115(A) (Ord. 120132 Section 1, 2000.) The Code defines “Gender Identity”:

C. “Gender identity” means a person’s identity, expression, or physical characteristics, whether or not traditionally associated with one’s biological sex or one’s sex at birth, including transsexual, transvestite, and transgendered, and including a person’s attitudes, preferences, beliefs, and practices pertaining thereto.

Id., § 12A.06.115(C).

Because the criminal law-making power is distributed throughout the several levels of government in the United States, as many as three layers of hate crime penalty laws may apply to the same criminal conduct.

3.2.3.1.3 Analysis

Surprising similarities appear in the texts of Canadian and American hate crime penalty laws. The foremost similarity lies in the antidiscrimination terminology used to describe prohibited motives or biases. The national criminal laws of both Canada and the United States authorize an increased penalty for discriminatory crimes, and both specify “sexual orientation” as a prohibited ground of discrimination or prohibited motive. Neither expressly includes “gender identity” as a prohibited motive.

The use of common terminology suggests that the two countries share common notions about equality in the context of criminal law. Yet, a systematic analysis belies the superficial similarities in vocabulary. As systems of legal inquiry and classification, the two countries’ hate crime laws embody different equality rights in practice. The following sections will address the subtleties of the differences between the two systems, beginning with the differences in the vocabulary of equality used in hate crime penalty laws.

3.2.3.2 Antidiscrimination Terminology in Hate Crime Sentencing

Hate crime penalty enhancement laws articulated antidiscrimination terminology in national criminal codes in both Canada and the United States in the mid-1990s. As will be seen, antidiscrimination terminology appeared in a few court decisions before the enactment of formal hate crime penalty laws. Sentencing judges in both the United States and Canada occasionally used antidiscrimination terminology in their sentencing decisions before the enactment of hate

crime penalty statutes. Although some courts applied antidiscrimination principles in sentencing earlier, formal hate crime laws compelled judges to analyze evidence of discriminatory motives in their sentencing decisions more systematically, using a uniform terminology. Because hate crime penalty laws have established a new vocabulary of equality in sentencing decisions, an examination of their antidiscrimination terminology is important.

Therefore, before examining the trend in court decisions before and after the enactment of hate crime laws, the next section will examine the antidiscrimination terminology embodied in these laws. This antidiscrimination terminology has been controversial, however, because it authorizes penalty enhancements for only some discriminatory motives. Criticism centered on which discriminatory motives to prohibit will be analyzed below along with a discussion of the terminology used in the legal texts themselves.

3.2.3.2.1 Canada

The Canadian sentencing premium requires: “evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation or any other similar factor.”¹⁵³ The Supreme Court has not been called upon to interpret the language of the sentencing premium, but

¹⁵³ Criminal Code, § 718.2(a)(i). Enacted in 1995, the Canadian Sentencing Principles for “bias, prejudice or hate” came into force on Sept. 3, 1996, by Order in Council P.C. 1996-1271 (Aug. 7, 1996). See Bill C-41, *An Act to Amend the Criminal Code (Sentencing) and Other Acts in Consequence thereof*, S.C. 1995, c. 22. The legislative Summary provided the following explanation of the new provisions: “Part XXIII is amended to include an express statement of the purpose and principles of sentencing. Where a crime is motivated by ‘hate’, this is deemed to be an aggravating factor for the purpose of sentencing.” *Id.*, c.22 Summary. The same Act required courts to consider sanctions other than prison, “with particular attention to aboriginal offenders” and set a general principle of sentencing equality. See *id.*, S.C. 1995, c. 22, § 6. The principle states: “all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.” Criminal Code, R.S.C., 1985, c. C-46, s. 718.2(e). In its leading sentencing equality case the Supreme Court reconciled the new equality principle for aboriginal offenders by weighing it along with both new and old Sentencing Principles related to uniformity. See *R. v. Gladue*, [1999] 1 S.C.R. 688. The Court affirmed the sentencing judge’s decision not to reduce the sentence of an Aboriginal woman.

lower courts have applied the Sentencing Principles to enhance penalties for crimes motivated by sexual orientation.

3.2.3.2.2 United States

Hate crime terminology began to appear in state laws in the United States in the early 1980s.¹⁵⁴ The 1994 legislation requiring a federal hate crime penalty enhancement, and its implementing Guidelines, apply when, “the defendant intentionally selected any victim . . . because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person.”¹⁵⁵ Both the United States Supreme Court and the lower federal courts have rendered significant decisions regarding the application of the hate crime Guidelines, but the federal courts have not frequently applied the Guidelines to homo- or trans-phobic crimes.

¹⁵⁴ See Michael Shively, *Study of Literature & Legislation of Hate Crime in America*, at i Key Findings (USDOJ, National Institutes of Justice, 2005); Nancy E. Gist, *A Policymaker’s Guide to Hate Crimes*, ix, Executive Summary (USDOJ, BJA, Nov. 1999 Reprint) (NCJ 162304). Significantly, American scholarship does not trace hate crime laws directly to World War II atrocities or any other single source. Shively provides the following synopsis:

Accompanying the rapid spread of federal and state hate crime legislation over the past 20 years has been dramatic growth of the research literature on hate crime over the same time period. However, it would be misleading to suggest that hate crime research is a recent phenomenon. Studies of lynching and other forms of race-motivated violence preceded this period by decades. But the term “hate crime” did not appear with any substantial frequency in the social research literature until recently. Studies in which hate crime is so named and defined in ways generally consistent with contemporary hate crime statutes have grown from a trickle in the 1980s to a steady stream over the past ten years.

Shively, *id.*, at 49 (citations omitted); see generally, *id.*, ch. 3 (“Research and Evaluation of Literature”).

¹⁵⁵ Hate Crimes Sentencing Enhancement Act, Pub. L. No. 103-322, 108 Stat. 1796 (1994) (codified in part at 28 U.S.C. § 994 note (1994)) (HCSEA); see also U.S. Sentencing Guidelines Manual § 3A1.1(a) (1998) (implementing HCSEA). The Guidelines Manual includes earlier civil rights laws alongside new enhancements for hate motivation. See Guidelines Manual, *id.*, § 2H1.1 Application Note 4 (citing § 3A1.1). The Guidelines Manual lists two particular statutes as “involving Individual Rights”—18 U.S.C. § 1091 (criminal penalties for genocide or incitement to genocide against “national, ethnic, racial, or religious group”); and 42 U.S.C. § 3631 (criminal penalties for intimidation or interference with housing rights, because of race, color, religion, sex, handicap, familial status, national origin). 1 Federal Sentencing Guidelines Manual, § 2H1.1 Commentary (2005). As required by Congress, the Guidelines prohibited the application of the sentence enhancement to sexual offenses involving gender bias. The United States Attorney’s Manual mentions principles applicable to sentence enhancement proceedings in several places, but it does not mention sentencing enhancement for hate crimes. United States Attorneys’ Manual, available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/index.html (accessed July 30, 2007).

3.2.3.2.3 Analysis

It is worth noting that the text of the Canadian *Charter*, particularly § 15(2), enshrines a more substantive approach to equality than the American Fourteenth Amendment. The texts of hate crime penalty laws in both countries, however, retain a formal equality approach in their grounds of prohibited discrimination.¹⁵⁶ Specifically, both the United States Sentencing Guidelines and the Canadian Sentencing Principles present a list of prohibited biases stated in neutral terms.¹⁵⁷ Thus, on the face of the hate crime penalty provisions, enhanced penalties may be imposed on offenders from disadvantaged groups, if they target members of dominant groups because of a prohibited ground of discrimination. In other words, a gay man may be subjected to an enhanced penalty for a hetero-phobic assault against a person perceived to be straight. Hetero-phobic hate crimes are practically unheard of in either Canada or the United States. But, for example, a substantial fraction of police-reported hate crimes in the United States are racially motivated crimes committed by Black assailants against victims perceived to be White. The Canadian Sentencing Principles are theoretically subject to the same formally neutral application.

Several aspects of the two countries' hate crime terminology are analyzed below. The most important similarity here, however, is presence of “sexual orientation” as a prohibited bias. On the other hand, not all crimes motivated by “sexual orientation” are covered by the United

¹⁵⁶ The distinction between formal and substantive equality penetrates the everyday discourse of the local Queer press in Vancouver. Professor Brenda Cossman, articulated the “trend” in Canadian court decisions beginning in the late 1990s to reverse, “the denial of pure formal equality: outright discrimination against gay folks because they were gay; outright animus, hatred, dislike, often justified in the language of religion and tradition.” Brenda Cossman, *Naked Eye: Equality on Paper*, XTRA! WEST, May 10, 2007, at 5. In her analysis, Professor Cossman concludes formal inequality had been successfully defeated by the *Charter*, but only after it was combined with, “the coming out of gay issues in the 1990s.” *Id.* Cossman does not mention hate crime legislation, but it is notable that the trend she identifies coincides with the codification of the Sentencing Principles for “bias, prejudice or hate.”

Cossman rightfully cites the series of Supreme Court of Canada decisions in support of her conclusion that the *Charter*, “allowed the courts, rather than cowering politicians, to take the lead on formal equality rights.” Cossman, *id.* The list of key decisions, however, does not include those implementing equality in criminal sentencing. Unlike other fields, where courts provided leadership in eliminating formal inequality, criminal sentencing embraced formal equality principles only after Parliament’s codification of the Sentencing Principles.

¹⁵⁷ The Aboriginal offender sentencing principle, by comparison, embodies a form of substantive equality. An Aboriginal offender subject to the sentencing premium for bias, prejudice or hate might argue for an offsetting mitigation under the separate Sentencing Principle for Aboriginal Offenders.

States Sentencing Guidelines. Hate crimes committed outside the sphere of federal legislative authority are not covered by the Sentencing Guidelines and are not subject to enhanced penalties for bias under the laws of some states. The Washington state Malicious Harassment statute authorizes punishment for crimes motivated by “sexual orientation,” but not all state statutes are as broad.

Canadian and American hate crime laws are also deceptively similar in their omissions. Neither country’s laws expressly authorize increased penalties for crimes motivated by “gender identity.” But, while trans-phobic hate crimes are omitted from both countries’ laws, they are omitted differently. The Canadian Sentencing Principles—like the text of the *Charter*, § 15—invite courts to embrace analogous prohibited biases. The recognition of analogous grounds like “gender identity” is thus left to the discretion of the Courts. The American Sentencing Guidelines do not expressly authorize the recognition of additional biases. The text of the Guidelines does not refer to other similar forms of bias, and the historical practice has been for Congress, rather than the federal Courts or the Sentencing Commissioners, to expand existing penalties under the Guidelines. Notably, it was Congress rather than the courts or the Commissions, that mandated the establishment of Guidelines for hate motivated conduct.¹⁵⁸

Thus, hate crimes motivated by “gender identity” may well go unpunished, particularly if they are not addressed explicitly in state law. The Washington Malicious Harassment law, for example, does not authorize punishment for crimes motivated by “gender identity.” The Seattle Municipal Code, on the other hand, does incorporate “gender identity” along with, “marital status, political ideology, age, or parental status,” as prohibited biased motives for crimes within the City’s legislative authority.

¹⁵⁸ See, e.g., Pub. L. 103-322, Title XXVIII, § 280003, Sept. 13, 1994, 108 Stat. 2096 (Hate Crimes Sentence Enhancement Act mandating hate crime enhancement in Sentencing Guidelines).

Legislative proposals in the two countries suggest a fundamentally different approach to legal change in the field of hate crime penalties. Lawmakers in both Canada and the United States have proposed legislation to broaden the underlying conduct subject to hate crime penalties. Only in the United States do federal legislators retain for themselves the power to expand the antidiscrimination terminology applicable to hate crime penalties. But, judges in both countries interpret and apply existing hate crime texts in individual cases. The key aspects of hate crime penalty laws that remain subject to judicial interpretation in the two countries are examined next.¹⁵⁹

Aside from the particulars of antidiscrimination language used in hate crime laws, serious objections have been raised to the use of criminal laws to punish some, but not all, forms of discriminatory motives. This criticism can only be understood in context with the hate crime penalty enhancement texts and the construction given to the texts in the course of judicial review by courts that have reviewed them.

In the United States, the validity of hate crime laws has generally been accepted as settled doctrine.¹⁶⁰ The United States Supreme Court has held that hate crime laws do not generally violate the constitutional equality rights of those penalized for their discriminatory crimes. Yet, the Court's reasoning in its seminal case assumes that hate crime laws will be drafted using "content-neutral" antidiscrimination language that authorizes enhanced penalties, "across the board." The Court expressly analogized hate crime laws to federal antidiscrimination statutes,

¹⁵⁹ Other differences appear in the American and Canadian hate crime penalty laws. For example, the United States Sentencing Guidelines for hate motivation apply only a limited set of violence criminal offenses. Thus, among the limited classes of federal crimes, a still narrower list of "predicate offenses" are subject to the penalty enhancement provisions of the Sentencing Guidelines for hate motivation. The Canadian Sentencing Principles do not make such a distinction. In theory, all criminal offences defined under the Criminal Code are available as predicate offences for an enhancement based on bias, prejudice or hate. The absence of limits to the available predicate offences raises interesting questions about the potential for double aggravation. For example, may a court imposing a sentence for the willful promotion of hatred based on "sexual orientation," consider the bias built in to the elements of the offence as an aggravating factor? This possibility is avoided by the listing of limited predicate offences in the United States Sentencing Guidelines and their enabling legislation.

¹⁶⁰ See Bernard P. Haggerty, *Hate Crimes: A View from Laramie, Wyoming's First Bias Crime Law, the Fight Against Discriminatory Crime, & a New Cooperative Federalism*, 45 HOW. L. J. 1, at 42-43 (2001) (citing authorities).

which constitute, “permissible content-neutral regulation of conduct.”¹⁶¹ In other words, hate crime laws in the United States do not violate a defendant’s constitutional equality rights, so long as they use neutral antidiscrimination classifications, like race or sexual orientation. The inference from the Supreme Court’s cases is that a hate crime law would violate a defendant’s constitutional rights if it authorized penalties using affirmative action terminology. In other words, a hate crime law authorizing enhanced penalties because the victim was “gay” or “black” would almost certainly be declared unconstitutional.

Which classifications, or grounds of discrimination, to include within the list of prohibited biases remains subject to debate. Generally the grounds of prohibited discrimination incorporated into hate crime laws have coincided with historically problematic discrimination. Some grounding for the selection of prohibited biases in hate crime penalty laws may be found in the history of discriminatory violence, to the extent that it is documented. But, part of the problem encountered by advocates of hate crime laws has been a lack of official documentation with which to justify additional hate crime legislation.

Regardless of which discriminatory motives are chosen to include in a hate crime statute, however, in the United States each *ground* of prohibited discrimination must adhere to the rule of *group* neutrality. The requirement of neutrality in hate crime penalty laws should render these laws immune from criticism based on their discriminatory effects. Nevertheless, such criticism persists.

In Canada, a hate crime penalty enhancement law could be constructed without the neutrality required the Supreme Court of the United States. It is, for instance, entirely conceivable that something like the aboriginal offender provision of the Sentencing Principles could be incorporated into the Sentencing Principles for bias, prejudice or hate. In other words, Parliament could amend the Criminal Code to state explicitly that the terms “bias, prejudice or

¹⁶¹ See *id.* (citations omitted).

hate” are meant to apply only to victims targeted because of their disadvantaged status in Canadian society. Alternatively Canadian courts, if pressed to do so by the litigants in a criminal sentencing proceeding, could interpret the existing Sentencing Principles to incorporate a requirement of some victim disadvantage. To date, however, Canadian Courts and Parliament have not deviated substantially from the American approach of formal neutrality.

Without venturing to predict the outcome of such an interpretive exercise, two basic approaches seem possible. First, a court could apply an interpretation of the terms, “bias, prejudice or hate,” similar to the interpretation of “discrimination” in the human rights context, which requires some showing of disadvantage. Second, alternatively, a court could simply note that the aboriginal offender provision of the Sentencing Principles expressly requires courts to consider the disadvantaged status of aboriginal offenders, while the principles for bias, prejudice or hate do not. If Parliament intended to require a consideration of disadvantage in the provisions for “bias, prejudice or hate,” it would have made the requirement explicit.

Which interpretation would prevail in a Canadian court is impossible to predict. While the Supreme Court of Canada has yet to address the question, a neutral application of the Sentencing Principles for bias, prejudice or hate seems permissible under the equality rights provisions of the *Charter*. But, might the Sentencing Principles for bias, prejudice or hate be interpreted more liberally to permit a form of affirmative action in sentencing? Because of the Canadian commitment to substantive equality discussed previously, it is conceivable that either a court or Parliament could adopt a disadvantage-specific approach to hate crime sentence enhancement without violating the equality rights provisions of the *Charter*.

Affirmative action in Canadian hate crime sentencing remains an unanswered question. The American interpretation, by contrast, is virtually certain—affirmative action in sentencing is impermissible, because the prohibited grounds of discrimination must apply in a neutral, “across the board” fashion. In sum, therefore, as they now stand, both Canadian and American hate

crime laws apply neutral, antidiscrimination terminology. Hate crime sentencing is subject to *de jure* neutrality in the United States and *de facto* neutrality in Canada.

Yet, despite the requirement of neutrality in hate crime sentencing in both countries, law enforcement officials seem reluctant to invoke hate crime laws. I suggest this reluctance stems from two primary sources. First, the rhetoric of some hate crime sentencing decisions suggests a reliance on a logical fallacy—a continuing assumption that hate crime laws constitute a form of affirmative action. As has been shown, to date at least, there is no basis for characterizing hate crime laws as a form of affirmative action in either Canada or the United States.

Second, however, critics of hate crime laws continue to object to what they see as an arbitrary selection of prohibited, discriminatory motives. I have summarized both this critique and the responses that have been made to it in a separate work:

Some critics, notably Gellman, and Jacobs and Potter, suggest that hate crime laws are invalid because they identify proscribed biases arbitrarily. First, as with the choice of which offenses to include, the choice of classifications is no more arbitrary than any other policy decisions about criminal law.

Second, one modern scholar has answered this critique by requiring a consideration of the “social context” of discrimination, omitting any class of discrimination that would place current victims at greater risk. A third approach, consistent with the American “social context” of equal protection jurisprudence, is to test the duration, extent, and effects of past discrimination. Any characteristic susceptible to “particularized findings of past discrimination” should be included in a hate crime penalty enhancement law. Hence, upon a showing of past religious discrimination, crimes motivated by religion should be regulated. Whether past religious discrimination generally or past religious crime specifically should be required; what quantum of evidence should be required; and how narrowly tailored any remedy must be to the area subject to past discrimination, are all additional legislative policy choices. However, one useful purpose of the HCSA is to provide empirical support for whatever classifications a legislature decides to include in a substantive hate crime statute.¹⁶²

My conclusion was, in essence, that (a) hate crime laws are no more arbitrary than any other criminal laws, and (b) a well-drafted hate crime statistics law should answer any objection to the arbitrary selection of biased motives prohibited by a hate crime penalty enhancement law. This

¹⁶² Haggerty, *id.*, at 50-51 (footnotes omitted) (citing Susan Gellman, *Sticks & Stones Can Put You in Jail, But Can Words Increase Your Sentence? Constitutional & Policy Dilemmas of Ethnic Intimidation Laws*, 39 UCLA L. REV. 333 (1991); James B. Jacobs & Kimberly Potter, *HATE CRIMES: CRIMINAL LAW & IDENTITY POLITICS* (1998)).

conclusion still seems valid in the United States, and it seems to apply with equal force in Canada. Even if Canadian courts or the Parliament chose to embrace an affirmative action approach or disadvantaged status analysis to hate crime penalty enhancements, hate crime laws would be no more arbitrary than, for example, the aboriginal offender sentencing principles. And, while Canada has no national hate crime statistics reporting law, such a law could provide a rational justification for the grounds of discrimination prohibited by Canadian hate crime laws.

3.2.3.3 Standard of Proof

In both Canada and the United States prosecutors must prove the elements necessary to impose increased penalties for hate crimes. Constitutions and statutes in both countries articulate a standard of proof for criminal cases, and courts in both countries have interpreted the standard of proof applicable to hate crime penalties.

3.2.3.3.1 Canada

The Canadian Bill of Rights articulates a “right to be presumed innocent until proven guilty according to law in a fair and public hearing.”¹⁶³ The *Charter* elaborated on the language of the Bill of Rights by adding a specific reference to trial by jury:

11. Any person charged with an offence has the right
 - ...;
 - d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;
 - ...;
 - f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;¹⁶⁴

Neither text expressly mandates proof beyond a reasonable doubt, and neither specifically applies to sentencing proceedings.

¹⁶³ *Canadian Bill of Rights*, § 2(f).

¹⁶⁴ *Charter*, § 11(d), (f).

Even before the *Charter*, however, the Supreme Court of Canada unanimously held that the crown must prove aggravating factors in sentencing beyond a reasonable doubt.¹⁶⁵ And, Parliament has since specified the standard of proof for an enhanced sentence under the Canadian Criminal Code:

724. (1) In determining a sentence, a court may accept as proved any information disclosed at the trial or at the sentencing proceedings and any facts agreed on by the prosecutor and the offender.

....

(3) Where there is a dispute with respect to any fact that is relevant to the determination of a sentence,

(a) the court shall request that evidence be adduced as to the existence of the fact unless the court is satisfied that sufficient evidence was adduced at the trial;

...;

(d) subject to paragraph (e), the court must be satisfied on a balance of probabilities of the existence of the disputed fact before relying on it in determining the sentence; and

(e) ***the prosecutor must establish, by proof beyond a reasonable doubt, the existence of any aggravating fact*** or any previous conviction by the offender.¹⁶⁶

The sentencing court “shall accept as proven all facts, express or implied, that are essential to the jury’s verdict of guilty.”¹⁶⁷

¹⁶⁵ See *R. v. Gardiner*, [1982] 2 S.C.R. 368 (per Dickson, J.); see also *R. v. Boucher*, [1951] S.C.R. 265 (reversing and remanding for entry of judgment of acquittal in absence of proof beyond a reasonable doubt). Laskin C.J., dissenting, reasoned that the Supreme Court lacked jurisdiction to address questions of “quantum” for sentences within the authorized range: “If Parliament has thought fit to leave the quantum of a sentence to be finally determined at the Court of Appeal level, it should similarly be considered that this carries with it the final determination of the considerations which enter into the measure of a sentence.” *Gardiner*, *id.* (opinion of Laskin, C.J., dissenting in part). In its 1982 decision, *R. v. Gardiner*, a majority of the Supreme Court held that the power to determine the standard of proof in sentencing lay with the Courts. The Majority held that the Supreme Court has jurisdiction to review principles applied in sentencing, and in particular the applicable burden of proof:

Questions of burden of proof have traditionally been of concern to the judiciary and left to the judiciary and not Parliament to resolve. We are dealing here with a procedure which has evolved at common law and not by statute. It is not an issue which should take the time of Parliament.

It seems to me that there is a positive collective interest in having federal law, in particular the criminal law, one and the same for all Canadians and in knowing that the country’s highest Court is in the background, in case of need, to illuminate difficult points of law arising in the sentencing process. Cases calling for the articulation of governing and intelligible principles bearing upon deprivation of personal liberty would seem rationally to be the paradigm of the type of case which should find its way to this Court.

R. v. Gardiner, *id.* (Majority opinion of Dickson, J.). Despite the dissent regarding jurisdiction, the Court was unanimous in its conclusion regarding the burden of proof in sentencing.

¹⁶⁶ Canadian Criminal Code, R.S., 1985, c. C-46, s. 724; 1995, c. 22, s. 6 (emphasis added). The standard of proof for facts in sentencing proceedings may not lie within the Parliament’s power to define crimes, but the Parliament also has the exclusive power to regulate, “the procedure in criminal matters.” *Constitution Act, 1867*, § 91(27).

¹⁶⁷ *Id.*, § 724(2)(a).

These general statements of the standard of proof, however, must be weighed against the specific language of the Sentencing Principles. When sentencing for bias, prejudice or hate, under § 718.2(a)(i), judges, “shall [] take into consideration” the principle that, “a sentence should be increased” upon a showing of “evidence” of a prohibited, biased motive. This combination of language assigns sentencing judges a uniquely broad discretion.

3.2.3.3.2 United States

In the United States, the Sixth Amendment establishes a nationwide standard of proof for all criminal cases: “In all criminal prosecutions, the accused shall enjoy the right to a speedy public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation[.]”¹⁶⁸ Like the Canadian texts, the Sixth Amendment contains no express requirement of proof beyond a reasonable doubt. The United States Supreme Court has long recognized proof beyond a reasonable doubt as the common law standard of proof for crimes.¹⁶⁹

In its 1975 decision in *Mullaney v. Wilbur*, the Court held that the prosecution must prove, beyond a reasonable doubt, any fact that increases “the degree of criminal culpability.”¹⁷⁰ The holding in *Wilbur* applied to Maine state statutes that authorized the elevation of manslaughter to murder without requiring the prosecution to prove the absence of provocation beyond a reasonable doubt. The Court expressly extended the requirement of proof beyond a reasonable doubt to state sentence enhancement statutes in *Apprendi v. New Jersey*.¹⁷¹

¹⁶⁸ U.S. CONST. AMEND. VI; *see also id.*, art. III, § 2, cl. 3 (establishing trial by jury for all crimes).

¹⁶⁹ *In Re Winship*, 397 U.S. 358, 361-69 (1970) (reviewing history of common law requirement of proof beyond a reasonable doubt); *Mullaney v. Wilbur*, 421 U.S. 684, 692-704 (1975) (same).

¹⁷⁰ *Mullaney v. Wilbur*, *id.*, at 697-98. The Court reversed *Wilbur*’s murder conviction because Maine’s state law assigned the defendant the burden to prove provocation to support a conviction of the lesser offense of manslaughter. Significantly, *Wilbur*’s defense was “heat of passion provoked by [] homosexual assault”; he claimed he killed the victim, “in a frenzy provoked by [his] homosexual advance.” *Wilbur*, *id.*, at 685.

¹⁷¹ 530 U. S. 466 (2000). The Court held: “Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *Id.*, at 490; *see also Cunningham v. California*, 127 S. Ct. 856, 166 L. Ed. 2d 856 (2007) (holding California determinate sentencing law violated Sixth Amendment by authorizing sentencing judges to deviate upward from mid-point of sentencing range upon proof by a preponderance of the evidence).

But not all sentence enhancement statutes are the same. The prosecution need not prove the facts necessary to increase a sentence beyond a reasonable doubt, if the applicable legislation leaves the sentencing judge the discretion to deviate from the guideline establishing the aggravating factor. In *United States v. Booker*, the Supreme Court recently construed the Sentencing Guidelines to be “advisory” and thus effectively exempt from the constitutional requirement of proof beyond a reasonable doubt.¹⁷² The Guidelines remain effective as “advisory” sentencing principles, but federal courts now have the discretion to deny an enhanced sentence despite evidence of a biased motive.

3.2.3.3.3 Analysis

Despite differences in the distribution of criminal lawmaking powers, the standard of proof for hate crime penalties is uniform throughout both Canada and the United States. In both countries, prosecutors must prove elements necessary to authorize hate crime penalties beyond a reasonable doubt. Yet, in both countries the application of the standard of proof may be open to question in particular cases.

For example, a Canadian sentencing court must be “satisfied on a balance of probabilities,” about any disputed facts used in sentencing, but the crown must prove aggravating factors, like biased motives, “beyond a reasonable doubt.” The court “shall accept” facts essential to a jury verdict, but if an aggravating factor like bias is not part of the verdict, the court, “shall request that evidence be adduced.” Disputes about which facts are “essential” to a jury’s verdict are probably inevitable. But, if only some evidence of a biased motive appears at trial, and if bias is not an essential element of the offense, then the Code requires the sentencing judge to request additional evidence.

¹⁷² See *United States v. Booker*, 125 S. Ct. 738, 160 L.Ed.2d 621 (2005). Although the Guidelines are now advisory rather than mandatory, sentencing courts must consider the Guidelines. See 24 C.J.S. CRIMINAL LAW § 2023 (2006) (collecting cases).

Requiring a sentencing judge to demand additional evidence, however, seems inconsistent with the prosecutor's burden of proof beyond a reasonable doubt. Moreover, if a prosecutor chooses not to present evidence of bias, prejudice or hate either at trial or during sentencing, the Code seems to authorize—even require—a sentencing judge to usurp the prosecutor's discretion.

A federal judge in the United States is confronted with a slightly different set of questions. The Sentencing Guidelines, which once mandated a particular sentence enhancement for biased motives, now only recommend an increased sentence. Since the Sentencing Guidelines are no longer mandatory, a prosecutor may seek an enhanced penalty for biased motives during sentencing, even if the question of bias was never presented to the jury. So long as the biased motive is not treated as an automatic aggravating factor it need not be proven beyond a reasonable doubt. But, what if a prosecutor proves the biased motive beyond a reasonable doubt to the jury, then may the judge nevertheless decline to follow the recommended penalty enhancement? Without the mandatory sentence enhancement, moreover, how would a prosecutor ever place the question of a biased motive before a jury? The answers to these questions, for now, lie in the structure of criminal sentencing procedures. In both Canada and the United States, judges and prosecutors enjoy considerable discretion. The laws governing penalties for hate crimes generally increase rather than constrain this discretion. At most, hate crimes remain a tool for use only to the extent that judges and prosecutors chose to use them. Their discretion to withhold hate crime punishment is virtually unlimited.

Canadian prosecutors may disregard evidence of bias, prejudice or hate, while Canadian judges bear an independent duty to inquire about evidence of bias, prejudice or hate. But, practically, the judicial duty is meaningless where a prosecutor has chosen not to present any evidence of motives. Moreover, no practical remedy exists for a judge's failure to inquire when presented with some evidence of bias. And, for all practical purposes, American judges and

prosecutors enjoy similar discretion. In federal court, sentence enhancements for biased motives are entirely discretionary—if either a prosecutor or a judge chooses to disregard evidence of bias, then no enhanced penalty will be imposed. If state or federal legislators chose to mandate enhanced sentences for hate, then judicial discretion will be constrained, but prosecutors will still be free to shape penalties according to their discretion in charging decisions.

3.2.3.4 Mixed Motives & Causation

Reported decisions imposing hate crime penalties in Canada and the United States commonly confront questions about the degree of biased motivation required. Canadian and American authorities have so far reached slightly different conclusions.

3.2.3.4.1 Canada

The Canadian Criminal Code authorizes a sentencing premium upon a showing of “evidence that the offence was motivated by bias, prejudice or hate based on . . . sexual orientation[.]”¹⁷³ The terms “motivated by” and “based on” are subject to interpretation. Some degree of motivation with some causal connection to one or more of the listed biases must be proven, but the Criminal Code does not specify a quantum of motive or causation.

In addition to the questions about the quantum of motive or causation, one group of law enforcement officials has recommend a “codified definition” of hatred to facilitate not only hate crime and hate propaganda investigations and prosecutions but also hate crime statistical analysis.¹⁷⁴ For hate propaganda, MacMillan, *et al.* note that, “in practice, by virtue of the *Keegstra* case, the police in Canada had broad discretion and little real direction on how to

¹⁷³ Criminal Code § 718.2(a)(i).

¹⁷⁴ See MacMillan, *et al.*, *supra* note 128, at 459-61.

categorize material as meeting the test for hate.”¹⁷⁵ For the sentencing premium for bias, prejudice or hate, the same commentators suggest an added ambiguity inhibits enforcement:

Another important reason for recommending a national definition of hatred is that it would greatly assist the police, Crown counsel and the courts in resolving some of the uncertainty surrounding the applicability of the elements of bias, prejudice or hate in sentencing under s. 718 for a hate/bias offence. . . . [I]t is not clear whether these motivational elements must be present in whole or in part for the section to be brought into play. . . . As well, a uniform national definition would assist in clarifying the sentencing standard intended by the phrase “bias, prejudice or hate”. In other words, is this sentencing phrase governed by the Keegstra definition of hatred, or does it include the lower standards of motivation because of the presence of the additional terms “bias” and “prejudice[?]”¹⁷⁶

MacMillan, *et al.* add that, for statistical purposes, “until recently, some provinces or agencies only categorized offences as hate crimes if the offences were determined to be *wholly or singularly* motivated by bias, prejudice or hatred.”¹⁷⁷

Judicial guidance regarding the application of the Sentencing Principles for bias, prejudice or hate has since been provided by Canadian courts. In *R. v. Nash*,¹⁷⁸ an Ontario Court concluded racial motivation was “significant contributing factor” to the offence. While the case did not involve homo- or trans-phobic motives, the Court’s application of the burden of proof to co-defendants with differing degrees of prohibited bias is nevertheless noteworthy:

I am satisfied, based on all the evidence, that the offence is properly characterized as one motivated by racial hatred, referred to in Section 718.2, although it is impossible, in my view, to dissect what was in the mind of each of the individuals who participated in this event. The accused was a party to this group attack, and the evidence is quite clear, in my view, given the racist comments that were made before the violence was initiated, and given the fact that the victims were members of a visible minority, and that this group of people attacked them without any provocation, that a *significant contributing factor* was this racist motivation. If the accused, Mr. Nash, had something else in his mind in addition to that, or if he was less of a racist, if one can say that, than Mr. McBurney was, that may be. I do not think I can make any determination

¹⁷⁵ MacMillan, *et al.*, *id.*, at 459.

¹⁷⁶ *Id.*, at 460.

¹⁷⁷ *Id.*, at 460-61 (emphasis in original).

¹⁷⁸ See *R. v. Nash*, [2002] O.J. No. 3843 (Ont. Ct. of Justice) (Fairgrieve J.) (finding racial motivation “significant contributing factor”)

concerning that, but I am satisfied that *the offence itself has been proved by the Crown beyond a reasonable doubt to have been motivated by racial hatred.*¹⁷⁹

In support of its finding, the Court cited uncontested expert testimony establishing the “indicia of white supremacist racism,” in addition to the defendant’s group membership and participation in the group’s activities at the time of the offence.¹⁸⁰ Based on the evidence, the Court applied the Code’s mandate: “the section of the Code makes it clear that the sentence is to be increased when that aggravating factor has been established.”¹⁸¹

The Alberta Court of Appeal provided further guidance in a case involving a mixture of “political” motives with those prohibited by the Sentencing Principles for bias, prejudice or hate.¹⁸² In *R. v. Sandouga* the Court of Appeal provided the following summary of Sentencing Principles applicable to aggravating circumstances:

A court is required, in imposing a sentence, to consider aggravating and mitigating circumstances (s. 718.2(a)). Aggravating circumstances must be established by proof beyond a reasonable doubt (s. 724(3)(e)). Section 718.2(a)(i) addresses hate crimes. It deems “evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, [...] religion, [...] or any other similar factor [...] to be [an] aggravating [circumstance]”. *The word “motivated” implies a link between the bias, prejudice or hate and the decision to commit the crime.*¹⁸³

The Court found the trial court’s one-year sentence for a synagogue arson demonstrably unfit because it failed to, “unequivocally indicate that such hate crimes and terrorist acts will not be countenanced.”¹⁸⁴ The Court specifically rejected any requirement of broad hatred against the targeted group. Even accepting the defendant’s claim that, “he does not hate Jews,”¹⁸⁵ the Court found a “clear link” between the crime and the defendant’s prejudice:

Sandouga’s actions were directed against an identifiable religious group and were motivated by revenge against all members of that group. Sandouga targeted

¹⁷⁹ *Id.*, ¶ 4 (emphasis added).

¹⁸⁰ *Id.*, ¶ 5.

¹⁸¹ *Id.*, ¶ 6 (citing Criminal Code, § 718.2).

¹⁸² See *R. v. Sandouga*, 2002 ABCA 196, [2002] A.J. No. 1042 (Ct. App.) (Fruman J.A., Perras & Hembroff JJ.).

¹⁸³ *Id.*, ¶ 16 (quoting Criminal Code) (emphasis added).

¹⁸⁴ *Id.*, ¶ 37.

¹⁸⁵ *Id.*, ¶ 17.

the synagogue because its congregants are adherents of the same religion as the people he considers responsible for problems in Palestine. *There is a clear link between his enmity towards or prejudice against the Jewish people, and his commission of the crime.* The offence is therefore a hate crime. The sentencing judge erred in principle by failing to consider this serious aggravating circumstance.¹⁸⁶

While provincial Courts of Appeal have addressed some of the questions about the quantum of motivation required by the Sentencing Principles, the Supreme Court of Canada has yet to address the topic. And, despite the specificity of the antidiscrimination terminology used in the Criminal Code Sentencing Principles for bias, prejudice or hate, significant space remains for discretion in the classification decisions of police, prosecutors, and judges.

3.2.3.4.2 United States

The United States Sentencing Guidelines use a slightly different formulation, requiring proof that the accused “intentionally selected any victim or any property as the object of the offense of conviction because of the actual or perceived . . . sexual orientation of any person[.]” This formulation clearly authorizes increased punishment for crimes based on mistaken identity and for crimes directed toward a victim’s associates even if they do not possess the same characteristics as the victim. In this respect the Sentencing Guidelines are broader than the Canadian Sentencing Principles. On the other hand, the Guidelines require proof of a specific intent to select a victim “because of” a prohibited bias.

The Sentencing Commission issues a Guidelines Manual that interprets the language of the Guidelines.¹⁸⁷ The Manual explains that the hate crime enhancement applies only if, “*a primary* motivation for the offense was the race, color, religion, national origin, ethnicity,

¹⁸⁶ *Id.*, ¶ 18 (emphasis added); compare *id.*, ¶ 17.

¹⁸⁷ See Guidelines Manual, § 3A1.1(a); *id.* Commentary, Application Note 3 & Background.

gender, disability, or sexual orientation of the victim.”¹⁸⁸ Although the victim need not technically possess the characteristics motivating the offender, the hate crime enhancement is set out among other victim characteristics, including victim “vulnerability.” Offender characteristics are generally deemed irrelevant, and the Guidelines Manual states unequivocally that an offender’s “Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status, . . . are not relevant in the determination of a sentence.”¹⁸⁹

In a mixed motive case predating the hate crime Guideline, the Eighth Circuit held that a civil rights prosecution for racially-motivated interference with public park facilities was not precluded, even if the defendant was also motivated by other factors, including, “hatred for homosexuals.”¹⁹⁰ Other federal courts have held that both a “vulnerable victim” and a “hate crime” enhancement may be applied in appropriate cases.¹⁹¹ Thus, while the Sentencing Guidelines do incorporate a general prohibition on the “double-counting,”¹⁹² of the same motive for sentencing calculations, mixed motives do not preclude the application of a hate crime enhancement under the Guidelines.

The language of state and municipal hate crime penalty laws varies throughout the United States. The Washington Malicious Harassment statute requires proof that an offender “maliciously and intentionally” injured the victim “because of” their actual or perceived characteristics.¹⁹³ The statute does not require proof that the offender acted “solely because of” the victim’s characteristics. The state courts have adopted a “substantial factor” analysis—a

¹⁸⁸ *Id.*, § 3A1.1 Commentary, Background (emphasis added). A different quantum of motivation or causation applies to the identification of hate crimes for the purpose of crime statistics.

¹⁸⁹ See Guidelines Manual, § 5H1.10. The Manual authorizes enhanced sentences for violations of the criminal civil rights laws for “hate crime motivation.” See Guidelines Manual, *id.*, § 2H1.1 Application Note 4 (citing § 3A1.1).

¹⁹⁰ See *United States v. Bledsoe*, 728 F.2d 1094, 1098 (8th Cir. 1984) (quoting jury instruction interpreting 18 U.S.C. § 245).

¹⁹¹ See *United States v. Boylan*, 5 F.Supp.2d 274, 283 (D.N.J. 1998) (construing Guidelines § 3A1.1(a) & (b) and noting “The two adjustments are not listed in the disjunctive and thus, it appears that both can apply to a given set of facts.”). Boylan was a municipal court judge who exchanged reduced traffic penalties for sexual favors, choosing his victims based on their race, gender, and financial vulnerability.

¹⁹² *But see generally* Boylan, *id.*, at 283-84 (no “double counting” violation where defendant both chose vulnerable victims and perverted justice).

¹⁹³ RCW § 9A.36.080(1).

prosecutor need only prove that the victim’s perceived characteristics were a “substantial factor” in the offender’s actions, not the sole motivation.¹⁹⁴

3.2.3.4.3 Analysis

A subtle difference may lie between the terms “motivated by” and “intentionally selects.” The terms “based on” and “because of” may likewise differ. But, in both Canada and the United States, prosecutors must prove, and judges must find, some degree of motivation and some causal connection between a biased motive and the criminal act before imposing an enhanced penalty for a discriminatory crime.

Because of uncertainty in the degrees of motivation or causation, however, police, prosecutors, and sentencing judges are enabled to apply flexible interpretations of the sentencing provisions in both countries. The Guidelines Manual is available to provide interpretive guidance to law enforcement officials in the United States. And, if legislators disagree with the stated interpretations of the Guideline for hate motivation, then they have an open opportunity to mandate a different standard. In Canada, by contrast, no published interpretive rules apply to the Sentencing Principles for bias, prejudice or hate. The result is that sentencing courts interpret the motivation and causation requirements on a case-by-case basis. Provincial Courts of Appeal, and ultimately the Supreme Court of Canada, are available to provide a uniform interpretation, but this process may be time consuming. Interestingly, since the state sentencing guidelines do not interpret the motivation or causation requirement of the Washington Malicious Harassment statute, it has been applied according to the interpretations of courts, like the Canadian Criminal Code Sentencing Principles. Thus, in both Canada, and some states like Washington, law enforcement officials and sentencing judges enjoy an added modicum of discretion.

¹⁹⁴ State v. Pollard, 906 P.2d 976, 981-82 (Wash. Ct. App. 1995).

In conclusion, the assessment of the motivation requirement for hate crimes is subject to the same forces that influence police and prosecutorial discretion in all other crimes. Because police agencies and prosecutors may be concerned with their case “clearance” or “success” rates, they may tend to exercise their discretion not to classify a crime as a hate crime in cases involving complex mixed motives, or other variations from the “paradigm” case, even where they could construe the relevant statutes as applicable.¹⁹⁵

3.2.3.5 Provocation & Self-Defense

An analysis of the effects of hate crime penalty statutes on subsequent sentencing decisions will follow shortly. As will be seen, however, these new laws have had a practical effect on the assertion of certain defenses in cases involving hate-related conduct. The hate crime laws attach a strategic risk to the assertion of certain defenses, particularly provocation and self-defense. The case of *Mullaney v. Wilbur* provides an example of the use of provocation as a defense to a charge of murder. Significantly, Wilbur’s defense was “heat of passion provoked by [] homosexual assault”; he claimed he killed the victim, “in a frenzy provoked by [his] homosexual advance.”¹⁹⁶

Wilbur, however, arose long before either the American or Canadian hate crime penalty laws. Nothing in the terminology of hate crime penalty laws expressly prohibits the use of provocation or self-defense claims. But, hate crime laws make such claims more difficult in both Canada and the United States. If a defendant claims an assault was provoked or justified by homosexual advance, but is found guilty nevertheless, then he risks admitting the homophobic motive necessary for a sentence enhancement in the same case. Claims of “homosexual

¹⁹⁵ See generally T. A. Maroney, *The struggle against hate crime: a movement at a crossroads*, 73 N.Y.U. L. REV. 564 (1998) (describing pull toward “paradigm cases”); Elizabeth A. Boyd, *et al.*, “*Motivated by Hatred or Prejudice*”: *Categorization of Hate-Motivated Crimes in Two Police Divisions*, 30 LAW & SOC.’Y REV. 819 (1996) (comparing police interpretation of hate crime law in two divisions of same department).

¹⁹⁶ *Wilbur, id.*, at 685. The Court reversed Wilbur’s murder conviction because Maine’s state law assigned the defendant the burden to prove provocation to support a conviction of the lesser offense of manslaughter.

advance,” and “gay panic” are therefore more difficult, although they may still be asserted in both countries.¹⁹⁷

3.2.3.6 Hate Crimes in Youth or Juvenile Proceedings

In both Canada and the United States, youthful offenders are common among the perpetrators of hate crimes, including homo- and trans-phobic hate crimes. Therefore questions have arisen regarding the application of hate crime penalty laws in Youth Court or juvenile delinquency proceedings.

As with the Criminal Code, Parliament has established a uniform, national law for youthful offender adjudications.¹⁹⁸ The Act codifying the Sentencing Principles applied to conditional discharges, pardons, and remissions, but it explicitly exempted youthful offender proceedings from the sentencing provisions of the Criminal Code.¹⁹⁹

The United States Constitution establishes minimum standards of fairness in juvenile delinquency proceedings. For example, juveniles may not be found delinquent for conduct that would constitute an adult crime, unless the prosecutor presents proof beyond a reasonable doubt.²⁰⁰ Aside from such procedural protections, however, states almost exclusively determine the laws applicable to youthful offenders.²⁰¹

In both Canada and the United States the applicability of hate crime sentencing principles to youth proceedings remains uncertain.

¹⁹⁷ Heterosexual advance and straight panic have never been recognized in either country.

¹⁹⁸ See Young Offenders Act.

¹⁹⁹ See S.C. 1995, c. 22, § 16 (amending Young Offenders Act § 20(8)).

²⁰⁰ See *Winship*, 397 U.S. at 361-69 (1970) (adopting standard of proof beyond a reasonable doubt for juvenile adjudications based on conduct equivalent to adult crimes).

²⁰¹ Congress seeks to influence state juvenile justice laws by attaching conditions to its funding programs. A 1992 amendment required states receiving federal “formula grants” for juvenile justice to include provisions in their state plans allocating funds for “hate crime” prevention: “Programs designed to prevent and reduce hate crimes committed by juveniles, including educational programs and sentencing programs designed specifically for juveniles who commit hate crimes and that provide alternatives to incarceration[.]” See 42 U.S.C.A. § 5633(a)(10)(N) (1995) (codifying Pub. L. 102-586, § 2(f)(3)(i)(VI)).

As with adult criminal laws, Canadian Youth Court proceedings are governed by a national statute. The availability of the Sentencing Principles for bias, prejudice or hate in Youth Court proceedings has been contested. Since many hate-related incidents, including crimes motivated by “sexual orientation” and “gender identity” are committed by groups with at least some youthful participants, the applicability of the Sentencing Principles for bias, prejudice or hate is significant. Because the Youth Criminal Justice Act (YCJA) does not expressly exclude bias, prejudice or hate from consideration ancillary to the Act’s other purposes, Courts, and perhaps Parliament, will be forced to determine the relevancy of the Sentencing Principles in future cases and legislation.

In the United States, most juvenile offenses are adjudicated under state or local laws.²⁰² A complete analysis of hate crime laws in state juvenile court proceedings would be too complex for the present study. However, legislation pending in Congress recognizes the problem of hate crimes committed by juveniles by requiring the FBI to include juvenile offenses in its HCSA data.²⁰³ Thus, regardless of the treatment of this question in future court cases, Congress may well act to expand the hate crime field to include juvenile offenders.

3.2.3.7 The Effect of Hate Crime Laws—A Trend Analysis

The emergence of a substantial body of jurisprudence in a relatively new and narrow field suggests that hate crime penalty laws are important. Questions about whether hate crime laws have reduced the frequency or severity of hate crimes, including homophobic and trans-phobic crimes, are beyond the scope of this study. But, have hate crime laws resulted in important legal changes? Would judges have imposed the same kinds of penalties and developed the same

²⁰² See, e.g., R.A.V., *supra* note 111 (juvenile prosecution under St. Paul, Minnesota Municipal Ordinance).

²⁰³ See Matthew Shepard Local Law Enforcement Hate Crimes Prevention Act of 2007, S. 1105, 110th Congress, 1st Session (introduced in Senate April 12, 2007) (proposing addition of crimes committed by juveniles to the data collection mandate of the HCSA); Local Law Enforcement Hate Crimes Prevention Act of 2007, H.R. 1592, 110th Congress, 1st Session (Referred to Senate May 7, 2007) (identical Bill in House).

sentencing principles without codified hate crime laws? And, do answers to these questions differ in Canada and the United States? In order to answer these questions, it will be helpful to examine sentencing decisions in each country before and after the enactment of national hate crime penalty laws. A quantitative analysis of hate crime sentencing decisions is probably impossible. Nevertheless, an analysis of the trend among typical sentencing decisions in each country may reveal relevant evidence.

A longitudinal study of cases before and after codification provides a convenient cross-national comparison. Such a comparison should reveal whether, and to what extent, the codification of national hate crime laws changed judicial decisionmaking, by for example: increasing or decreasing overall sentences for homophobic crimes, encouraging or discouraging the use of “gay panic” or “homosexual advance” defenses, or increasing consistency among sentencing judges. A comparison of typical Canadian and American sentencing decisions before and after the codification of national sentencing principles for hate crimes is therefore set out below.

The analysis here will focus on the effects of the codification of sentencing principles for hate crimes on judicial sentencing decisions.²⁰⁴ The selection of typical cases before and after hate crime laws is inherently subjective. Still, a brief trend analysis provides worthwhile observations about the effects of hate crime laws in Canada and the United States. This analysis will also serve as an introduction to the comparison of recent cases set out in Chapter 4, , as well as the practices of nongovernmental social groups working in the hate crime field, set out in Chapter 5.

In addition to other similarities, Canada and the United States share a similar benchmark date for an analysis of trends in hate crime cases. Although several state and local laws

²⁰⁴ For a similar before-and-after analysis using the entrenchment of *Charter* equality rights as a benchmark see Miriam Smith, *LESBIAN & GAY RIGHTS IN CANADA: SOCIAL MOVEMENTS & EQUALITY-SEEKING: 1971-1995* (1999). Smith’s work analyzes the implications of legal change for social movements, but her analysis provides a useful model for examining the decisions sentencing judges.

authorized penalties for homophobic (and trans-phobic) motives earlier, 1994 is the closest benchmark year for American hate crime laws. For the purposes of a cross-national comparison, the federal hate crime enhancement serves a convenient proxy for the general national acceptance of homophobic bias as a consideration in criminal penalties. Furthermore, the addition of hate crimes to the United States Sentencing Guidelines coincides conveniently with the coming into force of the 1995 Canadian Criminal Code Sentencing Principles. Thus, sentencing principles for homophobic hate crimes were codified at roughly the same time and have since remained stable in Canada and the United States.

Canadian and American courts occasionally denounced crimes motivated by “sexual orientation” before the statutory hate crime penalties became available in the mid-1990s. A few typical cases before and after the codified sentencing principles are analyzed here. Because a vocabulary naming homophobic and trans-phobic violence did not exist, even if officials had been willing to act upon it, a reliable quantitative analysis of cases before and after the enactment of the sentencing principles would be meaningless. Still, the trend seems to show an increase in decisions expressly addressing homophobic and trans-phobic bias.²⁰⁵

In each country, four rough, overlapping phases of judicial reasoning appear in criminal cases that mention homo- or trans-phobic motives: (1) early cases denouncing the victim or absolving the accused in part because of the victim’s characteristics; (2) pre-hate crime cases condemning the biases of the accused before the codification of sentencing principles for bias; (3) post-hate crime cases decided shortly after the enactment of hate crime laws but providing

²⁰⁵ A good critical examination of equality rights, with a focus on social movements, lesbian and gay rights case law, amendments to the Ontario Human Rights Code to prohibit “sexual orientation” discrimination, and early *Charter* litigation appears in Didi Herman, *Reforming Rights: Lesbian & Gay Struggles for Legal Equality in Canada* (Ph.D. Thesis, Univ. of Warwick, Dec., 1992); see also Herman, *id.*, at 317-21 Appendix A-C (listing cases, statutes, and interview subjects), 351-70 Bibliography. Among other authorities, Herman cites Davina Cooper, *Sexing the City: Lesbian & Gay Municipal Politics 1979-1987* (Ph.D. Thesis, Univ. of Warwick, 1992), and Philip Girard, *Sexual Orientation as a Human Rights Issue in Canada 1969-1985* (1989) 21 OTTAWA L.REV. 387.

little analysis of bias; and, (4) recent cases providing an increasingly sophisticated analysis and application of hate crime sentencing laws.

An analysis of Canadian decisions under the Sentencing Principles for bias, prejudice or hate is complicated by the lack of uniform publication among sentencing courts.²⁰⁶ This lack of uniform reporting is complicated by the relative scarcity of homophobic hate crime cases in comparison to all crimes.²⁰⁷ As in Canada, American courts mentioned homo- and trans-phobic motives in criminal cases both before and after the codification of hate crime penalty laws. In the United States sentencing decisions generally do not appear at all in published reporters unless they are appealed. Thus, American hate crime penalty cases may be even more difficult to analyze than their Canadian counterparts. Still, a body of typical Canadian and American cases is available for a general trend analysis.

3.2.3.7.1 Early Cases

In both Canada and the United States, homophobic and trans-phobic violence was legally invisible, or even sanctioned by law, until recent decades. Canadian governments once practiced homophobic violence as official policy,²⁰⁸ and laws criminalizing homosexual behavior

²⁰⁶ Compare, Julian V. Roberts & Andrew J.A. Hastings, *Sentencing in Cases of Hate-Motivated Crime: An Analysis of Subparagraph 718.2(a)(i) of the Criminal Code*, 27 QUEENS L.J. 93 (2001) (hereinafter Roberts & Hastings) (noting varied sources of decisions), with Julian V. Roberts, *Disproportionate Harm: hate crime in Canada: an analysis of recent statistics* (1995) (analyzing police hate crime statistics). In the United States, even in the federal courts, where sentencing decisions are subject to uniform criminal law and procedure, administrators have difficulty tracking hate crime sentencing decisions. For example, for the Fiscal Year 2006 the Sentencing Commission received “complete guideline application information” for only 65,055 out of 72,585 sentencing cases reported, effectively excluding thousands of sentences from analysis. See U.S. Sentencing Commission, 2006 Datafile, USSCFY06, Table 18 n.1.

²⁰⁷ Roberts and Hastings cited only a few homophobic hate crimes based on their analysis of both reported and unreported judgments during the first four years after the Sentencing Principles. Roberts & Hastings, *id.*, 98 n.17 (noting informal transmission of unreported judgments to authors).

²⁰⁸ See, e.g., *Muir v. Alberta*, [1996] A.J. No. 37 (Ct. of Q.B.). In its judgment awarding damages of \$740,780 against the Province, the Court cited discrimination as an “aggravating factor” in its calculations:

Ms. Muir is entitled to aggravated damages relating to the sterilization. These relate to actions that caused her injury. The main aggravating feature of the sterilization is that it was done in the context of branding Ms. Muir as a mental defective, a moron. Thus, two serious blows were struck during the same sterilization operation: Ms. Muir’s reproductive capacity was irretrievably destroyed and she was physically and mentally branded as a moron.

facilitated the masking of discriminatory violence.²⁰⁹ In the 1979 case of *R. v. Fraser*,²¹⁰ an Alberta Court accepted the defence theory, based on a “homosexual advance” posing “a real threat and [] a danger to him, both physically and emotionally, in his perceived image of himself as a male person the defendant’s gender self-image.” Because the defendant acted in “self defence,” the trial judge found him guilty of manslaughter instead of murder.²¹¹

As in Canada, few American court decisions that pre-date hate crime sentencing laws expressly authorize enhanced penalties for homophobic bias.²¹² Instead, as in Canada, homophobic bias generally appears in context with either a defense or sentencing mitigation claim based on “homosexual advance” by the victim. In a 1964 decision, the Supreme Court of Georgia reversed a death sentence, based on the defendant’s claim that he was provoked to shoot his common law wife when he found her in bed, “with a woman known to him to be a lesbian.”²¹³ The court affirmed the murder conviction²¹⁴ but reversed the death sentence because

Id., ¶ 145. Although the particular provision was not applied to the plaintiff, provincial policies expressly authorized the forced sterilization of women who “masturbated or had lesbian tendencies.” *Id.*, ¶ 152.

²⁰⁹ For instance, the 1957 case of *R. v. Galluzzo*, [1957] O.J. No. 38 (Supreme Ct. Ct. App.) involved an appeal by one of two defendants convicted of an apparently consensual “attempt to commit the crime of buggery, the one with the other, contrary to the Criminal Code.” *Id.*, ¶ 2. The appellant was released on bail after being sentenced to six months’ jail. The appellate court did not render a decision on the conviction, however, because the appellant failed to appear, resulting in an arrest warrant. Adult consensual “sodomy” was later decriminalized:

. . . the offences of buggery and gross indecency, effective August 26, 1969, became subject to an exception for acts committed in private between a husband and wife, or any two persons, each of whom is 21 years or more of age, both of whom consent to the commission of the act. With the repeal of the gross indecency provision in 1988, the exception was no longer relevant to that offence, although it was retained for the offence of anal intercourse (the offence substituted for buggery), with the age of 18 replacing the age of 21. The anal intercourse offence itself was declared unconstitutional by the Ontario Court of Appeal in 1988: see *R. v. LeBeau* (1988), 41 C.C.C. (3d) 163 (Ont. C.A.), somewhat ironically on the ground that the exception for consenting adults over the age of 18 created an age-based distinction that violates s. 15 of the *Charter*, and that cannot be justified under s. 1 of the *Charter*.

R. v. Golightly, [2007] O.J. No. 2007 (Supr. Ct. Justice) (D.K. Gray J.).

²¹⁰ *R. v. Fraser*, [1979] A.J. No. 17 (Supreme Ct. T.D.) (Miller J.).

²¹¹ *Fraser, id.*, ¶ 69.

²¹² See, e.g., *People v. White*, 157 Cal.App.3d 282 (Cal. Ct. App., 1984) (affirming sentence for 1981 attack where defendant kicked and beat victims and forced gay couple to engage in sex acts with each other, “because he thought that they had told his girlfriend that he was a homosexual”).

²¹³ *Tremble v. State*, 138 S.E.2d 274, 275 (Ga. 1964).

²¹⁴ Because provocation and self-defense are rarely available as defenses to theft-related crimes, homophobia is rarely available as a mitigating factor, and more likely an aggravating factor against defendants charged assaulting gay victims during a robbery. See, e.g., *Derrick v. State*, 773 S.W.2d 271 (Tex. Crim. App. 1989) (noting “homosexual encounter” with victim as “part of a continuing scheme by appellant to commit robbery of homosexual victims in Houston” in early 1980s); *Smith v. State*, 365 So.2d 704 (Fla. 1978) (citing testimony that defendant and

the defense had specifically requested a voluntary manslaughter instruction, and the jury had made a specific request to consider manslaughter. The court held that, “it was a jury question whether the chain of circumstances and conduct was sufficient to engender irresistible passion.”²¹⁵

In *United States v. Bledsoe*,²¹⁶ the Court of Appeal affirmed a federal civil rights conviction, following a state court acquittal for murder. The defendant was convicted in federal court of racially-motivated interference with the victim’s right to use public park facilities in violation of 18 U.S.C. § 245. The defendant admitted he had killed a “black faggot.”²¹⁷ In affirming the conviction the Court approved the use of a jury instruction that permitted a conviction despite “mixed motives,” so long as the, “clear implication from the[] instructions is that a substantial motivating factor must have been race.”²¹⁸ While *Bledsoe* pre-dated the Sentencing Guidelines for hate crimes, it remains valid. But, since *Bledsoe*, the Sentencing Guidelines have added an aggravating factor for “sexual orientation” bias. Thus, under the current Sentencing Guidelines, *Bledsoe*’s sentence could have been enhanced an additional amount because of his homophobic bias as well.

Since these decisions pre-dated hate crime penalty laws, the court had no reason to consider whether an anti-lesbian or anti-gay animus might be an aggravating factor. Courts in both countries also rejected claims of gay panic or homosexual advance for factual reasons long

accomplices, “met at a bar and decided to rob a homosexual in order to obtain money for beer”); *United States, ex rel., Butler v. Schubert*, 376 F.Supp. 1241 (S.D.N.Y. 1974) (citing inmate’s admission to killing professor, a “homosexual whom he was trying to ‘roll’”).

²¹⁵ *Id.*, at 275-76; *compare*, *People v. Radford*, 382 N.E.2d 486 (Ill. Ct. App., 1973) (noting “violent and heated” argument in which defendant made accusation of lesbian relationship while holding gun in hand). *See also* *State v. Strub*, 355 N.E.2d 819 (Ohio Ct. App., 1975) (noting “homosexual approaches” preceding aggravated murder); *People v. Ramey*, 317 N.E.2d 143 (Ill. Ct. App., 1974) (noting assault after “further advances,” following “homosexual activities”); *People v. Stoltz*, 196 Cal.App.2d 258 (Cal. Ct. App., 1961) (citing conflicting evidence regarding “homosexual advances”).

²¹⁶ *United States v. Bledsoe*, 728 F.2d 1094 (8th Cir. 1984)

²¹⁷ *See Bledsoe, id.*, at 1096.

²¹⁸ *Id.*, at 1098 (collecting “mixed motives” cases).

before the enactment of hate crime laws.²¹⁹ But, these early cases are characterized by their focus on whether the characteristics or behavior of the victim justified or provoked the crime.

3.2.3.7.2 Pre-Hate Crime Cases

A few cases in both Canada and the United States condemned homophobic bias before the enactment of formal hate crime laws. In a 1978 case, an Ontario Court increased the sentences on appeal for three youths who “set out to beat up ‘queers.’”²²⁰ The sentences of eight months’ imprisonment were, according to the Court, “completely disproportionate to the gravity the offences that were committed by these youths and must be increased.”²²¹ The Court expressly held that the homophobic bias must be considered an aggravating factor in sentencing, even for young offenders.²²² Most such cases, however, did not appear until much later. For example, the defendant in *R. v. Wilson* pled guilty to a 1991 assault “in the heart of the gay community” in Toronto.²²³ The sentencing judge questioned the omission of a victim statement from the facts presented in support of the guilty plea.²²⁴ The judge therefore invited statements from the victim and his friend for the purpose of sentencing, and his written decision quotes from

²¹⁹ In 1976 a British Columbia Court denied a crown transfer request against a juvenile who participated in a planned killing his “homosexual mentor.” The charges had earlier been reduced from murder to manslaughter. *R. v. D.I.G.*, [1976] B.C.J. No. 453 (Supreme Ct.) (Craig J.); *see also R. v. Catagas*, [1975] B.C.J. No. 646, ¶ 3, (Supreme Ct.) (Meredith J.). A possible homophobic bias was not considered. In another 1976 decision, a British Columbia Court reduced a sentence of three years and eight months to the eight months already served, plus three years’ probation. *R. v. Catagas*, [1976] B.C.J. No. 1011, Vancouver Registry No. CA 760134. The jury had convicted the defendant, a “Canadian Indian,” of manslaughter for stabbing an elderly man who had invited him into his home. The Court noted the victim’s “homosexual invitation” and the assailant’s “intensive aversion to homosexual practices,” because of a prior “homosexual attack described as a rape.” *Id.*, ¶ 3. Because both the jury and apparently the Crown recommended leniency, the Court reduced the sentence. *Id.*, ¶ 6, 8.

²²⁰ *R. v. T.A. (T.A., D.I. & O.R.)*, [1978] O.J. No. 1173 (Supreme Ct. Ct. App.).

²²¹ *Id.*, ¶ 11.

²²² *Id.*, ¶¶ 6, 9-10. The Court therefore increased the sentences to “the maximum term permissible for a reformatory sentence,” two years less one day, followed a period of probation. *Id.*, ¶¶ 11, 14. Another Ontario Court imposed a twelve-to-fifteen year sentence for the attempted murder of a gay man. The defendant hit the elderly, retired victim in the back of the head and plunged two knives into his back after they, “engaged in a variety of homosexual activities, including mutual acts of fellatio.” The Court did not expressly increase the sentence because of bias, and the defence apparently did not claim provocation due to homosexual advance. Instead of homophobia, the Court condemned the “stark horror” and breach of trust involved, emphasizing denunciation: “It must [] be made plain to all that such gratuitous violence simply will not be tolerated.” The Court rejected the Crown request for a life sentence. *R. v. Young*, [1991] O.J. No. 2210 (Ct. Justice Gen. Div.).

²²³ *R. v. Wilson*, [1991] O.J. No. 1746 (Ct. Justice Prov. Div.) (Harris Prov. Div. J.).

²²⁴ *See id.*

the victim's testimony.²²⁵ Although the decision pre-dated the statutory Sentencing Principles for bias, prejudice or hate, the Court gave a detailed listing of case-specific aggravating factors related to anti-gay bias, including, "language employed by the accused throughout [that] was threatening, intimidating, vulgar, obscene, and stereotypically referable to the gay community." The Court denounced the "repulsive conduct" occurring "in the heart of the gay community" as "gay bashing" and analogized to Nazi war crimes.²²⁶ The judge expressly concluded that an enhanced sentence for bias was required: "This type of conduct can only be perceived by society in general as being abhorrent and must by necessity be reflected in my sentence. As a result the offence calls for a more severe penalty than ordinary assaultive conduct."²²⁷

In case arising from a series of 1977 assaults, the Ontario Court of Appeal established a precedent for sentencing related to racist and homophobic violence. In its decision in *R. v. Atkinson, Ing & Roberts*, the Court described the assaults by a group of youths,²²⁸ and increased the penalties, adopting the reasoning of an earlier case involving a racially-motivated attack:

The learned trial judge appears to have been of the opinion that what was stated in the case of *R. v. Ingram*, supra, was not relevant since that case was concerned with a racially motivated attack. While in *R. v. Ingram* the attack was racially motivated, the principles set forth in the judgment are not limited to such an attack. The motive for the assaults in this case should have been considered by the trial judge as an aggravating factor in imposing sentence. We think the learned trial judge erred in failing to give effect to this principle in imposing the sentences under appeal.

Here a vicious assault was carried out by a cowardly gang of youths who selected innocent victims, complete strangers, who had the misfortune of being in a public park on that occasion. It is the type of offence which the public should

²²⁵ Wilson, *id.*

²²⁶ "[P]ermitting repulsive conduct of this nature to fester . . . is reminiscent of what . . . took place in Europe . . . during the 1930's and 1940's, resulting in the virtual hatred and extinction of millions of persons by a dictatorial zealot, because of the way they looked and their religious beliefs amongst other human characteristics." *Id.*

²²⁷ *Id.* (citing, *inter alia*, *R. v. Ingram & Grimsdale* (1977), 35 C.C.C. (2d) 376)). The Court concluded by imposing a two-month sentence. The Judge did not resolve the victim's suggestion of community service in the gay community. A man who attempted to stab his step-daughter's lesbian lover to death received an eight-year prison term in a 1993 Manitoba case. *R. v. Longpre*, [1993] M.J. No. 309 (Prov. Ct.) (Devine Prov. Ct. J.). The Court did not expressly determine whether the crime was motivated by lesbophobic bias, but it did find, "[t]he step-daughter's family was apparently vehemently opposed to this lesbian relationship and some sort of altercation took place . . . which prompted the step-daughter and her lover to flee." The Court concluded by denouncing the "vigilante justice" used by the defendants. Longpre, *id.*, ¶¶ 3-10, 18-19.

²²⁸ *R. v. Atkinson, Ing & Roberts* (1979), 43 C.C.C. (2d) 342, ¶ 1 (Ont. C.A.).

not and will not countenance, and the sentence imposed must reflect that.²²⁹

In spite of its analogy to the earlier racist attack, however, the Court of Appeal only denounced the cowardice of the attackers and the innocence of their victims. Still, earlier in its opinion the Court does note that the attackers, “set out to beat up ‘queers’” in a park with, “a reputation of being a place frequented by homosexuals.”²³⁰

Addressing a series of alleged offences from August, 1989, Linhares de Sousa, Prov. Ct. J., denied a Crown application for a transfer to adult court.²³¹ The Court’s reasons set out a series of alleged attacks by the youth and his co-defendants, including at least one motivated in part by anti-gay bias:

. . . . The Crown alleges . . . Mr. M. became involved in various criminal activities with some other individuals. One of these activities was to attack and rob homosexual men at Major’s Hill Park, an area of Ottawa apparently known for its homosexual activity. The alleged reasons for the attacks were; firstly that they were easy victims tending to be small in stature. They didn’t complain and therefore made for successful financial crimes; secondly, an intense dislike for homosexuals among certain members of the group; Mr. M. is alleged to have expressed some anti-homosexual sentiments. The Crown alleges that one such attack which forms the basis of one of the three counts of attempt to murder with which Mr. M. has been charged was against a Mr. Thomas Linden, an admitted homosexual. Mr. Linden was approached in Major’s Hill Park by four male persons. He fled through the park and was pursued by one male who knocked him to the ground and stabbed him three times, twice in the back and once in the arm with a knife. Mr. Linden survived but suffered a punctured spleen. It is alleged that Mr. M. stabbed Mr. Linden.

In addition to the bias alleged in the commission of the offences before the Court, the Crown presented evidence of the youth’s past homophobic violence: “[D]uring [a] short but significant period based on his own testimony, Mr. M. was exposed and participated in a variety of street criminal activities such as robberies or what is known in the vernacular as rolling ‘queers[.]’” The Court denounced the alleged offences as “serious and heinous,” but denied the transfer

²²⁹ *Id.* ¶¶ 9-10 (citing *R. v. Ingram & Grimsdale* (1977), 35 C.C.C. (2d) 376)).

²³⁰ *Id.* ¶ 1.

²³¹ *R. v. D.J.M.*, [1990] O.J. No. 514 (Prov. Ct. Youth Off. Ct.) (Linhares de Sousa Prov. Ct. J.).

application based in part on the youth's need for treatment that would be unavailable in an adult institution until near the end of a lengthy period of incarceration.²³²

Reviewing a different adult court transfer decision under § 24(1) of the *Charter*, the Ontario Court (General Division), Garton J., concluded that the provisions of the newly-enacted Young Offenders Act did not offend the *Charter*.²³³ The Ontario Court (General Division), Garton J., affirmed the decision to transfer a youth to adult court for the 1991 killing of a homosexual man followed by the theft of his belongings. Among other reasons for its decision, the Court found that the three-year maximum term available in Youth Court would be inadequate to allow the extensive treatment needed by the defendant, and a life imprisonment without parole for five-to-ten years would be a more fit penalty for the alleged offence.²³⁴ Despite the brutality of the killing, and the defendant's awareness that the victim was a homosexual man, the Court did not refer to any homophobic bias in its recitation of the relevant facts. On the other hand, the Court did highlight both the defendant's varying admissions before his arrest about alleged homosexual advances by the victim and expert opinions questioning his credibility.

The Ontario Court of Appeal in *R. v. Cooney*²³⁵ affirmed a manslaughter conviction for a 1991 killing but reduced the sentence imposed on the defendant from twelve to eight years. The Court, per Finlayson, J.A., concluded, on the most lenient view of the verdict, that the jury must have ruled out the defendant's presence at the scene of the killing by acquitting him of first degree murder. The dissent, per Galligan, J.A., concluded that the jury could have found the defendant present, consistent with a manslaughter verdict and would therefore have affirmed the twelve-year sentence. Since the defendant's role in the killing was in dispute, the Court of

²³² *Id.* At the conclusion of the Court's decision, the attorneys indicated on the record that they did not expect the case to proceed to trial.

²³³ *See R. v. H. (A.)*, [1992] O.J. No. 2114, ¶ 32, 10 O.R. (3d) 683 (Gen. Div.) (Garton J.).

²³⁴ *Id.*, ¶¶ 131-32. The Ontario Court of Appeal affirmed the transfer decision, finding "compelling reasons" in support of proceeding in adult court, because of the seriousness of the offence and "the interests of society and of the young person." *See R. v. H. (A.)*, [1993] O.J. No. 468, 12 O.R. (3d) 634 (Ct. App.).

²³⁵ [1995] O.J. No. 945 (Ct. App.).

Appeal did not address the motive for the killing, but its opinion establishes that whoever performed the killing targeted the victim in part because of his sexual orientation. The defendant had apparently used classified ads to arrange meetings with homosexual men; the Crown presented a statement from the defendant admitting he, “had placed an ad in a ‘fag’ magazine to lure a homosexual victim.”²³⁶ Nevertheless, neither of the Court of Appeal opinions touches upon any homophobic motivation.

In *R. v. K. (M.)*²³⁷ the Ontario Court of Appeal affirmed the maximum disposition of three years’ secure custody followed by two years’ probation, less one day, for a youth who had pled guilty to second degree murder. The defendant, who was fourteen at the time of the killing, claimed his adult male victim had grabbed his genitals and propositioned him. But, he also bragged to his friends afterward about using a heavy metal bar like a baseball bat to kill the victim, and he threatened to kill his friends if they reported the killing. The Court of Appeal did not expressly consider homophobic bias as a motivating factor, but both the Court of Appeal and the Youth Court judge did apparently reject the youth’s homosexual advance claim. The Court of Appeal agreed with the Youth Court’s assessment of the need to “protect society,” but the Court also noted the youth was entitled to automatic, periodic review of his disposition under the Young Offenders Act.²³⁸

Although they include hearsay statements, further details about the killing are set out in the provincial court’s earlier decision denying the Crown’s adult court transfer application in the same case.²³⁹ In particular, the transfer decision provides greater detail about the youth’s homosexual advance claim, which he described while he was bragging to his friends:

3 The accused, age fourteen years, apparently informed the youths that he went to the deceased’s apartment for cigarettes and beer as he routinely had in the past. Somerton allegedly made a sexual advance toward the accused and was warned,

²³⁶ *Id.*, ¶¶ 4-5.

²³⁷ *R. v. K. (M.)*, [1996] O.J. No. 1587, 28 O.R. (3d) 593 (Ct. App.) (McMurtry C.J.O., Finlayson & Abella J.J.A.).

²³⁸ *Id.*, ¶¶ 21-22 (citing § 28, Young Offenders Act, R.S.C. 1985, c. Y-1).

²³⁹ *See R. v. M.K.*, [1993] O.J. No. 1400 (Ct. of Justice Prov. Div.) (Weisman Prov. Div. J.).

“I’ll kill you if you do that again”. The deceased repeated the overture and was struck in the head ten to twelve times with a heavy iron bar that was kept in the apartment.

4 At one point during the attack, Somerton said, “Don’t hit me no more”, and at another, “Don’t hit me, it hurts”. The deceased’s fingers were broken when he attempted to cover his head.

5 In relating this tale, the accused seemed calm and happy about what he had done.²⁴⁰

In spite of the seriousness of the alleged offence, the provincial court denied the transfer application, in part because society would be best protected “in the long-term” by treatment available in youth facilities.²⁴¹ Like the Court of Appeal, however, the provincial court apparently discounted the youth’s homosexual advance claim.

The New Brunswick Court of Appeal affirmed the sentence and parole eligibility determination in a case arising out of a “bizarre, horrible and serious” attack on several victims in 1993.²⁴² During the attack the co-defendants repeatedly called the victims “queers, fagots, gays,” held them down, forced them to suck “each other’s penis” declaring, “that’s what you cocksuckers deserve,” and inserted a curling iron and a rum bottle into their rectums.²⁴³ The Court of Appeal held that the sentences were not unfit and affirmed the sentencing court’s decision to delay parole eligibility until the completion of the earlier of one-half of the sentence or ten years.²⁴⁴ Yet, while the Court of Appeal cited the sentencing court’s reference to “denunciation,” the opinion does not explicitly denounce the apparent homophobic motives of the defendants.

In its 1995 statement of reasons for sentencing, an Ontario court in *R. v. McDonald*²⁴⁵ considered the defendant’s mixed motives for robberies against gay men. And, even though the

²⁴⁰ *Id.*, ¶¶ 3-5.

²⁴¹ *Id.*, ¶ 46.

²⁴² *R. v. Chaisson*, [1995] N.B.J. No. 490 (Ct. App.). The Court of Appeal decision was made on remand from the Supreme Court of Canada, which held that the Court of Appeal had jurisdiction to review the sentencing court’s parole eligibility determination. *See R. v. Chaisson*, [1995] 2 S.C.R. 1118, ¶¶ 16-17.

²⁴³ *Id.*, ¶ 5 (quoting agreed statement of facts).

²⁴⁴ *Id.*, ¶¶ 11, 12-13.

²⁴⁵ *R. v. McDonald*, [1995] O.J. No. 2137 (Ct. of Justice Gen. Div.) (Hamilton J.) (October, 1993 killing).

case pre-dated the Sentencing Principles for bias, prejudice or hate, the Court expressly denounced the defendant's discriminatory motives:

. . . McDonald has a pretty substantial record and he is not just a con man, he's a violent con man. He uses violence on weaker people. He threatens the weaker person, as he did in this particular case, and he takes pride in it and justifies his criminal activities by his reply to Detective Earl when he says the victim is just a fag. So anything that is done to him is justifiable.

. . . .

. . . . people in the city are not going to put up with violence. It is not justifiable to pick on minorities or it is not justifiable to pick on people of different sexual persuasion than yourself and to prey on these people as McDonald seems to do and take pride in it. That type of thinking has to stop.²⁴⁶

Considering his extensive criminal history, the court sentenced the defendant to five years for robbery, concurrent with an additional two years for using a knife.

The B.C. Court of Appeal addressed a provocation defense in its 1996 decision affirming first degree murder verdict in *R. v. Moore*.²⁴⁷ The Court characterized the victim as, “a practicing but not aggressive homosexual.”²⁴⁸ Affirming the guilty verdict, the Court of Appeal discounted the defendant's provocation theory:

35 There is no evidence of any description of a dispute between the victim and the appellant in the case at bar. The evidence of an unwanted sexual advance by the victim is circumstantial and tenuous. The instruction to the jury on provocation was the most favourable direction the appellant could receive on any theory of the defence premised on the victim's homosexuality and the appellant's apparent heterosexuality. . . .²⁴⁹

On the other hand, there is no indication in the opinion that the defendant received a sentencing premium because the crime was motivated by bias, prejudice or hate.

Robert Joseph Carolan pleaded guilty to a 1994 aggravated assault claiming the victim made a “homosexual advance” on him in a washroom.²⁵⁰ The Court described the defendant's reaction as, “violent in the extreme” and noted the victim had suffered “severe head injuries

²⁴⁶ *Id.*, ¶¶ 1, 4.

²⁴⁷ [1996] B.C.J. No. 1959 (Ct. App.).

²⁴⁸ *Id.*, ¶ 8.

²⁴⁹ *Id.*, ¶ 35.

²⁵⁰ *R. v. Carolan*, [1995] A.J. No. 82 (Prov. Ct. Crim. Div.) (McMeekin Prov. Ct. J.) (Reasons for Sentence).

leaving him in a coma on life support systems to this day.”²⁵¹ The Court rejected the defendant’s apparent claim of sensitivity based on a childhood homosexual advance:

Further material before the Court establishes that at age 17 the accused had been the victim of a homosexual advance which did not progress to any great degree and accordingly I’m inclined to accept the Crown’s submissions that this previous occurrence played little part in the events before the Bar.²⁵²

Even assuming the alleged homosexual advance, the Court rejected the theory as a mitigating factor, concluding, “the accused followed the victim into the washroom and what then occurred represented a grossly excessive use of force for whatever was done by the victim. . . . his reactions were sufficient to be categorized as prolonged, brutal and cowardly calling for an emphasis on deterrence in any sentence imposed.”²⁵³ The Court imposed a sentence of eight years, but declined the Crown’s request to require him to serve one-half of the term before parole eligibility.²⁵⁴ While the Court referred to denunciation and to, “family and friends of the victim” and “pressure groups in society today continually calling for more harsh penalties,” no reference was made to denunciation for homophobic bias.²⁵⁵

The Manitoba Court of Appeal in 1994 reduced the sentence of one of three attackers who, “with nothing to do to amuse themselves in the early hours of the morning, decided to attack a man who they perceived to be a homosexual.”²⁵⁶ The Court of Appeal agreed with the trial judge that, “general deterrence” was important but reduced the two-year prison sentence to seven months, followed by six months’ probation. The Court reasoned that the defendant was a “youthful first offender,” who had expressed regret, and who claimed to have, “changed his attitude and to disassociate from those who shaped his previous views.” The Court also stressed

²⁵¹ *Id.*, ¶ 3.

²⁵² *Id.*, ¶ 8.

²⁵³ *Id.*, ¶ 10-11.

²⁵⁴ *See id.*, ¶ 20.

²⁵⁵ *See id.*, ¶ 14.

²⁵⁶ *R. v. Gallant*, [1994] M.J. No. 354 (Ct. App.) (Scott C.J.M., Huband & Helper J.J.A.).

that the defendant did not know his co-defendant had a club and that, while the victim was “beaten up,” he was released after only out-patient treatment.

The B.C. Court of Appeal affirmed a first degree murder verdict in the face of objections to the jury instructions on homosexual provocation in *R. v. Stewart*.²⁵⁷ Stewart first claimed he “lost it” and killed his victim because of his homosexual advances, but later asserted an alibi.²⁵⁸ The trial court gave provocation instructions, and according to the Court of Appeal the court was not required to instruct the jury further on the cumulative effect of intoxication and provocation. On the other hand, the Court of Appeal held the trial judge improperly failed to instruct the jury that provocation could negate the planning and deliberation required for a first degree murder conviction.²⁵⁹ The Court however, found that insufficient evidence supported a finding of deliberation and premeditation. Therefore, instead of remanding for a new trial, the Court of Appeal substituted a second degree murder verdict.²⁶⁰ The Court of Appeal noted a life sentence was required for second degree murder, but it invited submissions regarding parole eligibility. In sum, therefore, the Court may have accepted a homosexual panic defense, and the Court may have subsequently imposed a sentence without regard to the defendant’s admitted disgust for, and “strong aversion to homosexuality.”²⁶¹ On the other hand, since the case arose from a 1991 killing the Sentencing Principles for bias, prejudice or hate did not apply; so, the Court of Appeal was not required to consider evidence of the defendant’s homophobic prejudice.

Later in 1995, the same Court of Appeal reached a different result in response to a self-defence claim founded on an alleged homosexual advance in *Regina v. Butler*.²⁶² Butler stabbed the victim to death with a kitchen knife, claiming self-defence because the victim allegedly used

²⁵⁷ *R. v. Stewart*, [1995] B.C.J. No. 1384 (Ct. App.) (McEachern C.J.B.C, Wood & Ryan JJ.A.).

²⁵⁸ *See id.*, ¶ 46 (noting conflicting defenses).

²⁵⁹ *See id.*, ¶¶ 52-55.

²⁶⁰ *See id.*, ¶¶ 56-62.

²⁶¹ *See id.*, ¶¶ 10-11.

²⁶² *R. v. Butler*, 104 C.C.C. (3d) 198 (B.C. Ct. App.) (Southin, Prowse & Williams JJ.A.).

the knife in the course of a homosexual advance.²⁶³ The Court of Appeal rejected the defence claims, primarily because the defendant admitted repeatedly that he did not feel threatened by the victim.²⁶⁴ The Court of Appeal did not review sentencing, but since the case arose from a 1993 killing, the Court was not required to consider the Sentencing Principles for bias, prejudice or hate.

In a case arising from a 1995 killing, the Ontario Court of Appeal in *R. v. Gilling*²⁶⁵ remanded for a new trial based in part on the trial judge's inadequate instructions regarding provocation. The Court of Appeal characterized the evidence of provocation as "marginal," but remanded based on statements of the defendant indicating he cut the victim's throat in response to a homosexual advance.²⁶⁶ Because the case was being remanded for a new trial, the Court of Appeal declined to review the sentence, noting however that Crown counsel conceded the assessment of fifteen-years' parole ineligibility was excessive.²⁶⁷ Because the case arose before the effective date of the new Sentencing Principles, and because the Court of Appeal did not review the sentence, no conflict between the premium for bias, prejudice or hate and the defendant's provocation claim arose.

After a lengthy bench trial, an Ontario judge found Marcello Palma guilty of first degree murder in the killings of three prostitutes on the same night in May, 1996.²⁶⁸ One of the victims was a "transsexual" and another was picked up at a location, "well-known for transvestite prostitutes."²⁶⁹ The Court sentenced Palma to three concurrent terms of life without the possibility of parole for twenty five years.²⁷⁰ But, nothing in the decision indicates the defendant's selection of the victims based on their sexual orientation or gender identity was

²⁶³ *Id.*, ¶¶ 57-58 (summarizing prosecution and defense theories).

²⁶⁴ *Id.*, ¶¶ 59-62.

²⁶⁵ [1997] O.J. No. 2774, 34 O.R. (3d) 392 (Ct. App.).

²⁶⁶ *See id.*, ¶ 25 (quoting statements).

²⁶⁷ *Id.*, ¶ 30.

²⁶⁸ *R. v. Palma*, [2001] O.J. No. 3283 (Supr. Ct. of Justice) (Watt J.).

²⁶⁹ *See id.*, ¶¶ 16-19.

²⁷⁰ *Id.*, ¶ 233.

treated as an aggravating factor. Palma’s case is notable for two reasons. First, the Court rejected his provocation claims,²⁷¹ in part because his deliberate choice of victims from among what he deemed, “lesser beings.”²⁷² Second, in spite of finding the defendant considered the victims “scum” and a “lesser species,” the Court gave no express consideration to a sentencing premium for bias, prejudice or hate.²⁷³ The Court did not cite § 718, or even mention sentencing principles.

American cases immediately preceding the Sentencing Guidelines for hate crime tended to discount provocation claims and to treat homophobic violence more seriously. In 1990 a Pennsylvania Court rejected the use of provocation to justify homicide where the defendant had merely witnessed two women engaged in lesbian lovemaking.²⁷⁴ The Court held that homosexual activity between two persons is insufficient provocation to justify reducing a murder charge to manslaughter.²⁷⁵ The Arizona Supreme Court affirmed the judgment and sentence against a teenager tried as an adult for participating in, “the brutal beating murder of an alleged homosexual.”²⁷⁶ The court characterized the beatings, bludgeoning, and burning of the victim’s body, as “a heinous crime,” and noted expert testimony proving the defendant’s violent, “sociopathic personality.” Under these circumstances, the court affirmed a prison sentence of sixty years to life.²⁷⁷

The federal Court in *United States v. Winslow*,²⁷⁸ a 1991 case from Idaho, refused to apply a vulnerable victim enhancement to a conspiracy case because of the absence of actual victims:

²⁷¹ *Id.*, ¶¶ 207, 213-14, 220-21.

²⁷² *Id.*, ¶ 219.

²⁷³ *See id.*, ¶¶ 218-21, 233.

²⁷⁴ *Commonwealth v. Carr*, 580 A.2d 1362 (Pa. Super. Ct.1990).

²⁷⁵ *Id.*

²⁷⁶ *State v. Toney*, 555 P.2d 650, 652 (Ariz. 1976).

²⁷⁷ *Id.*, at 651-51, 655.

²⁷⁸ *United States v. Winslow*, 755 F.Supp. 914 (D.Idaho 1991) (Findings of Fact and Statement of Reasons).

The court found that in the case at bar, there was no evidence of any actual victims, but instead the only evidence was the defendants' talk and speculation concerning the intended victims. The court was not willing to hold that the potential or intended victims of this criminal conspiracy, which included a large class of minorities and homosexuals, should be considered "vulnerable victims" applicable under the guidelines.²⁷⁹

This case was decided before the enactment of the Guidelines for hate crimes, and since the defendants selected their "intended victims" based on prohibited biases, a hate crime enhancement might now be available in a similar case under the current Guidelines.

Also shortly before the Sentencing Guidelines for hate crimes, the Ninth Circuit remanded a similar extortion case for re-sentencing.²⁸⁰ Since the hate crime enhancement was not in effect, and since the defendant had been acquitted on the count that alleged an "anti-Semitic outburst," the Court did not have occasion to consider the defendant's discriminatory motives.²⁸¹

In a third case arising shortly before the enactment of the hate crime Guideline, the Fourth Circuit affirmed a ruling admitting evidence of a prior stabbing after a perceived homosexual advance.²⁸² The trial court admitted the evidence to prove "criminal intent" under the Federal Rules of Evidence:

Here, the evidence of Oechsle's prior stabbing was sufficiently similar in nature to his stabbing of Miller that it tended to prove his criminal intent. In both stabbings there were allegations, inter alia, of perceived homosexual overtures from the victim, followed by a facade of compliance from Oechsle, who then stabbed his victim in the back once the victim's guard was down. Under these circumstances the trial judge did not abuse its discretion in admitting the evidence of the prior stabbing.²⁸³

Thus, not only was the defendant's claim of homosexual advance rejected, his prior attempt to raise the defense was used against him.

²⁷⁹ *Id.*, at 917.

²⁸⁰ *See* United States v. Marsh, 26 F.3d 1496 (9th Cir. 1994).

²⁸¹ *But see* Marsh, *id.*, at 1504-08 (op. of Noonan, Cir. J., concurring and dissenting, arguing that threats to expose homosexual relations did not constitute economic threats).

²⁸² *See* United States v. Oechsle, 100 F.3d 951, 1996 WL 654377 (4th Cir. 1996) (Table) (per curiam) (not selected for official publication) (affirming conviction, remanding for re-sentencing for 1994 assault).

²⁸³ *See* Oechsle, *id.*, 1996 WL 654377, at *2 (citing FED. R. EVID. 404(b)).

3.2.3.7.3 Post-Hate Crime Cases

The first serious Canadian hate crime prosecution after the codification of the Sentencing Principles for bias, prejudice or hate was brought in British Columbia.²⁸⁴ The Provincial Court in *R. v. Miloszewski*²⁸⁵ allowed five co-defendants to plead guilty to manslaughter instead of murder in the killing of Nirmal Singh Gill in January, 1998. After an eleven-day sentencing hearing, the Court issued a detailed written decision imposing sentences of from fifteen to eighteen years in prison.²⁸⁶

The sentencing judge applied the Sentencing Principles for bias, prejudice or hate, emphasizing racist motives—but adding references to homophobia and other biases. The Court also attempted to reconcile the principles of equality and uniformity in sentencing:

. . . . I have heard evidence of truly hateful and sickening comments made by all of the accused as they disparaged ethnic minorities, homosexuals and members of the Jewish community. Clearly these views were fueled by hate, fear and ignorance. . . .

²⁸⁴ See Roberts & Hastings, *supra* note 206, at 97 (citing *R. v. Miloszewski*, [1999] B.C.J. No. 2710 (Prov. Ct.)). Roberts and Hastings cited the extensive media coverage of this first hate crime case. *Id.*, at 97 n.15 (citing S. Bittle, *Newspaper Coverage of Hate Crime: A Case Study* (Ottawa: Department of Justice Canada, 2000)). Other courts have rendered decisions explicitly or implicitly applying the Sentencing Principles to allegations of homophobic bias. See *R. v. Zephyr Willson*, (18 Jan. 2000), Sechelt 1187-2-B (B.C. Prov. Ct.) (unpublished) (homophobic bias “serious” aggravating factor); *R. v. Peers & Foss* (30 Sept. 1999), Vancouver 100463 (B.C. Prov. Ct.) (unpublished) (homophobic epithets accompanying assault; victim impact statement cited in sentencing decision). See also, e.g., *R. v. C. (A.)* 2004 BCPC 99, [2004] B.C.J. No. 811 (QL) (B.C. Youth Ct.); *R. v. S. (J.)* 2003 BCPC 442, [2003] B.C.J. No. 2877 (QL), (B.C. Youth Ct.); *R. v. Howald*, [1998] O.J. No. 3121 (QL) (Gen. Div.) (same-sex homophobic assault in custody; several factors considered, including homophobic motive); *R. v. Lefebvre*, [1998] A.Q. No. 985 (QL) (C.Q. Chambre criminelle) (anti-woman bias sole aggravating factor). Canadian legal scholars also analyzed hate crime laws both before and after the Sentencing Principles. See, e.g., Petersen, *supra* note 1; M. Shaffer, *Criminal Responses to Hate-Motivated Violence: Is Bill C-41 Tough Enough?* (1995), 41 MCGILL L.J. 199; L.J. Moran, *The Emotional Dimensions of Lesbian & Gay Demands for Hate Crime Reform* (2004), 49 MCGILL L.J. 925. Roberts and Hastings cite only a few homophobic hate crime cases from the first four years after codification, although they suggest a comparison of sentencing decisions for hate-motivated crimes before and after codification in 1995. Roberts & Hastings, *supra* note 206, at 97.

²⁸⁵ *R. v. Miloszewski*, [1999] B.C.J. No. 2710 (Prov. Ct.) (Stewart Prov. Ct. J.). More than a year after the Sentencing Principles came into force, the Court of Appeal in *R. v. Devereaux*, [1996] N.J. No. 323, 1995 No. 125 (Supreme Ct. Ct. App.) affirmed the dismissal of a private prosecution against a jailer who forced an inmate back to his cell after he refused to sign a property release form. The inmate had demanded the name of the officer who had made derogatory remarks about his sexual orientation when he was arrested.

²⁸⁶ *Miloszewski*, *id.*, ¶¶ 171-76.

. . . . I am not sentencing them today for those past events but the events do demonstrate graphically that these five men have exulted in their use of violence against innocent persons for no reason other than their identity. . . .

. . . .
 For hundreds of years, a paramount principle of the Common Law has been equality before the law. This principle applies equally to the law abiding and to the law breaker. No one, not even the most repugnant criminal ought to be singled out for *special or markedly different punishment*. Every person in our society has the right to both a full and fair trial, and if convicted, to a full and fair sentencing process.

. . . . That means I must put aside my revulsion and contempt for the racist views espoused by these five men and ensure that I am punishing them only for their actions.²⁸⁷

Despite the lengthy sentences, the judge misapplied the codified principles of equality for crimes motivated by bias, prejudice or hate. Applying ancient “Common Law” principles of equality to reject a “special” increased punishment for biased motives contradicts the language of equality codified in the Sentencing Principles.²⁸⁸

The B.C. Court of Appeal affirmed the sentences of two of Miloszewski’s co-defendants,²⁸⁹ endorsing what it called, “fit sentences for this despicable crime cruelly committed by a gang of racial bigots in pursuit of their racist aims.”²⁹⁰

In *R. v. Damelo*,²⁹¹ issued at about the same time as *Miloszewski*, an Ontario Court vigorously denounced anti-lesbian bias in a sentence for sexual assault.

²⁸⁷ *Id.*, ¶¶ 159-67 (emphasis added). In another 1999 decision, the British Columbia Court of Appeal affirmed a seven year manslaughter sentence for a man who stabbed his co-worker to death while threatening to cut off his penis. The victim had been teasing the defendant about being gay. In *R. v. Tran*, 1999 BCCA 367, [1999] B.C.J. No. 1494 (Ct. App.) (Braidwood, J.A.) the Court of Appeal did not mention any homophobic motivation, but it also did not suggest any mitigation of sentence due to provocation.

²⁸⁸ The judge might be required to disregard racist and homophobic expressions if they were being prosecuted separately as hate propaganda, to avoid double punishment for the same conduct, but no danger of double punishment appeared in the sentencing proceeding. In a more recent case, *R. v. Lankin*, 2005 BCPC 1, [2005] B.C.J. No. 10 (Buller Bennett Prov. Ct. J.), the sentencing judge imposed sixty days for criminal harassment motivated by racial prejudice. The case did not involve homophobia, but notably the Court applied both the Sentencing Principles for bias, prejudice or hate and *Charter* values of equality and multicultural heritage. See *Lankin, id.*, ¶¶ 28-29 (citing Crown submission and quoting *Charter* §§ 15(1), 27). This approach is analogous to the treatment of a human rights code as “quasi-constitutional,” and it acknowledges the seriousness of the principles of equality codified in the Sentencing Principles for bias, prejudice or hate.

²⁸⁹ *R. v. Miloszewski* (appeals by L.E.N. & Synderek), 2001 BCCA 745, [2001] B.C.J. No. 2765 (Ct. App.) (Lambert, Hollinrake & Saunders J.J.A.).

²⁹⁰ *Id.*, ¶ 30.

²⁹¹ *R. v. Demelo*, [1999] O.J. No. 3952 (Ct. of Justice Prov. Div.) (Harris Prov. J.).

[Damelo] apparently knew from the moment he entered the residence on Richmond Street that the victim was a lesbian. He was well aware of her gender preference and that it was female. He violated her sexually but *there is a significant amount of evidence to suggest that he violated her as well because of her sexual preference*. Whatever her preference may be and whatever he thinks, she does not have to be, nor should she be, nor should anyone of that particular preference be bashed around in this way.

. . . . I question what he would do or say if some dope dealer or punk like him called his mother or his sister a dike I question how he would treat that kind of a situation²⁹²

The judge quoted the Sentencing Principles for bias, prejudice or hate, and concluded they “may have” been present:

I commented earlier that the facts hinted that the assault was imposed because of the sexual preference of the victim. Sexual assaults generally may be imposed for a certain type of gratification. This *may have been* not only for gratification but motivation *because of who the victim was and her sexual preference*. Had she not been as tough as what she was, she may have been raped, and I believe she also thought she might have been.²⁹³

The judge imposed a sixty day custodial sentence, followed by eighteen months’ probation.²⁹⁴

A third example applying the Sentencing Principles shortly after their effective date, in this case a prosecution for incitement to hatred, is provided in *R. v. Froeblich*,²⁹⁵ where the defendant pleaded guilty and submitted a letter of apology. At sentencing the judge accounted for the apology in sentencing by noting that the defendant was an aboriginal offender and that a letter of apology held special significance in his community.²⁹⁶ The case did not involve allegations of homophobic bias, but it did bridge the transition period from before to after the effective date of the Sentencing Principles for bias, prejudice or hate.²⁹⁷

²⁹² Damelo, *id.*, ¶¶ 1-6 (emphasis added).

²⁹³ Damelo, *id.*, ¶ 14; *see id.*, ¶ 13 (quoting Criminal Code § 718.2(a)(i)).

²⁹⁴ *Id.*, ¶ 20. The Court also expressly rejected a request to serve the sentence intermittently to permit continued employment, reasoning that an intermittent sentence would amount to a term of probation, which was “totally inappropriate.” *Id.*, ¶ 29. The Court did not quantify a premium for lesbophobic bias, but the references to “a significant amount of evidence” which “may have” established a biased motive suggest a standard of proof less than either a preponderance of evidence or beyond a reasonable doubt. This standard equates to a “substantial evidence” standard of judicial review for an agency’s findings of fact.

²⁹⁵ *R. v. Froeblich*, 1999 CarswellOnt 1280 (Prov. Div.) (Cole Prov. J.).

²⁹⁶ *See id.* (D. Cole, P.C.J., Oral Reasons for Sentence) (noting that in sentencing aboriginal persons, “notions of reparation and apology may be more appropriate” than other forms of punishment).

²⁹⁷ *See Froeblich, id.*, ¶¶ 3-6 (surveying transition in Sentencing Principles occasioned by proclamation of Bill C-41

In *R. v. Tomlinson*,²⁹⁸ a case arising shortly after the effective date of the Sentencing Principles for bias, prejudice or hate, the Saskatchewan Court of Queen’s Bench considered a claim of homosexual provocation as a defense to a second degree murder charge. Rejecting the defendant’s version of the facts, the Court characterized the evidence of provocation as follows:

I find this factual scenario to be incredible. A 67-year old small man weighing approximately 130 pounds who had just been bloodied by a 29-year old man weighing 170 pounds with no tolerance for inappropriate sexual gestures, would not pursue the assailant with the view of grabbing his testes. However, given Clarke’s disposition and his previous impulsive conduct, it is possible that he became uncontrollably aroused and then touched Tomlinson’s genitals. Therefore, I must address the question of whether an ordinary person of the same age and sex as Tomlinson, who experienced similar sexual advances, would have lost self-control.²⁹⁹

After setting out the applicable legal standards, the Court rejected the provocation claim, under an objective test of reasonableness:

Dr. Menzies in his testimony would go no further than opining that the average person would react to a sexual touching of a nature allegedly experienced by Tomlinson but not to the degree of losing the power of self-control.

I am also satisfied that in our society an ordinary person, of the same age and sex and sharing with Tomlinson factors that may give Clarke’s actions and insults special meaning, would not have lost the power of self-control. ***In my view the defence of provocation is not intended to create an “open season” on homosexuals who act unlawfully.*** Such would be the case here for Tomlinson knew that Clarke was a cross dresser and had what might be described as a strong desire for homosexual contact. He was not caught off guard. Clarke had previously approached Tomlinson for sexual favours. Nor was this Tomlinson’s first experience for he had faced a similar incident in Vancouver which he handled without losing self-control.³⁰⁰

Because the “objective threshold” test for provocation was not satisfied, the Court found the defendant guilty. The Court did not address sentencing in its judgment, but since the killing occurred in July, 1997, the Sentencing Principles were in effect, and the Court would be required

on September 3, 1996).

²⁹⁸ *R. v. Tomlinson*, [1998] S.J. No. 848 (Sask. Ct. Q.B.) (Klebec J.).

²⁹⁹ *Id.*, ¶ 46.

³⁰⁰ *Id.*, ¶¶ 49-50 (emphasis added).

in a subsequent proceeding to consider evidence of the defendant's biases if they motivated the murder.

In a 1999 case, *R. v. Cvetan*,³⁰¹ the Ontario Court of Appeal reduced the co-defendants' sentences of six months' imprisonment plus two years' probation to six month conditional sentences. The Court's reasoning was based on a lapse in the sentencing judge's logic:

The trial judge did not accept the evidence of [the Crown] to the effect that the assault was motivated by the sexual orientation of the complainants. Without this evidence, we see no other evidence to support the trial judge's conclusion that the sexual orientation of the complainants played any part in this assault and was an aggravating factor in imposing sentence.³⁰²

The case stands for the simple principle that a sentencing court must base a sentence premium for bias, prejudice or hate on evidence that it has not itself rejected. Despite the reduction in the sentence, the Court of Appeal opinion does not repudiate the Sentencing Principles for bias, prejudice or hate—so long as they are applied logically.

In a 2001 British Columbia case, the trial court sentenced one youth and one adult for an expressly homophobic attack.³⁰³ The Judge's sentencing decision disavowed any finding of "provocation" by the victim and set out findings establishing both attackers' homophobic bias: "this event was motivated by a bias, prejudice or hatred of homosexuals. There is no other conclusion that can be reached based on the evidence."³⁰⁴

Finally, in one case soon after the enactment of the Sentencing Principles a court accepted a defendant's trans-sexuality as a mitigating factor in sentencing, because of

³⁰¹ [1999] O.J. No. 250 (Ct. of App.).

³⁰² *Id.*, ¶ 9.

³⁰³ *R. v. M.D.J. (& Troy Calvin Wilton)*, 2001 BCPC 250, [2001] B.C.J. No. 2110 (Prov. Ct.) (Burdett Prov. Ct. J.). A group including the two defendants called the victim derogatory names and sent the youth to "aggressively pursue" him to the back of a convenience store, where he was "beat up."

³⁰⁴ *M.D.J., id.*, ¶ 103. The sentencing Judge adopted "unequivocally" the reasons *R. v. Ingram & Grimsdale*. See *M.D.J., id.*, ¶ 5-6. Because he had no criminal record, the Court sentenced the adult to fourteen days in custody and one year of probation, with a conditional sentence order allowing community service. *Id.*, ¶¶ 9-11. The youth "J." however had an extensive juvenile record and was on probation at the time of the attack. The Court sentenced him to thirty days' incarceration, also conditionally allowing community service, followed by one years' probation. *Id.*, ¶¶ 12-13. Both were prohibited to contact the victim, except for a required letter of apology submitted through their probation officers. *Id.*

discriminatory abuse likely in prison. The Court reasoned: “Any sexuality irregularity identified in prison will attract focus and derision and beyond. . . . extended imprisonment in the subculture of a Federal Penitentiary would constitute punishment well beyond imprisonment.”³⁰⁵

In total, despite their condemnation of homophobic motives, cases decided soon after the enactment of the Sentencing Principles generally lacked a detailed analysis.

Like their Canadian counterparts, American federal judges sometimes embraced homophobia as a problem worthy of denunciation before the addition of the hate motivation provisions of the Sentencing Guidelines.³⁰⁶ For instance, in *United States v. Gonzalez*,³⁰⁷ a 1991 decision, a Court of Appeals affirmed a downward departure for a defendant because he appeared homosexual and would therefore suffer increased vulnerability to sexual assault in prison. In the 1993 case of *United States v. Lallemand*,³⁰⁸ a Court of Appeals affirmed a sentence enhancement based on a finding that married homosexual victims were selected for their vulnerability to extortion. And, a 1995 Court of Appeals decision, *United States v.*

³⁰⁵ *R. v. Tideswell*, [1997] O.J. No. 3743 (Ct. of Justice Gen. Div.) (Donnelly J.). The Canadian Human Rights Tribunal, furthermore, later rendered similar findings and invalidated prison regulations that facilitated trans-phobic violence. In *Kavanagh*, the Court affirmed a Canadian Human Rights Tribunal decision invalidating prison regulations that restricted (1) sex-reassignment surgery, and (2) the placement options of pre-operative transsexuals. *Canada (Attorney General) v. Canada (Human Rights Commission)*, 2003 FCT 89 (CanLII), (2003), 46 C.H.R.R. 196, (2003), 228 F.T.R. 231. Although the decision did not directly address sentencing for trans-phobic violence, it incorporated testimony from the complainant, Ms. Synthia Kavanagh, describing discriminatory violence against her in prison:

[129] According to Ms. Kavanagh, during her incarceration in male institutions operated by CSC, she was regularly beaten, sexually assaulted and ridiculed. In the course of an earlier federal sentence, Ms. Kavanagh says, she was raped by nine men. Ms. Kavanagh testified that some inmates viewed her as ‘a trophy’, and pursued her for sexual purposes. Insults from other inmates, who did not like what she was, would lead to violent confrontations. According to Ms. Kavanagh, there was always a great deal of conflict and violence surrounding her. Ms. Kavanagh acknowledged that other inmates are vulnerable to the sort of abuse that she experienced in male prisons, including homosexuals and very young inmates.

Kavanagh v. Canada (Attorney General), 2001 CanLII 8496 (C.H.R.T.), (2001) 41 C.H.R.R. 119. The Tribunal did not order placement in women’s prisons; instead it required the agency to reconsider its policy based on the “special vulnerability” of pre-operative male-to-female transsexuals. The Tribunal held that “Gender Identity Disorder” constituted a disability and that the policies discriminated on the bases of gender and disability.

³⁰⁶ See generally *United States v. Oechsle*, *supra* note 282 (authorizing the admission of evidence showing a prior stabbing attack on a homosexual victim).

³⁰⁷ 945 F.2d 525 (2nd Cir. 1991).

³⁰⁸ 989 F.2d 936 (7th Cir. 1993).

Palmer,³⁰⁹ affirmed a sentence enhancement based in part on a prior state conviction for anti-gay intimidation.

A 1990 state case from Illinois is better suited to reveal the transition in decisions before and after the enactment of a hate crime law.³¹⁰ In *People v. Williams*, the state court of appeals affirmed a sentence enhanced for homophobic bias, even though the attack occurred in 1987, before the addition of the aggravating factor to the statute.³¹¹ The court, however, held the earlier list of aggravating factors was not exclusive, and therefore, “[a] sentencing court may base the sentence on elements other than those listed in the statute so long as they are consistent with the statute.”³¹² The court noted that, “the defendant intended to target persons he perceived were homosexuals,” that he and his accomplice went to the park, “to rob homosexuals,” and that he, “used a term derogatory to homosexuals in describing the site of the crime.” The Court specifically held the sentencing court, “did not err when it considered that defendant’s attack [] was motivated in part by defendant’s belief that [the victim] was a homosexual.”³¹³ The defendant, who was black, raised objections to racial biases expressed during jury selection, but the court held that the comments were immaterial and caused no prejudice to the defendant.³¹⁴

In an unreported decision from 2000, a Tennessee court affirmed the dismissal of an equal protection claim by a prison inmate challenging a policy against “transsexual dressing,” including the wearing of earrings by men. Like the contemporaneous Canadian case above, the Court’s reasoning addresses the discriminatory motives sometimes involved in prison sexual assaults:

The Court recognizes that in general, a male wearing an earring does not immediately suggest that the wearer is transsexual or invite sexual assault. However, the atmosphere among the inmates in a prison undoubtedly contains

³⁰⁹ 68 F.3d 52 (2nd Cir. 1995).

³¹⁰ *People v. Williams*, 655 N.E.2d 1071 (Ill. Ct. App., 1995).

³¹¹ *See id.*, at 1078 (citing Ill. Rev. Stat. 1987, ch. 38, ¶ 1005-5-3.2).

³¹² *Id.* (citation omitted).

³¹³ *Id.*, at 1078.

³¹⁴ *Id.*, at 1077.

greater tension, both sexual and otherwise, than the atmosphere outside the prison walls. Therefore, we find that a policy restricting transsexual dressing, even in what seems a minor way, is reasonably related to the legitimate government interest in the welfare and safety of the inmates. Accordingly, the trial court did not err in granting summary judgment on Ahkeen’s equal protection claims.³¹⁵

In the same case, however, the Court remanded for a trial on the question of liability against an individual prison official for selective enforcement, including an alleged violation of the state’s malicious harassment statute.³¹⁶

While these state cases were not decided under the federal Sentencing Guidelines, they are indicative of the increased attention paid to claims of homo- and trans-phobic bias in American decisions shortly after the enactment of the Sentencing Guidelines.

3.2.3.7.4 Recent Cases

Although the outcomes of the cases have varied, more recent Canadian cases have gradually adopted a longer and more sophisticated analysis of homophobic bias. A Calgary court recently applied the Sentencing Principles to a homophobic assault with a beer bottle.³¹⁷ The Reasons for Judgment quote the factual basis for the guilty plea in which the defendant admitted he, “hit him twice across the face with a beer bottle, causing several lacerations across his right eye. One of the lacerations punctured his right eyeball. He also received two minor lacerations to his left cheek.”³¹⁸ He also admitted calling the victim derogatory homophobic names immediately before he assaulted him. The sentencing judge adopted the Crown’s listing of twenty-one aggravating factors, including one for biased motivation: “The only motivation

³¹⁵ Ahkeen v. Parker, No. W1998-00640-COA-R3CV, 2000 WL 52771 (Tenn.Ct.App. Jan. 10, 2000) (Not Reported in S.W.3d).

³¹⁶ *Id.* (reversing summary judgment on “state law claims of civil rights intimidation via malicious harassment and official oppression pursuant to Tenn.Code Ann. § 39-17-309; § 4-21-701; and § 39-16-403.”). More recent decisions have also considered hate crime sentencing laws in context with homophobic prison violence. *See Veney v. Wyche*, 293 F.3d 726 (4th Cir. 2002) (noting, “concerns of bias-motivated attacks on homosexuals have prompted almost half of the states to protect homosexuals with hate crime statutes”).

³¹⁷ *R. v. Amr*, 2006 ABPC 8, [2006] A.J. No. 92 (Prov. Ct., Crim. Div.) (Semenuk, Prov. Ct. J.).

³¹⁸ *Id.*, ¶ 4.

for the assault appears to be the Accused’s perception that the Victim was a homosexual and the fact that he is of French nationality.”³¹⁹

Yet, the Court did not include homophobia among the factors indicating “a high degree of moral blameworthiness.”³²⁰ After reviewing the parties’ authorities for the range of sentences, the judge explained the role of aggravating factors, without any express mention of aggravation for bias. The Court’s analysis of Sentencing Principles comprises only a single paragraph, and despite its finding that prohibited biases were the defendant’s sole motive³²¹ the Court did not analyze the Sentencing Principles for bias, prejudice or hate:

33 As stated above, denunciation and deterrence are primary sentencing considerations in this case. Protection of the public is also a major concern. The Court does not ignore the accused’s relative youth and the principle of rehabilitation. That being said, any discounting for his youth and rehabilitation will only be taken into account in fixing the length of a penitentiary sentence, and not for bringing the accused into the prison range of sentence. I say that because in the circumstances of this case I am of the opinion that the fundamental principle of sentence must govern. The sentence to be imposed here must be commensurate with the gravity of the offence and the moral blameworthiness of the accused. In this case, the offence is very grave, and the moral blameworthiness of the accused is very high. The aggravating circumstances are many, and the mitigating circumstances are few. A substantial penitentiary sentence is warranted. In my view, the sentence must be, at least, 4 years imprisonment. But for the accused’s youth, and lack of any serious adult record of violence, it would be higher. Giving the accused double credit for approximately 6 months spent in pre-trial custody, he is sentenced to 3 years imprisonment.³²²

While the Court must have enhanced the sentence for bias, the decision does not apportion punishment between the two biases—nationality and sexual orientation—and the other aggravating factors mentioned. By blending all of the Sentencing Principles into one ambiguous factor analysis, the Court effectively effaced the principles of equality embodied in the principle for bias, prejudice or hate. Arguably, the mere mention of bias, prejudice or hate, without further

³¹⁹ *Id.*, ¶ 31 (adopting Crown’s listing, ¶ (5)(o)).

³²⁰ *Amr, id.*, ¶ 13.

³²¹ *See id.*, ¶ 29 (quoting Criminal Code, § 718.2(a)(i), (b), (d) & (e)).

³²² *Id.*, ¶ 33.

analysis, violated the Code's sole mandate to "consider" the sentencing principle. Still, the only statutory aggravating factor quoted in the decision is § 718.2(a)(i), for "bias, prejudice or hate."

Perhaps the most extensive recorded application of the Sentencing Principles in a case involving bias, prejudice or hate based on sexual orientation appears in the sentencing colloquy of *R. v. Demers*.³²³ Demers pled guilty to an assault on Ryan MacKenzie, a participant in the City of Edmonton 2005 Gay Pride Festival.³²⁴ His sentencing was heard one year later, during 2006 Pride. The Crown presented a thorough factual basis for aggravating factors:

There are a number of aggravating factors, Your Honour.

Firstly, the nature of the offence and its surrounding circumstances. . . . It took place in a situation where there were people around. The complainant attended that location with a group of friends and there were other members of the public who also witnessed the incident and, in fact, attempted to intervene to stop the incident.

. . . . specifically, this offence took place in the context of an official event to mark Gay Pride Week, which was the raising of the Gay Pride flag. . . . It's an official event of the City of Edmonton. This year, our mayor was the marshal of the parade and so it is an official city event, which members of the public are invited to attend and expected to attend in safety.

Of course, there's always an expectation of safety for any members of the public who are going to Churchill Square or to City Hall as they have the right to do so as members of the City of Edmonton - residents of this city, regardless of whether they are gay or straight or their beliefs or their looks.

. . . .

Now, leading up to the event, as I indicated, there was some indication that the accused was with a group [] having some interaction with the complainant's group of people. There were some words exchanged and there was some yelling; and the complainant has advised me he was of the view that he was being challenged to fight and that he wanted to avoid confrontation.

. . . . he warned his friends to ignore it, that being the - what I might describe as taunting, and to keep on walking. And to quote from Mr. MacKenzie's witness statement:

I guess we were almost there, to the door of City Hall. I could hear them running and all I thought was, I only got a few more steps and I'm safe.

That was what was running through Mr. MacKenzie's mind; but he was, in fact, incorrect, because he opened the first door to enter City Hall and he was attacked in that location. He indicated that one of the guys - referring to the accused - Grabbed me and give me a good hit on the left side of the face right in

³²³ *R. v. Demers*, [2006] A.J. No. 1204 (Prov. Ct.) (Dzenick Prov. Ct. J.).

³²⁴ *See id.*, ¶ 59.

front of the ear. And it was at this time, that the attack did not continue because a member of the public intervened to stop the attack.

If I haven't said so already - or if it hasn't been highlighted previously - this act of violence was completely unprovoked. The complainant had no involvement with the accused and was, in fact, attempting to avoid any confrontation.

....

The major aggravating factor, in addition to all of this, is that the Crown alleges, Your Honour, that this assault was motivated by prejudice and hatred due to the victim's sexual orientation.

Your Honour has heard previously that Mr. MacKenzie came to this event at City Hall dressed in a manner that would suggest a different sexual orientation . . . - he was wearing high heels - high-heeled boots, tight white jeans, and tight white belly shirt which exposed his midriff and a belly-button ring. Across his shirt was the term, Drama Queen San Francisco. On top of his shirt, he was wearing a white corduroy jacket with a full fur lining and collar. He was also wearing earrings and sunglasses. And he indicated that he was walking in a particular manner which he described as a model walk. . . . this is all in keeping with the spirit of the event and [] he was just doing this for fun.

Now, the Crown does allege that that was the reason why Mr. MacKenzie was attacked.

[The accused admitted] "I hit him. He deserved it. There should be a law against dressing that way."

. . . . He was asked: So why did you hit the guy? Was it because he was gay? The response he received was: Yes, I didn't like the way he was walking and dressing. And he was asked: Do you hate gay people? And he said: I'm not fond of them.³²⁵

In addition to discussing exemplary cases, the Crown attorney presented reasons for applying the aggravating factor for bias, prejudice or hate from two sources: (1) the 2004 StatsCan Pilot Study on hate crime statistics; and, (2) the Ontario Crown Policy Manual for sentencing.³²⁶ Crown counsel also cited both the Criminal Code Sentencing Principles and the Canadian Human Rights Act to note that "hate-motivated discrimination that's based on sexual orientation has formally been against the law in Canada for a decade."³²⁷ The sentencing judge allowed the victim to read his impact statement and furthermore allowed the victim to ask the defendant if he would intervene to prevent homophobic violence in the future, and whether he would be

³²⁵ *Id.*, ¶¶ 61-76.

³²⁶ *Id.*, ¶¶ 88-94.

³²⁷ *Id.*, ¶ 77.

accepting if he learned that his newborn son was gay.³²⁸ After the recorded dialog between the victim and the perpetrator, the judge deemed a conditional sentence “very much in order,” and adjourned for the parties to prepare submissions.³²⁹ The parties’ joint submission, approved by the Judge, imposed a six month conditional sentence followed by twelve months’ probation.³³⁰

In *Ahenakew*, the provincial Court of Appeal affirmed the quashing of a conviction and remand for a new trial, where the trial judge had failed “to consider all of the evidence relevant to the question of whether Mr. Ahenakew had the intent necessary for a finding of guilt,”³³¹ and specifically, “relevant evidence concerning intent.”³³² Ahenakew had been convicted of wilfully promoting hatred against Jewish people for statements he made at a conference. Ahenakew may

³²⁸ The reported colloquy between the victim and the accused is notable:

MR. MacKENZIE: Am I allowed to ask him questions at this present time?

THE COURT: Yes, if you wish to.

MR. MacKENZIE: Okay. Recently, I have - saw you at City Centre, about a month and a half ago, and you were wearing the same typical clothes and you were hanging out with the same typical people as you were that day that I was victimized. My question to you is if - would you actually stop one of your friends from committing that kind of crime? Would you actually - if they started saying bad things, would you stick up for the gay community? Like, would you make sure that they would stop their conversations and stop the gay bashing verbally before it would actually escalate to what happened that day?

THE ACCUSED: I haven’t hung out with any of those people for a very long time, and I have - I have stood up because there was this person at - that lived - we spoke about this in - I guess there was this person that was dressing up that lived at the place where I’m living at the moment and my girlfriend and I hung out with them, and some people weren’t right with them. I still hung out them in front of them, in front of my friends, so -

MR. MacKENZIE: Okay. That’s good to hear. Second question: Congratulations upon your child and let’s say that your child happens to be gay when it grows up. Are you going to be able to accept that and love your child just the same or is that going to be an issue for you?

THE ACCUSED: I have spoken about this to friends because when they heard that - well, they know pretty much about a lot of what’s going on with me, and they told me - they asked me about that, because they know about the crime committed. And I told them that I’m not sure how I’d take it, but I would if it’s my child and - because - so I should accept my child however they want to think or -

MR. MacKENZIE: So you really don’t know how you’d react?

THE ACCUSED: Not at the moment, but I believe I would accept my child no matter what.

Id., ¶¶ 220-27.

³²⁹ *Id.*, ¶ 256.

³³⁰ *Id.*, ¶ 270. Among the cases cited by the Crown were *C.A.M (or M.(C.A.))*, [1996] 1 S.C.R. 500 (for the role of denunciation in sentencing), *R. v. Wilson*, *supra* note 223 (imposing aggravated sentence for crime motivated by sexual orientation), and *M.D.J.*, [2001] B.C.J. No. 2110 (same).

³³¹ *R. v. Ahenakew*, 2008 SKCA 4, [2008] 2 W.W.R. 68, 53 C.R. (6th) 314, 227 C.C.C. (3d) 428, 289 D.L.R. (4th) 59; *see id.*, ¶ 52.

³³² *Id.*, ¶ 34.

be contrasted with *R. v. Noble*,³³³ where the B.C. Supreme Court convicted the defendant of the willful promotion of hatred based on materials he distributed via the internet. The B.C. Court, finding it “unnecessary to quote extensively from the evidence,” nevertheless gave examples, including materials advocating violence against “the Jews and homosexuals” and describing “homosexuality as a crime against nature,” along with “images and posters . . . attacking gays, and others.”³³⁴

The most recent Canadian hate crime penalty case addressing homophobic bias claims arose during the 2005 Pride celebration in Vancouver.³³⁵ The victim, Michael Young was intoxicated and had had little sleep at the time of the altercation and was therefore unsure of his ability to identify his attackers.³³⁶ The Court therefore expressed doubt about some, though not all of Young’s testimony, and specifically, noted, “Young’s evidence about . . . whether anti-gay comments were made to him . . . must be considered with the greatest caution.”³³⁷ One of the two defendants testified, and the Court declined to accept his testimony.³³⁸ Instead, the Court relied primarily on the testimony of a passerby.³³⁹

The Court found it was, “left with a reasonable doubt about the nature and extent of Cheema’s participation in the fight.”³⁴⁰ The Court found that co-defendant Toor had, “punched [Young], with a closed fist to the face, at least once and quite possibly twice. This was after

³³³ *R. v. Noble*, 2008 CarswellBC 329, 2008 BCSC 215 (B.C. S.C. Feb 04, 2008). In conclusion, the trial Judge noted that, “*Hatred* is a term which has a broader meaning than simply violence.” *Noble, id.*, ¶ 48 (emphasis in original).

³³⁴ *Noble, id.*, ¶¶ 42-44 (reviewing evidence of willful intent to promote hatred).

³³⁵ *See R. v. Cheema & Toor*, 2008 BCPC 35 (Prov. Ct.) (Judgment issued Feb. 12, 2008) (Reasons for Judgment dated Feb. 22, 2008), available online at http://www.provincialcourt.bc.ca/judgments/pc/2008/00/p08_0035.htm (accessed Mar. 11, 2008); *see also* Natasha Barsotti, *Gaybashing: One guilty, one acquitted, Judge convicts Toor of assault causing bodily harm*, Xtra West, Wed., Feb. 27, 2008, available online at http://www.xtra.ca/public/viewstory.aspx?AFF_TYPE=4&STORY_ID=4399&PUB_TEMPLATE_ID=2 (accessed Mar. 11, 2008); Glenn Bohn, *Man convicted in pride week assault: Judge to decide whether attack on gay man was a hate crime*, Vancouver Sun Sat., Mar. 01, 2008; Natasha Barsotti, *Gaybashing trial inches forward*, Xtra West, Thurs., Aug. 30, 2007 (noting re-instatement of assault charges in alleged homophobic assault case, after “courtroom mix-up”).

³³⁶ *See R. v. Cheema & Toor, id.*, ¶¶ 17-18.

³³⁷ *Id.*, ¶ 87.

³³⁸ *See id.*, ¶¶ 88-91 (detailing inconsistencies in Cheema’s testimony).

³³⁹ *See id.*, ¶¶ 92-95 (reciting reasons).

³⁴⁰ *Id.*, ¶ 107; *see also id.*, ¶ 114.

Young had been separated from one or possibly both of the Indo-Canadian men and was walking away[.]”³⁴¹ And, according to the Court, Toor kicked Young at least twice in the legs.³⁴² The Court also found that Young had suffered bodily injury sufficient to support Toor’s conviction of assault with bodily harm.³⁴³

However, on the question of bias, the Court found insufficient evidence of anti-gay comments before the altercation:

There is insufficient reliable evidence to establish beyond a reasonable doubt that anti-gay comments were made before the fight. I find that at least one of the men yelled [] “fucking faggot” as they were walking away in the lane. This was after the fight. There is not sufficient reliable evidence to determine which of two men yelled these words after the fight.³⁴⁴

As of March, 2008, the Court had not yet sentenced the one defendant found guilty of attacking Young.³⁴⁵ Therefore, it is impossible to know for certain whether the Court will consider the sentencing principle for bias, prejudice or hate. However, the use of the Sentencing Principles for bias, prejudice or hate is doubtful since the Court was unable to rely on evidence of bias in its verdict.

Two additional recent attacks addressed by the Courts during the course of this study are compared separately in Chapter 4.

Still, despite the codification of the Sentencing Principles, and despite the gradually increasing sophistication of sentencing decisions, cases considering bias, prejudice or hate remain rare.³⁴⁶ Furthermore, while courts must consider homophobic bias in their sentencing

³⁴¹ *Id.*, ¶ 110.

³⁴² *Id.*, ¶ 111.

³⁴³ *Id.*, ¶¶ 115-17.

³⁴⁴ *Id.*, ¶ 113.

³⁴⁵ Coinciding with the release of the Court’s Reasons for Judgment in Young’s case, Vancouver queer leaders hosted a play followed by a panel discussion about homophobia and gaybashing. *See* Nathaniel Christopher, What are we doing about gaybashing? Queer leaders discuss hate crimes, Xtra West, Thurs., Feb. 28, 2008 (documenting Vancouver performance of play “Steel Kiss” followed by panel discussion); *see also id.* (linking video report of play and panel discussion).

³⁴⁶ The 2002 volume of the Canadian Abridgement lists only six cases addressing aggravating factors under the Sentencing Principles, and none of these addresses enhancement for bias, prejudice or hate. *See* R11B Canadian Abridgment, IX4h, at 103-06, nn.61953 to 61958 (2nd ed. 2002). Roberts and Hastings cited only a few homophobic

decisions, the Criminal Code does not quantify the sentencing premium. Academics have criticized this lack of guidance.³⁴⁷ The general ethos of Canadian law allows judges more discretion than in the United States.³⁴⁸ But Roberts and Hastings specifically contrast the United States Sentencing Guidelines with the Sentencing Principles of the Criminal Code, concluding that guidelines are unlikely, despite an identified need for principles of sentencing equality for those convicted of hate-motivated offences.³⁴⁹

The Canadian trend toward increased attention to homophobic motives in sentencing is not reflected in federal sentencing in the United States. Despite the inclusion of “sexual orientation” in the United States Sentencing Guidelines for hate motivated crimes, almost no published cases have applied the Guidelines to impose enhanced penalties for homophobic hate crimes.³⁵⁰ In a 2004 decision, *Greene v. Bowles*,³⁵¹ the federal Court of Appeals reversed the dismissal of a civil rights claim against prison officials based on their deliberate indifference

hate crime cases from the first four years of the Sentencing Principles. The Canadian Statutory Citations likewise list only a handful of cases applying the Sentencing Principles for bias, prejudice or hate. The 2006 Supplement digests forty-one cases, and none of these mention bias, prejudice or hate based on sexual orientation or gender identity. *See id.*, at 91-98 nn.418 to 459 (Supp. 2006). Two address racial bias, one applying the aggravating factor, and the other reversing the finding of bias. *Id.*, (citing *R. v. Lankin*, 2005 BCPC 1 (2005), 2005 CarswellBC 29 (Prov. Ct.) (Bennett Prov. J.) (sentence of thirty-two days in jail for criminal harassment accompanied by racist note); *R. v. Wright*, 2002 ABCA 170, (2002), A.J. No. 892, 273 W.A.C. 371, 303 A.R. 371 (Ct.App.) (Bensler J. (*ad hoc*), Johnstone J. (*ad hoc*), Russell J.A.) (Setting aside finding of aggravating factor based on racist slur made by accused several hours after offence; affirming overall sentence)). One case cited in the 2006 Supplement expressly held that proof beyond reasonable doubt is required to establish an aggravating factor under the Sentencing Principles. *See R v. P. (J.G.)*, 2003 ABPC 25 (Prov. Ct.) (Semenuk Prov. J.).

³⁴⁷ For example, Roberts and Hastings criticize the judicial discretion allowed under the Sentencing Principles:

Section 718.2 of the Criminal Code clearly identifies the statutory aggravating factors to be considered at sentencing. However, it is left to the trial judge, guided by any direction from the appellate courts, to determine the extent to which the presence of hate motivation should increase the severity of the sentence imposed. The current sentencing system provides judges with considerable discretion at sentencing, and with no presumptive or even advisory guidelines on how to exercise their discretion. With few cases of hate crime being sentenced, and few sentences being reviewed by the appellate courts, the case law is unlikely to provide detailed guidance for trial judges. Under these circumstances, it will be difficult to establish with any consistency the extent of aggravation in any particular case. No precise guidance is likely to emerge from the case law unless judges explicitly identify the effect of the aggravating factors in their reasons for sentence.

Roberts & Hastings, *supra* note 206, at 107 (footnote and citation omitted).

³⁴⁸ *See* Roberts & Hastings, *id.*, at 110-11 (reviewing sentencing reform inquiries, provincial consultations, and adoption of narrative, rather than numerical guidelines in Sentencing Principles).

³⁴⁹ *Id.*, at 111-12 (citing testimony from Parliamentary hearings).

³⁵⁰ *Compare* United States v. Allen, 341 F.3d 870 (9th Cir. 2003) (criminal civil rights prosecution for racist attacks not applying Guidelines enhancement for racial motivation).

³⁵¹ No. 02-3626 (6th Cir., Mar. 16, 2004).

resulting in assaults on a pre-operative male-to-female transsexual. Although the Court did not specify any discriminatory motive, the decision was based in part on the prison warden's own expert testimony that "transgendered inmates are often placed in protective custody because of the greater likelihood of their being attacked by their fellow inmates."³⁵²

When he announced the indictment in response to the killing of a lesbian couple, Julianne Marie Williams and Lollie Winans, United States Attorney General John Ashcroft condemned the attack invoking the hate crime Sentencing Guideline.³⁵³ Professor Susan Becker poignantly countered this official pronouncement by highlighting the rarity of such prosecutions:

one prosecution in eight years hardly reflects a solid record of federal commitment to eliminating hate crimes against gay men and lesbians who are victims of brutal crimes. . . . the dearth of prosecutions is not due to the shortage of brutal hate crimes against gay men and lesbians, but rather the incredibly narrow applicability of the Hate Crimes Sentencing Enhancement Act.³⁵⁴

The indictment alleged the defendant "intentionally selected" the victims because of their "actual or perceived gender or sexual orientation," and that he did so in violation of the hate crime Guideline.³⁵⁵ The indictment was later withdrawn, however, and no further charges have been made in relation to the killings.³⁵⁶

In a recent case from the District of Columbia, the Court of Appeals affirmed a conviction under the D.C. Bias-Related Crimes Statute based on the defendant's assaults on two women.³⁵⁷ The Court concluded that a sufficient "nexus" connected the assaults and the

³⁵² *Id.* The plaintiff's claims were based on the Cruel and Unusual Punishment Clause of the Eighth Amendment, not the Equal Protection Clause.

³⁵³ See Susan J. Becker, *Tumbling Towers as Turning Points: Will 9/11 Usher in a New Civil Rights Era for Gay Men & Lesbians in The United States?* 9 *Wm. & Mary J. Women & L.* 207, at 249 (2003); see *id.*, at 249 nn.246-50 (collecting references to announcement of indictment). Ashcroft asserted: "By invoking the hate crimes enhancement part of sentencing enhancement today, today's murder indictment makes clear our commitment to seek every prosecutorial advantage and to use every available statute to secure justice for victims like Julianne Marie Williams and Lollie Winans." See *id.*, at 249.

³⁵⁴ *Id.*, at 249-50 (citing announcement of federal indictment).

³⁵⁵ See Indictment (citing Sentencing Guidelines, § 3A1.1(a)), available online at <http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/ricerice/urice040902ind.pdf> (accessed Mar. 10, 2008).

³⁵⁶ See Charges against lesbian hikers' accused killer may be withdrawn, *The Advocate*, Feb. 10, 2004, available online at http://www.advocate.com/news_detail_ektid04072.asp (accessed Mar. 10, 2008).

³⁵⁷ *Shepherd v. United States*, 905 A.2d 260 (D.C. App. 2006).

defendant's biased motive, based in part on the "verbal stream of homophobic insults" accompanying the assaults.³⁵⁸

Because of the relative scarcity of United States federal cases applying the Sentencing Guidelines for hate motivation, Chapter 4 will utilize a recent Washington state case as a basis for comparison with a Canadian case.

3.2.3.7.5 Analysis

As indicated, the impact of hate crime laws on society as a whole is beyond the scope of this analysis. As with society as a whole, moreover, it is impossible to know all of the details surrounding the incorporation of hate crime penalty practices into the routines of judicial sentencing decisions. Among other impediments to a comprehensive understanding of this process, judicial sentencing decisions are constrained by the decisions of police and prosecutors who screen many cases before they even arrive in courts—and even by victims who often avoid reporting crimes to police. Nevertheless, some conclusions are supported by the available sentencing decisions.

First, codified hate crime laws have established a uniform a vocabulary for judicial sentencing decisions that was not available before. Although the language of Canadian and American hate crime penalty laws differs, sentencing judges within each country now have a shared basis for analyzing claims of biased motives in sentencing. And, in both countries this vocabulary identifies crimes motivated by "sexual orientation" as deserving of criminal punishment.

³⁵⁸ *Id.*, at 262-63 (citing D.C.Code §§ 22-3701, -3703 (2001)).

Second, decisions analyzing biased motivations for crimes began to appear more frequently and with more sophistication, though only gradually, shortly before the codification of hate crime sentencing laws.

Third, in both Canada and the United States, hate crime laws have probably reduced claims of gay panic and homosexual advance. And, even if such claims have not decreased, defendants and their attorneys have surely encountered far greater risks because of the possibility of enhanced penalties for homophobic bias.

Fourth, crimes motivated by “gender identity” or “gender expression” are not expressly included in hate crime penalty laws in either Canada or the United States. Generally, trans-phobic crimes do not appear in sentencing decisions in either country according to the same trends as homophobic hate crimes. Nevertheless, trans-phobic violence has been the subject of judicial consideration in a few cases in both countries.

A few important differences appear in the hate crime law in the two countries. Most significant, while judicial decisions denouncing homophobic violence have appeared in both Canada courts and American state courts, American federal courts have rarely considered hate crime penalties in cases involving homophobic violence. This gap in federal decisions may partly explain the current efforts to expand federal court hate crime jurisdiction.

The effect of hate crime penalty laws on the frequency or severity of hate crimes is probably impossible to know. In both Canada and the United States, however, sentencing courts have at least acknowledged homophobic bias as an aggravating factor in sentencing. This gradual trend is certainly due to a complex interaction of many factors. But, one contributing factor is almost certainly the enactment of laws that either require or authorize enhanced criminal penalties for homophobic or trans-phobic bias.

Hate crime prosecutions remain rare in both Canada and the United States. Nevertheless, a recognized hate crime classification system has emerged in both countries. While these

prosecutions have not always been successful, the legal classification systems in both countries have acknowledged homophobic hate crimes. Trans-phobic hate crimes remain at the threshold of recognition in both countries. A complete understanding of the legal classification systems for hate crimes in Canada and the United States is, however, impossible without examining a number of other laws that identify hate crimes and thus contribute to official legal knowledge about inequality in the criminal law field.

3.2.4 Other Hate Crime Laws

Despite the central importance of criminal prosecutions and sentencing proceedings in defining the hate crime field in both the United States and Canada, other governmental proceedings address hate crimes and hate-related conduct. Some of these non-penal hate crime laws authorize legal remedies other than criminal punishment, but as a group they are important primarily for their contribution to official legal knowledge. In both Canada and the United States, hate crime penalty laws co-exist with other hate crime laws and together constitute a new “classification system.”³⁵⁹ Hate crimes occurred before the advent of hate crime laws, but they were either omitted as crimes altogether or classified in a manner that allowed them to remain invisible as a category. The new classification system constituted by hate crime laws has restructured a segment of official legal knowledge in both Canada and the United States. But, both the dynamics of this change and the resulting taxonomies differ slightly in the two

³⁵⁹ Geoffrey C. Bowker & Susan Leigh Star, *SORTING THINGS OUT: CLASSIFICATION & ITS CONSEQUENCES* (1999). New classification systems, “draw on the authority of outdated knowledge while simultaneously supplanting it.” *Id.*, at 260. Bowker and Star explain why a thorough analysis of hate crimes before and after hate crime laws presents an impossible task: “There [is] no way of coding past knowledge and linking it to current practice.” *Id.*, at 258. Despite the impossibility of connecting the new hate crime classification systems with past legal standards, present-day lawyers and judges necessarily assume that current hate crime laws rely on perfect historical memory: “Three social institutions, more than any others, claim perfect memory: the institutions of science, law, and religion.” *Id.*, at 275. Yet, paradoxically, new classification systems, “draw on the authority of outdated knowledge while simultaneously supplanting it.” *Id.*, at 260. Bowker and Star use the term “clearance” to describe the process of forgetting or erasing old knowledge, which is necessary to cope with the paradoxes of a new classification system. *Id.*, at 259-61. Those aspects of old knowledge retained by the new classification system are necessarily drawn from what Bowker and Star call “potential memory”—archived files, forms, and other information of organizations. *Id.*, at 268. Also paradoxically, the absence of any potential memory makes a new classification system impossible; whereas, a large potential memory retained within an old system makes a new classification system inconvenient.

countries. Some of these differences may be inconsequential, but some aspects of the hate crime classification systems have important consequences for nongovernmental groups that monitor homophobic and trans-phobic hate crimes.

Antidiscrimination laws in the fields of civil rights and human rights authorize judicial and administrative remedies for hate crimes in both Canada and the United States. In both countries lawmakers have extended the terminology of hate crime law into the field of education and elsewhere. Official statistical inquiries in both countries contribute to legal knowledge in the hate crime field. Hate speech and propaganda laws have already been mentioned, and they also contribute to the hate crime classification system. An exhaustive study of all laws related to hate crime classification is impossible here, but five categories of legal inquiry will be examined: (a) hate speech and hate propaganda laws; (b) hate crime statistics laws; (c) laws authorizing civil rights and human rights remedies for hate crimes; (d) school harassment and bullying laws; and, (e) other laws authorizing governmental inquiries into hate-related conduct.³⁶⁰

3.2.4.1 Hate Speech & Propaganda Laws

Hate speech and hate propaganda laws were addressed briefly above to illustrate the free expression limits on equality in Canada and the United States. As indicated earlier, laws punish hate speech to varying degrees in Canada and the United States. But, regardless of these differences, the hate propaganda sections of the Canadian Criminal Code and the various state and local hate speech regulations in the United States all influence their respective hate crime classification systems by articulating prohibited grounds of discrimination. The antidiscrimination language of these laws is therefore reviewed briefly here.

³⁶⁰ As indicated earlier, laws punish hate speech to varying degrees in Canada and the United States. The hate propaganda sections of the Canadian Criminal Code and the various state and local hate speech regulations in the United States all influence their respective hate crime classification systems by articulating prohibited grounds of discrimination.

The Criminal Code of Canada contains two types of hate crime laws. The first is the sentencing premium for offences “motivated by bias, prejudice or hate,” which has already been discussed.³⁶¹ The second type of hate crime law is contained in the Hate Propaganda sections of the Criminal Code, §§ 318 & 319. As suggested above, the Canadian *Charter* accommodates more robust laws regulating hate-related speech than its American counterpart. And Canada’s hate propaganda laws have recently been amended to expressly prohibit hate propaganda motivated by “sexual orientation.” While Canada does not have the same history of criminal civil rights laws as the United States, the Criminal Code expressly incorporated antidiscrimination principles in the “Hate Propaganda” sections in the 1970s. The Hate Propaganda provisions³⁶² create offences and authorize criminal penalties for anyone who advocates genocide, publicly incites hatred, or willfully promotes hatred against an “identifiable group.” The equality rights language applicable to hate propaganda appears in the definition of “identifiable group”: “any section of the public distinguished by colour, race, religion, ethnic origin or sexual orientation.”³⁶³

American hate speech laws are found mostly among state statutes and municipal codes, and these laws are restricted by constitutional protections for free expression.³⁶⁴ The equality rights language embodied in these laws varies widely throughout the country, and even among municipalities within the same state. As an example, the St. Paul, Minnesota, Bias-Motivated Crime Ordinance, which the Supreme Court invalidated in *R.A.V. v. St. Paul*, prohibited the display of symbols arousing “anger, alarm or resentment in others on the basis of race, color,

³⁶¹ The same section contains Sentencing Principles for spouse, partner, and child abuse, abuse of “a position of trust or authority,” and several other factors.

³⁶² Criminal Code §§ 318, 319, R.S., 1985, c. C-46, s. 320; R.S., 1985, c. 27 (2nd Supp.), s. 10, c. 40 (4th Supp.), s. 2; 1990, c. 16, s. 4, c. 17, s. 11; 1992, c. 1, s. 58, c. 51, s. 36; 1998, c. 30, s. 14; 1999, c. 3, s. 29; 2002, c. 7, s. 142. A person publicly incites hatred by: “communicating statements in any public place, incit[ing] hatred against any identifiable group where such incitement is likely to lead to a breach of the peace.” Criminal Code, § 319(1). A person willfully promotes hatred by: “communicating statements, other than in private conversation, willfully promot[ing] hatred against any identifiable group.” *Id.*, § 319(2).

³⁶³ Criminal Code, § 318(4), R.S., 1985, c. C-46, s. 318; 2004, c. 14, s. 1.

³⁶⁴ State constitutions may provide greater free speech protection than the federal Constitution.

creed, religion or gender.”³⁶⁵ Legislation in both the state of Washington and the City of Seattle authorizes punishment for hate-related speech, but such laws are subject to strict limits articulated by the United States Supreme Court in *R.A.V.*³⁶⁶ As described earlier, the Washington state Malicious Harassment statute applies to expressive conduct that constitutes a threat of harm, if it is accompanied by a discriminatory bias of, “race, color, religion, ancestry, national origin, gender, sexual orientation, or mental, physical, or sensory handicap.”³⁶⁷ To comply with freedom of expression restrictions, the state statute expressly cautions: “Words alone do not constitute malicious harassment unless the context or circumstances surrounding the words indicate the words are a threat.”³⁶⁸ Seattle’s Malicious Harassment ordinance similarly prohibits hate speech if it constitutes a malicious and intentional threat of harm, but only if committed because of: “gender identity, marital status, political ideology, age, or parental status.”³⁶⁹ In Seattle hate speech and hate conduct are prohibited by the same state and municipal legislation and therefore subject to the same prohibited biases.

3.2.4.2 Hate Crime Statistics Laws

Government officials in both Canada and the United States gather national crime statistics, but there are differences in the legal frameworks governing official hate crime statistics. Hate crime statistics laws are directly relevant to hate crime penalties, because of the “conceptual overlap” between hate crime reporting by police agencies and the enforcement of hate crime laws.³⁷⁰ In other words, the collection of hate crime statistics influences how police investigate hate crimes. Moreover, as will be seen in Chapter 5, the differences in hate crime

³⁶⁵ See *R.A.V.*, *supra* note 111, at 377 (quoting city ordinance).

³⁶⁶ See *R.A.V.*, *supra* note 111.

³⁶⁷ RCW § 9A.36.080(a)(1).

³⁶⁸ RCW § 9A.36.080(1)(c).

³⁶⁹ See Seattle Municipal Code, § 12A.06.115.

³⁷⁰ See King, *supra* note 134, at 191 n.1 (citing, *inter alia*, Valerie Jenness & Ryken Grattet, *MAKING HATE A CRIME: FROM SOCIAL MOVEMENT TO LAW*, at 140 (2001) (hereinafter Jenness & Grattet)).

statistics law in the two countries result in significant differences in the legal knowledge resources available to nongovernmental groups that contest hate crime labeling decisions.

The first national hate crime law, *per se*, in the United States was the Hate Crime Statistics Act of 1990—a uniform, national police reporting law. The HCSA was in effect for four years before Congress mandated the Sentencing Guidelines for hate crime motivation.³⁷¹ Whereas the Sentencing Guidelines require proof that a prohibited bias was “a primary motivation,”³⁷² the Hate Crime Statistics Act uses a less strict standard. As noted earlier, legislation pending in Congress recognizes the problem of hate crimes committed by juvenile offenders by requiring the FBI to include juvenile offenses with the HCSA data it collects.³⁷³ Because of its comparable position as a centralized agency, the United States Sentencing Commission is able to compile extensive data documenting the application of hate crime Sentencing Guidelines in federal courts. For example, for the Fiscal Year 2006 the Commission received “complete guideline application information” for 65,055 out of 72,585 sentencing cases reported.³⁷⁴ Only twenty six (26) of the offenders in these cases received “Hate Crime”

³⁷¹ See 28 U.S.C.A § 534 notes (2006) (codifying Pub. L. 101-275, Apr. 23, 1990, 104 Stat. 140, as amended Pub. L. 103-322, Title XXXII, § 32096, Sept. 13, 1994, 108 Stat. 2131; Pub. L. 104-155, § 7, July 3, 1996, 110 Stat. 1394 (Hate Crime Statistics Act)). The HCSA has never been “codified.” From the time they were first authorized to the present, federal hate crime statistics have been governed by a curiously un-codified statute.

³⁷² See Guidelines Manual, § 3A1.1(a); *id.* Commentary, Application Note 3 & Background.

³⁷³ See Matthew Shepard Local Law Enforcement Hate Crimes Prevention Act of 2007, S. 1105, 110th Congress, 1st Session (introduced in Senate April 12, 2007) (“To provide Federal assistance to States, local jurisdictions, and Indian tribes to prosecute hate crimes, and for other purposes”); Local Law Enforcement Hate Crimes Prevention Act of 2007, H.R. 1592, 110th Congress, 1st Session (Referred to Senate May 7, 2007); *see also* H. Rep. 110-113, 110TH Congress, 1st Session APRIL 30, 2007 (report of hearings in House committee). The legislation would also add “gender identity” and crimes committed by juveniles to the data collection mandate of the HCSA. A 1992 amendment required states receiving federal “formula grants” for juvenile justice to include provisions in their state plans allocating funds for “hate crime” prevention: “Programs designed to prevent and reduce hate crimes committed by juveniles, including educational programs and sentencing programs designed specifically for juveniles who commit hate crimes and that provide alternatives to incarceration[.]” See 42 U.S.C.A. § 5633(a)(10)(N) (1995) (codifying Pub. L. 102-586, § 2(f)(3)(i)(VI)).

³⁷⁴ See U.S. Sentencing Commission, *Sourcebook of Federal Sentencing Statistics*, available online at <http://www.ussc.gov/ANNRPT/2006/SBTOC06.htm> (accessed May 17, 2007) (2006 Datafile, USSCFY06), Table 18—Offenders Receiving each Chapter Three Guideline Adjustment, Fiscal Year 2006. The Commission noted that it received “complete guideline application information” for only 64,055 out of 72,585 federal sentencing cases in that year. *Id.*, Table 18 n.1. Thus, sentencing decisions for roughly 8,000 federal criminal cases were unaccounted for in 2006.

guideline adjustments under § 3A1.1.³⁷⁵ The Commission also tracks the document submission rate for the various jurisdictions required to report.³⁷⁶ All of these analyses are set out in an annual Sourcebook of Federal Sentencing Statistics.³⁷⁷ On the other hand, the Commission's data do not break down the hate crime sentences according to the type of bias.

To date, Canada has no national system for reporting hate crime statistics, but a similar law has been advanced by legal scholars, and in 2004, Statistics Canada (StatsCan) reported the results of a Pilot Study collecting hate crime statistics from numerous police jurisdictions.³⁷⁸ The Ministry of Justice has authority to study hate crime sentencing. But, like police-generated hate crime statistics, hate crime sentencing practices have been analyzed in only a preliminary fashion in Canada.³⁷⁹ Technically, provinces hold the power over the administration of justice, giving them authority to analyze hate crime sentencing data and to establish standards and practices in the prosecution of hate crimes. Practically, however, the national Ministry of Justice is in the best position to gather uniform data and to produce uniform reference and training materials for police and prosecutors. So, for example, the Ministry has developed an annotated practice manual for police and prosecutors responding to criminal harassment complaints, which includes extensive guidance about sentencing, dangerous offender status, and protection orders, particularly in cases of domestic violence.³⁸⁰ The Ministry has not developed comparable guidance documents for sentencing or other relief in hate crime cases.

³⁷⁵ See *id.*, Table 18 Victim-Related. More offenders received adjustments for both vulnerable victims (220) and official victims (89). *Id.*

³⁷⁶ See *id.*, Table 1.

³⁷⁷ See U.S. Sent'g Comm'n Ann. Rep. (11th ed. 2006), available at <http://www.ussc.gov> (accessed May 17, 2007) (citing 28 U.S.C. §§ 994(w)(requiring accounting and recommendations) & 997 (requiring annual report)).

³⁷⁸ See Statistics Canada, <http://dsp-psd.communication.gc.ca/Collection-R/Statcan/85-002-XIE/0040485-002-XIE.pdf> (StatsCan Pilot Study released June 1, 2004) (Canadian Hate Crime Statistics).

³⁷⁹ This is apparently because of the variation in reporting practices for nationwide arrest, charging, and conviction data. See Roberts & Hastings, *supra* note 206, at 108-09.

³⁸⁰ *Criminal Harassment: A Handbook for Police & Crown Prosecutors* (Minister of Public Works and Government Services Canada, rev. ed. 2004) available at <http://www.justice.gc.ca/en/ps/fm/pub/harassment> (accessed Dec. 10, 2005). The Handbook was issued in 1999 and revised in 2004. The Ministry's general guidance for crime victims likewise omits any discussion of hate crime. See *A Crime Victim's Guide to the Criminal Justice System*, June 5, 2002, available at <http://www.justice.gc.ca/en/ps/voc/guide/index.html> (accessed Dec. 10, 2005).

3.2.4.2.1 Constitutional Authority for Statistics

The United States Constitution does not use the word “statistics.” It requires an “actual Enumeration [of persons] . . . within every [] term of ten years,” and it expressly grants Congress the power to “direct” the manner of the enumeration.³⁸¹ For purposes other than the census, however, any statistics mandated by Congress must be authorized by some other constitutional power, such as its commerce or spending powers. The Canadian Parliament is expressly granted exclusive authority to legislate in all matters related to “The Census and Statistics.”³⁸² On the other hand, provinces possess exclusive authority in matters related to “The Administration of Justice in the Province.”³⁸³

Both Canadian and American governments produce masses of knowledge in the form of statistical data.³⁸⁴ Canada’s central statistical system has arisen in from 1918 legislation creating the Dominion Statistics Bureau, followed by the 1971 Statistics Act.³⁸⁵ But, in both countries, the collection of hate crime statistics remains a matter subject to contention between national, state, provincial, and local governments. The outcome to date has been different in the two countries.

3.2.4.2.2 National Hate Crime Statistics Laws

In the United States, the federal Hate Crime Statistics Act contains the earliest and possibly the most significant definition of “hate crime” in federal law. The HCSA applies to all

³⁸¹ U.S. CONST. art. I, § 2; compare Art. I, § 2 (enumeration to apportion representatives) with Art. I, § 9 (“census or enumeration” to apportion taxes); *but see*, U.S. CONST. AMEND. XVI (authorizing taxation apportioned by individual income rather than state population).

³⁸² *Constitution Act, 1867*, § 91(6).

³⁸³ *Constitution Act, 1867*, § 92(14).

³⁸⁴ *Report to Congressional Requesters: Statistical Agencies—A Comparison of the U.S. & Canadian Statistical Systems* (U.S. GAO, Aug., 1996) (GAO/GGD-96-142). This inquiry, posed by Congress to its General Accounting Office, asked about differences in “organizational and budget structures,” “legal frameworks,” and chief statisticians in the two countries. *Id.*, at 1. The purpose and context of the inquiry were, “proposals to consolidate some or all of the agencies comprising the federal statistics system,” in comparison to “the centralized Canadian statistical system and Statistics Canada.” *Id.*

³⁸⁵ *Id.*, at 18-19.

crimes “including where appropriate” eight predicate offenses. The HCSA did not expressly define the term “hate crime,” but its most significant features assign data collection and reporting duties to the Attorney General:

(b)(1) Under the authority of section 534 of title 28, United States Code, the Attorney General shall acquire data, for each calendar year, about *crimes that manifest evidence of prejudice based on race, religion, disability, sexual orientation, or ethnicity*, including where appropriate the crimes of murder, non-negligent manslaughter; forcible rape; aggravated assault, simple assault, intimidation; arson; and destruction, damage or vandalism of property.³⁸⁶

Quantitative analyses of hate crime statistics gathered under the HCSA have been attempted.³⁸⁷

The proposed Matthew Shepard Act would expand the data collection and reporting requirements of the HCSA in two ways.³⁸⁸ First, it would add “gender and gender identity” to the prohibited grounds of discrimination for hate crimes to be reported. Second, it would add “crimes committed by, and crimes directed against juveniles” to the offenses subject to the Act.³⁸⁹

Shortly after the HCSA became law in the United States, a Private Member’s Bill proposing a Bias Incidents Statistics Act (BISA) was introduced in the Canadian Parliament.³⁹⁰ This proposal failed, however, and it has not been re-introduced in the last ten years.³⁹¹ Nevertheless, the proposed text is worth comparing to the HCSA. The Bill would have mandated a new unit within the RCMP with two data collection and reporting obligations:

³⁸⁶ Pub. L. 101–275, Apr. 23, 1990, 104 Stat. 140, as amended by Pub. L. 103–322, title XXXII, § 320926, Sept. 13, 1994, 108 Stat. 2131; Pub. L. 104–155, § 7, July 3, 1996, 110 Stat. 1394 (emphasis added). The same legislation requires the Attorney General to “establish guidelines” for data collection and “publish an annual summary” of hate crime data. *See id.*, § 7(b)(2), (5).

³⁸⁷ *See* William B. Rubenstein, *The Real Story of U.S. Hate Crime Statistics: An Empirical Analysis*, 78 TUL. L. REV. 1213 (2004) (quantitative analysis of published, police-generated hate crime statistics database). Based on his quantitative analysis, Professor Rubenstein draws the conclusion that Congress should “strengthen the enforcement of criminal laws meant to deter hate crimes,” in addition to educational initiatives and antidiscrimination laws. *See* 78 TUL. L. REV. at 1243–44.

³⁸⁸ *See* The Matthew Shepard Local Law Enforcement Hate Crimes Prevention Act of 2007, S.1105, 110th Congress, 1st Sess. (introduced in Senate Apr. 12, 2007).

³⁸⁹ *See* Matthew Shepard Act, *id.*, § 8.

³⁹⁰ Bill C-45, *Bias Incidents Statistics Act*, 3d Sess., 34th Parl., 1991–92–93 (1st reading 8 June, 1993), cited in Glenn A. Gilmour, Working Document, Hate-Motivated Violence, at 56 n.275 (May 1994) available online: <http://www.justice.gc.ca/en/ps/rs/rep/1994/wd94-6/wd94-6.pdf> (accessed Sept. 14, 2007) (Department of Justice Canada Report No. WD1994-6e).

³⁹¹ Since it has not been re-introduced recently, the text of the bill itself is not available on the Parliament’s website.

- (a) classify as a bias incident, any incident investigated in that year by the Force that the unit is satisfied, after applying the criteria referred to in subsection (2), was wholly or partly motivated by bias against an identifiable group; and
- (b) collect and compile statistics that indicate the number of incidents classified in that year as bias incidents and that identify which identifiable group was the target of bias in each such incident.

The proposal required the Minister of Justice to “establish and publish criteria” for identifying bias incidents and to publish an annual report of bias incident statistics.³⁹² The explanatory note accompanying the Bill cited a desire for “public exposure” to statistics about “incidents . . . wholly or partly motivated by bias against those sections or individual members of the public distinguished by colour, race, religion, sexual orientation or ethnic origin.”³⁹³ In addition to the RCMP, the Bill would have authorized the Minister of Justice to negotiate agreements with provinces and municipalities to share statistics, “that are classified as bias incidents by that force and that identify which identifiable group was the target of bias in each such incident.”³⁹⁴

Despite the failure of the BISA, Statistics Canada has begun to develop a nationwide hate crime statistics program under its general legislative authority. A pilot project was conducted in two policing jurisdictions in Ontario, and nationwide statistics are expected to be reported for the first time in 2008.³⁹⁵

3.2.4.2.3 Hate Crimes & Campus Crime Statistics

In both Canada and the United States hate crimes occur on college and university campuses. The differences in higher education laws regarding campus crime statistics make these laws relevant here. In the United States, colleges and universities receiving federal funding are required to publish and report campus crime statistics to the United States Department of

³⁹² See *id.*, §§ (2) & (3).

³⁹³ See Gilmour, *id.*

³⁹⁴ See *id.*, § 4(1).

³⁹⁵ See The Daily, Tues., Feb. 6, 2007, Police-reported data on organized crime, hate-motivated crime and cyber crime, available at <http://www.statcan.ca/Daily/English/070206/d070206b.htm> (accessed Dec. 12, 2007).

Education.³⁹⁶ This reporting requirement began in 1991, simultaneous with the Hate Crime Statistics Act, and it incorporated the definition from the HCSA.³⁹⁷ Canadian educational institutions are subject to no nationwide campus crime or crime statistics mandate.³⁹⁸

3.2.4.3 Civil Rights & Human Rights Laws

Civil rights and human rights laws were discussed earlier to describe their antidiscrimination terminology. Besides their general contributions the vocabulary of equality rights, however, these laws also provide remedies for hate-related conduct in limited circumstances.

Canadian human rights codes authorize remedies for some hate-related conduct, including conduct motivated by “sexual orientation.” Canadians increasingly challenge hate-related activities in human rights tribunals, including the national Canadian Human Rights Tribunal.³⁹⁹ To date, the Canadian codes have not generally addressed conducted motivated by “gender identity.” Similarly, in the United States the federal civil rights laws authorize both administrative remedies, and remedies in federal court, for some hate-related conduct, in the context of employment discrimination for example. But, currently no federal law authorizes remedies for discrimination based on “sexual orientation” or “gender identity.” On the other hand, some state and municipal civil rights and human rights laws ban “sexual orientation” or “gender identity” discrimination, or both.

The 1996 case of *Romer v. Evans* illustrates the importance of municipal laws protecting human and civil rights in the United States. The Supreme Court decision addressed a challenge to a state voter initiative—Amendment 2, passed by Colorado voters in 1992. The initiative,

³⁹⁶ See 20 U.S.C. § 1092(f)(1)(F)(i) & (ii) (2004).

³⁹⁷ *Id.*, § 1092(f)(7); see also 20 U.S.C. § 7161 (4) (incorporating definition of “hate crime” from HCSA).

³⁹⁸ Instead, Canadian higher education funding is subject to a much more *ad hoc* negotiation encompassing revenue sharing grants from the national government to the provinces.

³⁹⁹ See, e.g., *Warman v. Winnicki*, 2006 CHRT 20 (CanLII); *Warman v. Kulbashian*, 2006 CHRT 11 (CanLII).

however, was proposed in part to invalidate local human rights and antidiscrimination laws adopted by several cities throughout the state. These laws attempted to prohibit discrimination based on “sexual orientation” in areas within the cities’ authority.⁴⁰⁰ The Supreme Court’s decision effectively validated such local civil and human rights laws.

The leading Canadian case addressing hate in a human rights decision is *Ross v. New Brunswick School District No. 15*,⁴⁰¹ in which the Supreme Court affirmed the dismissal of a teacher for his off-duty anti-Semitic and racist comments. The Court reversed the agency’s permanent ban on the teacher’s future employment.⁴⁰² In a second leading case, outside the employment context, *Taylor v. Canada (Human Rights Commission)*,⁴⁰³ the Supreme Court affirmed a series of cease and desist orders by the Canadian Human Rights Commission against a political party and its representative who operated a telephone service used to transmit messages slandering Jews.

Neither *Taylor* nor *Ross* involved homo- or trans-phobic speech, but such messages have been addressed in human rights jurisprudence. The Canadian Human Rights Tribunal has applied the Canadian Human Rights Act to homophobic hate messages on the world-wide web.⁴⁰⁴ In one such case the Tribunal issued a cease and desist order against the web-site operator whose postings were “likely to expose gay and lesbian persons to hatred and contempt.”⁴⁰⁵

3.2.4.4 School Harassment & Bullying Laws

Similar school harassment complaints in Seattle and Vancouver illustrate how hate-related conduct in a school setting can create the potential for liability in either a human rights

⁴⁰⁰ See *Romer v. Evans*, 517 U.S. 620, 634 (1996).

⁴⁰¹ [1996] 1 S.C.R. 825.

⁴⁰² *Id.*, ¶¶ 111-12.

⁴⁰³ *Taylor v. Canada (Human Rights Commission)*, [1990] 3 S.C.R. 892.

⁴⁰⁴ See, e.g., *Schnell v. Machiavelli & Associates Emprize Inc.*, 2002 CanLII 1887, ¶¶ 58, 101-02, 105 (C.H.R.T.), T.D. 11/02.

⁴⁰⁵ *Schnell, id.*, ¶¶ 162-64 (applying CHRA, § 54).

agency or a court case against the school. In a lawsuit against a Seattle-area school district, former student Mark Iversen complained of “six years of escalating anti-gay verbal harassment (by peers and, in some cases, school district employees).”⁴⁰⁶ The lawsuit did not result in a reported court decision. But, in an out-of-court settlement the Kent, WA School District agreed “to pay Mark \$40,000 and sign[] a series of written commitments regarding its policies, procedures and training.”⁴⁰⁷

A similar result was reached in suburban Vancouver in the case of Azmi Jubran, which was litigated to a written decision. In Jubran,⁴⁰⁸ the provincial Human Rights Tribunal held a school board liable for harassment against a student that included anti-gay epithets and physical assaults. In the course of the harassment, the student retaliated and at one point was prosecuted for an assault on one of his assailants. In the end, the Tribunal found that the board failed to comply with its duties under the Human Rights Code by failing to provide adequate discipline and education and other resources to school personnel to eliminate the harassment.⁴⁰⁹ Of particular interest is the Court of Appeal holding that Jubran was not required to prove he was either gay, or perceived as gay, in order to bring a complaint under the Code.⁴¹⁰

The Jubran and Iversen cases are of note because, in effect, they impose a duty of local lawmaking in the field of equality rights for conduct that could be characterized as a hate crime. By requiring school boards to adopt policies and practices to eradicate homophobic violence and harassment in schools, these cases will result in local knowledge about equality rights in schools. And, although the label “hate crime” may be avoided in schools policies, knowledge about

⁴⁰⁶ Report, *They don't even know me!: Understanding Anti-Gay Harassment & Violence in Schools, A Report On the Five-Year Anti-Violence Research Project Of the Safe Schools Coalition of Washington State*, at 68 (Beth Reis, et al., Jan., 1999) (citing Mark Iversen vs. Kent School District, et al. (unreported 1999 out-of-court settlement)).

⁴⁰⁷ *Id.* at 68. The settlement is also reported on the website of the Seattle Chapter of the American Civil Liberties Union, which represented the plaintiff. See <http://www.aclu-wa.org/detail.cfm?id=174> (accessed Mar. 10, 2008).

⁴⁰⁸ School District No. 44 (North Vancouver) v. Jubran, 2005 BCCA 201. The Supreme Court of Canada denied Jubran's application for leave to appeal one aspect of the BC Court of Appeals decision. See Board of School Trustees of School District No. 44 (North Vancouver) v. Jubran, 2005 CanLII 39611 (S.C.C.) (dismissing application for leave to appeal).

⁴⁰⁹ *Id.* ¶ 96.

⁴¹⁰ *Id.* ¶ 55.

homophobic violence in schools is apt to influence habits of thought about “hate crimes” outside the schools.

The B.C. School Act regulates harassment in schools, and as the Jubran case illustrates, its provisions can address virtually the same conduct as a hate crime prosecution or a human rights complaint based on a hate crime. Indeed, the analogy between school bullying and hate crimes is not unprecedented. In *Citrion v. Zundel*, the Canadian Human Rights Tribunal relied on the analogy explicitly:

[81] ...The mere fact that they are singled out for recurring, public vilification can erode an individual’s personal dignity and sense of self-worth. *It is not unlike being victimised by the school bully*. Even if the bully and his or her friends do not act on the schoolyard taunts, the victim nonetheless suffers the public humiliation, shame and fear that flow from the verbal attack.⁴¹¹

School bullying and harassment policies are more than conceptually relevant to Sentencing Principles for bias, prejudice or hate. Sanctions imposed for school bullying may be considered in subsequent sentencing decisions, at least in Youth Court.⁴¹² Even in the small selection of court cases arising from the Webster killing, school behaviour was relevant to sentencing. At least one of Webster’s killers was apprehended because he bragged about the killing to classmates at school. And, the Supreme Court has recently agreed to hear a defamation case brought against a radio host who criticized opponents of school bullying laws in Surrey, B.C.⁴¹³

Because of these lawsuits and human rights complaints, it is no surprise that state and provincial legislatures in Canada and the United States have considered school anti-harassment laws. And, some school districts in both Canada and America have adopted local anti-harassment policies that address homo- or trans-phobic conduct.

⁴¹¹ *Citrion*, supra note 57, ¶ 81 (emphasis added).

⁴¹² See, e.g., *R. v. R.C.W.M.*, 2004 BCCA 502 (CanLII) (history of school bullying and harassment considered in review of sentences for fitness). A substantial history of school bullying and harassment is documented in the Reasons for Judgment in the Youth Court in the same case, although no discriminatory motivations are mentioned. See *R. v. R.C.W.M. & C.Y.P.*, 2004 BCPC 128 (CanLII).

⁴¹³ See *Simpson v. Mair & WIC Radio Ltd.*, 2006 BCCA 287 (CanLII), [2006] 10 W.W.R. 460, (2006), 55 B.C.L.R. (4th) 30, leave to appeal granted, *sub nom* *WIC Radio Ltd. & Rafe Mair v. Kari Simpson*, 2007 CanLII 2769 (S.C.C.), No. 31608 (Feb. 1, 2007).

Washington state law requires school boards to adopt policies prohibiting discriminatory “harassment, intimidation, or bullying of any student,”⁴¹⁴ when motivated by, “color, religion, ancestry, national origin, gender, or sexual orientation, or [] a mental, physical, or sensory handicap.”⁴¹⁵ The legislation requires the state education agency to adopt a Model Policy for local districts to consider. The Model Policy adopted by the agency prohibits bullying and harassment motivated by “sexual orientation,” while giving administrators discretion to punish bullying and harassment motivated by “gender identity.”⁴¹⁶ The Seattle Public Schools have adopted a policy prohibiting acts of hostility by school employees motivated by sexual orientation or gender identity.⁴¹⁷ The student anti-harassment policy does not prohibit harassment or bullying motivated by sexual orientation or gender identity.⁴¹⁸

Provincial legislation to address school bullying and harassment has been proposed in British Columbia.⁴¹⁹ The 2006 version of the proposed Safe Schools Act would require school districts to adopt policies “prohibiting bullying, harassment, intimidation and or discrimination on the basis of” sexual orientation or gender identity.⁴²⁰ To date, however, this legislation has not passed. Meanwhile, the provincial government has issued a Guide for safe schools.⁴²¹ The Guide’s Standards define “bullying, harassment or intimidation” as unacceptable conduct.⁴²² But, as the Guide notes, the Schools Act makes the adoption of anti-harassment policies discretionary.⁴²³ The Guide references the provincial Human Rights Code ban on “sexual

⁴¹⁴ RCW § 28A.300.285.

⁴¹⁵ See RCW § 28A.300.285(2) (adopting definition of prohibited biases from malicious harassment statute, RCW § 9A.36.080(3)).

⁴¹⁶ See Sample Policy 3207—Students, Prohibition of Harassment, Intimidation and Bullying (adopted Apr. 8, 2002), available at <http://www.k12.wa.us/SafetyCenter/LawEnforcement/pubdocs/ModelPolicy.doc> (accessed Dec. 11, 2007).

⁴¹⁷ See Seattle Public Schools Policy No. D50.00 (Rev., Sept. 2004), available at <http://www.seattleschools.org/area/policies/d/D50.00.pdf> (accessed Dec. 11, 2007).

⁴¹⁸ See *id.*, Policy No. D49.01 (Rev. April 4, 2007).

⁴¹⁹ Bill M 204—2006, Safe Schools Act, 2nd Session, 38th Parliament (amending B.C. School Act).

⁴²⁰ Bill M 204—2006, *id.* (adding proposed § 2.2(a) to School Act).

⁴²¹ *Safe, Caring & Orderly Schools: A Guide* (B.C. Ministry of Education, Standards Department, March 2004).

⁴²² *Id.*, at 16-17.

⁴²³ See *Guide, id.*, at 16 (quoting B.C. Schools Act § 85(2)(c)(i) (authorizing but not requiring student codes of conduct)).

orientation” discrimination, and it invites schools to adopt policies addressing “homophobia” in schools. Vancouver School Board Policy prohibits “harassment related to sexual orientation,” but not “gender identity.”⁴²⁴

In both Canada and the United States school policies are administered locally. Beginning in 1994, however, federal education laws in the United States also began to include hate crime prevention sections.⁴²⁵ The education sections incorporate the HCSA definition of hate crime,⁴²⁶ and they authorize programming more broadly for preventing “crimes and conflicts motivated by hate in localities most directly affected by hate crimes.”⁴²⁷ These provisions did not create federally-protected rights sufficient to trigger civil rights liability against school officials for bullying.⁴²⁸ But, they have interjected national hate crime standards into local schools policy. Canadian schools, like Canadian colleges and universities, are free from any such national hate crime policy.

3.2.4.5 Other Laws

In both Canada and the United States, governmental agencies conduct legal inquiries too numerous to list. These inquiries may be divided into two categories: (1) *ad hoc*; and, (2) systematic. Both types appear in Canada and the United States.

The leading example of *ad hoc* inquiry in the field of hate crime law in Canada is the inquiry by the Cohen Committee, which was discussed in Chapter 2. The 1966 Cohen Report introduced hate crime terminology to Canadian law, and Parliament adopted the recommendations of the Cohen Report by enacting the hate propaganda provisions of §§ 318,

⁴²⁴ See Vancouver School Board, School District No. 39 (Vancouver), Policy No. JFCK* Violence Prevention (rev. Jan., 2005), available at <http://www.vsb.bc.ca/districtinfo/policies/jfckviolenceprevention.htm> (accessed Dec. 11, 2007).

⁴²⁵ See 20 U.S.C.A. §§ 7131(a)(7) & 7133 (2003) (authorizing agency programs and grant funding for hate crime prevention).

⁴²⁶ 20 U.S.C.A. § 7161(4) (2003).

⁴²⁷ 20 U.S.C. § 7131(a)(7) (2003).

⁴²⁸ See *Stevenson ex rel. Stevenson v. Martin Bd. Of Educ.*, 93 F.Supp.2d 644 (E.D. N.C. 1999) (applying 42 U.S.C. § 1983).

319.⁴²⁹ The Cohen Report did not investigate homo- or trans-phobic violence, however, and the Canadian Criminal Code was not amended to prohibit homophobic hate propaganda until 2004. American legal inquiry in the field of civil rights tends to be systematic. The United States Commission on Civil Rights constitutes a systematic, ongoing equality rights inquiry. Created in 1957, the Commission exercises almost no remedial enforcement powers typical of a Canadian rights agency. But, its power to create knowledge is not reflected in any similar agency in Canada. A review of Commission publications shows it produced knowledge about hate crimes, even before the passage of the HCSA.⁴³⁰

Other forms of legal inquiry relevant to hate crime law, but not fully addressed here include: reporting obligations under international law;⁴³¹ civil rights laws; juvenile justice laws establishing punishments for young offenders;⁴³² laws authorizing delayed parole eligibility;

⁴²⁹ See Maxwell Cohen, *The Report to the Minister of Justice of the Special Committee on Hate Propaganda in Canada* (Queen's Printer, 1966) (*Cohen Report*).

⁴³⁰ See, e.g., *Who Is Guarding the Guardians? A Report on Police Practices. Based on a national consultation held in Washington, DC; hearings in Philadelphia and Houston; several State Advisory Committee reports and open meetings; and research during and after the hearings.* 173 pp. No. 005-901-00029-4. (1981); *Recent Activities Against Citizens and Residents of Asian Descent. Discusses historical discrimination against Asian immigrants and Asian Americans, demography of persons of Asian descent, factors in anti-Asian activity, and specific incidents since 1982 of violence, harassment, intimidation, and vandalism against persons of Asian descent.* CHP 88. 87 pp. No. 005-902-00043-6. (1988); *Intimidation and Violence: Racial and Religious Bigotry in America. An update of a 1983 statement.* CHP 96. 29 pp. No. 005-902-00057-6 (1990).

⁴³¹ Canadian national and provincial governments participate in human rights reporting pursuant to treaty obligations. See, e.g., Human Rights Program, Department of Canadian Heritage, *International Covenant on Economic, Social & Cultural Rights, Fourth Report of Canada* (2004); Human Rights Directorate, Multiculturalism and Citizenship Canada, *International Covenant on Civil & Political Rights, Second & Third Reports of Canada* (1990). In the field of domestic violence, for instance, the ICESCR references Canada's 1999 General Social Survey Victimization Report, as "evidence-based information on spousal violence and abuse of older adults to be used in the development of policies and programs addressing the prevention of family violence." ICESCR Report, at 65 ¶269.

The United States has reported about hate crimes motivated by "sexual orientation" prosecuted and monitored under both state and federal laws in its reports to the United Nations treaty bodies. See *The Convention on the Elimination of All Forms of Racial Discrimination: Initial Report of the United States Of America to the United Nations Committee on the Elimination of Racial Discrimination*, at 64-65 (September 2000); see *id.* (noting 47 states have hate crime penalty laws, but only 19 have hate crime reporting and statistics laws); archived report, available at http://www.state.gov/www/global/human_rights/cerd_report/cerd_report.pdf (accessed Aug. 9, 2007). Its most recent periodic report, however, excises all references to "sexual orientation," even in quotations drawn from the HCSA and state hate crime laws. See *Periodic Report of the United States of America to the U. N. Committee on the Elimination of Racial Discrimination Concerning the International Convention on the Elimination of All Forms of Racial Discrimination* (April 2007), available at <http://www.state.gov/documents/organization/83517.pdf> (accessed Aug. 9, 2007).

⁴³² A 1992 amendment required states receiving federal "formula grants" for juvenile justice to include provisions in their state plans allocating funds for "hate crime" prevention: "Programs designed to prevent and reduce hate crimes

internal law enforcement and judicial administrative policies; laws authorizing *ad hoc* inquiries and systematic research about hate crimes;⁴³³ hate crime prevention laws;⁴³⁴ the common law and statutes regarding defamation; military regulations;⁴³⁵ extradition and immigration laws; prison conduct policies; volunteer protection laws;⁴³⁶ and, domestic violence laws. In either Canada or the United States, or both, laws authorizing punishment or other remedies, or documenting hate-related incidents, have appeared in each of these areas, and more, too numerous to analyze in detail here.

In both Canada and the United States a tort action is available for a physical assault or battery. For example, in a 2000 judgment, the B.C. Supreme Court awarded damages to plaintiffs Brian Coutts and Randall Lampreau who had sued the three men who attacked them in a “violent homophobic assault.”⁴³⁷ While the Court was able to award damages in the civil action, the Court noted that, “[a]t the [] criminal trial, the three defendants were acquitted by reason of identification issues.”⁴³⁸ Though the Court in *Coutts v. Truong* characterized the assault as homophobic, the judgment gives no indication that discriminatory motives were necessary to the assessment of damages. In Washington state, by contrast, the Malicious Harassment statute expressly authorizes a statutory tort action whose elements include

committed by juveniles, including educational programs and sentencing programs designed specifically for juveniles who commit hate crimes and that provide alternatives to incarceration[.]” *See* 42 U.S.C.A. § 5633(a)(10)(N) (1995) (codifying Pub. L. 102-586, § 2(f)(3)(i)(VI)).

⁴³³ In addition to civil rights agencies, many additional federal agencies conduct inquiries related in some way to equality rights or hate crimes. In both countries such laws authorize crime statistics generated outside police departments (NCVS, NIBRS, and GSS).

⁴³⁴ For example, laws authorizing grants for community-based justice programs incorporate the crime prevention as a priority. *See* 42 U.S.C.A. §§ 13861 (authorizing grants), 13868 (defining “young violent offenders” as 7-to-22-year-olds who commit, inter alia, “hate crimes and civil rights violations”).

⁴³⁵ New legislation in 1996 required the Secretary of Defense to survey and report about “hate group” activity within the armed forces. *See* 10 U.S.C.A. § 481 notes (citing Pub. L. 104-201, § 571(c)(1)(adding both gender discrimination and hate group activity to reporting requirements)). This section was amended extensively in 2002 to segregate the gender relations and equal opportunity surveys. *See id.*, § 481 (codifying Pub. L. 107-314, § 561(a)(1), 116 Stat. 2554). The legislation makes no mention of homophobic discrimination or harassment, but it also does not limit the term “hate group” to groups motivated by race or gender.

⁴³⁶ The federal Volunteer Protection Act exempts volunteers from limits on liability when they have committed “misconduct” that “constitutes a hate crime,” as defined by the HCSA, or have “been found to have violated a Federal or State civil rights law. *See* 42 U.S.C.A. § 14503(f)(1)(B) & (D) (2005).

⁴³⁷ *See* *Coutts v. Truong*, 2000 BCSC 1561, [2000] B.C.J. No. 2239, at ¶ 1 (Supreme Court) (Wilkinson J.).

⁴³⁸ *Id.*, ¶ 9.

discriminatory motives. Thus, a civil action for malicious harassment may be brought, in addition to an action for assault or battery, when the attack is motivated by sexual orientation. Civil actions based on the malicious harassment statute have been rare, however.⁴³⁹ Likewise, as indicated previously, civil actions under the B.C. Civil Rights Act have been rare, and the B.C. legislation does not cover conduct motivated by sexual orientation.

Like the national inquiry that resulted in the Cohen Report, provinces conduct *ad hoc* inquiries related to hate crimes. The history of formal rights inquiries in British Columbia⁴⁴⁰ includes such an inquiry into hate group activities. The McAlpine Report was the result of an inquiry into whether to appoint a public board of inquiry under the provincial Human Rights Code.⁴⁴¹ The author concluded as a matter of law that he lacked authority under the existing Code to institute such an inquiry:

My conclusion is that there is no case in law against the Klan under the Human Rights Code of British Columbia as currently drafted. It follows that the appointment of a board of inquiry would be unwarranted.⁴⁴²

The Report therefore recommends adopting additional provisions in the Code to prohibit statements encouraging discrimination. Of note are the author's observations about monitoring and reporting: "Incidents of racism can only be effectively dealt with if there is a system by which incidents are reported by the police, the schools, and government agencies."⁴⁴³ He specifically criticized the Vancouver Police Department for failing to incorporate violations of

⁴³⁹ *But see* Ziegler v. Ziegler, 28 F.Supp.2d 601 (E.D.Wash., 1998) (denying motion to dismiss state law claims, including malicious harassment).

⁴⁴⁰ Legal inquiries, including rights inquiries, have been ongoing in British Columbia for some time. The process by which Vancouver Island and British Columbia were conjoined into a single jurisdiction is discussed in early the reports of inquiries conducted for the British Parliament. *See* Papers Regarding the Proposed Union of British Columbia & Vancouver Island (May 31, 1866); Duncan McDonald, *British Columbia and Vancouver Island* (1862). Robert McDonald provides an analysis of the first fifty years of Vancouver in his book *Making Vancouver*. Robert McDonald, *Making Vancouver (1863-1913)* (1996). Other histories touching upon Vancouver include: *Working Lives Vancouver (1886-1986)* (1989); J. A. Lapence, *People vs. Politics: Vancouver-Burrard (1963-1965)* (Univ. of Toronto Press 1969). Long before the union of British Columbia and Vancouver Island, however, the British Parliament regulated activities, in particular the fur trade, in the region. *See, e.g.*, *Bill for the Regulation of the Fur Trade & Establishing a Criminal & Civil Jurisdiction within Certain Parts of North America* (1821).

⁴⁴¹ John D. McAlpine, *Report Arising out of the Activities of the Ku Klux Klan in British Columbia* (1981).

⁴⁴² McAlpine Report, *id.* at 59.

⁴⁴³ *Id.* at 66.

the Human Rights Code into its regulations and procedures manual. And, the expert retained to advise the Reporter recommended: “in all prima facie cases of overt violence against minorities, The Human Rights branch should press local police for full investigations and stepped up police service.”⁴⁴⁴

One more recent inquiry relevant to hate crimes and information practices in British Columbia is described in the 1994 Black Report.⁴⁴⁵ The report summarizes an extensive public consultation and review process and sets out similarly extensive recommendations for human rights law and practice in B.C. Matters related to anti-gay hate violence and information practices appear in the report. One of the goals recommended is to “monitor equality trends and patterns. The human rights system must serve to identify emerging issues or it will fail over the long run.”⁴⁴⁶ The recommended mandate for the human rights agency included “educational and information programs.” The report emphasized the inadequacy of case-by-case adjudication to address systemic inequality:

Some part of the system for protecting human rights should have the capacity and resources to identify such patterns and bring them to public attention. Even the broadest of systemic cases will not be able to accomplish this task. A different kind of process for *research and monitoring is needed*.⁴⁴⁷

The need for information and monitoring programs recurs throughout the report, and the desirability of “coordinating educational initiatives” with nongovernmental rights groups is noted.⁴⁴⁸ The use of the Human Rights Code itself as “an Educational Document” is explicitly set out as a priority.⁴⁴⁹

The Black Report notes the limits on provincial powers in the area of criminal law: “In addition to other difficulties described in this section, there would be constitutional limitations on

⁴⁴⁴ *Id.* Appendix 1, at 3.

⁴⁴⁵ Bill Black, B.C. Human Rights Review, Report on Human Rights in British Columbia (Dec., 1994) (Report to the Ministry Responsible for Multiculturalism and Human Rights).

⁴⁴⁶ Black, *id.* at 1 (some emphasis omitted).

⁴⁴⁷ *Id.* at 14 (emphasis added).

⁴⁴⁸ *Id.* at 73-74.

⁴⁴⁹ *Id.* at 78.

how far the Province could go in creating penal provisions, since criminal law is an area within federal jurisdiction.”⁴⁵⁰ In addressing the grounds of discrimination to be included, however, the report rejected an invitation to delete “sexual orientation,” in part because, “It would be pointless to discuss this possibility since the courts have said in the clearest terms that the ground of sexual orientation deserves constitutional protection and is analogous to the other grounds set out in the Charter of Rights and Freedoms.”⁴⁵¹ The Black Report contains several explicit references to discriminatory violence, including violence against persons with HIV.⁴⁵²

In structural terms, the Black Report identified the establishment of, in effect, a permanent tribunal in 1984 as providing “continuity” and an “opportunity to develop expertise.”⁴⁵³ Additional recommendations include a requirement for annual reports, special reports, research projects, and special inquiries by a Human Rights Commission.⁴⁵⁴ Although the Report declines to recommend criminal penalties in Commission cases, it does note that sexual assault and hate propaganda are both crimes and violations of the Code.⁴⁵⁵

The landscape of hate crime law in the United States does not include *ad hoc* judicial inquiries at either the state or federal levels. On the other hand, unlike their Canadian counterparts, American cities institute human rights inquiries that lead to local legislation. These local laws include not only hate crimes penalty laws but also a variety of other legal principles related to hate crimes. Local inquiries of this nature are addressed in greater detail in Chapter 5.

3.2.4.6 Analysis—The Role of Other Hate Crime Laws in Canada & the U.S.

Laws imposing penalties because of discrimination are important because in both text and practice they constitute a body of official knowledge about inequality. Even if they had no other

⁴⁵⁰ Black, *id.* at 142 n.138.

⁴⁵¹ *Id.* at 162-62 n.172.

⁴⁵² *Id.* at 9-10.

⁴⁵³ *Id.* at 21.

⁴⁵⁴ *Id.* at 47-49.

⁴⁵⁵ *Id.* at 143.

effect, the reported decisions of judges and juries considering increased penalties for hate crimes recognize inequality as a problem. Although unaccompanied by the solemnity or spectacle of criminal proceedings, other laws produce a similar result without considering the imposition of enhanced criminal penalties for bias. Among laws that do not authorize criminal penalties, laws that establish official hate crime statistics are critically important. Hate crime statistics directly justify increased penalties in individual cases. In the Canadian case of *R. v. Demers*, for instance, the Crown used hate crime statistics to support its sentencing submission for an assault committed during a Pride celebration.⁴⁵⁶ Hate crime statistics have had similar influences in the United States. For instance, a federal court considering the killing of a transvestite prison inmate,⁴⁵⁷ distinguished the official knowledge created by hate crime statistics laws from the terminology used in domestic violence laws.⁴⁵⁸ Thus, both in official judicial reasoning and in general public discourse, hate crime statistics play an important role in establishing legal knowledge about hate crimes.

Beyond their instrumental effects in individual cases, however, hate crime statistics laws, and other hate crime laws, are part of an interconnected legal classification system for hate crimes in both Canada and the United States.

3.2.5 Summary

Table 3.2 below sets out the important variations in the language and dynamics of equality rights in Canadian and American hate crime laws. The first two rows represent the hate

⁴⁵⁶ The Crown delivered an extensive submission, including citations to recent hate crime statistics. *Demers*, *supra* note 323, ¶¶ 88-92.

⁴⁵⁷ See *Thomasson v. United States*, No. 99-3165-JTM, Mem. Ord. Aug. 23, 1999, 1999 WL 690098 (Not Reported in F.Supp.2d, D.Kan., 1999). The case was decided before the Supreme Court invalidated the civil rights remedies of the VAWA in *Morrison*, but the reasoning reveals the importance of hate crime statistics laws.

⁴⁵⁸ The Court dismissed because the complaint alleged a “gender orientation” rather than “gender” motive. The decision recognizes the importance of principles of equality established during official Congressional inquiry: “the consistent tenor has been Congress’s concern about violence against women. Had Congress wished to extend the protections accorded in the VAWA to persons who have suffered violence based on gender or sexual orientation, it could have, but did not do so.” *Id.* (citations omitted). In dismissing the complaint, the Court noted that Congress included “sexual orientation” bias in the Hate Crimes Statistics Act, but excluded it from the Violence Against Women Act. *Id.*, n.2. The VAWA standard, “motivated by gender,” is excluded from the HCSA.

crime penalty enhancement laws in Canada and the United States. National laws in both countries provide a uniform standard specifying the forms of discrimination to be denounced in the punishment of crimes. In Canada, the Sentencing Principles have been either applied, or at least considered, in a number of cases to denounce crimes motivated by sexual orientation. In the United States, the federal Sentencing Guidelines have been applied to homophobic hate crimes only minimally. Far more significant in the United States are the state and local hate crime laws available in some, but not all jurisdictions. In Canada, by contrast, provinces and municipalities do not generate hate crime penalty laws.

Table 3.2—Equality Rights Language in Hate Crime Laws (United States & Canada)

Hate Crime Law	Y/N	Prohibited Grounds	Notes
United States Sentencing Guidelines	Y	“intentionally selected any victim . . . because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person.”	<ul style="list-style-type: none"> • Uniform standard, predicate offenses limited. • Advisory, must consider. • Quantified Enhancement • Gender motive unavailable for rape & sexual assault. • State & local hate crime laws vary
Canadian Criminal Code Sentencing Principles	Y	“evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation or any other similar factor.”	<ul style="list-style-type: none"> • Uniform national standard. • Predicate offences unlimited. • Discretionary, must consider. • Un-quantified enhancement. • Analogous grounds. • No provincial or local hate crime laws
United States Hate Crime Statistics Act	Y	“manifest evidence of prejudice based on race, religion, disability, sexual orientation, or ethnicity.”	<ul style="list-style-type: none"> • Uniform national standard. • Predicate offenses limited. • Voluntary participation, state local reporting laws & policies. • Un-codified statute. • Condition of federal funding.

Hate Crime Law	Y/N	Prohibited Grounds	Notes
Canadian Hate Crime Statistics	N	Bias Incident Statistics Act (proposed): “any incident . . . wholly or partly motivated by bias against an identifiable group . . . section of the public distinguished by colour, race, religion, sexual orientation or ethnic origin and includes any person belonging to that group.”	<ul style="list-style-type: none"> • No uniform standard. • Voluntary statistics, provincial authority, local police RCMP reporting policies. • No federal funding conditions.
Canadian Criminal Code, Hate Propaganda	Y	Incitement/Promotion of Hatred/Genocide Advocacy vs. “any section of the public distinguished by colour, race, or ethnic origin.” “sexual orientation” added 2004.	<ul style="list-style-type: none"> • Valid, but limited by Free Expression. • Attorney General consent required. • Parallel private, human rights enforcement. • Omitted from Sentencing Principles.
United States Hate Speech	N	Incitement to Genocide against, “national, ethnic, racial, or religious group.” Primarily Local & State Laws.	<ul style="list-style-type: none"> • Limited by free expression principles. • No private prosecution. • No uniform human rights enforcement. • Included in Sentencing Guidelines.
United States School Harassment	N	None.	<ul style="list-style-type: none"> • Federal grants for school anti-hate programs. • State laws, local school board & university policies.
Canada School Harassment	N	None.	<ul style="list-style-type: none"> • Provincial laws, local school board & university policies.
United States School Hate Crime Statistics.	Y (higher ed. only)	Same as HCSA.	<ul style="list-style-type: none"> • Higher Education Statistics Mandatory. • Condition of Federal Funding. • HCSA definition, administered separately. • State laws & local policies.
Canada School Hate Crime Statistics.	N	None.	<ul style="list-style-type: none"> • Provincial laws, local school board & university policies.

Despite the informal influence of federal hate crime penalty enhancement law on state and local legislation in the United States, the grounds of prohibited discrimination in state and local hate crime laws are not subject to any national minimum standard. A state or city might authorize enhanced penalties for race-motivated crimes only, or for no hate crimes at all. To date, attempts to use federal law to set a minimum “backdrop” standard for criminal penalties have failed in Congress, and their fate in the Supreme Court is uncertain.⁴⁵⁹

Finally even if Congress were to extend a national hate crime law to local crimes, as in Canada, in both countries hate crime penalty enhancements remain subject to significant police, prosecutorial, and judicial discretion. The Canadian Sentencing Principles appear to establish a uniform understanding of equality rights in hate crime law, by specifying particular grounds of prohibited discrimination. Throughout Canada, sentencing judges are required to consider any evidence of the particular, named biases. The mandate to “take into consideration” evidence of listed biases is an express limit on sentencing discretion. The Code requires judges to consider listed, and other similar, biases so long as some “evidence” of such a bias is present. Yet, the Sentencing Principles also represent an expansion of judicial discretion. As long as the judge considers evidence of bias, the Sentencing Principles do not require any particular outcome. Unlike the United States Code and Sentencing Guidelines, the Canadian Sentencing Principles do not require or even advise any particular sentencing premium for a hate crime. Moreover, judges are required to coordinate the Sentencing Principles for bias, prejudice or hate with other, frequently conflicting principles. By imposing mandatory considerations without adopting administrative guidelines or delegating rulemaking authority to an administrative agency or

⁴⁵⁹ See Matthew Shepard Local Law Enforcement Hate Crimes Prevention Act of 2007, S. 1105, 110th Congress, 1st Session (introduced in Senate April 12, 2007) (“To provide Federal assistance to States, local jurisdictions, and Indian tribes to prosecute hate crimes, and for other purposes”); Local Law Enforcement Hate Crimes Prevention Act of 2007, H.R. 1592, 110th Congress, 1st Session (Referred to Senate May 7, 2007); see also H. Rep. 110-113, 110TH Congress, 1st Session APRIL 30, 2007 (report of hearings in House committee). The legislation would also add “gender identity” and crimes committed by juveniles to the data collection mandate of the HCSA.

commission, the Parliament gave judges broad overall discretion in sentencing decisions. In the United States, while the Sentencing Commission regulates the application of hate crime penalty enhancements, its Guidelines have been construed as merely advisory.⁴⁶⁰ Thus, in both countries, the official definition of inequality in practice, including inequality motivated by sexual orientation, is firmly embedded in the discretionary decisions of law enforcement personnel.

The remaining rows in Table 3.2 depict the influences of “Other” hate crime laws. Some of these laws similarly assign the discretion to define inequality to law enforcement personnel. The Canadian Hate Propaganda provisions and hate speech laws in the United States, to the extent that they are available at all under the constraints of freedom of expression, assign to law enforcement personnel the discretion to define inequality in practice by deciding which discriminatory utterances to investigate, prosecute, and punish.

The Hate Crime Statistics Act in the United States, likewise delegates discretionary decisionmaking to federal, and ultimately local, police investigators. This law, earlier than any other national law in the United States, established official equality rights terminology for hate crimes, according to the particular grounds of prohibited discrimination to be monitored by police. But it is police who define inequality in practice under the HCSA as they classify, or decline to classify, individual hate-related events. Moreover, while the HCSA aspires to a national scope, even this law does not exhaust the discretionary power of Congress. First, Congress has only gradually added grounds of prohibited discrimination to the official hate crime database. While crimes motivated by sexual orientation count, gender and gender identity crimes do not. The Sentencing Guidelines include gender discrimination, except in cases involving sexual assault, while gender discrimination is excluded from the HCSA. Thus, the national definition of hate crime excludes most anti-woman crimes. And, of course, the national

⁴⁶⁰ See Booker, *supra* note 172.

definition of inequality established by the official hate crime statistics is further limited by the discretionary decisions of local police investigators.

Differences in civil and human rights laws and other laws authorizing inquiries into hate-related activity have been addressed minimally to provide context. In both countries, civil rights or human rights laws authorize relief for conduct equivalent to hate crime, when it occurs in an employment setting, for example. Laws regulating harassment in schools and requiring schools to monitor and report hate-related harassment have been analyzed because they illustrate a key cross-national similarity in the division of governmental powers. In both Canada and the United States public schools are regulated by local school boards, which exercise remarkably similar powers under state or provincial legislation. And, the resulting school harassment laws and policies are remarkably similar.

School harassment laws and policies, and other hate crime laws are revealing because they delegate the power to define inequality in practice to government officials outside the criminal law system, and hence subject to different local legislative dynamics. The constitutional division of governmental powers in the United States and Canada locates the activities of both governmental agencies and nongovernmental groups that contend in the hate crime field. The site of lawmaking and law enforcement power in the hate crime field locates both governmental and nongovernmental power to label hate crimes and similar discriminatory conduct. A review of the interview data in Chapter 5 will identify the sites of governmental power important to nongovernmental groups. Of these, two are most relevant to the comparison between Canada and the United States: (1) the power to define and monitor crimes and criminal penalties for discriminatory conduct; and, (2) the power to define and monitor similar conduct in school settings. School harassment laws and laws requiring hate crime statistics in higher education overlap with hate crime laws, when the conduct rises to the level of a crime. These laws would

not normally be considered hate crime laws. Nonetheless, they represent an opportunity to triangulate data and to verify the observations from a comparison of formal hate crime laws.

Hate crimes motivated by “sexual orientation” have been subject to enhanced criminal penalties in both countries. In Canada prosecutions considering enhanced penalties for homophobic hate crimes have all been brought under a single, national criminal code, although they have appeared across the country. In the United States, the federal hate crime penalty law has been invoked only minimally for homophobic crimes, but state hate crime prosecutions have been more common. Homophobic, but not trans-phobic, hate crimes have thus “become cognitively taken for granted”⁴⁶¹ in both Canada and the United States. Just as police begin to exercise a “power . . . to define racism”⁴⁶² in their hate crime labeling decisions during criminal investigations, prosecutors and judges in both countries begin to define racism and other types of inequality. Other hate crime laws assign the discretion to define inequality outside police departments and courtrooms, but government officials—school administrators, for instance—remain the primary sources of official legal knowledge about hate crimes.

The institutionalization of hate crime prosecutions and sentencing decisions has been accompanied to some extent by a parallel institutionalization among nongovernmental groups that contend in the hate crime field. Generally speaking, nongovernmental social groups engage in contention at every stage of discretionary decisionmaking in the hate crime classification process—from the labeling of hate crimes for statistical purposes by police investigators to sentencing decisions by judges. These parallel contentious practices among nongovernmental groups are addressed in Chapter 5. Before examining the legal knowledge practices of

⁴⁶¹ See Jenness & Grattet, *supra* note 370, at 7-8 (addressing “institutionalization”: “the process by which the meanings and practices that constitute hate crime stabilize, become cognitively taken for granted by actors, and attain a high level of normative consensus.”); see also T. A. Maroney, *The struggle against hate crime: a movement at a crossroads*, 73 N.Y.U. L. REV. 564, 579 (1998) (describing process by which “‘Hate crime’ [] became a resonant new diagnosis.”).

⁴⁶² See Jeanine Bell, *POLICING HATRED* at 13, 27, 64 (2002) (noting formal and informal “routine practices” of police “labeling” hate crimes, and “the power of the police to define racism, [etc.]”).

nongovernmental groups in the hate crime field, however, Chapter 4 will cap the discussion of official hate crime practices by comparing two similar Canadian and American cases. A comparison of recent court decisions issued in the aftermath of allegedly homophobic attacks in Canada and the United States will illustrate the practical institutionalization of hate crime sentencing laws in criminal cases in the two countries.

4 Case Comparison

4.1 Introduction

The analysis to this point has synthesized general principles related to hate crime law in Canada and the United States. Chapter 5 will examine the role of hate crime laws in the practices of nongovernmental groups that monitor homophobic and trans-phobic hate crimes in Seattle, Washington and Vancouver, British Columbia. This Chapter presents a comparison of recent hate crime prosecutions in these two cities, to connect the abstract principles of hate crime law to their social context.

During the course of interviews beginning in the summer of 2005, nongovernmental groups in both Seattle and Vancouver identified hate-related events that they believed constituted hate crimes. When asked to provide examples of recent acts of homophobic or trans-phobic violence, a consensus in each city identified a single, recent event. In Vancouver it was the killing of Aaron Webster, and in Seattle, it was the assault on Micah Painter.

Subjects interviewed in Vancouver questioned whether any person had ever received an enhanced sentence for homophobic or trans-phobic bias in Canada. The assumption seemed to be that such enhanced penalties had been imposed in at least some jurisdictions in the United States. A quantitative analysis of the numbers of sentences enhanced because of a sexual orientation or gender identity bias in Canadian and American courts would be a worthwhile exercise, but no such analysis is attempted here. Among other problems, variations in the publication of reasons for sentencing decisions would render such a quantitative analysis suspect.

Nevertheless, Canadian and American courts have considered homophobic motives in their sentencing decisions. Specifically, recent court rulings in Vancouver and Seattle at least considered enhanced sentences for homophobic bias. In each prosecution, the guilty parties

accepted their sentences without appealing. Therefore, decisions from appellate courts of record are unavailable. Still, the Courts issued written decisions in each of the cases, and gave either written or oral reasons for their decisions to apply or not to apply enhanced penalties for bias. The events were atrocious—Aaron Webster died, while Micah Painter survived a violent attack. Each event triggered claims of homophobic bias both inside and outside court, and in each case the sentencing judges analyzed the legal standard governing criminal penalties for bias.

4.2 A Canadian Case—Aaron Webster

4.2.1 The Youths—‘J.S.’ & ‘A.C.’

On November 17, 2001, a group of five young men used baseball bats and golf clubs to attack and kill Aaron Webster in Stanley Park in Vancouver. The attackers were not immediately identified, but tips to the Vancouver Police revealed that one of the attackers had bragged about the killing to his high school classmates. Seventeen-year-old JS was arrested, interrogated, and later confessed to participating in the killing.¹ The Crown charged JS with manslaughter.² The sentencing judge noted the Crown’s choice not to seek adult proceedings:

It seems that originally the Crown sought to have the accused raised to adult Court because of the seriousness of the offence under the then Young Offenders Act, but appeared to have withdrawn that application upon some agreement with counsel for the accused which seemed to include his entering a plea of guilty to the offence in Youth Court.³

The Court set out the Summary of the Facts, which “was entered by the Crown with no opposition[.]”⁴ After investigating the tips about JS, police eventually interviewed him and obtained “a warned and videotaped” statement at first denying any involvement; he later advised

¹ See *R. v. J.S.*, 2003 BCPC 442 (CanLII).

² Criminal Code, § 236(b).

³ See *R. v. J.S.*, *supra* note 1, ¶ 2.

⁴ *Id.* ¶ 3.

a Detective that “he wanted to come clean.”⁵ JS denied the attack was motivated by Webster’s sexual orientation; he claimed the group attacked Webster because they were drunk and he was one of “those peeping tom guys”:

[Detective] M It just didn’t matter who it was?

[JS (Suspect)] S No, actually it did. Well, we were looking for those, those peeping tom guys.

M *Peeping tom guys who look in cars at guys making out.*

S: fucking voyeurs. *Yeah. Exactly....* And they fight back as well, you know....

PC: Oh, they do?

S: Yeah

PC: ... how many times did you say you guys did that, would you go out and look for guys?

S: Oh, *I’ve done it like three times*

....

M Were you looking for gays down there?

S No.

M Did you know he was gay when you got him?

S No.

M Why would you think he’s walking around nude for?

S I didn’t know. We were drunk and that was a good excuse to beat him up.

M Cause he was naked.

S Yeah. ...

....

M And just again, just so it’s clear in my mind, why, why did you guys go out to do that? Like what was the, was it a fun thing or?

S Yeah. It’s um entertainment. ...⁶

The judge reviewed the extensive psychological evidence submitted in support of the sentencing recommendations of the Crown and the defence. While his lawyer instructed him not to discuss the details of the crime with the examining psychologist, JS did reveal his sexual orientation, and in the words of the psychologist:

*He described himself as hetero sexual by orientation and has never had homosexual thoughts. He went on to say that people having alternative lifestyles do not bother him. . . . I found him quite remorseful and he had the ability to take responsibility and empathize with people. Having said that, in the absence of his disclosure of the incident in question, it is obviously hard to figure out his real feeling towards the offence in question.*⁷

⁵ *Id.*

⁶ *Id.* ¶ 5. JS later went with investigators to Stanley Park and walked them through the attack and provided a second taped interview. *See id.* ¶ 6.

⁷ JS, *id.* ¶ 14 (quoting report of psychologist) (emphasis added).

The Crown agreed not to pursue its application to raise the case to adult court, but the Crown’s expert compiled a report, and its conclusions were considered in sentencing. The Crown’s expert provided a similar caveat to his assessment:

Nevertheless, after reviewing police reports and the synopses of the alleged offence, it is clear that this offence involved clear and purposeful planning, pre-meditation and intent, as indicated by a repeated pattern of aggression towards males in the Stanley Park area and the purposeful bringing and use of objects such as golf clubs and a baseball bat in the commission of the beating. Further more, my own review of police reports indicate that the offence involved an extremely violent and unprovoked attack by reportedly five males against one individual who was attempting to flee and avoid engaging in violence. The beating involved multiple blows to the victim, causing contusions to the back, face, neck forearm, leg, and ribcage. In addition, there are no indications that J.S. made any serious efforts to stop or prevent the assault from occurring. Overall, this offence reflects a great deal of callousness and lack of empathy toward the victim.⁸

Besides the expert assessments and agreed facts from the interviews, the Court considered victim impact statements from several sources, including the “Gay Community”:

Victim Impact statements were given viva voce by the deceased’s mother, his sister and his cousin. The Court extends its deepest sympathies to them on their tragic loss. A written statement was provided by a member of the Gay Community who states that the incident happened in an area in Stanley Park normally frequented by gays and shared the media’s view that the killing was a “gay-bashing” which spread terror and fear in that community. There was some objection to this particular statement being relevant because of the accused statement that he and his friends went to the park looking for “peeping-toms” and he had no idea that the deceased was homosexual. ***I however choose to accept this statement as having some relevance to the issues of this case.***⁹

After reviewing the information available, the judge began the sentencing analysis with a critique of the expert testimony of the psychologists:

I wish to state from the onset that it causes me some alarm that all the professionals involved in the assessment of this young person seemed so “charmed” by J.S.’s personality that no “alarm bells” went off on reading the statement by the accused that he and his friends went to the park looking for “entertainment” which they found by beating up innocent victims. . . .

Counsel for the accused took objection to Crown counsel referring to his client as being part of a “gang.” I however will describe them as a “thug brigade stalking human prey for entertainment” in a manner very reminiscent of Nazi Youth in pre-war Germany. The civilized world continues to regard with abhorrence such pursuits, and I have every reason to believe that Canada is a shining example in decrying such intolerance.

⁸ *Id.* ¶ 5.

⁹ *Id.* ¶ 19 (emphasis in original).

I made the comment during submissions when counsel for the young person kept referring to all the glowing reports from family, friends and teachers that J.S. “would not harm anyone” and how tolerant he was, that they were obviously not aware of J.S.’s nightly pursuits.

I am totally amazed that Dr. Riar, supported by Dr. Ley and Dr. Bartel could conclude given the confession of J.S. that “He does not have any psychopathic, criminal, or antisocial traits and overall has been quite “pro-social.”

Dr. Bartel redeems himself in my opinion when he calls the crime for what it is . . .¹⁰

Because JS was not prosecuted as an adult, the judge applied § 38 of the Youth Offenders Act.¹¹

However, since the Act required consideration of other relevant aggravating and mitigating circumstances, the Court incorporated an analysis of the Criminal Code Sentencing Principles:

I find that the accused and his friends formed a “gang-like group” and savagely beat Aaron Webster, causing his death, and in view of the above the accused’s degree of participation in the beating is irrelevant. Further it strikes me that the accused by using baseball bats and golf clubs to beat the accused must have been aware that death could result from these hard objects coming against a fragile body with the obvious force that was applied, and were really reckless as to the consequences of their actions.

With regards a consideration of the harm done to victims, the death of the victim is obviously the worst harm that an offender can inflict, and the accused was certainly very instrumental in causing the death of Aaron Webster.

With regards whether it was intentional and foreseeable, it strikes me that for young men to have weapons “resident” in their vehicle for excursions into a park looking for innocent victims to beat up, is certainly intentional, and death or serious injury to the victim is certainly either foreseeable or implies a certain recklessness as to consequences. Further the fact that the accused had indulged in this activity on three previous occasions, although he says that he did not use weapons, suggests to me that their actions were certainly intentional.

With regards reparation by the young person, Mr. Webster has unfortunately been killed and reparation to the victim is impossible.

With regards time spent in detention, J.S. has spent no time in detention, although his counsel has described his bail conditions as akin to house arrest. I do not believe that this amounts to detention.

With regards previous findings of guilt, J.S. has no previous Court history.

With regards “other aggravating and mitigating circumstances”, I find that in regard to mitigating circumstances, the fact that J.S. took one and a half years to confess and at first denying it until the sight of crime scene photos made him break down and confess, in my opinion certainly diminishes this aspect of mitigation. I also find that the accused has already benefited from a consideration of mitigating circumstances when the Crown withdrew its application to raise the young person to adult Court after what appears to be an agreement with his counsel that he would plead guilty in Youth Court, thereby avoiding the rigours of an adult sentence. I should state that I also find that the accused’s claim that he was drunk when committing the offence, merely a tactic to

¹⁰ JS, *id.* ¶¶ 33-37.

¹¹ *See id.* ¶ 41 (citing § 38(3)).

deflect culpability, as demonstrated by his contradictory statements to those interviewing him of his alcohol intake. I find that the clarity with which he remembered the details of events of that fateful night when he went to the scene with police officers, suggests that he was certainly not as intoxicated as he would have the professionals who interviewed him believe.

The aggravating factors in my opinion are numerous:

1. *The attack and beating of Mr. Webster was in fact a “hate crime” as set out in section 718.2 (a)(1) of the Criminal Code.* I am aware that the Crown has conceded that since J.S. has stated that they went to the park looking for “peeping-toms” or “voyeurs”, and that he did not know that this area was frequented by homosexuals, she has no way of establishing that this was a “hate crime.” I disagree.

Section 718.2 of the Criminal Code states as follows:

[quoting § 718.2(a)(i)]

I am of the opinion that this crime was motivated by “bias, prejudice or hate based” on a factor similar to sexual orientation and is covered by this section of the Criminal Code. It strikes me that this section contemplates hatred against “peeping toms” and/or “voyeurs” as being within its purview, since in my opinion such activity represents a sexual lifestyle which some may consider deviant, but is a sexual lifestyle all the same.

I have been advised that the media has been describing this incident as a “gay-bashing” with no foundation for saying so. On this point *I find it incredible that the accused and his friends who were obviously in the habit of visiting the park to “beat up” “peeping toms” and “voyeurs” were so naïve that they did not notice that this area was frequented by gays. In any event a gay person was “bashed” by the accused and his friends in an area reputedly frequented by gays, and in that regard I fail to see why it cannot be regarded as a “gay bashing.”*

2. The attack was cowardly and so brutal that it caused the death of Aaron Webster.
3. This was a random, unprovoked attack by a group of strangers on a hapless victim who did not even fight back.
4. The young person confessed one and a half years later and after there were rumours around his school of his involvement. He even denied it at first.
5. The accused and his friends were in the habit of taking weapons in their vehicle with the purpose of seeking out certain innocent male victims and assaulting them.¹²

In its analysis, the Court drew a direct analogy to two leading precedents involving sentencing for racist and homophobic violence, *R. v. Atkinson, Ing, & Roberts* and *R. v. Ingram &*

¹² JS, *id.* ¶¶ 43-58 (emphasis added).

Grimsdale.¹³ The Court quoted at length from the facts of the first case, which it described as “eerily similar to the facts of the case at bar”:

On the night of September 10, 1977, five youths, all residents of the Clifton House for Boys, set out to beat up “queers” in Riverdale Park, a municipal park situated close by. The park had a reputation of being a place frequented by homosexuals. The youth[s] sought out and physically beat up three men who were complete strangers to them. The assaults were completely unprovoked. It was not a melee. After the first victim was assaulted, he was left bloodied, beaten and lying on the ground. The youths then sought out and beat up a second victim, and after finishing with him, found a third. They also were left lying on the ground. All the victims were found either unconscious or only semi-conscious. The assaults were carried out with indescribable brutality. Although no weapons were used, the respondents beat their victims with their fists and kicked them.¹⁴

The Court agreed that, “in assaults of this nature,” general deterrence, “should not be the paramount consideration,” and instead, the Court should adopt the reasoning of *R. v. Ingram and Grimsdale*, “which was a precursor and instrumental to the enactment of S.718.2 of the Criminal Code.”¹⁵ Specifically, the Court accepted, “Parliament’s concern for the incitement of racial hatred is reflected in s. 281 of the Criminal Code. . . . Such assaults, unfortunately, invite imitation and repetition by others and incite retaliation.”¹⁶

Like the Court of Appeal in *R. v. Atkinson, Ing, and Roberts*, the judge in *R. v. JS* extended the *Ingram and Grimsdale* principles and considered the motive for the attacks as an aggravating factor: “Here, a vicious assault was carried out by a cowardly gang of youths who selected innocent victims, complete strangers, who had the misfortune of being in a public park on that occasion. It is the type of offence which the public should not and will not countenance, and the sentence imposed must reflect that.”¹⁷

Moreover, unlike the Court in *R. v. Atkinson, Ing, and Roberts*, the sentencing judge expressly found that the attack on Webster was not mere “youthful bad judgment in the heat of a

¹³ *Id.* ¶¶ 59-64 (citing *R. v. Atkinson, Ing & Roberts* (1979), 43 C.C.C. (2d) 342 (Ont. C.A.) & *R. v. Ingram & Grimsdale* (1977), 35 C.C.C. (2d) 376).

¹⁴ *JS, id.* (quoting *R. v. Atkinson, id.* ¶ 1).

¹⁵ *Id.* ¶¶ 62-63.

¹⁶ *Id.* ¶ 63.

¹⁷ *Id.* ¶ 64.

tragic moment,” and, “that the egregious and extreme aggravating circumstances of this offence warrants a sentence that must reflect the abhorrence felt by a civilized society for such a heinous crime. . . . I find therefore for all the reasons stated above that a non-custodial sentence would be inappropriate.”¹⁸ The Court denied the Crown’s recommended sentence of 28 to 32 months in favor of “the maximum permitted under the Youth Criminal Justice Act for this offence[,] a Custody and Supervision Order for a period of three years.”¹⁹

A second juvenile, A.C., was sentenced in Youth Court by a different Provincial Court Judge.²⁰ Werier, Prov. Ct. J., gave written reasons in support of A.C.’s sentence:

24 During the sentencing hearing three victim impact statements were read out in Court. One was from a close cousin of Mr. Webster, one was from his mother, and one was from his sister. Each of these statements reflects the powerful and lasting impact that this crime has had on an innocent family and indirectly on the community at large.

. . . .

28 Section 38(3) of the YCJA outlines other factors that I am required to take into account in determining the appropriate sentence for A.C. These factors are:

29 The degree of participation of A.C. in the commission of this offence. (s. 38(3)(a)) A.C. was clearly an active participant in this tragic beating. He chased Mr. Webster, and hit him with the bat at least three times, the last time while Mr. Webster was already on the ground.

30 The harm done to victims and whether it was intentional or reasonably foreseeable. (s. 38(3)(b)) A.C.’s actions clearly contributed to the death of Mr. Webster. There is no doubt that a death would be a reasonably foreseeable outcome of a beating perpetrated on one innocent victim by a group of five young men wielding bats and clubs.

. . . .

35 He was next involved with the youth criminal justice system at the age of 16. He was convicted of possession of stolen property (a motor vehicle) and dangerous operation of a motor vehicle. He was placed on probation for 12 months for that offence on October 10, 2001. He committed the manslaughter of Mr. Webster while on probation.

. . . .

38 I am to consider any other aggravating and mitigating circumstances related to A.C. or the offence that are relevant to the purpose or principles set out in the YCJA. (s. 38(3)(f))

39 The only mitigating circumstances argued by defence counsel were A.C.’s willingness to testify against the two adult co-accused, and the fact that he

¹⁸ *Id.* ¶¶ 66-67.

¹⁹ *Id.* ¶ 70 (citing § 105 Youth Criminal Justice Act).

²⁰ *R. v. A.C.*, 2004 BCPC 99, [2004] B.C.J. No. 811 (Youth Ct.) (Werier Prov. Ct. J.).

entered a guilty plea. However, I find these circumstances to be diminished by the fact that A.C. remained in the community after committing this offence for almost two years, and did not begin to cooperate with the police until after J.S. made his statement to the police implicating A.C. As well, A.C. has received the significant benefit of the Crown seeking a youth sentence for this crime, rather than an adult sentence.

40 Insofar as aggravating factors are concerned, I have considered the following:

- a) This was a cowardly, unprovoked and vicious attack perpetrated by a group of young men, (which included A.C. as an active participant) on a previously unknown victim. He was beaten to death with baseball bats, a golf club, and other unknown blunt instruments. He was then left by these young people to die in the Park. This is an extremely aggravated case of manslaughter;
- b) As concluded by Dr. McBride, “There is no evidence that A.C. suffers from a major mental illness in the form of a mood, anxiety, or psychotic disorder. Furthermore, although he exhibited some antisocial traits, such as a capacity for callousness, a lack of insight, and repeated offending, he does not display the kind of lifestyle instability and impulsivity that is typically seen in individuals with an Antisocial Personality Disorder or with a Psychopathic Personality Disorder.”
- c) A.C. committed this crime while on probation.

41 It is obvious that it would be inappropriate to sentence A.C. to a non-custodial sentence given the extremely aggravating circumstances of this offence. He is considered a low to moderate risk for future violent offences. The pre-sentence report and psychiatric report make it clear that there are programs that A.C. might avail himself of while in custody, including the Violent Offender Treatment Program. This would address his rehabilitation while in custody and his reintegration into the community. The custody and supervision order would be a meaningful consequence which would serve to promote a sense of responsibility to this particular youth, while at the same time acknowledging the harm done to the victim and to the community.

42 I therefore impose a custody and supervision order for a period of three years. I order that A.C. spend two years in closed custody and one year in the community under conditional supervision in accordance with section 105 of the YCJA.²¹

The sentencing Judge’s only reference to a bias or hate motivation is in the repeated denials of the youth that he and the others discussed targeting gay men. And, the judge does not mention

²¹ R. v. A.C., *id.*, ¶¶ 24, 28-42 (applying Youth Criminal Justice Act, S.C. 2002, c.1, s. 38(2)(e)(i) to (iii)).

any argument by the Crown in support of bias, prejudice or hate as an aggravating factor. Plainly, however, the judge did not receive the same materials as the judge in *R. v. Cran*.²²

4.2.2 The Adult—Cran

The Canadian Criminal Code requires judges to consider sentences in other similar cases. Strict equalization is not required, however. Very similar cases can result in very different sentences. And, when adults and minors are prosecuted for similar conduct, or even the same events, the results can vary widely. Not only can judges depart from each other in similar cases, but prosecutors have broad discretion to seek either Youth Court or adult proceedings.

This combination of judicial and prosecutorial discretion is even broader than normal in prosecutions for homophobic and trans-phobic attacks, since these attacks are frequently committed by groups of young men who may be sentenced separately. The Webster killing is an excellent example of the breadth of prosecutorial and judicial discretion.

The Youth Court judge in *R. v. JS* departed from the prosecutor's recommendation and increased the sentence to account for homophobic bias. The adult court judge who sentenced JS's adult companion in crime, on the other hand, adopted a different perspective.²³ In her Reasons for Sentence, Madam Justice Humphries both distinguished and disputed the earlier Youth Court sentencing decision:

This case has received a great deal of publicity. Many comments have been made about the court's failure to decide the case in certain ways or to characterize this crime in a particular way. I am going to begin by addressing the issue which has been of such public concern: the motive for this crime.

²² *R. v. Cran*, 2004 BCSC 1635, [2004] B.C.J. No. 2574 (QL), 65 W.C.B. (2d) 59 (B.C.S.C.) (Cran Judgment); *R. v. Cran*, 2005 BCSC 171, [2005] B.C.J. No. 215 (QL), 63 W.C.B. (2d) 642 (B.C.S.C.) (Cran Sentencing). Cran's sentencing has been the subject of at least one individualized case study. See Sean Robertson, *Spaces for Exception in Canadian Hate Crimes Legislation: Accounting for the Effects of Sexuality-Based Aggravation in R. v. Cran*, 50 CRIM. L. Q. 482 (2005). Cran appealed his verdict and sentence. See *id.*, at 489 n.22 (citing *Man convicted of fatal gay-bashing in Stanley Park to appeal verdict*, VANCOUVER SUN, at B3 (Mar. 19, 2005)). Robertson did not have access to Janoff's book at the time he wrote his article, but he did cite Janoff's earlier work. Compare Robertson, *id.*, at 504 n.58 (citing D.V. Janoff, *Pink Blood: Queer Bashing in Canada* (M.A. Thesis, Simon Fraser Univ., Department of Criminology, 2000)) with Douglas Janoff, *PINK BLOOD: HOMOPHOBIC VIOLENCE IN CANADA* (2005).

²³ *R. v. Cran*, 2005 BCSC 171 (Reasons for Sentence Feb. 8, 2005).

I said in my reasons for conviction that the motive remains obscure.

The Crown does not have to establish a motive when proving the elements of a charge. However, *section 718.2(a)(i) of the Criminal Code provides that evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation or any other similar factor is an aggravating factor on sentence.*

The youth court judge who sentenced the youth, J.S., on his plea of guilty stepped outside the sentencing provisions of the *Youth Criminal Justice Act* and called this crime “a hate crime,” referring to s. 718.2(a)(i) of the *Criminal Code*. A second youth court judge who subsequently sentenced the youth A.C. on his guilty plea did not. The sentence imposed for each youth was three years, which is the maximum for this offence under the *Youth Criminal Justice Act*.

The Crown has not referred to s. 718.2(a)(i) in this case and does not rely on it, nor did they refer to it before either of the youth court judges. They have not taken the position that I could or should call the crime of which Mr. Cran has been found guilty “a hate crime.”

The right of a person charged with an offence to a fair and public hearing by an independent and impartial tribunal is enshrined in the *Canadian Charter of Rights and Freedoms*. That means that each case that comes before the court is decided by an impartial judge on the evidence put before the court, and only on that evidence. A court cannot step outside the rule of law and base its decisions on matters reported in the media. . . . In a criminal case, which includes proceedings on sentence, that means basing the decision only on facts that have been proven beyond a reasonable doubt based on evidence called in open court. . . .

With the greatest of respect to the youth court judge who referred to this as a hate crime, I can only say that *I am not aware of any authority in the Criminal Code or otherwise which would allow this court to declare a particular crime “a hate crime.”*

I am aware that the death of Aaron Webster has had a significant effect on the gay community. However, there was no evidence before the court of Mr. Webster’s sexual orientation, other than what might be inferred from his presence at the Second Beach parking lot. As well, there was no evidence before the court that Mr. Cran’s motive for attacking Mr. Webster was his sexual orientation. In order to consider such a motivation as an aggravating factor on sentence, I must be satisfied beyond a reasonable doubt that such a motive has been proven.

There is also no basis on the evidence before the court to equate “peeping toms and voyeurs” to gay people in the mind of Ryan Cran in the absence of evidence and in the face of evidence to the contrary. . . .

Ryan Cran told two friends of his involvement with Mr. Webster’s beating; the evidence at trial was that one of those friends wore a recording device for several months while having conversations with Ryan Cran. Despite these investigative measures, there was no evidence before the court that Mr. Cran was concerned with anything other than peeping toms, and there is no evidence that he ever mentioned a concern with gay people.

In any event, Aaron Webster was not peeking in cars when this group encountered him. There is no suggestion Aaron Webster ever peeked in cars. He was simply standing near a parking lot, smoking, naked. There was no evidence before the court to explain where his clothes were or why Aaron Webster was naked.

What motivated this group to chase and beat Mr. Webster remains, as I said in my earlier reasons, obscure. On the evidence before me, it appears to be because they were looking for peeping toms or voyeurs based on the previous incident in which a man had

peeked into Ryan Cran’s car while he was with his girlfriend, and, as Mr. Weber said in his submissions, came across a man who caught their attention because he was alone and naked.²⁴

The Court initially scorned the defence claim that Cran was less culpable than the other attackers:

this was not a spontaneous event that occurred because the group happened to be parked at Second Beach, . . .
 Regardless of where they parked or why they went to Stanley Park in the first place, . . . [T]he group was looking for someone to beat up by the time they left the car with weapons in their hands. . . . Mr. Cran [] told Mr. Morgado they beat the man but he, Cran, stopped before the others did. From this, the only reasonable inference is that Mr. Cran also struck blows before he stopped. Mr. Cran told Mr. Rudek: “*We lynched a guy, we beat him up.*”²⁵

The Court explicitly found that, “Cran was a member of a group,” that the group had been riding in his van, which contained weapons, that he admitted using a weapon himself, rather than his fists, that he “was the most sober,” and that he and the others ran away leaving Webster without medical attention.²⁶

The Crown did not claim an aggravated sentence for bias, but it did request a six- to nine-year sentence because of the group behaviour.²⁷ The Court, however, felt obliged to distinguish the Youth Court and adult sentences, and to discount Cran’s lesser role within the assailant group:

Here the two youths, both of whom struck blows to Mr. Webster’s head either of which could have been the fatal blow, were sentenced under a regime that has a maximum sentence of three years. This sentence cannot be of assistance in sentencing an adult, even one whose direct actions were less extensive than the youths’.²⁸

The judge also emphasized the differences in evidence presented for the Youth Court guilty pleas versus the adult trial: “now that I have heard all the evidence at trial, which the provincial court judges who accepted guilty pleas did not, I am of the view that there is some differentiation to be

²⁴ *Id.*, ¶¶ 1-13 (some emphasis added). In her earlier decision, the Judge had convicted Cran and acquitted another adult co-defendant Danny Rao. *See R. v. Cran* 2004 BCSC 1635, 2004 CarswellBC 2894. The B.C. Court of Appeal later affirmed Cran’s conviction. *See R. v. Cran*, 2006 BCCA 464, 213 C.C.C. (3d) 212, 231 B.C.A.C. 205, 381 W.A.C. 205, [2007] B.C.W.L.D. 924, [2007] B.C.W.L.D. 923, [2007] B.C.W.L.D. 918.

²⁵ Cran, *id.* ¶¶ 18-21 (emphasis added).

²⁶ *Id.* ¶ 26.

²⁷ *Id.* ¶ 27.

²⁸ *Id.*

drawn between the participation of J.S. and A.C. and that of Ryan Cran.”²⁹ Thus, Cran received the benefit of favorable comparison to the other defendants sentenced earlier, as his sentencing judge seems to admit: “Different considerations might apply to an analysis of the actions of J.S. and A.C., given all of the evidence I have now heard, but those issues are not before me.”³⁰

The Cran decision demonstrates that the last in a group to be sentenced separately may receive the greatest differentiation in sentencing by way of comparison with other defendants. So, factors like the prosecutor’s choice of which case to charge first and which cases should be accepted for plea agreements can make a substantial difference—the early cases can set the tone for the later cases, and even constrain the penalties imposed in later cases.

The judge expressly found that none of the aggravating factors listed in § 718.2(a) applied, but concluded nevertheless, “there are other aggravating factors.”³¹

Nevertheless, the facts relevant to Ryan Cran are still extremely serious. I accept the Crown’s submissions that it is a significant aggravating circumstance that Mr. Cran was part of a group armed with weapons who targeted this innocent victim in a public place for no apparent reason other than he caught their eye as being different.

Although there is no evidence that this crime was motivated by bias, prejudice or hatred for the *enumerated reasons* in s. 718.2, the court can always consider hate as an aggravating factor in a *general sense*. It may be that such willingness to inflict terrifying pain on another human being is inevitably an expression of some kind of hatred. But what is so chilling about this case is that this group seems to have done this for some reprehensible and almost inconceivable concept of entertainment.³²

Despite its finding against an enumerated ground of bias, prejudice or hate, the Court noted the importance of denunciation and imposed a sentence of six years, between the defence and Crown recommendations:

Given the circumstances of this offence the public must be satisfied that the principles of deterrence, denunciation and retribution are adequately taken into account in any sentence imposed. To say attacks such as this one cannot be countenanced is to state the self-evident. This is especially so when an attack is so random, so cowardly, and so

²⁹ *Id.* ¶¶ 37-38.

³⁰ *Id.* ¶ 39 (emphasis added).

³¹ Cran, *id.* ¶ 32.

³² *Id.* ¶¶ 41-42 (emphasis added).

terrifying. *A strong message must be sent to deter repetition or imitation of such a crime, and to express society's abhorrence of such conduct.*³³

What Cran's sentence would have been with a premium for homophobic bias is hard to say. Nothing in the Criminal Code would have required a particular increase, and considering the qualitative nature of judicial sentencing discretion displayed in the decision, the judge might have adopted the same sentence, even with the premium. But, as the judge properly noted, the Crown withheld its discretion to seek a bias premium.

Cran and his audience of peers must have learned the meaning of the term “Lynching” somewhere during the course of their schooling or upbringing. Both hate crimes and lynching have meaning with legalistic overtones, although the definition of hate crime varies, and although neither Canada nor the United States has criminalized “lynching” *per se*. Whatever their strict legal meaning in courts and government agencies, these labels clearly carry everyday meaning. And, the colloquial meaning of labels for violent inequality is important even in the most formal of legal inquiries. The role of colloquial meanings is exemplified by the label “gay-bashing” used in the prosecution of the young men who assaulted Micah Painter in Seattle in July 2004.

4.3 An American Case—Micah Painter

During the Seattle Pride celebration in the summer of 2005, three young men used a broken vodka bottle to attack Micah Painter along a city street in Seattle, Washington. Police labeled the attack a “hate crime” motivated by Painter's sexual orientation under the federal statistics law. Prosecutors charged the attackers with malicious harassment.

The Court files documenting the prosecution and sentencing of Micah Painter's attackers may be accessed by the public.³⁴ But, unlike the Vancouver sentencing decisions, written

³³ *Id.* ¶ 43 (emphasis added); *see id.* ¶ 48-49. As an interesting aside, the Judge's order included a weapons' prohibition, but no mention was made of a ban on contact with the other group attackers.

reasons supporting sentencing in the Seattle cases are not available online. Photocopies of the written Judgments and Sentences are available, but they are set out on standardized court forms with boxes (“[]”) checked to indicate the Court’s decisions.

All three of Painter’s attackers were found guilty by a jury in the same trial. The jury found the principal attacker, Samusenko, guilty of two counts of Assault in the Second Degree and one count of Malicious Harassment.³⁵ Because he used a vodka bottle to attack Painter, his malicious harassment conviction and one of his assault convictions were subject to a special verdict of “armed with a deadly weapon other than a firearm.”³⁶

The same judge sentenced the attackers in two separate hearings, and their sentences varied accordingly. Samusenko was sentenced last. He received concurrent sentences of: fourteen months, with twelve month’s “mandatory confinement,” for his assault with the bottle; thirteen months, with six month’s consecutive mandatory confinement, for using the bottle during malicious harassment; and, thirteen months for an assault without the bottle. The terms amount to thirty-two months, but because of concurrent sentencing, the net term was effectively the longest of the three—fourteen months, with twelve month’s mandatory confinement.

The Court ordered Samusenko to have “no contact” with either Painter or the other two attackers for “the maximum term of 10 years,” and to pay “\$500 + restitution” to be determined

³⁴ Criminal records for all three of Painter’s male assailants are indexed and summarized on the Court’s Web site. See www.metrokc.gov/kcscsc; see also <http://dw.courts.wa.gov/index.cfm?fa=home.namelist> (online court document search engine) (accessed Jan. 29, 2007). The Court documents themselves are not available in electronic format at this time, but paper copies may be obtained by following the online instructions. Apparently, the sentencing Judge’s reasons are not set out in writing. Thanks are due to the Court’s staff for photocopying and mailing the sentencing documents at no cost for this research. The young women who were present for the attack were not charged. The verdicts in the Painter attack were reported in the local Seattle Gay News. See Robert Raketty, *The Verdict is in: All three assailants found guilty in attack on Micah Painter*, SEATTLE GAY NEWS, Fri., Apr. 1, 2005, at 1, available at <http://www.sgn.org/sgnnews13/page1.cfm> (accessed Jan. 11, 2006). Other scholars have encountered similar impediments to access in research related to the sentencing decisions of judges. See, e.g., Karen M. Masson, *Familial Ideology in the Courts: The Sentencing of Women* (M.A. Thesis, Simon Fraser Univ., June, 1992) (reprinting correspondence with judges regarding interviews transcripts of sentencing decisions).

³⁵ See *State v. Vadim Samusenko*, No. 04-1-02026-0 SEA, ¶ 2.1 Counts I-III (Judgment & Sentence Felony, filed May 24, 2005) (citing RCW §§ 9A.36.021(1)(C) (Assault in the Second Degree), .080(1)(A)(B) or (C) (Malicious Harassment)).

³⁶ Samusenko, *id.* ¶ 2.1(b) Special Verdict (quoting RCW § 9.94A.510(4)).

later.³⁷ The judge also imposed standard conditions to apply upon release from prison, including “Not to own, use, or possess a firearm or ammunition.”³⁸

The other two attackers, Kravchenko and Savchak, were sentenced together a month before Samusenko. They received identical felony sentences of five-and-one-half month’s confinement, plus six month’s consecutive mandatory confinement for using a weapon other than a firearm during malicious harassment.³⁹ Each also received concurrent, suspended sentences of 364 days for Assault in the Fourth Degree.⁴⁰ Both were ordered to have no contact with Painter, Samusenko, or each other for five years, but their sentences did not include a weapons ban.

Detailed accounts of the trial and conviction of Painter’s attackers, including both the judge’s reasons for sentencing and interviews with jurors, appeared in the local press. Seattle’s largest independent weekly gave this account of the trial:

Micah Painter wasn’t in court last week when the three young immigrants who gay-bashed him were found guilty of a hate crime and led away in handcuffs. . . . Painter had heard about the crowds of . . . supporters of his three Evangelical attackers. The crowds scared Painter. He feared his presence at the moment of judgment might kindle in the attackers’ compatriots a desire for revenge. Jurors also noticed the Russians and Ukrainians jamming the benches in court. Looking at the crowd, “a lot of us felt intimidated,” one juror told me. . . . , and some jurors expressed fear of running into the attackers’ friends later.

In the end, those worries, justified or not, didn’t prevent the jury from finding all three attackers guilty of a hate crime and varying degrees of assault.

. . . . The evidence was there, and it was damning: Two of the bashers essentially admitted to the attack after their arrest; multiple eyewitnesses saw them do it; and after the assault, one attacker bragged about having “beat that faggot.”

. . . . [defense counsel] repeatedly suggested to the jury that gays are unfairly overprotected these days. When the jury began deliberating . . . , 11 people said yes immediately. [Counsel’s] inflammatory tactics had backfired, several jurors told me,

³⁷ *Id.* ¶¶ 4.1, 4.3, 4.5.

³⁸ *Id.* Appendix H (citing RCW 9.94A.720(2)).

³⁹ *See* State v. David Kravchenko, No. 04-1-02027-8 SEA (Judgment & Sentence Felony, filed May 9, 2005); State v. Yevgeniy Savchak, No. 04-1-02097-9 SEA (Judgment & Sentence Felony, filed May 9, 2005).

⁴⁰ *See* State v. David Kravchenko, No. 04-1-02027-8 SEA (Judgment & Sentence Non-Felony, filed May 9, 2005); State v. Yevgeniy Savchak, No. 04-1-02097-9 SEA (Judgment & Sentence Non-Felony, filed May 9, 2005).

offending them and causing them to dig in their heels on the need for a hate-crime conviction.

But one juror initially voted “no,” . . . he didn’t like the “thought police” aspect of hate-crime laws. This could easily have created a hung jury, but his fellow jurors convinced him that it was his job to enforce Washington’s hate-crime law, not to quibble with why it exists in the first place. He changed his vote.

. . . .

When it came to the assault charges, however, . . . all three were convicted of lesser assault charges, and none is now facing more than a few years. . . .

. . . .

. . . as many as eight jurors were ready to convict Samusenko on first-degree assault. “If you go at someone with a broken vodka bottle, your behavior reveals your intention,” he said. But one juror, a man in his 80s, believed he knew what a gay-bashing was, and that the intent of a gay-bashing was “just to gay-bash,” not to inflict great bodily harm. It didn’t make a lot of sense, but there was no budging him. Ultimately, the jury could only unanimously agree on convicting Samusenko of second-degree assault, for which the threshold for guilt is lower: “recklessly” inflicting “substantial bodily harm.” That left many on the jury angry and frustrated.

[But, w]ith Samusenko having already received second-degree assault, the jurors felt they couldn’t give his accomplices anything higher. That left them with no choice but to give Kravchenko and Savchak fourth-degree assault. “I was not happy,” said juror Jan Weber, a homemaker from Kent. “I felt like they needed more than a slap on the hands.”⁴¹

The March, 2005 article concluded by explaining Painter’s understanding of the Courtroom crowds:

“Guilty is guilty,” Micah Painter told me, “and I feel validated.”

He was more upset with a gay community that seemed to think his meth use the night of the attack made him a poor candidate for the role of gay-bashed-martyr; the number of gay supporters at the trial never made it out of the single digits. And while the courtroom was filled with his assailants’ family members, neither of Painter’s parents—both Evangelical Christians, like his assailants—was present at the trial.

A few weeks later, when the last of the attackers was sentenced, the same news sources documented the outcomes:

King County Superior Court Judge Jeffrey M. Ramsdell has sentenced the last of three men convicted with the brutal bashing of a 24-year-old Micah Painter June. On Friday, May 13, Vadim Samusenko received two years and eight months in prison. The other men, David Kravchenko and Yevgeniy Savchak, had been sentenced last month to 11 months for their roles in the attack.

⁴¹ See Eli Sanders, *Mixed Message: Micah Painter’s Assailants Found Guilty of Hate Crime but Get Lesser Assault Convictions*, THE STRANGER, Apr. 7 – Apr. 13, 2005, available at <http://www.thestranger.com/2005%2D03%2D31/feature.html> (accessed Jan. 31, 2007) (with accompanying photograph captioned, “GUILTY Vadim Samusenko and David Kravchenko as the verdict was read”).

The prosecutor had sought first degree assault convictions against the Whatcom County men, but failed to convince all of the jurors that the charge was warranted. Instead Samusenko, the instigator of the attack, was found guilty of second-degree assault with a deadly weapon. Kravchenko and Savchak were also found guilty of lesser charges.

Samusenko was also found guilty of assault in the second degree for a separate incident. Minutes after his attack on Painter, Samusenko had pointed a gun to the chest of Richard Evans who had overheard the men bragging about the bashing. Samusenko accused Evans of being a police officer.

Samusenko appealed to the mercy of the court during the sentencing hearing, which drew a small crowd of the victim’s supporters and the perpetrator’s family alike. . . .

. . . .

During an interview with the Seattle Gay News late last month, Deputy Prosecuting Attorney Sean O’Donnell called the event “three minutes of hate, violence and stupidity that changed Micah Painter’s life—and hopefully the defendants’ as well—forever.”

“The police, particularly Detective Al Cruise, did an outstanding job investigating this crime,” said O’Donnell. “The community, as represented by the jury, spoke strongly against hate. It appeared to us that the Seattle community as a whole was appalled about what happened—and this was reflected in the witnesses’ willingness to not only cooperate, but proactively help the police during the investigation.”

Painter had written a letter addressed to the three men, which O’Donnell shared with the court. O’Donnell had told the SGN last month that the letter was “generous and well thought...and...showed an impressive degree of maturity and forgiveness.” The letter reads: “No good can come from hatred. I hope the next time one of you encounters someone different than yourself—be it race, gender or beliefs—you try to understand them rather than show hate; show compassion instead of violence.”⁴²

Another citywide weekly paper likewise ran a full account of the sentencing proceeding, emphasizing the religious undertones in the proceedings:

There was barely a mention of God during the three-week trial of the men who gay bashed and stabbed Micah Painter last summer. . . .

It was as if religion had been completely erased from the discussion of a hate crime that occurred, according to a young Evangelical woman who was with Samusenko that night, because being gay is “against our religion.”

But on Friday, May 13, when Samusenko, a 21-year-old immigrant from the former Soviet Union, faced sentencing for his crimes against Painter, there was no restraint in dropping God’s name. Samusenko’s lawyer, . . . lectured King County Superior Court Judge Jeffrey M. Ramsdell about mercy and seemed to suggest that the judge might incur the “wrath of God” if he wasn’t lenient. . . .

⁴² Robert Raketty, with David Hildebrand, *Last of Micah Painter’s attackers sentenced Judge says basher’s remorse ‘too little, too late,’* SEATTLE GAY NEWS, Fri., May 20, 2005, available at <http://www.sgn.org/> (accessed Jan. 31, 2007).

Samusenko himself told a story about having strayed from God’s path and then returning to Christ during the 10 months he had so far spent in jail.

....

If Judge Ramsdell was moved by the repeated invocations of God’s name, it didn’t show. He batted away Olmstead’s argument that an exceptionally light sentence was warranted because Samusenko was remorseful (“The defendant’s insight is too little too late”). . . . was a victim of his own intoxication that night. . . (“The defendant had been forewarned that his involvement with alcohol tended to result in criminal difficulties”). And Judge Ramsdell seemed particularly dismissive of [the] argument that Painter had brought the assault on himself. When Samusenko approached the victim holding a broken vodka bottle and demanded to know whether he was gay, Painter replied “yes.” Samusenko then stabbed Painter in the face and back. “Did [Painter] initiate the contact?” Judge Ramsdell asked. . . . : “No.”

[The defense] also suggested that the “extremely verbal” gay community might be attempting to harden the judge’s heart, to which Judge Ramsdell responded: ***“I have received absolutely no communications from the purportedly ‘extremely verbal’ gay community.” The only people he’d heard from, he said, were Samusenko’s supporters.*** Judge Ramsdell gave Samusenko nearly three years in jail, close to the maximum that prosecutors had asked for. He had already sentenced Samusenko’s two accomplices, David Kravchenko, 20, and Yevgeniy Savchak, 18, last month. Each received one day less than a year in jail for their role. . . . the judge designed the sentence length so as not to trigger their automatic deportation back to the former Soviet Union, which their attorneys had argued was a “life sentence.”

Painter didn’t show up to the sentencing hearings, but he did send an e-mail to be read aloud to the attackers. “Every day for the rest of my life I will bear the scars you carved in me,” Painter wrote. “None of us can change what has happened. We only have control over where we go from here.”

One place the three attackers will not be going is back to their extremely conservative church in Bellingham—at least, not together. Judge Ramsdell prohibited the attackers from having contact with each other for five years, something their lawyers protested as harming their ability to practice their religion.

That didn’t seem to bother Judge Ramsdell. “They’ll have to find a different church to attend,” he said.⁴³

Because both the Canadian and American prosecutions occurred at about the same time as the interviews, further details about both cases appear in the comments of informants in Chapter 5. The details above will, however, serve to inform a comparison of the application of hate crime laws in practice in the two countries.

⁴³ Eli Sanders, *Word of God: Religion Comes Out at Sentencing of Micah Painter’s Convicted Gay Bashers*, THE STRANGER, May 19 - May 25, 2005, (captioned, “JUDGMENT DAY? Painter’s attacker, Vadim Samusenko, gets three years.”), available at <http://www.thestranger.com/2005%2D03%2D31/feature.html> (accessed Jan. 31, 2007).

4.4 Analysis—Comparing Cases

The ultimate legal labeling of cases in Vancouver and Seattle differed. It seems remarkable, particularly from an American perspective, that Cran bragged about a “Lynching” and yet avoided the “hate crime” label. Imagine, by contrast, the same case brought by Webster’s relatives in a human rights agency, or the same case brought before an inquiry commission. In a broader inquiry, outside the narrow confines properly described by Cran’s sentencing Judge, the meaning of Lynching to Cran and to society would seem a proper topic. Would the Crown have presented its case differently if Cran had bragged about a hate crime instead of a Lynching? No law prohibits Lynching *per se* in either Canada or the United States. Still, this kind of admission seems relevant and important to an understanding of the social meaning of hate crime.

Some similarities appeared in the reasoning of the fact-finders in both Canadian and American cases. Both Cran’s sentencing judge and the hold-out juror in the Painter prosecutions expressed reluctance to infer a motive from circumstances surrounding the attacks. Cran’s sentencing judge was reluctant to infer homophobic motives from the location of Webster’s killing in gay cruising area. Painter’s hold-out juror was reluctant to infer an intent to inflict serious harm based on his understanding of a typical “gay-bashing.” The sentencing Judges for JS and for Painter’s attackers used similar reasoning too. Both relied on inferences from evidence presented to denounce the attackers’ discriminatory motives. The sequence of the cases produced another similar result—in general, older attackers, sentenced last, and after a trial, received the benefit of a favorable comparison with those sentenced earlier.⁴⁴

⁴⁴ A similar observation might be made for Matthew Shepard’s attackers.

Unlike the Painter case, Cran’s prosecutors did not present evidence of a prohibited bias, and Cran’s sentencing judge confined the analysis to facts alleged and proved by the Crown.⁴⁵ Yet the sentencing judge in Cran seemed to confuse the concept of “hate crime” unnecessarily by embracing the ambiguous idea of “hate in a general sense.” The callousness of using group violence for its entertainment value seems better addressed by other unambiguous Sentencing Principles, without relying on abstract, “general” hate. Moreover, why was the apparently proven violent “attention” to male nudity not sufficient evidence of an impermissible bias? The group had not attacked any naked women. Furthermore, the judge and the Crown prosecutor seem to have overlooked the concept of sexual privacy motivating Cran. Cran resented a “Peeping Tom” who had seen him and his girlfriend alone in his van. He did not express concern for his girlfriend’s privacy; instead, he seems to have been offended by the thought of a naked man watching him during sexual activity. Arguably, according to Cran’s own logic, he was motivated in part by a negative reaction to homosexual attention.

Of course, all of these considerations would require proof beyond a reasonable doubt, as well as perhaps other procedural protections, before they could justify a premium for bias. Also, a finding of bias, prejudice or hate, does not require any particular increase in sentencing. Thus, a judge could consciously or unconsciously offset this against mitigation for some other factor. In other words, the Criminal Code makes any statement of sentencing reasons inherently discretionary. Skillful judges and prosecutors could have characterized either case here as motivated in whole or in part by homophobic bias, skillful defence counsel could have contended otherwise, and skillful judges could have justified findings in either direction.

Sentencing for “hate crimes” is a similarly discretionary process under the United States Code and the United States Sentencing Guidelines, as they are currently interpreted by the

⁴⁵ The Judge’s characterization of the quantum of evidence required may have been technically incorrect, but since the Crown did not allege a bias motive, the standard of proof did not matter.

Supreme Court. Until recently, sentencing in federal court was subject to binding sentencing principles defining precise sentencing ranges, with only narrow departures allowed for mitigating and aggravating factors. These factors remain, but they have been declared merely advisory. So, a sentence enhancement for a “hate crime” in federal courts in the United States operates like a corresponding sentencing premium under the Canadian Criminal Code. If the factor is proven, then the sentencing judge may incorporate the sentence enhancement factor into a complex sentencing discretion matrix. Neither Canadian nor U.S. sentencing principles as currently interpreted mandate a particular increase in penalty, even if the sentence enhancement factor is proven.

Hate or bias crime sentencing is important primarily to denounce both the underlying crime and the discriminatory motive. In either Canada or the United States, however, a judge has broad discretion to determine the degree and terms of denunciation for both the underlying crime and the discriminatory motive.

The Washington state statute applied to Painter’s attackers seems radically different than the Canadian and U.S. sentencing principles. “Malicious Harassment” is its own offense under the state’s Criminal Code and as such requires proof beyond a reasonable doubt to a jury that the accused “maliciously and intentionally” injured the victim “because of” their characteristics.⁴⁶ Yet, a Malicious Harassment prosecution in Washington has an effect similar to a hate crime sentencing case in either Canadian courts or federal court in the United States. American jurisprudence requires pretrial notice, a jury trial, and proof beyond a reasonable doubt for any *mandatory* hate crime penalty. The quantum of proof for a *discretionary* hate crime penalty enhancement—a preponderance of evidence or beyond a reasonable doubt—varies and is not fully settled.⁴⁷ The only seeming difference is that, as a separate offense, malicious harassment

⁴⁶ RCW § 9A.36.080(1).

⁴⁷ The bias element of Malicious Harassment requires proof beyond a reasonable doubt because it is an element of a crime. But the same standard applies for sentence enhancement factors that mandate an enhanced sentence.

requires its own sentence in addition to sentences imposed for any underlying offenses like assault. But, at least in cases like the Painter attack, where malicious harassment is tried along with other concurrent offenses, a sentencing judge will have broad discretion to run sentences concurrently or consecutively.

Just as Washington has adopted its own hate crime law, the city of Seattle has adopted an even more local variant of the state Malicious Harassment law. In theory, prosecutors would have an opportunity to seek denunciation for the same hate-related event in at least three jurisdictions. In practice, however, as the Painter case illustrates, a prosecution is usually limited to only one jurisdiction.

In sum, therefore, both Canadian and American judges possess significant sentencing discretion, and prosecutors wield significant discretion in the choice and timing of charges. In both the United States and Canada, judges and prosecutors exercise significant control over the degree of official denunciation attached to both crimes and the discriminatory motives associated with crimes.

The discretion of prosecutors and judges makes hate crime prosecutions and sentencing proceedings predominantly *ad hoc* proceedings. And even a civil action for damages and other relief under the Washington state Malicious Harassment statute would be processed by judges and juries on an *ad hoc* basis, without reference to a body of data on hate-related violence. The public might not reach any firm understanding of equality rights from cases like these. Indeed, both the Painter and Webster cases seem to support only the general conclusion that prosecutors and judges in Canada and the United States may denounce discrimination based on “sexual orientation” in their sentencing decisions when the facts are proven to their satisfaction. This may seem unremarkable, but the mere official acknowledgement that is at least implicit in the recent Canadian and American cases set out above confirms the arrival of new legal classification systems for hate crimes in both countries.

While court cases appear on an *ad hoc* basis only, hate-related events are subject to ongoing, systematic contention in both Canada and the United States. In both Canada and the United States legal classifications are used to establish official knowledge about hate crimes outside the courts. For example, as will be revealed in the next Chapter, Vancouver police classified the Webster killing as a hate crime in their investigative reports and their subsequent law reform advocacy. Governmental classifications like these contribute to the meaning of both individual hate-related events and general concepts like hate crime and equality. Furthermore, in addition to these official, governmental classification decisions, nongovernmental groups participate in the definition of legal knowledge. In both Canada and the United States, nongovernmental social groups use legal terminology to present knowledge about hate-related events. The practices of these groups and their relationship to official classification decisions are explored in Chapter 5.

4.5 Conclusion

A comparison of recent, typical hate crime cases in Vancouver and Seattle demonstrates that hate crime laws have assumed an important role in social contention about homophobic violence in Canada and the United States. A comparison of individual cases is incomprehensible without an understanding of the texts of hate crime penalty laws and their more general legal context. While Canadian and American legal systems and hate crime laws share many basic similarities, an analytical legal comparison also reveals several critical differences.

First, the *governmental powers* relevant to hate crime law are distributed differently in the two countries. The Canadian national Parliament maintains the exclusive power to define crimes and criminal penalties. Therefore, the Canadian Criminal Code defines the Sentencing Principles for hate crimes throughout Canada. The United States Congress and the United States Sentencing Commission have likewise established nationwide Guidelines for hate crime

penalties. These Guidelines serve as an important model for hate crime penalty laws, but most hate crimes are defined and prosecuted according to state or municipal laws, which vary widely throughout the country.

Second, although the general *equality rights* accepted in the two countries vary, the language of equality articulated in hate crime penalty laws remains remarkably similar. Both countries penalize hate crimes motivated by “sexual orientation,” and, with minor exceptions, neither penalizes crimes motivated by “gender identity.”

Third, in addition to hate crime penalty laws, both Canadian and American legal systems have adopted hate crime statistics mechanisms. The American system is expressly authorized by a Hate Crime Statistics Act, which defines hate crime to include crimes motivated by “sexual orientation,” but not “gender identity.” The Canadian Parliament has not enacted a separate hate crime statistics law, although the national statistics agency has begun to implement a hate crime statistics program using police reports about hate-related incidents.

Fourth, a comparison of recent cases shows that Canadian and American courts struggle with the same fundamental questions in the application of hate crime penalty laws: What standard of proof applies to alleged biased motivations? What degree of motivation is required to establish a hate crime? To what extent are defenses such as provocation and self-defense implicated by hate crime penalty laws? How do hate crime penalties apply to youth court proceedings?

In both Canada and the United States, however, hate crime penalty enhancement laws and other hate crime laws have combined to create new classification systems that create a body of official legal knowledge about inequality. These classification systems vary, and the introduction of hate crime classification systems has had different effects in the two countries. The dynamic social effects of the hate crime laws in Canada and the United States are studied in more detail in Chapter 5.

5 Hate Crimes & Social Contention in Canada & the United States

5.1 Introduction

Chapter 1 introduced the research methods used to gather information from nongovernmental groups concerned about homo- and trans-phobic crimes in Canada and the United States. This Chapter begins with a more specific introduction.

As suggested in Chapter 1, hate crime scholars and critical criminologists have called for more research in areas relevant to this study. Jean-Paul Brodeur, for instance, has called for the articulation of a theory of knowledge production among criminologists studying policing.¹ Professor Barbara Perry, on the other hand, has suggested that community responses to hate-related activity deserve more attention than they have received to date.² This Chapter is meant to respond to both calls for research, by presenting the results of a qualitative comparison of how nongovernmental social groups contend and inquire about homophobic and trans-phobic hate crimes in Canada and the United States. While police practices are examined to provide context, the primary data from each site reveal the practices of nongovernmental groups, as they gather, process, and present information in an overall hate crime labeling or classification system. And, a comparative analysis of the data from the two countries describes knowledge production using the concept of social contention introduced in Chapters 1 and 2.³

The focus here is on the nongovernmental knowledge practices that contribute to hate crime labeling. In traditional criminal law practice, police, prosecutors, judges, and juries label

¹ Jean-Paul Brodeur, *Richard V. Ericson & Kevin D. Haggerty, Policing the Risk Society*, 1998 CAN. J. CRIM. 455 (book review); see also Jean-Paul Brodeur, *Disenchanted criminology*, 1999 CAN. J. CRIM. 131 (placing criminological research in context with the production of knowledge).

² See Barbara Perry, *Hate Crime*, 47 BRIT. J. CRIM. 842 (reviewing Nathan Hall, *HATE CRIME* (2005)).

³ See generally Alberto Melucci, *CHALLENGING CODES: COLLECTIVE ACTION IN THE INFORMATION AGE* (1996); Alberto Melucci, *NOMADS OF THE PRESENT: SOCIAL MOVEMENTS & INDIVIDUAL NEEDS IN CONTEMPORARY SOCIETY* (1989); *DYNAMICS OF CONTENTION* (Doug McAdam, et al. eds., 2001).

behavior “criminal” in courtrooms. By contrast, the hate crime labeling process, including hate crime statistics practice, arises only as an adjunct to traditional criminal procedure. A crime may be prosecuted to a criminal conviction, even though it is not labeled a hate crime. Nevertheless, hate crimes are labeled or classified predominantly during official, governmental inquiry, including criminal investigations and prosecutions and the official labeling of hate crimes for statistical purposes. In practice, however, knowledge about hate crimes also emerges from beyond the official inquiries that examine crime, punishment, and even statistics.

Informants for this study represent nongovernmental groups that engage in some form of social contention or inquiry contributing to legal knowledge about hate crimes. The study examines hate crimes motivated by sexual orientation or gender identity or expression—homophobic and trans-phobic hate crimes. After introducing the research methods and hypotheses, this Chapter presents a summary and an analysis of data collected from interviews and other sources at two primary research sites: Vancouver, British Columbia and Seattle, Washington.⁴

The sites of comparison here were chosen for their convenient location and for their relevance to the research questions.⁵ Vancouver and Seattle both have official governmental hate crime labeling systems, but they currently utilize different labeling procedures, in particular different hate crime statistics mechanisms. The sites of comparison thus differentiate between jurisdictions where police do and do not collect and publicly report police hate crime statistics.

It was hypothesized that hate crime information practices of groups would vary between sites according to variations in hate crime labeling processes. Where official hate crime statistics are produced in the routine of police investigations, intuition suggests that knowledge about hate

⁴ Similar “control” data were gathered from two additional sites, Winnipeg, Manitoba and Minneapolis, Minnesota, but a discussion of the control groups is omitted here for the sake of brevity.

⁵ English is the predominant language in both Vancouver and Seattle, and all of the interviews for this study were conducted in English. An obvious test of the analysis here would be to examine sites within Canada and the United States in which hate crime inquiry practices can be traced to French or Spanish language and colonial origins.

crimes might be taken for granted. Thus, groups monitoring hate crimes in Seattle should rely more on the official knowledge and statistics produced by police agencies; whereas, groups in Vancouver should adopt information practices independent of official statistics.

A quantitative analysis was not anticipated, but the results were expected to identify “‘key’ causal conjectures, which could then be examined in more detailed case-oriented studies.”⁶

Before the study commenced, preliminary variables were identified using a “Boolean” Truth Table to illustrate the logic of the anticipated qualitative comparison:

Table 5.1—Information Practices of Groups that Monitor Hate Crimes

	C	S	D
Vancouver	1	0	0
Seattle	1	1	1

Key: C=Traditional Criminal Law Labeling Process; S=Police-Generated Statistics; D=Hate Crime Database.

The first two columns represent the presence (“1”) or absence (“0”) of a traditional criminal procedure (“C”) that labels hate crimes, and a system of police-generated hate crime statistics (“S”). Both jurisdictions label hate crimes in traditional criminal proceedings, but Vancouver does not utilize police-generated hate crime statistics. The third column represents the outcome variable. It was expected that groups in Seattle would gather, process, and present information in systematic hate crime databases (“D”) maintained for the purpose of contending with similarly systematic, official hate crime labeling decisions; whereas, those in Vancouver would not.

These preliminary variables were conjectural; the actual variables identified in the final results have been determined by the content of the data, in a “dialog of ideas and evidence.”⁷ Each group’s information practices are specified in greater detail in the course of this Chapter, and the actual indicators are drawn from the interview data.⁸

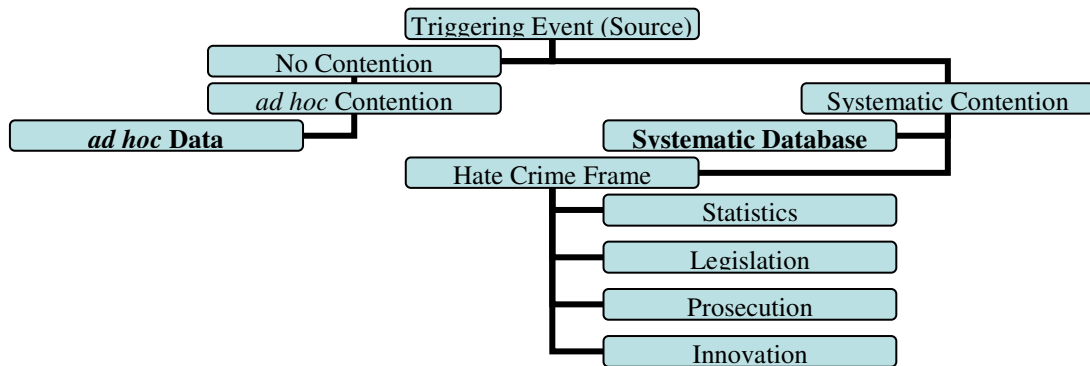
⁶ See generally Charles C. Ragin, *THE COMPARATIVE METHOD*, at 168 (1987) (discussing ‘key’ causal conjectures).

⁷ Ragin, *id.*, at 164.

⁸ See *id.*

By definition, all of the groups studied monitor hate crimes and maintain data in some form. The interview script was designed to reveal information practices maintained for the purpose of contesting official labeling decisions. Participants were asked to describe and to explain the function of their information practices. The interview script is reproduced in Appendix 3. It was assumed that groups learn about hate-related events, gather information, and consciously or unconsciously chose whether to respond by initiating or participating in a contentious dialog. If the group does respond, it was assumed that its reaction could be classified as either discrete, *ad hoc* contention or an element in the group’s internal system of ongoing contention. Regardless of its *ad hoc* responses, groups may process and retain information in a database to facilitate retrieval and presentation in a future contentious episode. A preliminary model, set out in Figure 5.1 below, was developed to describe the flow of information in groups that monitor hate crimes. This model is refined somewhat in the analysis that follows.

Figure 5.1—Information Flow Model for Groups that Monitor Hate Crimes



As Chapters 3 and 4 demonstrated, the official hate crime classification systems in Canada and the United States are similar, but not identical. The systems of criminal law, governmental statistics, and other governmental and nongovernmental knowledge practices that combine to produce official hate crime labeling decisions all differ by both locality and nation. At each site, though, official legal inquiry combines with an inventory of nongovernmental inquiry practices in a dynamic process of social contention. This process constitutes both local

and national fields⁹ of hate crime inquiry. And, nongovernmental practices of inquiry and contention may be correlated with laws defining the official hate crime inquiry at each location.

The research proposal set out the following preliminary research questions and working hypotheses:

RESEARCH QUESTIONS:

How do nongovernmental groups that monitor anti-gay hate crimes gather, process, and present information for the purpose of contesting official hate crime labeling decisions? What are the similarities and differences in the hate crime databases of such groups in Vancouver and Seattle?

WORKING HYPOTHESES:

Where police investigators generate official hate crime statistics, nongovernmental social groups use systematic databases to contest official hate crime labeling decisions.

In Seattle, groups will gather, process, and present data about hate crimes to contend within the frame of the official hate crime labeling system. Because Vancouver police do not generate hate crime statistics, Vancouver groups will use more *ad hoc* contention, presenting political claims outside the official labeling framework.

The answers to these research questions and the results of hypothesis testing set out in this Chapter and the analysis of results in Chapter 6 suggest both theoretical and practical conclusions about the impact of differences in hate crime laws on the mobilization, information practices, and social contention of nongovernmental groups that monitor hate crimes.

Between June, 2005 and January, 2006, groups in both Seattle and Vancouver provided interviews, which constitute the primary research data. Most of these interviews were videotaped, and an edited summary of the interviews was shown to participants in both Vancouver and Seattle to validate an initial comparison and to obtain further information.¹⁰ Data from the interviews was supplemented by references to secondary data sources, including websites, brochures, and newspaper accounts documenting hate crime labeling practices at each

⁹ I borrow the concept of a “field” of social inquiry primarily from the work of French sociologist Pierre Bourdieu. See Pierre Bourdieu, *The Specificity of the Scientific Field*, in FRENCH SOCIOLOGY: RUPTURE & RENEWAL SINCE 1968, ch. 15, at 257-92 (Charles Lemert ed., 1981); see also BOURDIEU: CRITICAL PERSPECTIVES (Craig Calhoun, et al. eds., 1993) (collecting critical scholarship).

¹⁰ See, e.g., Joseph Tobin, et al., PRESCHOOL IN THREE CULTURES (1989) (describing use of videotapes for feedback).

location. Representatives of police hate crime units in Seattle and Vancouver were also interviewed, to place the practices of nongovernmental groups into context alongside official hate crime information practices. The results, however, are primarily meant to examine the practices of the nongovernmental groups.

The interviews intentionally elicited more information than necessary to conduct the analysis presented here. The interviews were therefore not transcribed in their entirety. Instead, each interview was processed into a DVD format with a navigable menu consisting of the primary topics arranged in chronological order. These topics assigned menu titles, and the menu titles are used here as reference points for citations to the most significant information. The portions of the interviews analyzed here address only the practices of the groups most relevant to the construction of legal knowledge about homo- and trans-phobic hate crimes. The complete interviews are, however, set out in their entirety in the DVDs on file with the author. A Table of Contents listing the groups and DVD menu titles for each interview is set out in Appendix A.¹¹ This table represents an informal coding of the interview data for use in the analysis.

Because the volume of information gathered is too great to present here in its entirety, the presentation will be limited. The necessary filtering of information will be guided by two goals: first, to present the voices of groups interviewed as authentically and completely as possible; and, second, to present enough information, and the right information, from each group to permit a comparative analysis of their knowledge practices in relation to the official hate crime classification systems in use at each site.

The qualitative comparison that follows will reveal important differences between the two sites. Nongovernmental social groups may adopt information practices of their own to influence official labeling decisions within an existing system, to re-shape official inquiry practices, or for their own autonomous development. In other words, the groups studied here

¹¹ See Appendix A—Interview Contents.

seek to establish legal knowledge through both *ad hoc* and ongoing or systematic contention, and both within and outside the official channels of legal inquiry. These nongovernmental practices also fall on a continuum from those *contained* by the influences of the official channels of legal inquiry to more *uncontained* forms relatively free from official influence.

The data reveal both similarities and differences in the practices of groups in Canada and the United States. In general terms, the results confirm the working hypotheses: Groups in Seattle use official hate crime statistics to frame their contention about hate crimes. In Vancouver, by contrast, no official hate crime statistics system exists to serve as either a resource for contention or as a limiting influence on the types of data gathered. This result coincides with a difference in the official hate crime classification systems: Seattle police publicly compile official hate crime statistics, and Vancouver Police do not. Where police do not systematically gather and publish hate crime statistics, social contention is at its least contained, in relation to the influences of an official classification system. Where local lawmakers are empowered to oversee or review classification decisions related to hate crimes, social contention more easily transgresses the official classification system, but remains contained by whatever local legal oversight mechanism is available.

But, an analysis of the data discloses a more complex and dynamic relationship between the official knowledge production practices and the social contention of the nongovernmental groups studied here.

The following analysis compares the practices of five pairs of Canadian and U.S. groups that contend in the hate crime field: (1) Community Anti-Violence Projects; (2) *Ad hoc* Anti-Violence Groups; (3) School Safety and Education Groups; (4) Family Support Groups; and, (5) Transgender Rights Groups. A sixth category, police hate crime units, is added at the end to provide context for the analysis of nongovernmental groups and their practices. At each site, similar groups are paired for an initial description utilizing a combination of quotations drawn

from interviews and literature either provided during interviews or otherwise available in print or electronic form. Several groups whose activities are relevant to this study were referenced in the course of interviews. Interviews were not conducted with all of these additional groups, but where relevant their activities are described as accurately as possible using information from the interviews and other secondary sources. In each of the first five categories, the practices of nongovernmental groups in each country are briefly compared. Following the initial analysis of nongovernmental groups, the official practices of police hate crime units at each site are discussed. Information provided during and after unrecorded interviews with police representatives at each site is summarized and briefly compared.

Chapter 6 will provide a summary analysis that synthesizes the results of both this Chapter and the earlier Chapters. The remainder of this Chapter will analyze the knowledge practices of the six pairs of groups interviewed in Vancouver and Seattle. In addition to the detailed break-down of interview contents set out in Appendix A, the following Data Table lists the groups and their representatives who agreed to provide interviews for the study.

Table 5.2—Data Table

Research Site (n=2)	Participant Group (n=12)	Informant
Vancouver, B.C.	Vancouver Lesbian, Gay, Bisexual, and Transgender Community Centre	Anti-Violence Coordinator, Cameron Murdock
	West Enders Against Violence Everywhere (WEAVE)	WEAVE Member, Jack Herman
	Gay and Lesbian Educators BC (GALE—BC)	Media Spokesperson, Steve LeBel GALE—BC Member, James Chamberlain*
	Vancouver Parents and Friends of Lesbians and Gays (PFLAG)	Vancouver PFLAG President, Susan Harman*

Research Site (n=2)	Participant Group (n=12)	Informant
	Trans Alliance Society	Treasurer, Gayle Roberts
	EGALE Canada & Transaction Canada	Member, Tami Starlight*
	Vancouver Police Department & BC Hate Crime Team	Vancouver Police Department, Sergeant Mark Graf
Seattle, WA	Seattle Lesbian, Gay, Bisexual, and Transgender Community Center	Executive Director, Shannon Thomas Hate Crime Awareness Project Coordinator, Kristina Armenakis*
	ACTION NorthWest**	
	Safe Schools Coalition	Co-chair, Beth Reis*
	Seattle Parents and Friends of Lesbians and Gays (PFLAG)	Bellevue PFLAG Chair, Wendy Wartes
	Ingersoll Gender Center	Board Member, Walker Burch-Lewis
	Seattle Police Department & Bias Crime Coordinator	Seattle Police Department Detective Christie-Lynne Bonner (former Bias Crime Coordinator)

* Participated in Feedback Interviews. **No interview conducted.

Because their activities include the most obvious and direct social contention in the hate crime field, anti-violence projects situated in lesbian, gay, bisexual, and transgendered (LGBT) community centers are analyzed first.

5.2 Community Anti-Violence Projects

In both Canada and the United States LGBT people establish community centres. A comparison of the overall services, facilities, and practices of LGBT community centres would

constitute a valuable addition to scholarship, as well as a useful resource for the centres themselves, but such a broad project is beyond the scope of this study.¹² Here I compare only the anti-violence programs, which are situated in LGBT community centres, and their role in social contention and the production of knowledge about homo- and trans-phobic hate crimes.

In 2005, at the time this research was conducted, both Seattle and Vancouver LGBT Community Centers hosted anti-violence projects designed to serve and advocate for hate crime victims. The Seattle Hate Crime Awareness Project was just beginning its nine-month term, with a possibility of continuation; whereas, the Vancouver Anti-Violence Pilot Project was just ending its six-month term with no further services anticipated. Despite differences in the length and content of their operations, both of these programs participated in contention to establish legal knowledge about individual hate crimes and about homophobic and trans-phobic hate crimes in general.

In Seattle I interviewed the Executive Director of the Center and the Coordinator of the Hate Crime Awareness Project. In Vancouver I interviewed the Coordinator of the Antiviolence Pilot Project.

5.2.1 Anti-Violence Pilot Project—Vancouver

In 2005, the Vancouver LGBT Community Centre had recently received funding for an Anti-Violence Coordinator position, but the position was for a six-month “Pilot Project” only. The Anti-Violence Coordinator, Cameron Murdock, was from Seattle and until recently had served as a trained victim services volunteer with substantial knowledge concerning Seattle Police Department hate crime practices. The funding for the position was received after staff at

¹² The documentary and videotaped data collected for this study constitute a body of knowledge, including knowledge about LGBT community centres, that cannot be fully tapped here.

The Centre submitted a grant application to the provincial Ministry for Public Safety & Solicitor General of the Solicitor General.¹³

According to Murdock, an early task for the Anti-Violence Coordinator was the production of a brochure titled “Lesbian, Gay, Transgender, Bisexual Anti-Violence Project at *The Centre*.” The Pilot Project is described in the text of the brochure:

The Centre has received temporary support to be able to offer antiviolence staff to help LGTB people who have experienced violence/trauma.

The LGTB Anti-Violence Pilot Project is made possible through a partnership with Victim Services and Community Programs Division of the Minister of Public Safety and Solicitor General. The Centre also partners with the BC Society for Male Survivors of Sexual Abuse to provide resources for our communities.

We are committed to raising awareness of the realities of violence against and within LGTB communities. We want to demonstrate the needs of LGTB people and develop culturally relevant resources. Please utilize Pilot Project resources, share your experiences and identify your needs for ongoing services. Your involvement can make a difference!

The LGTB Antiviolence Project is supported by other Centre programs, services & associates.¹⁴

Significantly, the Project’s goals combined both direct services to victims and information and knowledge production practices:

The Anti-Violence Project documents crimes and participates in community activism. We work with law enforcement and social services agencies to make sure they provide appropriate services for LGBT people. We educate social service providers, law enforcement officials, and members of the LGTB communities.¹⁵

¹³ Murdock and the Centre staff understandably declined to release a copy of the grant application, because it was not available to the public, but they agreed to provide a copy of the concluding project report after it was published in the Spring of 2006.

¹⁴ Anti-Violence Pilot Project Brochure (2005) (available at www.lgtbcentrevancouver.com). The Brochure lists “Additional Community Resources,” including “The Centre: Reception/Prideline, Information, Referrals & Peer Support.” Murdock also provided copies of a brochure titled STOP Lesbian, Gay, Transgender, Bisexual BASHING: Self Defense Resources and Information (“Adapted from pamphlet produced by the 519 Community Centre, Toronto, ON”). This brochure apparently predated the Anti-Violence Pilot Project. It emphasizes safety and self-defense practices, and among other things encourages victims of “Bashing” to “develop a plan of how you will respond if you are verbally harassed or attacked,” to “Report the incident to the police. Get the badge number of each police officer with whom you speak,” and to “call the Prideline or LGTB Victim Services at The Centre.” Accompanying the two brochures, Centre distributes a business card titled “Bashing is a Crime,” which encourages victims to report to the LGTB Anti-Violence Pilot Project, the police, and other resource agencies.

¹⁵ Anti-Violence Pilot Project Brochure, *id.* The Pilot Project Brochure lists five categories of services (Bias (Hate) Crimes, Abusive Relationships, Sexual Assault & Rape, Pick-up Crimes, and Professional Training & Consultation) and concludes “Everyone deserves to feel safe!”

In our interview, Murdock described both the resources provided by the Vancouver LGBT Centre generally and the “advocacy” performed by the Anti-Violence Pilot Project.¹⁶ At the time of the interview, Murdock was still the Coordinator of the Project, but because it was funded only as a six-month pilot, it was scheduled to terminate shortly after the interview.¹⁷

The Pilot Project provided both advocacy and support to hate crime victims, beginning with the complex and stressful decision about whether to report their attack to the police.¹⁸ Knowledge about homo- and trans-phobic hate crimes was critical to virtually all of these activities, as Murdock explained in the context of the most notorious recent hate-related event:

One of the key things to know is that these are crimes that are under-reported, for a number of different reasons. . . . There’s not really a lot of reporting that’s going on unfortunately, and when reports are made, that information isn’t necessarily being documented by different police organizations, and even if it is, there are times when that information is not presented by prosecutors in trial. So, for instance, in the case of Aaron Webster, a very famous case up here, that information that Aaron was gay, that the attack took place in a known gay cruising area, was not presented, and the crime of his murder was not tried as a hate crime.

. . . . No information about Aaron’s sexuality and about the intent of the attackers was included [by the prosecutor].¹⁹

Because of resource limitations and the limited duration of the Project, Murdock explained, the Project relied on some outside sources of data regarding hate crimes. One key source of Vancouver hate crime data, according to Murdock, came from another group called WEAVE:

As a pilot project we are pretty limited in what we can and are able to do. Fortunately, there’s another project called WEAVE, which is West Enders Against Violence Everywhere, and they are collecting data on hate crimes that happen here in the West End of Vancouver.²⁰

¹⁶ See *The Anti-Violence Pilot Project*, DVD, Menu Title—*The Anti-Violence Pilot Project*.

¹⁷ See *The Anti-Violence Pilot Project*, DVD, Menu Title—*Termination of Services*.

¹⁸ See *The Anti-Violence Pilot Project*, DVD, Menu Title—*Advocacy & Reporting*.

¹⁹ See *The Anti-Violence Pilot Project*, DVD, Menu Title—*Under-Reporting*.

²⁰ See *WEAVE Vancouver*, DVD.

Murdock gave an account of the hate crime data compiled by the Vancouver Police Department and the RCMP, but he emphasized his group's reliance on the data produced by WEAVE—even in training provided to police workers themselves:

Q: Do the Vancouver Police or the police in this region record or document some of those; do they have a policy or practice related to hate incidents or statistics or documentation about hate crimes?

A: They do. And, you know one of the things that gets in the way is of course here in Canada we place a high value on being polite. And, in North American culture it is considered to be polite to assume that people are heterosexual. So, police, just like anybody else that you talk to, are frequently afraid that if they ask somebody about what their sexual orientation is that they might insult them or make them angry. And, so, oftentimes, officers are not asking the right questions; they are not asking someone what their sexual orientation is or if somebody made a reference to sexual orientation in a confrontation. So those types of things are under-reported. But, the mechanism is there in the reports for officers to document if there is a bias element.

Q: Do you know whether that's a policy that varies from suburban community, to rural, to urban?

A: Yeah, you know, really what we would be talking about is not just the Vancouver Police but also the RCMP, the police agency that's national. So, really, it is something that a mechanism is in place to capture, it's just not captured as frequently as it's happening.

....

Q: Is there a process for compiling that information from the various jurisdictions and maybe reporting about it or doing an annual, yearly reports about that, do you know?

A: You know, my understanding about that is that, like many police agencies, their resources are stretched a bit thin. Over 2001-2002, data from that time period was collected, and they [the Vancouver Police Department] published a report on bias crime in the area. . . .

Q: But, that's something that's not done, or mandated to be done, annually it was just a pilot project?

A: Yes, very similar. You know, because of the scope of what we're doing and the resources that we have, we really aren't capturing statistics like that. But, we're relying on WEAVE as a close—our close relationship with them—to get that information and to look at things like trends. But, really what we are trying to do is prevention and then outreach. So, providing services and education.

Q: Do you know how long they've been in existence?

A: I know that they have published two reports now. And, they really are a tremendous asset for us in terms of collecting demographic information and statistical information about incidents. So, yes, they are really helpful that way.

. . . .

Yeah, I absolutely have used their information in my education and outreach efforts. . . . For instance, I recently talked to police-based advocates that work within police departments that are working with folks that are experiencing incidents, violent crimes. In the training that I do for them, I used WEAVE's statistics and talked about the trends that they were identifying—as well as the National Coalition of Anti-Violence Projects [NCAVP] in the States.²¹

After the conclusion of both the initial interview and the feedback meetings, I obtained a copy of the Anti-Violence Pilot Project Final Report, which was issued publicly.²² By this time, Murdock was no longer working at the Centre, and the Pilot Project was concluded.²³ The purpose of the Final Report itself is described as follows:

The final and key task was to create this report, in which we hope to provide policy makers, community leaders and community members with a more in-depth understanding of violent crimes against LGTB people, leading to the commitment of resources that support much-needed services to the LGTB communities. All too often, preventable violent crimes occur and are under reported by a group that has been silenced by heterosexism, homophobia and transphobia.²⁴

²¹ See *The Anti-Violence Pilot Project*, DVD, Menu Title—*Under-Reporting*.

²² Cameron Murdock, *Final Report, Lesbian, Gay, Transgender, Bisexual (LGTB) Anti-Violence Pilot Project* (The Centre, Vancouver, B.C., 2006) (hereinafter *Final Report*). The *Final Report* credits the Pacific Foundation for the Advancement of Minority Equality, The Centre, A Community Centre Serving and Supporting Lesbian, Gay, Transgender and Bisexual People and Their Allies, and Donna Wilson, The Centre's Executive Director.

²³ According to the Centre's Education Coordinator, funding had still not been located for an ongoing project as of May, 2006. Information about the Pilot Project no longer appears on the Vancouver Centre website, although another anti-violence initiative for communities outside Vancouver is described among the educational initiatives on the website. See *The LGBT Anti-Violence Project: Creating Strong & Safe Queer Communities*, available at <http://www.lgbtcentrevancouver.com/violence.htm> (accessed Jan. 18, 2008). The new year-long Project is described as follows: "This one-year project focuses on increasing safety, preventing violence and improving the strength and well being of LGBT people in four communities in BC: Prince George, Nanaimo, Nelson and Kelowna." *Id.* The Project's partners include the "Government of Canada's National Crime Prevention Strategy" and the BC Ministry of Public Safety and Solicitor General—the same agency that funded the Pilot Project.

²⁴ *Final Report*, *supra* note 22, at 3. Among many other points, the discussion documents the threat of "backlash" violence from opponents of marriage equality, the inadequacy of services for victims of same-sex intimate violence, and the need for stability in anti-violence programs. The discussion cites both news accounts of hate-related events and the results of systematic studies from the NCAVP in the United States. *Id.*, at 13-15. The results of the WEAVE Survey are addressed in the next section. See *Results: The West End Gay Bash Survey, 2003-2004* (WEAVE, Vancouver, B.C., 2005) (hereinafter *WEAVE Survey*) (on file with the author). Electronic copies of the *Survey Results* are available by contacting J. Herman at weave2y3@yahoo.ca.

In other words, the Final Report was meant to provide the knowledge resources necessary to mobilize resources to prevent homo- and trans-phobic hate crimes.

The Final Report opened with a photograph of Aaron Webster,²⁵ and its text confirms the direct link between the killing and the Project. The first paragraph of the Final Report attributes the formation of the Project directly to the Aaron Webster killing:

After the 2001 murder of Aaron Webster, a gay man who lived and died in Vancouver’s West End, the Centre, a Community Centre Serving and Supporting Lesbian, Gay, Bisexual, Transgender People and Their Allies sought to respond to violence affecting the Lesbian, Gay, Bisexual, Transgender (LGBT) communities. A Safety Committee was established and involved representatives of The Centre, the Vancouver Police Department, LGTB business owners, and community members. The Committee identified and confirmed community issues and the need for direct service and education for LGTB people and education and consultation resources for service providers, law enforcement, and the judicial system.²⁶

The formation of the Pilot Project was itself presented as a successful mobilization of resources in response to the Webster killing—although only temporarily. The Victim Services Division of the Ministry for Public Safety & Solicitor General funded the Pilot Project, and the Report praises the agency’s role: “While funds were not available for a full service program the establishment of a partnership with the Victim Service Division resulted in the very positive and practical development of a training manual and training program for Victim Service Workers and other practitioners in the field.”²⁷ The Final Report provided three case studies as examples of “direct services” that the Pilot Project had provided to victims.²⁸ Other activities documented in the Final Report included “Community Education,” and “Community Collaboration,” with a goal “to provide information about the Anti-Violence Pilot Project, solicit input about services

²⁵ *See id.*, at 2.

²⁶ *Final Report*, *supra* note 22, at 2.

²⁷ *Id.*, at 2.

²⁸ *See id.*, at 4-6.

and to draw together a network of collaborating agencies and individuals to respond to local needs.”²⁹

After stating its general findings, the Final Report lists five “Required Actions” to, “increase safety and an organized response to anti-LGTB violence.”³⁰ Yet, despite the Coordinator’s references to WEAVE in our interview, the Final Report does not mention the WEAVE Survey—which is discussed in the next section.³¹ Instead, the concluding section of the Final Report details the results of the Antiviolence Survey conducted by the Pilot Project itself during the summer of 2005.³²

The demographic summary that introduces the Antiviolence Survey results provides significant detail, carefully describing “Respondents’ Gender” according to ten different categories, for example. Moreover, “Respondents’ Sexual/Affectional Orientation” is separately distinguished in nine categories, including “Other.”³³ To further reveal the complexity of the respondents’ experiences, the results list “Crimes Experienced by LGTB Respondents” in nine categories: verbal abuse, harassment in the workplace, LGTB bashing (physical violence), sexual assault, abuse by same-sex partner, abuse by other-sex partner, child abuse, elder abuse, and other.³⁴

Notably, the term “hate crime” is not used in the results. Instead, the pervasive violence in the lives of LGBT people is presented in a more narrative form:

95% of LGTB people reported experiencing verbal harassment. 40% had experienced some form of harassment in the workplace. Over 38% had been sexually assaulted. One third had been abused as children. 18% had experienced abuse in an intimate relationship, and 5% were victims of elder abuse. Every LGTB respondent reported experiencing violence. By comparison, the 4

²⁹ *Id.*, at 7. Among the groups included in this collaboration were local groups like WEAVE, groups from across Canada, like the 519 Antiviolence Programme in Toronto, and groups in the US, like the NCAVP. *Id.*, at 6-7.

³⁰ The only Required Action directly related to the police was, “Increase the Efficacy of the Criminal Justice System.” *Id.*, at 11-12.

³¹ The Final Report does list WEAVE among the Pilot Project’s “network of collaborating agencies.” *Final Report*, *id.*, at 7.

³² *Id.*, at 16-20.

³³ *Id.*, at 16.

³⁴ *Id.*, at 19.

heterosexual participants reported no history of violence at all. Participants reported that they had experienced more than one of the seven types of violence in the survey: on average, participants had experienced violence in three different categories.³⁵

The survey also provided an assessment of the knowledge and responsiveness of police, prosecutors, courts, and political leaders to violence affecting LGTB communities.³⁶ Among survey respondents, 67% “believed police did not understand the LGTB communities”; whereas, 80% “believed that the police did not respond well enough to LGTB people.” The report explains this apparent discrepancy:

Given that more people [thought] the police have an adequate understanding of LGTB people than an adequate response to them, it is possible that the difference between this and the statistic above represents a lack of trust in police, and perceptions of police as homophobic or heterosexist in their dealings with the community.³⁷

As is apparent from the results summarized here, the Antiviolence Survey liberates respondents to express their own identities and experiences of violence with few constraints. The Survey also provided respondents an opportunity to critique the official response to violence against LGTB people.

Both the Pilot Project’s Antiviolence Survey and the research cited to support the Final Report’s findings draw on other nongovernmental sources of knowledge about hate crimes. In fact, the Final Report does not cite any official hate crime statistics. On the contrary, it presents the following contentions about the state of official hate crime inquiry in Vancouver:

“Vancouver is one of the few cities in Canada that does not collect statistics on hate crimes committed against specific minorities, such as queers. Vancouver police say that job falls to the provincial Hate Crime Team whose funding was cut by Victoria several years ago.”

³⁵ *Id.*, at 19. The Final Report notes that “abuse in same gender and heterosexual relationships occur at the same rate,” yet, “No LGTB specific battered partner shelters or advocacy exist in the province of B.C.” *Id.*, at 14.

³⁶ *Id.*, at 17-19.

³⁷ *Id.*, at 18. A similar gap between “understanding” LGTB people and responding to violence in LGTB communities appears in perceptions of Lawmakers, Judges, and prosecutors. 83% thought political leaders responded inadequately, while 66% believed they needed to understand more. Courts are “ineffective in protecting the legal rights of LGTB crime victims,” according to 87% of respondents; whereas, 61% “thought the Crown needed a better understanding of LGTB people in order to respond more effectively to crimes referred by police.” *Id.*, at 18-19.

Aaron Webster, an out gay man, was murdered by a group of men in a gay “stroll” area of Stanley Park. Despite all of the markings of a bias crime, his sexuality was never mentioned in the trial of his murderers, and none of the compelling evidence of bias were introduced by the Crown. No bias crime enhancement was sought by the Crown, despite protest from the LGTB communities.³⁸

Knowledge about trans-phobic violence is presented with particularity in a statement by transgender activist Gwendolyn Ann Smith, quoted in the Final Report. The statement references one nongovernmental inquiry used to document trans-phobic violence:

In fact, one thing that has come to light in [creating the website www.rememberingourdead.org] is how much more is yet to be done. Over the last decade, one person per month has died due to transgender-based hate or prejudice, regardless of any other factors in their lives. This trend shows no sign of abating. Will we be willing to bear yet another century of violence and hatred aimed at those who do not easily wear [the label] man or woman?³⁹

The Coordinator reported that he received training from the National Coalition of Antiviolence Programs (NCAVP) in the United States,⁴⁰ and at several points the Final Report references the NCAVP as a model. Specifically, the Final Report incorporates one of the NCAVP’s recommendations to “Increase the Efficacy of the Criminal Justice System”:

Consistent with the recommendation of the National Coalition of Antiviolence Programs, a re-investment in anti-bias investigation and data collection is needed. Funding for the hate crimes unit needs to be increased, and uniform data collection standards need to be instituted throughout the province and country. The investigation and prosecution of acts of harassment, intimidation and anti-LGTB violence can only be improved by providing the resources needed

³⁸ *Final Report, supra* note 22, at 8 (quoting and citing article by Jeremy Hainsworth, XTRA WEST, at www.365gay.com/newscon04/05/052404salArm.htm) (emphasis in original). To illustrate the problem of under-reporting common among victims of homo- and trans-phobic violence, the report refers to the Antiviolence Survey, and one additional, unnamed source:

In a survey of LGTB people and allies living in the Vancouver area conducted by the AVPP, LGTB people responded that they reported violence and harassment to a partner or friend twice as often as they reported such crimes to the police or a medical provider.

In 1997, a national survey of 1200 gay and lesbian people found that 22% of the respondents had experienced a physical assault, but only 26% of those assaulted reported them to the police.

Final Report, id., at 9 (no citation provided). All of the sources listed at the conclusion of the Final Report are online documents linked to the report by hypertext worldwide web addresses. See *Final Report, id.*, at 20. In addition, the Final Report references the use of the online reporting features available through SAFEgay.ca. *Id.*, at 7. A thorough study of internet communication technologies (ICTs) exceeds the scope of this study. Many of the groups studied here used ICTs, but they were not pervasive. WEAVE, for example, maintained no website, although I was able to obtain its survey results in electronic format.

³⁹ *Final Report, id.*, at 13 (alternations in original, emphasis omitted).

⁴⁰ *Id.*, at 3.

by the criminal justice system. Training and resources to increase cultural awareness should be expanded in law enforcement agencies, and should be implemented at all levels of the Crown and judiciary throughout B.C. It must be made clear that violence against LGTB people will not be tolerated in British Columbia.⁴¹

The appeal to adopt a systematic and ongoing hate crime statistics program is reiterated in the recommendation to “Fund Research”:

Our ability to respond effectively to violence impacting LGTB people is limited by our lack of reliable, British Columbian and Canadian research. While *Toronto’s RCMP and 519 Community Centre have worked for years to collect data in concert with the NCAP in the United States*, Vancouver and British Columbia trails behind in responding to violence against its LGTB citizens. We need to understand trends in violence, how violence differs in Vancouver and smaller B.C. municipalities, and what responses are most effective against it.⁴²

Ad Hoc Anti-Violence Groups, including WEAVE, are compared in greater detail in section 5.3 below. The Seattle LGBT Center’s Hate Crime Awareness Project is examined next.

5.2.2 Hate Crime Awareness Project—Seattle

I obtained data about the Seattle Hate Crime Awareness Project from two separate interviews, first with the Executive Director of the Seattle LGBT Community Center, and later, after she was hired, with the new Hate Crime Awareness Project Intern.⁴³ Shannon Thomas, the Seattle Center’s Executive Director, provided both an interview and a tour of services provided by the Center.⁴⁴ Thomas introduced the Center’s anti-violence programming by providing a copy of a folding Hate Crimes “Wallet Card.” The Card’s title page lists the agencies cooperating in its production:

⁴¹ *Final Report*, *supra* note 22, at 11 (emphasis added).

⁴² *Id.*, at 12.

⁴³ In addition to a separate interview, the Intern was able to participate in the Seattle feedback meeting.

⁴⁴ Thomas’s tour of the Center included its privately-funded, public-access internet terminal, and the offices of several groups housed at the Center. See *Seattle LGBT Center*, DVD. Groups included, for example, an LGBT youth camp, an Hispanic LGBT group, Gay Community Social Services, Verbena, a Lesbian health and services project, the Northwest Lesbian & Gay History Museum Project, and Equality Washington, a marriage equality group. As with the Vancouver Centre, a full account of the services, facilities, and practices of the Seattle Center is impossible here.

Hate Crimes: What to do if it happens to you, . . . produced by the Anti-Gay Bias Education Project with cooperation from the: City of Seattle Commission for Sexual Minorities, City of Seattle Police Department, City of Seattle Department of Neighborhoods.⁴⁵

The card quotes from the state Malicious Harassment statute and summarizes the Seattle Police Department policy, “to investigate by all means possible all reports of anti-gay malicious harassment.” To encourage reporting, the card instructs victims how to address police investigators:

Stress [to investigating officers] that the crime was motivated by hate based on perceived sexual orientation. You do not need to reveal your sexual orientation to report the crime and you should not be asked to. It is the perpetrator’s perception that matters. Whether or not the perception is correct is irrelevant under the law.⁴⁶

Conspicuously absent from the Wallet Card is any mention of the Seattle Municipal Ordinances, which extend the coverage of the state malicious harassment statute to offences motivated by gender identity and expression.⁴⁷

Like the Vancouver Centre, the Seattle Center provides resources and referrals for a broad range of services, including services related to hate crimes:

We [] provide a lot of resource and referral information through our Resources and Referral Network, which is open seven days a week both online and in the building itself for people to come in. And, basically, they can get any information they need on LGBT life in Seattle.⁴⁸

Along with its general referrals, the Seattle Center makes referrals for callers who have been the victims of hate crimes:

For instance, if they’re the victim of a hate crime, definitely getting them in touch with the local police department, do we need with immediate health care information? Do we need counseling and support services? So, really just feeling

⁴⁵ See Wallet Card (on file with the author).

⁴⁶ *Id.*

⁴⁷ On the other hand, the card references remedies other than prosecution: “If you know the perpetrators, contact your district court for information about obtaining a no-contact/anti-harassment order.” Although obtaining an anti-harassment order against an unknown assailant may be difficult, no authority is identified that requires a known perpetrator.

⁴⁸ See *Seattle LGBT Center*, DVD, Menu Title—*Resources & Referrals*. Other knowledge-related practices hosted by the Center include a Website, an online and print Newsletter, a Library, Education resources, Fiscal Sponsorship for Center partners, a Museum Project, services for partner groups housed within the Center, a Cyber-Center offering on-site internet access, and an art gallery.

the calls out, and you know we've got a database full of resources, so we're able to link people up with whatever they might need.⁴⁹

During the course of our interview, Thomas also announced the creation of the new Hate Crime Awareness Project to be hosted at the Center:

Another thing that we're going to be providing is more information and data on the prevalence of hate crime and then also how aware our community is of hate crimes, and what are the gaps found in programs and services and then hopefully addressing those needs in the future.

Q: Can you maybe describe how that project came to be and what it's going to ...?

It's actually really exciting and it's come together through the course of a lot of serendipitous meetings of leaders.... But, last year, after the hate crimes occurred, I actually coordinated with Beth Reis who's with the Safe Schools Coalition and King County. We talked about a possible joint venture where we could have an intern or employee . . . to really do a few things. Number one, look at the data and track what is really happening in the city of Seattle around hate crimes, as well as school-based violence with LGBT youth. Also then making more community awareness . . . and where can we fill the gaps? What kind of advocacy and direct service needs are there for the community?

So, we applied for a JustServe Intern, [and] she begins on the fifteenth [of September] . . . and we'll have her through July 30th [of 2006].⁵⁰

Thomas's use of the term "the hate crimes" referred to the attack on Micah Painter and another hate-related attack in Seattle's Ballard neighborhood.

Thomas explained that the Center and the Seattle-Based Safe Schools Coalition would co-supervise the intern, and that the duties would overlap between the activities of both groups:

We're basically co-supervising the intern. There's really two pieces to the Project. We're looking not only at school-based violence, which is where the Safe Schools Coalition piece comes in, but we're looking at community-based violence—and the awareness of the LGBT and mainstream community around hate-based crimes, whether they be LGBT-focused or other minority -focused. We want to look at a lot of data, of course focusing on an LGBT population.

⁴⁹ See *Seattle LGBT Center*, DVD, Menu Title—Hate Crime Referrals.

⁵⁰ See *Seattle LGBT Center*, DVD, Menu Title—Internship. The Executive Director described the JustServe program as follows: "JustServe is a program through the federal government where the . . . government has interns and the place them at non-profit organizations where the intern makes a very small stipend . . . a lot of real world experience and do a lot of great work for the non-profits[.]" The internship funding was also linked to funding from the federal Americorps program.

So, it's sort of a dual project.⁵¹

The Seattle Center had engaged in contention about hate crimes before the Hate Crime Awareness Project was established. But, according to Thomas, the new position was meant to extend Seattle's status as a "model city" for domestic violence intervention services to the field of hate crimes.

Kristina Armenakis had just begun her term as Intern and Coordinator of the Hate Crime Awareness Project when we met for an interview at the Seattle LGBT Community Center in December of 2005.⁵² Armenakis described the creation of the Project as follows:

. . . a brand new project that is focused on raising community awareness about local hate crimes and hate violence—hate incidents or hate crimes and providing any support to targets of hate crimes. . . .

This position was created to coordinate that project, and we began in September [2005], and at that time we didn't have any idea of what we were going to find. No idea of what kind of community support was available . . . for targets, and which organizations are equipped to work specifically with anti-LGBT hate crimes, what kind of statistics there were available locally on hate crimes, and how motivated the community was around this topic—if people perceive violence as a problem in Seattle....

So, since then, I've met with a lot of community organizations and looked at some of the national statistics and local statistics—like the FBI report, and the National Coalition of Anti-Violence Programs, they don't have a specific Seattle set of statistics, but I've looked at sort of the general trends on anti-LGBT violence, and I've looked at Seattle Police Department statistics. . . .

I've sort of gotten the sense that there's not a lot of motivation in the community around this topic, but there's also not a lot of talk about it.

So, one of the things I am going to be doing is creating a website so that people understand what the laws are, what the reporting process is—and not just to call 911, but what the expectations are from the police when you call, like what kinds of things you will actually have to do and what you can expect from the officers, what kind of training officers have had, and then what the prosecution process would be through the King County Prosecutor's Office, . . .

⁵¹ See *Seattle LGBT Center*, DVD, Menu Title—Hate Crime Data.

⁵² See *Hate Crime Awareness Project*, DVD. The term of the coordinator's internship was set at nine months, subject to annual renewal by the local fund administrator—the Freemont Public Association, a non-profit, anti-oppression and anti-poverty organization.

And then also, like, some ways you can protect yourself, some community organizations you can go to if you've been targeted. And, it would be for both like support and if you wanted to do some sort of community response or some advocacy-based counseling, as opposed to like mental health counseling.

So, the website will just be . . . It'll be small because I don't want people to be overwhelmed with information . . . it'll just be locally-based information.

So, that's probably the biggest thing that's going to happen right now, because I am still uncovering like how much interest will I get from people once I delve into this.⁵³

The idea for the Seattle Hate Crime Awareness Project, Armenakis explained, emerged from an earlier Bias Crime Reporting Project which had developed a survey, but which had experienced “not a lot of success” finding a student to do the work.⁵⁴ The earlier project was being implemented in part by the Seattle Police LGBT Advisory Council (a liaison committee between the LGBT community and the Department).⁵⁵ Although the project had received grant funding for the distribution of the survey and media publicity from the Pride Foundation—a regional, non-profit, LGBT funding agency—the “bureaucracy” of the groups involved slowed the project and eventually the funding had to be returned unused.

Armenakis agreed that a problem with under-reporting of anti-LGBT hate crimes “definitely” exists in Seattle. She emphasized however that her role was not to pressure targets of hate crimes to report to the police but rather to educate the public about their reporting options:

I'll make sure people really understand what their options are. Through this website or any community education I do—that people know that they can report to the police and that that is one option, and that there is definitely a place for the legal system.

And, some people, no matter what, are not going to report to the police and wouldn't feel comfortable for a multitude of reasons. So, I kind of feel like it's

⁵³ See *Hate Crime Awareness Project*, DVD, Menu Titles—*Introduction & HCAP Website* (emphasis added).

⁵⁴ To avoid this prior lack of success, and to maximize the small resources available to her, Armenakis had received help from Vista volunteers in other programs in Seattle, including the Washington Reading Corps.

⁵⁵ The Seattle Police Department/LGBTQ Advisory Council was listed with its Seattle Government email address among the community organizations in the Seattle Gay News Community Calendar for June, 2005. See SEATTLE GAY NEWS, Arts & Entertainment Section, June 3, 2005, at 37.

my job as a person who's going to work with a diverse community just to make sure that people know that there are other options out there outside of the police department that are available, but that the police is one totally viable option and people know exactly what to expect.⁵⁶

While the Coordinator did not contemplate pressuring victims to report, her role did include “resource referral” for a range of services from safety planning and personal counseling to community advocacy organizations that could mobilize a community response “if somebody’s been targeted.” Armenakis explained her two-part job description:

One part of it is responding to hate crimes—responding to the incidents that have already happened. So, that’s one half of my position, which is why it gets half of—twenty hours a week—of staff resources. . . . The Hate Crime Awareness Project is basically half-time.

The other half of my position is with the Safe Schools Coalition, and so I am working on anti-LGBT bullying. And, that’s such an important link because it is that environment of bullying in schools where it is okay to use homophobic language that leads to hate crimes ultimately when we are adults. We set the climate for youth by saying that it’s okay to use this kind of language and to target people on the basis of actual or perceived sexual orientation.

And so, I am doing some preventative education and responding, helping people respond to the actual hate crime incidents.⁵⁷

Armenakis described tentative plans to conduct a survey which would serve as a central knowledge-producing function of the Project:

We are going to do a community survey, and it’s not going to be a really scientific research model, we’re not going through the University of Washington or anything.

But just we’ve come up with this survey, which I am going to distribute as widely as possible and just get people to tell me about their experiences with hate incidents in Seattle if they have been victimized in any way and to tell me about their experiences with police and to tell me about why they did or did not report and what happened as a result.

So that may provide some information about why people are not reporting, like what kinds of stereotypes people have about police and what their fears are so I can make sure those are addressed so that people who would like to report but are just afraid to.

⁵⁶ See *Hate Crime Awareness Project*, DVD, Menu Title—*Hate Crime Reporting Options*.

⁵⁷ See *Hate Crime Awareness Project*, DVD, Menu Title—*Job Description*.

There could also be some information possibly of the nature of the incidents in Seattle.⁵⁸

In addition to learning the nature and extent of under-reporting, moreover, the Coordinator indicated that the Community Survey would ask those who had reported hate crimes to the police to describe their experiences, including whether their report was investigated or prosecuted.

Armenakis described the genesis of the Community Survey in the earlier Bias Crimes Reporting Project:

The goal of that project was to increase community awareness, but mostly to increase reporting to the police department and find out why people were not reporting.

So, I changed the focus a little bit, and made it more of a community model. But, they are the one's who originally designed this Project, and I am just tailoring it and expanding it to fit more of our interests.

They attempted to go through one of the departments of the University of Washington, and they didn't have a lot of success, with trying to find a student to work on this. Again, if I had more time, I might spend more time just looking for someone to assist me in this process. I'm at a cross-roads of having to trade-off what's going to be most important in this project. So, I'm trying to determine if going through that again and trying to recruit a student is a worthwhile use of time.⁵⁹

Her comments in both our interview, and at the Seattle Feedback meeting, revealed that Armenakis was keenly aware of the details of both the Micah Painter attack and the attack in Ballard. Since she had served in her position for only a few months, she was unaware of any more recent homo- or trans-phobic hate crimes in Seattle. However, she did articulate a clear plan for a coordinated response in the event of such an incident:

If that happened, I would probably try to make contact with the Bias Crimes Coordinator [at the Seattle Police Department]. They know that this position has been created and that through the LGBT Advisory Council we would try to

⁵⁸ See *Hate Crime Awareness Project*, DVD, Menu Title—*Community Survey*.

⁵⁹ See *Hate Crime Awareness Project*, DVD, Menu Title—*Bias Crime Reporting Project*. Armenakis explained that the earlier Bias Crime Reporting Project was never implemented. Nevertheless, she had access to both the materials compiled for the earlier version of a survey and a small amount of funding pledged by a local group.

provide support for that person who was the target. The Bias Crimes Coordinator could let that target know that services are available.⁶⁰

Armenakis later revealed disappointment with the lack of a coordinated response to the Ballard incident.

Like the Vancouver Anti-Violence Pilot Project, Seattle’s Hate Crime Awareness Project was established with government grant funding. But, in other respects, the services, funding, and staffing for the Seattle Project differed from Vancouver’s. The Seattle Center joined with the Safe Schools Coalition to submit a grant application to the JustServe/AmeriCorps program—a program funded by the United States Department of Justice and administered by a local non-profit group.⁶¹ Two aspects of the Grant Application are relevant here. First, the application cited official hate crime statistics to show that hate crimes motivated by sexual orientation are more violent than other crimes and are frequently committed by young offenders. The logic of the grant application was thus founded on both the reduction of violence in the community and preventative education in schools—coinciding with the goals of the two applicant groups. The choice of the official statistics over nongovernmental reports, from the NCAVP for example, is easily understood considering that the ultimate funding agency—the United States Department of Justice—is also the source of the official statistics. The need for a Hate Crime Awareness Project likely would seem more apparent when supported by the grantor’s own, “official” statistics rather than unofficial sources. Second, consistent with its name as a hate crime “awareness” project, the grant application set out particular goals for the production and

⁶⁰ See *Hate Crime Awareness Project*, DVD, Menu Title—*Incident Response*.

⁶¹ Like the Vancouver Centre, the Seattle LGBT Center and Safe Schools did not wish to release their grant application and proposed job description to the general public—for understandable privacy reasons. Nevertheless, I was provided a copy of the document on the condition that I was not to release it publicly. See Grant Application, *Seattle LGBT Community Center Proposal – JustServe AmeriCorps Hate Crime Awareness Project*, at 1 ¶2 “Need” (undated, Summer 2005) (on file with the author) (citing “Hate Crime Reported in NIBRS, 1997-99” (linking to online report at <http://www.ojp.usdoj.gov/bjs/pub/pdf/hcrn99.pdf>)). It may be significant to note that the statistical database cited by the groups is one of two official hate crime database produced by police in the United States—NIBRS and UCR. The groups did not cite UCR statistics. This choice is consistent with the Intern’s subsequent explanation of under-reporting in official statistics. Instead, the grant application cited results from the NIBRS, a research method based on reported “incidents” rather than crimes and therefore theoretically less susceptible to the dynamics of under-reporting.

distribution of knowledge in the form of data about anti-LGBT hate crimes in both schools and the “community.”

Armenakis explained that even though official national and local statistics are available for anti-LGBT hate crimes, reporting is “really low.” She cited “personal stories” victims had reported to her, one involving an attack with a beer bottle. To assess awareness a survey was created and prepared to be circulated throughout the local LGBT community.⁶²

Summarizing her work at the Safe Schools Coalition, Armenakis described the development and presentation of a brief anti-violence training for schools. Armenakis reconciled her dual roles by explaining that there is a “link” between anti-LGBT school bullying and hate crimes outside schools. The work of the Safe Schools Coalition is addressed more fully in a later section.

By late Spring, 2006, the Hate Crime Awareness Project had not released the results of its own community survey. But, in April of 2006, the Project and the Center jointly issued a report analyzing “Bias Crimes and Incidents” in Seattle by type of bias and neighborhood for the preceding five years.⁶³ The report was written by Ken Molsberry, a computer systems and data analyst for the Seattle City Attorney’s Office, who volunteered his time outside work hours, and edited by Armenakis from the Hate Crime Awareness Project.⁶⁴ The Report’s introductory section cites the Ballard incident in November, 2004 as the event that triggered the research study:

⁶² Noting that the survey sounded similar, I provided copies of the Vancouver WEAVE survey results in electronic format for her reference—she had not been aware of the WEAVE survey. Armenakis explained that other sources are available to supplement the incomplete official hate crime statistics, which frequently omit the nature of a crime, especially its community-wide effects. As an instance of such a source she cited the NCAVP, which issues an annual report covering LGBT Domestic Violence and anti LGBT hate crimes in several U.S. cities. To Armenakis, the NCAVP reports served as a source of ideas, and they emphasized that police intervention in hate crimes is only one option among several remedies for victims.

⁶³ Ken Molsberry, *Bias Crimes & Incidents in Seattle, 2000 to 2005: An analysis by type of bias & neighborhood* (Kristina Armenakis ed., 2006) (hereinafter *Molsberry Report*).

⁶⁴ See *Molsberry Report, id.*, at 29 (Acknowledgements), 31 (About the Author).

This study arose out of a bias crime committed on November 24, 2004. A description of the assault is informative in illustrating the cruel and horrific nature of a “typical” bias crime.

The victim, a white male, was in the bar of a Ballard restaurant where he was accosted by three male patrons who repeatedly asked if her were gay. . . . Upon leaving the restaurant, the victim was approached and struck forcefully in the head by one of the men, . . . The blow knocked the victim to the pavement where he struck his head and was knocked unconscious.

Witnesses from the restaurant observed the assailant repeatedly kick the victim while he was unconscious. As the assailant attacked his victim, he shouted, “This is still Ballard” – to communicate that gay people were not welcome in that neighborhood. . . .

. . . .

. . . . The fact that the victim in this crime is in fact not gay demonstrates that anyone can be a victim of a bias attack, since such attacks are often based merely on the perceptions of the assailants rather than reality.

Although bias attacks happen repeatedly in Seattle, there is a reason that this particular crime gave rise to this study. That reason is the lack of community response to the crime—not only during the assault, but afterward as well.⁶⁵

According to the Report, Seattle Police recorded 144 bias crimes and 259 separate bias incidents during the study’s five-year period.⁶⁶ Like many of these events, however, the Seattle Police Department “mischaracterized the [Ballard] attack, leading to a lapse in its investigation.”⁶⁷

The Molsberry Report directly examines the data collected by the Seattle Police Department as part of its official hate crime statistics procedures.⁶⁸ Even though the Report uses police investigators as its ultimate data source, it does not merely re-analyze the numerical data submitted to the FBI’s UCR program. Instead, it analyzes the text of police “bias crimes” reports

⁶⁵ *Molsberry Report, id.*, at 4 (footnotes omitted). The introduction cites three sources: the police incident report, correspondence with the victim, and a Seattle Gay News Article of December 17, 2004. Another more recent homophobic incident triggered an article and a weeklong web-log on the website of one of Seattle’s weekly newspapers. See David Schmader, weblog, *Gay-Friendly Bashing Last Night on Capitol Hill*, Mon. Jan. 7, 2008, available at http://slog.thestranger.com/2008/01/gayfriendly_bashing_last_night_on_capito (accessed Feb. 3, 2008) (collecting forty-nine comments).

⁶⁶ *Molsberry Report, supra* note 63, at 4 n.6.

⁶⁷ *Molsberry Report, id.*, at 5 n.8.

⁶⁸ Like the Anti-Violence Pilot Project Final Report from Vancouver, the Seattle Bias Crimes and Incidents Report presents a number of references with worldwide web addresses. See *Molsberry Report, id.*, at 30 (Bibliography and resources).

provided pursuant to a public disclosure request—with confidential identifying information redacted.⁶⁹

The Report provides both technical and practical justifications for re-examining the official data. First, Molsberry and Armenakis critique the limited knowledge that is produced with the annual release of bare hate crime statistics by the Seattle Police Department. They quote from a 2002 Human Rights Watch report criticizing Seattle’s limited release of hate crime data:

Law enforcement agencies should regularly publish and make public comprehensive statistics on bias-motivated crimes in their jurisdictions regardless of whether the crimes are prosecuted under special hate crime legislation. [In contrast to Los Angeles, Chicago, Phoenix, and Dearborn, Michigan, neither] New York nor Seattle publish yearly data on hate crimes. . . . The only published data on hate crimes in New York and Seattle is the data published yearly by the FBI in its annual hate crimes report. This data . . . is cursory in nature, providing only the number of hate crimes committed each year and the types of victims. . . .⁷⁰

Second, the Report seeks to bridge a gap between national statistics and the local reality of hate crimes. Because, “Knowing about a problem is the first step in solving it,” and because, “awareness of the problem is one of the most powerful tools in preventing bias attacks,” the Report seeks to make law enforcement information more “readily available to the community.”⁷¹

The “community” targeted for information is defined as the local neighborhood:

The purpose of this study [] is to dispel the misconception that there is any neighborhood in Seattle in which bias attacks are not a problem. By empowering the citizenry and neighborhood organizations with information about the prevalence of bias attacks in their neighborhoods, they will hopefully take action to reduce attacks motivated by bias, hate, and prejudice.⁷²

But, despite the reasoning provided, the Seattle Report was not motivated by technical errors in the official knowledge about hate crimes. As with the Vancouver Pilot Project, the

⁶⁹ See *Molsberry Report*, *id.*, at 9.

⁷⁰ See *Molsberry Report*, *id.*, at 3 (quoting “We Are Not The Enemy”—*Hate Crimes Against Arabs, Muslims, and Those Perceived to be Arab or Muslim after September 11*, at 5, 39 (Human Rights Watch, New York, 2002)).

⁷¹ See *Molsberry Report*, *id.*, at 29 (quoting *Hate & Bias Crimes—A Citizen’s Guide From the Office of Attorney General Mike Hatch* (Minn. Atty. Gen. Ofc.))

⁷² See *Molsberry Report*, *id.*, at 5.

Seattle Bias Crimes and Incidents Report was issued in response to a particular hate-related event: the November 24, 2004 Ballard neighborhood assault.⁷³ Citing the police Incident Report, correspondence with victim, and a Seattle Gay News article, the Report details a “shocking” attack involving three men who asked the victim if he was gay and later beat him, knocked him unconscious, and kicked him while he lay on the sidewalk outside a northwest Seattle restaurant.⁷⁴ As indicated already, Molsberry and Armenakis distinguish this particular attack because of “the lack of community response to the crime.”⁷⁵ The victim was “disgusted” because witnesses failed to “take action,” while he was attacked.⁷⁶

The Ballard attack was reported to police, who “later discovered that it had been mischaracterized . . . leading to a lapse in the investigation.”⁷⁷ When he learned about this attack in his own neighborhood, the Report’s primary author, Ken Molsberry, launched his own inquiry. He addressed emails, letters, and telephone calls to numerous local officials including the “district council of the neighborhood where this attack took place.” Two local elected officials “took action” by contacting the police Department, and one neighborhood resident wrote a letter to the editor of the neighborhood newspaper. But, Molsberry received little response from his neighborhood leaders, and because of this frustration he initiated the study that led to the Report.

Molsberry learned that the police Incident Report had properly flagged the “BIAS CRIME” box but that a subsequent labeling error had occurred during the investigation.⁷⁸

⁷³ *Id.*, at 4 (footnote omitted).

⁷⁴ *See id.*, at 4 n.4 (citing sources).

⁷⁵ *Id.*, at 4.

⁷⁶ *See id.*, at 5 (quoting victim statements from news account).

⁷⁷ *See id.*, at 5 n.8.

⁷⁸ *See id.*, at 13 n.18. Molsberry’s February, 2005 and January, 2006 public disclosure requests were more successful than mine. He obtained incident reports covering a five-year period, including the report for the Ballard assault, even though it was technically still being investigated. My request for records about the Micah Painter attack was denied on the grounds of an ongoing investigation, even though convictions had already been obtained. Because my focus here is primarily on the practices of nongovernmental groups rather than governmental agencies, I have chosen not to dispute the denial of my disclosure requests by either the Vancouver or the Seattle Police.

Beginning from this error, the Report analyzes several broader categories of under-reporting by investigating officers, which combine to compound the problem of victim under-reporting:

Such instances raise two potential causes for concern. First, some crimes are apparently not treated as such [as crimes], leading to underinvestigated cases. Second, SPD's data might unintentionally understate the rate of crimes versus incidents.⁷⁹

In other words, a labeling error at the beginning of a hate crime investigation infects both the database of knowledge about hate crimes and the investigation of an individual case.

The Report sets out the method it uses to clarify ambiguous report data. A sample page from the Department's database is set out in the Report. The police database does not reproduce narrative accounts by investigating officers; instead, each incident is tabulated in pre-assigned boxes and codes. Suspects and victims are described by their race, gender, orientation, age, victim injuries, and whether the suspect "Knows Victim." The stages of the investigation are tracked with prompts for crime, bias focus, assigned, disposition, charge referred, and charge final. Adjacent to these prompts are three boxes to flag the report for bias crime, arrest, and convicted. A final box allows limited space for notes.⁸⁰

The Report states that it does not re-evaluate the police determinations contained in the data, except to assign a "Bias focus," when the "Notes" field in the police database "indicated a clear bias."⁸¹ But, "between October 2004 and December 2005, more than 35% of the records lacked a Bias focus (or had an apparently inaccurate one) when the Notes would otherwise indicate a clear bias."⁸² Among the examples of bias clearly indicated in the Notes field but omitted from the Bias focus field, the Report provides the following quote from an individual

⁷⁹ *Molsberry Report*, *supra* note 63, at 13.

⁸⁰ *Id.*, at 9, Figure 1.

⁸¹ *Id.*, at 11-12.

⁸² *Id.*, at 12.

report: “[V]ictim received a letter from an unknown person. The letter implied that dire consequences could occur if Jewish people did not accept Jesus as the ‘Messiah’.”⁸³

A higher rate of “missing Bias focus,” appeared in records entered after October, 2004, and the Report expresses “concern” about this new aspect of under-reporting:

. . . . [T]he missing Bias focus data could be a cause for concern. SPD is required by state law to report the data to other law enforcement agencies for use in their studies and reports on the prevalence of bias attacks. If as many as one third of these records are being reported with no indication of their bias, it would cause substantial underreporting, not only to other law enforcement agencies but also for any other purpose to which the data might be put, including internal to SPD and the City of Seattle. Because many types of bias attacks are substantially underreported by victims to law enforcement agencies, further underreporting by law enforcement agencies would compound the problem.⁸⁴

In addition to victim under-reporting, and an increased under-reporting of bias by investigators, the Report documents under-reporting in three subsequent stages of police labeling reflected in the SPD database: Bias Crime, Charge Referred, and Charge Final. The under-reporting of bias focus infects both events that rise to the level of a crime and those that are tracked as incidents only. The Report, however, documents under-reporting of crimes at each of these three subsequent stages:

In addition to missing Bias focus data, there is a concern that the SPD data underreports the frequency of attacks that rise to the level of bias crime and malicious harassment. In the SPD database, these designations are recorded in the fields labeled Bias Crime, Charge Referred, and Charge Final.⁸⁵

Apart from the Report’s data analysis, moreover, Molsberry’s experiences exemplify contention in the field of civil rights in Seattle. In the Ballard case, the victim engaged the official police inquiry processes, and, in part because of Molsberry’s inquiries, the Department initiated an internal inquiry and re-opened the investigation—though unsuccessfully.⁸⁶

⁸³ *Id.*, at 12 n.11; *see also, e.g., id.*, at 23 (tabulating anti-Muslim death and arson threats of Sept. 11 & 12, 2001).

⁸⁴ *Id.*, at 12.

⁸⁵ *Id.*, at 12.

⁸⁶ *Id.*, at 12-13 (recounting victim’s correspondence with Department).

Contention about this event was not confined to the boundaries of criminal law, however. Because of his sense of responsibility for his own neighborhood, and after unsuccessful inquiries among neighborhood representatives, Molsberry re-configured the police database to specify the number and type of bias attack for each of Seattle's 18 neighborhoods.⁸⁷ Molsberry furthermore documents the role of local government civil rights agencies. Implicitly, the Report contends that the city's Department of Neighborhoods, local Neighborhood Councils, and neighbors themselves should assume some responsibility for hate crimes in Seattle. Explicitly, when the Report was released to the public, Molsberry said it confirmed the high rates of crimes motivated by sexual orientation found in a 1995 report by the Seattle Commission for Sexual Minorities.⁸⁸

The Report's text cites the work of the Seattle Office of Civil Rights. The Office of Civil Rights

⁸⁷ See *id.*, at 1, Table 1; see also *id.*, at 3-5 (recounting motivation for study). The Report received substantial news coverage when it was presented to the public in April, 2006. See Manny Frishberg, *Bias crimes in Seattle detailed in new report: Nearly half of all bias crimes are committed against Gays*, SEATTLE GAY NEWS, Fri., May 5, 2006, available online at http://www.sgn.org/sgnnews34_18/page1.cfm (accessed Jan. 16, 2008) (linking Report to home.earthlink.net/~kennem/biascrime (inactive link)). The Report is available online at a different address: <http://home.comcast.net/~kmolsberry/biascrime/> (accessed Jan. 16, 2008); see also Athima Chansanchai, *Bias crimes found in all areas of city: Top 2 motivators cited are race, sexual orientation*, SEATTLE POST-INTELLIGENCER, Thurs., May 4, 2006, available online at http://seattlepi.nwsourc.com/local/268997_bias04.html (accessed Jan. 16, 2008).

Shortly after the release of the Report, a racially motivated hate crime in the Ballard neighborhood received substantial press coverage. Sam Skolnik, *Ballard residents take stand against hate crime*, SEATTLE POST-INTELLIGENCER, Fri., May 19, 2006 (available at http://seattlepi.nwsourc.com/local/270865_ballardparty19.html) (reporting malicious harassment charges against white assailants after April, 2006 attack against African-American Eighth Grader); see also News Release, *Felony Charges Filed in Ballard Hate Crime* (King County Prosecutor's Office, May 9, 2006) (available at <http://www.metrokc.gov/proatty/news/2006/ballardhatecrime.htm>). Without mentioning the previous year's attack, the press reported a substantial neighborhood response "an eclectic group of community activists, musicians and prosecutors gathered Thursday to stand united against hate crimes in their community." The group included representatives from the African-American Jewish Coalition for Justice and the King County Washington Women Lawyers, but no LGBT groups were mentioned. *Id.*

A year before this, at about the time Molsberry learned about the earlier Ballard attack, the press were reporting the King County Superior Court sentencing of Micah Painter's last attacker two years and eight months in prison. See Robert Raketty, *Last of Micah Painter's attackers sentenced: Judge says basher's remorse 'too little, too late,'* SEATTLE GAY NEWS (available at <http://www.sgn.org/sgnnews20/page1.cfm>) (noting jury verdict, not guilty of first degree assault and guilty of lesser charge second degree assault with a deadly weapon). A month before, Painter's other two attackers had been sentenced to eleven months in prison each. *Id.* Molsberry learned about the Ballard attack from the Seattle Gay News. During the same month as the Painter attack, the press reported an attack on a Seattle Men's Chorus singer attending a festival in Montreal, Quebec, "apparently [] the second gay Seattle man to suffer a hate-related assault in the last month." Sam Skolnik, *Gay Seattle man recovering from attack in Montreal*, SEATTLE POST-INTELLIGENCER, Wed., July 21, 2004 (available at http://seattlepi.nwsourc.com/local/182942_assault21.html (accessed June 8, 2006)). "The chorus responded by dedicating 'Not in Our Town,' a song about communities fighting prejudice, to him." *Id.*

Although beyond the scope of this research, a study correlating press accounts of hate crimes to community "responses" would be worthwhile.

⁸⁸ See Frishberg, *Bias crimes in Seattle detailed in new report, id.*

is equipped to receive reports of hate crimes at the same time they are reported to police. According to the staff interviews cited in the Report, the Office of Civil Rights reviews monthly bias crime reports from police, and has “expressed frustration” when “attacks seemed to have clear components of malicious harassment and should have been treated as bias crimes,” but were ruled out as crimes by police.⁸⁹

The Seattle Bias Crimes and Incidents Report takes a hate-related incident as an opportunity for contention about hate crimes. Specifically, the Report utilizes police data to reconstruct knowledge about hate crimes according to a local understanding of neighborhood responsibility that would not otherwise appear in official police data. Yet, the police data impose inherent limits on the potential innovations in local knowledge about hate crimes. First, the Report itself assumes that police-generated data omit substantial numbers of hate crimes. Presumably, therefore, this knowledge is inherently omitted from any knowledge based on police-generated inputs. Yet, since the Report is an analysis of police-generated data, it seems to suffer from the same deficiency that it criticizes.

Second, even though Seattle Police data are capable of capturing some narrative notes, the complexity of knowledge about individual hate crimes is limited by the boxes available. So, as the Report states, some reports “exhibited biases that were clear yet consisted of more than one bias.”⁹⁰ Since the police inputs do not provide a convenient accounting for these “multiple-bias attacks,” the Report counted them as “Other.”⁹¹ Perhaps no inquiry system is capable of establishing a pure description of a hate-related incident, but the array of boxes available on an official set of forms imposes another inherent limit on knowledge.

After its publication, the Molsberry Report became the basis for an official inquiry by the Seattle City Council. The Council invited the Report’s authors and representatives of the Seattle

⁸⁹ *Molsberry Report*, *supra* note 63, at 12-13 (citing interviews).

⁹⁰ *Id.*, at 11.

⁹¹ *Id.*

Police Department to appear before the Council for a public hearing. In advance of this hearing, the Molsberry and Armenakis presented a list of recommendations, based on the Report and titled, “Improving Our Response to Bias Attacks.”⁹² Notably, the Recommendations and The SPD submitted a Memorandum detailing its response.⁹³ The Report and Recommendations also became the basis for a public hearing held jointly by the Seattle Commission on Sexual Minorities and the Seattle Human Rights Commission.⁹⁴ In short, the Molsberry Report became the basis for a significant local event contending about the details of the Police administration of knowledge about anti-LGBT hate crimes in Seattle.

As of this writing, the website for the Hate Crime Awareness Project is no longer available on the Seattle Center’s website.⁹⁵ Nevertheless, another Community Safety Forum was hosted by the Center in the Fall of 2007, “in response to recent news reports about incidents of gay-bashing and malicious harassment on Capitol Hill.”⁹⁶

5.2.3 Comparison

Participants in the feedback meetings in both Seattle and Vancouver noted that groups in the two cities share more similarities than differences. A notable similarity is the instability of

⁹² Ken Molsberry, Kristina Armenakis & Robert S. Jacobs, *Improving Our Response to Bias Attacks: Recommendations for Seattle City Council* (June, 2006), available online at <http://home.comcast.net/~kmolsberry/biascrime/> (accessed Jan. 2008) (linking print and video materials related to Report). Added to Molsberry and Armenakis as a co-author was Robert S. Jacobs, Regional Director of the Anti-Defamation League.

⁹³ See Letter from Ken Molsberry & Kristina Armenakis to Seattle City Council President & Police Chief (Jan.30, 2007), available online at <http://home.comcast.net/~kmolsberry/biascrime/files/RecommendationsResponseToSPD.doc> (accessed Jan. 16, 2008).

⁹⁴ See Molsberry website, available at <http://home.comcast.net/~kmolsberry/biascrime/> (accessed Jan. 2008) (linking print and video materials related to Report). The contention triggered by the Ballard attack has since resulted in a formal inquiry by the City Auditor into the Police Department’s Bias Crime practices. See *Seattle’s Enforcement of Bias Crimes* (Office of City Auditor, Aug. 4, 2008), available at <http://www.seattle.gov/audit/2008.htm> (accessed Aug. 11, 2008); see also *Councilmembers receive final bias crimes audit*, SEATTLE GAY NEWS, Fri., Aug. 8, 2008), available at http://www.sgn.org/sgnnews36_32/page8.cfm (accessed Aug. 11, 2008).

⁹⁵ See <http://www.seattlelgbt.org/hatecrimeproject/> (accessed Jan. 16, 2008).

⁹⁶ See Event Announcement, *Seattle LGBTQ Center Co-Sponsors Community Safety Forum Nov. 27th at 6:00pm*, available at <http://www.seattlelgbt.org/node/1032> (accessed Jan. 16, 2008).

Anti-Violence Programs, at least those that rely on government-funded grants. Seattle's Hate Crime Awareness Project lasted only nine months, and the Vancouver Pilot Project lasted only six. Both Programs have ceased to exist in any form on the websites of their host organizations. Other similarities could be cited,⁹⁷ but more important here are the several important differences that appear in a comparison of Anti-Violence Programs in the two cities.

The most significant difference between the Seattle and Vancouver Projects, for the purposes of this study, lies in the relationship between official hate crime statistics and the knowledge producing practices of each program. In Seattle, official police statistics were fully integrated into the contentious practices of the Hate Crime Awareness Project. Police statistics were used to justify the governmental funding request, police statistics and police incident reports were used to generate the Molsberry Report, which was edited by the Hate Crime Awareness Project Intern, and even after the conclusion of the Internship, the former Intern continued to partner with Molsberry to use the hate crime statistics and reporting process as a site of contention about the proper classification of hate-related events.

In Vancouver, on the other hand, because police statistics, and the information gathering and reporting practices that accompany them, were missing from the resources available, the hate crime statistics and reporting process was unavailable as a site of contention for the Pilot Project. While the Vancouver Pilot Project produced a concluding Report, it did not perform the same role as the Seattle Report. Specifically, it was not used as a vehicle of contention in any form of public governmental inquiry. On the other hand, the absence of hate crime statistics and reporting by police in Vancouver enabled WEAVE to form and produce the survey referred to by the Vancouver Pilot Project Coordinator in his interview. The omission of references to the WEAVE survey from the Pilot Project Final Report, moreover, confirms the disengagement of

⁹⁷ For instance, both anti-violence projects began soon after notorious hate-related events. A more thorough examination of the mobilizing effects of hate-related triggering events would be worthwhile. The discussion here, however, focuses on knowledge-producing mobilizations.

the Pilot Project from explicit contention about official hate-crime classification decisions. WEAVE, and its Seattle counterparts are examined in more detail in the next section.

The analysis performed in the Seattle Report would be possible in Vancouver if police there regularly compiled reports identifying suspected hate crimes, if those reports were adequately preserved, and if the Department were convinced to release information from the reports to a researcher. According to its 2000 Policy Guide, the B.C. Hate Crime Team is officially tasked with maintaining, “a system for tracking and analysis of data on hate-related offences, including . . . offences which include hate as a motivating factor,” and “A data analyst provides support for the Team in maintaining current information on the database.”⁹⁸ Still, such an analysis has never been produced in Vancouver—at least not publicly.⁹⁹

The suggestion by Vancouver’s Pilot Project Coordinator of cooperation “in concert” between police, the LGTB community center, and a nongovernmental group in the United States follows closely after an appeal for a “community response,” that emphasizes “Partnering with community organizations.” But, the Final Report appeals to a particular kind of partnering and cooperation. While it mentions meetings with WEAVE, and despite the Coordinator’s praise for WEAVE during our interview, the Final Report omits any reference to the WEAVE survey results. This omission seems intentional, and it illustrates a difference in the contentious practices of the established LGBT Centre and the more *ad hoc* group WEAVE.

In comparison to the Molsberry Report in Seattle, moreover, both the Vancouver Pilot Project Final Report and the WEAVE Survey Results share another common feature. Unlike the Seattle Report, the two Vancouver reports focus entirely on, “heterosexism, homophobia, and

⁹⁸ B.C. Attorney General & Minister Responsible for Human Rights, *Hate/Bias Crime Policy Guide* (Rev. Sept., 2000).

⁹⁹ The Vancouver Police Department commissioned a Simon Fraser University student to produce a similar, though smaller, analysis of hate crimes in Vancouver neighborhoods, drawn from its police reports for the year 2000. The Department presented this report to lobby for the addition of “sexual orientation” to the ban on hate propaganda in the Canadian Criminal Code. See Scott MacMillan, *Hate Bias Crimes in Vancouver 2001 & 2002* (Vancouver Police Department, undated) (on file with the author).

transphobia.” The Seattle Report on the other hand adopts the formal neutrality represented by the boxes offered in the police incident reports. Instead of focusing solely on systematic change in official hate crime statistics, the Pilot Project Report appeals for greater funding for community-based advocacy and services.

The interviews with Community Anti-Violence Programs revealed the critically important role of less established groups that had been organized for the purpose of establishing knowledge about hate crimes. These *ad hoc* Anti-Violence Groups are examined next.

5.3 *Ad Hoc* Anti-Violence Groups

Established groups like the LGBT Community Centres engage in a range of ongoing, systematic contention and more occasional, *ad hoc* contention about hate crimes. Distinct from contention within established organizations, however, the interviews revealed less established groups that emerged in response to discrete hate-related events. In Vancouver, I interviewed a representative of one such *ad hoc* group, West Enders Against Violence Everywhere (WEAVE). This group was added to the original list of participant groups after I met with the Anti-Violence Pilot Project Coordinator, because of his explicit reliance on the data from the WEAVE Survey. WEAVE did not appear in my initial subject list, because it maintains no website, and because it was a relatively new group. Nevertheless, the group seemed indispensable to a description of hate-related contention in Vancouver. To balance WEAVE, I also attempted to interview a representative of Action Northwest in Seattle—a similar group referenced in the Seattle interviews. While I was unable to arrange such an interview, I was able to construct a description of the Seattle group’s activities from its website and from the descriptions of other informants. The practices on these *ad hoc* groups are compared next.

5.3.1 West Enders Against Violence Everywhere (WEAVE)—Vancouver

I met with Jack Herman, a representative from WEAVE during the lunch hour at the offices of the provincial government agency where he worked. Herman was employed by the Ministry of Public Safety & Solicitor General, the same agency that funded the Anti-Violence Pilot Project at the Vancouver LGBT Centre.

Herman explained the close connection between the Aaron Webster killing and the formation of WEAVE. He indicated that WEAVE issued its first Press Release, announcing the group's formation, in late 2002 or early 2003 when the Webster killing was still receiving significant media attention.¹⁰⁰ Herman indicated that most of the members of the group had saved things like news clippings about bashing, and that he had maintained an envelope of his own with clippings, but no organized database existed apart from the survey. Herman was well informed about the Webster killing, and he noted that the attack had been classified as a "Hate Crime" in the juvenile proceedings and that the youths had received maximum sentences.

The WEAVE Survey has already been mentioned, and the WEAVE organizers did not maintain a website. In the interview, however, I was able to elicit both the "Mandate" of WEAVE and the reasons for the survey:

"Our mandate is to make the West End safer for all of its residents, particularly the gay, lesbian, bisexual, trans-gendered, and two-spirited community. We will measure the violence in our community and share that information with civic authorities and other community groups. Through these partnerships we will establish a community response of zero tolerance to violence on our streets. WEAVE defines violence to include rape, assault, verbal and physical queer bashing and all other forms of hate-motivated attacks."

How we got together was interesting because I was a volunteer on the Bash Line, that is no more, it's defunct now, but... And, I answered a call where a couple had been bashed and referred them and helped them with the police, etc. Months later when the Bash Line was closed due to lack of volunteers I was at a party, and I recognized the voice of this caller—a very distinctive voice. And, she recognized my voice as well, and we sort of got together and introduced ourselves.

¹⁰⁰ WEAVE Interview Notes dated Aug. 18, 2005 (on file with the author).

We said, “now that the Bash Line is gone we should do something.” And, what came out of that was a community meeting to say, “We want to know about violence in our community. We think it’s growing.” And we realized that nobody, no organization had ever measured the violence in the West End of Vancouver. The Queer Bashing violence.

So, we decided, “Well, let’s go measure.”

So, we had a lot of meetings, and we came up with a questionnaire, and we hit the streets. We’d stand outside bookstores, went in bars, coffee shops. And, we asked people: “have you ever been physically or verbally assaulted in the West End?”¹⁰¹

Although the survey was only a year-long project, it can be seen from the interview response that the group consciously chose to compile quantitative, numerical data.

The WEAVE Survey Results allowed respondents to self-identify as gay, lesbian, transgender, or straight. Only a small fraction (six percent in recent months) of straight respondents responded affirmatively to the question: “Have you ever been verbally or physically assaulted in the West End?” These results are juxtaposed to emphasize the overwhelming rate of victimization among Gay (79 percent) and Lesbian (thirteen percent) respondents asked the same question.¹⁰² The Survey results themselves further demonstrate that the group tailored its survey questions to suit the needs of the West End. For instance the Survey asked respondents to describe the locations and other circumstances surrounding their assaults.

The details of the Bash Line and its data-collection activities are worth noting, despite their subsequent disappearance:

¹⁰¹ *WEAVE Vancouver*, DVD, Menu Titles—*WEAVE Vancouver to A Community Meeting*; see also *Hate Crime Study, Rough Cut, Nov. 28, 2005*, DVD, Menu Title—*Research & Reporting*. As recently as June, 1998, the Bash Line was described in materials distributed by legal aid groups in B.C. See Joy Tataryn, *et al.*, *Same Sex, Same Laws: Lesbians, Gay Men, & the Law in B.C.*, at vii-viii (Legal Services Society, Information Update, June, 1998). The description of the Bash Line as it existed in 1998 is consistent with the description provided by Jack Herman and others. The 1996 version of the same publication also described the information-gathering processes of police:

Homophobic violence often comes from strangers. It usually occurs because the offender assumes the victim to be lesbian or gay. The police classify this as a “hate crime.” It is important that you tell the police if you were attacked or threatened because you are a lesbian or gay, or because the offender thought you were. Then they can keep track of how often, when, where, and in what situations this happens. In this way, lesbians and gay men can help protect each other and can help police provide better protection by isolating patterns of violence.

Id., *The Police & You: Your Right to Police Protection*, at 60 (1996). The same section provides a contact telephone number for the “lesbian and gay police liaison” in Vancouver for assistance. See *id.*, at 61.

¹⁰² *WEAVE Survey*, *supra* note 24, Table—“Victims Identify As” (on file with the author). Transgendered respondents reported the lowest rates of recent victimization (two percent). *Id.*

Q: Who operated the Bash Line when it was in existence?

A: Well, I did for its last leg. There was a long history of volunteers in there. It was basically . . . operated off of one cop's desk—financed by the BC Government through a grant to the police and staffed by volunteers from the Queer community. Basically, it wasn't a perfect system, but it was the only system for reporting bashings—except to the police of course. You would phone; you would leave your name and number and what time it was best to call; and then we would call them back and try to assist them then.

Q: Sometimes that would lead to a police report and sometimes not?

A: Sometimes. Right. We always took a report—not a police report, but an information report—if the victim was willing to talk about it. And, we were upfront, “I'm going to take down some, ask you some questions. You know, if you don't want to answer, don't answer.”

The primary reason for the Bash Line was to have somebody to talk to and get some referral service going on.

Q: Did you also, it sounds like, kept some baseline of information. Did you keep those information reports and form some kind of database with those?

A: The police were supposed to. We filled out the forms and—when the victim was willing—and we dropped those off at the cop shop. And they were taken from there. From what I understand, down the road, they weren't putting, using it, or doing anything with them anyway, so....

Q: What Happened to them do you know?

A: I have no idea.

Q:Are they in a box somewhere?

A: Probably. Probably.

Q: The Bash Line went out of operation in ...

A: 2002.¹⁰³

In addition to WEAVE, the Aaron Webster killing triggered the formation of a community group called the Davie Street Safety Committee. Herman described its initial activities: “It was a direct result of Aaron Webster's murder. This Committee was formed after

¹⁰³ WEAVE Vancouver, DVD, Menu Titles—*The Bash Line to Bash Line Ended*

Aaron Webster was killed, and they wanted to do something about it. . . . They incorporated the bash line as a new component of the Pride Line of The Centre.”¹⁰⁴

Herman discussed the results of the WEAVE Survey that were distributed to the media in May, 2005. The Survey questionnaire was designed to capture the circumstances surrounding reported bashing incidents, including location of incidents.¹⁰⁵ But the Survey questions were also designed specifically to elicit profiles describing the typical perpetrators:

We wanted to get a profile of who was doing the bashing. And, we had heard when we were creating the survey—there were a lot of stories going on in the West End, on the street, about a particular racial group [that] was doing most of the attacking, and that they were quite young. And, then we were hearing other stories that there were “swarmings” where male and females were involved. So, we wanted to get a profile. So we started asking “race,” “age” of attackers, “sex,” that kind of thing so we could get a profile.¹⁰⁶

Herman traced the history of WEAVE from its beginnings at around the time of the Aaron Webster killing to the release of the Survey results in May, 2005:

[Q]: Can you explain maybe what you did with the report once it was put together?

[A]: Well, we had a press release, and there was quite a lot of press coverage when we first announced WEAVE and what we were going to try to do. . . .

. . . . late in 2002, Aaron Webster was murdered in Stanley Park. And, so Gay Bashing was like a “hot” story to the media. So when WEAVE was formed and it announced it was going to measure the violence in the West End, they were all sort of “in our face.” So, that was good. We were getting the message out there that we were going to start taking information and measuring violence. And, then, in May of 2005 when we released the results of the Survey, the media was there in full force. They had a lot of questions for us, and we were happy to see that much press coverage, because we’ve always said over and over again that the message has to keep going out there in the community about this violence. And, the more it’s told, the more educated we all are about how safe our streets are—or are not—, you know, an intelligent person can take that information and act accordingly.

¹⁰⁴ See *WEAVE Vancouver*, DVD, Menu Title—*It was a Direct Result*.

¹⁰⁵ See *WEAVE Vancouver*, DVD, Menu Title—*The Report*. Unlike the jurisdictional locations elicited on the FBI’s hate crime incident report forms, which attempt to connect incidents to channels of interstate commerce falling within the legislative authority of Congress, the WEAVE Survey was limited to more functional locations to enable residents to avoid places presenting a particular danger.

¹⁰⁶ See *WEAVE Vancouver*, DVD, Menu Title—*The Report*.

[Q]: You mean to plan for safety, specifically?

[A]: Yeah, personally, to plan for your personal safety. But, also . . . the stats surprised a lot of people who thought that maybe gay bashing was getting better, like getting less. And, you know, it wasn't. It isn't. And, as a matter of fact, what the Survey shows is that bashings are involving more perpetrators than ever .

¹⁰⁷
..

According to Herman, the Survey responses revealed disturbing trends over the preceding five year period. He emphasized three examples from the Survey: (1) the number of perpetrators involved in each incident was increasing; (2) women were becoming more frequent participants; and, (3) the number of teenaged perpetrators was increasing.¹⁰⁸

[Q]: . . .when you did the research for drafting those questions, did you look at any particular resources that would describe how to do a survey like that?

[A]: I did, but to be honest with you, I couldn't find anything that . . . I could lift and model after for gay bashing. . . when I was surfing the web I couldn't find a lot of information about measuring gay bashing—like who had done it? Where had it been done? There had been a lot of studies that I read about gay bashing, but I didn't see any survey models. So I looked at other surveys . . .

....

So, we had yet another meeting, and we said, “what are the things that we want to know, that we don't know?” Forget all these other surveys. And that's what we came up with.

The long and the short of it is that after the Survey was finished, and we got the data, and we got the information out in readable form, we realized that there were other questions that we should have asked. But, you know, live and learn. It was a first attempt.

[Q]: Do you think there will be another one?

[A]: We are debating whether there is going to be another one. If there's going to be another one we're going to try to make it a lot more sophisticated. . . .¹⁰⁹

¹⁰⁷ See *WEAVE Vancouver*, DVD, Menu Title—*Live & Learn to Aaron Webster Murdered*.

¹⁰⁸ See *WEAVE Vancouver*, DVD, Menu Title—*The Stats Surprised a lot of People*. Herman compared the respondents' reports for the preceding year against the same respondents' reports for one-to-five years earlier. Reports for the preceding year showed increases: perpetrator groups of three or more increased from two percent to twenty-two percent; and, perpetrator groups that included women increased from two percent to twelve percent.

¹⁰⁹ See *WEAVE Vancouver*, DVD, Menu Title—*Yet another Meeting to Live & Learn*.

WEAVE disseminated its survey results, beginning in May, 2005, by issuing a press release, granting press interviews, and presenting its results to interested groups.¹¹⁰ Herman noted criticisms raised in the media after the release of the Survey results, and he indicated that any future survey would attempt to meet any legitimate objections. Specifically in response to criticism challenging the scientific methodology of the Survey, Herman concluded: “I said, well we’re not professionals at this, you know. But, somebody has to get out there and measure it. And, so that’s what we did.”¹¹¹

After the conclusion of our interview, Herman volunteered additional information about hate crimes.¹¹² Specifically he condemned both the use of religious rhetoric to promote homophobic hatred and the failure of police and prosecutors to respond to both hate propaganda and hate crimes.

5.3.2 Action Northwest Bias Crime Forum—Seattle

I learned about a Seattle *ad hoc* group during the course of my interviews with the Seattle LGBT Center and the Hate Crime Awareness Project, and during the Seattle feedback meeting. The online “Seattle/Puget Sound Bias Crime Forum,” which was specifically referenced in the interviews, remained available on the World-Wide Web throughout the course of the study. The masthead for the website includes the following greeting:

Seattle/Puget Sound Bias Crime Forum
A division of ACTION NorthWest
Have you been a victim of a bias crime? Have you witnessed an attack?
Sympathetic to the cause? Then this is the Forum for you.¹¹³

This interactive website was developed shortly after a particular hate-related event in Seattle. The website included an interactive “Micah Painter Bias Crime Forum,” “Trial News for

¹¹⁰ WEAVE Interview Notes, dated Aug. 18, 2005 (on file with the author).

¹¹¹ See *WEAVE Vancouver*, DVD, Menu Title—*Live & Learn*.

¹¹² See *WEAVE Vancouver*, DVD, Menu Title—*More About Hate Crimes*.

¹¹³ See <http://www.actionnw.net/micah/> (accessed Jan. 31, 2007).

Micah’s Attackers,” an “Image Gallery,” and “Words of Support for Micah,” in addition to links to “Report a Bias Crime,” to learn about the “Q Patrol” initiative, and to the text of the state malicious harassment statutes.

As the trial and sentencing of Painter’s attackers progressed, the Bias Crime Forum invited readers to participate publicly: “Please join the rest of us from ACTION NorthWest as the verdicts are handed down this Friday, April 8th, and again Friday, May 13th!”¹¹⁴ The Forum also presented local news stories, including prominently a March 9, 2005, Seattle Gay News story which detailed the public contention of nongovernmental groups, including Action Northwest:

ACTION Northwest, a grassroots network of progressive organizations, has a forum about the trial on its website and links to resources for victims of malicious harassment. It can be found at www.actionnw.net.

“We have always been focused on the charge of malicious harassment with a deadly weapon and the jury returned a verdict of guilty on all of those counts,” said Ryan Biava, a spokesperson for Equal Rights Washington, a new statewide advocacy group for the Lesbian, Gay, Bisexual and Transgender community. “That has been our focus throughout, because the laws of the state of Washington protect against this type of attack.” The irony is that Mr. Painter may be protected under Washington law this way, but he can be fired from his job or evicted from his apartment today due to his sexual orientation.

Immediately after the attack happened last June 27, Gay Pride weekend in Seattle, the region’s LGBT community and Seattle’s political leaders came together to publicly decry the vicious nature of the attack. Several benefits were held to help Painter with medical bills and living expenses while he recovered from his injuries, which included bruises, internal bleeding and deep cuts to his face and back.

“I think the public outcry and attention to this – especially from the Gay community – was extremely important in terms of moving this along very, very quickly,” said Seattle City Councilmember Tom Rasmussen, who is openly Gay. “I am sure the police department and the prosecutors would have done their job, but I think that the attention that was given to this really heightened the importance of this in everyone’s mind.”

Rasmussen has long called for lawmakers in Olympia to pass the Anderson-Murray Anti-Discrimination bill, which has languished in one form or another in the Washington State Legislature for 29 years. The bill passed out of the House of Representatives but faces an uncertain future in the Senate.

“The system worked in this case, but it is a reminder to me that we really need to have anti-discrimination laws on the books. The malicious harassment law was extremely important in the prosecution of these men,” said Rasmussen. “If we wouldn’t have had that law on the books there could have been a very different outcome – a far less just

¹¹⁴ *Id.*, Message posted by Dave Hildebrand, Online Media Coordinator, Micah Painter Benefit.

outcome... I hope it finally convinces anyone who doubts the need for a statewide anti-discrimination law that further protection is warranted.”¹¹⁵

I learned about the Seattle Bias Crimes Forum in my correspondence with the Hate Crime Awareness Project Coordinator,¹¹⁶ who noted that Action Northwest was one of three organizers of the community forum in response to the Painter attack.¹¹⁷ The online Bias Crimes Forum was created by Action Northwest shortly after the Painter attack was publicly reported.¹¹⁸ Before the Painter attack, Action Northwest hosted a website with announcements and action alerts, for example tracking the progress of state legislation banning discrimination based on sexual orientation.¹¹⁹ Thus, the Painter attack did not lead to the creation of Action Northwest. The Bias Crime Forum, on the other hand, arose directly out of the Painter attack, and specifically in anticipation of the trial and sentencing of Painter’s attackers.

Posts to the website included a “Call to Action” for a fundraising benefit at the Seattle Center, followed by a “Show of Support and Protest March.” And, in addition to a general “Micah Painter Bias Crime Forum,” listing messages posted by interested users, the site hosted a section titled, “Trial News for Micah’s Attackers.” This Trial News section announced important events and milestones in the criminal proceedings, including the trial and sentencing decisions for Painter’s attackers, and encouraged Painter’s friends and supporters to attend the public proceedings. Action Northwest was, therefore, actively engaged in both public contention in the criminal proceedings against Painter’s attackers and in the coordination of a community

¹¹⁵ See *id.* (reprinting Robert Raketty, “Verdict – Guilty,” SEATTLE GAY NEWS, Mar. 9, 2005). Social contention using Internet Communication Technologies (ICTs) was not limited to either the Action Northwest Bias Crime Forum, or the more conventional letters and articles in the local alternative press, however. The local *Indymedia* website similarly served as a forum for information exchange and argumentation about the Painter attack. See <http://seattle.indymedia.org/en/2004/07/241303.shtml> (accessed Jan. 31, 2007).

¹¹⁶ Specifically, the Project Coordinator referred me to an Action Northwest contact, but I was unable to contact this person to arrange an interview. See Email from Kristina Armenakis to author, dated Dec. 14, 2005 (on file with author).

¹¹⁷ See *A Forum on Public Safety*, SEATTLE GAY NEWS, Fri., Apr. 29, 2005, at 7, available online at <http://www.sgn.org/sgnews17/page7.cfm> (accessed Jan. 1, 2006). The forum was presented May 4, 2005, at the Seattle Center, and the agenda included, “funding opportunities to bring back the Q Safety Patrol.” The other two organizers were the Seattle LGBT Community Center and the LGBT Advisory Council to the Seattle Police.

¹¹⁸ See <http://www.actionnw.net/micah/viewtopic.php?t=5> (accessed Jan. 1, 2006).

¹¹⁹ See <http://www.actionnw.net/frame.htm> (accessed Jan. 11, 2006).

response that included not only nongovernmental groups like the LGBT Center but also Seattle Police and Prosecutors. Thus, unlike WEAVE in Vancouver, Action Northwest was able to channel its contention into some existing channels of official legal contention.

5.3.3 Comparison

The Molsberry Report and the Bias Crime Forum in Seattle and the WEAVE survey in Vancouver suggest how principles of equality are interpreted and applied in the hate crime field by nongovernmental groups. In Seattle, the Molsberry Report gives the following explanation for the application of a formally neutral, antidiscrimination principle in the classification of hate crimes:

When interpreting the results, it is important to bear in mind that the attacks are not always in the direction of members of the dominant culture (black, Muslim, foreign, for example). That is certainly the norm, but there are many instances in which assailants of the minority culture attack members of the dominant culture. For instance in regard to racial bias, black, white, and Asian people appear in the reports both as victims and as attackers. Regardless, bias attacks are pernicious in their effect no matter which direction they happen, and the same community efforts to build respect and acceptance will address both. Therefore the data as a whole may be interpreted generally without regard for this distinction.¹²⁰

The fundamental difference between the Seattle analysis and the WEAVE study, however, lies in the source of the knowledge. The WEAVE survey was constructed and implemented by an *ad hoc*, nongovernmental group, using its own survey as the primary data source. The Seattle study, by comparison, drew exclusively from police-generated bias crime reports and statistics. Although more detailed, it was not significantly different from the Vancouver Police Department -sponsored academic study commissioned to support the hate propaganda amendments to the Criminal Code. Because it draws from police-generated data,

¹²⁰ *Molsberry Report*, *supra* note 63, at 16.

accepting both official terminology and the reliability of the official incident reports, the Seattle study may be seen as fundamentally contained contention.

Perhaps the most illuminating aspect of Herman's account is the significant social consequences caused, at least in part, by the absence of any official hate crime statistics for Vancouver. The founders of WEAVE were motivated by a combination of triggering events, including primarily the abandonment of the Bash Line and the Aaron Webster killing. But they were also motivated partially by one non-event—the void created by the absence of any official hate crime statistics. Stated alternatively, WEAVE took advantage of an opportunity created by the absence of any official inquiry to conduct its own local legal inquiry. The resulting Survey constituted local legal knowledge about queer bashing, and hence social inequality equality. Moreover, in the dynamic surrounding the WEAVE Survey, the founders of the group took advantage of an opportunity to develop their own expertise, and their own credentials, which in turn may be available as resources for either an ongoing, periodic survey, or a subsequent survey conducted in response to another triggering event. In other words, in the event of another notorious hate-related incident, WEAVE exists as a recognizable group, with both a knowledge base and an expertise in the production of legal knowledge that lie outside the official governmental sources. Herman's modest acknowledgement, "you live and learn," may represent the most important outcome of the WEAVE Survey. The Vancouver participants in the feedback process doubted whether the autonomy illustrated by the WEAVE Survey outweighed the absence of official hate crime statistics. Nevertheless, respondents in both Seattle and Vancouver unanimously agreed that maintaining both governmental and nongovernmental sources of hate crime statistics represented the best practice.

Homo- and trans-phobic behavior appears in schools in both Canada and the United States, and in both countries, nongovernmental groups participate in the construction of knowledge about this behavior. Because the concepts hate crime and school bullying can

overlap significantly, School Safety and Education Groups were included in the study, and their practices are compared next.

5.4 School Safety & Education Groups

As indicated in Chapter 3, some school boards in Canada and the United States have adopted official policies or practices to identify hate-related incidents in schools. Nongovernmental groups study hate-related incidents in schools too, and their methods for classifying and inquiring about these incidents provide a useful analytical parallel to community-based Anti-Violence Groups. I interviewed representatives of Safe Schools Coalition in Seattle and Gay and Lesbian Educators BC (GALE—BC) in Vancouver.¹²¹

5.4.1 Safe Schools Coalition—Seattle

Safe Schools Coalition originated in Seattle, and its operations are based in Seattle, but it has grown to become a national, and to some extent an international, organization. Beyond its wealth of publications, which are summarized below, my interview with one of the Coalition's three co-chairs, Beth Reis, revealed further details about the contours of hate crime inquiry within the schools context. Reis explained that there is no uniform policy in the state for reporting school incidents, and that school data and police data about hate-related incidents are entirely separate. On the other hand, Reis counted as one of the group's successes the passage in 2002 of a statewide school anti-bullying law—requiring school districts to consider adopting

¹²¹ In both our initial interview and the follow-up feedback meeting, the Safe Schools representative urged me to include the local Gay, Lesbian, Straight Education Network, GLSEN Puget Sound. Because Safe Schools is a national—even international—organization, the local GLSEN might have been a better pair to the province-wide GALE-BC. On the other hand, GALE-BC includes mostly educators, whereas, GLSEN includes a broader membership—at least in its title. I was unable to include GLSEN, however, primarily because of my own time constraints. Still, it is important to notice the structural and functional differences between Safe Schools and GALE-BC.

policies defining bullying, and establishing a state-issued model policy. The Coalition had since compiled a report about compliance with the new bullying law.¹²²

After our interview, Reis provided additional, detailed references to research either conducted for or available from the Coalition.¹²³ Reis also participated in the Seattle feedback meeting and provided additional information about the Coalition and school safety policy. In response to the description of the Vancouver School Board Pride Committee, Reis gave further details about the Seattle School District LGBT program—the School District has assigned a paid programming staff position whose “primary function” is to help with LGBT initiatives in schools.¹²⁴ She explained that the new anti-bullying law does not require “any kind of state-level reporting system” or even district-level reporting system for discriminatory harassment in schools.¹²⁵ Reis further noted that schools “often don’t report” hate crimes to the police or inform kids of their right to go to police, even when criminal complaints would be appropriate and that distinguishing between hate crime and harassment is difficult within the schools.¹²⁶

¹²² Interview Notes, Safe Schools Coalition (on file with the author); *Safe Schools Coalition*, DVD.

¹²³ Among the citations provided were: Office of Superintendent of Public Instruction, *Washington State Survey of Adolescent Health Behaviors: Analytic Report* (E.L. Einspruch, et al. eds. 2001); Carmen McDowell, *The prevalence, characteristics & typology of Washington state school district policies on bullying, harassment, and discrimination* (Oct. 7, 2002), available at <http://www.safeschoolscoalition.org/PolicyAnalysisProject-Final10-6-02.pdf> (accessed Aug. 12, 2003); D. Olweus, *BULLYING AT SCHOOL: WHAT WE KNOW & WHAT WE CAN DO* (1993); L. Jenks, Washington State Department of Health (unpublished research for the Safe Schools Coalition from the 2002 Healthy Youth Survey); T. Harachi, et al., *United States*, in *THE NATURE OF SCHOOL BULLYING: A CROSS-NATIONAL PERSPECTIVE* (PK Smith, et al. eds.); Washington attorney General’s Office, *Anti-Bullying Brochure* (available at http://www.atg.wa.gov/bullying/BullyingBrochure8_05.pdf). Among these, Carmen McDowell’s 2002 study of Washington state school district policies on bullying, harassment, and discrimination bears a striking resemblance to a Duluth, MN research project cited as influential by the Minneapolis Schools representative in a later interview.

¹²⁴ See *Seattle Feedback*, DVD, Menu Title—*Seattle Schools LGBT Committee*.

¹²⁵ See *Seattle Feedback*, DVD, Menu Title—*Bullying Law Weaknesses*.

¹²⁶ See *Seattle Feedback*, DVD, Menu Title—*Rural Police Differences*.

The Coalition publishes numerous resources targeted primarily for use by educators.¹²⁷ The publications demonstrate that the Coalition maintained a research practice from its beginnings. Early in its existence, the Coalition began a study of incidents of anti-gay violence in Washington state schools. The study was meant to present more than a head count of incidents; instead it gathered “objective facts” to tell the stories of those who did and did not survive the incidents. The Report issued at the conclusion of the study summarizes the Coalition’s formation story in its acknowledgements section:

We are indebted to Dr. Robert Bidwell who, as a member of the Seattle Commission on Children and Youth, chaired the landmark 1988 hearings on the needs of GLBT youth and founded the committee that would become the Safe Schools Coalition.¹²⁸

This report, issued in 1999, begins with a description of the Coalition and its Safe Schools Project, established to conduct a five-year study of anti-gay school violence.¹²⁹

Although limited to school-related events, the Coalition’s 1999 Report at the conclusion of the Anti-Violence Research Project constitutes a significant example of hate crime classification. After analyzing the “sometimes-brutal,” narratives for each of the 111 incidents reported, two Appendices provide significant insight into the attitude of the group to the existing classification system for hate-related activity in schools.¹³⁰ In particular, the Legal Appendix lists school policies and union contracts in the state that “specifically prohibit harassment and

¹²⁷ A partial list of publications focusing on hate-related incidents in schools, includes: Brochure, *The Safe Schools Intervention Services: Helping schools end anti-gay bullying and harassment* (Feb., 2003); Report, *Eighty-Three Thousand youth: Select Findings of Eight Population-Based Studies, as they pertain to anti-gay harassment & the safety and well-being of sexual minority students* (May, 1999); *Safe Schools Resource Guide: Helping Educators Serve ALL Youth & Families Regardless of Sexual Orientation or Gender Identity* (Beth Reis ed., 3rd ed., Nov., 2001); *Safe Schools Resource Guide—Washington State Supplement: Helping Educators Serve ALL Youth & Families Regardless of Sexual Orientation or Gender Identity* (Beth Reis ed., Nov., 2001); Report, *They don’t even know me!: Understanding Anti-Gay Harassment & Violence in Schools, A Report On the Five-Year Anti-Violence Research Project Of the Safe Schools Coalition of Washington State* (Beth Reis, et al., Jan., 1999).

¹²⁸ See Report, *They don’t even know me!*, *id.*, at ii.

¹²⁹ *Id.*, at 1, Executive Summary (emphasis in original) (footnote omitted).

¹³⁰ See *id.*, Appendix A, *Legal Definitions, Laws, & Policies*, by Karen Kane; Appendix B, *Towards an Appropriate Response to the Problem of Anti-Gay Harassment in Schools*, by Carolyn Halley.

discrimination based on sexual orientation,”¹³¹ and “Recent Lawsuits and Settlements,”¹³² including a settlement by a Seattle (Kent, WA) school district for “six years of escalating anti-gay verbal harassment (by peers and, in some cases, school district employees)” against former student Mark Iversen. The Appropriate Response Appendix begins by noting the “dearth” of studies and lack of “program elements” related to anti-gay school harassment, despite the recommendations of a federal “Youth Suicide” Task Force Report.¹³³ Specifically included in the recommended responses are school policies for “monitoring” bullying behavior.¹³⁴ One revealing observation from the Appropriate Responses Appendix addresses the “local political climate” measured by local lawmaking:

The proportion of school districts offering mental health services targeting sexual minority youth appears to vary widely as a function of the political climate of the community. One study of 250 school districts reported that nearly a quarter of districts in communities with anti-gay-bias ordinances offered support groups or counseling for gays, lesbian, and bisexual students, while nearly none of the non-ordinance districts had such programs.¹³⁵

The conclusions recommend the open adoption and implementation of written school policies against anti-gay harassment, for each locality: “schools should create policy prohibiting anti-gay language and behavior on the district or building level. These policies would optimally be created with student input, and would be posted prominently.”¹³⁶

The Coalition continues to monitor hate-related incidents in schools. Its “Intervention Services” brochure invites reports of “all [school] bullying and violence, especially anti-gay harassment and other bias-based discrimination. . . . You do NOT have to be gay, lesbian, bisexual or transgender to use our services.” Those seeking help are directed to either the

¹³¹ *Id.*, at 67-68 nn.7-12 (citing policies).

¹³² *Id.*, at 68.

¹³³ *Id.*, Appendix B, at 69.

¹³⁴ *Id.*, at 70 n. 21 (and accompanying text).

¹³⁵ *Id.*, at 70 n.23 (and accompanying text).

¹³⁶ *Id.*, at 73. After issuing its January, 1999 Report, the Coalition conducted a meta-analysis of eight recent quantitative studies of anti-gay harassment in schools in the United States. This report describes the eight governmental and academic studies. *See Report, Eighty-Three Thousand youth, supra* note 127, at 1.

“Intervention Hotline,” a toll-free telephone number or the “Intervention Team” email address. The hotline is answered by a caseworker at the office of Hate Free Zone, another participant in this study.¹³⁷ While the Coalition does not maintain a formal database listing all hate incidents it has discovered, the group’s monthly minutes do reference past incidents, and Reis maintains these minutes on a computer hard drive along with the group’s other organizational records.¹³⁸

In 2001, the Coalition issued its third edition of the Resource Guide and the first edition of a Washington State Supplement to the Resource Guide. The primary Resource Guide includes a Law and Policy section that states:

A growing number of states and school districts are adopting laws and policies that explicitly prohibit discrimination and harassment on, among other factors, sexual orientation, and gender identity. Regardless of local law or district policy, of course, public schools have a constitutional obligation, under the Equal Protection Clause of the Fourteenth Amendment, not to selectively protect children from harm. Failure to protect a child can and has resulted in administrative intervention by the U.S. Department of Education as well as civil suit.¹³⁹

The Handouts accompanying the Resource Guide emphasize the need for record-keeping to establish the existence of anti-gay harassment in schools. In addition to recommendations to “involve the police if you believe a crime may have been committed (including malicious harassment),” the Handout, *An Administrator’s Guide To Handling Anti-Gay Harassment*, presents recording recommendations:

KEEP A RECORD of the events in the permanent files of the targeted student, with his or her permission, and the offenders, if there has been any disciplinary action. Also keep an incident report on file in a malicious harassment log, so that patterns can be discerned and ongoing problems can be addressed.

¹³⁷ The 2003 printing of the Intervention Services Brochure explained that the hotline as, “actually it is Planned Parenthood’s Sex Information Line; they help the Safe Schools Coalition with these calls.” By the time of our 2005 interview, however, Beth Reis identified Hate Free Zone as the Hotline operator. *See Safe Schools Coalition*, DVD.

¹³⁸ Other information-related activities include a “Zine” for kids (www.safeschoolzine.org). Like the Coalition’s many research resources and reports, the Zine is available on its sophisticated website. The group also circulates a “news digest,” about three times each year, which along with summaries of its monthly meeting minutes is distributed to its members via a list serve. *See Safe Schools Coalition*, DVD.

¹³⁹ *See Safe Schools Resource Guide: Helping Educators Serve ALL Youth & Families Regardless of Sexual Orientation or Gender Identity* (hereinafter Resource Guide), *supra* note 127, at 14 ¶ 6.7.

The same handout encourages school officials to be vigilant against retribution against those who report harassment, and to announce “firm” policies each year.¹⁴⁰ The Handout for educators intervening in harassment encourages teachers to both stop the behavior and use the event to educate students. It also includes directions for contending with unsupportive administrators.¹⁴¹ A separate Handout guides educators to surviving anti-gay harassment.¹⁴² This handout also emphasizes record keeping:

KEEP A WRITTEN RECORD:

- Write down everything that led *up* to the harassing incident(s) as well as what was said and done *during* the incidents. Note the time, location and who was involved (including witnesses).
- Write down the names of those in whom you have confided or from whom you have sought help *since* the incident. Note the time, location and what was said during those conversations.¹⁴³

This handout also notes the possibility of local laws prohibiting harassment, including local versions of hate crime laws:

- If anti-gay slurs were used in the course of the incident, tell the police officer that the crime (or one of the crimes) you are reporting is “malicious harassment as defined by RCW 9A.36.080.” Stress that the crime was motivated by hate based on perceived sexual orientation. You don’t have to say whether you are actually gay and you shouldn’t be asked.
- Describe in detail the hate or prejudice that was expressed and what caused you to fear harm. For example, “They called me ‘faggot’ and said they would ‘kick my butt’.” Or, “They asked me why ‘dykes’ liked other girls and said they would ‘teach me to like boys’.” If the assault was physical and you have physical pain, make sure it is written down in the police report. Get the incident number from the officer and ask how to get a copy of the police report. Get the officer’s name and badge number.¹⁴⁴

Thus, even though the contention of the Coalition is directed toward education and schools, it directly addresses homophobic hate crimes that occur at school.

The Washington State Supplement contains much of the same information as the primary Resource Guide. It adds information about state-specific resources, for instance, the Washington

¹⁴⁰ *Resource Guide, id.*, at 63, 64.

¹⁴¹ *Resource Guide, id.*, at 65-66.

¹⁴² *Id.*, at 67-68.

¹⁴³ *Id.*, at 67 (emphasis in original).

¹⁴⁴ *Id.*, at 68 (some citations omitted).

State School Safety Center, sponsored by the State Superintendent of Public Instruction, which, “provides model bullying/harassment/ intimidation policy.” The largest part of the Washington State Supplement, however, is contained in the Local Community Resources section, which lists local governmental and nongovernmental groups organized in ten regions throughout the state.¹⁴⁵

5.4.2 Gay and Lesbian Educators BC (GALE-BC)—Vancouver

Steve LeBel, Media Spokesperson for GALE-BC initially expressed reluctance to participate because the group saw itself as more of a “clearinghouse” for educational information than a participant in contention about hate crimes.¹⁴⁶ During the eventual interview, moreover, LeBel distinguished hate crimes, like the Webster killing, from school bullying. One of the group’s leaders does have a history of individual advocacy in the field, including a partially successful lawsuit challenging the exclusion of LGBT subject matter from his Kindergarten teaching curriculum.¹⁴⁷ The group itself, however, focuses on providing resources to educators. The group does, however, serve as a research resource center for bullying studies and as a provider of education in the field of school bullying and harassment against LGBT students.

¹⁴⁵ See *Safe Schools Resource Guide—Washington State Supplement: Helping Educators Serve ALL Youth & Families Regardless of Sexual Orientation or Gender Identity*, *supra* note 127, at 21-35.

¹⁴⁶ See Interview Notes, GALE-BC (on file with the author). School safety groups in both Seattle and Vancouver recognize that hate crimes occur in school settings. Research published by Seattle’s Safe Schools Coalition and incorporated into the educational materials of Vancouver’s GALE-BC surveys the national school statistics gathered in the United States, including statistics on “School Hate Crime Victimization.” Furthermore, the same research expresses hope for improvements in national hate crime data collection efforts, particularly the use of randomized crime victim surveys to test for uniformity in police reporting practices. See Beth Reis, *Why Must Public Schools Teach About Sexual Orientation? in Challenging Homophobia*, at Rationale, pages 1-6, (arguing that, “the ongoing addition of NCVS data on hate crime may allow sound estimation of the extent of underreporting, and examination of whether current cross-state variations in hate crime rates seen in UCR data are functions of different levels of hate crime or of different [police] reporting practices.”). See also generally, The Nation’s two crime measures, U.S. Department of Justice May 2003, available at <http://www.ojp.usdoj.gov/bjs/abstract/ntmc.htm> (revised 5/21/03) (comparing UCR and NCVS). Yet, critically, the Safe Schools Coalition juxtaposes the national hate crime statistics efforts with local efforts in Seattle to document and remedy homophobic hate crimes, including those that occur both inside and outside school settings. See *id.*, at 2-3 (collecting local legal authorities). Local efforts to document and quantify homophobic hate crimes in Vancouver, by contrast, are more limited.

¹⁴⁷ See *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710. The Supreme Court (Per McLachlin C.J.C.) held that the Surrey, B.C. School Board acted outside the authority of the B.C. Schools Act, and its own policies, in its resolution refusing to authorize three books for classroom instruction because they related to “same-sex parented families.” See *id.*, ¶¶ 1-2.

In the subsequent Vancouver feedback meeting James Chamberlain, another GALE-BC representative elaborated on the information provided in the initial interview. Chamberlain explained that BC Schools do not “track” incidents; there is no mechanism for doing so. The “McCreery Center did a survey of 99 incidents in schools in 1999,” and this constituted the “only statistics” on school violence he knew of in BC.¹⁴⁸ Although Chamberlain pointed to Victoria and Vancouver public schools as having made “concrete” efforts to do something about LGBT school harassment, he also noted the absence of any mechanism for province-wide incident tracking.

As with the Seattle Coalition, much of the information I obtained from GALE-BC can be derived from the extensive literature that it produces and provides to educators. The 2000 version of its informational brochure includes the following Statement of Purpose:

There is a pressing need for lesbians, gays, bisexuals, and transgendered people and allies to be able to support one another in the face of homophobia and intolerance within the educational system and society in general.

The primary focus of GALE-BC is to advocate for change in the educational system which will result in a positive environment for lesbians, gays, bisexuals, and transgendered people in education, whether they are students, parents, teachers, support staff, or administrators.

GALE-BC also offers support to its members through regular meetings, social events and a monthly newsletter.¹⁴⁹

Its goals and commitments include several items related to homo- and trans-phobic violence and harassment:

¹⁴⁸ See *Vancouver Feedback*, DVD, Menu Title—*Tracking School Incidents*.

¹⁴⁹ Brochure, *Committed to acceptance and understanding through quality education* (GALE-BC, June 2000 rev.). GALE-BC’s most significant publications include the titles: *Challenging Homophobia in Schools: A K to 12 resource for educators, counselors & administrators to aid in the support of, & education about Lesbian, Gay, Bisexual, & Transgender youth & families* (GALE-BC, 2nd ed. 2004); *CREATING & SUPPORTING A GAY/STRAIGHT ALLIANCE* (GALE-BC, 2nd ed. 2004); *Dealing with Name-Calling: a resource produced by GALE* (2005). Most of its publications are made available on the group’s website www.galebc.org. These publications reveal some interaction between groups included in this study. For example *Challenging Homophobia* includes both a July 27, 2004 endorsement letter and a letter of introduction to educators and service providers from Vancouver PFLAG. See *Challenging Homophobia, id.*, Introduction, at 6, 7-8. The acknowledgements also credit both the current Trans Alliance Society, and the former Zenith Foundation, also participants here. See *id.*, Introduction, at 10. Also included is a six-page article by Beth Reis, co-coordinator of the Safe Schools Coalition in Seattle. See Beth Reis, *Why Must Public Schools Teach About Sexual Orientation?* in *Challenging Homophobia, id.*, Rationale, at 1-6.

- Increasing awareness of discrimination and harassment on the basis of sexual orientation or gender identity
- Stopping homophobic slurs, violence and intolerance in educational settings
- Effective non-harassment and antidiscrimination policies

While GALE-BC emphasizes educational materials, these materials do address anti-LGBT violence and harassment. Its most recent publication, *Dealing with Name-Calling*, begins with a four-page summary of the April, 2005 decision of the BC Court of Appeal reinstating a human rights tribunal judgment for monetary damages and other relief against a North Vancouver school for failing to protect one of its students from anti-gay bullying and homophobic taunts. The student, Azmi Jubran, “wasn’t gay,” but the Court of Appeal reinstated the judgment in his favor because he had been the victim of physical and verbal assaults that “attributed” negative stereotypes about homosexuality to him. The group summarized the Court of Appeal conclusions criticizing the absence of school Codes of Conduct, Training, Curricula, and Safety practices, addressing anti-LGBT discrimination and violence.¹⁵⁰ Perhaps based on the school district’s failure to monitor the continued harassment of Jubran, the 2005 Name-Calling booklet presents a five-point list of anti-gay bullying actions.¹⁵¹ The list concludes with a forceful appeal for monitoring and reporting to ensure enforcement:

5. Report, record and follow-up

Follow-up with school behaviour forms, think sheets, referral forms and put the problem on staff committee or staff meeting agendas. Record what happened, where, why, when, who was involved, how many times it has happened, how long it has been going on and who were the bystanders. This can be used to assess and identify repeated behaviour or aggressors and victims and facilitate discussions with parents, police and any other community agencies.

Report the problem to your administrator, who will need to follow up with:

- School Code of Conduct policy changes
- A School-wide Strategy to deal with homophobic slurs
- Case-by-Case Intervention plans
- Parent and Community education programs¹⁵²

¹⁵⁰ *Challenging Homophobia, id.*, 2-5.

¹⁵¹ *Id.*, at 12-13.

¹⁵² *Id.*, at 13.

In addition to the Jubran case summary and the new reporting and monitoring recommendations, the 2005 Name-Calling Booklet summarizes two other recent events. First, the booklet includes passages from the province-wide inquiry conducted by a task force of the Ministry of Education, concluding in 2003.¹⁵³ Second, the booklet recounts the debate and adoption of the April 1, 2005 British Columbia School Trustees Association resolution encouraging the adoption of local school district anti-gay harassment policies. This resolution was passed “as a result of a lack of action by the BC Ministry of Education to advocate for LGBT students’ safety in schools.”¹⁵⁴

A noticeable difference appears in both the BCSTA resolution and the recommendations of the Name-Calling booklet. The earlier Challenging Homophobia handbook recommends the adoption of student codes of conduct that mirror the language of the BC Human Rights Act. The Name-Calling booklet and the BCSTA resolution, on the other hand, for the first time recommend language exceeding the protections of the Act. After quoting the prohibited grounds of discrimination in the Act, the booklet states:

Ensure your school’s code of conduct policy uses specific and inclusive language such as:

“Discrimination and harassment towards students or employees on the basis of their real or perceived sexual orientation or gender identification will not be tolerated.”¹⁵⁵

The BCSTA resolution calls for policies that, “prohibit discrimination against, lesbian, gay, bisexual, and trans-identified students, as well as students who are harassed due to perceptions of their gender identity or sexual orientation.”¹⁵⁶ By seeking prohibitions against gender identity harassment, both the Name-Calling booklet and the BCSTA resolution are using a local policymaking forum to advocate the expansion of equality rights. The booklet notes that both Vancouver and Victoria school districts have adopted such policies.¹⁵⁷

¹⁵³ *Id.*, at 6, 17.

¹⁵⁴ *Id.*, at 17.

¹⁵⁵ *Dealing with Name-Calling: a resource produced by GALE, supra* note 149, at 16.

¹⁵⁶ *Id.*, at 17.

¹⁵⁷ *Id.*

Like its name-calling publication, the 2004 second edition of GALE-BC’s resource manual addresses hate crimes both in schools and in society.¹⁵⁸ One telling aspect of the Challenging Homophobia manual is its utilization of past hate crime inquiry results. The resource manual relates the results of numerous surveys and studies about anti-LGBT school harassment in both the US and Canada. One item, titled “Just the Facts . . . On Gay and Lesbian Students and Schools,” documents “Anti-Gay Violence and Harassment” and summarizes findings from studies by the US Department of Justice, the National Gay and Lesbian Task Force, and one additional US study.¹⁵⁹ A second item, titled “More ‘Just the Facts’ . . . On LGBT Students in British Columbia,” compares the results of LGBT youth hate crime studies in the US with a 1992 adolescent health survey and a 1999 LGBT adolescent health survey. While the results cited show similar degrees of “Anti-Gay Violence and Harassment” in schools in BC and the US, the US results include a reference to Department of Justice criminal justice studies.¹⁶⁰ No BC criminal justice data are referenced.¹⁶¹

The GALE-BC Challenging Homophobia manual is not organized the same as the Safe Schools Coalition Resource Guides, but it contains the same kinds of information, and significantly similar contention for reform to local and provincial school bullying laws. The Strategies section suggests ways to take action against homophobia; to create a safe school environment, school staff are encouraged to develop and implement clear policies:

A safe school environment can only be created when effective policies are in place and enforced. It is a school staff’s obligation to be proactive in ensuring a safe environment for all. Every child needs to feel acceptance, respect and approval to feel a sense of security and belonging.

....

¹⁵⁸ *Challenging Homophobia in Schools: A K to 12 resource for educators, counselors & administrators to aid in the support of, & education about Lesbian, Gay, Bisexual, & Transgender youth & families (hereinafter Resource Manual)*, supra note 149, Rationale, at 2-3 nn.10, 12-13.

¹⁵⁹ *Resource Manual, id.*, Rationale, at 22, 24 nn.18-21.

¹⁶⁰ *See id.*, at 23 nn.3, 14, 19, 20, 22, 26, & 24 n.18.

¹⁶¹ *Id.*, Rationale, at 25-26 (citing Being Out: Lesbian, Gay, Bisexual and Transgender Youth in BC: An Adolescent Health Survey (McCreary Centre Society, 1992 & 1999)).

At the school level there must be clearly delineated and enforced policy which ensures that schools are safe places, free from discrimination and harassment, for all people. Such policies need specifically to address issues of sexual orientation. Policies need to be publicized to the entire school community, so that the consequences of unacceptable behavior, and the procedures for dealing with it, are clear to all.¹⁶²

Similarly, the strategies section concludes with suggestions for training “to enable staff to recognize and respond to individuals and groups who have perpetrated homophobic harassment and violence,” and strategies to “Lobby and support local, district, provincial and national education organizations”:

Encourage the Ministry of Education and school boards to enact and enforce anti-homophobia and sexual harassment policies that explicitly include sexual orientation. These non-discrimination policies must protect the rights of teachers to discuss sexuality in an inclusive, accurate, and specific manner. As well, encourage all levels of teachers’ associations to include sexual orientation in all non-discrimination statements, whether in policy or in the collective agreement and to establish and support initiatives that deal with gay, lesbian, bisexual and transgender(ed) issues.¹⁶³

To protect students experiencing anti-LGBT violence in schools, staff are encouraged to use prevention, including discussions utilizing “teachable moments,” and an explicit student code of conduct and strong disciplinary actions.¹⁶⁴ And, staff members are invited to “Consult with the police liaison officer regarding LGBT issues.”¹⁶⁵ Among the support resources for students are “School Boards that specifically support youth through anti-homophobia education and policies to protect students from anti-gay harassment (i.e. Greater Victoria (SD #61)) and Vancouver (SD #39),” “Police and School Liaison Officers,” and “Media Coverage.”¹⁶⁶ Strategies for teachers include a “Teacher’s Self-Evaluation of Bias & Behavior,” meant to reveal a “hidden curriculum” of bias.¹⁶⁷ When dealing with LGBT families, teachers are asked to “Inform parents (LGB or otherwise) of any harassment/intimidation directed at their child, for whatever

¹⁶² *Id.*, Strategies, at 1-2.

¹⁶³ *Resource Manual*, *supra* note 149, Strategies, at 5.

¹⁶⁴ *Id.*, Strategies, at 7.

¹⁶⁵ *Id.*, Strategies, at 8.

¹⁶⁶ *Id.*, Strategies, at 16.

¹⁶⁷ *Id.*, Strategies, at 17.

reason.”¹⁶⁸ But, while some monitoring and tracking of incidents is implicit in ensuring an enforced policy, the manual does not explicitly detail incident reporting and monitoring policies as a recommended strategy.

Like its larger publications, GALE-BC’s newsletter, *GALE Force*, stresses the field of education but includes explicit references to hate crimes. The March/April issue leads with an article about demands for province-wide schools policies against homophobic conduct, “including both emotional and physical abuse.”¹⁶⁹ The article recounts the report of the 2003 Safe Schools Task Force which led to Ministry of Education guidelines, but it criticizes both the Task Force recommendations and the guidelines:

The former neglects to make any specific recommendations around homophobia, despite detailing numerous examples in the body of the report; the latter encourages school boards to include references to homophobia in Codes of Conduct, but doesn’t mandate such inclusion.

The issue reprints articles from both the United States and Canada including articles about “hate crimes” in schools. A second lengthy article, reprinted from Vancouver’s *Xtra! West* newspaper, details criticism of a proposed provincial Safe Schools Act recently introduced by the former Task Force chair. The article noted that the bill “specifically aims to prohibit discrimination and harassment on the basis of sexual orientation and gender identity.” Critics, including GALE-BC members, explained that while the bill addressed school codes of conduct, it would not “make these codes mandatory and, as such, they say school boards will still be left with the option to do nothing.”¹⁷⁰ In addition to omitting a firm mandate, the critics pointed out the absence of any educational or training requirements to introduce the problem of homophobic harassment to school communities outside those already enforcing policies in Vancouver and Victoria.

¹⁶⁸ *Id.*, *Strategies*, at 27.

¹⁶⁹ *GALE Force*, *The Newsletter for Friends and Families of the Gay and Lesbian Educators of BC* (Vol. 15 No. 2 Mar./Apr. 2005).

¹⁷⁰ *See id.*, *Too Little. Too Late?* (reprinting Jeremy Hainsworth, *Safer Schools: Critics Challenge Mayencourt’s New Education Bill*, *XTRA! WEST*, Feb. 3, 2005).

One article addressed a recent hate-related crime in Vancouver that had no apparent connection to schools.¹⁷¹ The article recounted the verdicts and sentences against the two young offenders and two adults who killed Aaron Webster in Stanley Park in November, 2001. The newsletter article appended the following note:

Editor’s note: Cran was sentenced to six years on February 8th, 2005. The judge who heard the case did not characterize it as a hate crime based upon sexual orientation which would have resulted in a longer sentence for Cran. The queer community was outraged that Webster’s murder was not acknowledged as a gay bashing.

Adjacent to the Webster story, the newsletter described a “hate crime” that was being investigated at a public school in the US.

In sum, the information practices of GALE-BC clearly include both providing educational materials and advocating for anti-bullying policies in local and provincial laws. And, at least to the extent that acts of bullying and harassment in schools sometimes constitute hate crimes, these activities constitute contention in the hate crime field. News coverage and commentary from Vancouver’s XTRA! West newspaper illustrates the perceived connection between the problem of school bullying and harassment and the curriculum in schools.¹⁷² Robin Perelle’s commentary connects demands for curriculum inclusion with demands for safety from homophobic violence, with a reference to the pending provincial safe schools legislation:

I want to exist.

And I want our province’s youth—gay and straight—to know it. I want them to learn, from the earliest possible age, that I am part of their world and have every right to share it.

I want regular queer references in classes to reach the clueless kids, the friendly kids, the angry kids, the ignorant kids, and especially the kids currently indoctrinated by parents, churches and other powerful adults to hate us and try to hurt us.

....

We already know we can’t leave it up to our school districts to take the lead and explicitly prohibit homophobic harassment. We tried that. Only two

¹⁷¹ See *id.*, Terri Theodore, *Mixed Verdicts in Vancouver Gay Murder*, CANADIAN PRESS, Dec. 10, 2004.

¹⁷² Compare Lori Kittleberg, *Education, Oppal says classes exclude queers, Corren complaint yields new course & promise of review*, *id.*, at 7, 9 (B.C. Attorney General praising creation of elective grade 12 course), with Robin Perelle, *Naked Eye, Some Victory*, *id.*, at 5 (“one little elective course ain’t gonna do it.”).

districts rose to the challenge. Vancouver and Victoria. That’s it. Two districts out of 60.

Two more districts at least mention sexual orientation in their policies. The rest are silent. Hardly a pass in anyone’s book.

I hope no one in government thinks I’ll forget about the Safe Schools bill now that I’ve been offered a shiny, new elective course.¹⁷³

Because of the perceived connection between school violence and school curriculum, and because of the placement of school violence in an educational framework, in other words, supporters of provincial and local anti-bullying policies are apt to consider their advocacy as related to education rather than hate crimes. Yet, the two fields clearly overlap.

5.4.3 Comparison

The differences between the Seattle and Vancouver school and education groups were negligible. Both groups engage in contention about hate-related events, but both do so primarily through the vehicle of educational materials meant to prevent school bullying and harassment. The groups share a common interest in the passage of school anti-bullying legislation, and the legislation sought by each group is meant to implement standardized educational and anti-harassment policies at the local school board level. The Washington Legislature has adopted such legislation; whereas, the B.C. Legislature has not. Neither B.C. nor Washington has any legal mechanism for systematically collecting data about school bullying and harassment on the basis of sexual orientation or gender identity or expression.

The radical similarity of groups that monitor school violence in the two locations may seem irrelevant, but there is a reason for the inclusion of these groups in the study. As will be discussed in the concluding analysis of Chapter 6, nongovernmental groups that contend in the hate crime field are significantly influenced by their local legal environment. In British Columbia and Washington, school anti-harassment policies are regulated at almost the identical locations within government. This fact of legal logistics makes school safety groups an ideal

¹⁷³ Perelle, *Naked Eye*, *id.* (adding quip, “one little elective course ain’t gonna do it.”).

basis for comparison with groups that contest the classification and exclusion of hate crimes by police investigators.

5.5 Family Support Groups (PFLAG)

Chapters of Parents and Friends of Lesbians and Gays (PFLAG) exist throughout both Canada and the United States. These groups share more than a common organizational name—they are part of the same international organization. PFLAG representatives provided interviews in both Vancouver and Seattle. Like the school safety groups at both sites, the PFLAG groups utilize extremely similar information and contention practices in response to hate-related events. Therefore, they are only briefly described here.

5.5.1 PFLAG—Seattle

The Seattle PFLAG group referred me to Wendy Wartes, the Chair of the PFLAG chapter in nearby Bellevue, Washington.¹⁷⁴ I met Wartes when I attended one of the chapter’s monthly meetings. The meetings follow a standard three-part PFLAG format: (1) introductions and expressions of “support” and confidential sharing in small groups; (2) an educational event with questions and answers; and, (3) suggestions for advocacy, “These may include groups to attend, letters to write, testimony before city, county or state officials, and marches and rallies.”¹⁷⁵

Though she indicated “faith” in the Seattle Police, relative to police outside the city, the group Chair gave me several examples of recent advocacy by the group related to hate crimes in Seattle, in particular the Micah Painter attack. In response to calls for support, the group had raised money for medical and legal costs, attended a courthouse rally in support of Painter, and

¹⁷⁴ See *Hate Crime Study, Rough Cut, Nov. 28, 2005*, DVD, Menu Title—*Families*.

¹⁷⁵ See Letter, *Welcome to PFLAG Bellevue* (undated) (on file with the author).

joined with other groups to attend the trial itself to show the jury and court that Painter had widespread community support. She also recalled that group members had participated in vigils for Matthew Shepard, the gay college student killed in Laramie Wyoming in 1998.

In July, 2005, an evangelical Christian group scheduled a conference to coincide with the Seattle Pride weekend. In response, the Seattle-area PFLAG group organized a counter-conference timed to coincide with the evangelical conference. The flier produced for the event stated, “People and clergy of all faiths are invited, regardless of their position on homosexuality. An atmosphere of mutual respect will be maintained.”¹⁷⁶ At the conference, PFLAG organizers distributed a booklet produced by Soulforce, a national “interfaith” group. The booklet, *A False Focus on My Family*, details the five “Violent Claims” and “Strange Science” utilized by the evangelical group.¹⁷⁷ Several of the “violent claims” critiques emphasized the connection between religious evangelism and hate crimes against LGBT people.¹⁷⁸

The Bellevue chapter newsletter is called *The Banner*.¹⁷⁹ The spring 2005 issue presented an article about a recent lobby day in support of a statewide antidiscrimination bill: “Seven cities have already passed anti-discrimination laws—Bill HB1515 will make discrimination due to sexual orientation against the law in the whole state.”¹⁸⁰ Another article described the emergence of a new advocacy group in the Seattle area: “ACTION Northwest, a new network of like-minded progressive organizations A new mission to make some grand changes[.]” The formation of the group occurred at a recent rally: “other people had the same

¹⁷⁶ Flier, *LoveWelcomesAll, Achieving Emotional & Spiritual Health in Families with Gay & Lesbian Youth* (2005) (available at www.lovelwelcomesall-wa.org) (on file with the author).

¹⁷⁷ Booklet, *A False Focus on My Family, Why every person of faith should be deeply troubled by Dr. James Dobson’s dangerous & misleading words about the lesbian, gay, bisexual, & transgender community* (Soulforce, Inc. 2004) (on file with the author).

¹⁷⁸ *Dear Dr. Dobson: An Open Letter Video to Focus on the Family* (Soulforce, Inc. 2005), cited in Booklet, *id.*

¹⁷⁹ THE BANNER, THE VOICE OF SEATTLE & BELLEVUE PARENTS, FAMILIES & FRIENDS OF LESBIANS, GAYS, BISEXUALS & TRANSGENDERS (Vol. 2005, Issue 1).

¹⁸⁰ See Linda Baker, *Lobby Day*, *id.*, at 1-2.

great idea. Other people joined this movement that day including equal marriage proponents and peace purveyors. . . . acting out in a constructive way[.]”¹⁸¹

Like the national organization’s founder, the local Bellevue Chair became involved in PFLAG to support her gay son. She explained her fears for her son at the time Matthew Shepard was killed in Wyoming. She emphasized to him that he should not walk alone after dark near his college. The Bellevue PFLAG maintains a news clipping binder that includes articles about its activities and about hate crimes against LGBT people. Group members also maintain close contact with other members across the country in an email network; when a hate crime or other important event occurs, they share the news with each other by email. Like the Vancouver chapter, the Bellevue group maintains a library of books and videotapes.¹⁸²

5.5.2 PFLAG—Vancouver

The Vancouver chapter of PFLAG engages in some activities related to anti-LGBT hate crimes, both generally and in response to specific cases. Its primary informational brochure, printed in both English and French, is produced by PFLAG Canada, with the addition of internet and telephone contact information for the local chapter.¹⁸³ Although it does not expressly mention hate crimes, the group’s brochure does state three broad functions including both services and information practices:

1. To provide information to local Chapters and Contacts on Canadian and international issues relevant to sexual orientation and gender identity so that they can better assist individuals, families and friends in their local communities.
2. To allow all the PFLAG Chapters and Contacts to have one strong, supportive and cohesive voice to address social and systematic events and issues that affect sexual orientation and/or gender identity in Canada.

¹⁸¹ *Id.*, at 2.

¹⁸² See *Hate Crime Study, Rough Cut, Nov. 28, 2005*, DVD, Menu Title—*Families*.

¹⁸³ See www.pflagvancouver.com.

3. To provide local Chapters and Contacts access to extensive print and published resource material.¹⁸⁴

The local Vancouver PFLAG distributes its own one-page “Recommended Reading” flier naming general references about, for example, gay and lesbian children and transsexualism in families and the workplace.¹⁸⁵

The majority of Vancouver PFLAG activities occur in context of its meetings. Susan Harman, the local chapter President indicated that meeting attendance and involvement of members proceed in cycles, with parents of LGBT children becoming involved during the “coming out” process and tending to decrease their involvement afterward. She described a slogan used by PFLAG “when you no longer need PFLAG, PFLAG needs you,” which is used to encourage family members and friends to stay involved after the “coming out” process to assist others.¹⁸⁶

Harman noted one couple involved in the local chapter whose child had committed suicide during “coming out.” After what they saw as a failure of the courts to impose hate crime penalties against Aaron Webster’s adult killers, this couple and the chapter President jointly submitted a letter to the editor to a Vancouver daily newspaper. The editorial exemplifies the kind of advocacy practiced by family support groups in relation to hate crimes:

As parents of gay children, we deplore the mild sentences given to the killers of Aaron Webster. These young men went to Stanley Park intending to cause trouble, and an innocent man died. In a province that has made great strides in moving towards equality for gays, how can judgments like this be acceptable?

The family of Aaron Webster has had to suffer twice. First, they experienced the death of a loved one. Then they had to watch while that death was devalued by light sentences given his attackers.

As members of Pflag, an organization for the parents, families and friends of lesbians and gays, we sympathize with the Webster family. Like all parents, we love our children and want what is best for them. Instead, we must fear that they will be victimized as Webster was.

¹⁸⁴ PFLAG Canada, *Struggling with issues of sexual orientation and/or gender identity? We can help!* (available at www.pflag.ca).

¹⁸⁵ PFLAG Vancouver, *Recommended Reading* (May, 1999) (printed list); *see also Suggested Reading Materials* <http://www.pflagvancouver.com/read.html> (accessed Feb. 29, 2008).

¹⁸⁶ *See Hate Crime Study, Rough Cut, Nov. 28, 2005, DVD, Menu Title—Families.*

We urge that stronger sentences be given to the perpetrators of such hate crimes. As a society, we are all diminished when we appear to condone these crimes by failing to take adequate measures against them.¹⁸⁷

Thus, although its resources ebb and flow, the Vancouver PFLAG chapter nevertheless practices advocacy in response to hate-related events.

5.5.3 Comparison

Not surprisingly, the PFLAG groups in Vancouver and Seattle are extremely similar, although their education and advocacy activities vary according to current events in each city. But, PFLAG members in both Seattle and Vancouver responded by participating in public acts of support for the victims of allegedly homophobic hate crimes during the course of this study.

5.6 Transgender Rights Groups

Nongovernmental groups provide services and advocacy for transgender people in both Seattle and Vancouver. I conducted an informal telephone interview with a representative of Ingersoll Gender Center in Seattle, and a videotaped interview with a member of Trans Alliance Society in Vancouver. I also invited a member of Transaction Canada and EGALÉ Canada to participate in the feedback meeting in Vancouver. And, through the Trans Alliance Society member, I also obtained documents from a former Vancouver organization, the Zenith Society.

Like the PFLAG groups, the Transgender Rights Groups in Vancouver and Seattle bear a marked resemblance, with a couple of notable exceptions, and they are described only briefly.

5.6.1 Ingersoll Gender Center—Seattle

I spoke to Walker Burch-Lewis by telephone about the Ingersoll Gender Center in Seattle.¹⁸⁸ The Center mostly provides support groups for transgendered persons and public

¹⁸⁷ See *Hate Crime Study, Rough Cut*, Nov. 28, 2005, DVD, Menu Title—*Families*; see also, Letter to the Editor, *Light sentences increased family's suffering*, VANCOUVER SUN (undated) (on file with the author).

education. The group was created in 1977, and its founder is Marsha Botser. In the early days, the group provided only educational programs. Now it coordinates with other organizations in a larger network to provide educational programs, especially to promote cultural competency among health care providers. Its work is predominantly peer-support, however, and the IGC provides frequent support groups with volunteer “peer” facilitators and a referral process that involves volunteer therapists.

While much of IGC’s activities are unrelated to hate crimes and only loosely related to social contention, several activities are particularly relevant. First, according to Burch-Lewis, some of the language now contained in the Seattle municipal ordinances, including gender identity and expression, “came out of Ingersoll . . . as well as other folks.” The Olympia, Washington ordinances, which include transgender-specific language to prohibit employment and housing discrimination, were written by Marsha Botser and one other person from Ingersoll.¹⁸⁹

Second, like its Vancouver counterparts, the IGC’s activities include an annual Trans Days of Remembrance (TDOR) event in Seattle, and the IGC has hosted this event. For a number of years the TDOR was held outside, but it was often plagued by rain and cold, so in December, 2005, it was held indoors at the Seattle LGBT Center, making it more central and public. The indoor program included two elements, followed by the traditional remembrance event. First, Verbena held its annual Transform Health Project Brunch at the Center on the morning of the TDOR. Second, at mid-day, the community-based self-defense advocacy group Home-Alive presented a transgender and gender variant self-defense workshop. Organizers

¹⁸⁸ Interview Notes (on file with the author). Our interview was not recorded; however, most of the information provided is also available on the Ingersoll Gender Center’s website. See <http://www.ingersollcenter.org/> (accessed Feb. 29, 2008).

¹⁸⁹ Other examples of local laws more protective of the rights of transgender people are Thurston County code provisions. Burch-Lewis was not sure if any particular hate-related events led to these ordinances.

drew a “logical” connection between the commemoration and political activities, including support for state antidiscrimination legislation.¹⁹⁰

Third, current anti-violence efforts include an *ad hoc* King County Working Group organized in response to anti-trans incidents in county jails in 2005. Two earlier jail assaults in 2005 had not yet been made public, but more recently, in December, 2005, an additional incident had occurred during an anti-war student walkout. During the walk-out, police apparently targeted two or three gender variant protesters for their only arrests, and they had been harassed at detention facilities. Since the arrests, activists had held a meeting to get organized, followed by presentations to the County Commission on Civil Rights and a press release.¹⁹¹ At the time of our interview organizers were researching model policies and local ordinances and planning to lobby for local legislation. But they meant to do their “homework” before presenting their demands. Particularly, they were preparing recommendations from other regions for adoption locally.¹⁹² The follow-up response had been “fairly good,” and, the initial response on the day of the incident was “amazing and impressive.” Largely through the “awesome” work of Action Northwest, organizers identified folks who knew the individuals arrested and arranged for immediate and culturally competent “jail solidarity” support at the jail, even before those arrested arrived.¹⁹³

¹⁹⁰ Not everyone agreed with a switch from a solemn commemoration to a more political event, but Burch-Lewis felt the differences of opinion coincided with those who want to focus on their own transitioning process and those who want to ally with a more lesbian and gay movement for law reform. The conflict over politicization is more apparent in the trans community than among queer activists in the more political LGB community. According to Burch-Lewis, differences of opinion are caused by the particular fears of disclosure common among transgender people. Disagreements also arise about whether to pursue a health focus versus legislation.

¹⁹¹ So far, one county commissioner, Tom Rasmussen, had been particularly supportive.

¹⁹² The Ingersoll Gender Center website now features its efforts to establish trans-inclusive policies for the King County Jail. See *King County Trans Jail Policy Project Report*, available at <http://www.ingersollcenter.org/?q=jail-policy> (accessed Feb. 29, 2008). Action Northwest submitted a letter of support for the IGC Jail Project, and it is reprinted on the IGC website. See *Action Northwest Letter of Support*, dated Apr. 23, 2006, available at <http://www.ingersollcenter.org/jail-policy-actionnw-letter> (accessed Feb. 29, 2008).

¹⁹³ The “flash” mobilization during the protest and coordination in activism overall created an opportunity for solidarity between transgender rights activists and activists in other fields. The mobilization by Action Northwest and others used technology like cell phones, and later included calls for support posted on both the Action Northwest and Seattle Independent Media websites, and at the time of our interview, an article was forthcoming in the Seattle Gay News and action updates were continuing on the Action Northwest website.

A fourth area of activity is more directly related to this study. At the time of our interview, IGC generally deferred hate crime training, monitoring and education to other groups. Burch-Lewis identified the National Center for Transgender Equality (NCTE) as the leading source for trans-related hate crime information. The NCTE has developed a draft policy workbook to influence national hate crime organizing, and it provides information and educational materials for activists throughout the U.S., which it makes available through its website.¹⁹⁴ Burch-Lewis provided the “personal view” that, while national organizing has been successful, transgender activists “need to get our shit together here” for the city and state level “elements.” Aware that statistics for hate crimes motivated by gender identity are available in Seattle, Burch-Lewis expressed a reluctance to demand enhanced penalties in view of the need for alternatives to the “prison industrial complex.”

Burch-Lewis described the history of anti-transgender violence in the Seattle area—“not too many” incidents had occurred, except for “one big public” incident before the 1990s, during the “very early days” for transgender organizing. After our interview, however, IGC began a new research project, which reveals more specific information about hate-related experiences of trans-gendered persons in Seattle. The project, called the *Perspectives Northwest Survey*, began in June, 2006 and culminated in the release of a Report in January, 2008.¹⁹⁵ The online Survey addressed numerous questions about the demographics of gender identity and expression in the Northwestern United States, but responses to three questions about hate crimes are relevant here:

- Have you ever been the victim of a hate crime? [“yes” 30%]
- If you answered “yes” to the previous question, (victim of a hate crime) was this due to your gender expression? [“yes” 54.6%]

¹⁹⁴ See www.NCTEquality.org.

¹⁹⁵ See *Perspectives Northwest Survey Report: Transgender and Gender Variant Community Needs Assessment Survey, Survey Period: June 2006 – June 2007* (Ingersoll Gender Center, Seattle, Jan. 9, 2008), available at <http://www.ourlives.tv/library/downloadables.php> (accessed Feb. 29, 2008). A Research Assistant from the University of Washington School of Social Work was a member of the Survey’s core leadership team. See *id.*, at 5.

- If you answered “yes” to the previous question, did you seek help or support via services within the Trans community (support groups, mental health, legal resources, etc)? [“no” 83.8%]¹⁹⁶

In addition to the numerical results, the report reprinted several narratives documenting informants’ personal experiences with hate crimes.¹⁹⁷

Burch-Lewis was also aware of the organizing by Action Northwest in response to the homophobic attack on Micah Painter and the subsequent court proceedings and press coverage. It is worth noting that the Perspectives Northwest Survey Report emerged shortly after the Painter cases, the Ballard attack, and the contention surrounding the King County Jail policies.

5.6.2 Trans Alliance Society—Vancouver

Trans Alliance Society (TAS) Treasurer Gayle Roberts met with me for an interview in Vancouver and provided a collection of documents from the now disbanded Zenith Foundation. Zenith, the predecessor to TAS, published a news digest, and Roberts was a member of the Board. She described Zenith as minimally viable, with only about 150 members.¹⁹⁸

Roberts described the TAS as an umbrella group. Among the organizations that provide services and resources to transgender persons in the Vancouver area are the Vancouver LGBT Centre and the Transgender Health Program of the Vancouver Coastal Health Authority. For victims of violence Roberts pointed to the group Women Against Violence Against Women (WAVAW) as the “trans-friendly” provider. She distinguished a different Vancouver organization, noting they had recently barred Kimberly Nixon, a transgendered person, from their volunteer training program.¹⁹⁹

¹⁹⁶ See *Perspectives Northwest Survey Report, id.*, at 45-46. Three-fourths of respondents lived in Washington State; 3.1% resided outside the United States. See *id.*, at 34.

¹⁹⁷ See *id.*, at 50, 51, 71 (references to “hate” or “hate crime”).

¹⁹⁸ Interview Notes, Trans Alliance Society (on file with author); see also *Trans Alliance Society, Videotaped Interview* (on file with author).

¹⁹⁹ See *id.*

Roberts acknowledged that she did not have much information about hate crimes, but she was able to provide information about health-related services for transgender persons, in addition to extensive documentation from the former Zenith Foundation. Though not directly related to hate crimes, Roberts was drafting a lengthy article critical of a public television program titled “Becoming Aden” recently aired by the Canadian Broadcasting Association (CBC). The program portrayed the difficulties encountered by a transitioning transsexual but did so using negative stereotypes, including drug abuse.²⁰⁰

The development of the VCHA Transgender Health Program is described in an article appearing in the local weekly newspaper XTRA! West.²⁰¹ The article quotes both Gayle Roberts and Tami Starlight, another participant in this study:

Jamie Lee Hamilton used to sit on the advisory body, but she took issue with the way it operated. She claims that from the beginning, there was no meaningful dialog within the committee, a lack of transparency and a lack of effective consultation with the trans community.

“This program has not been responsive to the community,” she says. “I don’t think those issues have been resolved.”

Gayle Roberts, a member of the advisory committee who transitioned under the old Gender Clinic, has been involved with the THP from its inception. She explains that while the members of the committee act as a liaison between the THP and the local health authority, when it comes down to it they essentially play an advisory role and don’t have the power to enact immediate change.

She says, however, that VCH has been receptive to complaints and is doing the best it can with limited resources.

“I believe the professionals are doing their very best to meet needs,” she says. “I believe that the organization is growing in a healthy way and responding well to any complaints.”

....

But, Tami Starlight, a trans activist who was part of the THP’s education working group, agrees with Hamilton that the program is not responsive. The program isn’t doing enough to help the marginalized such as transgendered sex workers, homeless youth and First Nations people, she says.

Starlight left the education board after a year, partially due to personal issues with the previous director, Josua Goldberg, but mainly because she felt the advisory committee lacked community consultation—leading to a feeling of disenfranchisement in the community.

²⁰⁰ *Id.*

²⁰¹ Sondi Bruner, *Resignations & strapped resources: New Transgender Health Program gets mixed reviews.*, XTRA! WEST, Sept. 29, 2005, at 7, 9.

She says that a program that doesn't fully connect with the community and its needs leaves empowerment just out of reach.

"They're holding the fruit over people's heads and seeing how far they can jump, she says.

Hamilton is also concerned about the new clinic's lack of medical services. With no doctors on staff, she says it's harder for trans people interested in surgery to find medical care, which could prevent them from taking active steps to transition, such as beginning hormone therapy.²⁰²

Nevertheless, the article concludes based on testimonials from several clients and others that the THP has been helpful: "despite its alleged problems, transgendered people who use services at the THP find it extremely helpful after years of dealing with the frustrations of mainstream health attitudes towards the trans community." And, the article quotes one staff member who identified the THP as a model program:

The THP is providing a template for trans communities all over North America because it's the only transgendered health program embedded within a health system that has people from the trans community working for it.²⁰³

The TAS uses an application form to identify its members, and it maintains a website with downloadable resources and links. Roberts gave a brief explanation of what she would expect of any group seeking to oppose trans-phobic violence: "I think if this is an issue that groups want to get involved in, then they've got to set up some kind of mechanism where they record it and it no longer becomes purely anecdotal."²⁰⁴ Except for the WEAVE Survey, though, my interviews were unable to uncover any such initiative tailored to trans-phobic violence in Vancouver.

²⁰² *Id.*, at 9.

²⁰³ *Id.* The same edition of XTRA! West provides coverage of a controversy about the Surrey (suburban Vancouver) School District decision to ban the play *The Laramie Project*, about the killing of Matthew Shepard in Laramie, Wyoming in 1998. As the article notes, the same school district battled to the Canadian Supreme Court, but finally failed in its efforts to ban "three gay-themed children's books." This suit was initiated by GALE-BC member James Chamberlain. A good, nearly simultaneous, parallel appears between the movement to present the play *The Laramie Project* in both the United States and Canada and *The Colour of Justice*, the fourth in a series called *The Tribunal Plays* in Great Britain. Richard Norton-Taylor, *THE COLOUR OF JUSTICE: BASED ON THE TRANSCRIPTS OF THE STEPHEN LAWRENCE INQUIRY* (Oberon Books, London, 1999). Both are innovative types of contention by nongovernmental social groups, each re-presenting the legal (and social) inquiries triggered by individual hate-related events.

²⁰⁴ See *Hate Crime Study, Rough Cut*, Nov. 28, 2005, DVD, Menu Title—*Research & Reporting*.

5.6.3 Comparison

In addition to a representative of TAS in Vancouver, I also met with Tami Starlight, an activist working with both EGALE Canada & Transaction Canada. Although I was unable to arrange a separate interview, I did invite Ms. Starlight to attend the Vancouver feedback session to view the composite video and provide comments. Her comments are incorporated below as part of the comparison.

The video used for feedback included footage from the Trans Days of Remembrance in Vancouver. The feedback from Seattle confirmed that parallel activities occur in Seattle each year. I attended the Trans Days of Remembrance in Vancouver in December, 2005 and recorded the march through downtown and several of the speeches by prominent LGBT and Ally Members of Parliament. I found the attendance, and the speeches, of the several national legislators remarkable. And, although my later informants gave me details of a very successful Trans Day of Remembrance in Seattle, I do not believe any prominent national legislators attended.

At the Vancouver TDOR, I also recorded the presentation of event organizer Tami Starlight. Tami agreed to participate in the study as a representative of both the national groups EGALE Canada & Transaction Canada. The “Remembrance” event furnished an excellent example of social contention for the production of a particular kind of knowledge about transphobic violence. Tami joined in the “feedback” event at the Vancouver Centre and was able to provide some of the most perceptive comments.

Overall, transgender rights groups in Seattle and Vancouver both focus significantly on health care. Unlike Vancouver, Seattle transgender rights activists have succeeded in promoting local laws prohibiting discrimination based on gender identity or gender expression. And, soon

after the conclusion of the interviews for this study, Seattle groups had successfully conducted an anti-violence survey tailored to trans-phobic violence.

5.7 Police Hate Crime Units

Because this study focuses on nongovernmental groups that monitor hate crimes, a detailed analysis of the information practices of police hate crime units in the two jurisdictions has not been attempted. An introduction to the legal and policy principles applicable to these units is set out in Chapter 3. This section compares the practices of the police hate crime units, but only to the extent necessary to provide a context for analyzing the nongovernmental groups that are the primary focus of the study. It is worth noting that, while I did interview a representative from each police unit, neither would allow any form of recording. And, my public record requests to the two agencies met with similarly reluctant responses. The Vancouver Police Department did provide a 2002 research study analyzing its homophobic hate crime data for Vancouver's West End. And, I did receive a copy of a small procedure manual for police and crown attorneys setting out guidelines for hate crime investigations and prosecutions. Each unit provided access to its departmental procedures manual—both were available online during the course of the study. And, Seattle's hate crime statistics are available online at the FBI UCR website.

The Vancouver Police Department did release transcripts from a series of news conferences held by investigators in the days after the Aaron Webster killing in 2001. I also received copies of training materials used by both hate crime units. But, both departments substantially denied my requests for documents directly related to the cases presented in Chapter 4.

The Seattle Police Department denied my request for information about the Micah Painter case, alleging it was an ongoing investigation—even though the two assailants had by the time of my request been convicted, sentenced, and waived their right to an appeal. It is theoretically possible that their companions could be charged as accessories, but this seems implausible. Although I followed up on my requests by providing additional information requested, I chose not to appeal the denial of access in either case. While it is a form of invasive second-guessing, a review of the police narrative reports often provides the only documentation available to determine whether the investigating and supervisory officers were adhering to their training and properly implementing the law. Therefore, I commend a thorough review of these materials to a future scholar.

Unlike the incident reports, however, I was able to review the written policies of both departments as they relate to bias-related incidents. The Seattle Police Department Manual is available online,²⁰⁵ as is the Vancouver Police Department, Regulations & Procedures Manual.²⁰⁶

The duties of the Bias Crimes Coordinator are set out in the Seattle Manual:

- (5) Bias Crimes Coordinator: The Bias Crimes Coordinator will coordinate the Department’s efforts against “hate crimes” by handling directly or coordinating the follow-up investigation on all malicious harassment cases. This unit will compile and report on all hate crimes as required by state and federal statutes, and provide training and information on “hate crimes” to Department staff, other law enforcement agencies, and the general public.²⁰⁷

The Manual also delineates strict procedures to be followed by officers investigating suspected bias crimes.²⁰⁸ Reports are “handled on a priority basis,” and the Manual requires a “thorough investigation.” Investigating officers are required to notify their superiors and forward copies of arrest packets and incident reports to the Bias Crimes Coordinator. The Bias Crimes Coordinator

²⁰⁵ See http://www.seattle.gov/police/publications/Policy/SPD_Manual.pdf (accessed Feb. 3, 2008).

²⁰⁶ See <http://vancouver.ca/police/Planning/RPM/index.htm> (accessed Feb. 3, 2008).

²⁰⁷ *Seattle Police Department Policies & Procedures Manual*, § 1.049A(III)(A)(1)(a)(5) (effective Nov. 22, 2005).

²⁰⁸ See *Seattle Police Department Policies & Procedures Manual*, § 3.097 (Malicious Harassment) (effective Sept. 26, 2007).

is tasked with receiving copies of bias-related arrest packets and incident reports, conducting follow-up investigations, and maintaining an official database:

The Bias Crime Coordinator is responsible for follow-up investigation of malicious harassment incidents and will receive all arrest packets.

....

In the event the circumstances are questionable, the incident shall be treated as a bias crime initially, all appropriate procedures shall be followed, and all the appropriate boxes on the Incident Report shall be checked, including the “Bias Crime” box.

The Bias Crimes Coordinator shall review all case reports identified as malicious harassment and maintain detailed data on all incidents and copies of all reports.²⁰⁹

The Vancouver Police Department Manual also addresses hate crime investigations, but with substantially less detail than its Seattle counterpart. First, the Vancouver Manual makes no mention of the officer assigned to the BC Hate Crime Team. The only reference to a specialized unit or official for hate crime investigations is to the Diversity Relations Unit, which according to the Manual is to receive a copy of reports with “bias overtones”:

7. Incidents Involving Bias Overtones

A bias related incident is defined under Section 718.2 [quoting section]. Whenever an investigating member, complainant, victim or witness, believes that an incident has occurred as a result of a bias overtone, the investigating member shall note the occurrence in the GO report and route the report to the Sergeant i/c Diversity Relations Section.

Reports shall include full details of any bias overtones, including any verbatim racist comments that are made. Comments regarding the validity of the allegations, and specific reasons to substantiate any doubts, shall be included in a report when the investigator believes that the complaint may be unfounded.²¹⁰

The Diversity Relations Unit is part of a Community and Police Incident Response Team; the Unit responds to an incident, “if there is a diversity issue present.” Its role is not to investigate but to manage information in “response to potentially serious and controversial incidents.”

²⁰⁹ *Seattle Police Department Policies & Procedures Manual*, § 1.049A(III)(A)(1)(a)(5) (Nov. 22, 2005).

²¹⁰ Vancouver Police Department, *Regulations & Procedures Manual*, § 28.01(7) (Report Writing) (effective Jan. 21, 2002). A “GO” report is a General Occurrence report entered into the PRIME records software. The requirement of a GO report is deceptive, because investigating officers have the option to render a GO report either “private”—available for review by only a limited number of officers—or “invisible”—unavailable for review by anyone, including crown counsel. *See* Vancouver Manual, *id.*, § 45.12 (Making Records Private or Invisible). As the Manual notes, rendering reports private or invisible can hamper, “information sharing and the collection of statistics.” *Id.* (Policy).

Nothing in the Manual tells the fate of reports routed to the Diversity Relations Unit, and nothing requires the maintenance of a database or the reporting of statistics related to bias incidents.

My interviews at each site revealed additional details about the application of the written policies in practice.

5.7.1 Vancouver Police Department & BC Hate Crime Team

Sergeant Mark Graf of the Vancouver Police Department provided both typed responses to my list of interview questions and an in-person interview.²¹¹ Sergeant Graf was paired with an RCMP officer and together these two officers constituted the BC Hate Crime Team. Although Graf was employed by the Vancouver Police Department, he worked out of the Surrey offices of the RCMP, which housed the physical offices of the Hate Crime Team.²¹²

Like the Seattle Bias Crimes Coordinator, Sergeant Graf declined to permit a recorded interview, but I was allowed to take notes.²¹³ Sergeant Graf also provided several documents at the time of our interview. First, I obtained a one-page flier published by the Vancouver Police Department describing the BC Hate Crime Team, and its Mandate:

The mandate of the Hate Crime Team is to ensure the effective identification, investigation, and prosecution of crimes motivated by hate.

The Team will liaise with communities to assist them in identifying hate activity that is criminal and hate activity that can be pursued with the assistance of Multiculturalism B.C. through human rights legislation.²¹⁴

²¹¹ See BC Hate Crime Team Interview Notes & Typewritten Responses, dated Sept. 29, 2005 (on file with the author).

²¹² Cameron Murdock of the Anti-Violence Pilot Project mentioned the existence of a Victoria, BC hate crime unit or office. I chose to exclude this office from my analysis here because Victoria lies outside even the extended suburban boundaries of Vancouver, and because I was able to contact the BC Hate Crime Team in Surrey.

²¹³ See Email from Sergeant Graf to author, dated Sept. 28, 2005 (on file with author).

²¹⁴ Flier, BC Provincial Hate Crime Team (City of Vancouver, Vancouver Police Department, undated) (on file with author). A description of the BC Hate Crime Team and its contact information appear on the Vancouver Public Library website. See <http://www2.vpl.vancouver.bc.ca/dbs/redbook/orgpages/4/4735.html> (accessed Sept. 16, 2005). The listing gives the Surrey RCMP contact information for the Team, along with the following summary:

Tracks and follow-up reports of hate crimes, coordinating with local police as appropriate.
People may call this office to obtain general information or to speak to police about a hate

Second, Sergeant Graf provided copies of the set of slides used during training provided by the Hate Crime Team to officers throughout the province. The six presentation slides were captioned: Mandate & Definition, Hate Crime Team, Hate Crime Sentencing Provisions, Hate Crime Criminal Offences—Advocating Genocide, Hate Crime Criminal Offences—Public Incitement & Willful Promotion of Hatred, and Identifiable Group, Section 318 C.C.C.²¹⁵

Sergeant Graf explained that the Team’s Mandate had changed since its creation in 1997 from primarily training to the current mandate: “To ensure the effective identification, investigation, and prosecution of crimes motivated by hate.”²¹⁶ The presentation slides set out the text of the Criminal Code sentencing provision for bias, prejudice or hate, as well as the hate propaganda provisions, and they conclude by noting that “sexual orientation” was recently included as an “identifiable group” in the hate propaganda provisions.²¹⁷

Finally, Graf also provided a copy of the Hate/Bias Crime Pocket Guide developed by the Team.²¹⁸ In response to questioning about the working definition or guidelines used by officers to identify hate crimes, Graf referred directly to the presentation slides used in training and the Pocket Guide.²¹⁹ The Pocket Guide folds to the size of a business card, but it provides significant detail about the guidance provided to investigating officers. Most of the Pocket Guide text mirrors the Presentation Slides used in officer training; however, a few additional details are included. First, the Definition section describes a “Hate/Bias crime” using the language of the Sentencing Principles for bias, prejudice or hate. But the same section distinguishes hate-related “incidents” that do not constitute crimes: “Hate/Bias incidents are

incident. Community liaison is provided by both this office and the Settlement and Multiculturalism Branch, MCAWS.

²¹⁵ See BC Hate Crime Team, Presentation Slides (on file with author).

²¹⁶ See Presentation Slide, *Mandate & Definition*; Interview Script, Typewritten Response 1, Notes, at 1.

²¹⁷ See Presentation Slides, *id.*

²¹⁸ *Hate/Bias Crime Pocket Guide* (BC Hate Crime Team, undated) (on file with author).

²¹⁹ Interview Script, Typewritten Response 4. The specific question and answer are set out below:

4. Where do investigators look for a working definition or a list of elements of a hate crime? Are there guidelines?

- See Criminal code and slides of offences and our Pocket guide.

those actions that are not criminal in nature and may be covered by the Human Rights Code of Canada.”²²⁰ Second, the Pocket Guide provides examples explaining why victims are reluctant to report hate crimes, along with “Hate Indicators For Investigators.”²²¹ Finally, the Guide lists specific “Duties of Police Officers,” including two directly related to the compilation of data:

The following procedural guidelines have been developed to ensure appropriate response to incidents motivated by hate/bias:

. . . .

- Document the incident and ensure it is categorized as a hate/bias offence
- Forward a copy of the report to the BC Hate Crime Team including concerns of the community and anticipated problems.²²²

Although they are listed among the “Duties” of investigating officers, the Pocket Guide does not cite any source of authority for these guidelines.

In both our interview and his typewritten responses, Sergeant Graf provided information about how hate-related incidents and crimes are documented in practice. While the Team receives inquiries about hate-related incidents, and while police agencies throughout the province forward copies of reports about hate crimes to the Team, Graf emphasized the Team’s limited data collection role:

We are typically asked about statistics by media. As an investigative unit we are driven by cases, not statistics. In doing so we keep abreast of what is happening in the province.²²³

²²⁰ *Pocket Guide, id.*, Definition. The Overview section paraphrases the hate propaganda provisions and adds the following description of the sentencing principle for bias, prejudice or hate: “Any other offence motivated by hate or bias where the sentencing judge **must** consider this an aggravating or mitigating factor.” *Id.*, Overview (citing § 718.2) (emphasis in original).

²²¹ The Hate Indicators are similar to those developed by the United States Department of Justice and used in their training materials.

²²² *Pocket Guide, id.*, Duties of Police Officers (formatting in original).

²²³ Interview Script, Typewritten Response 3 Hate Crime Data; *see also* Interview Notes, at 1, ¶3. Regarding community disagreements with police handling of hate crimes, Graf cited several examples, foremost the Webster case: “Absolutely, take the Aaron Webster case[.]” Interview Script, Typewritten Response 6, Protest. My interview responses from the BC Hate Crime Team representative were somewhat inconsistent with information documented elsewhere by RCMP and Vancouver Police Department representatives. *See* Craig S. Macmillan, *et al.*, *Criminal Proceedings as a Response to Hate: The British Columbia Experience*, 45 CRIM. L. Q. 419 (2002) (analyzing police hate crime data, and data-collection practices, through the year 2000). In fairness, however, my interview covered a period roughly five years later than the period described by Macmillan and his colleagues.

Graf did state in our interview that the Team was looking for ways to track hate crime and incident data using the Vancouver Police Department’s PRIME (Police Record Information Management Environment) software. He believed that PRIME offered investigating officers the option of a box to “flag” an incident as bias-related. And, he noted the system used by the RCMP enabled officers to enter a “code” to indicate a bias-motivation. However, even though “policy” required all departments to forward reports of “incidents” to the Team, Graf was not sure if this always happened.

Both the Pocket Guide and Graf’s description of the Team’s actual data collection practices conflict in some respects with the description of the “Police Role” set out in the Vancouver Police Department flier. The flier includes the following items related to data collection:

The role of the police members of the Team is to:

....

- collect and analyse all reports of hate crime
- compile a database of hate crime suspects and link this with other intelligence sources.
- ensure that local police agencies are informed of hate activities in their own and surrounding jurisdictions.

....

- liaise with Multiculturalism BC and the BC Human Rights Commission to ensure that they are informed of hate/bias incidents that are not criminal in nature.²²⁴

In practice, it seems the BC Hate Crime Team does not analyze hate crime reports collectively. And nothing revealed in our interview suggests the existence of a database of either hate-related incidents or suspects. If no such database exists, then the Team’s ability to provide information to surrounding jurisdictions and other agencies is limited to case-by-case notifications.

In fairness to the BC Hate Crime Team, two possible explanations exist for the apparent discrepancy between policy articulated in the flier and the practices described in our interview. First, although I obtained the Vancouver Police Department flier at the Team’s offices, it may

²²⁴ Flier, BC Provincial Hate Crime Team (on file with the author).

have been superseded in 2003, when according to Graf, the Team’s mandate was modified to a primarily investigative role. Second, the Team may well analyze incident reports systematically and maintain and share its databases with other agencies—but, without acknowledging these practices publicly. Regardless of the internal policies and practices, however, from the point of view of the nongovernmental groups interviewed in this study, neither Vancouver Police nor the BC Hate Crime Team gather official hate crime statistics. At least no official hate crime statistics are publicly reported.

As with the Seattle Bias Crime Coordinator, I combined my interview with the BC Hate Crime Team representative with a written public disclosure request. As in Seattle, I initially asked the Vancouver Police Department to provide anonymous data about hate and bias incidents and copies of the blank forms used to record such incidents. In the same letter, I requested information about the classification of one particular hate-related event—in this case the Aaron Webster killing. After my interview with Sergeant Graf, I submitted a second letter re-iterating my prior request and also requesting documentation showing how the former Vancouver Police Department Hate Crime Unit was re-constituted as part of the BC Provincial Hate Crime Team. I never received a response to my second letter, and as in Seattle, I chose not to challenge the denial of my request. In response to the first letter, however, the Department provided two sets of documentation: (1) transcribed notes of three police press conferences in the days after the Aaron Webster killing; and, (2) an academic research study commissioned by the Department analyzing its internal hate crime data for the years 2001 and 2002.²²⁵

The press conference transcripts reveal how police representatives classify bias-related incidents in the early stages of a criminal investigation—at least in their public statements to the

²²⁵ I am grateful to the Vancouver Police Department for providing photocopies of these documents without assessing a fee. The complete exchange of correspondence is contained in four letters: Letter from the Author Re: Request for Records, dated Sept. 15, 2005; Letter, from Information & Privacy Unit, dated Sept. 28, 2005 (I&P Unit Ref. No. 05-1903A); Letter from Author to Chief Constable, dated Oct. 21, 2005; and, Letter from Information & Privacy Unit Re: Records Access Request, dated Nov. 8, 2005 (I&P Unit Ref. No. 05-1903A).

press. A selection of quotations from the press conferences demonstrates the complexity, and fluidity, of hate crime classification decisions, both in the early stages of an individual criminal investigation, and on an ongoing basis.²²⁶ The incident was initially reported to the media on November 19, 2001—two days after the attack. The very first question from the media asked whether the crime was a gay bashing, and several subsequent questions addressed the availability of hate crime data generally:

[Q]: IS GAY BASHING THE ONLY THEORY THAT POLICE ARE LOOKING ON PERHAPS?

[A]: WE HAVEN'T DETERMINED YET EXACTLY WHAT THE MOTIVE FOR THIS PARTICULAR ATTACK IS. IT [sic] CERTAINLY ONE OF THEM WE HAVE NOT DISCOUNTED. IT HAS ALL THE EARMARKS OF A TYPE OF A SEXUALLY ORIENTED ATTACK. . . .

. . . .

[Q]: DO YOU HAVE ANY STATISTICS SCOTT ON HOW MANY SEXUALLY ORIENTED ASSAULTS THERE HAVE BEEN THIS YEAR TO DATE?

[A]: NO. YOU WOULD HAVE TO GO TO THE, I BELIEVE ITS [] THE PROVINCIAL HATE CRIME UNIT FOR THOSE TYPES OF STATS.²²⁷

. . . .

[Q]: ARE THERE ANY SUGGESTIONS OR INDICATIONS THAT IT MIGHT NOT BE A HATE CRIME?

[A]: WELL WE WOULD HAVE TO SAY AT THIS POINT OF COURSE WE HAVE TO KEEP ALL AVENUES OF THE INVESTIGATION OPEN, THERE IS NOTHING THAT IS 100% DEFINITIVE . . . SUFFICE TO SAY WERE [sic] NOT 100% SATISFIED, BUT NONETHELESS IT HAS ALL THE EARMARKS AND THE POSSIBILITY THAT IT WAS HATE MOTIVATED BY A SEXUAL ORIENTATION, . . .

. . . .

[Detective]: . . . I'VE GOT INSPECTOR JONES WHO IS THE COMMANDER IN CHARGE OF THAT PARTICULAR SEGMENT OF THE CITY AND

²²⁶ The relevant quotations are set out more fully in the Appendix. See Appendix 2—Vancouver Police Department Press Conference Excerpts—Aaron Webster Killing, November, 2001.

²²⁷ Letter from Information & Privacy Unit Re: Records Access Request, dated Nov. 8, 2005 (I&P Unit Ref. No. 05-1903A), DEPS NOTES, Nov. 19, 2001 (on file with the author).

HE'LL BE HERE TO GO AND SPEAK TO YOU ABOUT SOME OF OUR INITIATIVES AND SOME OF OUR ONGOING PROGRAMS THAT WE HAVE WITH THAT COMMUNITY. AND TO ADDRESS ANY QUESTIONS YOU MIGHT HAVE.

....

HATRED IS INTOLERABLE IN ANY COMMUNITY AND WHEN IT MANIFESTS ITSELF AS IT HAS OVER THE LAST WEEKEND I THINK IT CAUSES SHOCK AND ALARM TO ALL MEMBERS OF THE COMMUNITY. . . . WE HAVE SOME PEOPLE OUT THERE WHO HATE, WHO ARE PREPARED TO USE VIOLENCE TO MANIFEST THAT HATE FOR WHATEVER MOTIVATIONS. . . . WE WANT THE NAMES OF THOSE PEOPLE, WE COLLECT THOSE NAMES WHEN PEOPLE ABUSE SEX TRADE WORKERS AND WE WANT TO DO SOMETHING SIMILAR TO THAT. WE WANT A RECORD, THESE PEOPLE THAT COMMITTED THIS ACT ON THE WEEKEND. . . .

....

[Q]: WHAT DO YOU MEAN ABOUT DOCUMENTING AND REPORTING, IS THERE GOING TO BE A SPECIAL FILE ON THESE PEOPLE?

[A]: PRIME BC HAS OFFERED US AN OPPORTUNITY NOW TO COLLECT THIS INFORMATION IN A MUCH MORE EFFECTIVE WAY THAN WE HAVE BEEN ABLE TO IN THE PAST. . . . WE HAVE PRIME BC WHICH CREATES THE ABILITY FOR US TO DOCUMENT THESE ACTIVITIES AND TO COLLATE THEM AND TO ANALYZE THEM.

[Q]: IS THAT A PROVINCIAL DATABASE?

[A]: PRIME BC IS NOT ENTIRELY PROVINCIAL YET, IT WILL BE IN TIME. AT THE MOMENT THERE ARE 4 OR 5 POLICE AGENCIES ON IT. IN TIME THERE WILL BE MORE.

....

[Q]: HAVE YOU SEEN AN INCREASE OR DECREASE IN THE AMOUNT OF [] GAY BASHING CRIMES BEING COMMITTED IN THAT AREA?

[A]: WE HAD IN THE FIRST 6 MONTHS OF THIS YEAR 402 REPORTS TO THE BASH LINE, 8 OF THOSE WERE ACTUALLY CRIMINAL OFFENCES WE SEEM TO BE GETTING MORE COMFORT WITH THAT COMMUNITY REPORTING ACTUAL CRIMINAL OFFENCES, ASSAULTS THROUGH THE MAIN STREAM POLICE LINES.

[Q]: DO YOU HAVE ANY IDEA LIKE NUMBERS HOW MANY PEOPLE, OR A ROUGH ESTIMATE?

[A]: I HAVE ASKED FOR THE PROVINCIAL HATE CRIMES PEOPLE TO PROVIDE WITH THAT DATA AND THEY HAVEN'T HAD A CHANCE TO COLLATE IT YET.²²⁸

....

[DETECTIVE]: AT THIS POINT THERE IS NOTHING CONCLUSIVE TO GO AND SAY THAT YOU KNOW THAT THIS WAS SOLELY DIRECTED BY SEXUAL ORIENTATION. WERE [sic] CERTAINLY KEEPING THE OTHER OPTIONS OPEN, AS FAR AS WHAT OTHER MOTIVES THERE MIGHT HAVE BEEN IN THIS ATTACK.

[Q]: INSPECTOR JONES SEEMS TO THINK IT IS DEFINITELY A GAY BASHING?

[A]: YEH, THE INSPECTOR JONES OF COURSE IS WORKING IN THE WEST END AND I THINK WHAT HE IS SPEAKING ABOUT IS THE FACT THAT BASICALLY THE COMMUNITY LOOKS UPON AS THAT FROM THAT COMMUNITY, SO OF COURSE THAT'S WHERE THE FOCUS IS GOING TO BE. BUT I CAN SAY ON BEHALF OF THE HOMICIDE SECTION OF COURSE OTHER MOTIVES OF COURSE HAVE NOT BEEN DISCOUNTED AT THIS EARLY STAGE AT ALL.²²⁹

The second item provided in response to my public disclosure request is a report by a Simon Fraser University student analyzing Vancouver Police Department data in response to the Aaron Webster killing.²³⁰ The report, titled “Hate Bias Crimes in Vancouver 2001 and 2002,” was printed with the seal of the Vancouver Police Department, and its introduction indicates it is being submitted to the Parliamentary committee considering the addition “sexual orientation” to the prohibited grounds of discrimination in the hate propaganda provisions of the Criminal Code. According to the report, “The death of Aaron Webster and heightened awareness of violence in the LGBT community prompted a review of hate/bias events in Vancouver.”²³¹ Without

²²⁸ *Id.*, DEPS NOTES, Nov. 20, 2001 (on file with the author).

²²⁹ *Id.*, DEPS NOTES, Nov. 22, 2001 (on file with the author).

²³⁰ Letter from Information & Privacy Unit Re: Records Access Request, dated Nov. 8, 2005 (I&P Unit Ref. No. 05-1903A), Scott MacMillan, *Hate Bias Crimes in Vancouver 2001 & 2002*, *supra* note 99. The report’s introduction explains the research goal: “A research project was established to provide data to assist the Standing Committee on Justice and Human Rights in their review of the need to add sexual orientation to Section 318(4)CCC.” *Hate & Bias in Vancouver, id.*, at 2, A Question of Inclusion.

²³¹ *Hate & Bias Crimes in Vancouver, id.*, at 2, A Question of Inclusion. *See also* Proceedings of the Standing Senate Committee on Legal & Constitutional Affairs, Issue 3 - Evidence for March 11, 2004 (receiving testimony from Mr. Dave Jones, representing Vancouver Police Department, and others, endorsing Bill C-250, to amend the

precisely specifying its source material, the report references “Approximately 200 hate/bias incidents coded in 2001 – 2002 for Vancouver.” The report does not indicate whether these incidents were “coded” from the narrative descriptions of police incident reports, from boxes “flagged” in the PRIME database, or from some other source. Although the source data were apparently made available to the university student who compiled the report, the database for the report is not identified. Moreover, this source material—whatever it is—remains closed to public review. In other words, while the Aaron Webster killing triggered a review of hate crime data compiled by the Vancouver Police Department, the review was tightly controlled, and the data reviewed remained proprietary.

Despite the effective closure of the Vancouver Police hate crime database, a few critically important facts are established by the 2002 report. First, the Vancouver Police Department maintains a capacity to collect and analyze hate crime data in some form. Thus, if police hate crime data were retained, and if these data were made publicly available, then a proceeding to review them could serve as a site of legal contention about the existence of hate crimes. For now, however, even if hate crime data are being retained, they are not available for any form of public scrutiny.

Second, whether on his own or at the direction of police officials, the university researcher who analyzed the hate crime data for the years 2001 and 2002 established particular criteria for classifying and excluding hate crimes. While the report sets out the Criminal Code Sentencing Principle for a bias, prejudice or hate, the criteria used in the 2002 report “Filtered” the recorded incidents:

- Filtered through a hate/bias crime criteria to establish a set of incidents where clear evidence of hate/bias could be determined

Criminal Code (hate propaganda)). See Bill C-250, *An Act to Amend the Criminal Code (hate propaganda)*, passed by the House of Commons of Canada on Sept. 17, 2003.

- 128 confirmed cases of hate/bias were identified²³²

As the analytical comparison of Chapter 3 noted, the Sentencing Principles incorporate a peculiar sort of proof: mere “evidence” of a prohibited bias, proven beyond a reasonable doubt. This, however, is the standard applicable to an enhanced sentence—not necessarily the standard applicable to hate or bias “incidents” or the standard for a statistical sample of hate crimes. So, even though the process of compiling the 2001 and 2002 data was not a public one, the results do provide a glimpse sufficient to raise a question about the classification of the Webster killing.

Perhaps more interesting than the Vancouver Police Department’s analysis of its overall hate crime database, is its analysis of the single datum representing the Aaron Webster killing. All of the data analyzed are presented anonymously. Yet, only one “Death” is revealed in the entire dataset, and this death is classified with “clear evidence” as an incident motivated by a “sexual orientation” bias.²³³ Since Aaron Webster was the only person killed in a suspected gay bashing in 2001 or 2002, the police officially classified his death as a hate crime in their own data base and in their presentation to the Parliamentary Committee considering amendments to the Criminal Code.

The conclusion of the report appeals for “similar protection” in the hate propaganda provisions for “those attacked on the basis of their sexual orientation.”²³⁴ Hence, the Vancouver Police Department, with the assistance of an academic researcher, (successfully) utilized the Aaron Webster killing as a resource to contend for a national legislative change. Ironically, though, the same event was insufficient to trigger either a public review of the police hate crime classification practices or the imposition of local legal standards governing those practices.

Even assuming Vancouver Police gather and record information about hate-related incidents routinely in their investigations, their use of this information is apparently very limited.

²³³ See *Hate & Bias Crimes in Vancouver, id.*, at 15, Degree of Injury (listing death due to sexual orientation bias).

²³⁴ See *Hate & Bias Crimes in Vancouver, id.*, at 24, Conclusion.

My research disclosed only three instances in which Vancouver Police revealed any of their own hate crime data publicly. The first instance was a research report compiled by representatives of the Vancouver Police, the RCMP, and Crown prosecutors. This report, published in 2002 presented a meta-analysis of hate crime incidents reported to police from 1991 to 1999, and the authors cautioned that their article does not represent the official views of their respective agencies. The second instance, appearing shortly after the article, was the 2002 research report conducted by a Simon Fraser University student analyzing homophobic hate crimes in and around Vancouver’s West End. The third instance was testimony during Parliamentary hearings on the 2003 Hate Propaganda amendments, in which the Vancouver Police Department gave its official endorsement to the amendments.

This sequence of examples appears to disclose a pattern. While Vancouver police do gather some information about hate-related incidents, and while this information may be retained in a form that allows an analysis, Vancouver police carefully control the public presentation of the information. In this way, attention was deflected away from the actual hate crime classification system in practice.

5.7.2 Seattle Police Department Bias Crime Coordinator

I was able to obtain relatively little direct information about hate crimes from the Seattle Police Department. The newly-appointed Bias Crime Coordinator, Susanne Moore, responded to my telephone calls, but she indicated that she would not “be honoring” my request for an interview.²³⁵ Her impression was that anti-gay bias crimes were not “a problem” in Seattle, although she noted she had only been in her position for a few months. Moore referred me to the Department’s Media Relations Unit, and after several more telephone calls, I was given permission to interview Moore’s predecessor, Detective Christie-Lynne Bonner, but without any

²³⁵ Seattle Police Department Interview Notes, dated Sept. 9 & 15-16, 2005 (on file with the author).

video or audio recording. Bonner agreed to “talk briefly” to provide general information for the study, but she emphasized that she would only be able to assist briefly, because such research projects “tend to eat up hours.”²³⁶

After my interview with Detective Bonner, I made a written public disclosure request seeking both (a) anonymous demographic information about hate crimes, including the forms used by investigators to record information about suspected hate crimes, and (b) documents from the Micah Painter investigation, including the forms investigators used to identify the attack as a hate crime or malicious harassment.²³⁷ The Department initially sent a letter acknowledging my requests and indicating that they were “being researched.”²³⁸ In a January, 2006 letter, the Department denied my request for documents related to the Micah Painter attack, because the case remained “an active investigation.”²³⁹ No reason was given for denying my request for anonymous demographic information and forms, and I received no further correspondence from the Department. I chose not to challenge the denial of my public disclosure requests.

During our interview, however, Detective Bonner provided several documents that she used to train fellow officers in the investigation of hate-related incidents.²⁴⁰ Bonner noted that even though she was no longer serving as the Bias Crimes Coordinator, she continued to provide hate crime training to new officers. Her training materials included: (1) A detailed press release available on the King County Prosecuting Attorney’s website explaining the office’s “Hate Crimes Filing Practice,” in context with a decision “Declining to Use the Hate Crimes Law,” in a particular prosecution;²⁴¹ (2) A one-page presentation handout titled, “Malicious Harassment Protected Classes,” listing the prohibited grounds of discrimination in the state and city

²³⁶ *Id.*

²³⁷ Letter, Request for Records, dated Oct. 21, 2005 (with Seattle Police Department Information Request form).

²³⁸ Letter, Public Disclosure Request: Hate Crimes Information, dated December 23, 2005.

²³⁹ Letter, Public Disclosure Request—SPD Incident # 04-262539, dated Jan. 13, 2006.

²⁴⁰ Seattle Police Department Interview Notes, dated Sept. 28, 2005 (on file with author).

²⁴¹ *Statement to Media for Release*, dated May 25, 2001 (on file with author).

malicious harassment laws, accompanied by the text of the laws;²⁴² and, (3) A Washington Court of Appeals opinion affirming a conviction for racially-motivated malicious harassment.²⁴³ Finally, Bonner referred me to the Seattle Police Department Policy and Procedure Manual section on Malicious Harassment. She noted that the Manual was not available online, but that it was available at the public library. Bonner was able to provide examples of Malicious Harassment cases based only on the Seattle Municipal Code provisions, including at least one successful prosecution brought in Seattle Municipal Court in recent years.

5.7.3 Comparison

Information about the Seattle Police Department's hate crime classification practices seems relatively scant compared to the evidence available for Vancouver police. Indeed, my inquiries produced little information about the Seattle Police. Fortuitously, however, the very nongovernmental groups that I was studying were more successful than me. The Hate Crime Awareness Project Coordinator and her co-author were able to examine the raw source data used by Seattle Police, and to use the official police database as a site of contention in ways that proved impossible in Vancouver. Whereas the Vancouver Police Department successfully focused the attention from the Aaron Webster killing onto a national legislative campaign, the Seattle Police Department itself became the subject of a local legislative inquiry. The result seems counter-intuitive because police and prosecutors succeeded in obtaining Malicious Harassment convictions in the Painter case, while only one of the Vancouver cases was classified as a hate crime.

The absence of public review or local legislative authority in Vancouver explains the absence of local legal contention about the Vancouver Police hate crime classification system.

²⁴² Presentation Handout, *id.* (citing Seattle Municipal Code § 12A.06.115 & RC W § 9A.36.080).

²⁴³ State v. Pollard, 906 P.2d 976 (Wash. Ct. App. 1995).

Simply put, no local opportunity exists for social contention to challenge classification decisions by the Vancouver Police.

Police hate crime classification systems provide a convenient focus for a summary of nongovernmental social contention in the hate crime field. The mere availability of public review and local legislative power does not fully explain the counter-intuitive result of open contention in Seattle. Given the apparent success of the Painter prosecutions, social contention ought to have been dampened. The contrary result is, however, explained by the occurrence of a fresh event in the Ballard neighborhood, which Seattle Police mistakenly excluded from their hate crime database. Even though the Ballard attack never resulted in a conviction—or even an arrest—, Molsberry and Armenakis were able to use their Report to channel energy from both the Painter attack and the Ballard assault, into a public review of the police hate crime classification system. But, it was only because of the availability of a public review mechanism, accompanied by local legislative power, that this effort was able to focus social contention on the police hate crime classification system.

Both Armenakis, the Hate Crime Awareness Project Coordinator, and Reis, the Safe Schools Coalition representative, attended the Seattle feedback meeting, and they both noted differences in the language of legal equality used in the two countries.²⁴⁴ Armenakis emphasized that Washington state did not—at that time—have a law banning “sexual orientation” discrimination in employment and other fields.²⁴⁵ Beth Reis explained that City and County codes both ban discrimination based on gender identity, however.²⁴⁶

Aside from textual differences in laws related to equality rights, the feedback session revealed the dynamics of police-community relations that accompanied the successful malicious

²⁴⁴ See *Seattle Feedback*, DVD.

²⁴⁵ See *Seattle Feedback*, DVD, Menu Title—*Different Antidiscrimination Laws*. The legislature passed a state law banning “sexual orientation” discrimination soon afterward, and a campaign to repeal the law by referendum failed.

²⁴⁶ See *Seattle Feedback*, DVD, Menu Title—*Seattle & King County Non-Discrimination Ordinances*. One of Reis’s co-directors at the Safe Schools Coalition, and the founder of Seattle’s Ingersoll Gender Center, had co-authored a local ordinance in nearby Olympia, Washington that banned “gender identity” discrimination.

harassment prosecutions against Micah Painter’s assailants. The Seattle Bias Crime Coordinator and the Intern both attended a Public Safety Forum at the Center at which the police and prosecutors discussed the case. Reis was “very pleased” when prosecutors specifically asked community members to appear in the audience during the sentencing to counteract the impression that Painter lacked “a community that cared.”²⁴⁷ The founder of Action Northwest, which was also housed in the Seattle Center, helped organize the forum. In addition to establishing a Bias Crimes Forum on its website, Action Northwest organized a large march that progressed through downtown Seattle, with significant news coverage.²⁴⁸ The Action Northwest founder and other former members discussed reviving the Q-Patrol neighborhood safety program. Reis described Action Northwest as being “about political and community action.”²⁴⁹

In the field of hate crime statistics, Reis said it was good to have both the queer identified NCAVP data and the police data, and it was good for the police to take responsibility for the statistics.²⁵⁰ Reis emphasized the need to address under-reporting of hate crimes, explaining that the NCAVP surveys get higher victimization rates and show different trends, because of better reporting by victims to queer-identified agencies.²⁵¹ In terms of community data collection, groups don’t do that in Seattle; some perceive statistics as not necessary. Armenakis observed that there was not a lot of “energy” around hate crime prevention in Seattle; many don’t want to work with the police.²⁵² Reis agreed, although her perception was that the Seattle Police are better than many places toward LGBT crime victims.²⁵³

While the police and prosecutors strove to connect with the community in response to the Painter case, the relationship was not entirely reactive—Seattle has an established LBGT

²⁴⁷ See *Seattle Feedback*, DVD, Menu Title—*Seattle Police Response*.

²⁴⁸ See *id.*

²⁴⁹ See *id.*

²⁵⁰ See *Seattle Feedback*, DVD, Menu Title—NCAVP NGO Reporting.

²⁵¹ See *Seattle Feedback*, DVD, Menu Title—“*Their Numbers are Always Higher.*”

²⁵² See *Seattle Feedback*, DVD, Menu Title—*Not much “Energy.”*

²⁵³ See *Seattle Feedback*, DVD, Menu Title—*Police LGBT Advisory Council.*

community police advisory council, which has been in existence “for years.”²⁵⁴ The group meets in the Center, and the former Police Chief regularly attended the meetings. On the other hand, at the time of the feedback, Reis and the intern had not yet met the new Bias Crime Coordinator, even though she had been on the job for several months.

Things clearly changed in Seattle within a few months after the feedback meeting. Molsberry and Armenakis published their Report, which triggered a series of publicly contentious episodes in the local legislature and local civil rights agencies. Something about the Ballard incident and the Molsberry Report provided the “energy” that had been lacking in the aftermath of the Painter attack and subsequent prosecutions.

Three participants attended the feedback interview in Vancouver: Tami Starlight, James Chamberlain, and the PGLAG Vancouver chapter President. Tami Starlight’s impression was that there were more GLBT hate crimes in Seattle, otherwise the responses to hate crimes were mostly the same in the two cities.²⁵⁵ The PFLAG Vancouver President agreed that there were “more similarities than differences,” between groups in Seattle and Vancouver,²⁵⁶ and that the “support groups” in the two cities were “on the same page.”²⁵⁷

The Vancouver participants noted important differences in police practices. Tami Starlight noticed the differences in Police administration of hate crime statistics, distinguishing the B.C. Hate Crime Team and the Seattle Bias Crime Coordinator. She complained about the B.C. Liberal government cutting funding for Vancouver Police Department’s diversity training program through the Justice Institute, and a resulting lapse in diversity training for four years.²⁵⁸ Chamberlain, the GALE-BC representative also noted that there had been a former office in the

²⁵⁴ *See id.*

²⁵⁵ *See Vancouver Feedback*, DVD, Menu Title—“*We’re on the Same Page.*”

²⁵⁶ *See Vancouver Feedback*, DVD, Menu Title—*More Similarities than Differences.*

²⁵⁷ *See id.*

²⁵⁸ *See Vancouver Feedback*, DVD, Menu Title—*Police Hate Crime Statistics.*

Yaletown area for the B.C. Hate Crime Team, and that it seemed “odd” that they would be relocated outside Vancouver in Surrey; he described this change as, “quite ironic.”²⁵⁹

Starlight emphasized that the Vancouver Police Department had a “rough record on self-examination,” had been “pretty dodgy,” in the past, had “botched” internal investigations, and that it would “be more wise to create a body separate from Police,” to monitor hate crime statistics.²⁶⁰ Thus, Starlight found it “perplexing to see Seattle doing so much more by enforcement of law by keeping the statistics,” in contrast to “practically nothing” being done by the Vancouver Police Department.²⁶¹ Follow-up questioning revealed more of Starlight’s reasoning in favor of police statistics gathering:

[Q]: Do you think that makes a difference? Is it really enforcing the law keeping the statistics, because the critics would say that that’s just some meaningless bookkeeping task? Do you think there is some use to having the patrol officers gather hate crime statistics?

[A]: Absolutely.

[Q]: Why?

[A]: I think we have a culture of misinformation and apathy. Where it’s just like, “oh well, that doesn’t happen here,” . . . we forget so easily about things that happen, and if we actually look at it on paper and say well there’s been like fourteen violent acts in the past four months and go, “holy crap, no way,” right . . . I’m sure the community if it looked at a lot of the statistics would be just appalled.²⁶²

The Vancouver PFLAG representative stated that a more accurate definition of hate crime was needed, and that “for starters” police have to be the ones keeping statistics, because they are the people there, and because gathering statistics will raise the awareness of officers.

²⁵⁹ See *Vancouver Feedback*, DVD, Menu Title—*Police Hate Crime Statistics*.

²⁶⁰ See *Vancouver Feedback*, DVD, Menu Title—*Police Mistrust*.

²⁶¹ See *id.*

²⁶² See *Vancouver Feedback*, DVD, Menu Title—*Misinformation & Apathy*. Starlight’s reasoning reflects hate crime scholarship. Among others, Professor Ryan King notes the “conceptual overlap” between hate crime reporting by police and the enforcement of hate crime laws. See Ryan D. King, *The Context of Minority Group Threat: Race, Institutions, & Complying with Hate Crime Law*, 41 LAW & SOC’Y REV. 189, at 191 n.1 (2007) (citation omitted).

Yet, she emphasized the need to have “somebody watching over the statistics.”²⁶³ Chamberlain observed that it was good to have “both kinds” of hate crime monitoring organizations—the police and rights groups.²⁶⁴ As an example he cited the Vancouver School Board Pride Committee, which successfully combines “traditional educational partner groups,” and LGBT “community groups”:

It’s like the watchdogs and the gatekeepers all together in one committee. It creates friction at times and initially when it started I think there was fear on the part of the gatekeepers that the other group were going to be gate-crashers and wouldn’t work with them. . . . I think it’s important for groups outside of the system, whatever the bureaucracy body is, and groups within the system to work together as best they can because they can create more impetus for change than if you have the gatekeeper of whatever group [] saying “this is a school issue,” “this is not a police issue” The gatekeeper ends up having to have a vested interest in the outcomes if they are participating in the process.²⁶⁵

And, although it may seem inefficient, Tami Starlight emphasized the need to keep the “watchdogs” separate from the “gatekeepers”—in other words, the police should not be left to monitor their own behavior.²⁶⁶ In Vancouver WEAVE partially fulfills this separate role, but its effectiveness is limited by the unavailability of any mechanism for public review of police hate crime classification decisions.

This Chapter has set out the practices of nongovernmental groups that monitor homo- and trans-phobic hate-related events in Vancouver and Seattle. In the end, differences in local hate crime classification systems and processes for public review of classification decisions constitute important sites of social contention for nongovernmental groups in both cities. The similarities and differences between the contention practices of these groups will be analyzed in Chapter 6, along with the overall conclusions of the thesis.

²⁶³ See *Vancouver Feedback*, DVD, Menu Title—*The Police are “There.”* The GALE-BC representative explained that hate crime reporting must rely on rapport, noting that street cops are generally more receptive than office cops.

²⁶⁴ See *Vancouver Feedback*, DVD, Menu Title—*Gatekeepers, Watchers & Gatecrashers*.

²⁶⁵ *Id.*

²⁶⁶ *Id.* Starlight observed the need to address equality in multiple fields—education, health, etc.—because they are all inter-related; for example, the Pride Committee includes education partner groups and community LGBT groups, with “watchdogs” and “gatekeepers” together in one committee.

6 Conclusions

The hypothesis that differences in hate crime labeling or classification systems would correspond with differences in the contentious practices of nongovernmental social groups that monitor hate crimes is supported by the evidence. The style of contention practiced by the groups also corresponds with the local site at which the legal classification operates. Moreover, the tone, or affective voice, used by the groups to describe the legal classification system for hate crimes coincides with their contentious practices. However, the proposed distinction between *ad hoc* and systematic contention appears inadequate to encompass the range of contentious practices of the groups that participated in the study. The summary that follows will attempt to synthesize the key variables that describe the relationship between the legal classification system for hate crimes and the contentious practices of groups at each site.

6.1 Legal Systems

First, the legal systems corresponding to the nongovernmental contention at each site cannot be neatly divided into the two categories *ad hoc* and systematic. In both Vancouver and Seattle, hate crime laws are implemented through a combination of police administrative practices and litigation in criminal court proceedings. The observations of Professor Davis about discretionary inaction¹ remain generally true at both research sites in this study: police agencies in both Seattle and Vancouver exercise a powerful discretionary authority to define an event as a suspected crime, eligible for prosecution. More importantly, as Davis observed, police exercise a largely unregulated authority to classify an event as not a crime. Because of their position as

¹ See Kenneth Culp Davis, *Police Discretion* (1975); Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (1969).

the initial gatekeepers to official knowledge of crime, moreover, a determination by police investigators that an incident is not a crime is definitive, for if police decline to investigate an event as a suspected crime it generally will not be prosecuted. These discretionary decisions not to enforce the law are systematic only to the extent that they are governed by enforceable internal police policies. While such policies exist in both Seattle and Vancouver, they are not enforceable in any meaningful sense.

The same discretionary authority to define an event as not a crime extends to hate crimes. But, in the hate crime field, police investigators serve as critical gatekeepers to knowledge of an incident both as a crime and as act of discrimination. Like all other suspected crimes, hate-related incidents are classified, or excluded, as hate crimes on an *ad hoc* basis, as they occur. This *ad hoc* treatment is the same for all incidents that come to the attention of the police. What makes hate crimes different, however, is the parallel administrative system by which police classify, or exclude, incidents as hate- or bias-related.

This administrative classification system exists with dramatic differences in Seattle and Vancouver. In Vancouver, there is some evidence that police may, and perhaps do, classify, or exclude, incidents as bias- or hate-related at the early stages of their investigations. But, virtually no information about Vancouver Police Department's classification system is available to the public, and this classification system, if it even exists in practice, is not subject to any meaningful public review. Thus, the evidence suggests that incidents are either never classified as hate-related by the Vancouver Police Department, or classified as hate-related only on an *ad hoc* basis. So, the distinction between *ad hoc* and systematic legal classification is descriptive of police practices in Vancouver.

Police practices in Seattle are more difficult to characterize. As in Vancouver, incidents are classified as crimes on an *ad hoc* basis in Seattle as they come to the attention of the police. Unlike Vancouver, however, local laws in Seattle establish a system of public reporting and

review that applies to the classification of incidents as bias- or hate-related. Yet, the public administration of hate crime classifications in Seattle cannot be easily described as only systematic or only *ad hoc*. Police investigators, perhaps in consultation with the Bias Crime Coordinator, use a system of standardized forms and procedures to classify or exclude incidents as bias-related. But this system is applied, perforce, on an *ad hoc* basis as incidents come to the attention of police. Two key characteristics distinguish Seattle’s hate crime classification system from Vancouver’s: (1) local legal principles set out in the Municipal Code constrain police classification decisions; and, (2) an official public forum exists, in the form of legislative oversight in the City Council, for reviewing police discretion to exclude incidents as hate- or bias-related. Thus, in place of the *ad hoc* versus systematic distinction, hate crime classification decisions in Vancouver and Seattle are better characterized as either subject to, or free from local legal principles and public review. Table 6.1 illustrates the differences in official classification systems in practice in Seattle and Vancouver.

Table 6.1—Official Hate Crime Classification Systems—Seattle & Vancouver

	Local Legal Principles	Public Review
Vancouver	N	N
Seattle	Y	Y

One caveat should be emphasized here. While the local hate crime classification system in Vancouver is free from both local legal principles and any meaningful public review, this is not necessarily so. The provincial legislature has some authority both to establish a procedure and standards for the identification of hate- or bias-related incidents throughout the British Columbia, and to make police hate crime classification decisions subject to ongoing public review. Alternatively, the province might delegate these functions to municipal governments, including the Vancouver City Council.

Canadian human rights groups have noticed the opportunities presented by the entrenchment of human rights principles in municipal legislation.² Furthermore, my email correspondence with Richard Warman,³ a Canadian lawyer noted for his successful litigation against hate-related World Wide Web sites, confirmed the importance of local lawmaking power in the hate crime field:

Municipalities, are of course, creatures of the provincial legislation that enable their existence and thus limit the powers available to them. There's a famous case out of BC where Vancouver attempted to pass a by-law barring Shell from bidding on municipal contracts until such time as it withdrew from apartheid South Africa. The Supreme Court held this was outside the power of the municipality:^[4]

[citing *Shell Canada Products Ltd. v. Vancouver (City)*]

I think this would be an important case to cite in your research about the limits of municipal authority to 'do good' if you haven't already.

As you undoubtedly know, Canada's cities have been struggling for many years to have greater constitutional protection enshrined in the constitution for themselves.

That said, municipalities like London, Ontario have been approached by groups like the London Association for the Elimination of Hate to adopt zero-tolerance for neo-Nazi group use of public spaces. Also, people in BC have battled for years to try to stop the libraries in Vancouver and Victoria from continuing to quite happily rent out space to neo-Nazi groups and the libraries were adamant in defending their right to do so. (this is paraphrasing the controversy - you can find more info on this by doing an Internet search)⁵

² See Claire Young, *Bringing Human Rights to the City: Municipal Human Rights Charters in Canada* (Centre for Equality Rights in Accommodation (CERA), Dec., 2005), available online at <http://www.equalityrights.org/cera/docs/Municipal%20Charter%20Summary%20Dec%202005.doc> (accessed Jan. 30, 2008) (citing recently enacted Montreal human rights charter).

³ Email from Richard Warman to author, dated Apr. 17, 2006 (Warman email) (on file with author).

⁴ Warman email, *id.* (citing *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231 (invalidating Vancouver City Council anti-Apartheid Resolution)). The Majority of the Court (Per Sopinka J.) held that the resolutions exceeded the municipal authority of the City of Vancouver, because they were intended to address matters outside the boundaries of the city. See *id.*, ¶ 35. In dictum, the Majority also concluded that the resolutions amounted to "unauthorized discrimination" against the oil companies, because they were not authorized by the city Charter. See *id.*, ¶ 36. While, technically, the Court's ruling on "unauthorized discrimination," was not necessary to its holding, it remains an accurate statement of Canadian municipal law. In *114957 Canada v. Hudson (Ville)*, [2001] 2 S.C.R. 241, for example, the Supreme Court cited *Shell Canada Products* and re-articulated the same principles of interpretation, though with a different result. See *114957 Canada, id.*, ¶¶ 28-30 (concluding local bylaws regulating pesticide application within town did not constitute impermissible discrimination).

⁵ Warman email, *id.*

Canadian provinces have sole authority over, “Municipal Institutions in the Province.”⁶ Provincial legislators could expand the powers of municipalities to authorize local laws banning discrimination. And, utilizing their power in the administration of justice, provinces could be more explicit about the legal standards and procedures for public review governing police hate crime statistics. The current state of law, and the current practices of police agencies in British Columbia, however, precludes any meaningful legal principles or public review of hate crime classification decisions. Unlike the administrative practices of school administrators, moreover, the discretionary inaction of the police in response to hate-related incidents seem to be exempt from any meaningful review in the courts or human rights agencies. This too could be modified by legislation. One final point is, however, worth noting. While ongoing regulatory review of hate crime classification decisions is currently unavailable in British Columbia, any level of government could exercise its power to initiate an *ad hoc* public inquiry to examine the standards and procedures used by police to classify or exclude incidents as hate- or bias-related.

What is said here about police discretion is largely true of prosecutorial discretion, with only a few exceptions. When prosecutors in either Seattle or Vancouver classify an incident as hate- or bias-related in their charging or sentencing pleadings, their decisions are subject to review by a fact-finder, either a judge or a jury. And, at both sites, a successful prosecution or sentencing based on a bias motivation is subject to review in the appellate courts. But, critically, prosecutorial decisions not to pursue hate crime penalties are practically un-reviewable in both countries.

The official classification systems for hate crimes in Vancouver and Seattle stand in stark contrast to the classification systems for school bullying and harassment. At both sites, the classification of school harassment is subject to the legislative authority of local school boards. And local school boards in and near both Seattle and Vancouver have adopted publicly

⁶ *Constitution Act 1867*, § 92(8).

reviewable policies prohibiting homophobic and trans-phobic harassment. Table 6.2 characterizes school harassment laws at the two sites. A comparison of Tables 6.1 and 6.2 illustrates the differences between hate crime statistics laws and school anti-harassment laws. Whereas hate crime statistics are gathered and reviewed publicly at only one site, school board policies publicly prohibit homo- and trans-phobic harassment at both sites.

Table 6.2—School Harassment Laws—Seattle & Vancouver

	Local Legal Principles	Public Review
Vancouver	Y	Y
Seattle	Y	Y

Moreover, the presence of local legislative authority and public review of school harassment policies does seem to be reflected in the contentious practices of nongovernmental groups at both sites. Both Vancouver’s GALE-BC and Seattle’s Safe Schools Coalition participate in advocacy activities meant to promote local anti-harassment policies and provincial or state anti-harassment legislation. While the success of advocacy has varied slightly between B.C. and Washington state, the availability of parallel state, provincial, and local legislative sites for contention correlates with similarities in the styles of contention used by school safety groups. Groups in Seattle and Vancouver advocate for radically similar school safety laws using very similar techniques.

The consistency between school safety groups at the two sites tends to verify the assumption that legal cultures of Seattle and Vancouver are radically similar. Similarities in local school governance should lead to similarities in nongovernmental contention for similar anti-harassment policies only in radically similar cultures. Stated conversely, dissimilar cultures would be expected to produce different styles of contention, for different anti-harassment policies. But, the across-the-board correspondence in school governance and social contention for anti-harassment policies confirms that differences in the background legal cultures in Vancouver and Seattle are insignificant.

And, if background cultures are indeed similar, as a comparison of school safety laws and social contention suggests, then differences in social contention in the hate crime field are more certainly tied to differences in hate crime classification systems, including statistics laws.

6.2 Social Groups

After completing the individual group interviews, I organized a feedback meeting at each site to give the groups an opportunity to review the initial videotaped presentation of results and to provide their analysis of differences and similarities between the two sites. Information from these feedback meetings was presented in Chapter 5 alongside information from the individual interviews. The feedback information is used for a second purpose here; it provides several framework principles for a concluding comparison. Some of the important axes for a comparative analysis come directly from the participants at the feedback meetings.

Preliminary results for all five types of groups studied here are summarized in Table 6.3 below. In the Table, the first two columns represent the availability of Local Legal Standards and Public Review of classification decisions at each research site. Based on an analysis of the data, these two variables best articulate the legal principles most influential in the contentious behavior of the groups studied.

Table 6.3—Site & Style of Social Contention by Groups in Canada & the U.S.

	Legal Classification System		Social Contention	
	Local Legal Standards	Public Review of Classification	Site(s) of Contention	Style(s) of Contention
Canadian Groups				
Anti-Violence Programs	N	N	<ul style="list-style-type: none"> • Contained Government Funding, Collaboration & Victim Services 	<ul style="list-style-type: none"> • Reactive Group Formation & Case-Based Services
<i>Ad Hoc</i> Anti-Violence Groups	N	N	<ul style="list-style-type: none"> • Uncontained, Autonomous Neighborhood Survey 	<ul style="list-style-type: none"> • Reactive Group Formation • Ongoing (?) Survey

	Legal Classification System		Social Contention	
	Local Legal Standards	Public Review of Classification	Site(s) of Contention	Style(s) of Contention
School Safety Groups	Y	Y/N	<ul style="list-style-type: none"> • Contained Provincial Legislation & Local Policies 	<ul style="list-style-type: none"> • Ongoing, Established Group • Ongoing Lobbying & Education
Family Groups	N	N	<ul style="list-style-type: none"> • Contained, Case-Based Response 	<ul style="list-style-type: none"> • Ongoing, Established Group • Reactive, Case-Based Advocacy
Transgender Rights Groups	N	N	<ul style="list-style-type: none"> • Uncontained Education & Commemoration 	<ul style="list-style-type: none"> • Ongoing “Remembrance”
U.S. Groups				
Anti-Violence Programs	Y	Y	<ul style="list-style-type: none"> • Contained Police Advisory Council & Governmental Funding • Contained Police Data Analysis • Uncontained Local Legislative Inquiry 	<ul style="list-style-type: none"> • Reactive Group Formation & Community Survey • Reactive (?) Statistics Review • Ongoing Legislative Advocacy
<i>Ad Hoc</i> Anti-Violence Groups	Y	Y	<ul style="list-style-type: none"> • Uncontained, Autonomous Bias Crime Forum 	<ul style="list-style-type: none"> • Reactive Group Formation & Case-Based Response
School Safety Groups	Y	Y/N	<ul style="list-style-type: none"> • Contained State Legislation & Local Policies 	<ul style="list-style-type: none"> • Ongoing, Established Group • Ongoing Lobbying & Education
Family Groups	Y	Y	<ul style="list-style-type: none"> • Uncontained Education & Commemoration 	<ul style="list-style-type: none"> • Ongoing “Remembrance”
Transgender Rights Groups	Y	Y	<ul style="list-style-type: none"> • Contained Local & State Legislative Lobbying • Uncontained Education and Commemoration • Uncontained Survey 	<ul style="list-style-type: none"> • Established Group, Ongoing Lobbying • Ongoing “Remembrance” • Ongoing (?) Survey

The last two columns represent the practices of the groups studied in relation to bias-motivated events. The first of these, Site of Contention, represents the location, or governmental focal point, of each group’s information practices. These practices are characterized as either *contained*, if they correspond to the official classification system, or *uncontained*, if they adopt their own classification system or their own forum independent of any official, governmental

system.⁷ Where a group focuses its contention at more than one site, each site is described briefly. The final column lists the predominant Style or Styles of contention or other information practice utilized by each group. The styles are characterized, as close as possible, as either Reactive, if they appear in reaction to discrete incidents, or Ongoing, if they are sustained even in the absence of individual triggering events.

After explaining the characterization of each group's practices, the following discussion will attempt to correlate each group's practices with the key differences in local legal principles at each site. As suggested at the conclusion of Chapter 5, this discussion reveals an important connection between the local legal classification system used to label hate crimes and the dynamics of contention by nongovernmental groups that monitor hate crimes at each site.

Of the groups studied, three types are most directly engaged with the legal classification systems for hate-related incidents. The community-based anti-violence programs, the *ad hoc* anti-violence groups, and the school safety groups all engage in contention directly focused on bias-related incidents.

Collaboration with, and funding by, the governmental entities that implement the official classification system generally inhibits uncontained contention at the same site. Stated more simply, effective collaboration and resource pooling with governmental actors tends to contain the practices of nongovernmental groups. Vancouver's Anti-Violence Pilot Project illustrates this containment process. Since the Pilot Project was funded by the official provincial agency

⁷ The *contained* versus *uncontained* dichotomy is an adaptation of Melucci's distinction between *contained* and *transgressive* social contention. See Alberto Melucci, *NOMADS OF THE PRESENT: SOCIAL MOVEMENTS & INDIVIDUAL NEEDS IN CONTEMPORARY SOCIETY* (1989); see also Alberto Melucci, *CHALLENGING CODES: COLLECTIVE ACTION IN THE INFORMATION AGE* (1996); *DYNAMICS OF CONTENTION* (Doug McAdam, *et al.* eds., 2001). None of the group practices reviewed here seem transgressive. Yet, they do seem to embrace the official governmental classification systems to greater or lesser degrees.

By contrast, an example of transgressive contention appears in *R. v. Geoghegan*, [2005] A.J. No. 1966 (Prov. Ct.) (Fraser Prov. Ct. J.) (Oral Judgment, Oct. 4, 2005). While awaiting sentencing for throwing a pie into the face of the Alberta Premier, Geoghegan was identified among a group of protestors who disrupted a meeting of the Concerned Christian Citizens gathered to discuss Bill C-250, adding "sexual orientation" to the Criminal Code Hate Propaganda provisions. Geoghegan was sentenced to thirty days' jail for the pie incident and ordered to make a \$500 charitable contribution to the Concerned Christian Citizens.

charged with providing victim services, its activities focused on case-by-case victim services. And, though the Pilot Project did produce a Survey as part of its Final Report, the instrument elicited responses from individuals accessing services at the community-based LGBT Centre. Since data were collected and processed with the primary purpose of service delivery, the database produced was adapted to the improvement of service delivery, rather than as a challenge or alternative to any official database.

The *ad hoc* group WEAVE, by contrast, practices uncontained contention. Since its activities were neither funded by, nor coordinated with any official governmental agency, its Survey does not subscribe to the format or themes of any governmental entity. In the absence of any publicly reviewable database for hate-related incidents, moreover, the authors of the WEAVE Survey were at liberty to present their findings in any forum available to them. Judging by the responses of the participants in the feedback meetings, this freedom to choose a format and a forum for presenting nongovernmental classifications represents dubious advantages. The consensus at both locations was that parallel governmental and nongovernmental classification systems were the ideal. Nevertheless, the formation of WEAVE can be directly related to the absence of any publicly available official statistics. The tone of comments by Jack Herman during our interview demonstrates the importance among the group's members of taking responsibility, assuming agency, in the betterment of their own neighborhood. Judging by Herman's description, the WEAVE survey was conducted in defiance of the failure of police to publish official statistics. Indeed, the tone of Herman's interview responses suggested that WEAVE takes some pride in its autonomy from governmental influence—at least its autonomy from Vancouver Police Department influence.

In Seattle, when the Hate Crime Awareness Project was formed, there was little “energy” in the community for contention about hate crime statistics. The emotional state of let-down may be tied to the successful community collaboration between the LGBT community and police

and prosecutors during the prosecution and sentencing of Micah Painter’s attackers. If Beth Reis’s feedback is indicative, the community was “very pleased.” But, this contentment changed rapidly, upon news of a similar attack which the Seattle Police Department admittedly mislabeled. There followed a significant episode of contention directly challenging the legal classification system used by police to label hate crimes. The variation in mood coincided with differences in sites and styles of contention. The reactive focus on the prosecution, and a successful case, served to contain the contention following the Painter attack. The failure to investigate or properly code the Ballard attack led to indignant complaints, a thoroughgoing analysis of police data, and contentions public proceedings in the City Council. While the Ballard attack was apparently contained within the local legislative sphere, it was allowed to breach the containment defined by the Seattle Police Department’s administration of legal knowledge.

Similar observations apply to the Action Northwest. Its Bias Crime Forum and the public safety forum that it organized could have taken on a belligerent tone, but they were successfully contained by a focus on the prosecutions for the Painter attack.

The practices of school safety groups must be analyzed in reference to the official governmental classification systems that correspond to their practices. In their activities related to school violence and harassment the school safety groups do not typically engage with criminal justice hate crime classifications. Instead, their practices focus on school bullying and harassment motivated by homo- and trans-phobic bias. Both Vancouver’s GALE-BC and Seattle’s Safe Schools Coalition actively advocate local board policies and either provincial or state legislation that would classify and prohibit homo- and trans-phobic harassment and violence in schools. In both Vancouver and Seattle, school safety groups look to virtually identical legislative bodies, with virtually identical policymaking authority, to contend for the creation of virtually identical classification systems.

Policymaking at the two most local levels of government serves as both a mechanism for a public review of classification decisions and an opportunity to establish or modify a system of classification. As would be expected by the research hypotheses here, therefore, school safety groups contend in virtually identical ways at virtually identical legal locations. Because an ongoing, systematic mechanism of classifying school violence and harassment seems possible in both locations, the groups are not driven by a reactive case-based response. The groups contend within the available sites of official public review. Their contentious practices are of a contained nature, because contained sites are readily available in local school boards and provincial or state legislatures.

One further similarity is apparent from the comments of the school safety participants—they all expressed a desire for collaboration and conciliation in their relationships with school officials and educators. And, their tone of voice coincides with their style of contention—the school safety groups uniformly practice steady, ongoing contention for improvements in school bullying and harassment policy, within an existing legislative framework, and accompanied primarily by educational initiatives.

The results of contention by the school safety groups, moreover, verify the radical similarities in cultural background at each location. While the Vancouver group has not succeeded in its advocacy for a province-wide anti-harassment mandate, several local boards have adopted policies which it supports. In Seattle, a statewide “Model Policy” has been enacted by the legislature and the state education agency, although the legislation falls short of the wishes of the Seattle’s Safe Schools Coalition, because it does not institute a statewide ban on homo- or trans-phobic school harassment. The representatives of the school safety groups themselves agreed unanimously that their groups’ practices were more similar than different. If the cultural backgrounds of Vancouver and Seattle differed significantly, then different results could be expected for the school safety groups. The profound similarity of the school safety groups in

Seattle and Vancouver therefore confirms the premise of the study that these two locations are truly similar.

The PFLAG and transgender rights groups are the most difficult to characterize in their activities related to biased incidents, and the data analyzed here are therefore the least conclusive in relation to these two types of groups. These groups engage in contention related to homo- and trans-phobic events, but their contentious practices span a broad and unpredictable spectrum. The generally similar spectrum of contentious practices among transgender rights groups in Seattle and Vancouver reinforces the premise that the two locations share a similar cultural background. Comments in the Vancouver feedback meeting suggested any differences might be attributed to a smaller national population among Canadian groups, resulting in a lesser ability to achieve a “critical mass” of support for group efforts. Yet, the same commentators concluded that groups on both sides of the border were mostly “on the same page.”

Nevertheless, Family and Transgender rights groups are more difficult to characterize in their anti-violence activities. This difficulty, I speculate, is caused by the multiplicity of organizing principles governing these groups. The Family groups engage in education and support activities centered around periodic group meetings. Advocacy is only one among three organizing principles, and advocacy is understandably distributed among other causes in addition to contesting hate-related events. Transgender rights groups similarly span a spectrum of activities that include prominently health care policy, in addition to anti-violence work. In sum, family and transgender rights groups engage with the official governmental classification of hate-related events, but only as a small fraction of their much broader activities.

6.3 Connecting Social Contention with Legal Systems

The data related to the first three types of groups are more conclusive, however. Both the community-based anti-violence programs and the *ad hoc* anti-violence groups are organized directly around either discreet hate-related cases or hate-related violence generally. School

safety groups are likewise organized around anti-violence programming in schools and legislative and policy advocacy. And, although these Schools groups present educational materials and support local student groups, for example, all of these activities can fit easily into an anti-violence framework if they are characterized as preventative of future violence.

Setting aside the practices of the more complex family and transgender rights groups, the practices of the first three types of groups correlate to differences in local legal classification systems for hate-related conduct. The results for these groups are summarized more succinctly in Table 6.4 below.

Table 6.4—Results Summary

	Legal Classification System		Social Contention	
	Local Legal Standards	Public Review of Classification	Site(s) of Contention	Style(s) of Contention
Canadian Groups				
Anti-Violence Programs	N	N	Contained Site (Grant-Funded Pilot Project)	Reactive Formation Reactive Contention (Grant Terminated)
<i>Ad Hoc</i> Anti-Violence Groups	N	N	Uncontained Site (WEAVE Survey)	Reactive Formation Reactive Contention (Ongoing (?) Survey)
School Safety Groups	Y	Y	Contained Sites (School Board Policy)	Ongoing Contention
U.S. Groups				
Anti-Violence Programs	Y	Y	Contained Site (Grant Funded Project) Uncontained Site (City Council Review)	Reactive Formation Ongoing Contention (?) (City Council)
<i>Ad Hoc</i> Anti-Violence Groups	Y	Y	Contained Site Court Case Mobilization Uncontained (online Bias Crime Forum)	Reactive Formation Reactive Contention
School Safety Groups	Y	Y	Contained Sites (School Board Policy)	Ongoing Contention

When the groups are characterized strictly by their information practices in relation to police hate crime classification systems, the resulting correlation becomes apparent. In Vancouver, where police do not publicly gather hate crime statistics, and where their classification system is therefore un-reviewable, both *ad hoc* anti-violence groups and

community-based anti-violence programs have no official point of reference for contention about police hate crime classifications. The contention of these nongovernmental groups is therefore uncontained by any police classification system. At the same time, however, the absence of a police hate crime classification system deprives nongovernmental groups of any basis for a common, ongoing system of data collection in relation to hate-related events.

Community-based anti-violence programs and *ad hoc* anti-violence groups in Seattle, on the other hand, enjoy both locally-defined legal standards and a local mechanism of public review for police hate crime classifications. This mechanism is situated in the City Council, whose powers include not only oversight over the Police Department but also legislative authority to create new criminal offenses and hence new responsibilities for police. Thus, even though their contention might be triggered by a discreet hate-related event, like the Ballard attack, their focus tends to be located within a local legislative framework, and their style seeks modifications to the ongoing system of classification.

Where a police classification system and a mechanism for publicly reviewing police classification decisions are both available, two primary modes of behavior may be used to reconcile official and nongovernmental hate crime classifications. Nongovernmental groups may address disagreements about classification decisions—or classification practices more generally—either through collaboration or by seeking adversarial public review. Of these two techniques, collaboration remains “contained” from the perspective of police officials. If collaboration does not accomplish the desired reconciliation, however, nongovernmental groups may challenge police officials in a forum that permits public review of police classifications. From the perspective of police officials, public review would seem uncontained—the nongovernmental groups will have transgressed the boundaries of police authority. Still, from the perspective of a legal classification system, transferring a classification dispute to a local legislative body for public review remains within the boundaries of the overall legal

classification system. Thus, in the summary table above, I have characterized the public review of Seattle hate crime statistics as contained rather than uncontained contention.

But, in Vancouver, where no official hate crime classification is accessible, neither collaboration nor public review is an option. Thus, by definition, any hate crime classification advocated by anti-violence groups in Vancouver is uncontained. So, while the activities of Vancouver's community-based Anti-Violence Pilot Project might be seen as contained from the perspective of a victim services model, they are not contained by a police classification system for hate crimes. Moreover, even if public data collection and reporting were practiced by Vancouver police, the absence of any local legal forum in which to challenge police classifications would tend to liberate the practices of anti-violence programs from any police classification framework.

6.4 Summary of Findings

This study has been about social mobilization and social contention among groups that contend in the hate crime field. Implicitly, two aspects of mobilization and contention are revealed here in a comparative context: (1) the powerful intermediary roles created or facilitated by legal classification systems; and, (2) the role of homo- and trans-phobic hate crimes as triggering events for mobilization and social contention. Either of these effects might be explored in the practices of governmental agencies, for example police departments or local school boards. Here, however, the focus has been upon nongovernmental groups in society that monitor or otherwise participate in social contention related to hate crimes.

Several difficulties might be expected in a study with such a nongovernmental focus. The most obvious difficulty failed to materialize here. One might expect researchers to experience difficulty accessing the inner dynamics of groups which, by their nature, have a

serious stake in the privacy of their members and their proprietary knowledge. As Chapter 5 reveals, however, concerns about access were mostly unwarranted in this study. Informants were generally eager to provide information. Indeed more information was accumulated than can be adequately represented in the space allotted here.

The second, and ethically more serious, drawback relates to the disciplinary effects of an inquiry of any kind that examines the activities of marginalized social groups, particularly sexual minorities. The glare of attention, even the relatively trivial exposure of a preliminary academic study like this, can threaten the autonomy and integrity, not to mention the privacy, of a marginalized group in society. Lacking formal training in the ethical implications of social anthropology, I have relied upon the institutional protections of an ethical review board combined with the good faith implicit in my personal interactions with informants. I can only thank those who agreed to provide data for this research, and express my hope that the results live up to their expectations. Any lingering errors are my responsibility alone.

Having overcome these preliminary difficulties, the data suggested important findings related to both the dynamics of social contention and social mobilization in the hate crime field.

6.4.1 The Dynamics of Social Contention in the Hate Crime Field

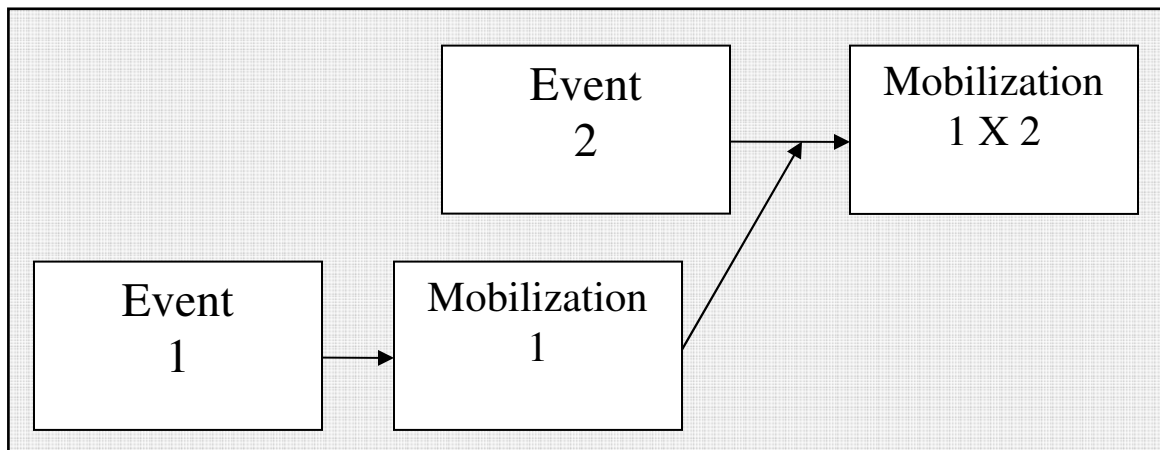
Research examining the knowledge-producing practices of police investigators in the hate crime field tends to describe an array of practices as if they are the end point on a spectrum of development, as if the recognition of hate crime as a domain brings an end to the processes by which legal knowledge is determined.⁸ The results here suggest a more dynamic process in which policing agencies continue to change their practices, despite the maintenance of a static set of applicable legal principles. But, the point emphasized here is that nongovernmental groups

⁸ See, e.g., Jeanine Bell, *POLICING HATRED* (2002); Valerie Jenness & Ryken Grattet, *MAKING HATE A CRIME: FROM SOCIAL MOVEMENT TO LAW*, at 7, 8 (2001); Elizabeth A. Boyd, et al., “*Motivated by Hatred or Prejudice*”: *Categorization of Hate-Motivated Crimes in Two Police Divisions*, 30 *LAW & SOC.’Y REV.* 819 (1996).

adopt knowledge-producing practices that either correspond with the official classification processes of police and other governmental agencies or represent autonomous efforts to define inequality in response to hate-related events. And, like policing agencies, nongovernmental groups sometimes adapt their practices in response to new triggering events, which include both changes in legal classification systems and new bias-related incidents.

But, this study does not examine mobilization or social contention in their general forms. Instead, the primary focus is on the kinds of mobilization and contention that contribute to or influence knowledge about equality in the context of hate crime classification decisions. At this time, a quantitative analysis of homo- and trans-phobic hate crimes, using official hate crime statistics would be inadvisable, even if it were possible. An analysis of hate crime classification systems is nevertheless both possible and useful. And, even more interesting is the examination of the role of nongovernmental social groups in the construction of legal knowledge about such hate crimes.

Moreover, and critically important to understanding the differences in practices in Seattle and Vancouver, the dynamics of social contention in the hate crime field do not always play out in a linear fashion. For example, as the interviews and other data reveal, the timing of multiple triggering events can cause a multiplier or crescendo effect, resulting in more vigorous mobilization than would have occurred in response to the separate events alone. Figure 6.1 below is meant to illustrate the sequence of events leading to a multiplier effect in social contention.

Figure 6.1—Effect of Successive Triggering Events

To illustrate, if one isolated hate crime occurs in a community, nongovernmental groups are likely to respond with some form of social contention—either in cooperation with or challenging police and prosecutorial classification decisions. If a substantial time lag occurs after this initial triggering event, then a new event may trigger a very similar mobilization and similar kinds of social contention by the same social groups. Of course a separate triggering event might also result in no action because of either a sense of resignation or hopelessness or a sense of success after a prosecution. If, on the other hand, a new hate-related event occurs soon after the initial triggering event, the mobilization and the kinds of social contention emerging from the second event are apt to be substantially different than if the two events had occurred in isolation. Note, moreover, that from the perspective of nongovernmental groups, either a hate-related incident, or a seemingly inadequate official response to such an event, can constitute a trigger for social mobilization and contention.⁹

Examples of the multiplier effect of successive triggering events are easily identified in the data compiled for this study. In Seattle, following the successful mobilization and contention in support of the Micah Painter prosecutions, a second hate-related event triggered occurred in

⁹ This model is far too simple to accurately describe the multi-variable world of actual social relationships. One might easily imagine, for example, a second event that triggers a response in a social group different than the first, but related by similar goals and interests—say, a homophobic assault followed close in time by a racist assault. In this scenario the streams of mobilization might well merge, resulting in a completely different dynamic. The social networking implications of such a dynamic are worth examining in some detail, but beyond the scope of this study.

Seattle's Ballard neighborhood. While this event might not have otherwise triggered any mobilization, the apparent misclassification of the event by Seattle Police was sufficient to energize some of the same groups that mobilized in response to the Painter case. The resulting contention may have been more vigorous than it would have been if the two events had been separated by a significant time.

Successive triggering events were available for contention in Vancouver in the aftermath of the Aaron Webster killing and the subsequent court cases. Significantly, the failure of prosecutors to seek a sentencing premium for bias, prejudice or hate in the Cran case was considered a significant new event by more than one Vancouver informant. I speculate that the Cran decision did not trigger a multiplier or crescendo effect because of differences in the local legal systems of Vancouver and Seattle. In Seattle the Hate Crime Awareness Project Coordinator and others were able to step outside the containment of the police hate crime statistics system and present their claims in a different forum—the Seattle City Council. Vancouver groups, however, had nowhere to go in response to the failure of enhanced penalties in the Cran case. While documents from the Vancouver Police Department, as well as excerpts from their public statements, suggest that police classified the Webster attack as a hate crime, Vancouver groups had no way of knowing about this classification decision, since Vancouver police do not report their classifications publicly. Moreover, even if Vancouver groups like WEAVE or the Anti-Violence Pilot Project had known about a potential mis-classification in the Webster case, no local legal forum exists in Vancouver to hear a challenge to a hate crime classification decision.

6.4.2 Intermediary Roles

Recalling the introductory examples cited in Chapter 2 will illustrate the powerful intermediary roles shared by police officials and the nongovernmental groups examined here.

History leaves little direct evidence of the practices of nongovernmental groups that interacted with Patrick and Augustine as they contended about slavery and mob violence centuries ago. Nonetheless, what we know from their recorded contention reveals several distinct similarities between the roles of these two church officials and the policing agencies and nongovernmental groups of today. Because they practiced legalistic classification, with some degree of official governmental authority, both Augustine and Patrick represent useful models for the analysis of roles among present-day governmental officials and nongovernmental groups. Furthermore, unlike ancient history, in our times the correspondence between governmental agencies and the nongovernmental groups that might contest their official legal classification decisions is available for immediate study.

The interview data and information gathered from police sources reveal important differences in the intermediary roles of governmental and nongovernmental representatives in the two countries. Governmental officials who assign legal classifications to hate-related events may be seen as intermediaries between governmental and nongovernmental groups. Thus, a police investigator, or a unit within a police department may be seen as the intermediary between the government and nongovernmental groups that monitor hate-related events. Simultaneously, these same governmental agents may be seen as intermediaries between different groups that share governmental authority. For instance, a police hate crime unit might be seen as an intermediary between an individual police investigator with questions about the classification of a hate-related incident and the prosecutor's office that will be required to litigate criminal responsibility and sentencing. In turn, the prosecutor would be an intermediary between police officials and the fact finder or sentencing judge. These intermediary relationships within governmental departments are very interesting. It is however, a premise of this study that exploring the roles and behaviors of official governmental intermediaries is akin to hagiography—while interesting, there is no particular shortage of such research. What is less

common and potentially more useful is an examination of the nongovernmental intermediaries that correspond to the official governmental groups that classify hate crimes.¹⁰

In Vancouver, police officials maintain close control over their hate crime classification decisions. Because their decisions are not subject to public review or local legal standards, Vancouver police hold a monopoly on the official legal definition of hate crime in practice. Vancouver police do present their knowledge about hate crimes, but they do so through closely guarded, proprietary channels. Two concrete examples appear in the data gathered here: (1) the academic study of police hate crime reports commissioned by Vancouver Police in preparation for its lobbying in favor of Bill C-250; and, (2) the 2002 academic paper published by three law enforcement officials, using proprietary police data about hate crimes in B.C., including Vancouver. This combination of a cultivated monopoly on official hate crime data, and the absence of any local legal standards or public review of data, places Vancouver Police and the B.C. Hate Crime Team in the position of an unassailable intermediary or broker of legal knowledge about hate crimes. Moreover, the police forces themselves clearly value the control of their own hate crime database. Allowing only limited, controlled access to the database gives the police forces the power to nominate their own preferred intermediaries in the production of academic knowledge in the criminal justice field. Thus, the police forces in B.C are able to control not only the how and why of knowledge production in the hate crime field but also the “who.” In this environment, nongovernmental groups are left with no meaningful role in the official hate crime classification system. On the other hand, groups like WEAVE are free to

¹⁰ Note, however, that an important and ambivalent role is played by quasi-governmental agencies or social groups—even in the classification of hate crimes. For example, MacMillan, et al. note that the Canadian Association of Chiefs of Police has interpreted the definition of a hate crime to exclude victims targeted because of both their vulnerability and a prohibited bias. See Craig S. Macmillan, *et al.*, *Criminal Proceedings as a Response to Hate: The British Columbia Experience*, 45 CRIM. L. Q. 419, 460-61 (2002) (“the CACP agreed on April 1, 1998, that the operating definition for hate crime will be “a crime motivated by hate, not vulnerability.”). The Washington Association of Sheriffs and Police Chiefs (WASPC) plays a similar quasi-governmental role as the entity responsible for aggregating local hate crime statistics to forward to the FBI.

develop their own data collection techniques, free from the influence of official data or official data collection methods.

In their intermediary roles, police and nongovernmental groups in Seattle differ profoundly from their Vancouver counterparts. Both Seattle Police and nongovernmental groups seek to classify hate-related events, but they do so in the presence of a third class of powerful intermediary—the City Council and local civil rights agencies. Because the City Council in particular has local lawmaking power binding on Seattle Police, and because Seattle Police are required to publish their hate crime classification decisions periodically, nongovernmental groups have a site at which to contest classification decisions. In this dynamic, both the nongovernmental groups and the City Council share a powerful intermediary role with the Police—all three entities combine to influence the definition of hate crime in practice.

There is nothing inherently insidious, or exceptional, in the careful control of official legal knowledge, even when it implicates our social understanding of concepts like hate crime or equality. But, the tight control of hate crime data by the Vancouver police constitutes a significant difference in the hate crime classification systems in Vancouver and Seattle. And, differences in the control of hate crime data, local legal standards, and the availability of public review, have very important consequences for the dynamics of social mobilization and contention about hate-related incidents.

6.4.3 Social Mobilization

What is distinctly, and unavoidably, lacking in the illustrations provided in Chapter 2 is evidence of the dynamics of social mobilization and social contention linked to the events described in Patrick’s Letter and Augustine’s Sermon. Each of these church officials was surely reacting not only to a discreet event but also to the sentiments of the social groups that constituted their congregations. Evidence about the practices of such nongovernmental groups is

generally omitted from recorded history, and the omission can probably never be cured. The practices of today's social groups, on the other hand, are available for study.

Perhaps even more today than in late Roman times, law defines the roles of both governmental and nongovernmental intermediaries, and law facilitates particular types of social mobilization and contention. But, how do laws shape the practices of these groups? And, how do nongovernmental groups seek to influence the laws themselves? These questions can probably never be answered definitively for groups in the early Fifth Century Roman provinces. But, they can, and should, be answered for equality-seeking groups operating in today's American and Canadian cities.

This study's important findings about social mobilization and contention are set out in Tables 6.3 and 6.4 above. To summarize, the presence or absence of local legal standards and public review for hate crime classification decisions influences the social mobilization and contention of nongovernmental groups. Where local legal standards and public review exist, nongovernmental groups tend to conform their contention and mobilization to the legal sites available to them. In this environment, nongovernmental contention also tends to be ongoing rather than reactive, although this dichotomy has only a limited power to describe the reality of life for groups that contend in the hate crime field. Where local legal standards and public review are unavailable, nongovernmental groups are under no pressure to conform to an official classification system and are free to develop their own autonomous classification mechanisms. In this environment, however, nongovernmental groups tend to resort to reactive contention in response to hate-related events.

6.4.4 Summary

The results of the study, in sum, suggest that nongovernmental social groups conform their contentious practices to the contours and dynamics of the locally available legal

classification systems. Stated in concrete terms: Nongovernmental social groups that monitor homo- and trans-phobic hate crimes tend to use the available police classification systems as their template for contesting hate crime classification decisions, and they tend to stylize their contention to fit the available mechanisms for local legislative review. Where a local hate crime classification system is either non-existent or not reviewable in public, nongovernmental social groups adapt both the location and style of their contentious practices to their own purposes. Overall, the results support the general hypothesis that an official hate crime classification system seems to produce systematic hate crime classification by nongovernmental groups; whereas, the absence of any official hate crime classification system seems to produce reactive nongovernmental classification decisions.

Employing a law and literature analysis, Casey Charles suggests a similar distinction between “contained” versus “transformative” responses to homophobic hate crimes.¹¹ Particularly relevant here, Charles uses the popular production of *The Laramie Project* to propose the development of a “model” for transformative social responses rather than “contained or sympathetic catharsis.”¹² Charles’s concluding imperative is suggestive of the very analysis attempted here: “our dramas must come out of the closet of the theatre into the streets, the courthouses, and the legislatures.”¹³

6.4.5 Further Research

The results of this study are necessarily preliminary. Alternative avenues of investigation might be identified at each stage of the analysis employed here. Unfortunately, significant questions remain unanswered; indeed, the results may raise more questions than answers. First,

¹¹ See Casey Charles, *Panic in the Project: Critical Queer Studies & the Matthew Shepard Murder*, 18 *LAW & LITERATURE* 225 (2006).

¹² See Charles, 18 *LAW & LITERATURE*, at 247-48.

¹³ 18 *LAW & LITERATURE*, at 248; see also, *id.* (noting “The production of *The Project* in Missoula did not lead to any police training or legislation on a municipal or state level, though clearly most in the room after the production would have voted for it.”).

if methodological challenges can be overcome, then a variety of quantitative studies of hate crimes and hate crime law would be extremely useful. If differences in terminology could be reconciled, a quantitative comparison of homo- and trans-phobic hate crimes in Canada and the United States would be of significant interest. Similarly, if the classification of hate crimes can ever be rendered sufficiently consistent over time, a longitudinal analysis of hate crime rates before and after the codification of hate crime sentencing principles, or before and after some other significant benchmark, would be revealing. Among other things, such quantitative analyses might tell us whether hate crime laws actually work to reduce the number or severity of hate crimes. Unfortunately, we may never have the advantage of a standardized hate crime vocabulary.

Second, while several scholars have examined police practices in the hate crime field, a study of the incorporation of hate crime penalties into the routines of judicial sentencing decisions would be worthwhile. At a minimum, such a study would require some standardization of reporting practices making the reasoning of sentencing judges in hate crime cases uniformly available for analysis.

Third, this study examined only a narrow sample of knowledge practices employed by a handful of nongovernmental groups. Even among these few groups, an inventory of services, facilities, and practices at various sites would constitute a valuable addition to scholarship, as well as a useful resource for the groups themselves. While such an examination might be seen as an unwarranted intrusion into the privacy of LGBT communities, the willingness of participants in this study suggests otherwise. By itself, a thorough study of internet communication technologies (ICTs) used by the groups studied here would constitute an important contribution to the literature on social contention. Likewise, studies correlating press accounts of hate crimes to community “responses,” or examining the social networking involved in social contention about hate crimes would be of interest.

Finally, this study began by offering the local aftermath of the Matthew Shepard killing in Laramie, Wyoming as an example of nongovernmental social contention triggered by homo- or trans-phobic hate crimes generally. Whether the results suggested here may be generalized to other sites in Canada and the United States would be worth investigating further. If the same relationships between the sites and styles of contention in the hate crime field can be verified for other urban sites in Canada and the United States, then a final extension of this analysis should focus on the same variables in more rural communities in the two countries.

6.4.6 Conclusion

John Boswell's seminal study reached a preliminary conclusion that differences in urban and rural or agrarian societies contribute to differences in social intolerance toward homosexuality.¹⁴ This study confirms Boswell's preliminary finding, but with subtle modifications. Setting aside the urban-rural distinction, Boswell's premise was that location is critically important to levels of social tolerance toward sexual minorities. What Boswell was unable to draw from his historical evidence, however, was that geographical and cultural differences matter, even among places with similar levels of urban development. This study did not examine social intolerance directly; instead, it examined the construction of knowledge by nongovernmental groups in Seattle and Vancouver. But, despite geographical and demographic similarities, despite surprising similarities in legal texts, and despite comparable levels of urban development, nongovernmental groups in Seattle and Vancouver exhibited marked differences as they participated in the definition of hate crimes in practice. These differences corresponded, not to an urban-rural distinction, but to differences in local legal systems. In other words,

¹⁴ See generally, THE BOSWELL THESIS: ESSAYS ON *CHRISTIANITY, SOCIAL TOLERANCE, & HOMOSEXUALITY* (Mathew Kuefler ed., 2006) (examining aspects of "Boswell Thesis").

differences between the countryside and the city, even differences between nations, may be less important than differences in the more intimate context of local legal culture.

This study was constructed to examine the legal knowledge practices that define hate crimes and equality from a local perspective. Therefore, some overemphasis on the importance of local legal dynamics is to be expected. Nevertheless, the results invite a focus on something more intimate than national legal cultures or laws as they exist on a more abstract national plane.

How do these results bear upon the social contention that arose after the Mathew Shepard killing? Like Boswell's study, this thesis has yielded only preliminary conclusions. But, it does seem possible to confirm one aspect embedded in the Boswell Thesis: legal knowledge about intolerance is intensely local in both its practical content and its social dynamics. The comparative analysis here seems to verify that our knowledge about legal ideas like hate crime, and ultimately equality, is shaped profoundly by our physical and sociological place. Tentative and general as it is, such a finding would be far less convincing if drawn from a single case like the Shepard killing. The work of this thesis was therefore justified on theoretical grounds.

Finally, however, translating theory into practical consequences, this thesis might be seen as a call for a particular kind of both scholarly and personal attention. Trite as the admonition may seem, the findings here suggest applying a global, at least cross-national, perspective to think locally. What is local in our lives is intimate and therefore unavoidably important to us. But, we cannot have full knowledge of our own local lives without imagining other localities.

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Report, *Eighty-Three Thousand youth: Select Findings of Eight Population-Based Studies, as they pertain to anti-gay harassment & the safety and well-being of sexual minority students* (May, 1999)

Seattle Police Department, Presentation Handouts (undated)

Booklet, *A False Focus on My Family, Why every person of faith should be deeply troubled by Dr. James Dobson's dangerous & misleading words about the lesbian, gay, bisexual, & transgender community* (Soulforce, Inc. 2004)

Joy Tataryn, et al., *Same Sex, Same Laws: Lesbians, Gay Men, & the Law in B.C.*, (Legal Services Society, Information Update, June, 1998)

Brochure, *Anti-Violence Pilot Project* (The Centre, Vancouver, B.C., 2005) (available at www.lgtbcentrevancouver.com)

Brochure, *STOP Lesbian, Gay, Transgender, Bisexual BASHING: Self Defense Resources and Information* (The Centre, Vancouver, B.C., undated)

The LGBT Anti-Violence Project: Creating Strong & Safe Queer Communities, available at <http://www.lgtbcentrevancouver.com/violence.htm> (accessed Jan. 18, 2008)

Vancouver Police Department Press Conference Excerpts—Aaron Webster Killing, November, 2001, DEPS NOTES, Nov. 19, 20, 22, 2001

Results: The West End Gay Bash Survey, 2003-2004 (WEAVE, Vancouver, B.C., 2005)

APPENDICES

Appendix A Interview Contents

Interview Title	Chapter No.	DVD Chapter Title
Anti-Violence Pilot Project—Vancouver	1	[no title]
	2	Start
	3	The Anti-Violence Pilot Project
	4	Literature
	5	Website
	6	Client Services
	7	Under-Reporting
	8	WEAVE
	9	Police Reporting
	10	Police Training
	11	Liaison Officers
	12	Coalitions & Networks
	13	Coordinator Background
	14	Resources
	15	Pride Line
	16	Funding
	17	Termination of Service
	18	Advocacy & Reporting
	19	Client Consent
	20	Community Response
	21	Centre Facilities
	22	Self-Defence
	23	Centre Tour
	24	Library
	25	The End
WEAVE—Vancouver	1	Start
	2	WEAVE Vancouver
	3	Introduction
	4	WEAVE Defines Violence
	5	How We Got Together
	6	A Community Meeting
	7	The Bash Line
	8	We Always Took a Report
	9	Did you Keep those Reports?
	10	Bash Line Ended
	11	Liaison Officer
	12	We Were There
	13	The Report

Interview Title	Chapter No.	DVD Chapter Title
WEAVE—Vancouver, continued	14	Yet another Meeting
	15	Live & Learn
	16	Aaron Webster Murdered
	17	The More Education...
	18	The Stats Surprised a lot of People
	19	We've Done Interviews
	20	Conversations with the Police
	21	Aaron Webster Part 2
	22	It Was a Direct Result
	23	Davie Street Safety Committee
	24	Pride Line
	25	The Last Thing You Want...
	26	The Problem with the Justice System
	27	Recent Bashing
	28	It was a Cell Phone
	29	Police Data Sharing?
	30	More about Hate Crimes
Hate Crime Awareness Project—Seattle	1	Start
	2	Seattle Hate Crime Awareness Project
	3	Introduction
	4	HCAP Website
	5	Hate Crime Reporting Options
	6	Prior Research Interests
	7	Job Description
	8	Community Survey
	9	Funding
	10	Bias Crime Reporting Project
	11	SPD LGBT Advisory Council
	12	Pride Foundation
	13	Bias crime Reporting Archive
	14	Safe Schools Coalition
	15	NCAVP
	16	Hate crime Definition
	17	Incident Response
	18	The End
Safe Schools Coalition— Seattle	1	Start
	2	Introduction
	3	Website
	4	Research
	5	Incident Criteria
	6	Hate Crimes in School
	7	Reporting in Schools
	8	Additional Literature
	9	Intervention Services

Interview Title	Chapter No.	DVD Chapter Title
Safe Schools Coalition— Seattle, continued	10	Ongoing Reporting
	11	More Literature
	12	Group Formation
	13	Education Committee
	14	Coalition Partners
	15	Funding
	16	Web Links
	17	Educators
	18	Police Relations
	19	Attorney Referrals
	20	Funding & Staff
	21	News Digest Archive
	22	State Bullying Law
	23	Library Tour
	24	The End
LGBT Community Center— Seattle	1	Start
	2	Office Space
	3	Resource & Referrals
	4	Hate Crime Referrals
	5	Web & Newsletter
	6	Library
	7	Education
	8	Hate Crime Awareness Project
	9	Internship
	10	Hate Crime Data
	11	Recent Incidents
	12	Intervention Services
	13	Police Advisory Board
	14	Center Tour
	15	Fiscal Sponsorship
	16	Museum Project
	17	Tenant Services
	18	Cyber-Centre
	19	Library Part 2
	20	Art Gallery
Rough-Cut Nov. 28, 2005	1	Rough Cut Nov. 28, 2005
	2	Families PFLAG Bellevue PFLAG Vancouver
	3	Schools Safe Schools Coalition—Seattle GALE-BC—Vancouver
	4	Community Centers Vancouver LGBT Centre Seattle LGBT Center

Interview Title	Chapter No.	DVD Chapter Title
Rough-Cut Nov. 28, 2005, continued	5	Anti-Violence Projects Seattle Hate Crime Awareness Project Vancouver Anti-Violence Pilot Project
	6	Research & Reporting Safe Schools Coalition—Seattle GALE-BC—Vancouver Vancouver Anti-Violence Pilot Project West Enders Against Violence Everywhere (WEAVE)—Vancouver Trans Alliance Society—Vancouver Parliamentary Sex Trade Inquiry Hate Free Zone Hearings—Seattle Seattle Hate Crime Awareness Project
	7	Commemoration Trans Days of Remembrance Knowing
	8	The End
Vancouver Feedback	1	[no title]
	2	Start
	3	Vancouver Feedback
	4	Mostly Similar
	5	Anti-Violence Projects
	6	More Similarities than Differences
	7	Seattle First-Response
	8	Tracking School Incidents
	9	Anti-Violence Program Funding
	10	“Interesting Ideas”
	11	Police & Hate Crime Statistics
	12	Police Mistrust
	13	Enforcement through Statistics
	14	Misinformation & Apathy
	15	The Police are “There”
	16	Gatekeepers, Watchdogs & Gatecrashers
	17	It’s a Human Problem
	18	Population Differences
	19	“We’re on the Same Page”
	20	Regional Differences Predominate
	21	Subtle Differences Only
	22	The End
Seattle Feedback	1	[no title]
	2	Start
	3	Seattle Feedback
	4	Different Antidiscrimination Laws
	5	Anti-Bullying Law
	6	Bullying law Weaknesses
	7	Seattle & King County Non-Discrimination Ordinances
	8	Missing Groups (GLSEN)

Interview Title	Chapter No.	DVD Chapter Title
Seattle Feedback, continued	9	Seattle schools LGBT Committee
	10	Home Alive
	11	Q-Patrol
	12	Seattle Police Response
	13	Action Northwest
	14	Limited Ethnic Diversity & Intersectionality
	15	Risks to Trans & Gender Non-Conforming Youth
	16	Gender Differences among Subjects
	17	Anti-Lesbian Hate Crimes
	18	Police Interaction
	19	NCVAP NGO Reporting
	20	“Their Numbers are Always Higher”
	21	Not Much “Energy”
	22	Police LGBT Advisory Council
	23	Rural Police Differences
	24	Lower Standards for Youth Safety
25	The End	

Appendix B Vancouver Police Press Conference Excerpts

[Nov. 19, 2001]

[Q]: IS GAY BASHING THE ONLY THEORY THAT POLICE ARE LOOKING ON PERHAPS?

[A]: WE HAVEN'T DETERMINED YET EXACTLY WHAT THE MOTIVE FOR THIS PARTICULAR ATTACK IS. IT [sic] CERTAINLY ONE OF THEM WE HAVE NOT DISCOUNTED. IT HAS ALL THE EARMARKS OF A TYPE OF A SEXUALLY ORIENTED ATTACK ON THIS INDIVIDUAL ON OUR VICTIM. . . .

....

[Q]: DO YOU HAVE ANY STATISTICS SCOTT ON HOW MANY SEXUALLY ORIENTED ASSAULTS THERE HAVE BEEN THIS YEAR TO DATE?

[A]: NO. YOU WOULD HAVE TO GO TO THE, I BELIEVE ITS [] THE PROVINCIAL HATE CRIME UNIT FOR THOSE TYPES OF STATS.

....

[Q]: WHEN WAS THE LAST TIME VANCOUVER HAD A GAY BASHING THAT LED TO A FATALITY?

[A]: I'M AFRAID I DON'T HAVE ANY HISTORY ON THAT FOR YOU.

....

[Q]: . . . IS THERE ALSO A HATE CRIMES INVESTIGATION INTO THIS?

[A]: AT THIS POINT WHAT THEY WOULD DO, IS THEY WOULD BE LIASING WITH THE PROVINCIAL HATE CRIME UNIT. NOW, AS I SAY NOW WHAT HAPPENS IS THAT THERE [sic] JUST KEPT APRISE [sic], KEEP IN MIND, UPON CONVICTION IF WE ACTUALLY FIND SOMEBODY RESPONSIBLE FOR THIS, AND TAKE THEM TO CONVICTION THEN SOME OF THE MECHANICS IF IT CAN BE PROVEN THAT IT WAS A HATE CRIME YOU KNOW, MOTIVATED AT THAT POINT THEY WOULD BE IN FOR SENTENCING PURPOSES.

[Q]: THE PROTOCOL IS THE HATE CRIMES UNIT DOES NOT GET INVOLVED IN THINGS LIKE YOUR MURDER INVESTIGATIONS UNTIL THERE IS REASON TO BELIEVE THAT, THAT IS WHAT HAPPENED[?]

[A]: YES, AND KEEP IN MIND THAT THE HATE CRIMES UNIT IS A TOTAL SEPARATE ENTITY TO OUR HOMICIDE UNIT. THE HOMICIDE UNIT IS THE DETECTIVES THAT WILL DO THE INVESTIGATION. VERY POSSIBLY THE HATE

CRIMES UNIT MIGHT BE THE RECIPIENT OF CALLS FROM THE PUBLIC OR TIPS AS WELL, AND OF COURSE WE WOULD LIAISE WITH THEM YOU KNOW TO GENERATE FOLLOW-UP ON THOSE TIPS.

[Q]: IS THERE A WARNING GOING OUT TO THE GAY COMMUNITY ABOUT FREQUENTING THE PARK?

[A]: WE DID THE VERY FIRST, THAT DAY SATURDAY, WE PUT OUT A WARNING TO THE GAY COMMUNITY.¹

[Nov. 20, 2001]

[Q]: ARE THERE ANY SUGGESTIONS OR INDICATIONS THAT IT MIGHT NOT BE A HATE CRIME?

[A]: WELL WE WOULD HAVE TO SAY AT THIS POINT OF COURSE WE HAVE TO KEEP ALL AVENUES OF THE INVESTIGATION OPEN, THERE IS NOTHING THAT IS 100% DEFINITIVE . . . SUFFICE TO SAY WERE [sic] NOT 100% SATISFIED, BUT NONETHELESS IT HAS ALL THE EARMARKS AND THE POSSIBILITY THAT IT WAS HATE MOTIVATED BY A SEXUAL ORIENTATION, TO US IT MEANS THAT WE HAVE TO CAUTION THE GAY COMMUNITY, AND THEY HAVE TO EXERCISE A LITTLE BIT MORE VIGILENCE IF THERE [sic] GOING TO BE IN THE PARK AFTER DARK.

[Q]: HAVE THERE BEEN ANY MORE ATTENTION PAID TO THE GAY AREAS OR WHATEVER AS FAR AS THE POLICE PATROLLING OR ANYTHING SINCE JUST IN CASE MAYBE, IS THERE ANY THREAT THAT THERE MIGHT EVEN BE SOME GAY VIGILANTE GROUPS THAT MIGHT WANT TO TAKE THEIR OWN STEPS TO PATROL OR WHATEVER?

[A]: WELL THERE IS NO INFORMATION AS FAR AS ANY GAY VIGILANTE ACTION OR ANYTHING LIKE THAT ON BEHALF OF THE GAY COMMUNITY, AND I REALLY DON'T EXPECT THERE WOULD BE ANYTHING LIKE THAT, IT'S A RESPONSIBLE COMMUNITY AND OF COURSE I THINK ITS IN A SITUATION WHERE THERE IN A GRIEVING POSITION RIGHT NOW. OF COURSE THERE WILL BE SOME ANGER AS A RESULT, BUT WERE [sic] WORKING TOGETHER WITH THAT COMMUNITY AND I'VE GOT INSPECTOR JONES WHO IS THE COMMANDER IN CHARGE OF THAT PARTICULAR SEGMENT OF THE CITY AND HE'LL BE HERE TO GO AND SPEAK TO YOU ABOUT SOME OF OUR INITIATIVES AND SOME OF OUR ONGOING PROGRAMS THAT WE HAVE WITH THAT COMMUNITY. AND TO ADDRESS ANY QUESTIONS YOU MIGHT HAVE.

....

HATRED IS INTOLERABLE IN ANY COMMUNITY AND WHEN IT MANIFESTS ITSELF AS IT HAS OVER THE LAST WEEKEND I THINK IT CAUSES SHOCK AND ALARM TO

¹ Letter from Information & Privacy Unit Re: Records Access Request, dated Nov. 8, 2005 (I&P Unit Ref. No. 05-1903A), DEPS NOTES, Nov. 19, 2001 (on file with the author).

ALL MEMBERS OF THE COMMUNITY. FOR THE LAST FIVE YEARS, THE DOWNTOWN AREA HAS FELT SAFE OR SAFER THAN PERHAPS IT DID IN THE PAST; AND IN A SINGLE INSTANT IT FEELS LESS SAFE, AND YET 1500 – 2000 PEOPLE SHOWED UP FOR AARON WEBSTER’S MARCH AND MEMORIAL AND THAT SAYS THAT THIS IS SUCH A RARE ACT THAT THIS IS SUCH AN EXTREME ACT THAT VANCOUVER IS PERHAPS STILL SAFE; AND YET WE HAVE SOME PEOPLE OUT THERE WHO HATE, WHO ARE PREPARED TO USE VIOLENCE TO MANIFEST THAT HATE FOR WHATEVER MOTIVATIONS. . . . AARON WEBSTER’S ONLY JUSTICE PERHAPS IS IF WE ARE ABLE TO MOBILIZE A COMMUNITY TO MAKE IT A SAFER COMMUNITY, AND TOWARDS THAT END WE HAVE A NUMBER OF INITIATIVES. WE HEARD FROM THE GAY COMMUNITY THAT THEY DON’T ALWAYS FEEL SAFE COMFORTABLE WHEN THEY REPORT EVENTS TO US, AND WE HAVE TAKEN STEPS WITH EMERGENCY COMMUNICATIONS TO ENSURE THAT ANY INDICATION WHERE THERE IS HATE BIAS INVOLVED IS REFERRED DIRECTLY TO ONE OF OUR STREET NCO’S SO IT CAN BE ASSIGNED AND INVESTIGATED. EVERY PERSON WHO ENGAGES IN THIS TYPE OF ACTIVITY WILL BE DOCUMENTED AND RECORDED, AND IF THEY HAVE COMMITTED A CRIMINAL ACT, A THREAT, AN ASSAULT THEY WILL BE PROSECUTED AS FULLY AS WE POSSIBLY CAN. DAVE YOUNG WHO IS THE NEIGHBORHOOD PATROL OFFICER AT THE YALETOWN COMMUNITY POLICE CENTRE HAS BEEN ASKED TO REMOTIVATE PEOPLE TOWARDS THE BASH LINE. THE BASH LINE HAS BEEN IN OPERATION FOR ABOUT 5 YEARS NOW, AND ITS NUMBER IS 899-6203. WE ARE ASKING PEOPLE THAT ARE INTERESTED IN VOLUNTEERING ON THAT BASH LINE TO PHONE THAT NUMBER AND TO OFFER THEIR ASSISTANCE AT THIS TIME. WE ARE ASKING MEMBERS OF THE GAY COMMUNITY TO STEP FORWARD . . . I’VE ASKED STEVE EELY WHO IS THE OFFICER WHO IDENTIFIED HIMSELF AS HAVING INTEREST IN WORKING WITH THIS COMMUNITY AND TO BE A LIAISON FOR THE GAY COMMUNITY. I’VE ASKED HIM TO MAKE CONTACT WITH THE CENTER AND BOTH GAY NEWSPAPERS TO SOLICITATE PEOPLE TO COME TO A COMMUNITY SAFETY FORUM, TO ADDRESS HOW THE POLICE AND THIS COMMUNITY, AND OTHER COMMUNITIES CAN WORK TO MAKE THIS DOWNTOWN AREA A SAFER AREA. . . . WE WANT THE NAMES OF THOSE PEOPLE, WE COLLECT THOSE NAMES WHEN PEOPLE ABUSE SEX TRADE WORKERS AND WE WANT TO DO SOMETHING SIMILAR TO THAT. WE WANT A RECORD, THESE PEOPLE THAT COMMITTED THIS ACT ON THE WEEKEND. . . .

....

[Q]: WHAT DO YOU MEAN ABOUT DOCUMENTING AND REPORTING, IS THERE GOING TO BE A SPECIAL FILE ON THESE PEOPLE?

[A]: PRIME BC HAS OFFERED US AN OPPORTUNITY NOW TO COLLECT THIS INFORMATION IN A MUCH MORE EFFECTIVE WAY THAN WE HAVE BEEN ABLE TO IN THE PAST. IN THE PAST WE USED A PROGRAM CALLED DISC WHICH HAS NOW GONE NATIONAL. WE WON’T BE USING THAT PARTICULAR PROGRAM, WE HAVE PRIME BC WHICH CREATES THE ABILITY FOR US TO DOCUMENT THESE ACTIVITIES AND TO COLLATE THEM AND TO ANALYZE THEM.

[Q]: IS THAT A PROVINCIAL DATABASE?

[A]: PRIME BC IS NOT ENTIRELY PROVINCIAL YET, IT WILL BE IN TIME. AT THE MOMENT THERE ARE 4 OR 5 POLICE AGENCIES ON IT. IN TIME THERE WILL BE MORE.

....

[Q]: HAVE YOU SEEN AN INCREASE OR DECREASE IN THE AMOUNT OF SORT OF GAY BASHING CRIMES BEING COMMITTED IN THAT AREA?

[A]: WE HAD IN THE FIRST 6 MONTHS OF THIS YEAR 402 REPORTS TO THE BASH LINE, 8 OF THOSE WERE ACTUALLY CRIMINAL OFFENCES AND THOSE WERE FOLLOWED UP THROUGH OUR YALE TOWN OFFICE. MY SENSE FROM SPEAKING TO MEMBERS OF THE COMMUNITY IS THAT THERE IS STILL A FAIR DEGREE OF VERBAL ABUSE AND INTIMIDATION. WE SEEM TO BE GETTING MORE COMFORT WITH THAT COMMUNITY REPORTING ACTUAL CRIMINAL OFFENCES, ASSAULTS THROUGH THE MAIN STREAM POLICE LINES.

[Q]: DO YOU HAVE ANY IDEA LIKE NUMBERS HOW MANY PEOPLE, OR A ROUGH ESTIMATE?

[A]: I HAVE ASKED FOR THE PROVINCIAL HATE CRIMES PEOPLE TO PROVIDE WITH THAT DATA AND THEY HAVEN'T HAD A CHANCE TO COLLATE IT YET.

....

[Q]: YOU SAID THERE WERE 402 CALLS TO THE BASH LINE THIS YEAR AND 8 WERE CRIMINAL OFFENCES, WHAT WERE THE OTHERS?

[A]: SEAKING [sic] INFORMATION, PEOPLE WANTING TO KNOW ABOUT THE BASH LINE, PEOPLE WANTING INFORMATION ON ACCESS TO OTHER RESOURCES FOR THE GAY COMMUNITY. THERE CURRENTLY IS ONLY ONE VOLUNTEER ON THAT LINE, IT IS A 24 HRS A DAY, 7 DAYS A WEEK; BUT [an] OFFICER PHONES THE COMPLAINANT BACK.

[Q]: SO YOU WOULD LIKE TO SEE MORE VOLUNTEERS STAFFING THAT LINE?

[A]: I WOULD LOVE TO SEE MORE VOLUNTEERS.

ROZ SHAKESPERE – I WAS APPROACHED SEVERAL TIMES AT THE MARCH ON SUNDAY AND A NUMBER OF PEOPLE HAVE NOW APPROACHED ME ON HOW TO BECOME A VOLUNTEER ON THE BASH LINE AGAIN.²

² *Id.*, DEPS NOTES, Nov. 20, 2001 (on file with the author). Several informants for this study identified Roz Shakespeare as an informal liaison between the Vancouver Police Department and the LGBT community.

[Nov. 22, 2001]

[DETECTIVE]: AND I JUST WANT TO STRESS AGAIN THAT AT THIS POINT THERE IS NOTHING CONCLUSIVE TO GO AND SAY THAT YOU KNOW THAT THIS WAS SOLELY DIRECTED BY SEXUAL ORIENTATION. WERE [sic] CERTAINLY KEEPING THE OTHER OPTIONS OPEN, AS FAR AS WHAT OTHER MOTIVES THERE MIGHT HAVE BEEN IN THIS ATTACK.

[Q]: INSPECTOR JONES SEEMS TO THINK IT IS DEFINITELY A GAY BASHING?

[A]: YEH, THE INSPECTOR JONES OF COURSE IS WORKING IN THE WEST END AND I THINK WHAT HE IS SPEAKING ABOUT IS THE FACT THAT BASICALLY THE COMMUNITY LOOKS UPON AS THAT FROM THAT COMMUNITY, SO OF COURSE THAT'S WHERE THE FOCUS IS GOING TO BE. BUT I CAN SAY ON BEHALF OF THE HOMICIDE SECTION OF COURSE OTHER MOTIVES OF COURSE HAVE NOT BEEN DISCOUNTED AT THIS EARLY STAGE AT ALL.³

³ *Id.*, DEPS NOTES, Nov. 22, 2001 (on file with the author).

Appendix C Interview Scripts

[Social Group Interview Script]

Subject Number Code: _____

Interview Script

Social Contention & Hate Crime Labeling: a Comparison of Non-Governmental Knowledge Practice in Canada & the United States

1. *Introduction.* This interview is meant to gather information about how non-governmental groups gather, compile, and present information about hate crimes against Gay Lesbian, Bisexual and Transgendered people. I will ask you a series of questions and record your responses. Because the interviews will be used for a comparison, it is important to ask the same questions in each interview. But, you should feel welcome to add any information you consider relevant. [NOTE: please do not provide names or identifying information not already publicly-available about yourself or others.]

2. *Educational Materials.* Describe any educational materials or services your group provides related to hate crimes? (Examples: reports or brochures about hate crimes; webpage mentions hate crimes; conference presentations, speaker's bureau, telephone hotline, counseling services).

3. *Hate Crime Information.* Do you gather, compile, or present information about hate crimes; if so, how? (Examples: newspaper clippings; newsletter; library materials about hate crimes; computer spread-sheet, database, timeline, or list of hate crimes in your city). Where else would your group look for reliable information about hate crimes during the last ten years?

4. *Guidelines & Definitions.* Does your group have guidelines that define what a hate crime is or how to respond to hate crime? How were these guidelines developed? How would you describe what a hate crime is?

5. *Police Liaison.* How does your group interact with the police, prosecutors, and other governmental agencies? (Examples: provide educational materials to the police, speakers for police training; inviting police investigators to meetings; refer victims to police; provide liaison or contact person for police; keep a copy of police business card or contact information).

6. *Disagreement & Protest.* Has your group ever disagreed with the police or other governmental agencies about a hate crime? If so, what did you do? (Examples: protest; complaint; letter to the editor; media contact; election campaign). Describe the level of trust your group places in police hate crime investigations and government hate crime statistics.

7. *Other Groups—Local.* Does your group interact with other groups that follow hate crimes in this city, including groups that monitor other kinds of hate crimes, for example, religious or racial hate crimes? If so, how do you interact? (Examples: organize events together/separately, share/not share office space or other resources, make referrals to each other, or not).

8. *Other Groups—Non-Local.* Does your group interact with regional, national, or international groups that monitor hate crimes? If so, how do you interact? (Examples: affiliate with a national group, or not, use reports, data, brochures from national group, or not)

Documents:

- _____ **Consent Form**
- _____ **Definition of Hate Crime**
- _____ **Reports**
- _____ **Intake Form**
- _____ **Other Forms**
- _____ **Confidentiality Policy**
- _____ **Newsletter**
- _____ **Calendar**
- _____ **Web Page**
- _____ **News Clippings**
- _____ **History of Group**
- _____ **Other**

Interview Procedures Checklist:

- Bring Consent Forms
- Stripe, Label & Cue Tapes
- Remove Lens Cap
- Check Lighting & Record Room Tone
- Record Audio & Video
- Change Camera Position
- Lock Out Tapes When Finished
- Obtain Photocopies
- Interview Script: June 20, 2005

[Modified Script—Seattle Police Department]

1. Introduction: Introduce yourself and describe the SPD Bias Crime Unit, its history and purpose. Explain how the Unit interacts with other investigators and other, County, State, Federal, police forces, and other governmental agencies, e.g., City and State human rights agencies.
2. Education: How do police investigators learn about hate crime investigation techniques, what a hate crime is, etc.? Does the Bias Crime Unit provide training to officers about how to investigate hate crimes? Maintain a reference library with materials about hate crimes? A website?
3. Hate Crime Data: Do Seattle Police collect hate crime information or statistics? Can you describe how, including any form(s) that are used to identify hate crimes during investigations? Have statistics gathering processes changed over time? How is information about individual hate crimes presented to the public or the news media—by officers from the Bias Crime Unit A single media relations officer?
4. Where do investigators look for a working definition or a list of elements of a hate crime? Are there guidelines?
5. Liaison: How does the Unit interact with groups representing hate crime victims—particularly victims of anti-gay hate crimes? Outreach? Meetings? Does the Unit maintain a list of contacts?
6. Protest: Are you aware of occasions when groups have disagreed about how police handled a hate crime? Examples in which the process has worked particularly well? What level of trust do victims' groups place in hate crime investigations or statistics in Seattle, King County, Washington State? How would you assess the level of under-reporting among victims of hate crimes—particularly anti-gay hate crimes?
7. Do investigators attend training or use reference materials from outside Seattle? From the FBI, state agencies, other departments? Do you interact with police in BC or Vancouver?
8. Do you rely on volunteers, e.g., from victim groups to assist with hate crime investigations or training? Other examples in which volunteers are used? How is the Bias Crime Unit funded? Do King County and Seattle share the costs? Foundation funding? Federal Funding?
9. Documents: I am hoping to get copies of brochures, reference materials, and any other documents you might consider useful to describe how hate crimes are investigated and reported in Seattle and Washington State.


Script Detail [group identifier omitted]—Sept. 23, 2005

Appendix D Certificate of Approval UBC Behavioural Research Ethics Board



The University of British Columbia
Office of Research Services and Administration
Behavioural Research Ethics Board

Certificate of Approval

PRINCIPAL INVESTIGATOR Black, W.	DEPARTMENT Law	NUMBER B05-0241
INSTITUTION(S) WHERE RESEARCH WILL BE CARRIED OUT		
CO-INVESTIGATORS: Haggerty, Bernard, Law		
SPONSORING AGENCIES		
TITLE: Social Contention & Hate Crime Labeling: A Comparison of Non-Governmental Knowledge Practice in Canada & the United States		
APPROVAL DATE APR 12 2005	TERM (YEARS) 1	DOCUMENTS INCLUDED IN THIS APPROVAL: April 4, 2005, Recruitment letter / Consent form / March 11, 2005, Questionnaires
CERTIFICATION: The protocol describing the above-named project has been reviewed by the Committee and the experimental procedures were found to be acceptable on ethical grounds for research involving human subjects.  <i>Approval of the Behavioural Research Ethics Board by one of the following:</i> Dr. James Frankish, Chair, Dr. Cay Holbrook, Associate Chair, Dr. Susan Rowley, Associate Chair Dr. Anita Hubley, Associate Chair This Certificate of Approval is valid for the above term provided there is no change in the experimental procedures		