A MANDATE AGAINST HATE: FINDING AND FOUNDING A PHILIPPINE LAW ON LGBT HATE CRIMES*

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ABSTRACT

Crimes motivated by bias or hate against Lesbian, Gay, Bisexual, and Transgender ("LGBT") persons are especially vicious, producing grave emotional and psychological impact on the victim and the LGBT community at large. As the Philippines is no stranger to these crimes, the state of Philippine law vis-à-vis these acts must be determined in order that they may be adequately addressed, and vulnerable groups properly protected.

This study provides a survey of relevant Philippine law and reveals that domestic law does not adequately address hate crimes. Legislation must be changed to protect LGBT persons against hate crimes. In particular, the author proposes that a bias motive in crimes should be treated as an aggravating circumstance to enhance penalties for offenders and serve as a deterrent against similar acts. He also suggests to permit civil actions based on "hate crime" causes of action in order to provide relief and remedy to victims. Finally, the author proposes a bill requiring law enforcement agencies to recognize, record, and report bias-motivated crimes so that various organs of the State may craft a more tailored response to LGBT hate crimes.

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> *"In Germany, they first came for the Communists, and I didn't speak up because I wasn't a Communist. Then they came for the Jews, and I didn't speak up because I wasn't a Jew. Then they came for the trade unionists, and I didn't speak up because I wasn't a trade unionist. Then they came for the Catholics, and I didn't speak up because I was a Protestant. Then they came for me—and by that time, no one was left to speak up."*
>
> —Martin Niemüller[1]

I. INTRODUCTION

Bias-motivated crimes, better known as "hate crimes," are criminal acts committed with a bias motive,[2] commonly hatred against a victim based on his or her race, religion, sexual orientation, ethnicity, national origin, or other characteristic defined by law.[3] As a general category, they are not a new phenomenon—acts of intimidation and violence have been committed because of race, religion, physical handicap, sex, or political belief in every era.[4] Acts motivated by hatred have determined the course of history from antiquity to the present, from the martyrdom of Christians under Rome, to lynching by the Ku Klux Klan, the holocaust of Jews by Nazi Germany, "ethnic cleansing" in the former Yugoslavia, and ongoing atrocities in the Darfur region of Sudan.[5] These acts have seen revolutions spawn, nations born, and maps redrawn.

Our own country is no stranger to such discord. Philippine history, from the Spanish Colonial Period to the present, chronicles strife between races and religions. Massacres of the Chinese in the Philippines were recorded as early as

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[1] Debby Carroll, Live Without Hate, *at* http://www2.cincinnati.com/nie/live_wo_hate/ (last visited June 24, 2014).

[2] ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS (OSCE ODIHR), HATE CRIME LAWS: A PRACTICAL GUIDE 16 (2009), *available at* http://www.osce.org/odihr/36426?download=true.

[3] BUREAU OF JUSTICE ASSISTANCE, US DEPARTMENT OF JUSTICE, A POLICYMAKER'S GUIDE TO HATE CRIMES 3 (1997), *available at* https://www.ncjrs.gov/pdffiles1/bja/162304.pdf.

[4] *Id.* at 1.

[5] *Id.*

the late 14th century, with the most violent occurring in 1603[6] and 1639[7] against those of Manila's *Parian* district. Twentieth century judicial records tell of violent confrontations between Roman Catholics and Protestants[8] as well as severely disruptive riots against the merchant Chinese.[9] Meanwhile, examples of more recent vintage include grave threats and flag burnings flowing from anti-Singaporean sentiment following the controversial Flor Contemplacion execution in 1995[10] and the recent surfacing of anti-Muslim vigilante groups in Mindanao.[11] The latter, notably, are but a disturbing resurrection of the infamous Ilaga and Tadtad groups of the Martial Law era, whose acts against the civilian Muslim population reached a bloody zenith with 65 unarmed civilians slaughtered in a mosque in June 1971.[12] It seems these acts based on hatred never really went away.

Even though race and religion previously dominated as victim characteristics of hate crimes in the Philippines, those with diverse sexual orientation and gender identity ("SOGI") are emerging as the latest targets. A spate of unresolved local killings involving members of the gay, lesbian, bisexual,

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[6] Shubert Liao, *How the Chinese Lived in the Philippines from 1570 to 1898*, *in* CHINESE PARTICIPATION IN PHILIPPINE CULTURE AND ECONOMY 25 (Shubert Liao ed., 1964), *citing* 12 EMMA HELEN BLAIR & JAMES ALEXANDER ROBERTSON, THE PHILIPPINE ISLANDS 1493-1803 141-168 (1903); José Eugenio Borao, *The massacre of 1603: Chinese perception of the Spaniards in the Philippines*, 22 ITINERARIO 22, 22 (1998).

[7] Liao, *supra* note 6, *citing* 29 THE PHILIPPINE ISLANDS 1493-1803 at 202-249 (Emma Helen Blair & James Alexander Robertson eds.,1903).

[8] *See, e.g.,* People v. Migallos, CA-G.R. No. 13619-R (Ct. of Appeals Aug. 5, 1955), *cited in* II LUIS B. REYES, THE REVISED PENAL CODE: CRIMINAL LAW 76 (2006 ed.) [hereinafter "II REYES"] *and* III AMBROSIO PADILLA, CRIMINAL LAW: REVISED PENAL CODE, ANNOTATED 177 (1989 ed.) [hereinafter "III PADILLA"].

[9] Lim Co Chui v. Posadas, 47 Phil. 460, 462 (1925).

[10] Valerie Chew, *Flor Contemplacion*, *at* http://eresources.nlb.gov.sg/infopedia/articles/SIP_15 51_2009-07-31.html (last visited June 24, 2014), *citing* Nirmal Ghosh, *Protesters in manila burn thousands of Singapore flags,* STRAITS TIMES, Mar. 26, 1995.

[11] Jeoffrey Maitem, *Dreaded Ilaga Is Back*, PHIL. DAILY INQUIRER, Aug. 28, 2008, at A1; Kristine Alave, Jocelyn Uy & Alcuin Papa, *New Ilaga Revives Fears Of Mindanao In '70s*, PHIL. DAILY INQUIRER, Aug. 29, 2008, at A1; William Depasupil, *DOJ Chief Sees Nothing Wrong With Ilagas Arming*, MANILA TIMES, Aug. 29, 2008, at A1; Cheryll Fiel, *2 New Vigilante Groups Surface in Mindanao*, BULATLAT, May 2005, *available at* http://bulatlat.com/news/5-12/5-12-vigilante.htm (last visited June 24, 2014).

[12] Robert McAmis, *Muslim Filipinos: 1970-1972*, SOLIDARITY, 1973, at 3, 3; Marco Garrido, *The evolution of Philippine Muslim insurgency*, ASIA TIMES ONLINE, Mar. 6, 2003, *available at* http://www.atimes.com/atimes/Southeast_Asia/EC06Ae 03.html; Maitem, *supra* note 11; Alave, Uy & Papa, *supra* note 11.

transgender ("LGBT") community have raised fears of hate crimes and serial killings:[13]

> In November 2006, [...] Joselito Siervo, 38, executive producer of Pinoy Dream Academy (PDA) of ABS-CBN was found dead in his house in Quezon City[14]—[after] two other ABS-CBN gay employees were killed seemingly on the same manner: i.e. on May 26, 2004, Eli "Mama Elay" Formaran, 52, an entertainment writer, was also found dead in his house;[15] and on August 8, 2005, the decaying body of Larry Estandarte, 27, ABS-CBN program researcher, was found inside the room he rented in UP Village, Brgy. Krus na Ligas, Quezon City.[16]
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> This is nothing new, if cases are to be reviewed—e.g. as early as February 18, 1998, Larry Arciaga, 34, was found dead from stab wounds in his own salon in Barangay Poblacion, Muntinlupa City.[17]
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> This isn't limited to metropolitan cities—e.g. on March 22, 2008, still unidentified gunmen shot dead a homosexual salon owner, Romeo Lim, 25, in the largely Muslim province of Sulu.[18]
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> This does not choose between affluent or impoverished—e.g. in April 2006, the body of relatively known fashion designer Melchor Vergel de Dios was found along Commonwealth Avenue in Quezon City;[19] and in March 2004, DZAM radio announcer William Castro, 42, was found dead in the room he rented at 6401 Phase II Bldg. 6, Sikatuna

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[13] Doris Franche, *Serial gay killer tugis sa pagpaslang sa designer*, PILIPINO STAR NGAYON, *available at* http://www.philstar.com/metro/332695/serial-gay-killer-tugis-sa-pagpaslang-sa-designer (last updated Apr. 22, 2006); Michael David Tan, *Violence Against Filipino GLBTQIs: The Years of Living Dangerously*, Outrage, *at* http://outragemag.com/the-years-of-living-dangerously/ (last updated Mar. 15, 2010.); *Is there a serial killer targeting gays?*, PHIL. ONLINE CHRONICLES, *at* http://thepoc.net/index.php/is-there-a-serial-killer-targeting-gays/ (last updated Sep. 2, 2009).

[14] Margaux Ortiz, *NBI could help link suspect to two slay cases*, PHIL. DAILY INQUIRER, Jan. 6, 2007, at A18; Doris Franche, *Killer ng PDA exec huli sa camera*, PILIPINO STAR NGAYON, *available at* http://www.philstar.com/metro/367161/killer-ng-pda-exec-huli-sa-camera (last updated Nov. 5, 2006).

[15] Katherine Adraneda, *Hunt continues for killer of movie scribe*, PHIL. STAR, May 28, 2004, at 19; Julie Aurelio, *Hotel waiter gets 12 years for slay*, PHIL. DAILY INQUIRER, Nov. 28, 2008, at A27.

[16] Malou Escudero, *Panlaban Sa Mga 'Gay Killer': Mga bakla, pinag-aaral ng Kung Fu*, PILIPINO STAR NGAYON, *available at* http://www.philstar.com/metro/367172/panlaban-sa-mga-%C2%91gay-killer%C2%92-mga-bakla-pinag-aaral-ng-kung-fu (last updated Nov. 5, 2006).

[17] Tan, *supra* note 13.

[18] Al Jacinto, *Beauty-salon owner slain*, THE MANILA TIMES, Mar. 23, 2008, at A6.

[19] Katherine Adraneda, *Parked car yields dead designer*, PHIL. STAR, Apr. 21, 2006, at 22; Candice Cerezo, *Designer, Man Found Dead In Car, Possibly Tortured*, THE MANILA TIMES, Apr. 21, 2006, at A1.

Bliss, Quezon City, triggering the police to summarily arrest (then released with no one charged) 13 male sex workers who may have been with the victim at one time or another.[20]

This affects all GLBTQIs—e.g. on May 11, 2003, the body of an unidentified transgender was found in a river in Camp Pantaleon Garcia in Cavite – she was raped before she was stabbed to death;[21] and on July 15, 2004, Lorna Dating, 26, a native of Iloilo, and who used to work as a house help at 389 Batangas St., Ayala Alabang Village, Muntinlupa City was found dead after (the police suspected) she fought off a would-be rapist.[22]

And it continues to happen to these days—e.g. on August 16, 2009, the body of Winston Lou Ynion was found drenched in his own blood in the toilet of his condominium unit in Katipunan, Quezon City (the Palanca Award-winning writer, and fellow in the 5th IYAS National Writers Workshop held in Bacolod City in 2005, was found with his hands and feet tied with a nylon cord and his body covered with stab wounds);[23] on December 2, 2009, Aries Alcantara, 28, a hairdresser in San Pascual, Obando, Bulacan was shot in front of Red Palmas Restaurant at Panghulo Road, Panghulo;[24] and on February 17, 2010, the lifeless body of Enrico "Jeric" Esquerra, 50, was found in San Jose St., Brgy. Damayan, in the City of Manila (he had multiple stab wounds, and his head was covered with plastic when his body was found).[25]

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Still other cases documented—by an initiative [of] the Metropolitan Community Church-Quezon City, SGO-Phils, OUTPhils, GABAY, and IFTAS to identify GLBTQI Filipinos affected by hate crimes—include the murder of Father Robert Tanghal (2005), beautician Joel Binsali (2005), advertising consultant Carl Roman Santos (2005),

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[20] Tan, *supra* note 13.

[21] *Id.*

[22] Lordeth Bonilla, *Sa Ayala Alabang Village: Tomboy nanlaban sa rape, pinatay*, PILIPINO STAR NGAYON, *at* http://www.philstar.com/metro/257643/sa-ayala-alabang-village-tomboy-nanlaban-sa-rapepinatay (last updated July 15, 2004).

[23] Nancy Carvajal, *Man stabbed dead in QC Condo; cops eye robbery*, PHIL. DAILY INQUIRER, Aug. 17, 2009, at A26.

[24] Rodrigo Manahan, *Bakla pinatay*, BANDERA, Dec. 2, 2009, *available at* http://bandera.inquirer.net/mainitinitpa/ mainitinitpa/view/20091202-4042/Bakla-pinatay.

[25] Ricky Tulipat, *Bading nilooban na, pinatay pa*, PILIPINO STAR NGAYON, *at* http://www.philstar.com/metro/ 549929/bading-nilooban-na-pinatay-pa (last updated Feb. 17, 2010).

businessman Francisco Uy (2006), doctor Epi Ramos (2006), and lesbian Matilde Sinolan (2010).[26]

It appears that hate crimes are alive and well in the Philippines—a cancer silently eating away at the fabric of a diverse and democratic society. Even though no neo-Nazis or Klansmen are to be found in our islands to evoke the western concept of these crimes with their swastikas and lynchings, hate crimes have occurred and continue to occur here, now with LGBT Filipinos as victims. It is an issue that must be discussed, and, affecting as many lives as it does, it is a problem that must be faced.

Hate crimes are especially vicious because compared to crimes not so motivated, they cause greater individual and societal harm. Hate crimes are grievous offenses against individuals. As he cannot change that trait that made him a victim, "the immediate victim may experience greater psychological injury and increased feelings of vulnerability."[27] Psychologically, violent hate crimes have a significantly deeper impact (e.g., depression, stress, anxiety, anger) on their victims than comparable violent crimes.[28] Hate crimes are also an assault upon the victim's identity and self-esteem and leads to psychological and affective disturbances—all reinforced by the usually-higher gravity of the violence attending a hate crime.[29]

Effects on the victim's particular community are equally odious, with crimes motivated by invidious hatred toward particular groups harming not only individual victims but sending "a powerful message of intolerance and discrimination to all members of the group to which the victim belongs."[30] Intimidation and fright will also befall the group sharing the victim's characteristic, other members feeling not only the risk of impending attacks but also a vicarious experience of the assault.[31] This generalized terror transcends

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[26] Tan, *supra* note 13.

[27] *Id.* at 20.

[28] American Psychological Association, The Psychology of Hate Crimes, at 1, *at* http://www.apa.org/about/gr/issues/violence/hate-crimes-faq.pdf (last visited June 24, 2014), *citing* Gregory Herek, et al., *Psychological sequelae of hate crime victimization among lesbian, gay, and bisexual adults*, 67 J. CONSULT. CLIN. PSYCH. 945, 948 (1999) and Jack McDevitt, et al., *Consequences for victims: A comparison of bias- and non- bias- motivated assaults,* 45 AM. BEHAV. SCI. 697, 710 (2001).

[29] Attorney General of the Province of Ontario, Hate Crimes and Discrimination, *at* http://www.attorneygeneral.jus.gov.on.ca/english/crim/cpm/2005/HateCrimeDiscrimination.pdf (last visited June 24, 2014).

[30] N.Y. PENAL LAW, § 485 [hereinafter "N.Y. Hate Crimes Act of 2000"].

[31] OSCE ODIHR, *supra* note 2, at 20.

particular groups and affects other minorities, given that bigoted ideologies and doctrines rarely limit their attacks to merely one or few groups.[32]

On the most basic level, "[h]ate crimes violate the ideal of equality between members of society," sending "a message to the victims that they are not welcome" and essentially "denying the victim's right to full participation in society.[33] These acts "damage the fabric of society and fragment communities."[34]

Recognizing the ominous effects of hate crimes on individuals, communities, and society as a whole, other jurisdictions have enacted legislation not only to provide their redress and punishment, but also to deter their commission and recurrence. Aware that hate crimes "intimidate and disrupt entire communities and vitiate the civility that is essential to healthy democratic processes,"[35] many countries in Europe, Asia, and the Americas have passed laws tackling these acts. The Philippines, notwithstanding the presence of a few local ordinances touching on the issue,[36] has largely ignored the issue and has no national legislation protecting LGBT Filipinos against hate crimes and other forms of discrimination. The state must take legal steps to protect such vulnerable individuals.

As an academic and legal endeavor, this work primarily seeks to determine the current state of Philippine law on LGBT hate crimes (hate crimes based on SOGI) by compiling and analyzing the statutes that implicate sex, gender, sexual orientation, and gender identity. As defined, hate crimes are comprised of two elements: a predicate crime committed with a bias motive.[37]

Thus, this inquiry concerning hate crimes in the Philippine setting is limited by the two elements and Philippine jurisdiction—the acts to be considered must be crimes (a predicate crime) and laws examined must be of local complexion. Where necessity requires, legal materials from international law and other jurisdictions will serve as a starting point of this study because

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[32] Attorney General of the Province of Ontario, *supra* note 29.

[33] OSCE ODIHR, *supra* note 2, at 17-19.

[34] *Id.*

[35] N.Y. Hate Crimes Act of 2000.

[36] *See, e.g.* Province of Cavite, Ordinance No. 009-2013 (Feb. 3, 2014); Quezon City, Ordinance No. SP-1309 (Sep. 2, 2003); Cebu City, Ordinance No. 2339 (Oct. 17, 2012); Davao City, Ordinance No. 0417-12 (Dec. 12, 2012); Angeles City, Ordinance No. 330-13 (Feb. 19, 2012); Bacolod City, Ordinance No. 640 (Apr. 23, 2013); Barangay Bagbag, Quezon City, Ordinance No. BO-004 (June 1, 2009); Barangay Pansol, Quezon City, Ordinance No. 009 (Nov. 8, 2008).

[37] OSCE ODIHR, *supra* note 2, at 16.

hate crimes as a legal concept originated beyond Philippine shores. Therefore, foreign materials will be used for purposes of definition, comparison, and in a few instances, persuasive authority.

Operating on the premise of perceived scarcity of domestic statutory law concerning hate crimes, this work recommends the adoption of legal measures to complement, remedy, or improve whatever is found. It is hoped that such compilation, analysis, and proposals, derived in part from other nations' experiences, will serve as a humble contribution toward a comprehensive legal answer to the problem of hate crimes against LGBT Filipinos.

Further, and perhaps most significantly, it is noted that hate crimes against LGBTs rarely, if at all, make it to the Philippine public's consciousness. That the few bias-motivated crimes making it into the headlines are usually related to the singular characteristic of religion (Islam, specifically) highlights the fact that awareness and discussion on the matter is woefully inadequate. Another objective of this work, therefore, is to enrich discourse on this ignored issue, hopefully resulting in heightened awareness and critical concern regarding the same.

A single issue presents itself as this inquiry's core: does the Philippines have a LGBT hate crime law? More accurately and perhaps more realistically, can we derive a Philippine LGBT hate crime law from the laws that are currently in force?

Answering this main query leads to more questions. If a Philippine LGBT hate crime law exists, what kinds of crimes does it comprehend and how does it operate vis-à-vis internationally-adopted model statutes? If, on the other hand, such a law is non-existent or is incomplete, what statutory remedies may be proposed to tackle the hate crime issue or to complete standing law? What legal challenges might such proposals face, and how can these be met? These are the questions that this work will address in the succeeding sections.

II. HATE CRIME: A DEFINITION

"Prejudices are what fools use for reason."
—Voltaire[38]

[38] Carroll, *supra* note 1.

"[C]rimes motivated by bigotry usually arise not out of the pathological rantings and ravings of a few deviant types in organized hate groups, but out of the very mainstream of society."

—Jack Levin & Jack McDevitt[39]

"A hate crime resembles no other crime. The effects of hate crime reach beyond the immediate victim or institution and can damage society and fragment communities."

—Paul M. Anderson, Commander of NYC's Bias Crime Unit[40]

Hate crimes, while not being new phenomena, are in their infancy as a subject of legal scholarship. Even as Western and local media throw around the term "hate crime" nowadays, it is used loosely and indiscriminately, muddling the legal concept. To begin this inquiry's exploration of LGBT Hate Crimes in the Philippine context, therefore, some groundwork is in order. This Chapter undertakes to introduce hate crimes as defined in legal scholarship, explore their elements, examine their characteristics and tackle some related topics relevant for a basic understanding of the issue.

A. Elements of a Hate Crime

American lawmakers may be credited with coining the term "hate crime" in 1985, when Representatives John Conyers, Barbara Kennelly, and Mario Biaggi co-sponsored a bill in the House of Representatives entitled the "Hate Crime Statistics Act."[41] Seeking to require the United States Department of Justice to collect and publish statistics on the nature and number of crimes motivated by racial, religious, and ethnic prejudice, this bill would not pass, a similar one becoming law only five years later in 1990. Despite its failure to enter the statute books, however, the effort massively increased media and public awareness of the phenomenon. Newspaper articles on the topic surged from a

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[39] JAMES B. JACOBS & KIMBERLY POTTER, HATE CRIMES: CRIMINAL LAW AND IDENTITY POLITICS 11 (1998).

[40] *Id.* at 79.

[41] DONALD ALTSCHILLER, HATE CRIMES: A REFERENCE HANDBOOK 3 (2nd ed., 2005).

scant 11 in 1985 to 511 in 1990, when the Hate Crime Statistics Act finally passed.[42]

While media latched on to the term "hate crime" quickly, legal scholarship would only begin using the term, along with the synonymous "bias crime" in the early 1990s.[43] The *Guide to Legal Periodicals* created a new "bias crime" subject heading by 1991, with nine articles listed under the topic.[44] The first of these articles was "Hate Violence: Symptom of Prejudice," focused on violence against lesbians and gays and published in the *William Mitchell Law Review*.[45]

Hate crimes, not being one particular offense within a jurisdiction's penal laws but rather a type of crime,[46] carry diverse definitions across states and organizations. What would qualify as a hate crime will vary according to each jurisdiction's statutory definition.

The Hate Crime Statistics Act of 1990, an important piece of US Federal legislation on the matter, distinguishes hate crimes as:

> [C]rimes that manifest evidence of prejudice based on race, religion, 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.[47]

The US Department of Justice's Bureau of Justice Assistance, however, adopts a shorter definition: "offenses motivated by hatred against a victim based on his or her race, religion, sexual orientation, ethnicity, or national origin."[48] In Europe, meanwhile, the Organization for Security and Cooperation in Europe's ("OSCE") Office for Democratic Institutions and Human Rights ("ODIHR") adopts a much simpler and general definition, defining hate crimes as "criminal acts committed with a bias motive."[49]

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[42] JACOBS & POTTER, *supra* note 39, at 4.
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] OSCE ODIHR, *supra* note 2, at 16.
[47] Hate Crime Statistics Act, 28 U.S.C. § 534 (1990).
[48] BUREAU OF JUSTICE ASSISTANCE, *supra* note 3, at 3.
[49] OSCE ODIHR, *supra* note 2, at 16.

These definitions, however, share commonalities that allow us to identify these acts across jurisdictions. Hate crimes are always comprised of two elements, a criminal offense committed with a bias motive: "The hate crime designation may be applied only where a 'predicate offense,' or underlying crime is committed as a result of bias or prejudice."[50]

1. Predicate Crime

The first element of a hate crime is that it is an act that constitutes an offense under a jurisdiction's criminal law. This criminal act may be referred to variously as the "predicate offense,"[51] the "underlying crime,"[52] or the "base offense."[53] For purposes of this inquiry, this element will hereinafter be referred to as the "predicate crime."

Statutes determine which predicate crimes, when motivated by bias, qualify as hate crimes. In the United States, the model statute recommended by the Anti-Defamation League ("ADL") for adoption (and is in fact used by many states as a prototype), covers only the crimes of harassment or intimidation.[54] In practice, however, the predicate crimes included by individual states vary widely. On one extreme are the states of Pennsylvania, Vermont, and Alabama, whose statutes make *any* offense a hate crime if the offender was motivated by race, religion, national origin, or other prejudices provided by statute.[55]

Meanwhile, other jurisdictions consider only relatively low-level offenses for hate crime designation, for example harassment, menacing, or criminal mischief.[56] The states of Ohio, New Jersey, and New York are jurisdictions which limit hate crimes to such categories of predicate crimes.[57] Somewhere in the middle of the spectrum are Illinois, which lists nine predicate crimes,[58] and Washington, D.C., which lists 11.[59]

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[50] BARBARA PERRY, IN THE NAME OF HATE: UNDERSTANDING HATE CRIMES 8 (2001) [hereinafter "In the Name of Hate"].

[51] *Id.*

[52] *Id.*

[53] OSCE ODIHR, *supra* note 2, at 16.

[54] JACOBS & POTTER, *supra* note 39, at 31. *See* Anti-Defamation League, Text of ADL Model Legislation, *at* http://www.adl.org/assets/pdf/combating-hate/Hate-Crimes-Law.pdf (last visited June 24, 2014) [hereinafter *ADL Model Legislation*].

[55] *Id. See, e.g.* 18 PA. CONS. STAT. § 2710(a); VT. STAT. ANN. § 1455; ALA. CODE § 13A-5-13.

[56] *Id.*

[57] *Id. See, e.g.,* OHIO REV. CODE ANN. § 2927.12; N.J. STAT. ANN. § 2C:12-1.

[58] *Id. See* ILL. JURIS. CRIM. LAW & PROC. § 61:02. The nine predicate crimes are assault, battery, aggravated assault, misdemeanor theft, criminal trespass to residence, misdemeanor

On the federal level, the Violent Crime Control and Law Enforcement Act of 1994,[60] as amended by the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act,[61] provides "sentencing enhancements of not less than 3 offense levels for offenses that the finder of fact at trial determines beyond a reasonable doubt are hate crimes." The act's definition of hate crimes, however, limits the predicate crimes covered to injury against persons as well as property crimes:

> '[H]ate crime' means a crime in which the *defendant intentionally selects a victim, or in the case of a property crime*, the property that is the object of the crime, because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person.[62]

Specific hate crimes criminalized by the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act are also limited to bodily harm:

> SEC. 4707. *Prohibition of Certain Hate Crime Acts.*
>
> (a) In General.—Chapter 13 of title 18, United States Code, is amended by adding at the end the following:
>
> "Sec. 249. Hate Crime Acts
> "(a) In General.—
> "(1) OFFENSES INVOLVING ACTUAL OR PERCEIVED RACE, COLOR, RELIGION, OR NATIONAL ORIGIN. — Whoever, whether or not acting under color of law, *willfully causes bodily injury to any person* or, through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, *attempts to cause bodily injury to any person*, because of the actual or perceived race, color, religion, or national origin of any person—
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> * * *

criminal damage to property, criminal trespass to vehicle, criminal trespass to real property, and mob action.

[59] *Id. See* D.C. CODE ANN. § 22-4001. The 11 predicate crimes are arson, assault, burglary, injury to property, kidnapping, manslaughter, murder, rape, robbery, theft, or unlawful entry.

[60] Pub. L. No. 103–322 (1994).

[61] 18 U.S.C. § 249 (2009).

[62] Pub. L. No. 103–322, § 280003(a). (Emphasis supplied.)

> "(2) OFFENSES INVOLVING ACTUAL OR PERCEIVED RELIGION, NATIONAL ORIGIN, GENDER, SEXUAL ORIENTATION, GENDER IDENTITY, OR DISABILITY.—
>
> "(A) IN GENERAL.— Whoever, whether or not acting under color of law, in any circumstance described in subparagraph (B) or paragraph (3), *willfully causes bodily injury to any person* or, through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, *attempts to cause bodily injury to any person*, because of the actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability of any person..."[63]

In Europe, meanwhile, statutes also differ as regards the predicate crimes that may be qualified to hate crimes. The OSCE notes that at least 23 countries have laws that increase penalties for *all* crimes that are committed with a bias motive,[64] Andorra,[65] Tajikistan,[66] and the United Kingdom[67] being examples given of such jurisdictions. Taking a more limited approach are 25 countries that allow penalty enhancement for only certain predicate crimes committed with bias motive.[68] Examples given by the OSCE of such states are Bosnia and Herzegovina[69] and Turkmenistan,[70] whose Criminal Codes limit hate crimes to crimes against the person, as well as Belgium, whose criminal laws cover a limited, though relatively more expansive selection:

> Articles 33-42 of Belgium's Law of 10 May 2007 provide that "hatred against, contempt for, or hostility to a person on the grounds of his so-called race, color of skin, descent, national or ethnic origin, nationality, sex, sexual orientation, marital status, birth, age, wealth, belief or philosophy of life, current and future state of health, disability, language, political conviction, or physical or genetic characteristic or social origin" are aggravating circumstances that can double the penalty of the following specified crimes: indecent assault and rape; manslaughter and intentional injury; non-assistance to a person in danger; violation of personal liberty and of the inviolability of private property; ambush or lying in wait; libel; arson, and destruction of personal possessions or property.[71]

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[63] 18 U.S.C. § 249 (2009).
[64] OSCE ODIHR, *supra* note 2, at 33.
[65] [CRIMINAL CODE OF ANDORRA], art. 30.6.
[66] [PENAL CODE OF THE REPUBLIC OF TAJIKISTAN], art. 62(1)(f).
[67] Powers of Criminal Courts (Sentencing) Act 2000, § 153 (Eng.).
[68] OSCE ODIHR, *supra* note 2, at 34.
[69] [CRIMINAL CODE OF BOSNIA AND HERZEGOVINA], art. 166(2).
[70] [PENAL CODE OF TURKMENISTAN], art. 101(2)(m), 107(2)(h), 108(2)(h), & 113(2)(e).
[71] OSCE ODIHR, *supra* note 2, at 35.

2. Bias Motive

The second element of a hate crime is that the predicate crime is committed with a bias motive. This bias motive separates hate crimes from ordinary crimes—"the perpetrator intentionally [chooses] the *target* of the crime because of some *protected characteristic*."[72] This target may be an individual or a group, as well as property "associated with a group that shares a particular characteristic."[73] This protected characteristic, meanwhile, is a characteristic shared by a group, examples being the factors of race, language, religion, ethnicity, nationality, sexual orientation, gender, and others.[74]

This concept of an intentional targeting of a protected characteristic is important, as not every crime motivated by hatred for the victim is a hate crime, a common misconception resulting from the use of the term.[75] The OSCE points to murders as an example. While murders are most often brought about by hatred, these will not be "hate crimes" unless the victim was chosen due to a protected characteristic.[76] On the other hand, a perpetrator who commits a crime without feeling "hate" towards the victim may still fall under the hate crime definition if the victim was selected because of a protected characteristic.[77] A very specific and intense emotional state, "hate" may not be apt to describe the motive behind most hate crimes, thus "bias motive" is a more appropriate term:

> Bias has a broader meaning than hate, and a bias motive only requires some form of prejudice on account of a personal characteristic. Bias can be felt in respect of a person, or a characteristic or an idea (where the victim symbolizes that characteristic or idea).[78]

As the hate crime element of predicate crime may be qualified by statutory definition, legislative policy also varies the second element of bias motive. Statutory provisions define the bias motive with regard to the required presence of hostility (animus), as well as the degree of causal relationship required between the predicate crime and the bias motive.

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[72] *Id.* at 16.
[73] *Id.*
[74] *Id.*
[75] *Id.* at 17.
[76] *Id.*
[77] *Id.* at 18.
[78] *Id.*

i. Determination of Bias Motive

A policy question which would serve as an important qualification to the bias motive element of a hate crime is whether the offender acts out of hatred toward a particular characteristic of the victim. This animus is an element of the popular conception of a "hate" crime, the criminal acting out his negative feelings against the victim's skin color, ethnicity, or religion.[79] The presence of this animus, however, is not a universal requirement of statutes defining hate crimes. Some merely require that the victim be selected due to his possession of some protected characteristic.[80] Two models of defining the bias motive thus emerge: the animus model and the discriminatory selection model:

> The *discriminatory selection model* of [hate] crimes defines these crimes in terms of the perpetrator's discriminatory selection of his victim. Under this model, it is irrelevant *why* an offender selected his victim on the basis of race or group; it is sufficient that the offender did so. Alternatively, the *racial animus model* of bias [hate] crimes defines crimes on the basis of the perpetrator's animus for the racial or ethnic group of the victim and the centrality of this animus in the perpetrator's motivation for committing the crime.[81]

(a) Animus Model

The animus model of bias motivation in hate crimes requires that "the offender must have committed the offense because of hostility or hatred based on one of the protected characteristics."[82] In order to successfully convict on a hate crime charge, this model would thus require evidence that the offender's acts are borne of some kind of hostility towards his victim. Conforming as it does to the popular idea of what a hate crime should be, it is the model of choice for most legal scholars in the field[83] as well as law enforcers:

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[79] *Id.* at 46.

[80] *Id.*

[81] FREDERICK LAWRENCE, PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW 30 (1999). (Emphasis supplied.)

[82] OSCE ODIHR, *supra* note 2, at 47.

[83] LAWRENCE, *supra* note 81, at 34, *citing* JACK LEVIN & JACK MCDEVITT, HATE CRIMES: THE RISING TIDE OF BIGOTRY AND BLOODSHED 33-44 (1993); Abraham Abramovsky, *Bias Crime: A Call for Alternative Responses*, 19 FORDHAM URB. L.J. 875, 878 (1992); Brian Levin, *Bias Crimes: A Theoretical and Practical Overview*, 4 STAN. L. & POL'Y REV. 165, 166 (1992–93); Jeffrie Murphy, *Bias Crimes: What do Haters Deserve?*, 11 CRIM. JUST. ETHICS 20, 22 (1992).

> This model is consonant with the classical understanding of prejudice as involving more than differential treatment on the basis of the victim's race. This understanding of prejudice, as reflected in the racial animus of the bias crimes, requires that the offender have [sic] committed the crime with some measure of hostility toward the victim's racial group and/or toward the victim because he is part of that group.[84]

American jurisdictions using the animus model for hate crimes include Connecticut, Maryland, Pennsylvania, Florida, New Hampshire, and New Jersey.[85] The last jurisdiction's statute provides for penalty enhancement for crimes motivated, at least in part, by "ill will, hatred, or bias due to race, color, religion, sexual orientation, or ethnicity."[86] Also in North America, Canada's Criminal Code mandates courts to take into consideration "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" to increase penalties when sentencing.[87]

In Europe, the United Kingdom's Crime and Disorder Act of 1998's provisions for racially-aggravated offences require that "at the time of committing the offence, or immediately before or after doing so, the offender demonstrates towards the victim of the offence hostility based on the victim's membership (or presumed membership) of a racial group"[88] or that "the offence is motivated (wholly or partly) by hostility."[89] Further continental examples include Ukraine, whose Criminal Code considers as an aggravating circumstance for the purposes of punishment that the offence was "based on racial, national, or religious enmity and hostility,"[90] and Belgium, whose Penal Code provides for an increased sentence if one of the motives of the offence is "hatred, contempt or hostility" towards a person because of a "protected characteristic."[91]

Requiring evidence of "hate," however, presents obstacles in implementation, with the OSCE-ODIHR cautioning that "[w]hether a person

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[84] *Id.*

[85] *Id.*

[86] N.J. STAT. ANN. § 2C:44-3(e) (1992).

[87] MICHAEL MCCLINTOCK, EVERYDAY FEARS: A SURVEY OF VIOLENT HATE CRIMES IN EUROPE AND NORTH AMERICA 42 (2005), *citing* An Act Respecting the Criminal Law, R.S.C., ch. 46, § 718.2(a)(i) (1985) (Can.).

[88] Crime and Disorder Act 1998, § 28(1)(a) (Eng.).

[89] Crime and Disorder Act 1998, § 28(1)(b) (Eng.).

[90] OSCE ODIHR, *supra* note 2, at 47, *citing* [PENAL CODE OF UKRAINE], art. 67(3).

[91] *Id., citing* STRAFWETBOEK [PENAL CODE] art. 377bis (Belg.).

actually feels 'hate' is a highly subjective question, and can be hard to prove in a court of law. The difficulty is compounded by the fact that almost no other criminal offences require proof of motive as an element of the offence."[92] Guidance and training for law enforcers and the judiciary would be required as to what would be sufficient evidence of animus,[93] a good example of which is the US Federal Bureau of Investigation's regulations implementing the Hate Crime Statistics Act of 1990 that provide for a set of indicators that aid in classifying a crime as a hate crime.[94]

(b) Discriminatory Selection Model

As in the animus model, the offender in the discriminatory selection model deliberately targets the victim because of a protected characteristic. What differentiates the latter is that no showing of actual hatred or hostility would be required to convict.[95] Jurisdictions that use this model in their definitions of hate crimes do not mention hatred or hostility at all, instead requiring that "the offender acted 'because of' or 'by reason of' the victim's protected characteristic."[96] Otherwise stated, "the law requires a causal link between the characteristic and the offender's conduct, but the exact emotion is not specified."[97]

The discriminatory selection model is broader in reach as "it reaches those offenders who harbored no hostility but selected their victims based on prejudices or stereotyped information about victim vulnerabilities."[98] At the same time, it brings within the ambit of hate crimes those predicate crimes motivated by animus:

> Any case that would meet the requirements of the racial animus model would necessarily also satisfy those of the discriminatory selection model because a crime motivated by animus for the victim's racial group will necessarily be one in which the victim was discriminatorily selected on this basis. The reverse is not true.[99]

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[92] *Id.*

[93] *Id.* at 49.

[94] FEDERAL BUREAU OF INVESTIGATION, US DEPARTMENT OF JUSTICE, HATE CRIMES DATA COLLECTION GUIDELINES AND TRAINING MANUAL 4 (2012), *available at* http://www.fbi.gov/about-us/cjis/ucr/data-collection-manual.

[95] OSCE ODIHR, *supra* note 2, at 48.

[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] LAWRENCE, *supra* note 81, at 73.

This breadth makes the discriminatory selection model easier to apply in practice and based on some opinions, may actually be more effective in addressing hate crimes:

> First, a discriminatory selection law *does not require that hate be proven as an element of the offence.* When a hate crime law requires "hostility," it requires law enforcement to make an assessment of an offender's mental state — an exercise that may be difficult and one for which most law enforcement [officers] are not trained.
>
> Second, the impact on the victim and members of the victim's community is usually the same, regardless of whether the offender acted out of hate or some other emotion. A victim who is targeted because the offender assumes that some protected characteristic of the victim makes him/her especially vulnerable to crime is likely to experience the same trauma as a victim who is targeted because the offender actually hates that characteristic. From the victim's perspective, what matters is that he/she has been chosen because of an immutable or fundamental aspect of his/her identity.[100]

American statutes utilizing this model include the federal-level Violent Crime Control and Law Enforcement Act of 1994, as amended by the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, which enhanced penalties for hate crimes. As may be seen in the wording of their provisions excerpted *supra*, since these statutes use the "because of" formulation to define hate crimes, their definition are devoid of any reference to animus, hate, or prejudice.[101] As for state laws, Wisconsin's penalty-enhancement hate crime law is "the only explicit discriminatory selection model statute in the country,"[102] being applicable only if the offender

> intentionally selects the person against whom the crime [...] is committed or selects the property that is damaged or otherwise affected by the crime [...] in whole or in part because of the actor's belief or perception regarding the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or

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[100] OSCE ODIHR, *supra* note 2, at 48-49.

[101] *But see* LAWRENCE, *supra* note 81, at 37, citing 139 CONG. REC. S13176 (daily ed. Oct. 6, 1993). The statement of Senator Feinstein, its chief sponsor, pointed out that the law as enacted uses the "because of" formulation, but he argued for its passage using language that definitely reflected the animus model.

[102] LAWRENCE, *supra* note 81, at 33.

occupant of that property, whether or not the actor's belief or perception was correct.[103]

California's penal code, meanwhile, uses the "because of" formulation similar to the federal laws mentioned, defining a hate crime as "a criminal act committed, in whole or in part, because of one or more of the following actual or perceived characteristics of the victim."[104] Surveys of American hate crime laws reveal that this "because of" or "by reason of" formulation has been adopted by most states in one form or another.[105]

European jurisdictions using the discriminatory selection model include France, whose penal code increases penalties for felonies or misdemeanors "when the offense is committed *because of* the victim's actual or supposed membership or non-membership of a given ethnic group, nation, race or religion,"[106] and Bulgaria, whose criminal code punishes one "who applies violence against another or damages his property because of his nationality, race, religion or his political conviction."[107] Similarly worded is the Danish Penal Code, which provides for penalty enhancement if it is shown "that the offense is rooted in the others' ethnic origin, religion, sexual orientation or the like."[108]

ii. Degree of Causal Relationship

Another policy question that would qualify the bias motive element of hate crimes is the degree of the "causal link." It is beyond question that there must be a causal relationship between the offender's act and the officially designated prejudice to deem such act a hate crime.[109] Should this prejudice be the only motive for a crime to qualify as a hate crime? Must the criminal conduct be "totally, primarily, substantially, or just slightly caused by prejudiced motivation?"[110] What of "mixed motives", where a number of different factors motivate the offender,[111] only one or some of them being prejudice?

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[103] WIS. STAT. ANN. § 939.645(1)(b) (1991).
[104] CAL. PENAL CODE § 422.55(a) (1991).
[105] LAWRENCE, *supra* note 81, at 35.
[106] OSCE ODIHR, *supra* note 2, at 48, *citing* C. PÉN., art. 132-76(1) (Fr.).
[107] *Id., citing* [CRIMINAL CODE], art. 162(2) (Bulg.).
[108] *Id., citing* STRAFFELOVEN [CRIMINAL CODE], § 81(vi) (Den.).
[109] JACOBS & POTTER, *supra* note 39, at 21.
[110] *Id.*
[111] LAWRENCE, *supra* note 81, at 10.

While different jurisdictions have taken definitive positions on the issue by wording their statutes to cover prejudiced motivation "in whole or in part,"[112] some have not. Some statutes using the "because of" formulation may be interpreted to cover both pure and mixed motivation. Scholars agree, however, that "although ultimately the search for bright lines is elusive, we can say that to constitute a [hate] crime, the bias motivation must be a substantial motivation for the perpetrator's criminal conduct,"[113] and in fact, "despite differences in the language used to set forth motivation requirements (manifest, evidences, motivated in whole, or in part, because of, etc.), the majority of courts hold that prejudice must be a substantial motivating factor."[114]

B. Identifying a Hate Crime and Proving Bias Motivation

Whether or not charges will be filed for violating criminal law will always depend on the availability of evidence. It is no different where hate crimes are concerned. While sufficient evidence of the predicate crime is obviously required, the peculiar challenge where hate crimes are concerned is satisfying the second element. Whether or not to classify a crime as a hate crime and to prosecute it as such (versus prosecuting just the predicate crime) depends on the availability of sufficient evidence to prove the bias motivation.

Some hate crimes present cut-and-dried, "slam dunk" evidence of bias motivation, especially when "the very nature of the attack shows that it was motivated by bias."[115] A French incident of vandals defacing Muslim graves in a military cemetery in northern France, leaving behind insulting graffiti about Islam and also hanging a pig's head from one of the headstones is a good example.[116] Unfortunately, in cases where the bias motive is less immediately

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[112] *See, e.g.,* Crime and Disorder Act 1998, § 28(1)(b) (Eng.); FEDERAL BUREAU OF INVESTIGATION, *supra* note 122. The United Kingdom's Crime and Disorder Act penalizes some crimes "motivated (wholly or partly)" by hostility, while the Federal Bureau of Investigation Guidelines reports a crime as a bias crime bias is to be reported only if investigation reveals sufficient objective facts to lead a reasonable and prudent person to conclude that the offender's actions were motivated, in whole or in part, by bias.

[113] LAWRENCE, *supra* note 81, at 10.

[114] JACOBS & POTTER, *supra* note 39, at 32, *citing* LU-IN WANG, HATE CRIMES LAWS 10-16 (1995).

[115] OSCE ODIHR, *supra* note 2, at 52.

[116] *Id.* at 52; *Vandals desecrate Muslim graves in northern France*, NEW YORK TIMES, Apr. 6, 2008, *available at* http://www.nytimes.com/2008/04/06/world/europe/06iht-france.4.11707631.html; *Vandals desecrate 500 French Muslim war graves*, THE TELEGRAPH, Dec. 8, 2008, *available at* http://www.telegraph.co.uk/news/worldnews/europe/france/3684187/Vandals-desecrate-500-French-Muslim-war-graves.html.

apparent, the crime will require deeper investigation, involving not only law enforcement and investigative expertise, but even expertise in social sciences:

> It may be difficult to prove beyond a reasonable doubt that a defendant acted out of bias or selected a victim because of certain characteristics. Prosecutors may need to seek such evidence from a variety of sources. These include confessions or admissions by the defendant that a crime was motivated by bias (this could include prior threats made to the victim), contemporaneous statements made in the course of committing the act, statements to third parties (if admissible), membership in and association with members of known "hate groups" (although membership alone would not likely be sufficient to prove the motivation for a particular act), and expert testimony.
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> * * *
>
> An expert, such as a psychologist, can be especially valuable in rendering an opinion as to whether bias was a motivating factor in a particular crime. Another area that an expert can be useful in is explaining the structure and philosophy of a group to which the defendant belongs, to show that bias toward persons with certain characteristics is a part of the group's beliefs. This person could be a sociologist who studies such groups, or a police officer with expertise in investigating or monitoring such groups.[117]

American law enforcement agencies required to implement their jurisdictions' hate crime laws have developed criteria and markers for identifying and classifying hate crimes. These are instructive as to the circumstances that may tag a crime as a hate crime and the evidence that should be gathered to prove bias motivation in such cases.

For instance, the Federal Bureau Investigation's (FBI) *Hate Crime Data Collection Guidelines* were formulated to implement the US Hate Crime Statistics Act of 1990,[118] which required the Attorney General who delegated the task to the FBI to gather data on American Hate Crimes. Defining a bias (hate) crime as "[a] criminal offense committed against a person or property which is motivated, in whole or in part, by the offender's bias against a race, religion, disability, sexual orientation, or ethnicity/national origin,"[119] the guidelines caution that "[b]ecause of the difficulty of ascertaining the offender's subjective motivation,

[117] 57 AM. JUR. PROOF OF FACTS 3d § 4 (2009).
[118] Hate Crime Statistics Act, 28 U.S.C. § 534 (1990).
[119] FEDERAL BUREAU OF INVESTIGATION, *supra* note 94, at 8.

bias is to be reported only if investigation reveals *sufficient objective facts to lead a reasonable and prudent person to conclude that the offender's actions were motivated, in whole or in part, by bias.*"[120]

The FBI guidelines then proceed to a listing of "Objective Evidence that the Crime was Motivated by Bias":

> While no single fact may be conclusive, facts such as the following, particularly when combined, are supportive of a finding of bias:
>
> 1. The offender and the victim were of different race, religion, disability, sexual orientation, and/or ethnicity/national origin. For example, the victim was black and the offender was white.
>
> 2. Bias-related oral comments, written statements, or gestures were made by the offender which indicate his/her bias. For example, the offender shouted a racial epithet at the victim.
>
> 3. Bias-related drawings, markings, symbols, or graffiti were left at the crime scene. For example, a swastika was painted on the door of a synagogue.
>
> 4. Certain objects, items, or things which indicate bias were used. For example, the offenders wore white sheets with hoods covering their faces or a burning cross was left in front of the victim's residence.
>
> 5. The victim is a member of a racial, religious, disability, sexual-orientation, or ethnic/national origin group which is overwhelmingly outnumbered by other residents in the neighborhood where the victim lives and the incident took place. This factor loses significance with the passage of time; i.e., it is most significant when the victim first moved into the neighborhood and becomes less and less significant as time passes without incident.
>
> 6. The victim was visiting a neighborhood where previous hate crimes were committed against other members of his/her racial, religious, disability, sexual-orientation, or ethnic/national origin group and where tensions remained high against his/her group.

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[120] *Id.* at 4. (Emphasis supplied.)

7. Several incidents occurred in the same locality, at or about the same time, and the victims were all of the same race, religion, disability, sexual orientation, or ethnicity/national origin.

8. A substantial portion of the community where the crime occurred perceived that the incident was motivated by bias.

9. The victim was engaged in activities promoting his/her race, religion, disability, sexual orientation, or ethnicity/national origin. For example, the victim was a member of the NAACP or participated in gay rights demonstrations.

10. The incident coincided with a holiday or a date of particular significance relating to a race, religion, disability, sexual orientation, or ethnicity/national origin, e.g., Martin Luther King Day, Rosh Hashanah.

11. The offender was previously involved in a similar hate crime or is a hategroup member.

12. There were indications that a hate group was involved. For example, a hate group claimed responsibility for the crime or was active in the neighborhood.

13. A historically established animosity existed between the victim's and the offender's groups.

14. The victim, although not a member of the targeted racial, religious, disability, sexual-orientation, or ethnic/national origin group, was a member of an advocacy group supporting the precepts of the victim group.[121]

On the other hand, the New York City Police Department (NYPD), the largest police force in the United States, established the Bias Incident Investigation Unit in 1980 "to monitor and investigate acts committed against a person, group, or place because of race, religion, or ethnicity," a mandate later expanded to cover anti-lesbian and gay prejudice and disability.[122] Renamed as the Hate Crimes Task Force in 2000, the unit has developed criteria to aid policemen in identifying hate crimes, along with questions a law enforcer should

121 *Id.* at 5-6.

122 JACOBS & POTTER, *supra* note 39, at 95.

ask himself when investigating a possible hate crime.[123] The criteria and questions are reproduced below:

Criteria

1. The motivation of the perpetrator.
2. The absence of any motive.
3. The perception of the victim.
4. The display of offensive symbols, words, or acts.
5. The date and time of occurrence (corresponding to a holiday of significance, i.e., Hanukkah, Martin Luther King Day, Chinese New Year, etc.).
6. A common-sense review of the circumstances surrounding the incident (considering the totality of circumstances).
    a. The group involved in the attack.
    b. The manner and means of the attack.
    c. Any similar incidents in the same area or against the same victim.
7. What statements, if any, were made by the perpetrator.

Questions to be Asked

1. Is the victim the only member or one of a few members of the targeted group in the neighborhood?
2. Are the victim and perpetrator from different racial, religious, ethnic, or sexual orientation groups?
3. Has the victim recently moved to the area?
4. If multiple incidents have occurred in a short time period, are all the victims of the same group?
5. Has the victim been involved in a recent public activity that would make him/her a target?
6. What was the modus operandi? Is it similar to other documented incidents?
7. Has the victim been the subject of past incidents of a similar nature?
8. Has there been recent news coverage of events of a similar nature?
9. Is there an on-going neighborhood problem that may have spurred the event?
10. Could the act be related to some neighborhood conflict involving area juveniles?
11. Was any hate literature distributed by or found in the possession of the perpetrator?
12. Did the incident occur, in whole or in part, because of a racial, religious, ethnic, or sexual orientation difference be-

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[123] *Id.* at 97-98.

tween the victim and the perpetrator, or did it occur for other reasons?

13. Are the perpetrators juveniles or adults, and if juveniles, do they understand the meaning (to the community at large and to the victim) of the symbols used?
14. Were the real intentions of the responsible person motivated in whole or in part by bias against the victim's race, religion, ethnicity, or sexual orientation, or was the motivation based on other than bias, ex: a childish prank, unrelated vandalism, etc?

Remember: The mere mention of a bias remark does not necessarily make an incident bias motivated, just as the absence of a bias remark does not make an incident non-bias. A common sense approach should be applied and the totality of the circumstances should be reviewed before any decision is made.

Finally, the American practice manual *American Jurisprudence Proof of Facts* summarizes the essential facts and circumstances to be proven to convict a hate crime perpetrator.[124] Though not as detailed as the FBI or NYPD lists, it will be noted that the list includes the two elements of hate crimes: the predicate crime and the bias motivation.

§ 9. *Proof of hate crime; checklist*

Evidence of the following facts and circumstances, among others, should be adduced by the state in an criminal action to convict a defendant of committing a hate crime.

[ ] Defendant committed act prohibited by law
— Defendant injured another person
— Defendant threatened or intimidated another person
— Defendant damaged another persons property

[ ] Defendant selected victim because of victim's characteristics
— Race
— Color
— Religion
— Creed
— National Origin
— Disability
— Sex/Gender
— Sexual Orientation

[124] 57 AM. JUR. PROOF OF FACTS 3d § 9 (2009).

— Other Characteristics

[ ] Defendant demonstrated bias or prejudice against a characteristic of victim
— Defendant confessed that victim was selected because of a characteristic
— Defendant made contemporaneous statements indicating that victim was selected because of a characteristic
— Defendant made prior statements indicating bias or prejudice toward a characteristic of the victim
— Defendant is a member of a group whose beliefs include bias or prejudice toward a characteristic of the victim

C. Characteristics of a Hate Crime

While the study of hate crimes as defined today is relatively new, the growing body of literature on the subject has started identifying the consistencies in the dynamics and patterns associated with these acts—the "trends," or what one author refers to as "empirical attributes" across categories of hate crimes.[125] A concise listing of these has been adopted by several writers from Levin and McDevitt's 1993 work: excessive brutality, stranger victimization, interchangeableness of victims, and multiple offenders.[126]

1. Excessive Brutality

Hate crimes are exceedingly likely to be violent as compared to predicate crimes not carrying a bias motive, "an inversion of trends for the general population."[127] These crimes are more violent in terms of the type of crime involved as well as the type of harm inflicted.[128] As for the type of attack involved, assaultive attacks are preponderant over offenses against property,[129] with crimes committed with bias motivation "dramatically more likely to involve physical assaults than do crimes generally."[130]

As for the degree of harm inflicted, "bias-motivated assaults are far more likely than other assaults to involve serious physical injury to the victim," with the Boston study referred to above finding that "nearly 75 percent of the

[125] BARBARA PERRY, HATE AND BIAS CRIME: A READER 5 (2003) [hereinafter "HATE AND BIAS CRIME"]; IN THE NAME OF HATE, *supra* note 50, at 11.
[126] LEVIN & MCDEVITT, *supra* note 111, at 16.
[127] IN THE NAME OF HATE, *supra* note 50, at 29.
[128] LAWRENCE, *supra* note 81, at 39.
[129] HATE AND BIAS CRIME, *supra* note 125, at 6.
[130] LAWRENCE, *supra* note 81, at 39, *citing* LEVIN & MCDEVITT, *supra* note 111, at 11.

victims of bias-motivated assaults suffered physical injury, whereas the national average for assaults generally is closer to 30 percent."[131] American homicide records, moreover, indicate an elevated occurrence of "multiple stabbings, genital mutilation, or torture"[132] where hate crimes against gays and lesbians are concerned, the offenders intending to "rub out the human being because of his (sexual) preference"[133] That hate crime victims are more likely to receive excessively brutal violence is linked to the motivation involved: "To the extent that Hate Crime perpetrators are motivated by fear, hatred, mistrust, or resentment of their victims [...] they are more likely to engage in extreme violence—violence which is beyond that necessary to subdue the victim."[134]

2. Victim Interchangeability

Compared to offenders in other crimes, perpetrators of hate crimes are more often than not strangers to their victims, "having focused exclusively on [the protected characteristic] in selecting the victim."[135] There is generally little or no pre-existing relationship between the perpetrator and victim that would provide alternative motivation for the former's acts other than his prejudices.[136] Further, the chief factor in classic hate crimes being that "the victim is attacked because of possession of a certain group characteristic, [...] victims are interchangeable, so long as they share the characteristic."[137] Perpetrators would generally be indifferent to the personal selection of their victims.

The victimization of strangers and the fungibility of victims highlight the prejudiced motivation of a hate crime—prejudice against a group or a characteristic of that group, not of any specific individual:

> These brutal acts of violence are commonly perpetrated on strangers—people with whom the perpetrator has had little or no personal contact. *The victim simply represents the Other in generic terms.* That he or she is a member of the hated or demonized group is enough to leave them vulnerable to attack. Further knowledge of their identity, personality, or intent is unnecessary.[138]

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[131] *Id.*

[132] IN THE NAME OF HATE, *supra* note 50, at 29, *citing* KEVIN BERRILL, HATE CRIMES: CONFRONTING VIOLENCE AGAINST LESBIANS AND GAY MEN 19-45 (1992).

[133] *Id.*

[134] *Id.*

[135] LAWRENCE, *supra* note 81, at 39, *citing* LEVIN & MCDEVITT, *supra* note 111, at 11.

[136] *Id.* at 14.

[137] *Id.*

[138] HATE AND BIAS CRIME, *supra* note 125, at 6. (Emphasis supplied.)

3. Multiplicity of Offenders

Hate crimes have also been noted to be more likely perpetrated by groups than by individuals.[139] Some studies report that hate crimes are group activities "involving ratios as dramatic as ten to one, but more often in the neighborhood of three to one,"[140] while Levin and McDevitt offer figures that contrast the 64 percent of hate crimes committed by multiple offenders to only 25 percent in the case of other crimes.[141]

D. Distinguishing Hate Crimes and Related Topics

Hate crimes involve protected characteristics that also come into play in other legal issues, specifically in genocide, hate speech, and discrimination. While related, these are distinct and separate crimes and concepts, and will be distinguished from hate crimes below.

1. Genocide

Genocide, as defined by the Convention on the Prevention and Punishment of the Crime of Genocide[142] and substantially adopted by the Philippine Act on Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity or Republic Act No. 9851, comprehends "any of the following acts with intent to destroy, in whole or in part, a national, ethnic, racial, religious, social or any other similar stable and permanent group as such":

(1) Killing members of the group;
(2) Causing serious bodily or mental harm to members of the group;
(3) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(4) Imposing measures intended to prevent births within the group; and
(5) Forcibly transferring children of the group to another group.[143]

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[139] LAWRENCE, *supra* note 81, at 40, *citing* LEVIN & MCDEVITT, *supra* note 111, at 16.

[140] PERRY, *supra* note 50, at 29.

[141] LEVIN & MCDEVITT, *supra* note 111, at 16.

[142] Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. 2, 78 U.N.T.S. 277.

[143] Rep. Act No. 9851 (2009), § 5. Philippine Act on Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity.

We may concede that the multitude of acts that comprise genocide are undoubtedly predicate crimes and "an intent to destroy, in whole or in part, a national, ethnic, racial, religious, social or any other similar stable and permanent group as such" is undeniably borne of hatred for that group—a bias motivation. It may thus be said that genocide is composed of many individual hate crimes, but is the sum of these parts a hate crime, especially since genocide is now a crime under domestic law?

It is submitted that even if we consider genocide as comprised of a multitude of individual hate crimes, the whole takes on a different complexion. Definitions of genocide invariably characterize it as widespread, systematic acts of violence,[144] meaning the many individual acts making up genocide as a crime must be coordinated, part of a bigger scheme and plan rather than isolatable events. Moreover, as many of the same definitions tag states, governments, political or social groups and their agents as perpetrators of genocide,[145] the crime becomes very dissimilar to its components of rape, destruction of life, and the like, where individual culpability may be ascertained. These and genocide's unique position as a crime under international law make it qualitatively and quantitatively different from the usual hate crimes.[146]

2. Hate Speech

It is not uncommon to find laws that criminalize speech regarding certain groups on the basis of the particular content thereof, the content of which vary widely. In Europe, for example, Holocaust denial, as well as the glorification of Nazi ideology (and similar acts concerning the Communist regimes of formerly Communist countries) are prohibited by law in Austria,[147] Germany,[148] Luxembourg,[149] Poland,[150] and Romania.[151] Worldwide, many

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[144] Adam Jones, Genocide: A Comprehensive Introduction 15-18 (2006).

[145] *Id.*

[146] OSCE ODIHR, *supra* note 2, at 24.

[147] European Commission against Racism and Intolerance, Legal measures to combat racism and intolerance in the member States of the Council of Europe – Austria, at 13 (Dec. 31, 2003), *available at* http://www.coe.int/t/dghl/monitoring/ecri/Legal_Research/National_legal_measures/Austria/Austria_SR.pdf.

[148] European Commission against Racism and Intolerance, Legal measures to combat racism and intolerance in the member States of the Council of Europe – Germany, at 20 (Dec. 31, 2002), *available at* http://www.coe.int/t/dghl/monitoring/ecri/Legal_Research/National_legal_measures/Germany/Germany_SR.pdf.

[149] European Commission against Racism and Intolerance, Legal measures to combat racism and intolerance in the member States of the Council of Europe – Luxembourg, at 10 (Dec. 1, 2004), *available at* http://www.coe.int/t/dghl/monitoring/ecri/Legal_Research/National_legal_measures/Luxembourg/Luxembourg_SR.pdf.

countries also prohibit speech that disparages, intimidates, or incites hatred against protected classes based on race, ethnicity, religion, sexual orientation, and other characteristics. Denmark,[152] Finland,[153] The Netherlands,[154] Singapore,[155] and South Africa[156] are examples of such jurisdictions. In the Philippines, the Magna Carta for Disable Persons prohibits "vilification," defined as "incit[ing] hatred towards, serious contempt for, or severe ridicule of persons with disability."[157] These regulated forms of speech may be categorized as "hate speech."

Is hate speech a hate crime? Returning to the elements of a hate crime would give us a negative answer. Like discrimination, without the laws that

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[150] European Commission against Racism and Intolerance, Legal measures to combat racism and intolerance in the member States of the Council of Europe – Poland, at 4 (Dec. 31, 2003), *available at* http://www.coe.int/t/dghl/monitoring/ecri/Legal_Research/National_legal _measures/Poland/Poland_SR.pdf.

[151] European Commission against Racism and Intolerance, Legal measures to combat racism and intolerance in the member States of the Council of Europe – Romania, at 10-11 (Dec. 1, 2004), *available at* http://www.coe.int/t/dghl/monitoring/ecri/Legal_Research/ National_ legal_measures/Romania/Romania_SR.pdf.

[152] The Middle East Forum, European Hate Speech Laws, *at* http://www.legal-project.org/issues/european-hate-speech-laws (last visited June 24, 2014), *citing* STRAFFELOVEN [DANISH CRIM. CODE], § 266b (Den.). The Criminal Code of Denmark provides for a fine or a 2-year prison sentence for publicly making statements that threaten, ridicule or hold a group in contempt on account of race, color, national or ethnic origin, creed or sexual orientation.

[153] European Commission against Racism and Intolerance, Legal measures to combat racism and intolerance in the member States of the Council of Europe – Finland, at 7 (Dec. 31, 2005), *available at* http://www.coe.int/t/dghl/monitoring/ecri/Legal_Research/ National_legal_ measures/Finland/Finland-2005-eng.pdf. The provision sentences a maximum prison term of two years for statements that threaten, attack, slander, or insult a national, racial, ethnic or religious group or a similar group.

[154] The Middle East Forum, *supra* note 152, citing WETBOEK VAN STRAFRECHT [PENAL CODE], art. 137c (Neth.). The provision states that publicly making defamatory statements about a group of people because of their race, religion, sexual orientation, or disability is punishable with imprisonment not exceeding one year.

[155] Zhong Zewei, *Racial And Religious Hate Speech In Singapore: Reclaiming the Victim's Perspective*, 27 SING. L. REV. 13 (2009), *citing* PENAL CODE, art. 298 (Sing.). "Art. 298 Whoever, with deliberate intention of wounding the religious or racial feelings of any person, utters any word or makes any sound in the hearing of that person, or makes any gesture in the sight of that person, or places any object in the sight of that person, or causes any matter however represented to be seen or heard by that person, shall be punished with imprisonment for a term which may extend to 3 years, or with fine, or with both."

[156] Wendy Isaack, *Equal in Word of Law: The Rights of Lesbian and Gay People in South Africa*, 30 HUM. RTS. 19, 20, *citing* Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, § 10 (S. Afr.).

[157] Rep. Act No. 7277 (1992), § 41, *amended* by Rep. Act No. 9442 (2007). Magna Carta for Disabled Persons.

criminalize the particular content of hate speech and their utterance, such speech would not be a crime *per se.* The freedom of speech guaranteed by many jurisdictions assures us that with certain exceptions, saying one's piece is not a crime. Hate speech by itself, therefore, lacks the first essential element of a hate crime—that there exist a predicate crime.[158] While the second element exists in that there is an obvious bias motivation for uttering hate speech, the act of speaking up in itself is not a crime. Hate speech is not in itself a hate crime by definition, though in many countries it is criminalized nonetheless for various reasons.

Notwithstanding the exclusion of hate speech from the rubric of hate crimes, it is nevertheless relevant to our study. First, while hate speech by itself may not be criminal *sans* statutory authority proscribing particular content against certain groups, it may be a violation of *other* laws that criminalize such conduct regardless of the individual or group it targets. For example, laws on slander, harassment, threats, incitement, and other speech-related crimes are generally-worded with respect to victims and in no way seek to protect certain groups the way hate crime laws do.[159] When uttering hate speech (supposedly by itself not criminal) violates these laws, it becomes a crime, a predicate crime which coupled with the obvious bias motivation (hate) makes it a hate crime.

Aside from violating the abovementioned speech-related crimes, most legal systems proscribe and penalize direct and immediate incitement to criminal acts. Hate speech that incites and induces others to commit crimes, therefore, may be criminal acts by themselves, and like those mentioned in the previous paragraph, becomes the predicate crime element in a hate crime. In the Philippines, for example, the Revised Penal Code considers as principals in a felony "[t]hose who directly [...] induce others to commit it."[160] Thus, it may be possible for one uttering hate speech that directly induces another to commit a crime to become a principal of such crime by inducement.[161] He would be guilty of a predicate crime, which with the prejudice exhibited transforms into a hate crime.

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[158] OSCE ODIHR, *supra* note 2, at 25.

[159] *See, e.g.,* REV. PEN. CODE, art. 282–285, 287, 358.

[160] REV. PEN. CODE, art. 17 ¶ 2.

[161] *See* I LUIS B. REYES, THE REV. PEN. CODE: CRIMINAL LAW 527 (16th ed., 2006) [hereinafter "I REYES"], *citing* U.S. v. Indanan, 24 Phil. 203, 219 (1913) and People v. Kiichi Omine, 61 Phil. 609, 613-614 (1935). Commentators hold that for one to become a principal by induction, the following requisites must be present: (1) that the inducement be made directly with the intention of procuring the commission of the crime; and (2) that such inducement be the determining cause of the commission of the crime by the material executor.

Further, hate speech is relevant to hate crimes as its utterance may form part of the evidence of a bias motive for "racist or biased speech before, during, or after a crime, may constitute evidence of motive and should form part of any criminal investigation."[162] Hate speech, therefore, while not a hate crime in itself, may form part of the milieu of such crimes.

3. Discrimination

"[D]iscrimination refers to less favorable treatment of a person on the basis of some prohibited consideration, such as racial or ethnic origin, or gender."[163] Philippine law, for example, declares acts of discrimination in employment, education, and other fields unlawful, prescribing criminal or civil penalties when these are committed against protected groups such as the disabled,[164] indigenous peoples,[165] women,[166] and children.[167] Discrimination, therefore, is different treatment because of the victim's protected characteristic.

In our definition of hate crime, a crime is committed because of the victim's protected characteristic. Different treatment, classification, or distinctions are in themselves not criminal. This is what prevents us from classifying prohibited discrimination as hate crimes. As drawing distinctions in itself is not a crime, the element of a predicate crime is absent in discrimination. This disqualifies discriminatory treatment by itself from being a hate crime and excludes anti-discrimination laws from the category of hate crime laws, though these concern some of the same categories of individuals.

Note, however, that while not all acts of discrimination are hate crimes as not all acts of differing treatment under discrimination are crimes (e.g., promoting or not promoting an employee and providing or not providing services), all hate crimes may be classed as discrimination. Committing a crime against someone is surely "different treatment" for the victim because of his possession of some characteristic. While an in-depth discussion on discrimination as a legal topic is outside the scope of this inquiry, the Philippines' international anti-discrimination obligations as well as domestic discrimination laws will be an important sources for justification and examples

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162 OSCE ODIHR, *supra* note 2, at 26.

163 *Id.* at 25.

164 Rep. Act No. 7277 (1992), § 46. The law provides penalties for acts of discrimination against the disabled in employment, education, and the use of public accommodation and services.

165 Rep. Act No. 8371 (1997), § 24. The Indigenous Peoples' Rights Act of 1997.

166 LAB. CODE, art. 135, *amended by* Rep. Act No. 6725 (1989).

167 *Id.*, art. 140.

of hate crime laws, since all hate crimes fall within the rubric of discrimination (though the reverse is not true).

III. HATE CRIME LAWS

> *"[I]t is but reasonable that among crimes of different natures those should be most severely punished, which are the most destructive of the public safety and happiness."*
>
> —Sir William Blackstone[168]

Hate crimes as a concept having been introduced in the immediately preceding chapter, this present section will discuss the legal response to the same, i.e., statutes that seek to prevent and penalize hate crimes.

A. Classifications of Hate Crimes

Bias-related crimes have been prosecuted in the United States since the 19th century, under a variety of laws enacted after the American Civil War to stop violent rampages against African Americans as well as the curtailment of their civil rights during the period of Reconstruction.[169] These laws include the Civil Rights Act of 1866, the Enforcement Act of 1870, the Ku Klux Klan Act of 1871, and the Civil Rights Act of 1875.[170] These post-Civil War statutes, however, while responding to issues of race and discrimination, are merely a product of their time, formulated to ensure the newly-freed slaves their civil rights. "The federal statutes did not aim to enhance punishment or to recriminalize conduct already covered by criminal law" and were not directed exclusively at hate crimes, but rather to the crimes of interfering with the exercise of civil rights:

> [None] of these statutes [were] meant to single out prejudices of common criminals for special condemnation and more severe punishment; rather, their purpose was to ensure that laws were enforced equally on behalf of all victims, no matter what race, and against all offenders, whatever their race, prejudice, or criminal

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[168] Wisconsin v. Mitchell, 508 U.S. 476, 488 (1993). The decision upheld the Constitutionality of the State of Wisconsin's hate crime statute.

[169] TOM STREISSGUTH, HATE CRIMES 43 (2003); ALTSCHILLER, *supra* note 41, at 3.

[170] ALTSCHILLER, *supra* note 41, at 3.

motivation. Unlike modern-day state hate crime statutes, which cover only those victims who fall within the groups listed in the hate crime statute, the post-Civil War statutes apply to everyone.[171]

These 19th century US laws, concerned as they are with issues of race and discrimination, are considered by scholars as the origins of hate crime legislation.[172] Indeed, by the 20th century, legislation penalizing hate crimes as defined today have been enacted in many jurisdictions. These modern hate crime laws are classified by legal scholars into four categories: (1) laws defining specific bias-motivated acts as distinct crimes (substantive crimes); (2) criminal penalty-enhancement laws; (3) laws creating a distinct civil cause of action for Hate Crimes; and (4) laws requiring administrative agencies to collect Hate Crime statistics (reporting statutes).[173]

1. Substative Hate Crimes

Some jurisdictions' laws make some bias-motivated acts substantive crimes—separate offenses that include the bias motivation as an integral element of the legal definition of the offense. Consistent with the definition of hate crime as being composed of a predicate crime and a bias motive, these laws redefine, i.e. re-criminalize, conduct that is already considered criminal as a new crime or as an aggravated form of an existing crime.[174]

i. American Examples

At both the federal and state levels, numerous American jurisdictions define bias-motivated offenses involving bodily injury (e.g. assault, battery, manslaughter, and murder) as substantive crimes. A wide-reaching example is the newly enacted Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act,[175] which created a new federal crime penalizing the willful causing of bodily injury, or the attempt to do so using fire, a firearm, or other dangerous weapon, with a bias motive.

§ 249. *Hate crime acts*

(a) IN GENERAL.—

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[171] JACOBS & POTTER, *supra* note 39, at 36-37.
[172] STREISSGUTH, *supra* note 169, at 43.
[173] JACOBS & POTTER, *supra* note 39, at 29.
[174] JACOBS & POTTER, *supra* note 39, at 33.
[175] 18 U.S.C. § 249 (2009).

(1) OFFENSES INVOLVING ACTUAL OR PERCEIVED RACE, COLOR, RELIGION, OR NATIONAL ORIGIN.—Whoever, whether or not acting under color of law, willfully causes bodily injury to any person or, through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, attempts to cause bodily injury to any person, because of the actual or perceived race, color, religion, or national origin of any person—

(A) shall be imprisoned not more than 10 years, fined in accordance with this title, or both; and
(B) shall be imprisoned for any term of years or for life, fined in accordance with this title, or both, if—
(i) death results from the offense; or
(ii) the offense includes kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill.

(2) OFFENSES INVOLVING ACTUAL OR PERCEIVED RELIGION, NATIONAL ORIGIN, GENDER, SEXUAL ORIENTATION, GENDER IDENTITY, OR DISABILITY.—

(A) IN GENERAL.—Whoever, whether or not acting under color of law [...] willfully causes bodily injury to any person or, through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, attempts to cause bodily injury to any person, because of the actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability of any person—

(i) shall be imprisoned not more than 10 years, fined in accordance with this title, or both; and
(ii) shall be imprisoned for any term of years or for life, fined in accordance with this title, or both, if—

(I) death results from the offense; or
(II) the offense includes kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill.

Bias-motivated harassment or intimidation is another area in which statutes defining such acts as substantive crimes proliferate.

Colorado: A person commits ethnic intimidation if, with the intent to intimidate or harass another person because of that person's race, color, religion, ancestry, or national origin causes injury, fear, or damage to property.[176]

Idaho: A person commits malicious harassment if, "maliciously and with the specific intent to intimidate or harass another person because of that person's race, color, religion, ancestry, or national origin[,]" he causes injury or damage to property.[177]

Michigan: A person is guilty of "ethnic intimidation" if that person "maliciously, and with specific intent to intimidate or harass another person because of that person's race, color, religion, gender, or national origin," causes injury or damage to property.[178]

Montana: A person commits the offense of malicious intimidation or harassment when, "because of another person's race, creed, religion, color, national origin[,] [...] he purposely or knowingly, with the intent to terrify, intimidate, threaten, harass, annoy, or offend," causes injury or property damage.[179]

Oklahoma: A person commits "malicious intimidation or harassment because of race" if he "maliciously and with the specific intent to intimidate or harass another person because of that person's race, color, religion, ancestry, national origin, or disability" causes injury or damage to property.[180]

South Dakota: "No person may maliciously and with the specific intent to intimidate or harass another person because of that person's race, color, religion, ancestry, or national origin" cause injury or damage to property."[181]

Washington: "A person is guilty of malicious harassment if he or she maliciously and intentionally commits [...] 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."[182]

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[176] LAWRENCE, *supra* note 81, at 192, *citing* COLO. REV. STAT. ANN. §18-9-121 (West 1997).

[177] *Id.* at 193, *citing* IDAHO CODE §18-7902 (1991).

[178] *Id., citing* MICH. COMP. LAWS §750.147b (1991).

[179] *Id.* at 192, *citing* MONT. CODE ANN. §45-5-221 (1996).

[180] *Id.* at 193, *citing* OKLA. STAT. tit. 21, §850 (1996)

[181] *Id., citing* S.D. COD. LAWS ANN. §22-19B-1 (1993).

[182] *Id., citing* WASH. REV. CODE ANN. §9A.36.080 (West 1994).

Where property is concerned, meanwhile, more commonly punished as a distinct substantive crime is the offense of institutional vandalism—the destruction or damaging of property that belong to religious groups. Adopted in some form or another in all but eight jurisdictions in the United States,[183] a general and detailed example of such laws is that recommended by the Anti-Defamation League in their Model Hate Crime Legislation:[184]

> A. A person commits the crime of institutional vandalism by knowingly vandalizing, defacing or otherwise damaging:
>
> i. Any church, synagogue or other building, structure or place used for religious worship or other religious purpose;
> ii. Any cemetery, mortuary or other facility used for the purpose of burial or memorializing the dead;
> iii. Any school, educational facility or community center;
> iv. The grounds adjacent to, and owned or rented by, any institution, facility, building, structure or place described in subsections (i), (ii) or (iii) above; or
> v. Any personal property contained in any institution, facility, building, structure, or place described in subsections (i), (ii) or (iii) above.
>
> B. Institutional vandalism is punishable as follows:
>
> i. Institutional vandalism is a ______ misdemeanor if the person does any act described in subsection A which causes damage to, or loss of, the property of another.
> ii. Institutional vandalism is a ______ felony if the person does any act described in Subsection A which causes damage to, or loss of, the property of another in an amount in excess of five hundred dollars.
> iii. Institutional vandalism is a ______ felony if the person does any act described in Subsection A which causes damage to, or loss of, the property of another in an amount in excess of one thousand five hundred dollars.

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[183] *Id.* at 179; Anti-Defamation League, Anti-Defamation League State Hate Crime Statutory Provisions, *available at* http://archive.adl.org/learn/hate_crimes_laws/state_hate_crime_statutory_provisions_chart.pdf (last visited June 24, 2014) [hereinafter *ADL Hate Crime Provisions*].

[184] ANTI-DEFAMATION LEAGUE, HATE CRIME STATUTES: A 1991 STATUS REPORT 4 (1991); *ADL Model Legislation*, *supra* note 54.

iv. Institutional vandalism is a ______ felony if the person does any act described in Subsection A which causes damage to, or loss of, the property of another in an amount in excess of five thousand dollars.

In determining the amount of damage to, or loss of, property, damage includes the cost of repair or replacement of the property that was damaged or lost.

ii. European Examples

Substantive crime laws are rare in the European region, according to a survey by the OSCE-ODIHR.[185] Nonetheless, examples do exist; a particularly expansive one being the racially-aggravated offenses of the United Kingdom's Crime and Disorder Act 1998.[186]

§ 28 Meaning of "racially aggravated"

(1) An offence is racially aggravated for the purposes of sections 29 to 32 below if—
   a. at the time of committing the offence, or immediately before or after doing so, the offender demonstrates towards the victim of the offence hostility based on the victim's membership (or presumed membership) of a racial group; or
   b. the offence is motivated (wholly or partly) by hostility towards members of a racial group based on their membership of that group.

* * *

§ 29 Racially-aggravated assaults

(1) A person is guilty of an offence under this section if he commits—
   a. an offence under section 20 of the Offences Against the [1861 c. 100.] Person Act 1861 (malicious wounding or grievous bodily harm);
   b. an offence under section 47 of that Act (actual bodily harm); or

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[185] OSCE ODIHR, *supra* note 2, at 32.

[186] *Id.* at 33, *citing* Crime and Disorder Act 1998, 1998 c. 37, § 28-32 (Eng.).

c. common assault, which is racially aggravated for the purposes of this section.

* * *

§ 30 Racially-aggravated criminal damage

(1) A person is guilty of an offence under this section if he commits an offence under section 1(1) of the [1971 c. 48.] Criminal Damage Act 1971 (destroying or damaging property belonging to another) which is racially aggravated for the purposes of this section.

* * *

§ 31 Racially-aggravated public order offences

(1) A person is guilty of an offence under this section if he commits—

a. an offence under section 4 of the [1986 c. 64.] Public Order Act 1986 (fear or provocation of violence);
b. an offence under section 4A of that Act (intentional harassment, alarm or distress); or
c. an offence under section 5 of that Act (harassment, alarm or distress), which is racially aggravated for the purposes of this section.

* * *

§32 Racially-aggravated harassment etc.

(1) A person is guilty of an offence under this section if he commits—

a. an offence under section 2 of the [1997 c. 40.] Protection from Harassment Act 1997 (offence of harassment); or
b. an offence under section 4 of that Act (putting people in fear of violence), which is racially aggravated for the purposes of this section.

2. Criminal Penalty-Enhancement Laws

Penalty enhancements, known also as "aggravating sentencing clauses" or "aggravating circumstances," are also used to create hate crime laws. These provisions of law operate by increasing the penalty for predicate crimes when

these are committed with a bias motive. As these statutes merely latch onto existing laws defining and penalizing (base) crimes, they may be classified as either general or specific:

> *General penalty enhancements.* Enhancement provisions that apply to a wide range of criminal offences are described as general penalty enhancements.
>
> *Specific penalty enhancements.* Specific enhancements apply increased penalties only to some criminal offences.[187]

i. American Examples

On the American federal level, the Violent Crime Control and Law Enforcement Act of 1994 mandates a sentence enhancement of three "offense levels" if the court finds that the federal crime was a hate crime.[188]

> SEC. 280003. DIRECTION TO UNITED STATES SENTENCING COMMISSION REGARDING SENTENCING ENHANCEMENTS FOR HATE CRIMES.
>
> (a) DEFINITION — In this section, 'hate crime' means a crime in which the defendant intentionally selects a victim, or in the case of a property crime, the property that is the object of the crime, because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person.
>
> (b) SENTENCING ENHANCEMENT — Pursuant to section 994 of title 28, United States Code, the United States Sentencing Commission *shall promulgate guidelines or amend existing guidelines to provide sentencing enhancements of not less than 3 offense levels for offenses that the finder of fact at trial determines beyond a reasonable doubt are hate crimes.* In carrying out this section, the United States Sentencing Commission shall ensure that there is reasonable consistency with other guidelines, avoid duplicative punishments for substantially the same offense, and take into account any mitigating circumstances that might justify exceptions.[189]

Penalty-enhancement laws are also very common among individual American states, with 45 of the 50 states and the District of Columbia having

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[187] *Id.* at 33-34.
[188] Pub.L. 103-322, § 280003 (1994).
[189] *Id.* (Emphasis supplied.)

legislation enabling racist and other discriminatory motives to be taken into account as an aggravating factor in sentencing.[190] Different states apply varying methods of penalty enhancement, however, as state laws from Montana, Alabama, and Florida illustrate.

Of one class are provisions tacking an additional prison term for whatever penalty one has incurred for a crime should the crime have been committed with a bias motive. Montana's law, a general penalty enhancement that may apply to all crimes, provides that:

> A person who has pleaded guilty or nolo contendere to or who has been found guilty of any offense xxx that was committed because of the victim's race, creed, religion, color, national origin, or involvement in civil rights or human rights activities or that involved damage, destruction, or attempted destruction of a building regularly used for religious worship, *in addition to the punishment provided for commission of the offense*, may [...] be sentenced to a term of imprisonment of not less than 2 years or more than 10 years[.][191]

Another group mandates a higher mandatory minimum sentence for violent crimes motivated by designated biases. Alabama's law, a general penalty enhancement, is such a statute.

> Section 13A-5-13. Crimes motivated by victim's race, color, religion, national origin, ethnicity or physical or mental disability.
>
> * * *
>
> (c) A person who has been found guilty of a crime, the commission of which was shown beyond a reasonable doubt to have been motivated by the victim's actual or perceived race, color, religion, national origin, ethnicity, or physical or mental disability, shall be punished as follows:
>
> (1) Felonies:
>
> a. On conviction of a Class A felony that was found to have been motivated by the victim's actual or perceived race, color, religion, national origin, ethnicity, or physical or mental disability, the sentence shall not be less than 15 years.

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[190] MCCLINTOCK , *supra* note 87, at 127; LAWRENCE, *supra* note 81, at 178.

[191] JACOBS & POTTER, *supra* note 39, at 29, *citing* MONT. CODE ANN. § 45-5-222. (Emphasis supplied.)

b. On conviction of a Class B felony that was found to have been motivated by the victim's actual or perceived race, color, religion, national origin, ethnicity, or physical or mental disability, the sentence shall not be less than 10 years.
c. On conviction of a Class C felony that was found to have been motivated by the victim's actual or perceived race, color, religion, national origin, ethnicity, or physical or mental disability, the sentence shall not be less than two years.[192]

Yet another class increases penalties by reclassifying the crime to the next higher category, resulting to increased prison terms. In Florida, maximum prison terms for hate crimes are effectively tripled when reclassification is applied.[193]

> 775.085 Evidencing prejudice while committing offense; reclassification.
>
> (1)(a) The penalty for any felony or misdemeanor shall be reclassified as provided in this subsection if the commission of such felony or misdemeanor evidences prejudice based on the race, color, ancestry, ethnicity, religion, sexual orientation, national origin, mental or physical disability, or advanced age of the victim:
>
> 1. A misdemeanor of the second degree is reclassified to a misdemeanor of the first degree.
> 2. A misdemeanor of the first degree is reclassified to a felony of the third degree.
> 3. A felony of the third degree is reclassified to a felony of the second degree.
> 4. A felony of the second degree is reclassified to a felony of the first degree.
> 5. A felony of the first degree is reclassified to a life felony.[194]

ii. European Examples

Quite a number of civil law jurisdictions in Europe treat specified bias motivations as aggravating circumstances that call for increased penalties.[195] As

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[192] *Id.* at 30, *citing* ALA. CODE § 13A-5-13.
[193] *Id.*
[194] FLA. STAT. ANN. § 775.085.
[195] OSCE ODIHR, *supra* note 2, at 33.

the determination of guilt and sentencing are not separate phases in these jurisdictions, consideration of bias motives that affect the applicable sentence is included in a single process.[196] Examples are Andorra, France, and Spain, whose respective penal codes provide for bias as aggravating circumstances.[197]

The Andorran penal code provides:[198]

> ARTICLE 30.
> *Circumstàncies agreujants*
>
> *Són circumstàncies que agreugen la responsabilitat criminal:*
>
> * * *
>
> 6. *Cometre el fet per motius racistes, xenòfobs o relatius a ideologia, religió, nacionalitat, ètnia, sexe, orientació sexual, malaltia o disminució física o psíquica de la víctima.*[199]

The French penal code provides:[200]

> ARTICLE 132-76
>
> *Dans les cas prévus par la loi, les peines encourues pour un crime ou un délit sont aggravées lorsque l'infraction est commise à raison de l'appartenance ou de la non-appartenance, vraie ou supposée, de la victime à une ethnie, une nation, une race ou une religion déterminée.*
>
> *La circonstance aggravante définie au premier alinéa est constituée lorsque l'infraction est précédée, accompagnée ou suivie de propos, écrits, images, objets ou actes de toute nature portant atteinte à l'honneur ou à la considération de la victime ou d'un groupe de personnes dont fait partie la victime à raison de leur appartenance ou de leur non-appartenance, vraie ou supposée, à une ethnie, une nation, une race ou une religion déterminée.*[201]

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[196] *Id.*

[197] MCCLINTOCK, *supra* note 87, at 70, 115; OSCE ODIHR, *supra* note 2, at 34.

[198] OSCE ODIHR, *supra* note 2, at 34, *citing* CODI PENAL [PENAL CODE], art. 30.6 (Andorra).

[199] Article 30. Aggravating circumstances. These circumstances aggravate the criminal liability: [...] 6. Committed due to racist and xenophobic motives or reasons related to ideology, religion, nationality, ethnic origin, sexual orientation, disease or physical or mental disability of the victim. [...]

[200] MCCLINTOCK, *supra* note 87, at 70, *citing* CODE PÉNAL [PENAL CODE] art. 132-76 (Fr.).

[201] In the cases provided by law, the punishment for a crime or a crime is compounded when the offense is committed because of membership or non-membership, real or perceived, of

The Spanish penal code provides: [202]

ARTÍCULO 22. *Son circunstancias agravantes*:

* * *

4) *Cometer el delito por motivos racistas, antisemitas u otra clase de discriminación referente a la ideología, religión o creencias de la víctima, la etnia, raza o nación a la que pertenezca, su sexo u orientación sexual, o la enfermedad o minusvalía que padezca.*[203]

Meanwhile, the United Kingdom's Powers of Criminal Courts (Sentencing) Act of 2000 considers racial aggravation as a circumstance meriting additional penalties.[204] As is usual among common law jurisdictions, the judge will take this into consideration during the sentencing phase of the proceedings.[205]

§ 153 Increase in sentences for racial aggravation

* * *

(2) If the offence was racially aggravated, the court—
- (a) shall treat that fact as an aggravating factor (that is to say, a factor that increases the seriousness of the offence); and
- (b) shall state in open court that the offence was so aggravated.[206]

3. Laws Providing Civil Remedies

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the victim to an ethnic group, nation, race or religion. The aggravating circumstance defined in the first paragraph is established when the offense is preceded, accompanied or followed by written words, pictures, objects or actions of any kind detrimental to the honor or esteem of the victim or group people which includes the victim because of their membership or non-membership, real or perceived ethnic group, nation, race or religion.

202 MCCLINTOCK, *supra* note 87, at 70, *citing* CÓDIGO PENAL (Penal Code), art. 22(4) (Spain).

203 Article 22. The following are aggravating circumstances: [...] 4. Commission of a crime for motives that are racist, antisemitic or another form of discrimination referring to the ideology, religion, or beliefs of the victim, the ethnicity, race, or nationality to which they belong, their gender or sexual orientation, or any illness or disability they may suffer.

204 OSCE ODIHR, *supra* note 2, at 34.

205 *Id.* at 33.

206 Powers of Criminal Courts (Sentencing) Act 2000, 2000 c.6, § 153 (Eng.).

While the first two categories of hate crime laws deal with criminal law, a third category of statutes create a distinct civil cause of action for hate crimes. These allow for civil redress in favor of victims of hate crimes supplementary to or independently of criminal prosecution, as penal action may not provide a full measure of justice.

> Criminal prosecutions are one legal response to hate crimes. They address society's demand for punishment of those persons who commit acts based on hate or prejudice against another's characteristics. In doing so, they restore society's sense of moral order and justice. *However, criminal actions do not compensate the victims of hate crime for physical and psychological injuries or property damage they sustained. To provide for that, several states that have hate crimes also have statutes allowing for civil lawsuits based on actions motivated by bias or prejudice towards a person's characteristics.*[207]

In contrast to its criminal provisions on hate crimes, US federal law is next to silent in terms of civil remedies for hate crime victims. Previously, civil redress specifically covering bias crimes was available for gender bias via the Violence Against Women Act of 1994 ("VAWA"),[208] which provides for a federal civil rights cause of action for victims of crimes of violence motivated by gender.

> SEC. 40302. CIVIL RIGHTS.
>
> * * *
>
> (c) CAUSE OF ACTION.—A person (including a person who acts under color of any statute, ordinance, regulation, custom, or usage of any State) who commits a crime of violence motivated by gender xxx shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate.[209]

This provision, however, was struck down on ground of federalism in *United States v. Morrison*,[210] in which the US Supreme Court ruled that the Federal Congress had overstepped its powers to legislate vis-à-vis the states in creating such a cause of action. Meanwhile, unlike the pre-*Morrison* VAWA, the newly-

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[207] 57 AM. JUR. PROOF OF FACTS 3d 1, § 7 (2009). (Emphasis supplied.)

[208] ALTSCHILLER, *supra* note 41, at 5; JACOBS & POTTER, *supra* note 39, at 74.

[209] 42 U.S.C. § 13981 (2009), Pub.L. 103-322, § 40302(c) (1994).

[210] ALTSCHILLER, *supra* note 69, at 6, *citing* United States v. Morrison, 529 U.S. 598, 627 (2000).

enacted Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act criminalizes certain hate acts but does not provide civil causes of action.[211] Notwithstanding the VAWA and the Shepard and Byrd Act's lack of civil remedies, however, such exist for victims of conspiracies "depriving any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws."[212]

On the state level, US statutes providing civil causes of action for hate crime victims are more common, with 31 states and the District of Columbia having such laws.[213] Some examples of states with such laws are Colorado, Idaho, and Illinois.

In Colorado, statute provides:[214]

> 13-21-106.5. *Civil damages for destruction or bodily injury caused by a bias-motivated crime.*
>
> (1) The victim, or a member of the victim's immediate family, is entitled to recover damages from any person, organization, or association that commits or incites others to commit the offense of a bias-motivated crime as described in section 18-9-121 (2), C.R.S. Such person, organization, or association shall be civilly liable to the victim or a member of the victim's immediate family for the actual damages, costs, and expenses incurred in connection with said action. For purposes of this section, "immediate family" includes the victim's spouse and the victim's parent, sibling, or child who is living with the victim.

In Idaho, statute provides:[215]

> 18-7903. *Penalties—Criminal and civil.*
>
> (b) In addition to the criminal penalty xxx, there is hereby created a civil cause of action for malicious harassment. A person may be liable to the victim of malicious harassment for both special and general

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[211] National Defense Authorization Act for Fiscal Year 2010, Pub.L. 111—84, 123 Stat. 2190 (2009).

[212] 42 U.S.C. 1985(3).

[213] *ADL Hate Crime Provisions*, *supra* note 183.

[214] Leadership Conference on Civil Rights Education Fund, *Hate Crime Laws*, PARTNERS AGAINST HATE, *available at* http://www.partnersagainsthate.org/laws/list-of-hate-crime-laws.html (last visited June 24, 2014), *citing* COLO. REV. STAT. ANN. §13-21-106.5.

[215] *Id. citing* IDAHO CODE §18-7903 (1991).

> damages, including but not limited to damages for emotional distress, reasonable attorney fees and costs, and punitive damages.

In Illinois, statute provides:[216]

> *Sec. 12-7.1. Hate crime.*
>
> c) Independent of any criminal prosecution or the result thereof, any person suffering injury to his person or damage to his property as a result of hate crime may bring a civil action for damages, injunction or other appropriate relief. The court may award actual damages, including damages for emotional distress, or punitive damages. A judgment may include attorney's fees and costs.

4. Reporting Statutes

A fourth and final category of hate crime laws have absolutely nothing to do with punishment but with data collection. Reporting statutes require administrative agencies to collect statistics on hate crimes, performing the vital function of filling "the information deficit about its full extent, the gaps in states' responses, and the protection required for those under threat."[217] Statistics-gathering "has been a tried and tested part of the fight against discrimination for many years, and is increasingly part of the effort by governments and civil society to combat hate crimes,"[218] and laws mandating collation of various data on hate crimes are part of the statute books of many jurisdictions.

i. American Examples

Hate crime statistics are collected at both the state and national level in the United States. At the federal level, the Hate Crime Statistics Act (HCSA) was enacted by Congress in 1990 and mandates federal government compilation and reporting of hate crime statistics and publication of an annual report. The HCSA requires the Attorney General to "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

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[216] *Id. citing* 720 ILL. COMP. STAT. 5/12-7.1.
[217] MCCLINTOCK, *supra* note 87, at 23.
[218] *Id.* at 24.

property."[219] The Attorney General has since delegated this task to the FBI, which, since 1992, has been publishing the required report.

As for individual states, 27 states and the District of Columbia have data collection statutes complementing criminal justice measures combating hate crimes.[220] These statutes' mandates include requiring data compilation, training, and even the establishment of offices to undertake the same.

In Florida, statutes provide:[221]

> 877.19 *Hate Crimes Reporting Act.*—
>
> * * *
>
> (2) ACQUISITION AND PUBLICATION OF DATA.--The Governor, through the Florida Department of Law Enforcement, shall collect and disseminate data on incidents of criminal acts that evidence prejudice based on race, religion, ethnicity, color, ancestry, sexual orientation, or national origin. All law enforcement agencies shall report monthly to the Florida Department of Law Enforcement concerning such offenses in such form and in such manner as prescribed by rules adopted by the department. Such information shall be compiled by the department and disseminated upon request to any local law enforcement agency, unit of local government, or state agency.

In Louisiana, statutes provide:[222]

> §2403. *Council on Peace Officer Standards and Training*
>
> * * *
>
> H.(1) The council may establish and implement curricula and publish training materials to train peace officers to identify, respond to, and report all crimes which are directed against individuals or groups, or their property, by reason of their actual or perceived race, age, gender, religion, color, creed, disability, sexual orientation, national origin, or ancestry.

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[219] 28 U.S.C. § 534.

[220] *ADL Hate Crime Provisions*, *supra* note 183; MCCLINTOCK, *supra* note 87, at 128.

[221] Leadership Conference on Civil Rights Education Fund, *supra* note 214, *citing* FLA. STAT. § 877.19.

[222] *Id.*, *citing* LA. REV. STAT. 40:2403.

In Nebraska, statutes provide:[223]

> 28-114. *Nebraska Commission on Law Enforcement and Criminal Justice; duties.*
>
> The Nebraska Commission on Law Enforcement and Criminal Justice shall establish and maintain a central repository for the collection and analysis of information regarding criminal offenses committed against a person because of the person's race, color, religion, ancestry, national origin, gender, sexual orientation, age, or disability or because of the person's association with a person of a certain race, color, religion, ancestry, national origin, gender, sexual orientation, age, or disability.

In Virginia, statutes provide:[224]

> § 52-8.5. *Reporting hate crimes.*
>
> A. The Superintendent shall establish and maintain within the Department of State Police a central repository for the collection and analysis of information regarding hate crimes and groups and individuals carrying out such acts.

ii. European Examples

Countries in Europe have not been left behind in establishing data-gathering mechanisms to learn more about the hate crime problem. Laws from Belgium are illustrative, with the twin Belgian measures enacted in 2003 that provide for improved monitoring of hate crimes, mandating the country's Center for Equal Opportunities and Opposition to Racism:

> [T]o collect and publish statistical data and courts' decisions as necessary for the evaluation of the implementation of the laws against racism and discrimination; receive information from the competent authorities on facts which may point at possible breaches of the laws against racism and discrimination and be informed by the authorities on the follow-up given; receive a yearly communication by the Ministry of Justice of judicial statistics on the implementation of the laws against racism and discrimination and of the relative decisions.[225]

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[223] *Id., citing* NEB. REV. STAT. § 28-114.
[224] *Id., citing* VA. CODE ANN. § 52-8.5.
[225] MCCLINTOCK, *supra* note 87, at 58.

IV. PHILIPPINE LAW ON HATE CRIMES

"This legislation [ethnic intimidation law] does more than punish[.] It says something about who we are, and about the ideals to which this state is committed."

—New Jersey Governor
Jim Florio[226]

Having defined hate crimes and the laws tackling them abroad, a discussion on the Philippine LGBT context is now order. What are the Philippine laws on bias-motivated acts against LGBT persons? Do these qualify as hate crime laws? This chapter inventories the scant Philippine legal provisions in force related to such hate crimes and seeks to determine, based on the definitions in previous chapters, whether the Philippines already has a hate crime law.

A. National Legislation

1. Revised Penal Code

In force since January 1, 1932, the Revised Penal Code ("RPC") codifies penal laws from the Spanish and American regimes as well as subsequent enactments by the Philippine legislature and Chief Executive.[227] The principal standing criminal law of the Philippines, the RPC defines and penalizes most of the crimes in the country, and for this reason would be the first place to search for a Philippine law on hate crimes. For the purposes of this inquiry, the RPC's provisions on aggravating circumstances and sedition are relevant.

i. Aggravating Circumstances

Based on the greater moral perversion of the offender who acts under them, aggravating circumstances are considered "signs of a dangerous state and greater dreadfulness of the offender,"[228] justifying his lengthened confinement.

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[226] JACOBS & POTTER, *supra* note 39, at 65.

[227] FLORENZ D. REGALADO, CRIMINAL LAW CONSPECTUS 2-3 (2009 ed.).

[228] GUILLERMO GUEVARA, COMMENTARIES ON THE REVISED PENAL CODE 65 (1946 ed.).

Judge Mariano Albert, one of the very first commentators on the RPC, classified them into two groups:

> First, those having an objective character consisting in the offense itself, in the peculiar manner of its commission and appearance, and are called in the Spanish Code "circumstances originating in the offense"; and, second, those of a subjective character showing the greater or less perversity or formidability of the offender, and are named in said Code "circumstances deriving from the conditions of the infractor". But, however they are called, it is undeniable that all the aggravating circumstances involve a greater perversity and a higher formidableness on the part of the offender, and this is enough to aggravate his liability.[229]

Article 14 of the RPC enumerates 21 aggravating circumstances that the Code takes into account for increasing the penalties for crimes,[230] all but two (numbers 7 and 20) taken from the old penal code which the RPC supplanted.[231] Only one of these, however, bears any relation to our study of hate crime laws:

> ARTICLE 14. *Aggravating circumstances.* - The following are aggravating circumstances:
>
> * * *
>
> 3. That the act be committed with insult or in disregard of the respect due to the offended party on account of his rank, age, or sex[.]

(a) Basis and Application

Much like the general rationale for aggravating circumstances, Article 14(3) of the RPC is based on the offender's greater perversity, in this case "shown by the personal circumstances of the offended party."[232] Due respect owed to the offended party on account of his or her rank, age, or sex must be violated.

In terms of application, it must be shown that the accused committed the crime "with insult or in disregard of the respect due the offended party." To this end, jurisprudence requires not only that the offended party's rank, age, or

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229 MARIANO ALBERT, THE REVISED PENAL CODE 104 (1932) [hereinafter "ALBERT"].

230 REV. PEN. CODE, art. 62. Depending on the penalty imposed, aggravating circumstances lead to the imposition of the greater penalty or the maximum period of a penalty.

231 ALBERT, *supra* note 229, at 104.

232 I REYES, *supra* note 161, at 341.

sex be established, but more importantly, that there be evidence that the accused *deliberately intended* to offend or insult the rank, sex, or age of the offended party.[233]

Where scope is concerned, meanwhile, appreciation of this circumstance has been limited only to crimes against persons or honor by the 1907 case of *United States v. Samonte*,[234] citing a decision of the Supreme Court of Spain dated February 24, 1876. In this decision, the Spanish Supreme Court excluded robbery from the aggravating circumstance's ambit, stating that the same is applicable only to offenses whose nature is capable of producing offense or contempt of the dignity and character of the victim (e.g. crimes against persons) and not to crimes against property where the intention is gain:

> *[Q]ue la circunstancia consignada en la primera parte del núm. 20 del art. 10 de dicho Código no es de estimar ni debe apreciarse sino cuando el delito cometido sea por su naturaleza capaz de producir ofensa ó desprecio del carácter ó dignidad de la persona ofendida, lo cual puede sin duda suceder y tener lugar en los delitos contra las personas, pero no en los que se atenta contra lo propiedad, á cuya clase pertenece el de que ahora se trata, en los que la intención, el propósito del delincuente no es el de ofender ni despreciar la dignidad de la persona perjudicada, sino lucrarse.* [235]

This scope has since been upheld by subsequent rulings,[236] which all reiterate *Samonte*:

> The aggravating circumstance that the crime was committed with insult or in disregard of the respect due the offended party on account of his rank, age or sex *may be taken in account only in crimes against persons or honor, when in the commission of the crime there is some insult or disrespect shown to rank, age, or sex* (Albert, Revised Penal Code, 1946 Ed., p. 109; Reyes, Revised Penal Code, 1974 Ed., Vol. I, p. 297). *It is not proper to consider this aggravating circumstance in crimes against property* (Aquino, Revised Penal Code, 1976 Ed., Vol I, p. 286, citing U.S. v. Samonte, 8 Phil. 286). Robbery with homicide is primarily a crime against property

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[233] *Id., citing* People v. Mangsant, 65 Phil. 548, 550-51 (1938).

[234] 8 Phil. 286, 287 (1907).

[235] S.T.S. Feb. 24, 1876 (Spain).

[236] People v. Pagal, G.R. No. 32040, 79 SCRA 570, 576-577, Oct. 25, 1977, *citing* MARIANO ALBERT, REVISED PENAL CODE 109 (1946 ed.) & I LUIS REYES, REVISED PENAL CODE 297 (1974 ed.); People v. Ang, G.R. No. 62833, 139 SCRA 115, 122-123, Oct. 8, 1985; People v. Nabaluna, G.R. No. 60087, 142 SCRA 446, 458, July 7, 1986; People v. Ga, G.R. No. 49831, 186 SCRA 790, 798, June 27, 1990; People v. Padilla, G.R. No. 126124, 301 SCRA 265, 276, Jan. 20, 1999; People v. Paraiso, G.R. No. 127840, 319 SCRA 422, 439-440 Nov. 29, 1999.

> and not against persons. Homicide is a mere incident of the robbery, the latter being the main purpose and object of the criminal (Ibid., Vol. III, 1976 Ed., p. 1434, citing U.S. v. Ipil, 27 Phil. 530, 535). The trial court erred in taking into account this aggravating circumstance. 237

There are also commentators, however, who include crimes against security as falling within the ambit of this aggravating circumstance.[238]

(b) Is Article 14(3) of the RPC a Hate Crime Law?

The operation of Article 14(3) of the RPC, which increases the penalties provided for crimes, makes it a candidate to be a hate crime law of the Penalty-Enhancement class. To see if such provision is a hate crime law, however, it must be determined whether or not it punishes hate crimes, i.e. acts comprised of predicate crimes and a bias motive.

Article 14(3) applies only to aggravate criminal responsibility for crimes under the RPC, the prosecution having to prove both the crime and the aggravating circumstances for penalty enhancement to take effect. To this end, the first element of a hate crime must be conceded: the act constitutes an offense under a jurisdiction's criminal law. It is the second element, though, which presents some ambiguity.

Once again, a bias motive exists when the perpetrator deliberately chooses the target of the crime because of some protected characteristic.[239] Breaking down Article 14(3), we see that it penalizes committing a crime (1) *with insult to the respect due* to the offended party on account of his rank, age, or sex; or (2) *in disregard of the respect due* to the offended party on account of his rank, age, or sex.

The wording of the provision varies widely with hate crime penalty-enhancement statutes of other jurisdictions cited in Chapter 3, inasmuch as the latter uses words unambiguous in indicating a cause-effect relationship between the crime and the protected characteristics involved. While identifying the characteristics of rank, age, or sex (only the last being material for this

[237] *Pagal*, 79 SCRA at 576-577. (Emphasis supplied.)

[238] LEONOR D. BOADO, NOTES AND CASES ON THE REVISED PENAL CODE 119 (2004 ed.).

[239] OSCE ODIHR, *supra* note 2, at 35.

discussion), the provision does not penalize the offender for committing the crime directly "because" of the characteristic of the victim but for *insulting* or *disregarding* the *respect* due to such victim for possessing such characteristic. Article 14(3) therefore contemplates an added concept of a respect due to people of certain rank, age, or sex, willful violation of which merits additional punishment. Indeed, the *sentencia* of 1876 referred to by *Samonte* and cited by Viada, states that such aggravating circumstance is applicable only to offenses whose nature is capable of producing offense or contempt of the dignity and character of the victim.

It is submitted that the "due respect" envisioned by Article 14(3) is comparable to and indeed serves the same function as other hate crime penalty-enhancement statutes. Conceptually, protected characteristics in hate crime law are selected to protect vulnerable groups possessing these traits and circumstances. By thus giving these characteristics the status of being "protected," hate crime laws in effect call for "respect" to be given to persons possessing these traits, not dissimilar to the "due respect" called for by Article 14(3). While it must be conceded that in jurisprudence, the "due respect" involved is—in many cases involving the circumstances of rank and age—due not because of vulnerability, but because of the victims elevated social or official rank[240] or the offender's filial duty to respect his elders,[241] the Supreme Court has applied "due respect" as a special protection for victims considered to be in a weaker position due to their age[242] or sex.[243]

Considering "due respect" for age and sex as the equivalent of protected characteristics, the bias motivation element in acts proscribed under Article 14(3) is made clearer by jurisprudence requiring in its application "evidence that in the commission of the crime, the accused deliberately intended to offend or insult the sex or age of the offended party."[244] The provision thus punishes more severely committing a crime with deliberate intention to insult and disregard the age or sex of the victim—a hate crime. Article 14(3) of the RPC is

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[240] *See, e.g.,* United States v. Cabiling, 7 Phil. 469, 474-475 (1907) [a pupil attacking his teacher], People v. Valeriano, 90 Phil. 15, 34-35 (1951) [killing a judge], and People v. Godinez, 106 Phil. 597, 606-607 (1959) [the killing of a Spanish consul by his subordinate, a mere chancellor], *cited in* I REYES, *supra* note 161, at 342.

[241] *See, e.g.,* People v. Curatchia, 97 SCRA 549, 556 (1980), *cited in* I REYES, *supra* note 161, at 344. The accused was a grandson of the offended party.

[242] *See, e.g.,* People v. Gammuac, 93 Phil. 657, 660-661 (1953), *cited in* I REYES, *supra* note 161, at 343. The victim was as "an old man of 80 and very weak," and so the accused acted in "disregard of the respect due the deceased on account of his age."

[243] *See, e.g.,* People v. Dayug, 49 Phil. 423, 426 (1926), *cited in* I REYES, *supra* note 161, at 345. The accused selected and killed a female relative of the killer of his own relatives as revenge.

[244] People v. Mangsant, 65 Phil. 548, 550-551 (1938).

thus a penalty-enhancement hate crime law covering the protected characteristics of age and sex, though very limited in the types of crimes it covers.

(c) Is RPC Article 14(3) a Hate Crime Law that can Protect LGBT Persons?

While Article 14(3) of the RPC is a penalty-enhancement hate crime law covering the protected characteristic of sex, "sex" has been invariably interpreted to refer to "the female sex, not to the male sex,"[245] given that the aggravating circumstance seeks to enforce "respect and consideration due a woman because of her delicate and physical condition."[246] Thus, under prevailing jurisprudence, this provision will only protect lesbian and bisexual women, against whom crimes against persons or honor are committed because they are women.

"Because they are women" is significant because the interpretation of "sex" as a legal term has yet to be expanded under Philippine jurisprudence to include sexual orientation or gender identity. Thus, in *Silverio v. Republic*, the Supreme Court held to the meaning of the term "unchanged" from the early 1900s:

> [T]he sex of a person is determined at birth, visually done by the birth attendant (the physician or midwife) by examining the genitals of the infant.
>
> * * *
>
> When words are not defined in a statute they are to be given their common and ordinary meaning in the absence of a contrary legislative intent. The words "sex," "male" and "female" as used in the Civil Register Law and laws concerning the civil registry (and even all other laws) should therefore be understood in their common and ordinary usage, there being no legislative intent to the contrary. In this connection, sex is defined as "the sum of peculiarities of structure and function that distinguish a male from a female" or "the distinction between male and female." Female is "the sex that produces ova or bears young" and male is "the sex that has organs to produce

[245] I REYES, *supra* note 161, at 345.

[246] I AMBROSIO PADILLA, CRIMINAL LAW: REVISED PENAL CODE, ANNOTATED 531 (15th ed. 1998).

> spermatozoa for fertilizing ova." Thus, the words "male" and "female" in everyday understanding do not include persons who have undergone sex reassignment. Furthermore, "words that are employed in a statute which had at the time a well-known meaning are presumed to have been used in that sense unless the context compels to the contrary." Since the statutory language of the Civil Register Law was enacted in the early 1900s and remains unchanged, it cannot be argued that the term "sex" as used then is something alterable through surgery or something that allows a post-operative male-to-female transsexual to be included in the category "female."[247]

Thus, "sex" remains "the female sex, not [...] the male sex", and such characteristic as determined from birth.[248] While *Silverio* clearly excludes male-to-female transsexuals from Article 14(3) coverage, the conservative interpretation of "sex" therein certainly excludes transgender women as well. While Article 14(3) of the RPC can be a source of protection for lesbian and bisexual women, therefore, it is a hate crime law that protects them as women, not as lesbian or bisexual persons. It is not an LGBT hate crime law.

ii. Sedition

(a) Elements

Included under the RPC title *Crimes Against Public Order*, sedition is defined in Article 139, which states:

> The crime of sedition is committed by persons who rise publicly and tumultuously in order to attain by force, intimidation, or by other means outside of legal methods, any of the following objects:
>
> 1. To prevent the promulgation or execution of any law or the holding of any popular election;
>
> 2. To prevent the National Government, or any provincial or municipal government, or any public officer thereof from freely exercising its or his functions, or prevent the execution of any administrative order;

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[247] Silverio v. Republic of the Philippines, G.R. No. 174689, 537 SCRA 373, 392–393, Oct. 19, 2007.

[248] *See, however,* Republic v. Cagandahan, G.R. No. 166676, 565 SCRA 72, Sept. 12, 2008, where the Supreme Court made some accommodation in the limited case of intersex persons.

> 3. To inflict any act of hate or revenge upon the person or property of any public officer or employee;
>
> 4. To commit, for any political or social end, any act of hate or revenge against private persons or any social class; and
>
> 5. To despoil, for any political or social end, any person, municipality or province, or the National Government (or the Government of the United States), of all its property or any part thereof.[249]

In its general sense "the raising of commotions or disturbances in the State,"[250] the ultimate object of sedition "is a violation of the public peace or at least such a course of measures as evidently engenders it"[251] for the purposes enumerated in the article, the fourth of which—the commission of acts of hate or revenge against private persons or any social class—is relevant to this study. The following elements must be proven for the crime of sedition to exist:

> 1. That the offenders rise (1) publicly, and (2) tumultuously;
> 2. That they employ force, intimidation, or other means outside of legal methods;
> 3. That the offenders employ any of those means to attain any of the following objects:
>
> * * *
>
> d. To commit, for any political or social end, any act of hate or revenge against private persons or any social class[.][252]

(b) Is Sedition under Article 139(4) a Hate Crime?

Punishing as it does "any act of hate or revenge against private persons or any social class," sedition under Article 139(4) is an excellent candidate for a hate crime law. Indeed, a cursory reading of the elements accepted to comprise sedition would allow one to easily identify the first and second elements as a predicate crime. A public and tumultuous uprising employing "means outside of legal methods," after all, by themselves possibly constitute the crimes of tumults and other disturbances of public orders[253] or alarms and scandals.[254]

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[249] REV. PEN. CODE, art. 139, as amended by Com. Act No. 202 (1936), § 1..
[250] II REYES, *supra* note 8, at 95, *citing* People v. Cabrera, 43 Phil. 64, 66 (1922).
[251] *Id.* at 96, *citing* People v. Perez, 45 Phil. 599, 601 (1923).
[252] *Id.* at 95.
[253] REV. PEN. CODE, art. 153.

It is, however, in its bias motivation factor that sedition under Article 139(4) makes its classification as a hate crime difficult. What separates a hate crime from ordinary crimes is its commission for a bias motive against persons bearing a characteristic protected by law. This protected characteristic is one shared by a group vulnerable to attack, examples being the factors of race, language, religion, ethnicity, nationality, sexual orientation, gender, and others.[255] It is readily apparent that the article, even as it proscribes "any act of hate or revenge against private persons or any social class" for "any political or social end," does not identify any social class or characteristic of private persons that are to be protected. It does not identify vulnerable groups but basically criminalizes tumultuous public uprisings against any group or any one.

The non-definition of protected classes or characteristic and the consequent non-inclusion of sedition under Article 139(4) under hate crime laws are explained by its history and object. Found in Article 236 of the old penal code and reenacted as part of the Treason and Sedition Law (Act No. 292) by the Philippine Commission,[256] the character of sedition as a crime has less to do with ensuring harmony between races or minorities as it does with safeguarding the new regime:

> In criminal law, there are a variety of offenses which are not directed primarily against individuals, but rather against the existence of the State, the authority of the Government, or the general public peace. The offenses created and defined in Act No. 292 are distinctly of this character. Among them is sedition, which is the raising of commotions or disturbances in the State. It is a revolt against legitimate authority.[257]

That sedition under Article 139(4) penalizes acts of hate or revenge "for any political or social end" highlights its purpose—to protect against a revolt against legitimate authority. The other objects of sedition, in fact, all invariably involve some strike against the government, and in interpreting the intent of the legislator where the object of Article 139(4) is concerned, regard must be had to the others which accompany it, in line with the maxim *noscitur a sociis*.

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[254] REV. PEN. CODE, art. 155.

[255] OSCE ODIHR, *supra* note 2, at 16.

[256] Act No. 292 (1901), § 5. Treason and Sedition Law.

[257] People v. Perez, 45 Phil. 599, 691 (1923), *citing* 2 BOUVIER'S LAW DICTIONARY 974; U.S. v. Abad, 1 Phil. 437, 440-441 (1902); and People v. Cabrera, 43 Phil. 64, 79-80 (1922).

2. Anti-Violence Against Women and Their Children Act of 2004

i. Background and Text

The Anti-Violence Against Women and Their Children ("VAWC") Act of 2004[258] is a legislative effort to "address violence committed against women and children in keeping with the fundamental freedoms guaranteed under the Constitution and the Provisions of the Universal Declaration of Human Rights, the convention on the Elimination of all forms of discrimination Against Women, Convention on the Rights of the Child and other international human rights instruments of which the Philippines is a party."[259] Where criminal law is concerned, the act's most significant provision is the recognition and punishment of a new crime:

> SECTION 5. *Acts of Violence Against Women and Their Children.* — The crime of violence against women and their children is committed through any of the following acts:
>
> a. Causing physical harm to the woman or her child;
> b. Threatening to cause the woman or her child physical harm;
> c. Attempting to cause the woman or her child physical harm;
> d. Placing the woman or her child in fear of imminent physical harm;
> e. Attempting to compel or compelling the woman or her child to engage in conduct which the woman or her child has the right to desist from or desist from conduct which the woman or her child has the right to engage in, or attempting to restrict or restricting the woman's or her child's freedom of movement or conduct by force or threat of force, physical or other harm or threat of physical or other harm, or intimidation directed against the woman or child. This shall include, but not limited to, the following acts committed with the purpose or effect of controlling or restricting the woman's or her child's movement or conduct:
>   1. Threatening to deprive or actually depriving the woman or her child of custody to her/his family;
>   2. Depriving or threatening to deprive the woman or her children of financial support legally due her or

[258] Rep. Act No. 9262 (2004). Anti-Violence Against Women and Their Children Act of 2004.

[259] Rep. Act No. 9262 (2004), § 2.

her family, or deliberately providing the woman's children insufficient financial support;

3. Depriving or threatening to deprive the woman or her child of a legal right;
4. Preventing the woman in engaging in any legitimate profession, occupation, business or activity or controlling the victim's own money or properties, or solely controlling the conjugal or common money, or properties;

f. Inflicting or threatening to inflict physical harm on oneself for the purpose of controlling her actions or decisions;

g. Causing or attempting to cause the woman or her child to engage in any sexual activity which does not constitute rape, by force or threat of force, physical harm, or through intimidation directed against the woman or her child or her/his immediate family;

h. Engaging in purposeful, knowing, or reckless conduct, personally or through another, that alarms or causes substantial emotional or psychological distress to the woman or her child. This shall include, but not be limited to, the following acts:

1. Stalking or following the woman or her child in public or private places;
2. Peering in the window or lingering outside the residence of the woman or her child;
3. Entering or remaining in the dwelling or on the property of the woman or her child against her/his will;
4. Destroying the property and personal belongingness or inflicting harm to animals or pets of the woman or her child; and
5. Engaging in any form of harassment or violence;

i. Causing mental or emotional anguish, public ridicule or humiliation to the woman or her child, including, but not limited to, repeated verbal and emotional abuse, and denial of financial support or custody of minor children of access to the woman's child/children.[260]

[260] Rep. Act No. 9262 (2004), § 5.

ii. Is Violence Against Women and their Children a Hate Crime?

Violence motivated by sex or gender is specifically punished under the laws of different jurisdictions, and the circumstances of sex or gender is often a characteristic protected under hate crime laws globally. VAWC under Republic Act No. 9282 is therefore an obvious candidate for a hate crime, being premised on a state-recognized need to "protect [...] particularly women and children, from violence and threats to their personal safety and security."[261]

Where the presence of predicate crimes is concerned, the enumeration of acts constituting VAWC in Section 5 merely recriminalizes acts already otherwise covered by the RPC, with the added qualification that these be "against a woman who is his wife, former wife, or against a woman with whom the person has or had a sexual or dating relationship, or with whom he has a common child, or against her child whether legitimate or illegitimate."[262] Physical harm or attempts thereof, listed under subsections (a), (c), and (f), would ordinarily be punishable under the various RPC crimes against persons,[263] e.g. parricide, murder, homicide, physical injuries, infanticide, and rape. Threats to cause harm under subsections (b) and (f), as well as the coercive acts listed in subsections (e) and (g) would be prosecutable under group of crimes comprising threats and coercion,[264] including grave threats, and grave coercions. Causing fear, emotional or psychological distress, mental or emotional anguish, public ridicule or humiliation under subsections (d), (h), and (i), meanwhile, would be covered by unjust vexation[265] unless otherwise covered by crimes involving threats and coercions.

Notwithstanding the presence of predicate crimes, the absence of the hallmark element of a bias motivation prevents VAWC from being classified as hate crimes. The predicate crime must be committed against a victim deliberately selected due to prejudice against a protected characteristic, and while no doubt the law considers being of the female sex or being a child a protected characteristic, deliberate selection of the victim due to her being a woman or a child is not an element of VAWC.

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[261] Rep. Act No. 9262 (2004), § 2.
[262] Rep. Act No. 9262 (2004), § 3(a).
[263] REV. PEN. CODE, arts. 246-266-D.
[264] REV. PEN. CODE, arts. 282-286.
[265] REV. PEN. CODE, art. 287.

The law's definition of VAWC as being committed "against a woman who is his wife, former wife, or against a woman with whom the person has or had a sexual or dating relationship, or with whom he has a common child, or against her child whether legitimate or illegitimate" in fact, requires an existing or previous relationship with the victim rather than a targeted choice based on sex or age. VAWC concerns itself with the fact that the victim bears the required relations with the offender, and not the latter's motivations for selecting his victim or committing the act. This is not surprising given the legislative history of this law, whose mother bills were all concerned with domestic violence. The House Bills were "The Anti-Abuse of Women in Intimate Relationships Act"[266] by Representative Bellaflor Angara-Castillo and "The Anti-Domestic Violence Act"[267] by Representative Harlin Abayon. Obviously, legislators were targeting violence in the home and in relationships rather than against women as a class or group.

Notably, this requisite relationship between the offender and victim indeed runs counter to recognized empirical attributes observed in hate crimes—that offenders are mostly strangers to their victims. Scholars have noted that there is generally little or no pre-existing relationship between the perpetrator and victim that might give rise to some motive for the crime other than bias toward the group bearing the protected characteristic,[268] victims being "interchangeable, so long as they share the characteristic."[269]

3. The Human Security Act of 2007: Hate Crimes and Terrorism

Hate crimes have not infrequently been equated to terrorism:

> *Hate crimes are a form of terrorism.* They have a psychological and emotional impact that extends far beyond the victim. They threaten the entire community, and undermine the ideals on which the nation was founded.[270]

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[266] H. No. 5516, 12th Cong., 2nd Sess. (Nov. 28, 2002).

[267] H. No. 6054, 12th Cong., 2nd Sess. (May 30, 2003).

[268] LAWRENCE, *supra* note 81, at 39, *citing* LEVIN & MCDEVITT, *supra* note 126, at 14.

[269] *Id.* at 38.

[270] Sen. Edward Kennedy, *quoted in* JOHN WRIGHT, HATE CRIMES 20 (2003). (Emphasis supplied.)

> If you're beaten up because you're black or gay or Jewish, it's more than a simple assault. *Hate crimes are terrorism.*[271]

This equation is not far-fetched, the previously-discussed *in terrorem* effect of hate crimes being *in pari materia* with the common notion of terrorism.

> Hate crimes are directed against individuals who are considered different with respect to race, religion, sexual orientation, national identity, or disability status. Terrorism is often designed to send a message that terrifies a civilian population. The two types of attacks—hate crimes and terrorism—are not mutually exclusive. An individual who, for reasons of prejudice and hate, incites terror among a population can be regarded as a terrorist, based on the consequences of his or her behavior. He or she has also committed a hate crime.[272]

Given this association between the two concepts, the Human Security Act of 2007 ("HSA")[273] calls for examination as a possible hate crime law, with its definition and punishment for the new crime of terrorism:

> SECTION 3. *Terrorism.* — Any person who commits an act punishable under any of the following provisions of the Revised Penal Code:
>
> 1. Article 122 (Piracy in General and Mutiny in the High Seas or in the Philippine Waters);
> 2. Article 134 (Rebellion or Insurrection);
> 3. Article 134-a (Coup d'état), including acts committed by private persons;
> 4. Article 248 (Murder);
> 5. Article 267 (Kidnapping and Serious Illegal Detention);
> 6. Article 324 (Crimes Involving Destruction);
>
> or under
>
> 1. Presidential Decree No. 1613 (The Law on Arson);
> 2. Republic Act No. 6969 (Toxic Substances and Hazardous and Nuclear Waste Control Act of 1990);
> 3. Republic Act No. 5207, (Atomic Energy Regulatory and Liability Act of 1968);
> 4. Republic Act No. 6235 (Anti-Hijacking Law);

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[271] Sen. Vincent Fort, *quoted in* JOHN WRIGHT, HATE CRIMES 20 (2003). (Emphasis supplied.)

[272] JACK LEVIN, DOMESTIC TERRORISM 42 (2006).

[273] Rep. Act No. 9372 (2007). Human Security Act of 2007.

5. Presidential Decree No. 532 (Anti-piracy and Anti-highway Robbery Law of 1974); and,
6. Presidential Decree No. 1866, as amended (Decree Codifying the Laws on Illegal and Unlawful Possession, Manufacture, Dealing in, Acquisition or Disposition of Firearms, Ammunitions or Explosives)

> [T]hereby sowing and creating a condition of widespread and extraordinary fear and panic among the populace, in order to coerce the government to give in to an unlawful demand shall be guilty of the crime of terrorism and shall suffer the penalty of forty (40) years of imprisonment, without the benefit of parole as provided for under Act No. 4103, otherwise known as the Indeterminate Sentence Law, as amended.[274]

It is obvious that the HSA does not exclusively refer to hate crime and is therefore not a hate crime law. While the first element of a predicate crime may be conceded given the HSA's enumeration of RPC felonies and special penal laws under which terroristic acts may be committed, the law does not specify that the motivation behind such acts should be bias. The motivation targeted is clearly the "sowing and creating a condition of widespread and extraordinary fear and panic among the populace, in order to coerce the government to give in to an unlawful demand." Though of course bias, prejudice, or bigotry may figure somewhere in the terrorist's motives, it does not figure in the law's language. Lacking the element of a bias motivation, terrorism under the HSA is not a hate crime. The HSA is not a hate crime law.

4. Civil Liability Statutes: Article 100 of the Revised Penal Code and Article 26 of the Civil Code

Given the lack of statutes defining or penalizing hate crimes, it will come as no surprise that Philippine laws do not specifically provide for a civil cause of action for victims of hate crimes either. Under Philippine criminal law, however, general provisions make those who commit crimes civilly liable, enabling victims of what would otherwise be hate crimes to recover civil damages. Article 100 makes "[e]very person criminally liable for a felony [...] also civilly liable" for restitution, reparation, or indemnification.[275] Moreover, under the Civil Code,

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[274] Rep. Act No. 9372 (2007), § 3.
[275] REV. PEN. CODE, art. 104.

moral damages may be awarded under Article 2219,[276] and where appropriate, exemplary damages under the same Code's Article 2230.[277] None of these damages, however, concern themselves with the fact that the crimes were committed with a bias motivation.

Article 26 of the Civil Code should likewise be considered, providing as it does a cause of action for damages, prevention and other relief for vexation:

> Every person shall respect the dignity, personality, privacy and peace of mind of his neighbors and other persons. The following and similar acts, though they may not constitute a criminal offense, shall produce a cause of action for damages, prevention and other relief:
>
> * * *
>
> Vexing or humiliating another on account of his religious beliefs, lowly station in life, place of birth, physical defect, or other personal condition.

At first glance, the above article might be taken as making perpetrators of bias-motivated vexation or defamation under Article 287 of the RPC civilly liable. Aside from religious belief and physical defect (such as disability), which are common categories for protection, "other personal condition[s]" might easily be interpreted to be race, ethnicity, or perhaps in line with contemporary

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[276] CIVIL CODE, art. 2219. Moral damages may be recovered in the following and analogous cases:

(1) A criminal offense resulting in physical injuries;
(2) Quasi-delicts causing physical injuries;
(3) Seduction, abduction, rape, or other lascivious acts;
(4) Adultery or concubinage;
(5) Illegal or arbitrary detention or arrest;
(6) Illegal search;
(7) Libel, slander or any other form of defamation;
(8) Malicious prosecution;
(9) Acts mentioned in article 309;
(10) Acts and actions referred to in articles 21, 26, 27, 28, 29, 30, 32, 34, and 35.

[277] CIVIL CODE, art. 2230. In criminal offenses, exemplary damages as a part of the civil liability may be imposed when the crime was committed with one or more aggravating circumstances. Such damages are separate and distinct from fines and shall be paid to the offended party.

experience, sexual orientation or gender identity.[278] Is it therefore a hate crime law providing civil redress for victims of the crimes of vexation and defamation?

The legislative history of Article 26 appears to hold the contrary. Meant as a supplement to "glaringly inadequate" penal laws against defamation and unjust vexation,[279] the Code Commission seems to have been targeting vexation outside the pale of the RPC:

> Not a few of the rich people treat the poor with contempt because of the latter's lowly station in life. To a certain extent this is inevitable, from the nature of the social make-up, but there ought to be a limit somewhere, *even when the penal laws against defamation and unjust vexation are not transgressed.* In a democracy, such a limit must be established. The courts will recognize it in each case. Social equality is not sought by the legal provision under consideration, but due regard for decency and propriety.
>
> Place of birth, physical defect and other personal conditions are too often the pretext of humiliation cast upon persons. Such tampering with human personality, *even though the penal laws are not violated,* should be the cause of civil actions.[280]

The provision not being meant to cover criminal vexation and defamation, it cannot pertain to hate crimes, which must be *criminal* acts motivated by bias. Nonetheless, it is a useful weapon for LGBT individuals to utilize in seeking redress and protection when their "right to peace of mind" is violated.[281]

B. Local Legislation

An observation made by the Equality Federation Institute, an American Non-Governmental Organization, seems to apply *mutatis mutandis* across the

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[278] Indeed, the article's non-exclusive listing parallels international conventions' anti-discrimination enumerations, whose use of the term "other status" have been held to embrace sexual orientation, as will be discussed *infra.*

[279] I ARTURO TOLENTINO, COMMENTARIES AND JURISPRUDENCE ON THE CIVIL CODE OF THE PHILIPPINES 94 (1990 ed.).

[280] *Id., citing* CODE COMMISSION, REPORT OF THE CODE COMMISSION ON THE PROPOSED CIVIL CODE OF THE PHILIPPINES 33-34 (1948). (Emphasis supplied.)

[281] *Id.* at 92-93.

Pacific Ocean: "Indeed, in states with politically difficult legislatures, local ordinances may be the only mechanism for providing protections."[282]

As the preceding section illustrates, Philippine law has next to nothing in the national level where hate crime laws protecting LGBT persons are concerned. Given that the Philippine legal system allows for much local autonomy for local government units ("LGUs"),[283] several such bodies have enacted LGBT anti-discrimination ordinances that present a promising alternative to obtain immediate protection.[284] These pieces of local legislation—mostly anti-discrimination laws penalizing discriminatory treatment in education, employment, and public accommodation on the basis of SOGI—are not hate crime laws by themselves.[285] As will be shown, however, some of them have provisions that may be considered local LGBT hate crime laws.

1. Forced Medical Examinations

Employing nearly identical language, anti-discrimination ordinances enacted by the cities of Cebu, Angeles, and Bacolod all contain prohibitions on forced medical examinations on the basis of SOGI.

ANGELES CITY ORDINANCE NO. 330-13

* * *

> *Section 4.* PROHIBITED ACTS. It is hereby prohibited to discriminate any person [sic] and/or group of persons on the basis of their [...] sexual orientation, gender identity, [or] gender and sexual preferences[.] It is unlawful for any person, natural or juridical, to:

* * *

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[282] EQUALITY FEDERATION INSTITUTE, BUILDING MOMENTUM FOR CHANGE: HOW LOCAL AND INCREMENTAL POLICY CAMPAIGNS CONTRIBUTE TO STATEWIDE VICTORIES 25 (2013), *available at* http:// equalityfederation.org/sites/default/files/Building_Momentum_for_Change_Final.pdf.

[283] CONST. art. II, § 25; art. X, § 2.

[284] *See, e.g.,* Province of Cavite, Ordinance No. 009-2013 (Feb. 3, 2014); Quezon City, Ordinance No. SP-1309 (s. 2003) (Sept. 2, 2003); Cebu City, Ordinance No. 2339 (Oct. 17, 2012); Davao City, Ordinance No. 0417-12 (s. 2012) (Dec. 12, 2012); Angeles City, Ordinance No. 330-13 (Feb. 19, 2012); Bacolod City, Ordinance No. 640 (Apr. 23, 2013); Barangay Bagbag, Quezon City, Ordinance No. BO-004 (s. 2009) (June 1, 2009); Barangay Pansol, Quezon City, Ordinance No. 009 (s. 2008) (Nov. 8, 2008).

[285] *See* discussion in Part II, *supra.*

i. Subject or force any person to any medical or psychological examination without the expressed approval of the person involved on the basis of perceived [...] sexual orientation [or] gender identity [...] except in cases where the person involved is a minor under age of discernment in which case prior approval of the appropriate Family Court shall be required. In the latter case, the child shall be represented in the proceedings by the Solicitor General or the latter's authorized representative.

* * *

BACOLOD CITY ORDINANCE NO. 640

* * *

SECTION 4. *Prohibited Acts.* It shall be prohibited to discriminate any person [sic] [...] by:

* * *

i) Subjecting or forcing any person to any medical or psychological examination without the expressed approval of the person involved on the basis of perceived [...] sexual orientation and gender identity [...]

* * *

CEBU CITY ORDINANCE NO. 2339

* * *

SECTION 4. *Prohibited Acts*—It is hereby prohibited to discriminate any person and/or group of persons on the basis of xxx sexual orientation [or] gender identity[.] It is unlawful for any person, natural or juridical, to:

* * *

f. Subject or force any person to any medical or psychological examination without the expressed approval of the person involved on the basis of perceived xxx sexual orientation [or] gender identity[;] Provided that such person is not psychologically incapacitated as determined by competent authority.

* * *

PANSOL VILLAGE ORDINANCE NO. 009 (S. 2008)

* * *

> SECTION 4. *Prohibited Acts.* It is prohibited to discriminate against any person and/or group of persons on the basis of sexual orientation and gender identity. It is unlawful for any person, natural or juridical, to:
>
> * * *
>
> i. Subject any person to any medical or psychological examination to determine and/or alter the person's sexual orientation or gender identity without the expressed approval of the person involved[.]
>
> * * *

Are such prohibitory provisions in these ordinances LGBT hate crime laws? The acts they prohibit certainly appear to have the elements of hate crimes.

Compelled medical examinations may easily be classed as coercions punishable under the RPC. If violence is employed, the offense would be grave coercion, compelling the victim "to do something against his will, whether it be right or wrong," without authority of law.[286] Forcing medical examinations without violence, meanwhile, would be classed as "other coercions" or at the very least, "unjust vexation" under Article 267 of the RPC. Depending on the methods used in such examinations, furthermore, crimes such as physical injuries[287] or sexual assault[288] may be involved. Because these ordinances are anti-discrimination ordinances, the bias motivation is clear—these acts are done to the victim "on the basis of" perceived SOGI. Predicate crimes and bias motivation being present, we can easily conclude that these ordinances punish hate crimes.

2. Ridicule, Vexation, and Harassment

Where local anti-discrimination ordinances utilized almost identical language to proscribe forced medical examinations on the basis of SOGI, they exhibit some variance in wording their prohibitions of ridicule, vexation and harassment. These statutes' disapproval of disparaging LGBT persons due to their SOGI is nonetheless clear:

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[286] REV. PEN. CODE, art. 268.

[287] REV. PEN. CODE, arts. 262–266.

[288] REV. PEN. CODE, art. 266-A, *as inserted by* Republic Act No. 8353 (1997).

BACOLOD CITY ORDINANCE NO. 640

* * *

SECTION 4. *Prohibited Acts.* It shall be prohibited to discriminate any person [sic] [...] by:

* * *

j) Verbal or Non-verbal ridicule and vilification, including but not limited to bullying or hate speeches, of a person on account or [sic] [...] sexual orientation and gender identity[.]

* * *

BAGBAG VILLAGE ORDINANCE NO. BO-004 (S. 2009)

SECTION 5. *Prohibited and punishable acts:* Shall be prohibited for any/all establishments, individual or group of persons to commit directly, indirectly thru negligence the following acts;

* * *

4. To harass, vex or cause any damage, injury or detriment to a person or group of persons by reason of being an LGBT.

* * *

DAVAO CITY ORDINANCE NO. 0417-12 (S. 2012)

SECTION IV. *Act of discrimination, how committed*—[T]he following constitute acts of discrimination and are therefore punishable:

* * *

5. By [sic] subjecting either by verbal or written word or publication, to ridicule or insult or attributing despicable behavior and habits or associating with violence and criminal activities, any person or group of persons by reason of his xxx gender identity [or] sexual orientation[.]

* * *

PANSOL VILLAGE ORDINANCE NO. 009 (S. 2008)

> SECTION 4. *Prohibited Acts.* It is prohibited to discriminate against any person and/or group of persons on the basis of sexual orientation and gender identity. It is unlawful for any person, natural or juridical, to:
>
> * * *
>
> j. Exclude or ridicule any person due to the applicant's sexual orientation or gender identity;
>
> k. Harm any person due to the applicant's sexual orientation or gender identity [...]
>
> * * *

Though insult, ridicule, and vilification are not predicate crimes on their own, the RPC does penalize unjust vexation[289]—the obvious result of such acts—as well as defamation and other crimes against honor.[290] Causing "harm" or "injury," meanwhile, may encompass a whole array of crimes, the most obvious being physical injuries under the RPC.[291] Once again, as these predicate crimes are done to the victim on account of SOGI, such fall under the definition of hate crimes.

A unique provision from Angeles City's anti-discrimination ordinance appears to punish a unique hate crime—harassment by law enforcement on account of SOGI:

> ANGELES CITY ORDINANCE NO. 330-13
>
> * * *
>
> SECTION 4. *Prohibited Acts.* It is hereby prohibited to discriminate any person [sic] and/or group of persons on the basis of their [...] sexual orientation, gender identity, [or] gender and sexual preferences[.] It is unlawful for any person, natural or juridical, to:
>
> * * *
>
> k. Harassment by members of institutions involved in the enforcement of law and the protection of rights, such as the Philippine National

289 REV. PEN. CODE, art. 287.
290 REV. PEN. CODE, arts. 353–364.
291 REV. PEN. CODE, arts. 262–266.

> Police (PNP) and the Armed Forces of the Philippines (AFP) of any person on the basis of his or her sexual orientation or gender identity;
>
> Among other cases, harassment occurs when a person is arrested or otherwise placed in the custody of the government institution, physically or verbally abused regardless of such arrest has legal or factual basis. Harassment of juridical persons on the basis of the sexual orientation or gender identity [...] of their members, stockholders, benefactors, clients or patrons is likewise covered by this provision.
>
> * * *

Capable of being perpetrated only by law enforcers and the armed forces, such "harassment" may be considered an LGBT hate crime consisting of the predicate crimes of maltreatment of prisoners,[292] unlawful arrest,[293] physical injuries,[294] and/or unjust vexation[295] under the RPC, committed "on the basis of [the victim's] sexual orientation or gender identity."

3. Monitoring Provisions

In yet another example of local governments being on the cutting edge of legislation, the anti-discrimination ordinances enacted by Cebu City and Bacolod City provide for studying and monitoring incidents of LGBT discrimination, including those discussed as hate crimes above:

> BACOLOD CITY ORDINANCE NO. 640
>
> * * *
>
> SECTION 5. *Anti-Discrimination Programs.* The Bacolod City Government [...] shall implement and institutionalize the following programs:
>
> * * *
>
> b) Discrimination and Stigma Studies. Fund shall be allocated (sic) stigma and discrimination case documentation, researches and information dissemination.

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[292] REV. PEN. CODE, art. 235.
[293] REV. PEN. CODE, art. 269.
[294] REV. PEN. CODE, arts. 262–266.
[295] REV. PEN. CODE, art. 287.

> c) Discrimination and Stigma Databank. Fund shall be allocated to set-up a databank of different cases and experiences of stigma and discrimination.
>
> * * *
>
> CEBU CITY ORDINANCE NO. 2339
>
> * * *
>
> SECTION 5. *Anti-discrimination programs*—The Cebu City government shall endeavor to ensure that discrimination is prevented and effectively addressed through the following programs:
>
> Discrimination and Stigma Reduction Program: The Cebu City government shall allocate funds to address discrimination and stigma which has the following components:
>
> * * *
>
> Discrimination and Stigma Studies and Databank. Fund shall be allocated for stigma and discrimination case documentation, researches and information dissemination as well as set-up a databank of different cases and experiences of stigma and discrimination.
>
> * * *

These provisions may be considered very rudimentary hate crime reporting statutes, although it must be conceded that their mandates are for discrimination in general, and not specifically for hate crimes nor incidents involving LGBT persons.

4. Limits of Local Ordinances

The willingness of local governments to protect LGBT persons from discriminatory acts is laudable, especially given the Philippine Congress' dragging its feet on the matter. The legislative powers granted to LGUs are not without limits, however. First and foremost, the territorial reach of such ordinances is severely limited. The handful of LGBT anti-discrimination ordinances currently enacted protects around 10% of Filipinos.[296]

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[296] The 2010 Census of Population and Housing placed the Philippine population at 92.34 Million. Cavite is the most populous province in the country, with 3,090,691 inhabitants

Further, statutory limits on the penalties the various local legislatures are allowed to impose hinder the ordinances' power to deter violations. Contrasting these penalties to the virtually unlimited sanctions that the Philippine Congress may impose make ordinance penal provisions seem like slaps on the wrist. Consider for example the penalties proposed under anti-discrimination bills pending in Congress:

> SECTION 10. *Penalties*. Persons found guilty of any of the discriminatory practices under Section 5 (A), 5 (B), 5 (E), 5 (F), and 4 (K) of this Act shall be penalized with a fine of not less than One Hundred Thousand Pesos (P100,000) but not to exceed Two Hundred and Fifty Thousand Pesos (P250,000) or imprisonment of two (2) years but not more than six (6) years, or both at the discretion of the court.
>
> Persons found guilty of any of the discriminatory practices under Section 5 (C), 5 (D), 5 (G), 5 (H), 5 (I), 5 (J) and 5 (K) of this Act shall be penalized with a fine of not less than Two Hundred Fifty Thousand

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(3.3% of the national population). National Statistics Office, 2010 Census of Population and Housing: Population Counts - CALABARZON (Apr. 4, 2012), *available at* http://www.census.gov.ph/sites/default/files/attachments/hsd/pressrelease/CALABARZON.pdf.

Quezon City is the most populous city in the Philippines with 2,761,720 inhabitants (3% of the national population). National Statistics Office, 2010 Census of Population and Housing: Population Counts - National Capital Region (Apr. 4, 2012), *available at* http://www.census.gov.ph/sites/default/files/attachments/hsd/pressrelease/National%20Capital%20Region.pdf.

Cebu City is the fifth most populous city in the country, with 866,171 inhabitants (1% of the national population). National Statistics Office, Population and Annual Growth Rates for The Philippines and Its Regions, Provinces, and Highly Urbanized Cities (Apr. 4, 2012), *available at* http://www.census.gov.ph/sites/default/files/attachments/hsd/pressrelease/ Population%20and%20Annual%20Growth%20Rates%20for%20The%20Philippines%20and%20Its%20Regions%2C%20Provinces%2C%20and%20Highly%20Urbanized%20Cities%20Based%20on%201990%2C%202000%2C%20and%202010%20Censuses.pdf.

Davao City is also the largest outside the National Capital Region, with 1,449,296 inhabitants (1.6% of the national population). National Statistics Office, 2010 Census of Population and Housing: Population Counts - Davao (Apr. 4, 2012), *available at* http://www.census.gov.ph/sites/default/files/attachments/hsd/pressrelease/Davao.pdf.

Angeles City is home to 326,336 inhabitants (0.4% of the national population). National Statistics Office, 2010 Census of Population and Housing: Population Counts – Central Luzon (Apr. 4, 2012), *available at* http://www.census.gov.ph/sites/default/files/attachments/hsd/pressrelease/Central%20Luzon.pdf.

Bacolod City is a city of 511,820 inhabitants (0.5% of the national population). National Statistics Office, 2010 Census of Population and Housing: Population Counts – Western Visayas (Apr. 4, 2012), *available at* http://www.census.gov.ph/sites/default/files/attachments/hsd/pressrelease/Western%20Visayas.pdf.

> Pesos (P250,000) but not to exceed Five Hundred Thousand Pesos (P500,000) or imprisonment of six (6) years but not more than twelve (12) years, or both at the discretion of the court.[297]

Under the Local Government Code, *barangays* are only allowed to impose fines and in amounts not exceeding PHP 1,000.[298] Municipalities are allowed a higher limit of PHP 2,500 as well as to impose imprisonment of up to six months in lieu of or in addition to the fine.[299] Cities and provinces enjoy the highest limits, allowed to impose fines of up to PHP 5,000 and/or imprisonment of up to one year.[300] Even if LGUs provide for maximum penalties for hate crimes, which they do not,[301] these still pale in comparison to what Congress can prescribe.

Finally, the staggering number of LGUs and their hierarchy makes standardization difficult. There are 42,028 possible *barangay* ordinances, 1,491 possible municipal ordinances, 143 possible city ordinances, and 80 possible provincial ordinances.[302] Local legislation fluctuates wildly in quality, running the gamut from the original but imprecise efforts[303] to the Congressional-caliber drafting.[304] With coverage already being territorial and patchy, such variance in language makes the situation confusing and chaotic.

C. Summary of Philippine Laws on LGBT Hate Crimes

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[297] Anti-Discrimination Act of 2013, H. Res. 3432, 16th Cong. (2013); Anti-Discrimination Act of 2014, S. No. 2122, 16th Cong. (2014).

[298] Local Gov't Code (1991), § 391(a)(14).

[299] LOCAL GOV'T CODE (1991), § 447(a)(1)(iii).

[300] LOCAL GOV'T CODE (1991), §§ 458(a)(1)(iii), 468(a)(1)(iii).

[301] *See, e.g.,* Cebu City, Ordinance No. 2339 (Oct. 17, 2012), § 7; Barangay Pansol, Quezon City, Ordinance No. 009 (s. 2008) (Nov. 8, 2008), § 5. Cebu's penalties for violations of its ordinance increase with recidivism. First-time offenders will face a fine of PHP 1,000, imprisoned for 1 to 30 days, or both. Second-time offenders will be fined PHP 3,000, imprisoned for 1 to 30 days, or both. Successive offenses will be penalized with a PHP 5,000 fine and/or 1 to 30 days' imprisonment. For all its sophistication, meanwhile, the Anti-Discrimination Ordinance of Barangay Pansol penalizes violations with a paltry PHP 300 fine.

[302] National Statistical Coordination Board, *Provincial Summary: Number of Provinces, Cities, Municipalities, and Barangays, by Region*, NATIONAL STATISTICAL COORDINATION BOARD WEBSITE, *available at* http://www.nscb.gov.ph/activestats/psgc/NSCB_PSGC_SUMMARY_Sept_12.pdf (last visited June 24, 2014).

[303] Davao City, for instance, has confused definitions of sexual orientation and gender identity, while Barangay Bagbag has a grossly vague penalty clause allowing it to "impose such penalties and sanctions to erring [sic] and transgressors of this Ordinance, as maybe [sic] deemed proper and equitable, predicated on the gravity of the violation."

[304] Barangay Pansol's ordinance mirrors almost exactly the definitions and acts covered by the Anti-Discrimination Act (H. No. 956) then pending in Congress.

Using the four kinds of hate crime laws to summarize this chapter's discussion, we see that there is a complete lack of national legislation relating specifically to hate crimes committed against LGBT persons. While a handful of local ordinances do cover some forms of hate crimes based on SOGI, these ordinances are limited in territorial coverage, in scope, and in penalty.

1. Substantive Hate Crimes

The Philippines has no national law penalizing substantive hate crimes against LGBT persons. A number of local ordinances penalize forced medical examinations, ridicule, vexation, and harassment on the basis of SOGI. As discussed above, however, such local legislation face limitations in territorial reach as well as penalties.

2. Criminal Penalty-Enhancement Laws

The Philippines likewise has no national law serving to enhance penalties for crimes committed with bias against LGBT persons. Even as Article 14(3) of the RPC enhances penalties for crimes against persons and honor[305] when the accused acts "with insult or in disregard of the respect due to the offended party on account of [...] sex," the provision has been restrictively interpreted to cover only women. While lesbian and bisexual women might indeed avail of such aggravating circumstance as victims, the provision takes into account their status as women, an does not concern itself with their SOGI.

3. Laws Providing Civil Remedies

No statute specifically provides for civil causes of action for LGBT victims of hate crimes.

4. Reporting Statutes

The Philippines has no national statute requiring administrative agencies to collect statistics on hate crimes against LGBT persons, an expected circumstance since Philippine national law does not directly recognize such crimes. A pair of city ordinances from Bacolod City and Cebu City establishes monitoring of discriminatory acts against LGBT persons, although like other

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[305]People v. Pagal, G.R. No. L-32040, 79 SCRA 570, 576-577, Oct. 25, 1977, *citing* MARIANO ALBERT, REVISED PENAL CODE 109 (1946 ed.) and I LUIS REYES, REVISED PENAL CODE 297 (1974 ed.).

local ordinances, their operation is confined to their respective city limits. Further, these do not specifically monitor hate crimes but acts broadly defined as discriminatory.

V. ARGUMENTS FOR A PHILIPPINE LAW ON LGBT HATE CRIMES

> *"Hate crime is an identity crime. This is what renders it different from ordinary crimes. Hate crimes target an aspect of a person's identity that is unchangeable or fundamental to a person's sense of self."*
>
> —OSCE Office for Democratic Institutions and Human Rights[306]

> *"These crimes are different because they are based on prejudice and hatred, which gives rise to crimes that have not a single victim, but are intended to dehumanize a whole group of people."*
>
> —Former U.S. Vice-President and Nobel Laureate Al Gore[307]

> *"I swore never to be silent whenever and wherever human beings endure suffering and humiliation. We must always take sides. Neutrality helps the oppressor, never the victim. Silence encourages the tormentor, never the tormented."*
>
> —Elie Wiesel, Nobel Peace Prize Laureate[308]

> *"Never doubt that a small group of thoughtful, committed citizens can change the world; indeed, it's the only thing that ever has."*
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> —Margaret Mead[309]

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[306] OSCE ODIHR, *supra* note 2, at 38.

[307] *Quoted in* JOHN WRIGHT, HATE CRIMES 20 (2003).

[308] *Quoted in* Carroll, *supra* note 1.

The previous chapter illustrated that, as per the commonly-accepted definition of hate crimes, the Philippines has next to nothing in laws covering such acts against LGBT persons. This current chapter will now attempt to raise the various arguments, legal or otherwise, supporting a Philippine law on hate crimes.

A. General Arguments for Hate Crime Laws

The major arguments advanced by advocates for the enactment of hate crime laws generally involve: (1) the greater harm caused by hate crimes to their victims, their immediate communities, and society; (2) the conflict-generating potential of hate crimes; and (3) the need for a greater deterrent against bias-motivated crimes and the morally educational value of hate crime laws. These will be discussed in order.

1. Hate Crimes Cause Great Harm

i. Physical Harm

The belief that hate crimes cause more physical harm than counterpart offenses without bias motivation is considered as dogmatic insofar as hate crime law advocates are concerned.[310] Frequently cited are sociologists Jack Devin and Jack McDevitt, who claimed in 1993 that "hate crimes tend to be excessively brutal"[311] based, among others, on a study of the records of Boston, Massachusetts police records from 1983-1987, indicating that "one of every two hate crimes reported to the Boston Police was a personal attack [assault]."[312] This finding has since been adopted by scholars, advocates, and government agencies such as the US Department of Justice,[313] which characterized hate

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[309] *Id.*

[310] JACOBS & POTTER, *supra* note 39, at 81, *citing* LEVIN & MCDEVITT, *supra* note 126, at 11, and ROBERT KELLY, BIAS CRIME: AMERICAN LAW ENFORCEMENT AND LEGAL RESPONSES 179 (1991). Critics counter Devin and McDevitt's conclusion as hasty and illogical, arguing that "[s]imply reporting that assaults comprised half of all hate crime over a four-year period does not indicate whether the bias-motivated assaults caused more injury than non bias-motivated assaults during the same period." JACOBS & POTTER, *supra* note 39, at 82. Such opponents maintain that only comparative empirical studies would support a claim of greater injury, studies yet to be conducted.

[311] LEVIN & MCDEVITT, *supra* note 126, at 100.

[312] *Id.*

[313] *See, e.g.* BUREAU OF JUSTICE ASSISTANCE, *supra* note 3, at 13; Office for Victims of Crime, National Bias Crimes Training for Law Enforcement and Victim Assistance Professionals, A Guide for Training Instructors 61 (1995).

crimes as "more likely to involve physical assault in their guide for policymakers":

> Perhaps the most salient characteristic of bias crimes is that they are more likely to involve a physical assault. While historically about 11 percent of all crimes are assaults against persons, for bias crimes assaults account for nearly one-third of total cases reported.
>
> Because they are more likely to involve assaults, hate crimes also are more likely to involve physical injuries. Offenders often use what hate crime experts call "imprecise weapons of opportunity," such as bricks, bats, clubs, tree limbs, and box cutters. As a result, hate crimes tend to be excessively brutal and result in more serious injuries than common criminal attacks. [314]

ii. Psychological Harm

Where psychological harm is concerned, no less than US Supreme Court was convinced by the claim that "bias motivated crimes are more likely to [...] inflict distinct emotional harms on their victims."[315] Proponents of hate crime laws also have comparative studies to back up their claim that hate crimes produce greater psychological harm than ordinary crimes. The American Psychological Association ("APA") has itself acknowledged the relatively worse distress hate crime victims experience, citing studies to the effect that "[w]hile violent crime victimization carries risk for psychological distress, victims of violent hate crimes may suffer from more psychological distress (e.g. depression, stress, anxiety, anger) than victims of other comparable violent crimes."[316]

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[314] BUREAU OF JUSTICE ASSISTANCE, *supra* note 3, at 13.

[315] Wisconsin v. Mitchell, 508 U.S. 47, 49 (1993).

[316] American Psychological Association, *supra* note 28, *citing* Herek, et al., *supra* note 28, and McDevitt, et al., *supra* note 28. Opponents maintain, however, that "it should come as no surprise that hate crime victims report psychological and emotional effects. All victims do." JACOBS & POTTER, *supra* note 39, at 83. Those critical of hate crime laws argue that hate crime victims suffered in the same manner and degree as other crime victims, citing studies to the same effect. *See, e.g.,* Arnold Barnes & Paul H. Ephross., *The Impact of Hate Violence on Victims: Emotional and Behavioral Responses to Attacks,* 39 SOCIAL WORK 247, 250 (1994), *cited in* JACOBS & POTTER, *supra* note 39, at 84. One particular study is even quoted to find that any difference between hate crime and ordinary crime victims' emotional reaction would point to hate crime victims experiencing *less severe* injury. JACOBS & POTTER, *supra* note 39, at 83, *quoting* Barnes & Ephross, *supra* note 316.

One such study cited by the APA, a 2001 comparative study by McDevitt, reports statistically-significant differences between effects on victims of hate crimes versus ordinary crimes:

> Bias crime victims cite that they are more nervous, more depressed, have more trouble concentrating, think about the incident when they do not mean to, and feel like not wanting to live any longer more often than [non-bias] victims. Collectively, we see that the bias group has more difficulty coping with the victimization and that they appear to have additional problems with their recovery process due to increased fear and more frequent intrusive thoughts.[317]

Using the same comparative data, the study also reports that "bias crime assault victims are more likely to experience increased fear and reduced feelings of safety after the crime than [non-bias] crime assault victims," and that "many of the bias crime victims [...] experienced more traumatic events in their lives following the original assault."[318]

Governmental agencies have also noted this greater harm as grievous against individuals. The OECD, in advising its member states with respect to hate crime laws, observes that as a hate crime target is "[u]nable to change the characteristic that made him a victim, the immediate victim may experience greater psychological injury and increased feelings of vulnerability."[319] The Ontario Attorney-General cites hate crimes as assaults upon the victim's identity and self-esteem, leading to psychological and affective disturbances as results reinforced by the usually-higher gravity of the violence attending a hate crime.[320]

iii. Social Harm

Supporters of hate crime legislation also allege that the injury inflicted by hate crimes spread beyond the victim. It is claimed that these harms "spread beyond the individual to the initial victim's 'group' or community in the wider neighborhood community who know the victim or hear of his or her experience."[321] In a paper for a symposium on hate crime legislation, Professor

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[317] McDevitt, et al., *supra* note 28.

[318] *Id.*

[319] OSCE ODIHR, *supra* note 2, at 20.

[320] Attorney General of the Province of Ontario, *supra* note 29

[321] Paul Iganski, *Hate Crimes Hurt More*, 45 AM. BEHAVIORAL SCIENTIST 627, 629 (2001), *excerpted in* PERRY, *supra* note 125, at 132. Contrarily, skeptics claim that "while some hate crimes have impacts beyond their immediate victims, hate crimes are by no means unique in this respect." JACOBS & POTTER, *supra* note 39, at 87. Further, opponents also point out that even granting for the sake of argument that hate crimes are more frightening, upsetting, and angering

Kent Greenawalt of Columbia Law School stated that "[s]uch crimes can frighten and humiliate other members of the community, [and] they can also reinforce social divisions and hatred,"[322] an opinion shared by another law professor who states that hate violence "can inflict damage above and beyond the physical injury caused by a garden-variety assault, both to the immediate victim and to other members of the group to which the victim belongs."[323]

Judicial approbation of this claim was given by the US Supreme Court, emphasizing in *Wisconsin v. Mitchell* the *in terrorem* effects of such acts, stating that "bias motivated crimes are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest."[324] State Supreme Courts have mostly agreed, the High Court of Oregon warning of the deleterious effects of hate crimes on communities:

> [Hate Crime] creates a harm to society distinct from and greater than the harm caused by the assault alone. Such crimes – because they are directed not only toward the victim but, in essence, toward an entire group of which the victim is perceived to be a member – invite imitation, retaliation, and insecurity on the part of persons in the group to which the victim was perceived by the assailants to belong.[325]

The Supreme Court of Washington, for its part, notes that secondary effects invariably accompany hate crimes:

> [T]hreats of violence based on personal characteristics or group identity cause deep individual and societal harm... when attacks are made on one group, members of other disempowered groups may feel threatened as well: a rash of attacks on African Americans by a racist group may well create apprehension among Asians, Jews, gays, or Hispanics in the neighborhood.[326]

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to the victim's community, such third-party anguish is not a permissible basis for increasing penalties for offenders – considering the fear and anxiety of strangers in sentencing and punishment only legitimates and encourages them. *Id.* at 87-88.

[322] JACOBS & POTTER, *supra* note 39, at 86, *quoting* Kent Greenawalt, *Reflections on Justifications for Defining Crimes by the Category of Victim,* 1992/1993 ANNUAL SURVEY OF AMERICAN LAW 617, 627 (1992/1993).

[323] *Id.*, *quoting* James Weinstein, *First Amendment Challenges to Hate Crime Legislation: Where's the Speech*, 11 CRIM. JUST. ETHICS 6 (1992).

[324] Wisconsin v. Mitchell, 508 U.S. 47, 48 (1993).

[325] JACOBS & POTTER, *supra* note 39, *quoting* State v. Plowman, 838 P.2d 558, 564 (1992).

[326] State v. Talley, 858 P. 2d 217, 122 Wn.2d 192, 208-209 (1993), *cited in* George L. Blum, Annotation, *Validity, Construction, and Effect of "Hate Crimes" Statutes, "Ethnic Intimidation" Statutes, or the Like*, 22 A.L.R. 5th 261, §2[a] (1994).

Over and above these harms to individuals and communities, meanwhile, hate crime law advocates also maintain that "hate crimes strike at the core of societal values, offending the collective moral code."[327] The OSCE highlights the human rights aspect that hate crimes violate, damaging the fabric of society:

> *Hate crimes violate the ideal of equality between members of society.* The equality norm is a fundamental value that seeks to achieve full human dignity and to give an opportunity to all people to realize their full potential. The status of the equality norm is evidenced by its constant reiteration in human rights documents. The first line of the UN Declaration on Human Rights refers to the "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family". It is a theme repeated in most UN human rights instruments, and in the core constitutional documents of almost every state in the world. *The violation of these values and norms by hate crimes has a weighty practical and symbolic impact.*[328]

2. Hate Crimes Cause Social Conflict

Proponents cite hate crimes' potential effect of triggering "retaliation and group conflict," aside from promoting intergroup friction, suspicion, and distrust to argue for the enactment of hate crime laws.[329] Advocates warn that hate crimes present potentially serious security and public order problems:

> Hate crimes affect a far wider circle of people than ordinary crime, and have the potential to cause social division and civil unrest. *By creating or emphasizing existing social tensions, these crimes can have the effect of causing division between the victim group and society at large. Hate crimes can exacerbate existing intergroup tensions, and play a part in interethnic or social unrest.* In internal conflicts, widespread hate crimes usually accompany the escalation phase. In situations where relations between ethnic, national or religious groups are already sensitive, hate crimes can have an explosive impact.[330]

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[327] Iganski, *supra* note 321, at 631.

[328] OSCE ODIHR, *supra* note 2, at 19. (Emphasis supplied.)

[329] JACOBS & POTTER, *supra* note 39, at 87-88. Conversely, opponents fear that the intergroup friction sought to be avoided will actually result from the enactment of hate crime statutes. ALTSCHILLER, *supra* note 41, at 13, *citing* James B. Jacobs & Kimberly Potter, *Hate crimes: A critical perspective*, 22 CRIME & JUST. 1, 41-42 (1997).

[330] OSCE ODIHR, *supra* note 2, at 20. (Emphasis supplied.)

The fear of such internecine unrest was acknowledged in *Wisconsin v. Mitchell*, with Chief Justice Rehnquist acknowledging the likelihood of hate crimes provoking retaliation and inciting community unrest.[331]

Supporters of hate crime laws would have some sociological bases to fear retaliatory attacks, following the "norm of reciprocity" in human behavior.[332] According to such theory, "much of human behavior is governed in a quid pro quo manner," people responding to others "in ways and to the degree that resembles that of the other person's initial response."[333] Studies seem to support the theory's validity, suggesting that "the recipient of a harmful act tends to respond to its provider with a harm that is comparable in both quantity and quality."[334]

3. *Hate Crimes Require Stronger Deterrents*

Finally, another argument used to advance hate crime legislation is that greater punishment is necessary to deter hate crimes. More severe punishments for such acts, say proponents, "sends a signal to would-be hatemongers everywhere that should they illegally express their bigotry, they can expect more than a mere slap on the wrist."[335] This is in line with a related proposition put forward by supporters that the enactment of hate crime laws and the prosecution of hate crime offenders "will contribute to social attitudes against bias and will reinforce norms of equality and respect."[336] Proponents urge that these statutes are morally educational, sending a political and symbolic message that bias-motivated crime is wrong and morally reprehensible:

> More important, however, is the powerful signaling effect inherent in bias crime legislation. The very existence of bias crime statutes sends

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[331] Wisconsin v. Mitchell, 508 U.S. 47, 48 (1993).

[332] Kellina M. Craig, *Examining Hate-Motivated Aggression: a Review of the Social Psychological Literature on Hate Crimes as a Distinct Form of Aggression*, 7(1) AGGRESSION & VIOLENT BEHAVIOR 85, 85-101 (2002), as excerpted in PERRY, supra note 125, at 118-130, citing Alvin W. Gouldner, *The Norm of Reciprocity: A Preliminary Statement*, 25 AM. SOCIOLOGICAL REV. 161, 161-178 (1960).

[333] *Id.*

[334] *Id.*, citing George A. Youngs, *Patterns of Threat and Punishment Reciprocity in a Conflict Setting*, 51(3) J. PERS. & SOC. PSYCHOL. 541, 541-546 (1986).

[335] JACOBS & POTTER, *supra* note 39, at 88, *quoting* LEVIN & MCDEVITT, *supra* note 126, at 217. Opponents refute such arguments by contending that hate crime laws might actually produce the *reverse* of the moral education sought, actually hardening and reinforcing bigotry by creating a "teacher's pet" effect. LEVIN & MCDEVITT, *supra* note 126, at 217; Susan Gellman, *Sticks and Stones Can Put You in Jail, but Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, 39 UCLA L. Rev. 333 (1991).

[336] Greenawalt, *supra* note 322, at 626.

> out a clear message to society that a discriminatory motivation for a crime is a prescribable evil in and of itself; one that we as a society will not tolerate.[337]

B. Specific Arguments for Philippine LGBT Hate Crime Laws

The previous section answers why the Philippines should enact hate crime laws to protect vulnerable minorities. This section now undertakes to address why LGBT persons are such a minority, and why SOGI is a characteristic that should be covered by a hate crime law.

While it would be an understatement to say that the inclusion of SOGI as a characteristic meriting protection from hate crimes—indeed any discussion on LGBT individuals—is controversial, "[o]ne cannot, in good faith, dispute that gay and lesbian persons historically have been, and continue to be, the target of purposeful and pernicious discrimination due solely to their sexual orientation."[338] Quite simply, hate crimes against LGBT Filipinos happen. The Philippines needs to prevent and learn more about these; more importantly, it has constitutional and international obligations to act.

1. Absence of Legal Protection for Filipino LGBTs

Though a conception exists that the Philippines is very tolerant toward persons who are LGBT, many hold a contrary view. The explanatory note to one of the Anti-Discrimination bills pending at the 16th Congress describes the situation succinctly:

> Lesbians and gays continue to be oppressed by the iniquitous treatment of society at large, primarily because of misconceptions and ignorance. Sadly for our democracy, gays and lesbians are still considered second class citizens when they try to exercise the rights to which they are rightfully entitled.
>
> In schools, workplaces, commercial establishments, public service, police and the military, prejudicial practices and policies based on sexual orientation and gender identity limit the exercise and enjoyment of basic human rights and fundamental freedoms. Lesbian or gay students, for instance, are refused admission or expelled from schools

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[337] JACOBS & POTTER, *supra* note 39, at 90, *quoting* Steven B. Weisburd & Brian Levin, *On the Basis of Sex: Recognizing Gender-Based Crimes*, 5(2) STAN. L. & POL'Y REV. 21, 27 (1994).

[338] Ang Ladlad LGBT Party v. Comm'n on Elections, G.R. No. 190582, 618 SCRA 32, 99, Apr. 8, 2010 (Puno, *C.J., concurring*).

> due to their sexual orientation or gender identity. Companies block the promotion of lesbian and gay employees due to the deeply embedded notion that homosexuality is an indication of weakness. Laws such as the anti-vagrancy law are also abused by law enforcement agencies to harass gay men.[339]

Citing the Petition for Registration for party-list accreditation in controversy in the case of *Ang Ladlad LGBT Party v. Commission on Elections*, Chief Justice Puno found that homosexuals have suffered a history of purposeful unequal treatment because of their sexual orientation:

> There have been documented cases of discrimination and violence perpetuated against the LGBT Community, among which are:
>
> (a) Effeminate or gay youths being beaten up by their parents and/or guardians to make them conform to standard gender norms of behavior;
> (b) Fathers and/or guardians who allow their daughters who are butch lesbians to be raped[, so as] to "cure" them into becoming straight women;
> (c) Effeminate gays and butch lesbians are kicked out of school, NGOs, and choirs because of their identity;
> (d) Effeminate youths and masculine young women are refused admission from *(sic)* certain schools, are suspended or are automatically put on probation;
> (e) Denial of jobs, promotions, trainings and other work benefits once one's sexual orientation and gender identity is *(sic)* revealed;
> (f) Consensual partnerships or relationships by gays and lesbians who are already of age, are broken up by their parents or guardians using the [A]nti-kidnapping [L]aw;
> (g) Pray-overs, exorcisms, and other religious cures are performed on gays and lesbians to "reform" them;
> (h) Young gays and lesbians are forcibly subjected to psychiatric counseling and therapy to cure them[,] despite the de-listing *(sic)* of homosexuality and lesbianism as a mental disorder by the American Psychiatric Association;
> (i) Transgenders, or individuals who were born mail [sic] but who self-identity as women and dress as such, are denied entry or services in certain restaurants and establishments; and

[339] H.B. 110, 16th Cong., 1st Sess. (July 1, 2013), Explanatory Note.

(j) Several murders from the years 2003-3006 were committed against gay men, but were not acknowledged by police as hate crimes or violent acts of bigotry.

The marginalized situation of the domestic LGBT community was also highlighted when Philip Belarmino, a Filipino facing deportation from the United States, successfully applied for political asylum claiming that he would be subjected to persecution in the Philippines because of his sexual orientation:

> At his individual merits hearing, Belarmino recounted that when he was as young as nine years old, he had been forced to engage in oral and anal sex by older bullies. He recalled that at age 16, he was repeatedly raped by a houseboy who threatened him with a knife. He said that he did not report the rapes to the police for fear that they would only extort money from him or even use him for "their sexual pleasures."
>
> Immigration Judge Loreto Geisse found Belarmino's testimony to be credible and determined that he would suffer persecution on the basis of his "membership in a particular social group" which was being a homosexual in the Philippines and granted him asylum.[340]

Being LGBT in Asia: The Philippines Country Report,[341] a UN Development Programme-sponsored study released in May 2014 reveals that not much has changed. Even as "[g]ays are increasingly tolerated in Philippine society, [...] discrimination persists and they remain vulnerable to hate crimes."[342]

Members of the Filipino LGBT community have been targets of violence inflicted because they were LGBT. They have been victims of hate crimes:

> Lesbian Gay Bisexual and Transgender (LGBT) persons are targeted with physical and verbal assaults that affect their economic, cultural, social, health, and other wellbeing. There are no coordinated and comprehensive state or even non-state mechanisms that monitor the instances of discrimination, bias, prejudice, and violence that LGBT

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[340] *Gay Filipino wins asylum in US case on gender grounds*, PHIL. DAILY INQUIRER, July 13, 2009, at A7; *Gay Filipino Wins Asylum Based on Persecution of Homosexuals*, SAN FRANCISCO SENTINEL, *at* http://www.sanfranciscosentinel.com/?p=28912 (last visited June 24, 2014).

[341] UNITED NATIONS DEVELOPMENT PROGRAMME, BEING LGBT IN ASIA: THE PHILIPPINES COUNTRY REPORT (2014).

[342] Agence France Presse, *Philippines Is Getting Better For Gays, But Discrimination Persists: UN Study*, HUFFINGTON POST, May 12, 2014, *at* http://www.huffingtonpost.com/2014/05/12/philippines-gay-discimination-un-_n_5311112.html.

> Filipinos face due to homophobia, transphobia, and machismo. Circumstantial records show that attackers are sex workers, strangers, groups of hostile neighbors, family members, and intimate partners, and very few have been positively identified, and even fewer are arrested and made to face the law. Murders and attempted murders were accomplished by such acts as stabbing, arson, mutilation, strangling, shooting, and battery.[343]

Specific instances have likewise been documented:

> On May 12, 1999, EN, a 29-year-old lesbian was holding hands with her girlfriend at a street corner in Quezon City when she was accosted and beaten up by a male relative of her girlfriend, and his male companion.
>
> Immediately after the assault, she sought medical attention. The medico-legal certificate issued by the attending physician stated that she suffered some soft tissue swelling at the zygometic area right of the face. She went to the local police station and the *barangay* leaders, and requested for assistance. In the investigation that followed, one of the perpetrators gave this translated statement:
>
> "That while walking within the vicinity of corner V. Luna Road and Kalayaan Avenue, I saw my cousin together with Ms. EN holding hands with Ms. RU. *That I react upon seeing Ms. EN having relationship with my cousin Ms. RU, since both of them are female gender. That to stop once and for all their illicit relationship, I slapped in the face of Ms. EN to awaken herself as a woman and not to tender my cousin on love relationship.*"
>
> This story appeared in *Abante*, a local tabloid, in its May 14, 1999 issue, under the heading, "TOMBOY SINAPAK NG 2 KELOT" (Tomboy walloped by two men).[344]

The perpetrator's motivation for assaulting EN was clear—so that she would "awaken herself as a woman and not to tender [his female] cousin on love relationship." Thus, this incident of physical injuries, a felony under the RPC, was committed because EN was a lesbian.

EN was lucky, however, to have escaped that incident with her life. Matilde Sinolan was not as fortunate; she was shot because she was lesbian:

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[343] Anti-Discrimination Act of 2013, H. No. 1230, 16th Cong. (2013), Explanatory Note.

[344] LESBIAN ADVOCATES PHILIPPINES, INC., UNMASKED: FACES OF DISCRIMINATION AGAINST LESBIANS IN THE PHILIPPINES 11 (2004). (Emphasis supplied.)

> Tomboy, binoga sa bunganga
>
> Sabog ang batok ng isang 32-anyos na tomboy makaraang barilin siya sa bunganga ng suspek na nakasagutan nito kamakalawa ng gabi si Barangay Beha, Buga-song, Antique.
>
> Ayon kay SPO3 Benjamin Dubria, deputy chief of police ng Bugasong, kasalukuyan pang tinutugis ang suspek na si Leonides Hionejar, 33, ng Valderama ng nasabing lalawigan.
>
> Agad na namatay ang biktimang si Matilde Sinolan dahil sa tama ng isang bala ng hindi pa malamang klase ng baril dahil dala din ito ng suspek sa kanyang pagtakas.
>
> Nagtalo umano ang dalawa dahil pinalalayo ng suspek ang biktima sa anak ng kanyang kinakasama na nauwi sa mainitang pagtatalo hanggang sa mabaril ni Hionejar si Sinolan.[345]

Even as this work was being written, meanwhile, the specter of a gay serial killing spree has been raised in the Ilocos by several unresolved deaths of homosexual men:[346]

> 2 pinatay na bading sa Ilocos Sur, biktima ng gay serial killer?
>
> VIGAN CITY—Dalawang bangkay na naliligo sa kanilang sariling dugo ang nakita sa border na kabukiran ng Barangay Bulag East at Taguiporo, Bantay, Ilocos Sur.

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[345] JB Salarzon, *Tomboy, binoga sa bunganga*, ABANTE, *available at* http://www.abante.com.ph/ issue/nov2209/crimes08.htm (last visited Jun. 20, 2010). "Tomboy shot in the mouth. A 32-year old tomboy's nape was blown open after she was shot in the mouth two nights ago, following an argument with the suspect at Barangay Beha, Buga-song, Antique. According to SPO3 Benjamin Dubria, deputy chief of police of Bugasong, suspect Leonides Hionejar, 33, from Valderama of the same province, was still at large. Victim Matilde Sinolan immediately died due to the gunshot wound, the type of gun used yet to be determined as the suspect brought the weapon with him as he escaped. The two reportedly quarreled because the suspect wanted the victim to stay away from his daughter with whom the latter was carrying on a relationship, a quarrel that escalated into an altercation leading to the shooting."

[346] *2 pinatay na bading sa Ilocos Sur, biktima ng gay serial killer?*, BOMBO RADYO PHILS., *at* http://www.bomboradyo.com/index.php/news/more-news/3123-2-pinatay-na-bading-sa-ilocos-sur-biktima-ng-gay-serial-killer (last visited Jun. 20, 2010); JB Salarzon & Richard Buenaventura, *Siniraan sa syota... Binatilyo pumatay ng 2 bakla!*, ABANTE, *available at* http://www.abante.com.ph/issue/may2710/pn01.htm (last visited Jun. 20, 2010).

> Kinilala ni C/Insp. Honesto Lazo ang mga biktima na sina Gener Del Castillo Bautista, 40, na taga Bulag East, Bantay at Jeffrey Pastor Pacleb, 23, na taga Taguiporo, Bantay at parehong bading.
>
> * * *
>
> Hindi inaalis ng mga otoridad ang posibilidad na maaaring umatake sa mga ito ay mga suspected gay serial killer sa bayan ng Bantay, dahil nitong nakalipas na mga buwan ay hindi pa nareresolba ang ilang kaso rin ng pagpatay.
>
> Ang pinaka-kontrobersiyal ay ang pagsaksak sa isang bakla sa Vigan at ang isang balikbayang bading naman sa Bantay kamakailan na ninakawan ng motorsiklo at pera.[347]

These are not the only cases of violence against the LGBT community. The Philippine LGBT Hate Crime Watch, an initiative by the Metropolitan Community Church of Quezon City ("MCCQC"), Single Guys Online-Philippines, OUT Philippines, GABAY, IFTAS and other concerned LGBT organizations to document violent incidents with LGBT victims yielded gruesome incidents involving some very grisly deaths:[348]

TABLE 1. Violent Incidents Involving LGBT Persons

Year	Location	Victim	Crime
1996	Pasig City	Jay Lavarez (Project Staff, Reachout Foundation)	Death due to multiple stab wounds - UNRESOLVED
1998	Muntinlupa City	Larry Arciaga (Salon owner)	Death due to multiple stab wounds - UNRESOLVED
2004	Quezon City	William Castro (DZAM radio announcer)	Death - UNRESOLVED
2004	Muntinlupa City	Lorna Dating (Househelp)	Death - UNRESOLVED
2005	Quezon City	Larry Estandarte (Researcher Rated K)	Death due to multiple stab wounds - UNRESOLVED

347 "2 gay men killed in Ilocos Sur, victims of a gay serial killer? VIGAN CITY – Two corpses bathing in their own blood were found at the border farms of Bulag East and Taguiporo villages in Bantay, Ilocos Sur. C/Insp. Honesto Lazo identified the victims as Gener Del Castillo Bautista, 40, of Bulag East, Bantay and Jeffrey Pastor Pacleb, 23, of Taguiporo, Bantay, both gay men. xxx The authorities do not discount the possibility that the assailants are suspected gay serial killers from the town of Bantay, since in the past few months there have been similar killings that have gone unresolved. The most controversial of such cases is the stabbing of a gay man in Vigan and the theft of a gay *balikbayan*'s motorcycle and cash in Bantay."

348 Interview with Marlon Lacsamana, Elder of IFTAS (Jun. 3, 2010).

Year	Location	Victim	Crime
2005	Quezon City	Father Robert Tanghal (Priest	Death due to multiple stab wounds - UNRESOLVED
2005	Quezon City	Joel Binsali (Beautician)	Death due to multiple stab wounds - UNRESOLVED
2005	Quezon City	Carl Roman Santos (Advertising Consultant)	Death due to multiple stab wounds - UNRESOLVED
2005	Quezon City	Eli Pormaran (Entertainment Writer)	Death due to multiple stab wounds
2005	Davao City	Roberto Barajan (Regional Director for Region 11 - TESDA)	Death due to multiple stab wounds - UNRESOLVED
2006	Quezon City	Melchor Vergel de Dios (Fashion Designer)	Death due to multiple stab wounds - UNRESOLVED
2006	Quezon City	Joselito Siervo (EP Pinoy Dream Academy)	Death due to multiple stab wounds - UNRESOLVED
2006	Quezon City	Francisco Uy (Businessman)	Death due to multiple stab wounds - UNRESOLVED
2006	Bontoc, Mountain Province	Quenel dan Constancio (Student)	Death due to stab wound at the heart - UNRESOLVED
2008	Sulu	Romeo Lim (Salon owner)	Death due to gunshot wounds - UNRESOLVED
2009	Iloilo	Epi Ramos (Doctor, HIV Advocate)	Death due to multiple stab wounds
2009	San Mateo, Rizal	VJ Rubio (Faculty - La Salle Antipolo, Writer)	Death due to strangulation - UNRESOLVED
2009	Quezon City	Winton Ynion (Faculty – UE Recto, Palanca Awardee)	Death due to multiple stab wounds - UNRESOLVED
2009	Obando, Bulacan	Aries Alcantara (hairdresser)	Death due to gunshot wounds - UNRESOLVED
2009	Dumaguete City	Ambrosio Miguel Madamba (Doctor)	Death due to gunshot wounds - UNRESOLVED
2009	Davao City	Jerrico Yu Uy (Photo Studio Owner)	Hit with blunt object on the head, found dead inside a drum filled with water
2010	Dumaguete City	Jayfel Rayoso (2nd year Mass Communication Student, Siliman University)	Strangled, tortured and slit at the neck
2010	Quezon City	Enrique Esguerra	Stabbed with ice pick and a plastic bag over his head

Figures for the first half of 2011 has the initiative documenting 28 killings within the community,[349] while a mid-2012 figure noted 17 killings that year.[350]

2. Absence of Empirical Data on LGBT-related Offenses

These confirmed cases of hate crimes against LGBTs already justify protecting the said group as a vulnerable sector through hate crime law. However, these reported cases could just be the tip of the iceberg—those "that made it to the news, with the victims either out or eventually outed as [LGBTs] after the heinous crimes."[351]

When asked if any of the incidents reported to them were confirmed to have been committed because the victims were LGBT, project head Marlon Lacsamana concedes that these crimes are difficult to classify as hate crimes because "as a country we do not have laws or policies recognizing it, thus most of the cases were filed under robbery with homicide or possible homicide,"[352] and investigated as such. Angie Umbac of the Rainbow Rights Project agrees, stating that "while there are efforts of women's human rights activists in the Philippines to gather data affected by crimes, the available data is sex-disaggregated data (meaning data is determined according to boys/girls), so that the concept of orientation or identity is not a factor in the data-gathering and recording, making GLBTQIs fall through the cracks, so to speak."[353] Further, probing deeper into possible bias-motivated crimes is made impossible by the victims' families' demand for privacy:

> Many, in a still largely homophobic world, would prefer the sex and/or gender identity of those who were murdered to stay hidden, so that no reporting correlating the crime with sex/gender is done. On this, Lacsamana notes that "the family don't want to pursue the case when it's going to be obvious that their son was killed for being gay," he says. "How to deal with these challenges is still a challenge, we (GLBTQIA Filipinos) have not met as a group since we are basically a

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[349] Joseph Holandes Ubalde, *Afraid: 'Killings of LGBTs in Philippines on the rise'*, INTERAKSYON, Jun. 27, 2011, *at* http://www.interaksyon.com/article/ 6916/afraid-killings-of-lgbts-in-philippines-on-the-rise.

[350] The Philippine LGBT Hate Crime Watch, *Press Statement: Manila LGBT Groups Celebrate IDAHO 2012*, http://thephilippinelgbthatecrimewatch.blogspot.com/2012/05/press-statement-manila-lgbt-groups.html (last visited Jun. 20, 2014).

[351] Tan, *supra* note 13; Interview with Marlon Lacsamana, Elder of IFTAS (Jun. 3, 2010).

[352] Tan, *supra* note 13.

[353] *Id.*

young formation. The details of documentation are so far (the only thing that) we have agreed on."[354]

At the very least, a legislative mandate requiring law enforcers to investigate possible anti-LGBT bias motivation in crimes is called for to shed light into these violent incidents. The fact that hate crimes currently do not exist as a legal concept leads to a dearth of data on their prevalence notwithstanding anecdotal reports of such incidents. In fact, the Philippine National Police (PNP) Directorate for Investigation and Detective Management, when asked for information "relative to the 'Hate Crimes' motivated by prejudice against a victim based on his [...] sexual orientation" could not provide any data as the said office only maintains "Crime Statistics (Index and Non-Index Crimes) of Police Regional Offices",[355] which does not cover nor recognize hate crimes.

The Philippine Commission on Human Rights' ("CHR") recent undertaking to "systematically document 'hate crimes' against LGBTs"[356] is a good first step toward this direction. The CHR, however, does not have the same access to criminal information as national law enforcement agencies such as the Philippine National Police ("PNP") and the National Bureau of Investigation (NBI). These organizations' non-involvement hampers this effort. There is thus a need for a law that requires recognition and data gathering on these acts by law enforcement agencies, to serve as a means toward addressing them.

3. State's Constitutional Obligations

Proponents of SOGI anti-discrimination laws invoke several provisions of the 1987 Philippine Constitution in calling for their enactment. In particular, the equal protection clause and various social justice and rights clauses enshrined in the country's fundamental law are appealed to as proscribing discrimination. In light of LGBT hate crimes being discriminatory acts based on SOGI,[357] these constitutional imperatives similarly justify the enactment of an LGBT hate crime law.

i. Equal Protection Clause

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[354] *Id.*

[355] Letter from Atty. Raul M. Bacalzo, Ph.D., Director, Philippine National Police Directorate for Investigation and Detective Management (Jun. 7, 2010) (on file with author).

[356] Philip C. Tubeza, *CHR to document 'hate crimes' vs LGBTs*, INQUIRER.NET, July 30, 2013, *at* http://newsinfo.inquirer.net/455573/chr-to-document-hate-crimes-vs-lgbts.

[357] *See* Part II, *supra*.

A legacy of its history as a territory of the United States, the due process and equal protection clauses are enshrined in its Constitution:

> No person shall be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws.[358]

The text of this provision has been part of every organic act and Constitution of the Philippines since 1902, when the United States Congress enacted the Philippine Bill of 1902[359] to provide for the government of the Philippine Islands. Section 5 of the said law provided "[t]hat no law shall be enacted in said Islands which shall deprive any person of life, liberty, or property without due process of law, or deny to any person therein the equal protection of the laws."

Philippine jurisprudence has been consistent in interpreting the import of the equal protection clause:

> According to a long line of decisions, equal protection simply requires that all persons or things similarly situated should be treated alike, both as to rights conferred and responsibilities imposed. Similar subjects, in other words, should not be treated differently, so as to give undue favor to some and unjustly discriminate against others.[360]

As simply put by the Supreme Court in *Tolentino v. Board of Accountancy*, the guarantee means "that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and in like circumstances."[361]

The Supreme Court grappled with the equal protection clause and sexual orientation in the case of *Ang Ladlad LGBT Party v. Commission on Elections*, where an LGBT political party challenged its disqualification by the Philippine Commission on Elections based on grounds rooted on religion and public morality. The Court refused to apply heightened or strict scrutiny in its analysis, instead applying the rational basis test on the exclusion of LGBT groups from

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[358] CONST. art. XIII, sec. 1.

[359] Pub. L. No. 235, § 5, 32 Stat. 691 (1902) (U.S.). An Act Temporarily to provide for the administration of the affairs of civil government in the Philippine Islands, and for other purposes.

[360] ISAGANI CRUZ, CONSTITUTIONAL LAW 124 (2007 ed.).

[361] Tolentino v. Board of Accountancy, 90 Phil. 83, 90 (1951), *citing* Missouri v. Lewis, 101 U.S. 22, 31 (1879).

the party system. The Court reversed the Commission and allowed the LGBT party to participate in the elections:

> The equal protection clause guarantees that no person or class of persons shall be deprived of the same protection of laws which is enjoyed by other persons or other classes in the same place and in like circumstances [...] moral disapproval of an unpopular minority – is not a legitimate state interest that is sufficient to satisfy rational basis review under the equal protection clause.[362]

Considering that hate crimes are discriminatory acts, we may join lawmakers sponsoring SOGI anti-discrimination legislation[363] in their claim that the equal protection clause proscribes hate crimes as "discrimination on the basis of sexual orientation or any other status in the enjoyment of rights."[364]

It may be asked, however, if the equal protection clause imposes a positive duty on the state to take measures, legislative or otherwise, "whether the command implicit in equal protection constitutes merely a ban on the creation of inequalities by the state or a command, as well, to eliminate inequalities existing without any direct contribution thereto by state action."[365] The US Supreme Court has declined to rule this way, interpreting the provision only as a shield against state action:

> The Supreme Court has told us many times that what the Equal Protection Clause prohibits—and all it prohibits—is arbitrary and

[362] Ang Ladlad LGBT Party v. Comm'n on Elections, G.R. No. 190582, 618 SCRA 32, 63-64, Apr. 8, 2010.

[363] *See, e.g.,* Anti-Discrimination Act, H. No. 9095, 11th Cong. (2000), Explanatory Note; Anti-Discrimination Act, H. No. 2784, 12th Cong. (2001), Explanatory Note; Anti-Discrimination Act, H. No. 634, 13th Cong. (2004), Explanatory Note; Anti-Discrimination Act, H. No. 956, 14th Cong. (2007), Explanatory Note; Anti-Discrimination Act, S. 2995, 15th Cong. (2011), Explanatory Note; Anti-Discrimination Act, H. No. 515, 15th Cong. (2010), Explanatory Note; Anti-Discrimination Act, S. 1022, 16th Cong. (2013), Explanatory Note; Anti-Discrimination Act of 2014, S. No. 2122, 16th Cong. (2014), Explanatory Note; Anti-Discrimination Act, H. No. 110, 16th Cong. (2013), Explanatory Note; Sexual Orientation or Gender Identity Discrimination Prohibition Act, H. No. 342, 16th Cong. (2013), Explanatory Note; Anti-Discrimination Act of 2013, H. No. 1230, 16th Cong. (2013), Explanatory Note; Anti-Discrimination Act of 2013, H. No. 3432, 16th Cong. (2013), Explanatory Note.

[364] Anti-Discrimination Act, H. No. 9095, 11th Cong. (2000), Explanatory Note. All subsequent iterations of the Anti-Discrimination Act filed by Reps. Rosales, Hontiveros, and Bag-Ao also contain identical language in their Explanatory Notes.

[365] JOAQUIN BERNAS, S.J., THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 159 (2003 ed.), *citing* Philip B. Kurland, *Foreword: Equal In Origin and Equal In Title to the Legislative And Executive Branches of the Government,* 78 HARV. L. REV. 143, 148 (1968).

> discriminatory classification by States. It chiefly prohibits racial classifications, but sometimes others as well. The Court said in 1918, and again in 1923, and in 2000, "The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." This spring, the Court referred to "[o]ur traditional view of the core concern of the Equal Protection Clause as a shield against arbitrary classifications."
>
> The Court said in 1946, "The equal protection clause of the Fourteenth Amendment protects the individual from state action which selects him out for discriminatory treatment [...] The right is the right to equal treatment." The Court said in 1955, "The prohibition of the Equal Protection Clause goes no further than [...] invidious discrimination."[366]

Senator Miriam Defensor-Santiago, herself a proponent of a SOGI Anti-Discrimination Law, appears to agree, considering the lack of relevant legislation a barrier to invoking the equal protection clause:

> Under the Equal Protection Clause of the Constitution, employers can't discriminate against a person in any aspect of employment, such as: hiring and firing; compensation; assignment; or classification of employees; transfer; promotion; layoff; or recall; job advertisements; recruitment; testing; use of company facilities; training and apprenticeship programs; fringe benefits; pay; retirement plans; and disability leave [...] To be considered as "illegal", such discrimination must however be in violation of a specific law. Otherwise, no protection from discrimination may be had even how unfair or unethical it may seem.[367]

Proponents will be heartened to note, however, that there are those who think otherwise. Arguing that "Philippine constitutional law . . . does not have to take its cue from American developments in law before it can take bolder strides towards equalization,"[368] noted constitutionalist Father Joaquin G. Bernas, S.J. maintains that "[t]he [equal protection] clause also commands the State to pass

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[366] Christopher Green, *The Original Sense of the (Equal) Protection Clause: Pre-Enactment History*, 19 GEO. MASON U. C.R. L.J. 1, 1–2 (2008). (Citations omitted.)

[367] Unlawful Employment Practice Act of 2010, S. No. 2292, 15th Cong. (2010), Explanatory Note.

[368] BERNAS, *supra* note 365, at 160.

laws which positively promote equality or reduce existing inequalities."[369] Father Bernas finds in the Philippine Constitution "no lack of doctrinal effort towards achieving a reasonable measure of equality," with its social justice provisions "[commanding] the State to take affirmative action in the direction of greater equality.[370] Some of these constitutional provisions are discussed below.

It should also be noted that, as will be discussed below, international obligations impel the Philippines to take affirmative action against discriminatory acts such as hate crimes, including prohibiting the same through legislation.

ii. Dignity and Equality Clauses

Under its article on state policy, the Constitution provides that "[t]he State values the dignity of every human person and guarantees full respect for human rights,"[371] mandating in its article on Social Justice and Human Rights that "[t]he Congress shall give highest priority to the enactment of measures that protect and enhance the right of all the people to human dignity."[372] Such provisions on dignity and equality, cited by proponents of SOGI anti-discrimination legislation, [373] apply with equal force to argue for the criminalization of LGBT hate crimes, an affront to the dignity and rights of LGBT individuals.

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[369] JOAQUIN BERNAS, S.J., THE 1987 PHILIPPINE CONSTITUTION: A COMPREHENSIVE REVIEWER 37 (2006 ed.). Father Bernas is Dean Emeritus of the Ateneo Law School and was a member of the 1986 Constitutional Commission that drafted the present Philippine Constitution.

[370] BERNAS, *supra* note 365, at 160.

[371] CONST. art. II, § 11.

[372] CONST. art. XIII, § 1.

[373] *See, e.g.* Anti-Discrimination Act, H. No. 9095, 11th Cong. (2000), Explanatory Note; Anti-Discrimination Act, H. No. 2784, 12th Cong. (2001), Explanatory Note; Anti-Gender Discrimination Act, S. No. 1738, 13th Cong. (2004), Explanatory Note; Anti-Discrimination Act, H. No. 634, 13th Cong. (2004), Explanatory Note; Anti-Gender Discrimination Act, S. No. 11, 14th Cong. (2007), Explanatory Note; Anti-Discrimination Act, H. No. 956, 14th Cong. (2007), Explanatory Note; Anti-Discrimination Act, H. No. 515, 15th Cong. (2010), Explanatory Note; Anti-Discrimination Act of 2010, H. No. 1483, 15th Cong. (2010), Explanatory Note; Anti-Discrimination Act of 2014, S. No. No. 2122, 16th Cong. (2014), Explanatory Note; Anti-Discrimination Act, H. No. 110, 16th Cong. (2013), Explanatory Note; Sexual Orientation or Gender Identity Discrimination Prohibition Act, H. No. 342, 16th Cong. (2013), Explanatory Note; The Anti-Racial, Ethnic, and Gender Identity, Sexual Orientation, and Religious Discrimination Act of 2013, H. No. 988, 16th Cong. (2013), Explanatory Note; Anti-Discrimination Act of 2013, H. No. 1230, 16th Cong. (2013), Explanatory Note; Anti-Discrimination Act of 2013, H. No. 1842, 16th Cong. (2013), Explanatory Note; Anti-Discrimination Act of 2013, H. No. 3432, 16th Cong. (2013), Explanatory Note.

Reliance on these provisions to justify an LGBT hate crime law is quite on point, given that such a law would definitely "protect and enhance the right of all the people to human dignity." Independent of the debate on whether the equal protection clause calls for positive legislative action, these provisions mandate the legislature to act. Indeed, the framers of the Constitution chose their words carefully, deliberately making such legislation Congress' "highest priority":

> It communicates the message that what is expected of Congress is not just the day-to-day police power but of powers needed to achieve radical social reform of critical urgency.[374]

4. State's International Obligations

Apart from the urgent action called for because of actual incidents of hate crimes against the LGBT community narrated above, the Philippines also has obligations under international law to protect the LGBT community from discrimination in the form of hate crimes:

> In an age that has seen international law evolve geometrically in scope and promise, international human rights law, in particular, has grown dynamically in its attempt to bring about a more just and humane world order. For individuals and groups struggling with inadequate structural and governmental support, international human rights norms are particularly significant, and should be effectively enforced in domestic legal systems so that such norms may become actual, rather than ideal, standards of conduct.[375]

The Philippines is party to the International Covenant on Civil and Political Rights ("ICCPR")[376] and the International Covenant on Economic, Social and Cultural Rights ("ICESCR"),[377] treaties that obligate the state against discrimination and discriminatory acts in general. Both texts not only obligate States Parties to ensure that the rights they enshrine are enjoyed by all without discrimination, but also mandate them to prohibit discrimination on the basis of "race, colour, sex, language, religion, political or other opinion, national or social

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[374] BERNAS, *supra* note 365, at 1192–1193, *citing* II RECORD OF THE CONSTITUTIONAL COMMISSION 684, 736, 739–40.

[375] Ang Ladlad LGBT Party v. Comm'n on Elections, G.R. No. 190582, 618 SCRA 32, 74, Apr. 8, 2010 (2010).

[376] International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter "ICCPR"]. The Philippines ratified the ICCPR on Oct. 23, 1986.

[377] International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter "ICESCR"]. The Philippines ratified the ICESCR on June 7, 1974.

origin, property, birth or other status" *per se*.[378] The ICCPR and the ICESCR require the Philippines to assure that its citizens enjoy without discrimination the rights contained in said documents, which include the right to life,[379] to liberty and security of person,[380] to freedom from unlawful attacks on honor and reputation,[381] and to freedom of expression,[382] among others. The Philippines is obliged to take steps, including but not limited to the enactment of legislation, should discrimination threaten citizens' free exercise of these guaranteed rights.[383] These documents form valid bases for the Philippines to penalize hate crimes, such offenses being a form of discrimination under these agreements.

These ICCPR and ICESCR provisions, while not specifically including SOGI as a protected characteristic, have been held to cover sexual orientation and gender identity by the treaty bodies tasked to oversee their implementation. In the 1994 case of *Toonen v. Australia*, the UN Human Rights Committee ("UNHRC") declared that "the reference to 'sex' in ICCPR articles 2, paragraph 1 and 26 is to be taken as including sexual orientation."[384] The doctrine that the non-discrimination obligations cover sexual orientation was subsequently reiterated in *Young v. Australia*[385] and *X v. Colombia*.[386] Following these rulings, the UNHRC has since expanded its interpretation to hold that these provisions include discrimination based on gender identity as well.[387]

Secondly, "the inclusion of 'or other status' in [ICCPR] Article 26 [as well as ICCPR Article 2 and ICESCR Article 2] reveals the intention of the

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[378] ICCPR, arts. 2, 26; ICESR, art. 2.

[379] ICCPR, art. 6.

[380] ICCPR, art. 9.

[381] ICCPR, art. 17.

[382] ICCPR, art. 19, ¶ 2.

[383] ICCPR, arts. 2, 26; ICESCR, art. 2.

[384] Toonen v. Australia, Communication No. 488/1992, ¶ 8.7, U.N. Doc. CCPR/C/50/D/488/1992 (Hum. Rts. Committee, Mar. 31, 1994).

[385] Young v. Australia, Communication No. 941/2000, ¶ 10.4, U.N. Doc. CCPR/C/78/D/941/2000 (Hum. Rts. Committee, Sep. 18, 2003). "Prohibition against discrimination under article 26 comprises also discrimination based on sexual orientation."

[386] X. v. Colombia, Communication No. 1361/2005, ¶ 7.2, U.N. Doc. CCPR/C/89/D/1361/2005 (Hum. Rts. Committee, May 14, 2007). "Prohibition against discrimination under article 26 comprises also discrimination based on sexual orientation."

[387] *See, e.g.* Human Rights Committee, Concluding Observations: Ukraine, ¶¶ 8, 10, U.N. Doc. CCPR/C/UKR/CO/7 (Aug, 22, 2013); Human Rights Committee, Concluding Observations: Finland, ¶ 8, U.N. Doc. CCPR/C/FIN/CO/6 (Aug. 22, 2013); Human Rights Committee, Concluding Observations: Peru, ¶ 8, U.N. Doc. CCPR/C/PER/CO/5 (Apr. 29, 2013); Human Rights Committee, Concluding Observations: Paraguay, ¶ 9, U.N. Doc. CCPR/C/PRY/CO/3, (Apr. 29, 2013), Human Rights Committee, Concluding Observations: Hong-Kong, China, ¶ 23, U.N. Doc., CCPR/C/CHN-HKG/CO/3 (Apr. 29, 2013).

framers [...] to include grounds which are not listed, particularly where party-State action creates distinctions or identifies a differentiated status, whether by law or by other official action."[388] Thus, the Committee on Economic, Social, and Cultural Rights ("CESCR") has interpreted the ICESCR provisions against discrimination to include the prohibition against SOGI discrimination:

> "Other status" as recognized in article 2, paragraph 2, includes sexual orientation. States parties should ensure that a person's sexual orientation is not a barrier to realizing Covenant rights, for example, in accessing survivor's pension rights. In addition, gender identity is recognized as among the prohibited grounds of discrimination; for example, persons who are transgender, transsexual or intersex often face serious human rights violations, such as harassment in schools or in the workplace.[389]

The non-exclusivity of the enumerations in the ICCPR and ICESCR and the inclusion of sexual orientation within their coverage are affirmed, according to the Philippine Supreme Court, by "a variety of United Nations Bodies":

> The Committee on Economic, Social and Cultural Rights (CESCR) has dealt with the matter in its General Comments, the interpretative texts it issues to explicate the full meaning of the provisions of the Covenant on Economic, Social and Cultural Rights. In General Comments Nos. 18 of 2005 (on the right to work) (Committee on Economic, Social and Cultural Rights, General Comment No. 18: The right to work, E/C.12/GC/18, November 24, 2005), 15 of 2002 (on the right to water) (Committee on Economic, Social and Cultural Rights, General Comment No. 15: The right to water, E/C.12/2002/11, November 26, 2002) and 14 of 2000 (on the right to the highest attainable standard of health) (Committee on Economic, Social and Cultural Rights, General Comment No. 14: The right to the highest attainable standard of health, E/C.12/2000/4, August 14, 2000), it has indicated that the Covenant proscribes any discrimination on the basis of, inter-alia, sex and sexual orientation.
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> The Committee on the Rights of the Child (CRC) has also dealt with the issue in a General Comment. In its General Comment No. 4 of

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[388] Comment-in-Intervention of the Commission on Human Rights, Ang Ladlad LGBT Party v. COMELEC, G.R. No. 190582, Apr. 8, 2010, ¶ 20.

[389] Committee on Economic, Social and Cultural Rights, General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights (art. 2, para. 2), ¶ 32, U.N. Doc. E/C.12/GC/20 (May 25, 2009).

> 2003, it stated that, "State parties have the obligation to ensure that all human beings below 18 enjoy all the rights set forth in the Convention [on the Rights of the Child] without discrimination (Article 2), including with regard to "race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status". These grounds also cover [inter alia] sexual orientation". (Committee on the Rights of the Child, General Comment No. 4: Adolescent health and development in the context of the Convention on the Rights of the Child, July 1, 2003, CRC/GC/2003/4).[390]

Indeed, the Committee Against Torture's General Comment No. 2 has also included sexual orientation or transgender identity in their enumeration of prohibited grounds of discrimination.[391]

While the ICCPR and the ICESCR do not put forward direct definitions of discrimination, the UNHRC has defined the term in its 1989 General Comment on Non-discrimination [392] by culling from the International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD") and the Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW"):

> 6. The Committee notes that the Covenant neither defines the term "discrimination" nor indicates what constitutes discrimination. However, article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination provides that the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. Similarly, article 1 of the Convention on the Elimination of All Forms of Discrimination against Women provides that "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex

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[390] Ang Ladlad LGBT Party v. Comm'n on Elections, G.R. No. 190582, 618 SCRA 32, 75 n.49, Apr. 8, 2010; Comment-in-Intervention of the Commission on Human Rights, Ang Ladlad LGBT Party v. COMELEC, G.R. No. 190582, Apr. 8, 2010, ¶ 21.

[391] Committee Against Torture, General Comment 2, Implementation of article 2 by States Parties, ¶ 21, U.N. Doc. CAT/C/GC/2/CRP. 1/Rev.4 (2007).

[392] United Nations Office of the High Commissioner for Human Rights, Human Rights Committee, General Comment 18: Nondiscrimination, ¶ 6-7. 12, 37th sess., 1989, *in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1, p. 26 (1994).

> which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.
>
> 7. While these conventions deal only with cases of discrimination on specific grounds, the Committee believes that the term "discrimination" as used in the Covenant should be understood to imply *any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status*, and which has the purpose or effect of *nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.*[393]

As pointed out in Part II vis-à-vis the definition and elements of hate crimes, hate crimes form a subset of discrimination in that these crimes involve different treatment of persons because of some characteristic. The definition of discrimination as cited above serves to confirm this observation, as clearly, crimes committed with bias motives are a "distinction [...] based on [... a] ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status [...] which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms."[394] Depending on the predicate crime involved, hate crimes may violate the right to life, to security, to honor, to education, to employment, and others guaranteed by the ICCPR and ICESCR. Further, the *in terrorem* quality of hate crimes has the effect of violating vulnerable groups' rights to expression and to hold opinions. The threat of a bias-motivated attack can force putative victims into hiding, literally and figuratively.

Violent hate crimes are clearly acts of discrimination, with the UNHRC and CESCR repeatedly calling on States Parties to act against violence based on SOGI[395] and invoking the Covenants' anti-discrimination provisions. The

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[393] Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18 1979, 1249 U.N.T.S. 13 [hereinafter "CEDAW"]. (Emphasis supplied.) The CEDAW entered into force in Sep. 3, 1981. The Philippines ratified the same on Aug. 5, 1981.

[394] *Id.*

[395] *See, e.g.*, Human Rights Committee, Concluding Observations: Russian Federation, ¶ 27, U.N. Doc. CCPR/C/RUS/CO/6 (Nov. 24, 2009); Human Rights Committee, Concluding Observations: Mexico, ¶ 21, U.N. Doc. CCPR/C/MEX/CO/5 (May 17, 2010); Human Rights Committee, Concluding Observations: Uzbekistan, ¶ 22, U.N. Doc. CCPR/C/UZB/CO/3 (Apr. 7, 2010); Human Rights Committee, Concluding Observations: Peru, ¶ 8, U.N. Doc.

UNHRC, in particular, considers violence on the basis of SOGI a violation of the right to liberty in its upcoming General Comment No. 35:

> The right to "security of person" in article 9 is independent from the right to liberty of person, and refers to freedom from bodily injury, including fatal injury. [...] *States parties must respond appropriately to patterns of violence against categories of victims such as xxx violence against sexual minorities.*[396]

The Philippines' obligation to bring its domestic law in line with the ICCPR is "unqualified and of immediate effect," and failure to comply with the "cannot be justified by reference to political, social, cultural or economic considerations within the State."[397] In light of States Parties' obligations to enact appropriate legislation to protect Covenant rights as well as the Covenants being interpreted as prohibiting SOGI discrimination, it follows that laws proscribing such acts are obligatory. The Philippines must enact hate crime laws to protect LGBT persons as a matter of international obligation. In fact, to confirm that the State has a duty to provide for such laws, we need look no further than UNHRC's 2012 Concluding Observations for the Philippines:

> The State party should adopt a comprehensive anti-discrimination law that prohibits discrimination on the basis of sexual orientation and gender identity and take steps, including awareness-raising campaigns, *to put an end to the social stigmatization of and violence against homosexuals.*[398]

In conclusion, a Philippine law on LGBT hate crimes is needed not only because of the deleterious effects of hate crimes on its victims, their communities, and society, but also because the Philippines has international and domestic obligations to stamp out various forms of discrimination based on SOGI. There is also a need for recognizing and gathering data on hate crimes to better address such acts of discrimination.

CCPR/C/PER/CO/5 (Apr. 29, 2013); Committee on Economic, Social, and Cultural Rights, Concluding Observations: Poland, ¶ 32, U.N. Doc. E/C.12/POL/CO/35 (Dec. 2, 2009); Committee on Economic, Social, and Cultural Rights, Concluding Observations: Monaco, ¶ 50, U.N. Doc. E/C.12/MCO/CO/1 (June 13, 2006); Committee on Economic, Social, and Cultural Rights, Concluding Observations: Brazil, ¶ 50, U.N. Doc. E/C.12/BRA/CO/2 (June 12, 2009).

[396] Human Rights Committee, Draft General Comment No. 35: Article 9: Liberty and security of person, ¶ 8, U.N. Doc. CCPR/C/107/R.3 (Jan. 28, 2013). (Emphasis supplied.)

[397] Human Rights Committee, General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 14, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004).

[398] Human Rights Committee, Concluding Observations: Philippines, ¶ 10, U.N. Doc. CCPR/C/PHL/CO/4 (Nov. 13, 2012). (Emphasis supplied.)

VI. LEGAL CHALLENGES: FREE SPEECH, VAGUENESS, EQUAL PROTECTION, AND OTHERS

"No person shall be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws."

"No law shall be passed abridging the freedom of speech, of expression, or of the press, or the right of the people peaceably to assemble and petition the government for redress of grievances."

— The 1987 Philippine Constitution[399]

Having submitted that the Philippines needs an LGBT hate crime law, this inquiry now attempts to anticipate and address the possible legal challenges to the said law. To this end, American jurisprudence directly dealing with hate crime statutes will be instructive given the absence of relevant Philippine jurisprudence on the matter and the fact that the legal challenges involved are based on Constitutional provisions that we have imported from the United States. This chapter, therefore, will first outline the legal challenges presented to American hate crime laws and current case law on the same, with these rulings serving as persuasive authority on the legal issue of such statutes' validity. As an adjunct and complementary to persuasive American jurisprudence on hate crime laws, relevant local jurisprudence involving free speech challenges against penal laws will thereafter be presented, serving as an aid in anticipating a Philippine Supreme Court decision should a Philippine LGBT hate crime law be assailed in the same fashion.

A. Free Speech Challenges

The right to free speech, expression, and thought are rights considered inherent and inalienable by the international community, these being enshrined

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[399] CONST. art III, §§ 1, 4.

in Articles 18[400] and 19[401] of the Universal Declaration of Human Rights (UDHR),[402] Articles 18[403] and 19[404] of the ICCPR, and featured in almost all Constitutions of democratic jurisdictions. The centrality and importance of these freedoms have been underscored many times in jurisprudence, notably from the United States whose First Amendment is a well-known expression of these guarantees.

In *Palko v. Connecticut*, Justice Cardozo declared that "freedom of thought, and speech [...] is the matrix, the indispensable condition, of nearly every other form of freedom. With rare aberrations a pervasive recognition of that truth can be traced in our history, political and legal."[405] In *Abood v. Detroit Board of Education*, meanwhile, the heart of this guarantee was held to be "the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State."[406] The indispensability and centrality of freedom of thought and of speech in a democracy is to such a degree that generally all opinions and expression are protected:

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[400] "ARTICLE 18. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."

[401] "ARTICLE 19. Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

[402] Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948) [hereinafter "UDHR"].

[403] "ARTICLE 18. (1) Everyone shall have the right to freedom of thought, conscience and religion."

[404] "ARTICLE 19.

(1) Everyone shall have the right to hold opinions without interference.

(2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."

[405] Palko v. Connecticut, 302 U.S. 319, 327 (1937). This case was cited with approval by our own Supreme Court in *Salonga v. Paño*, G.R. No. 59524, 134 SCRA 438, 458-459, Feb. 18, 1985, as well as in separate opinions in *Imbong v. Ferrer*, G.R. No. 32432, 35 SCRA 28, 49, Sept. 11, 1970 (Fernando, *J., concurring and dissenting*), *Manila Public School Teachers Association v. Laguio*, G.R. No. 95445, 200 SCRA 323, 338, Aug. 6, 1991 (Gutierrez, *J., dissenting*), *Ople v. Torres*, G.R. No. 168338, 293 SCRA 141, 192, Feb. 15, 1998 (Mendoza, *J., dissenting*), *David v. Macapagal-Arroyo*, G.R. No. 171396, 489 SCRA 160, 278, May 3, 2006 (Ynares-Santiago, *J., concurring*), and *Chavez v. Gonzales*, G.R. No. 168338, 545 SCRA 441, 528, Feb. 15, 2008 (Carpio, *J., concurring*). *Salonga* was in turn cited in *Adiong v. Comm'n on Elections*, G.R. No. 103956, 207 SCRA 712, 716, Mar. 31, 1992.

[406] Abood v. Detroit Board of Education, 431 U.S. 209, 235 (1977).

> [F]undamentally, the constitution protects all speech and thought, regardless of how offensive it may be. "[I]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." Texas v. Johnson, 491 U.S. 397, 414 (1989). As Justice Holmes put it: "If there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought we hate." United States v. Schwimmer, 279 U.S. 644, 654-55 (1929) (Holmes, J., dissenting), overruled, Girouard v. United States, 328 U.S. 61 (1946)[407]

With these freedoms of speech and thought being vital guarantees of almost all democratic jurisdictions, it is no surprise that a major concern for opponents of hate crime laws is their alleged infringement of such rights.[408] Succinctly, they consider "hate crimes" as "thought crimes," and hate crime laws "dangerously close to criminalization of speech and thought"[409]:

> Generic criminal laws already punish injurious conduct; so recriminalization or sentence enhancement for the same injurious conduct when it is motivated by prejudice amounts to extra punishment for values, beliefs and opinions that the government deems abhorrent. The critics ask: If the purpose of hate crime laws is to punish more severely offenders who are motivated by prejudices, is that not equivalent to punishing hate speech or hate thought? [410]

According to critics, in order to prove a defendant's intentional selection of his victim because of some trait, the prosecution would have to introduce evidence of the defendant's prior speech and associations. This evidentiary use would have a chilling effect on those who feared the possibility of prosecution for offenses subject to hate crimes,[411] infringing upon their right to free speech.

1. American Jurisprudence

American courts, responding to allegations of overbroad and vague hate crime laws infringing on free speech, "have held that particular ethnic intimidation, hate crimes, and like statutory schemes were not violative of First

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[407] State v. Mitchell, 485 N.W.2d 807, 169 Wis. 2d 153, 163-164 (Wis. 1992).

[408] *See, generally, Mitchell,* 169 Wis. 2d at 164-172; Gellman, *supra* note 335.

[409] Gellman, *supra* note 335, at 334.

[410] JACOBS & POTTER, *supra* note 39, at 121.

[411] This was the argument used against Wisconsin's hate crime law in *Wisconsin v. Mitchell,* 508 U.S. 47, 48 (1993).

Amendment freedoms, primarily on the basis that the provisions were aimed at conduct not protected by the First Amendment, and since the legislation prohibited reprehensible conduct instead of speech."[412]

The US Supreme Court's distinction between hate crime laws that are impermissible for punishing protected expression and those allowed as they are limited to unprotected conduct, though not without its critics,[413] appear to have largely foreclosed First Amendment challenges to penalty-enhancement statutes and "gave the states broad legal authority to write and pass penalty-enhancement statutes for criminal conduct inspired by prejudice."[414]

Beyond penalty-enhancement statutes, other State appellate and high courts have followed the distinctions made in *R.A.V.* and *Mitchell* and have upheld State statutes that punish specific behavior motivated by bias.[415] To date, the US Supreme Court has yet to grant certiorari on such rulings.[416] High courts in various states have found no significant differences between such statutes and the statute upheld in *Mitchell*, both similarly punishing a crime motivated by bias:

> Following this line of reasoning, the Maryland appellate court, for example, upheld a statute making it a crime to "harass or commit a crime upon a person [...] because of that person's race, color, religious belief or national origin.
>
> As the Supreme Court of Missouri summarized with regard to a similar statute, "While [the statute] admittedly created a new motive-based crime, its practical effect is to provide additional punishment for conduct that is already illegal but is seen as especially harmful because it is motivated by group hatred. *It is clear from Mitchell that enhanced punishment for criminal conduct on account of a defendant's motives of bias or hatred toward a protected group is consistent with the United States Constitution.*"[417]

As a consequence, care must be taken to distinguish between laws that validly target unprotected conduct and those that infringe upon the Constitution

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[412] Blum, *supra* note 327, at § 4.

[413] *See, e.g.*, LAWRENCE, *supra* note 81, at 90; JACOBS & POTTER, *supra* note 39, at 129.

[414] STREISSGUTH, *supra* note 169, at 62.

[415] BUREAU OF JUSTICE ASSISTANCE, *supra* note 3, at 31.

[416] *Id.*

[417] *Id.* at 32, *citing as examples* Ayers v. State, 645 A.2d 22, 33-35 (Md. 1994); State v. McKnight, 511 N.W.2d 389, 396 (Iowa 1994); State v. Mortimer, 641 A.2d 257, 261-264 (NJ 1994); State v. Vanatter, 869 S.W.2d 754, 757 (Mo. 1994). (Emphasis supplied.)

by proscribing protected speech.[418] The landmark cases of *R.A.V v. City of St. Paul, Minnesota* and *Wisconsin v. Mitchell* are discussed below.

i. *R.A.V v. City of St. Paul, Minnesota*

The very first US Supreme Court case dealing with a hate crime law was 1992's *R.A.V. v. City of St. Paul, Minnesota*,[419] where the Court examined legislation that made particular bias an element of a crime.

In the early morning hours of June 21, 1990, Robert Anthony Viktoria (a minor at the time) and several other teenagers allegedly assembled a cross by fastening broken chair legs with tape. The cross was erected and burned in the front yard of an African-American family living across the street from Viktoria. Viktoria was charged, *inter alia*, for a violation of the St. Paul Bias-Motivated Crime Ordinance, which provided:

> Whoever places on public or private property, a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.[420]

Viktoria sought to dismiss the charge under the Bias-Motivated Crime Ordinance on the ground that it was substantially overbroad and impermissibly content based, and therefore facially invalid under the US Constitution's First Amendment. The trial court granted the motion, but the Minnesota Supreme Court reversed, interpreting the ordinance as limited to so-called "fighting words" which "one knows or has reasonable grounds to know arouse anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." As the US Supreme Court had ruled more than 50 years previously in *Chaplinsky v. New Hampshire*[421] that such words were speech unprotected by the First Amendment, the Minnesota Supreme Court rejected the overbreadth claim. The State's Supreme Court also ruled that the ordinance was not impermissibly content-based because "the ordinance is a narrowly tailored means towards accomplishing the compelling governmental interest in protecting the community against bias-motivated threats to public safety and order." Viktoria

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[418] Blum, *supra* note 327, at § 4.

[419] R.A.V. v. City of St. Paul, Minnesota, 505 U.S. 377 (1992).

[420] St. Paul, Minn., Legis. Code § 292.02 (1990).

[421] 315 U.S. 568, 573 (1942). The defendant in this case was convicted of issuing an insult after calling a city marshall a "racketeer" and a "damned fascist".

appealed, and the US Supreme Court granted certiorari, eventually unanimously striking down the ordinance as unconstitutional.

The Court ruled that while it is well-within the government's authority to deem constitutionally-unprotected "fighting words" as unlawful, such authority could not be exercised in such a way that criminalizes only some of these that contain ideas that the government disfavors.[422] The majority noted that fighting words expressing hostility toward a person due to his or her sexual orientation or political affiliation were not prohibited by the city ordinance, while those expressing racial, gender, or religious intolerance were, a "selectivity" that "creates the possibility that the city is seeking to handicap the expression of particular ideas," a selection that is not content-neutral.[423] Justice Scalia asserted that St. Paul's law unconstitutionally permitted persons on one side of a debate to speak freely while stifling the other side's response, holding, in the most-cited part of the decision that "St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules."[424]

It seemed to critics that the *R.A.V.* decision sounded a death knell for hate crime laws.[425] Opponents of hate crime laws "were bolstered in their opinion that ordinary laws against criminal behavior would have to be sufficient without referring to racial, ethnic, or religious prejudice,"[426] after the Supreme Court held that while burning a cross in someone's front yard is reprehensible, "St. Paul has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire."[427]

R.A.V., however, focused on content-based restrictions and did not address the constitutionality of other types of hate crime legislation. Justice Scalia "distinguished impermissible content-based restrictions from other restrictions, such as laws against treason, that are 'directed not against speech but against conduct,'" but did not rule on the latter class.[428] The jealous defense of expression in *R.A.V.*, thus, did not hold when the Supreme Court provided clarification in passing upon the constitutionality of a statute that enhanced the

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[422] *R.A.V.*, 505 U.S. at 391.
[423] *Id.* at 394.
[424] *Id.* at 392.
[425] JACOBS & POTTER, *supra* note 39, at 129.
[426] STREISSGUTH, *supra* note 169, at 60.
[427] *R.A.V.*, 505 U.S. at 396.
[428] LAWRENCE, *supra* note 81, at 90.

penalty for otherwise criminal behavior motivated by prejudice in *Wisconsin v. Mitchell*.[429]

ii. *Wisconsin v. Mitchell*

In October 1989, Todd Mitchell was with a group of other African American individuals in an apartment complex in Kenosha, Wisconsin. The group was indoors, discussing the film *Mississippi Burning*, focusing specifically a scene in which a white man beat a young black boy who was praying. Later moving outside the complex, the group was joined by Mitchell in further discussing the scene. Seeing that the group was enraged, Mitchell asked the group, "Do you all feel hyped up to move on some white people?"[430]

A few minutes later, Gregory Reddick, a white boy, approached the group from across the street. As the boy walked by, Mitchell turned to the group and remarked, "You all want to fuck somebody up? There goes a white boy; go get him." Mitchell counted to three and pointed toward the boy. The group ran toward the boy and beat him severely, sending him into a coma for four days.

Mitchell was subsequently convicted of aggravated battery, normally carrying a penalty of two years' imprisonment. Wisconsin law, however, provides that "the maximum period of imprisonment prescribed by law for the crime may be increased by not more than 5 years" if the felon "[i]ntentionally selects the person against whom the crime [...] is committed [...] in whole or in part because of the actor's belief or perception regarding the race, religion, color, disability, sexual orientation, national origin or ancestry of that person."[431] Mitchell was accordingly sentenced to four years' imprisonment.

Mitchell appealed and, arguing that the penalty-enhancement provision violated the First Amendment by punishing offensive thought, initially found success with the Wisconsin Supreme Court:

> On the day after the R.A.V. decision was issued by the U.S. Supreme Court, the Wisconsin Supreme Court issued a ruling in Wisconsin v. Mitchell that the State's hate crimes law violated the defendant's right to free speech. According to the court, the law violated the first amendment because the State imposed additional penalties solely because of the defendant's biased motivation in committing the crime.

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[429] Wisconsin v. Mitchell, 508 U.S. 476 (1993).
[430] *Id.* at 479-481.
[431] WIS. STAT. § 939.645.

> "A statute that is designed to punish personal prejudice impermissibly infringes upon an individual's first amendment rights," the court said. Relying on Scalia's majority opinion in R.A.V., the court concluded that the hate crime law was unconstitutional because it singled out the defendant's biased thoughts and penalized him based upon the content of those thoughts.[432]

Mitchell would not find similar success when the case was elevated on certiorari. Responding to Mitchell's argument that the Wisconsin penalty enhancement statute is invalid because it punishes the defendant's thoughts—his discriminatory motive, or reason, for acting—the unanimous Court through Chief Justice William Rehnquist drew from two analogies to rebuff him: "the role that motive plays in (1) criminal sentencing and (2) federal and state anti-discrimination laws."[433]

Where sentencing is concerned, the Court noted that considering motive in sentencing is not novel:

> Traditionally, sentencing judges have considered a wide variety of factors in addition to evidence bearing on guilt in determining what sentence to impose on a convicted defendant. The defendant's motive for committing the offense is one important factor. Thus, in many states the commission of a murder, or other capital offense, for pecuniary gain is a separate aggravating circumstance under the capital-sentencing statute. [434]

While cautioning that taking into account the defendant's associations and abstract beliefs (and nothing more) in sentencing was repugnant to the First Amendment, the Court however held that the US Constitution does not preclude evidence concerning one's beliefs and associations at sentencing if those beliefs and associations are in some way related to the commission of the crime:

> [A] defendant's abstract beliefs, however obnoxious to most people, may not be taken into consideration by a sentencing judge. xxx however, "the Constitution does not erect a per se barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment." Thus, in Barclay v. Florida, we allowed the sentencing judge to take into account the defendant's racial animus

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[432] BUREAU OF JUSTICE ASSISTANCE, *supra* note 3, at 31.
[433] State v. McKnight, 511 N.W.2d 389, 394 (Iowa 1994).
[434] *Mitchell*, 508 U.S. at 476.

> towards his victim. The evidence in that case showed that the defendant's membership in the Black Liberation Army and desire to provoke a "race war" were related to the murder of a white man for which he was convicted. Because "the elements of racial hatred in [the] murder" were relevant to several aggravating factors, we held that the trial judge permissibly took this evidence into account in sentencing the defendant to death.[435]

Moving on to the role of motive in anti-discrimination laws, the Court next drew a parallel between motive in hate crime laws and anti-discrimination laws: "motive plays the same role under the Wisconsin statute as it does under federal and state anti-discrimination laws, which we have previously upheld against constitutional challenge."[436] In the anti-discrimination law cases cited, the laws' opponents argued that discrimination may be characterized as a form of exercising the freedom of association protected by the First Amendment. To this the Court replied that such conduct had "never been accorded affirmative constitutional protections," and concluded that "the Constitution places no value on discrimination." By analogy, therefore, hate crimes are argued to be a form of exercising the freedom of speech, expression, or thought protected by the First Amendment, but rejected by the Court as unprotected conduct.

The Court next distinguished *Mitchell* from *R.A.V.*, finding that the St. Paul ordinance targeted expression, which is protected by the first amendment, while the Wisconsin statute is aimed at conduct not protected by the Constitution:

> Nothing in our decision last Term in R.A.V. compels a different result [the upholding of anti-discrimination statutes] here. That case involved a First Amendment challenge to a municipal ordinance prohibiting the use of "'fighting words' that insult, or provoke violence, 'on the basis of race, color, creed, religion or gender.'" Because the ordinance only proscribed a class of "fighting words" deemed particularly offensive by the city - i.e., those "that contain [...] messages of 'bias-motivated' hatred," we held that it violated the rule against content-based discrimination. *But whereas the ordinance struck down in R.A.V. was explicitly directed at expression, the statute in this case is aimed at conduct unprotected by the First Amendment.*[437]

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[435] *Id.* at 485-486.
[436] *Id.* at 487.
[437] *Id.* at 487. (Emphasis supplied.)

As contrasted from *R.A.V.*, the *Mitchell* Court also saw Wisconsin's penalty enhancement statute as involving legitimate state interest, over and above the State's mere disagreement with bigoted thoughts, and thus valid:

> Moreover, the Wisconsin statute singles out for enhancement bias-inspired conduct because this conduct is thought to inflict greater individual and societal harm. For example, according to the State and its *amici*, bias-motivated crimes are likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest. *The State's desire to redress these perceived harms provides an adequate explanation for its penalty-enhancement provision over and above mere disagreement with offenders' beliefs or biases.* [438]

Mitchell was also unsuccessful in arguing that "the statute is 'overbroad' because evidence of the defendant's prior speech or associations may be used to prove that the defendant intentionally selected his victim on account of the victim's protected status." [439] The argument would hold that "the statute impermissibly chills free expression with respect to such matters by those concerned about the possibility of enhanced sentences if they should, in the future, commit a criminal offense covered by the statute." [440] Chief Justice Rehnquist rejected the feared chilling effect as too speculative:

> [T]he prospect of a citizen suppressing his bigoted beliefs for fear that evidence of such beliefs will be introduced against him at trial if he commits a more serious offense against person or property [...] is simply too speculative a hypothesis to support Mitchell's overbreadth claim.
>
> The First Amendment, moreover, does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent. Evidence of a defendant's previous declarations or statements is commonly admitted in criminal trials subject to evidentiary rules dealing with relevancy, reliability, and the like. [441]

2. Philippine Jurisprudence

Every Philippine Organic Law and Constitution since the American regime has adopted the guarantee of free speech from our American colonizers in an almost verbatim fashion. Efforts to reformulate this guarantee enshrined in

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[438] *McKnight*, 511 N.W.2d at 395, *citing Mitchell*, 508 U.S. at 487-488.

[439] *Mitchell*, 508 U.S. at 488. (Emphasis supplied.)

[440] *Id.*

[441] *Id.* at 488-489.

Article II, Section 4 of the 1987 Constitution were in fact rejected, as explained by Commissioner Fr. Joaquin Bernas, S.J. that "[t]he sentiment was that the provision had become the subject of an extensive body of jurisprudence, both Philippine and American, and should be preserved."[442] Therefore, given the acknowledgment by the framers of the Philippine charter that the guarantees of free speech and expression derive its definitions and limitations at least in part from American jurisprudence,[443] American cases dealing with First Amendment challenges to hate crime laws should be enlightening and of very persuasive authority.

This being the case, it is submitted that the legal reasoning used in both the *R.A.V* and *Mitchell* decisions will be persuasive and applicable to a free speech-based legal challenge posed to a Philippine counterpart to the questioned laws as cases on all fours with such a challenge. It is doubtful that a legal challenge based on free speech will prosper at the Philippine Supreme Court, presaging from its rulings on recent free speech challenges raised against penal laws.

These cases reveal the Philippine Supreme Court's stand that claims of vagueness and overbreadth are inapplicable in "facial" challenges[444] against criminal laws. Indeed, penal laws are completely immune from overbreadth challenges, and while vagueness challenges are entertained "as applied"[445] to particular plaintiffs, "the Court has not declared any penal law unconstitutional on the ground of ambiguity."[446] These doctrinal rulings appear to translate to

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[442] BERNAS, *supra* note 365, *citing* I RECORD CONSTI. COMM'N 758-760. During the proceedings, Fr. Bernas describes the provision as having been "subject of extensive jurisprudence explaining what it means, what its limitations are."

[443] I RECORD CONST. COMM'N 760. Deliberations in the Constitutional Commission recognized that the right to free speech was "well-understood not only in American Jurisprudence but also in Philippine Jurisprudence."

[444] Romualdez v. Comm'n on Elections, G.R. No. 167011, 553 SCRA 370, 418 n.35, Apr. 30, 2008, *citing* David v. Macapagal-Arroyo, G.R. No. 171396, 489 SCRA 160, May 3, 2006. "A facial invalidation or a line-by-line scrutiny is an examination of the entire law, pinpointing its flaws and defects, not only on the basis of its actual operations to the parties involved, but on the assumption or prediction that its very existence may cause others not before the court to refrain from constitutionally protected speech, or on the ground that they may be applied to others not before the court whose activities are constitutionally protected."

[445] *Id.* at 436 (Carpio, J., *dissenting*). In contrast to "facial" challenges, "as applied" challenges require plaintiffs to assert that a statute violates his own constitutional rights.

[446] Romualdez v. Sandiganbayan, G.R. No. 152259, 435 SCRA 371, 383, July 29, 2004, *citing* Estrada v. Sandiganbayan, G.R. No. 148560, 369 SCRA 394, 503-504, Nov. 19, 2001 (Panganiban, J., *concurring*); Nesrin B. Cali, *The Void-For-Vagueness Doctrine in the Philippine Supreme Court,* 53 UST L. REV.115, 139 (2009).

upholding a future Philippine hate crime law against challenges on these grounds.

i. *Adiong v. Commission on Elections*

The first noteworthy application of such doctrines under the new dispensation was under *Adiong v. Commission on Elections,*[447] involving a Commission on Elections (COMELEC) resolution prohibiting the posting of decals and stickers on cars, *calesas*, tricycles, pedicabs and other moving vehicles. The Court struck down the resolution for overbreadth, describing a statute as void for overbreadth "when 'it offends the constitutional principle that a governmental purpose to control or prevent activities constitutionally subject to state regulations may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.'"[448]

Adiong is of limited use for purposes of hate crime laws apart from the definition provided, since the law assailed in the case was a COMELEC resolution. As it concerned restrictions upon election campaigning, moreover, *Adiong* involved free speech rights and implicated a different kind of analysis as opposed to penal laws. More relevant for this work are *Estrada v. Sandiganbayan*, *Romualdez v. Sandiganbayan,* and *David v. Macapagal-Arroyo*, all of which deal with overbreadth and vagueness challenges to laws or issuances relating to crime.

ii. *Estrada v. Sandiganbayan*

After President Joseph Estrada's ouster in 2001, charges were soon brought before the Sandiganbayan—the anti-graft court—for several offenses allegedly committed while in office. The most serious of these was for plunder under Republic Act ("R.A.") No. 7080, the Anti-Plunder Law. Estrada moved to quash the information, arguing that Section 1, pars. (d), 2 and 4 of the Anti-Plunder Law were vague and overbroad, and thus offensive to the Constitution.

The Court, adopting the observations of Justice Vicente V. Mendoza, acknowledged that a statute may be challenged as vague or overbroad because of a possible "chilling effect."[449] However, it held that such rationale does not apply to penal statutes, premised on the apprehension that "[c]riminal statutes have general *in terrorem* effect resulting from their very existence, and, if facial

[447] Adiong v. Comm'n on Elections, G.R. No. 103956, 207 SCRA 712, 719-720, Mar. 31, 1992.

[448] *Id.* at 716, *citing* Zwickler v. Koota, 389 US 241, 250 (1967).

[449] Estrada v. Sandiganbayan, G.R. No. 148560, 369 SCRA 394, 441, Nov. 19, 2001.

challenge is allowed for this reason alone, the State may well be prevented from enacting laws against socially harmful conduct."[450] The Court ruled that "[i]n the area of criminal law, the law cannot take chances as in the area of free speech," citing American jurisprudence to the same effect.[451]

Summing up its ruling on the matter, the Court in *Estrada* held that "the doctrines of [...] overbreadth, and vagueness are analytical tools developed for testing 'on their faces' statutes in free speech cases or, as they are called in American law, First Amendment cases. They cannot be made to do service when what is involved is a criminal statute."[452] No license to create vague laws was given, however, as challenges of vagueness "as applied" are still recognized.[453]

iii. *Romualdez v. Sandiganbayan*

The decision in *Romualdez v. Sandiganbayan* was a reiteration of *Estrada*'s ruling, establishing that doctrinal rule in Philippine case law. Charged for violating Section 5 of R.A. No. 3019 (the Anti-Graft and Corrupt Practices Act), Alfredo Romualdez assailed the constitutionality of the said provision, calling it "impermissibly broad."[454]

Repeating its *Estrada* ruling that "the overbreadth and the vagueness doctrines have special application only to free-speech cases" and "are not appropriate for testing the validity of penal statutes,"[455] the decision also re-emphasized the Court's historical unwillingness to void statutes "on their faces" for vagueness.[456]

To end its disquisition on the inapplicability of facial challenges via the overbreadth and vagueness doctrines on penal laws, the Court in *Romualdez* concludes that "[a]s conduct—not speech—is its object, the challenged provision must be examined only 'as applied' to the defendant, herein petitioner, and should not be declared unconstitutional for overbreadth or vagueness."[457]

iv. *David v. Macapagal-Arroyo*

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[450] *Id.*

[451] *Id.* (Citations omitted.)

[452] *Id.* at 442.

[453] *Id.*

[454] Romualdez v. Sandiganbayan, G.R. No. 152259, 435 SCRA 371, 381, July 29, 2004.

[455] *Id.* at 381-382.

[456] *Id.* at 383-384. (Citations omitted.)

[457] *Id.* at 384.

The Court grappled with overbreadth again in *David v. Macapagal-Arroyo*,[458] where Professor Randolf David, among others, questioned the validity of several presidential issuances promulgated in view of threats to the government. Presidential Proclamation ("P.P.") No. 1017, declaring a state of national emergency, together with General Order No. 5, implementing said presidential proclamation and directing the AFP and the PNP to immediately carry out the necessary and appropriate actions and measures to suppress and prevent acts of terrorism and lawless violence, was assailed as void on its face because of its being "overbreadth." Professor David and the other petitioners claimed that enforcing P.P. No. 1017 affected not only unprotected conduct but infringed on rights protected by Section 4, Article III of the Constitution as well, sending a "chilling effect" to the citizens.

While not citing its earlier majority decision in *Estrada* but rather the Concurring Opinion penned by Justice Mendoza in the same case, the Court reiterated that "[f]irst and foremost, the overbreadth doctrine is an analytical tool developed for testing 'on their faces' statutes in free speech cases, also known under the American Law as First Amendment cases."[459] The Court observed that to begin with, the proclamation in question is not primarily directed to speech or even speech-related conduct, but actually a call upon the AFP to prevent or suppress all forms of lawless violence.[460]

More importantly, the Court cited *Broadrick v. Oklahoma*[461] and held that "the overbreadth doctrine is not intended for testing the validity of a law that 'reflects legitimate state interest in maintaining comprehensive control over harmful, constitutionally unprotected conduct'".[462]

Dismissing the overbreadth challenge to P.P. No. 1017's provisions against "acts of terrorism and lawless violence," the Court ruled that "claims of facial overbreadth are entertained in cases involving statutes which, by their terms, seek to regulate only 'spoken words' and again, that 'overbreadth claims, if entertained at all, have been curtailed when invoked against ordinary criminal laws that are sought to be applied to protected conduct.'" [463] It was incontrovertible for the court that P.P. No. 1017 pertained to a "spectrum of

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[458] David v. Macapagal-Arroyo, G.R. No. 171396, 489 SCRA 160, May 3, 2006.
[459] *Id.* at 236.
[460] *Id.*
[461] Broadrick v. Oklahoma, 413 U.S. 601 (1973).
[462] David v. Macapagal-Arroyo, 489 SCRA at 236.
[463] *Id.* at 237.

conduct, not free speech, which is manifestly subject to state regulation," and thus beyond the pale of an overbreadth challenge.[464]

3. Dissents, Refutation, and Judicial Currency

The doctrinal rulings made in *Estrada*, *Romualdez*, and *David* had their share of dissenters.

In *Estrada*, Justice Kapunan acknowledged that "the doctrine of overbreadth applies generally to statutes that infringe upon freedom of speech,"[465] but argued that the void-for-vagueness doctrine, distinct from overbreadth, "applies to criminal laws, not merely those that regulate speech or other fundamental constitutional rights."[466] "It is an erroneous argument that the Court cannot apply the vagueness doctrine to penal laws. Such stance is tantamount to saying that no criminal law can be challenged however repugnant it is to the constitutional right to due process."[467]

Justice Tinga echoes Justice Kapunan in his dissents in *Romualdez*[468] and *David*.[469] Citing American cases, he argued that vagueness may be used to strike down penal statutes: "Granting that perhaps as a general rule, overbreadth may find application only in 'free speech' cases, it is on the other hand very settled doctrine that a penal statute regulating conduct, not speech, may be invalidated on the ground of 'void for vagueness.'"[470]

Those in the majority, however, clarify that the unavailability of vagueness challenges is limited only to "facial" challenges of penal laws, and thus refute the dissenters' allegation of an erroneously sweeping doctrine on vagueness.[471] The majority emphasizes that while a penal law may not be invalidated facially or "on-its-face" via vagueness or overbreadth challenges,

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[464] *Id.*

[465] Estrada v. Sandiganbayan, G.R. No. 148560, 369 SCRA 394, 529, Nov. 19, 2001 (Kapunan, *J.*, *dissenting*), *citing* IV RONALD ROTUNDA, ET AL., TREATISE ON CONSTITUTIONAL LAW – SUBSTANCE AND PROCEDURE 25-31, 36-37 (1992) and LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1033 (2nd ed. 1998).

[466] *Estrada,* 369 SCRA at 529.

[467] *Id., citing* Lanzetta v. New Jersey, 306 U.S. 451, 458 (1939).

[468] Romualdez v. Sandiganbayan, G.R. No. 152259, 435 SCRA 371, 395, July 29, 2004 (Tinga, *J.*, *dissenting*).

[469] David v. Macapagal-Arroyo, 489 SCRA 160, 282, May 3, 2006 (Tinga, *J.*, *dissenting*).

[470] *Id.* at 313.

[471] Romualdez v. Comm'n on Elections (Resolution on the Motion for Reconsideration), G. R. No. 167011, 573 SCRA 639, 643-645, Dec. 11, 2008.

such a law may still be challenged for vagueness as applied to extant facts affecting real litigants.

Thus, after *Estrada*, *Romualdez*, and *David*, the doctrine that the overbreadth and (facial) vagueness challenges cannot be made against penal statutes still hold some jurisprudential value.

In the 2008 case of *Romualdez v. Commission on Elections*,[472] concerning the penal provisions of R.A. No. 8189 (the Voter's Registration Act of 1996), the Court reiterated *Estrada*, *Romualdez*, and *David* as against facial vagueness challenges, reminding the petitioners that "facial invalidation or an 'on-its-face' invalidation of criminal statutes is not appropriate."[473] Subsequently, in the 2010 case of *Southern Hemisphere Engagement Network, Inc. v. Anti Terrorism Council*,[474] involving the constitutionality of the Human Security Act of 2007, the Court through Justice Carpio-Morales affirmed Justice Mendoza's previous stand in *Estrada*:

> Justice Mendoza accurately phrased the subtitle in his concurring opinion that the vagueness and overbreadth doctrines, *as grounds for a facial challenge*, are not applicable to *penal* laws. *A litigant cannot thus successfully mount a facial challenge against a criminal statute on either vagueness or overbreadth grounds.*
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> * * *
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> It is settled [...] that *the application of the overbreadth doctrine is limited to a facial kind of challenge and, owing to the given rationale of a facial challenge, applicable only to free speech cases.*[475]

Like the majority in *Romualdez v. Sandiganbayan*, *Southern Hemisphere* makes it a point to distinguish between "facial" and "as-applied" challenges, as well as to underscore that vagueness challenges are still available in the latter category.[476] Assailing penal laws on this basis, however, is "legally impermissible absent an actual or imminent charge" against the plaintiff,[477] as "statutes found vague as a matter of due process typically are invalidated only 'as applied' to a particular

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[472] Romualdez v. Comm'n on Elections, G.R. No. 167011, 553 SCRA 370, Apr. 30, 2008, *cited in* Nesrin B. Cali, *The Void-For-Vagueness Doctrine in the Philippine Supreme Court,* 53 UNIV. SANTO TOMAS L. REV. 115, 153 (2009).

[473] *Id.* at 418.

[474] Southern Hemisphere Engagement Network, Inc. v. Anti Terrorism Council, G.R. No. 178552, 632 SCRA 146, Oct. 5, 2010.

[475] *Id.* at 186-187.

[476] *Id.* at 189.

[477] *Id.*

defendant."[478] American case law on such "as applied" vagueness challenges—due process challenges—to hate crime laws, as well as Philippine jurisprudence on the same vis-à-vis penal laws, are discussed *infra.*

B. Challenges to the Admissibility of Evidence of Motive

Related to First Amendment challenges and "thought crime" allegations against hate crime laws are challenges to the admissibility of evidence of motive. As a bias motivation is an essential element of a hate crime, such evidence is a condition *sine qua non* for these acts' identification and successful prosecution. The relevance and admissibility of the same have not gone uncontested, as illustrated in the cases of *Mitchell* and *In re Joshua H.*

The *Mitchell* case was concerned with motive. First, the defendant argued that the Wisconsin penalty enhancement statute was invalid because it punishes the defendant's discriminatory motive, or reason, for acting. The unanimous Court drew a parallel between motive in hate crime laws and anti-discrimination laws: "motive plays the same role under the Wisconsin statute as it does under federal and state anti-discrimination laws, which we have previously upheld against constitutional challenge."[479] Thus, while hate crimes were argued to be a form of exercising the freedom of speech, expression, or thought protected by the First Amendment (similar to how discrimination was characterized in previous cases), these acts were rejected by the Court as unprotected conduct.

As regards the admissibility of evidence on motive, it was held that while taking into account the defendant's associations and abstract beliefs (and nothing more) in sentencing was repugnant to the First Amendment, the US Constitution does not preclude evidence concerning one's beliefs and associations at sentencing if those beliefs and associations are in some way related to the commission of the crime.[480]

In the case of *In re Joshua H.,*[481] Joshua H. (the juvenile defendant) and his family lived across the street from the victim William Kiley, a gay man. Kiley also owned a rental unit directly adjacent to Joshua H.'s home. When Kiley mowed his tenant's lawn, grass clippings blew onto the H's driveway, angering

[478] *Id., citing* Estrada v. Sandiganbayan, 421 Phil. 290, 355 (2001).

[479] Wisconsin v. Mitchell, 508 U.S. 476, 487 (1993).

[480] *Id.* at 485-486.

[481] *In re* Joshua H., 13 Cal. App. 4th 1734, 1739-1741 (Cal. Ct. App. 1993), *cited in* Blum, *supra* note 327, § 11.

the defendant and his family. The issue of grass clippings became such a heated issue that Kiley ultimately stopped mowing the grass.

As the defendant and his family constantly harassed him because of his sexual orientation, Kiley decided to obtain videotaped proof. He again mowed the lawn at his rental and eventually a fight broke out between the juvenile and the victim, an altercation which was captured on videotape:

> It showed an agitated Joshua dancing around Kiley like a boxer, yelling at him to clean up the grass clippings, and pointing at his driveway for approximately one and one-half minutes. During this time Joshua repeatedly called Kiley a "faggot," "queer," and "punk." He taunted Kiley, "come on, let's get it on you faggot queer." After Kiley ordered Joshua to "[g]et off my property," Joshua hit him. Kiley did not respond at first, but then he squirted Joshua with the hose. Joshua became enraged. He took off his shirt, threw it on the car in his driveway, then came after Kiley, hitting and kicking him several times. Kiley never hit back.
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> During the altercation, Joshua's mother and sisters came outside, and then his father joined them. Mr. H. said he didn't want to talk to Kiley. Mrs. H., however, called him a "fucking ass hole." As the battered Kiley was returning home, Joshua yelled out, "Where are you going, faggot, you going to suck some faggot dick?"[482]

Joshua H. was successfully prosecuted under California's hate crime law, which permitted a misdemeanor to be punished as a felony "if the crime is committed [...] because of the other person's race, color, religion, ancestry, national origin, or sexual orientation." On appeal, Joshua H. contended that while his so–called "hate" motivation may properly be considered in sentencing, his motive may not be used as an element of a substantive criminal offense.

The California Court of Appeals pointed out that an actor's reason for acting is not always irrelevant in criminal or civil law:

> [I]t is not true that an actor's reason for acting is never relevant in criminal or civil law. The same conduct may be punished differently depending on the reason the defendant acted, i.e., the defendant's mental state, or mens rea. For example, a homicide may be charged as first degree murder, second degree murder, voluntary manslaughter, or involuntary manslaughter, or it may be excused altogether, depending on the perpetrator's motive. Another example is breaking and

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[482] *Id.* at 1740.

> entering, which is punished more severely if done to commit a felony; yet another example is kidnapping, which is punished more severely where the kidnapping is done to commit a sex crime.
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> Motive is also relevant in the anti-discrimination laws. The same act (e.g., refusing to rent to an African-American) is permissible if based on the applicant's poor credit history but is not if based on the applicant's race. "Anti-discrimination statutes do not," Justice Bablitch pointed out, "prohibit a person from not hiring someone of a protected class, they prohibit a person from not hiring someone of a protected class because or on the basis of his or her protected class."[483]

Countering other State Courts which at that time had determined that "motive" was what was being punished by their respective hate crime statutes and that motive could not be an element of a criminal offense, the Court held that the critical inquiry "is whether the government has a legitimate interest in distinguishing one act from another on the basis of the element at issue, whether the element be labeled 'intent' or 'motive.'"[484] Where hate crimes are concerned, this legitimate interest is very present:

> In the case of hate crime legislation, the government has a legitimate and even compelling interest in distinguishing between acts of violence randomly committed and acts of violence committed because the victim is a member of a racial, religious or other protected group. It is the *selection* of a victim because of his or her race or other status, not the *reason* for that selection (intolerance, xenophobia, vengeance, fear, to impress others, and so forth) that triggers the additional punishment imposed by the hate crime statutes. *Whether the perpetrator's intentional selection is denominated his or her "intent" or his or her "motive," it is relevant and may properly be considered in determining guilt.*[485]

The *Joshua H.* Court's pronouncement that "[t]he same conduct may be punished differently depending on the reason the defendant acted" holds true under the Philippines' criminal law. One only needs to look at our Penal Code's Aggravating Circumstances to confirm that penalties for similar felonies will be increased if "committed in consideration of a price, reward, or promise."[486] On the other hand, persons who act "in defense of the person or rights of a stranger" will not incur any criminal liability under Article 12 of the same Penal

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[483] *Id.* at 1751. (Emphasis supplied.)

[484] Blum, *supra* note 327, § 11.

[485] *In re Joshua H.*, 13 Cal. App. 4th at 1751-1752. (Emphasis supplied.)

[486] REV. PEN. CODE, art. 14, ¶ 11.

Code, but only if "the person defending be not induced by revenge, resentment, or other evil motive."[487]

Under the same Penal Code, homicide is qualified to murder if committed "in consideration of a price, reward, or promise,"[488] while the penalty for kidnapping and serious illegal detention immediately becomes death if committed "for the purpose of extorting ransom from the victim or any other person."[489] Meanwhile, illegal possession of firearms, highway robbery, arson, and other specified crimes under the Human Security Act of 2007 will be treated as the crime of Terrorism and punished much more severely if committed "in order to coerce the government to give in to an unlawful demand."[490]

Aside from the motive-based differentials in penalties, jurisprudence instructs that while "[m]otive is not an essential element of a crime, and, hence, need not be proved for the purpose of conviction,"[491] motive can nonetheless become relevant in criminal prosecutions. For example, "[w]here the identity of a person accused of having committed a crime is in dispute, the motive that may have impelled its commission is very relevant."[492] Moreover, motive has been held "important in ascertaining the truth between two antagonistic theories or versions"[493] of a crime, and essential "if the evidence is merely circumstantial."[494]

Simply put, motives are relevant in Philippine criminal law. Relevance notwithstanding, it would be better to note, like the California Court, that "[i]t is the *selection* of a victim because of his or her race or other status, not the *reason* for that selection (intolerance, xenophobia, vengeance, fear, to impress others, and so forth) that triggers the additional punishment imposed by the Hate Crime statutes."[495]

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[487] REV. PEN. CODE, art. 12, ¶ 3.

[488] REV. PEN. CODE, art. 248, ¶ 2.

[489] REV. PEN. CODE, art. 267. However, note that while Article 267 of the RPC maintains the distinction between motives in kidnapping and their corresponding penalties, Republic Act No. 9346 (An Act Prohibiting the Imposition of Death Penalty in the Philippines) has since abolished capital punishment. This effectively makes the penalties for kidnapping with or without ransom the same under this article.

[490] Rep. Act No. 9372 (2007), § 3.

[491] I REYES, *supra* note 161, at 57, *citing* People v. Aposaga, G.R. No. 32477, 108 SCRA 574, 595, Oct. 30, 1981.

[492] *Id., citing* People v. Murray, 105 Phil. 591, 598 (1959).

[493] *Id., citing* People v. Boholst-Caballero, G.R. No. 23249, 61 SCRA 180, 191, Nov. 25, 1974; People v. Tabije, G.R. No. 36099, 113 SCRA 191, 197, Mar. 29, 1982.

[494] *Id., citing* People v. Oquiño, G.R. No. 37483, 122 SCRA 797, 808, June 24, 1983.

[495] *In re* Joshua H., 13 Cal. App. 4th 1734, 1751-1752 (1993). (Emphasis supplied.)

C. Due Process Challenges

In general, a statute or act may be said to be vague when it lacks comprehensible standards that men "of common intelligence must necessarily guess at its meaning and differ as to its application."[496] Such laws are held to be void, and this void-for-vagueness doctrine has been extended to criminal laws as a matter of due process:

> That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well recognized requirement consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.[497]

It has been further held that a vague penal statute is repugnant to the Constitution in two respects: "(1) it violates due process for failure to accord persons, especially the parties targeted by it, fair notice of the conduct to avoid; and (2) it leaves law enforcers unbridled discretion in carrying out its provisions and becomes an arbitrary flexing of the Government muscle."[498]

Defendants have frequently brought "as applied" challenges alleging that hate crime laws are constitutionally void for being vague.[499] Such suits complain that by their nature of looking into biased motivations, such laws are "nebulous and imprecise," inviting prosecution without standards and giving unlimited discretion on the trier of fact to determine whether an offense has been committed.[500] These objections have been mostly overruled, with courts holding that such laws not unconstitutionally vague, as long as the legislature is careful in wording them:

> Generally, the language of a "hate crimes" or similar statute, in order to sustain constitutional scrutiny, must be sufficiently explicit to inform those who are subject to it of what conduct on their part will

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[496] BERNAS, *supra* note 365, at 130, *citing* LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 718 (1978), *citing* Connally v. General Construction Co., 269 U.S. 385 (1926).

[497] Connally v. General Construction Co., 269 U.S. 385, 391 (1926).

[498] People v. Nazario, G.R. No. L-44143, 165 SCRA 186, 195, Aug. 31, 1988.

[499] Blum, *supra* note 327, § 4.

[500] *Id.*

> render them liable to its penalties. A "reasonable degree of certainty" about what conduct falls within the statute's prohibition is required, although "absolute certainty" is not. Moreover, in addition to giving fair notice of prohibited conduct, a criminal statute must not be so vague as to allow a judge or jury unbridled discretion to decide what conduct to punish.[501]

1. American Jurisprudence

i. *People of Michigan v. Richards*[502]

Defendant David Allen Richards confronted his neighbors, an African-American couple, and repeatedly threatened them while they were attempting to move out of their apartment. Richards' threats included statements such as "black motherfucker," "black sons of bitches," "half–breed baby," "[I'll] whip your black ass," and "[I'll] kill [your] nigger-loving whore." After that, the defendant also pounded on the victims' door, declaring that he had a gun with him and that he had "shot motherfuckers before." Richards proceeded to threatening to destroy the couple's property.

The victims persisted in their efforts to move out of their apartment, making a few more trips with belongings back and forth from their apartment complex until Richards, his girlfriend, and another male with a stick approached their vehicle. As Richards threatened to shoot them, the victims decided to drive off. The police arrived a short while after that, and upon seeing them, Richards continued to shout racial epithets. The defendant was convicted of ethnic intimidation pursuant to Michigan law[503] and was sentenced to one to two years of imprisonment. The case was appealed, Richards impugning the constitutionality of the ethnic intimidation statute and calling it "unconstitutionally vague."

The Michigan Supreme Court commented that a law may indeed be challenged if it is "so indefinite that it confers unstructured and unlimited discretion on the trier of fact to determine whether an offense has been

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[501] *Id.* at § 2[b].

[502] People v. Richards, 202 Mich. App. 377, 378 (Mich. Ct. App. 1993), *cited in* Blum, *supra* note 327 and STREISSGUTH, *supra* note 169, at 71.

[503] The Michigan Penal Code makes a person guilty of ethnic intimidation if that person maliciously, and with specific intent to intimidate or harass another person because of that person's race, color, religion, gender, or national origin, causes physical contact with another person, damages, destroys, or defaces any real or personal property of another person, or threatens, by word or act, to do so. MICH. COMP. LAWS 750.147b (1931)

committed."[504] In this case, however, the court concluded that the law in question does not give a trier of fact "unstructured and unlimited discretion"; such statute is satisfied "only when there is evidence of an underlying predicate criminal act committed because of racial animosity."[505] These two elements, according to the court, were "very clear and definite" in Richards' case.[506]

ii. *State of Oregon v. Plowman*[507]

Darin Dale Plowman and three other individuals drove to a store in Portland, Oregon to purchase beer. While two of their companions entered the store, the defendant Plowman and another individual remained outside in the parking lot. Serafin and Slumano, the victims, arrived at the store thereafter. One of the defendant's companions approached Serafin and asked him if he had any cocaine. Knowing very little English, the victim said he did not have any drugs and started to walk away. Plowman's companion then attacked Serafin, beating him on the head and kicking him. Meanwhile, Plowman and another companion began beating the second victim Slumano, who was at that time seated in his vehicle.

Eyewitnesses to the approximately two-minute attack heard the perpetrators shout "Talk in English, motherfucker," "white power" or "white pride" loud enough to be heard fifty feet away during the beating. Told by the store staff that the police had been alerted, the assailants became even more agitated and screamed, "They're just Mexicans" and "They're just fucking wetbacks." The perpetrators then sped away in their car, someone inside the car shouting "white power."

Convicted of assault and of intimidation under Oregon Statute Section 166.165(1)(a)(A),[508] Plowman challenged the intimidation law for violating the Due Process Clause because its terms were vague.[509]

The Oregon Supreme Court brushed aside Plowman's vagueness challenge. In order to withstand a vagueness challenge, the Court held that a statute that defines a criminal offense must give a person of ordinary intelligence

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[504] People v. Richards 202, Mich. App. 377, 379 (Mich. Ct. App. 1993).

[505] *Id.*

[506] *Id.*

[507] State v. Plowman, 838 P.2d 558, 560 (Or. 1992), *cited in* Blum, *supra* note 327, at § 4.

[508] OR. REV. STAT. § 166.165(1)(a)(A) makes it a crime for two or more persons, acting together, to "[i]ntentionally, knowingly, or recklessly cause physical injury to another because of their perception of that person's race, color, religion, national origin or sexual orientation."

[509] State v. Plowman, 838 P.2d 558, 561 (Or. 1992).

a reasonable opportunity to know what conduct is prohibited.[510] Further, the law must provide explicit standards so that those who enforce and apply the law do not do so in an arbitrary or discriminatory fashion.[511] Both these requirements were met by Oregon's law:

> The crime is defined in sufficiently clear and explicit terms to apprise defendant and others of what conduct is prohibited. ORS 166.165(1)(a)(A) prohibits two or more assailants, acting together, from causing physical injury to another because the assailants perceive the victim to belong to one of the specified groups. The challenged phrase means simply that the assailants' perception need not be accurate for them to have committed the crime of intimidation in the first degree. For example, if the assailants, acting together, intentionally cause physical injury to a victim because they perceive the victim to be Catholic, the assailants have committed the crime of intimidation in the first degree even if the victim is not in fact Catholic, but is instead Episcopalian.
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> * * *
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> The statute expressly and unambiguously requires the state to prove a causal connection between the infliction of injury and the assailants' perception of the group to which the victim belongs. The trier of fact must find all the essential elements of the crime beyond a reasonable doubt.[512]

iii. *State of Washington v. Talley*[513]

In April 1991, teenagers Daniel Myers and Brandon Stevens were at a party at one of their friends' home. The party conversation turned to Chris Elion, an African-American classmate. The group decided to burn a cross in the Elion family's yard, some of them feeling that Chris had been acting "too cool at school." They proceeded to fabricate a cross, planted it in the Elions' front yard, and attempted to set it on fire.

Charged with malicious harassment,[514] the defendants successfully impugned the law at the lower courts, arguing *inter alia* that that the meaning of

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[510] *Id.* at 562.

[511] *Id.*

[512] *Id.* at 561.

[513] State v. Talley, 858 P. 2d 217, 122 Wn.2d 192, 197-198 (Wash. 1993), *cited in* Blum, *supra* note 327, at § 4.

[514] The statute in question, WASH. REV. CODE § 9A.36.080 (1993), states: "(1) A person is guilty of malicious harassment if he maliciously and with the intent to intimidate or harass

the phrase "in a way that is reasonably related to, associated with, or directed toward" is unclear.[515]

The Washington Supreme Court, on review, noted that the federal test for vagueness applies: "statute must provide both adequate notice and standards to prevent arbitrary enforcement."[516] Further, the court pointed out that "the challenging party must prove unconstitutionality beyond a reasonable doubt."[517]

Conceding that in the case at bar, the challenged terms were not defined, the court nonetheless maintained that one needs only to look to the plain, ordinary meaning of the words to counter any allegation of vagueness:

> In ordinary usage, the court commented, the terms "related" and "associated" are synonymous and mean "connected" or "united" in purpose and interest. "Directed toward," the court added, means aimed at achieving an objective. When analyzing the wording of a statute, the court pronounced, the court will read the statute as a whole; applying the doctrine of ejusdem generis to the terms of the phrase under inquiry, the allegedly vague terms are to be interpreted in a manner consistent with the other words in the sequence, or, in this

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another person because of, or in a way that is reasonably related to, associated with, or directed toward, that person's race, color, religion, ancestry, national origin, or mental, physical, or sensory handicap:

(a) Causes physical injury to another person; or

(b) By words or conduct places another person in reasonable fear of harm to his person or property or harm to the person or property of a third person. Such words or conduct include, but are not limited to, (i) cross burning, (ii) painting, drawing, or depicting symbols or words on the property of the victim when the symbols or words historically or traditionally connote hatred or threats toward the victim, or (iii) written or oral communication designed to intimidate or harass because of, or in a way that is reasonably related to, associated with, or directed toward, that person's race, color, religion, ancestry, national origin, or mental, physical, or sensory handicap. However, it does not constitute malicious harassment for a person to speak or act in a critical, insulting, or deprecatory way unless the context or circumstances surrounding the words or conduct places another person in reasonable fear of harm to his or her person or property or harm to the person or property of a third person; or

(c) Causes physical damage to or destruction of the property of another person.

(2) The following constitute per se violations of this section:

(a) Cross burning; or

(b) Defacement of the property of the victim or a third person with symbols or words when the symbols or words historically or traditionally connote hatred or threats toward the victim.

(3) Malicious harassment is a class C felony."

[515] State v. Talley, 858 P. 2d 217, 122 Wn.2d 192, 212 (Wash. 1993).

[516] *Id.*

[517] *Id.*

> instance, the words "because of." In ordinary usage, the court explained, "because of" means "by reason of" or "on account of"; when read as a whole, then, this language is clear and provides adequate notice that the prohibited conduct is the selection of crime victims from certain specified categories.[518]

2. Application to the Philippines

Because the vagueness doctrine springs from the due process clause which was also lifted from the American Constitution's Fifth and Fourteenth Amendments into our own charter, it is submitted that the legal reasoning used in the *Richards, Plowman,* and *Talley* decisions will be persuasive and applicable to vagueness challenges posed to a Philippine counterpart to the questioned laws. Notwithstanding the fact that necessarily, the vagueness complained of in these American cases pertain to the particular wording of the impugned statutes, they provide support for hate crime laws in general as these should by definition contain the same elements.

Indeed, while the Philippine Supreme Court has noted that it has not declared any penal law unconstitutional on the ground of ambiguity,[519] recent Philippine case law on the vagueness of penal statutes shows a liberal tendency. In *Estrada*, the Court called for reasonableness and allowed some flexibility:

> [T]he "vagueness" doctrine merely requires a reasonable degree of certainty for the statute to be upheld—not absolute precision or mathematical exactitude, as petitioner seems to suggest. Flexibility, rather than meticulous specificity, is permissible as long as the metes and bounds of the statute are clearly delineated. An act will not be held invalid merely because it might have been more explicit in its wordings or detailed in its provisions, especially where, because of the nature of the act, it would be impossible to provide all the details in advance as in all other statutes.[520]

In the "as applied" challenge in *Romualdez v. Sandiganbayan*, meanwhile, the Court paralleled *Talley* in ruling that "[e]lementary is the principle that words should be construed in their ordinary and usual meaning":

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[518] Blum, *supra* note 327, at § 4, *citing* State v. Talley, 858 P. 2d 217, 122 Wn.2d 192, 213 (Wash. 1993),

[519] Romualdez v. Sandiganbayan, G.R. No. 152259, 435 SCRA 371, 383, July 29, 2004, *citing* Estrada v. Sandiganbayan, G.R. No. 148560, 369 SCRA 394, 503-504, Nov. 19, 2001 (Panganiban, J., *concurring*); Nesrin B. Cali, *The Void-For-Vagueness Doctrine in the Philippine Supreme Court,* 53 UNIV. SANTO TOMAS L. REV. 115, 139 (2009).

[520] Estrada v. Sandiganbayan, G.R. No. 148560, 369 SCRA 394, 440, Nov. 19, 2001

> A statute is not rendered uncertain and void merely because general terms are used therein, or because of the employment of terms without defining them; much less do we have to define every word we use. Besides, there is no positive constitutional or statutory command requiring the legislature to define each and every word in an enactment. Congress is not restricted in the form of expression of its will, and its inability to so define the words employed in a statute will not necessarily result in the vagueness or ambiguity of the law so long as the legislative will is clear, or at least, can be gathered from the whole act.
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> [I]t is a well-settled principle of legal hermeneutics that words of a statute will be interpreted in their natural, plain and ordinary acceptation and signification, unless it is evident that the legislature intended a technical or special legal meaning to those words. The intention of the lawmakers—who are, ordinarily, untrained philologists and lexicographers—to use statutory phraseology in such a manner is always presumed. [521]

Given that the recommended statutes provided by this inquiry use uncomplicated phraseology or at the very least those that have been used in statutes declared free from vagueness elsewhere or found in other domestic laws, construction in ordinary and usual meaning should be no problem.

D. Equal Protection Challenges

While hate crime laws have also been challenged on the grounds that their provisions violated equal protection rights, American courts have generally upheld these laws, holding that they do not violate equal protection rights "since there was a rational basis, in part to redress discrimination, for the distinctions drawn as to enhanced penalties where victims were selected by the defendants on the basis of the victims' race, gender, and the like."[522]

1. American Jurisprudence

i. *People of the State of New York v. Grupe*[523]

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[521] Romualdez v. Sandiganbayan, G.R. No. 152259, 435 SCRA 371, 387, July 29, 2004.

[522] Blum, *supra* note 327, at § 5.

[523] People v. Grupe, 532 N.Y.S.2d 815, 141 Misc. 2d 6, 7 (N.Y. Crim. Ct. 1988), *cited in* STREISSGUTH, *supra* note 169, at 67, and Blum, *supra* note 327, § 5.

Defendant Peter Grupe was charged with aggravated harassment under New York law[524] for striking his victim on the face and body while shouting ethnic slurs directed toward the latter, including "[i]s that the best you can do? I'll show you Jew bastard."[525] Grupe sought the charge's dismissal, *inter alia*, on equal protection grounds. He argued that "[s]imilar conduct involving harassment not based upon the race or ethnicity of the victim is a noncriminal offense punishable by no more than 15 days in jail," while his charge of aggravated harassment may lead to a one-year prison term.[526]

The court rebuffed Grupe's equal protection argument, pointing out that the legislature's classification of bias-motivated harassment as a distinct offense carrying a different grade of punishment was a rational exercise of its functions, based on observed trends:

> [T]he Legislature's determination to classify bias-motivated harassment as a different grade of offense carrying a different grade of punishment is a rational exercise of that body's functions. The Legislature was aware of increasing problems of bias-related violence and, given the emotional as well as physical scars left by such acts, reasonably determined to impose greater punishment for them.
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> Furthermore, there is a rational basis for the Legislature to have concluded that the measure was necessary to redress past discrimination against racial and ethnic minorities which had engendered violence and physical intimidation of individual members of such groups.
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> For these reasons, defendant's motion to dismiss on equal protection grounds must be denied.[527]

ii. State of Oregon v. Beebe[528]

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[524] N.Y. PENAL LAW § 240.30(3). "A person is guilty of aggravated harassment in the second degree when, with intent to harass, annoy, threaten or alarm another person, he [...] 3. Strikes, shoves, kicks, or otherwise subjects another person to physical contact, or attempts or threatens to do the same because of the race[,] color, religion or national origin of such person."

[525] People v. Grupe, 532 N.Y.S.2d 815, 141 Misc. 2d 6, 7 (N.Y. Crim. Ct. 1988).

[526] *Id.*

[527] *Id.* at 13.

[528] State of Oregon v. Beebe, 680 P.2d 11, 12 (Or. Ct. App. 1984), *cited in* Blum, *supra* note 327, § 5.

Gary Andrew Beebe was charged with racial intimidation,[529] with the complaint alleging that he "[d]id unlawfully and by reason of the race of Barry Lloyd Johnson with intent to harass, annoy and alarm Barry Lloyd Johnson," and subjected Barry Lloyd Johnson "to offensive physical contact" by "throwing said Barry Lloyd Johnson to the ground." Beebe challenged the complaint under the equal protection clause of the United States Constitution, theorizing that the law denied him equal protection rights as it provided greater protection to a victim due to the victim's race, color, religion, or national origin. The trial court found for Beebe and sustained his demurrer. The State of Oregon appealed.

On review, the Oregon Court of Appeals disagreed with the lower tribunal's assessment that the law gave greater protection to a victim who is assaulted because of his race, color, religion or national origin. The Court held that the statute distinguished not on the basis of victims but between acts of harassment motivated by prejudice and those not so motivated, ruling that on the basis of such distinction, the legislature may make reasoned decisions concerning the social harm of particular conduct and thus criminalize them:

> We disagree with the trial court's assessment of the effect of the statute. *The statute does not offer more protection to any class of victims.* Anyone may be a victim of bigotry. It is the defendant who classifies, and he does so by his motive. The statute distinguishes between acts of harassment which are motivated by racial, ethnic or religious animus and acts of harassment which are not so motivated.
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> Properly focused, the question is whether the legislature may enhance the penalty for unlawful conduct if the conduct is racially motivated. The task of the legislature in drafting criminal laws is to make reasoned decisions concerning the social harm of particular conduct. The criminal laws are replete with examples of such legislative judgment. [...] Our task in reviewing such legislative judgments is to determine whether the distinction made in the severity of the crime bears a rational relationship to a legitimate legislative purpose. The legislature may legitimately determine that the danger to society from assaultive conduct directed toward an individual because of his race, religion or national origin is greater than the danger from such conduct under other circumstances. Assaultive behavior motivated by bigotry is directed not just at the victim but, in a sense, toward the group to which the particular victim belongs. Such confrontations therefore readily — and commonly do — escalate from individual

[529] OR. REV. STAT. § 166.155(1). "A person commits the crime of intimidation in the second degree if, by reason of race, color, religion or national origin of another person, the person violates ORS 164.345 or ORS 166.065."

> conflicts to mass disturbances. That is a far more serious potential consequence than that associated with the usual run of assault cases. There being a rational basis for the distinction, we hold that it is constitutionally permissible to punish otherwise criminal conduct more severely when it is motivated by racial, ethnic or religious hatred than by individual animosity.[530]

2. Philippine Jurisprudence

Again, the equal protection clause invoked in the challenges tackled by American courts was transplanted *verbatim* to our own Constitution. In line with the recognition of the framers that these borrowed provisions are subject of extensive jurisprudence explaining what they mean and what their limitations are,[531] American decisions on equal protection challenges to hate crime laws are persuasive should similar challenges to a hate crime law be made.

Philippine jurisprudence also has precedent cases wherein the Supreme Court brushed aside equal protection challenges to penal laws due to reasonable legislative distinctions made in response to social conditions. This is a good sign for putative hate crime laws as these are of course made using reasonable and practical bases.

In *People v. Ching Kuan*,[532] the Court upheld the graduation of fines prescribed by Article 66 of the Revised Penal Code according to the "means and wealth of the culprit," citing the interest of the law in the plight of the poor. Differing treatment for government officials and police officers were also upheld in the cases of *Nuñez v. Sandiganbayan*[533] and *Himagan v. People,*[534] respectively. In *Nuñez*, the Court cited a constitutional command versus crime in public office as authority for distinguishing accused individuals in public office, while in *Himagan*, the policemen's possession of weapons and the badge of the law (that may be used to harass witnesses) was reason enough to treat them differently.

E. Critical Analysis

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[530] *Beebe*, 680 P.2d at 13. (Emphasis supplied.)

[531] I RECORD CONST. COMM'N 758-760.

[532] People v. Ching Kuan, 74 Phil. 23, 24 (1942), *cited in* BERNAS, *supra* note 365, at 153.

[533] Nuñez v. Sandiganbayan, G.R. No. 50581, 111 SCRA 433, 445-446, Jan. 30, 1982, *cited in* BERNAS, *supra* note 365, at 154.

[534] Himagan v. People, G.R. No. 113811, 237 SCRA 538, 551, Oct. 7, 1994, *cited in* BERNAS, *supra* note 365, at 154.

The fact that the Philippines has almost nothing in the statute books concerting LGBT hate crimes carries with it the consequence that no local precedent may be relied upon should any challenge to a future Philippine hate crime law premised on the grounds of free speech (overbreadth and vagueness), due process (vagueness), and equal protection arise.[535] However, the legal reasoning of American jurisprudence which has upheld hate crime laws vis-à-vis the very same constitutional guarantees we have imported into our own legal system may be invoked as very persuasive authority when such suits are brought.

From American jurisprudence, we may glean that penalty-enhancing hate crime laws do not infringe constitutionally-guaranteed freedoms of thought or opinion by considering motives, as the biased motivations in hate crime laws are no different from the motivations in anti-discrimination laws. Both do not enjoy constitutional protection.[536] More importantly, "[i]t is the *selection* of a victim because of his or her race or other status, not the *reason* for that selection (intolerance, xenophobia, vengeance, fear, to impress others, and so forth) that triggers the additional punishment imposed by the hate crime statutes,"[537] conduct which is not favored by the Constitution.[538] At any rate, motive is not always irrelevant in criminal law, with conduct possibly being "punished differently depending on the reason the defendant acted, i.e., the defendant's mental state, or mens rea."[539]

Such statutes are also not so overbroad as would chill free expression of bigoted beliefs for fear of future prosecution. The hypothesized chilling effect is too speculative, and does not take into account that First Amendment jurisprudence does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent, subject to evidentiary rules dealing with relevancy, reliability, and the like.[540] Where vagueness is concerned, courts will not hesitate to uphold a hate crime law where the crimes are defined in sufficiently clear and explicit terms to apprise citizens what conduct is prohibited,[541] challengers on the basis of vagueness having to prove unconstitutional vagueness beyond reasonable doubt. Courts, moreover, do not expect word-by-word definitions from the legislature, the *verba legis* construed in

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[535] No case has likewise been brought to assail the anti-discrimination ordinances cited in Part IV on these grounds.

[536] Wisconsin v. Mitchell, 508 U.S. 476, 487 (1993).

[537] *In re* Joshua H., 13 Cal. App. 4th 1734, 1751-1752 (Cal. Ct. App. 1993).

[538] *Mitchell,* 508 U.S. at 488.

[539] In re *Joshua H.*, 13 Cal. App. 4th at 1751.

[540] *Mitchell,* 508 U.S. at 488.

[541] State v. Plowman, 838 P.2d 558, 561 (Or. 1992).

their ordinary and usual meaning.[542] As for equal protection, these statutes do not violate equal protection rights "since there was a rational basis, in part to redress discrimination, for the distinctions drawn as to enhanced penalties where victims were selected by the defendants on the basis of the victims' race, gender, and the like."[543]

Presaging from contemporary Philippine jurisprudence, similar challenges may also be reasonably expected to fail in light of cases excluding penal statutes from overbreadth and facial vagueness challenges,[544] cases that would be analogous to one against a Philippine hate crime law and would in all probability be used as precedent. More importantly, current jurisprudence reveals that the Philippine Supreme Court recognizes the limits of Constitutional challenges to laws that "reflect legitimate state interest in maintaining comprehensive control over harmful, constitutionally unprotected conduct":

> It remains a 'matter of no little difficulty' to determine when a law may properly be held void on its face and when 'such summary action' is inappropriate. *But the plain import of our cases is, at the very least, that facial overbreadth adjudication is an exception to our traditional rules of practice and that its function, a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from 'pure speech' toward conduct and that conduct –even if expressive – falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct.*[545]

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[542] State v. Talley, 122 Wn.2d 192, 213 (Wash. 1993); Romualdez v. Sandiganbayan, G.R. No. 152259, 435 SCRA 371, 387, July 29, 2004.

[543] Blum, *supra* note 327, at § 5; People v. Grupe, 532 N.Y.S.2d 815, 141 Misc. 2d 6, 13 (N.Y. Crim. Ct. 1988); State of Oregon v. Beebe, 680 P.2d 11, 13 (Or. 1984).

[544] Estrada v. Sandiganbayan, G.R. No. 148560, 369 SCRA 394, 440-443, Nov. 19, 2001; *Romualdez*, 435 SCRA at 381-384; David v. Macapagal-Arroyo, G.R. No. 171396, 489 SCRA 160, 236-240, May 3, 2006; Romualdez v. Comm'n on Elections, G.R. No. 167011, 553 SCRA 370, 418, Apr. 30, 2008; Southern Hemisphere Engagement Network, Inc. v. Anti Terrorism Council, G.R. No. 178552, 632 SCRA 146, 180-189, Oct. 5, 2010.

[545] *David*, 489 SCRA at 236. (Emphasis supplied.)

VII. RECOMMENDATIONS

> *"[O]ur single most effective weapon is the law. I implore you to support the Bias Related and Intimidation Act I have proposed, and make it clear to the people of this state that behaviour based on bias will not be ignored or tolerated."*
>
> —New York State Governor Mario M. Cuomo[546]

> *"Hate crimes are a plague to the very fabric of our nation, and none of us are safe until all of us are safe."*
>
> —Civil Rights Leader Jesse Jackson[547]

> *"Nothing is more important than standing together against intolerance, prejudice, and violent bigotry."*
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> —Former US President Bill Clinton[548]

In view of the absence of legislation dealing directly and comprehensively with hate crimes, the arguments raised for such laws, and the judicial imprimatur that is anticipated, it is recommended that the Philippine Congress enact a Philippine LGBT hate crime law. To this end, the present chapter will undertake to propose a set for the Philippines. Inspiration will be culled from the various categories, examples, and classifications introduced in the introductory chapters of this study to serve as basis of such proposals, the controversies faced by the same set of global hate crimes also serving as a guide to the challenges to be met.

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[546] *Quoted in* JACOBS & POTTER, *supra* note 39, at 79.
[547] *Quoted in* JOHN WRIGHT, HATE CRIMES 20 (2003).
[548] *Id.*

A. National Legislation

Like the choice of protected characteristics enumerated under the law, no global consensus exists for the choice of the type of hate crime laws to enact. States use substantive crimes, penalty enhancements, or even both. Whether to enact statutes making hate crimes a substantive crime or merely providing penalty enhancement, whether or not to provide for an independent civil action, or even all of the above, are all matters of policy. While it is submitted that regardless of the class of hate crime laws enacted, the arguments supporting them, as well as the case law in favor of their validity apply, a two-step scheme is herein proposed, taking into consideration the current state of affairs with regard to Philippine hate crimes based on SOGI.

The unavailability of detailed statistics on Philippine hate crimes is conceded and expected and the need for more information is accepted. However, the need for immediate action on the issue as per our international obligations and actual incidents of these acts must also be recognized. Balancing these interests, therefore, the First Phase of this work's proposal fashions a law that makes an immediate policy expression against hate crimes but addresses the need for more in-depth information on these acts by laying the groundwork for governmental data-gathering on them. The Second Phase, meanwhile, relies and depends on the information to be gathered under the First Phase of recommendations to create a more targeted response to hate crimes.

TABLE 2. Phases of Legislation

First Phase	• Penalty Enhancement: SOGI Bias motivation as an Aggravating Circumstance • Prosecutorial Training • A Philippine Hate Crime Reporting Statute • Independent Civil Actions for Hate Crime Victims
Second Phase	• Specific Hate Crimes as Substantive Crimes

1. *First Phase*

The First Phase of recommended legislative action has two objectives: (1) to immediately provide legal remedy for hate crime victims; and (2) to provide government with a more comprehensive picture on the hate crime situation in the Philippines, with a view of more tailored legislation later on, discussed *infra* as the Second Phase of legislative action. The first objective is addressed via a new aggravating circumstance in the Revised Penal Code along with an independent civil action for crimes committed therewith, while a

reporting statute for hate crimes focuses on the second objective via mandated governmental statistics-gathering on such incidents.

i. Transitional Remedies

It is submitted that immediate legal remedies for victims are necessary not only to comply with the Philippines' international obligations vis-à-vis LGBT hate crimes, but also to provide urgent protection to this vulnerable group. The enactment of an aggravating circumstance and independent civil action targeting LGBT hate crimes is a declaration of state policy against these acts and will hopefully serve as an immediate deterrent, which by reports, recorded and anecdotal, do occur.

ii. Penalty Enhancement through Bias Motive as an Aggravating Circumstance

As an immediate and preliminary step, it is submitted that making bias motivation based on SOGI an aggravating circumstance under the Revised Penal Code would be more advantageous as compared to immediately enacting substantive LGBT hate crimes laws, if but for expediency and convenience. Both classes have expressive and morally educational value against prejudice.

Legislating hate crimes as substantive crimes are concededly very expressive as criminal law, "a substantive crime explicitly condemning the prohibited bias motive" and having "greater visibility."[549] Such laws,[550] however, are not without their difficulties:

> Substantive offences pose challenges as well. A substantive hate crime offence requires motive to be proved in order for the accused to be convicted. Prosecutors may be reluctant to press charges regarding a substantive offence if they believe it will be harder to prove. In some jurisdictions there is the additional problem that courts can only consider the offence with which the accused is indicted. Hence, a substantive hate crime indictment may not allow the court to convict of the base offence if the bias element is not proven. This is a

[549] OSCE ODIHR, *supra* note 2, at 35.

[550] One would note House Bill No. 2572. In August 2013, Rep. Sol Aragones filed House Bill No. 2572 at the House of Representatives. Section 4 of the measure provides that "[a]ny person who shall commit a Crime Against Persons or Against Chastity as enumerated in the Revised Penal Code against a member of the LGBT community shall suffer the maximum penalty imposed by the Code if it is proven that the act complained of is in the nature of a hate crime." The bill is currently pending before the House Committee on Women and Gender Equality and is being consolidated with other measures involving discrimination based on SOGI.

> disadvantage of substantive offences, and can cause prosecutors either to avoid using the hate crime laws, or to accept a guilty plea to the base offence in order to ensure the offender is convicted.[551]

The limitation that "courts can only consider the offence with which the accused is indicted" is not a problem in this jurisdiction vis-à-vis an indictment for hate crimes. The predicate crime is an offense necessarily included in the information for a hate crime and may thus be proven in the same trial without having to be separately charged. This ensures that, at the very least, the offender may be convicted of the predicate crime committed.

Penalty-enhancement statutes also have their fair share of disadvantages:

> One significant disadvantage with a penalty enhancement law, however, is that a court's decision to enhance the penalty on the basis of a bias motive might not be part of the public record. [...] A consequence is that an accused's criminal history cannot be used to determine whether he or she has a past history of bias-motivated crimes.
>
> Without explicit recognition of the bias motive, the hate crime law loses much of its symbolic weight. Thus, a penalty enhancement, while easier to implement, may not fulfill the expressive function of recognizing and condemning a prohibited bias.[552]

This concern is also unfounded in the Philippine setting as aggravating circumstances have to be alleged in the information[553] and the prosecution having the burden to "prove every aggravating circumstance as fully as the crime itself."[554] The courts, having to render their decisions "expressing therein clearly and distinctly the facts and the law on which it is based,"[555] must necessarily mention and condemn the bias motive, if warranted.

Both substantive crime laws and penalty-enhancement laws equally serving an expressive purpose against hate crimes, it is submitted that expediency and convenience would, in this First Phase of action, tilt the scale in favor of the latter class of law:

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551 *Id.*
552 OSCE ODIHR, *supra* note 2, at 36.
553 RULES OF COURT, RULE 110, § 9.
554 People v. Maturgo, G.R. No. 111872, 248 SCRA 519, 520, Sept. 27, 1995.
555 CONST. art. VIII, § 14.

> Penalty enhancements are easier to incorporate into a penal code, because codes usually list certain factors that can increase a sentence for a crime. Penalty enhancements can apply to a wide range of crimes, and failure to prove the facts supporting an enhancement will not jeopardize a conviction on the underlying offence.[556]

This rationalization is very applicable to the Philippines, whose Revised Penal Code does recognize aggravating circumstances that increase criminal liability in Article 14.

Given that penalty enhancement is only a preliminary step toward a more comprehensive penal law on hate crimes, an aggravating circumstance would have immediate expressive and morally educational value against hate crimes until the reporting statute coupled with it provides the legislature with more information with which to craft a more comprehensive and tailored criminal statute. It is therefore proposed that a new aggravating circumstance be added to Article 14 of the Revised Penal Code to cover bias motivation based on SOGI:

> ARTICLE 14. *Aggravating Circumstances.* – The following are aggravating circumstances:
>
> * * *
>
> 22. That the offender intentionally selected the person against whom the crime is committed or selects the property that is damaged or otherwise affected by the crime in whole or in part because of the gender identity or sexual orientation of that person or the owner or occupant of that property, whether or not the offender's belief or perception regarding these characteristics was correct.

This proposal, modeled after Wisconsin State law, uses "intentionally selected" to highlight that it targets conduct and not expression, a nod to the *Mitchell* decision and confirmation that "[i]t is the *selection* of a victim because of his or her race or other status, not the *reason* for that selection (intolerance, xenophobia, vengeance, fear, to impress others, and so forth) that triggers the additional punishment imposed by the Hate Crime statutes."[557] Further, it utilizes the discriminatory selection model of hate crimes. The proposal's wording does not require the proof of any hatred or animus in the bias motivation but merely requires that the offender intentionally selects the target

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[556] OSCE ODIHR, *supra* note 2, at 36.

[557] *In re* Joshua H., 13 Cal. App. 4th 1734, 1751-1752 (Cal. Ct. App. 1993).

of the crime on account of the characteristics listed. This eases enforcement, given that hate or animus are very specific emotions which would be harder to prove. Further, this brings into the ambit of the law crimes not motivated by animus but nonetheless within the same rubric:

> First, a discriminatory selection law *does not require that hate be proven as an element of the offence.* When a hate crime law requires "hostility," it requires law enforcement to make an assessment of an offender's mental state—an exercise that may be difficult and one for which most law enforcement are not trained.
>
> Second, the impact on the victim and members of the victim's community is usually the same, regardless of whether the offender acted out of hate or some other emotion. A victim who is targeted because the offender assumes that some protected characteristic of the victim makes him/her especially vulnerable to crime is likely to experience the same trauma as a victim who is targeted because the offender actually hates that characteristic. From the victim's perspective, what matters is that he/she has been chosen because of an immutable or fundamental aspect of his/her identity.[558]

Such proposed aggravating circumstance should of course be applied reasonably and practically. On its face, the proposed aggravating circumstance would immediately cover crimes against persons and property, with crimes against personal liberty and security, as well as those against honor, also reasonably being within its ambit. Excluded from its application, however, are crimes that would be impossible to commit with a bias motive due to the nature of the crime or its victim—it would be absurd to make hate crimes out of crimes against national security and the law of nations,[559] crimes committed by public officers,[560] and crimes against the civil status of persons.[561]

iii. Prosecutorial Training

As hate crimes are a new concept and more difficult to prosecute due to the issue of bias motivation, it is proposed that the Department of Justice (through or led by its National Prosecution Service) establish programs for training state, regional, provincial, and city prosecutors and assistant prosecutors in the prosecution of LGBT hate crimes. These guidelines shall be formulated in consultation with the National Bureau of Investigation, the Philippine National

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[558] OSCE ODIHR, *supra* note 2, at 48. (Emphasis supplied.)
[559] REV. PEN. CODE, tit. 1.
[560] REV. PEN. CODE, tit. 7.
[561] REV. PEN. CODE, tit. 12.

Police, the Department of Interior and Local Government, the Commission on Human Rights, and such representatives from non-governmental organizations as may be required.

iv. Independent Civil Actions for Hate Crimes

While the inclusion of bias motivation based on SOGI as an aggravating circumstance would already give the victim civil redress in the form of the offender's civil liability *ex delicto*,[562] moral damages in appropriate cases, and exemplary damages, it is also proposed that hate crimes be included in the list of crimes for which Article 33 of the Civil Code provides the victim an independent civil action:

> In cases of defamation, fraud, physical injuries, *and felonies aggravated by bias motives,* a civil action for damages, entirely separate and distinct from the criminal action, may be brought by the injured party. Such civil action shall proceed independently of the criminal prosecution, and shall require only a preponderance of evidence.[563]

Such addition is not only convenient, requiring only the insertion of hate crimes into Article 33 of the Civil Code, but also serves a dual purpose. It provides a higher chance of redress for hate crime victims as well as empowers such persons.

A higher chance of redress results as Article 33 "lessen[s] the dependence of the citizen upon the prosecuting attorney for the recovery of damages arising from the criminal offenses, by creating civil actions independent of the criminal action and not affected by the outcome of the latter." Needing only a preponderance of proof and not reliant on the prosecutor's zeal, this independent action further provides empowerment for hate crime victims "in keeping with the spirit of individual initiative and the intense awareness of one's individual rights" and a "sense of self-reliance in the enforcement of one's rights."[564]

v. Reporting Statute on LGBT Hate Crimes

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562 Rev. Pen. Code, art. 100.

563 Rev. Pen. Code, art. 33.

564 I TOLENTINO, *supra* note 279, at 147.

As discussed in Part V of this work, official statistics on the prevalence of LGBT hate crimes in the Philippines—statistics on who the victims are, where these are committed, and what criminal acts are committed—are not available. Hate crimes not being a legal concept in the Philippines, law enforcers are simply not required to note nor compile information on crimes as bias-motivated acts as these will not be prosecuted as such. This lack of information severely limits the response to hate crimes, which by reports, both documented and anecdotal, do occur.

It is in this light that a Philippine hate crime reporting statute is recommended, forming a vital and integral part of any legislative response to hate crimes. Requiring law enforcement agencies to collect and analyze statistics on hate crimes and to regularly apprise the appropriate congressional committees of their findings, such a hate crime reporting statute will enable the legislature to fashion more specific measures against hate crimes, including, but not limited to, laws making particular hate crimes substantive crimes.

It is proposed that the Philippine National Police's Directorate for Investigation & Detective Management which currently compiles PNP crime statistics, take charge of spearheading the compilation such data-gathering effort. All PNP Provincial Offices and PNP Stations in independent cities will report those crimes under their jurisdiction which evidence bias motivation, the entire organization necessarily being mandated to begin recognizing and investigating the hate crime aspect of incidents involving LGBT victims under their investigation. The National Bureau of Investigation (NBI), meanwhile, in line with its function "[t]o act a national clearing house of criminal and other informations for the benefit and use of all prosecuting and law-enforcement entities of the Philippines,"[565] will supplement PNP data with reports of LGBT Hate Crimes under its investigation. To aid the PNP and NBI in this endeavor, the National Police Commission (NAPOLCOM) will be required to provide the training and reporting guidelines necessary.

The PNP should be mandated to compile and analyze such information, taking into account the prevalence, types, and victim profile of hate crimes committed in the Philippines, and submit an annual report to the appropriate committees of Congress. Should the statistics warrant, Congress should enact more specific laws targeting the LGBT hate crimes found to be prevalent, such as the substantive LGBT hate crime laws discussed *infra.*

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[565] Rep. Act No. 157, § 1(c) (1947). An Act Creating a Bureau of Investigation, Providing Funds Therefor, and for Other Purposes.

vi. Philippine Hate Crime Act of 2014

All three components of the First Phase of recommended legislative actions are encapsulated in the following bill, "The Philippine Hate Crime Act of 2014":

Sixteenth Congress of the
Republic of the Philippines
Second Regular Session

HOUSE OF REPRESENTATIVES
H.B. No. ___

Introduced by Representative _______________

AN ACT MAKING BIAS MOTIVATION BASED ON SEXUAL ORIENTATION OR GENDER IDENTITY AN AGGRAVATING CIRCUMSTANCE UNDER THE REVISED PENAL CODE, PROVIDING AN INDEPENDENT CIVIL ACTION FOR CRIMES COMMITTED THEREWITH, AND MANDATING THE COLLECTION OF DATA REGARDING CRIMES COMMITTED BY REASON OF THE VICTIM'S GENDER IDENTITY OR SEXUAL ORIENTATION, AMENDING FOR THIS PURPOSE CERTAIN PROVISIONS OF ACT NO. 3815, OTHERWISE KNOWN AS THE REVISED PENAL CODE, REPUBLIC ACT NO. 386, OTHERWISE KNOWN AS THE CIVIL CODE OF THE PHILIPPINES, AND FOR OTHER PURPOSES.

Be it enacted by the Senate and House of Representatives of the Philippines in Congress assembled:

SECTION 1. *Short Title.* – This Act shall be known as the "Philippine LGBT Hate Crime Act of 2014."

SECTION 2. *Declaration of Policy.* –

Hate Crimes motivated by invidious hatred against Lesbians, Gays, Bisexuals, and Transgendered (LGBT) individuals threaten the safety and welfare of all citizens. They inflict on victims incalculable physical and emotional damage and tear at the very fabric of free society. These not only harm individual victims but send a powerful message of intolerance and discrimination. Hate Crimes can and do intimidate and disrupt entire communities and vitiate the civility that is essential to healthy democratic processes. In a democratic society, citizens cannot be required to approve of the beliefs and practices of others, but must never commit criminal acts on account of them.

To this end, the State declares Hate Crimes based on Sexual Orientation or Gender Identity abhorrent and unlawful, undertaking to immediately prevent and punish such Hate Crimes and to comprehensively gather information on such acts in order to better address them.

SECTION 3. *Definition of Terms.* – As used in this Act, the following terms shall mean:

a. Hate Crime or Bias-Motived Crime – Crimes committed by reason of a particular characteristic possessed by the victim, whether actual or perceived.
b. Gender Identity – The personal sense of identity or expression as characterized, among others, by manner of clothing, inclinations, and behavior in relation to masculine or feminine conventions. A person may have a male or female identity with the physiological characteristics of the opposite sex.[566]
c. Sexual Orientation – The direction of emotional sexual attraction or conduct. Tis can be towards people of the same sex (homosexual orientation), towards people of both sexes (bisexual orientation), towards people of the opposite sex (heterosexual orientation), towards everyone, or towards no one.[567]

SECTION 4. *Bias Motivation as an Aggravating Circumstance.* – An aggravating circumstance to cover bias motivation based on Sexual Orientation or Gender Identity is hereby appended to Article 14 of Act No. 3815, otherwise known as the Revised Penal Code:

Art. 14. *Aggravating Circumstances.* – The following are aggravating circumstances:

* * *

22. THAT THE OFFENDER INTENTIONALLY SELECTED THE PERSON AGAINST WHOM THE CRIME IS COMMITTED OR SELECTS THE PROPERTY THAT IS DAMAGED OR OTHERWISE AFFECTED BY THE CRIME IN WHOLE OR IN PART BECAUSE OF THE GENDER IDENTITY OR SEXUAL ORIENTATION OF THAT PERSON OR THE OWNER OR OCCUPANT OF THAT PROPERTY, WHETHER OR

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566 Anti-Discrimination Act of 2013, H. No. 3432, 16th Cong. § 3(f) (2013).
567 *Id.* at § 3(l); Anti-Discrimination Act of 2014, S. No. 2122, 16th Cong. § 3(l) (2014).

> NOT THE OFFENDER'S BELIEF OR PERCEPTION REGARDING THESE CHARACTERISTICS WAS CORRECT.

Section 5. *Prosecutors' Training and Orientation.* – The Department of Justice (DOJ) shall, within 180 days from the effectivity of this act, establish programs for training State, Regional, Provincial, and City Prosecutors and Assistant Prosecutors in the prosecution of Hate Crimes based on based on Sexual Orientation or Gender Identity. These guidelines shall be formulated in consultation with the National Police Commission, the National Bureau of Investigation, the Philippine National Police, the Department of Interior and Local Government, the Commission on Human Rights, and such representatives from Non-Governmental Organizations as the DOJ may require.

SECTION 6. *Independent Civil Actions for Hate Crimes.* – Article 33 of Republic Act No. 386, otherwise known as the Civil Code of the Philippines is hereby amended to read as follows:

> ARTICLE 33. In cases of defamation, fraud, physical injuries, AND CRIMES AGGRAVATED BY BIAS MOTIVES, a civil action for damages, entirely separate and distinct from the criminal action, may be brought by the injured party. Such civil action shall proceed independently of the criminal prosecution, and shall require only a preponderance of evidence.

SECTION 7. *Hate Crime Reporting and Statistics Gathering.* –

a. The Philippine National Police (PNP) is mandated to gather data about the prevalence, victim profile, types, and other characteristics of Hate Crimes based on based on Sexual Orientation or Gender Identity in the Philippines, and submit an annual report compiling and analyzing such data to the Senate's Committee on Public Order and Illegal Drugs and the House of Representatives' Committee on Public Order and Safety. The PNP shall source its data from reports submitted by its Provincial and City Offices and Stations as well as reports on cases under the investigation of the National Bureau of Investigation (NBI).
b. The PNP's Regional, Provincial, City, and Municipal Offices and Stations shall recognize Hate Crimes based on based on Sexual Orientation or Gender Identity in their investigations. PNP Offices in every province or independent city shall compile reports of Hate Crimes based on based on Sexual

Orientation or Gender Identity under its jurisdiction and submit the same to PNP headquarters on a monthly basis.

c. The NBI shall submit reports of Hate Crimes based on based on Sexual Orientation or Gender Identity under its investigation to the PNP for compilation and consolidation on a monthly basis.
d. The National Police Commission (NAPOLCOM) shall, within 180 days from the effectivity of this act, establish the guidelines for the collection and reporting of Hate Crimes based on based on Sexual Orientation or Gender Identity a, including the necessary evidence and criteria that must be present for classifying an these incidents as such. These guidelines shall be formulated in consultation with the PNP, the NBI, the Department of Interior and Local Government, the Commission on Human Rights, and such representatives from Non-Governmental Organizations as the NAPOLCOM may require.
e. The NAPOLCOM shall, within 180 days from the effectivity of this act, establish programs for training PNP personnel to orient them in the identification of Hate Crimes based on based on Sexual Orientation or Gender Identity and prepare them for the data-gathering required in this section. These programs shall be formulated in consultation with the agencies and groups in the immediately preceding paragraph.

SECTION 8. *Funding.* – The amount necessary to implement the provisions of this Act shall be included in the annual General Appropriations Act (GAA).

SECTION 9. *Repealing Clause.* – All provisions of laws, orders, decrees, including rules and regulations inconsistent herewith are hereby repealed and/or modified accordingly.

SECTION 10. *Separability Clause.* – If any part or provision of this Act shall be held unconstitutional or invalid, other provisions hereof which are not affected thereby shall continue to be in full force and effect.

SECTION 11. – *Effectivity.* This Act shall take effect thirty (30) days following publication in three (3) newspapers of general circulation.

2. Second Phase

As a Second Phase of action, legislating LGBT hate crimes as substantive crimes is recommended, taking into account that such laws are very expressive as criminal law, since a substantive crime explicitly condemning the prohibited bias motive has greater visibility.[568] It must be made clear, however, that this Second Phase of recommended legislation relies and depends on the information to be gathered under the First Phase of recommendations. These substantive crime laws, after all, are merely a more targeted response to LGBT hate crimes via penal laws tailor-made for the hate crimes found. Thus, the content and very necessity of this second wave of laws would be a function of the data gathered via the reporting statute enacted as part of the First Phase of recommendations.

Such data may reflect a preponderance of particular types of crimes committed as hate crimes, homicides and physical injuries, for example, and leading to legislation creating substantive LGBT hate crimes against persons:

Sixteenth Congress of the
Republic of the Philippines
Second Regular Session

HOUSE OF REPRESENTATIVES
H.B. No. ___

Introduced by Representative _______________

AN ACT QUALIFYING HOMICIDE COMMITTED BY REASON OF THE VICTIM'S SEXUAL ORIENTATION OR GENDER IDENTITY, AND CREATING A NEW FELONY NAMED "BIAS-MOTIVATED PHYSICAL INJURIES" AMENDING FOR THIS PURPOSE CERTAIN PROVISIONS OF ACT NO. 3815, OTHERWISE KNOWN AS THE REVISED PENAL CODE.

Be it enacted by the Senate and House of Representatives of the Philippines in Congress assembled:

SECTION 1. *Bias Motivation as a Qualifying Circumstance.* – A circumstance qualifying a homicide to murder is hereby appended to Article 248 of Act No. 3815, otherwise known as the Revised Penal Code, as amended:

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568 OSCE ODIHR, *supra* note 2, at 35.

> Art. 248. Murder. — Any person who, not falling within the provisions of Article 246 shall kill another, shall be guilty of murder and shall be punished by *reclusion perpetua* to death, if committed with any of the following attendant circumstances:
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> * * *
>
> 7. BY REASON OF THE VICTIM'S SEXUAL ORIENTATION OR GENDER IDENTITY, WHETHER OR NOT THE OFFENDER'S BELIEF OR PERCEPTION REGARDING THESE CHARACTERISTICS WAS CORRECT.

SECTION 2. *Bias-Motivated Physical Injuries.* – A new provision is hereby inserted into the Revised Penal Code as Article 263-A to read as follows:

> ART. 263-A. BIAS-MOTIVATED PHYSICAL INJURIES. – ANY PERSON WHO SHALL WOUND, BEAT, OR ASSAULT ANOTHER BY REASON OF THE VICTIM'S SEXUAL ORIENTATION OR GENDER IDENTITY, WHETHER OR NOT THE OFFENDER'S BELIEF OR PERCEPTION REGARDING THESE CHARACTERISTICS WAS CORRECT, SHALL BE GUILTY OF THE CRIME OF BIAS-MOTIVATED PHYSICAL INJURIES AND SHALL SUFFER THE PENALTY OF PRISION MAYOR TO RECLUSION TEMPORAL.

SECTION 3. *Repealing Clause.* – All provisions of laws, orders, decrees, including rules and regulations inconsistent herewith are hereby repealed and/or modified accordingly.

SECTION 4. *Separability Clause.* – If any part or provision of this Act shall be held unconstitutional or invalid, other provisions hereof which are not affected thereby shall continue to be in full force and effect.

SECTION 5. *Effectivity.* – This Act shall take effect thirty (30) days following publication in three (3) newspapers of general circulation.

Being premised on the data previously collected, the crimes tackled may as easily be those against property, e.g. arson, malicious mischief, depending on the needs shown. The new laws may even make very specific crimes akin to "institutional vandalism" or "racial intimidation" both of which are of American and British origins previously discussed in Part III.

B. Local Legislation

While the efforts of local governments to protect their LGBT inhabitants through anti-discrimination legislation—certain parts of which, as observed *supra*, are hate crime laws—are admirable, the limitations on jurisdiction and penalties noted above make national legislation preferable. Likewise, the risk of local statutes being variable or inconsistent across jurisdictions makes a national law the superior measure.

We must also recognize, however, the difficulties that LGBT-affirming legislation faces in the Philippine Congress. The 15-year failure to enact an anti-discrimination law covering SOGI speaks for itself.[569] Efforts to gain immediate, albeit limited, protections at the LGU level should not be abandoned nor ignored, though the limitations previously discussed should be mitigated.

The fact that ordinances are of limited territorial scope, targeting larger cities and provinces with larger populations, allows a few local victories to provide outsized results in coverage. Indeed, the handful of ordinances in force against discrimination based on SOGI currently enacted now provides protections to 10% of Filipinos. Faced with the limitations on penalties under the Local Government Code, meanwhile, hate crime law proponents should lobby the *Sanggunians* to provide the highest possible penalties in their ordinances in order to maximize their deterrent effects. Finally, proponents would do well to agree on common templates for local legislation to minimize variance in content and quality. It is recommended that definitions and prohibited acts be based on and identical to those proposed for national legislation *in pari materia* to avoid future conflict.

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[569] The first anti-discrimination bill covering SOGI was filed in 1999. Lesbian and Gay Rights Act of 1999, H. No. 7165, 11th Cong. (1999). Congress has yet to enact such a law despite similar bills being filed at every Congress.