
**FEDERALIZING HATE CRIMES: SYMBOLIC POLITICS,
EXPRESSIVE LAW, OR TOOL FOR CRIMINAL
ENFORCEMENT?**

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INTRODUCTION

Within the past eighteen months the Senate has twice passed legislation sponsored by Senator Edward M. Kennedy that would create a broad new federal hate crime.¹ Given the bipartisan support the proposed legislation has

¹ Although hate crimes legislation has also been introduced in separate bills, in July 1999 and June 2000 hate crimes legislation was offered and passed in the Senate in the form of amendments to larger appropriations bills. In 1999, Senator Kennedy proposed the hate crimes measure as an amendment to the Justice-Commerce appropriations bill. *See* 145 CONG. REC. S9038 (daily ed. July 22, 1999) (Amend. 1324). This amendment was agreed to by unanimous consent. 145 CONG. REC. S9038 (recording agreement to amendments 1308 to 1341). Senator Kennedy's amendment was combined with an amendment proposed by Senator Hatch to become The Hate Crimes Prevention Act of 1999, Title IX of the Senate version of the appropriations bill. *See* S. 622, 106th Cong. (1999) (Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2000 (Engrossed Senate Amendment) Title IX). The House version did not include the Hate Crimes Prevention Act of 1999. *See* H.R. 1217, 106th Cong. (1999); *News In Brief*, 65 CRIM. L. REP. 591 (1999) (reporting differences between House and Senate versions of 2000 appropriations bill, including lack of hate crimes provision in House bill and Senate's refusal to agree to House version). The hate crimes provisions were not included in the compromise consolidated appropriations bill ultimately enacted after months of legislative maneuvering. For an overview of the complex process by which the various appropriations bills were ultimately combined in a consolidated appropriations act (including the numerous continuing resolutions and the presidential veto of an earlier version of the Commerce-Justice appropriations bill), and links to the various documents, see the Library of Congress's site, Current Status of FY2000 Appropriations Bills, (2000) <<http://lcweb.loc.gov/global/legislative/appover.html#fn10>>.

In June 2000, Senator Kennedy retitled his 1999 proposal the Local Law Enforcement Enhancement Act of 2000 and offered it as Amendment 3473 to the National Defense Authorization Act (S. 2549). *See* 146 CONG. REC. S5370 (daily ed. June 19, 2000). After two days of debate, the Kennedy amendment passed in a roll call vote. *See* 146 CONG. REC. S5434 (daily ed. June 20, 2000). A hate crimes provision proposed by Senator Hatch also passed. *See id.* at S5428 (passage of Amend. 3474). On July 26, 2000, the House disagreed with the bill that incorporated the Senate Amendments, H.R. 4205, and agreed to go to conference. *See* 146 CONG. REC. H7058 (daily ed. July 26, 2000).

The following independent bills incorporate Senator Kennedy's proposals: S. 622, 106th Cong. (1999); H.R. 1082, 106th Cong. (1999); H.R. 77, 106th Cong. (1999); and S. 1529, 105th Cong. (1997). These bills are not identical to the amendment passed by the Senate on June 20, 2000. A comparison of the bills and the June 2000 amendment reflects some changes in the jurisdictional provisions that appear to be responsive to issues raised in the hearings and particularly to the Supreme Court's decision in *United States v. Morrison*, 120 S. Ct. 1740, 1744 (2000) (noting that a "jurisdictional element establishing that the federal cause of action is in pursuance of Congress' regulation of interstate commerce" supports the

enjoyed in the Senate² and the expressions of support offered in the House,³ the Kennedy proposal⁴ warrants serious examination. As other commentators have recognized, federal hate crimes legislation raises many important questions,⁵ including the adequacy of the constitutional basis for federal

finding of Congressional authority under the Commerce clause). To the extent that these proposals differ, this article focuses on the updated provisions in the June 2000 amendment.

² The vote in favor of the Kennedy proposal in June 2000 was 57 to 42. *See* 146 CONG. REC. S5434 (daily ed. June 20, 2000). Thirteen Republicans voted in favor of the amendment: Burns, Chafee, Collins, DeWine, Jeffords, Lugar, Mack, Roth, Smith (Ore.), Snowe, Specter, Stevens, and Voinovich. *Id.* Byrd was the only Democrat that voted against it. *Id.*

³ The Hate Crimes Prevention Act of 1999, H.R. 1082, 106th Cong. (1999), parallels the Kennedy amendment proposed in 1999. *See* 145 CONG. REC. S9038 (daily ed. July 22, 1999). The House bill has garnered 192 cosponsors. *See* Bill Summary & Status for the 106th Congress, (2000) <<http://thomas.loc.gov/cgi-bin/bdquery/z?d106:h.r.01082:>>. For statements in support of the House bill, *see, e.g.*, 146 CONG. REC. H4681 (daily ed. June 20, 2000) (statement of Rep. Jackson-Lee); 146 CONG. REC. E946 (daily ed. June 9, 2000) (statement of Rep. Hastings); 146 CONG. REC. E920 (daily ed. June 9, 2000) (statement of Rep. Johnson); 146 CONG. REC. E928 (daily ed. June 9, 2000) (statement of Rep. Gephardt); 146 CONG. REC. H3933 (daily ed. June 7, 2000) (statement of Rep. Baldwin); 146 CONG. REC. H3935 (daily ed. June 7, 2000) (statement of Rep. Nadler); 146 CONG. REC. H3932 (daily ed. June 7, 2000) (statement of Rep. Lampson); 146 CONG. REC. H3933 (daily ed. June 7, 2000) (statement of Rep. Davis); 145 CONG. REC. H9963 (daily ed. Oct. 13, 1999) (statement of Rep. Crowley).

⁴ By using the phrase "Kennedy proposal," I intend to encompass the common features of the amendments proposed under different titles in 1999 and 2000, as well as freestanding bills proposed by Senator Kennedy. To the extent these provisions differ, *see supra* note 1, this article focuses on the most recent version of the Kennedy proposal embodied in the June 2000 Senate amendment.

⁵ In addition to the adequacy of the constitutional basis for federal jurisdiction, the testimony at the hearings and the published commentary on hate crimes legislation also raise issues of the advisability of defining new bias offenses (as opposed to prosecuting the behavior under existing laws), and the First Amendment implications of defining these offenses according to the offender's motive or ideology. These issues were discussed in the hearings on the Hate Crimes Act, and have been the subject of scholarly attention elsewhere. *See, e.g., Legislating Against Hate and Bias: Outline of Testimony Before the Congress of the United States, House of Representatives Committee on the Judiciary*, 106th Cong. (1999) [hereinafter *House 1999 Hearings*] (statement of Heidi M. Hurd, Professor of Law and Philosophy and Co-director of the Institute for Law and Philosophy at the University of Pennsylvania) (arguing that hate crimes legislation is "il-liberal" because criminal laws should not punish emotional states and bad character traits); FREDERICK M. LAWRENCE, PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW 80-109, 161-75 (1999) (concluding that hate crime laws do not violate the First Amendment and arguing that the expressive value of punishment justifies the more severe punishment of bias crimes); JAMES B. JACOBS & KIMBERLY POTTER, HATE CRIMES: CRIMINAL LAW AND IDENTITY POLITICS 79-91 (1998) (critiquing culpability of offender, harms caused to victims, impact on third parties, moral education, and other justifications offered for hate crime offenses), 111-29 (concluding that

jurisdiction.⁶ One important issue, however, has received little attention. Assuming a sufficient constitutional basis for federal jurisdiction and a judgment that hate crime laws are desirable and otherwise constitutionally valid, what is the appropriate division of responsibility between federal law and state law? What is the justification for the creation of the new *federal* crime embodied in the Kennedy proposal?⁷ Consideration of this issue sheds light on the nature of the proposed hate crimes themselves as well as the functions and role of federal crimes.

My analysis is premised on a traditional assumption: in the realm of defining and punishing crime there is—and should be—a distinction between the role played by the federal government and the roles of state and local government. The states presently bring approximately ninety-five percent of the total prosecutions for serious crime in the United States,⁸ and federal criminal jurisdiction has historically been the exception rather than the rule. This traditional practice reflects both the structure of the Constitution and a policy preference. The federal government's enumerated powers do not include a general police power,⁹ which is reserved to the states. In accordance

hate crime statutes constitute viewpoint discrimination and are necessarily at odds with the First Amendment); Anthony M. Dillof, *Punishing Bias: An Examination of the Theoretical Foundations of Bias Crime Statutes*, 91 NW. U. L. REV. 1015, 1039-44, 1081 (1997) (critiquing theoretical foundations of bias crime laws because one person has no proper interest in others' reasons for acting, and bias is an overbroad proxy for proper considerations such as harm to the victim); Alon Harel & Gideon Parchomovsky, *On Hate and Equality*, 109 YALE L. J. 507, 509 (1999) (arguing that hate crimes legislation may be warranted under a "fair protection paradigm" that considers the relative vulnerabilities to crime of various victims); Andrew E. Taslitz, *Condemning the Racist Personality: Why the Critics of Hate Crimes Legislation Are Wrong*, 40 B.C. L. REV. 739, 742 (1999) (arguing that hate crimes (1) undermine the victim's psychological and moral need for individualized justice, (2) contribute to a racist culture that increases the risk of physical harm, and (3) rely upon a theory of human worth that is incompatible with our constitutional culture); George C. Thomas III, *On Trial: Laws Against Hate Crimes*, 36 CRIM. L. BULL. 3 (exploring First Amendment implications as well as justifications for hate crime laws and suggesting that laws might be justified on the basis of the added immorality of crimes where the victim is selected because of his or her weakness).

⁶ For a discussion of the jurisdictional issues, see *infra* notes 20-21, 24-31 and accompanying text.

⁷ Frederick Lawrence has considered this issue. See House 1999 Hearings, *supra* note 5 (statement of Frederick M. Lawrence, Professor of Law, Boston University) [hereinafter Lawrence statement] (concluding that on prudential grounds federal hate crimes are justified by potential for state default and federal interest in equality, and that Kennedy amendment is needed to remedy gaps in 18 U.S.C. § 245; LAWRENCE, *supra* note 5 at 110-60 (recounting history of federal civil rights enforcement and concluding on prudential grounds that federal hate crimes are justified by potential for state default and federal interest in equality).

⁸ James A. Strazzella, *Task Force on Federalization of Criminal Law*, 1998 A.B.A. CRIM. JUST. SEC. 19.

⁹ Recognizing the traditional role of federalism, the Supreme Court recently stated:

with this structure and with the principles of federalism, federal criminal jurisdiction should be created only when there is a demonstrated need for federal intervention. According to this understanding, the existence of a constitutional power upon which jurisdiction could be based is necessary, but it is not a sufficient basis to justify the enactment of new federal crimes.

Despite the contemporary trend to federalize a wider range of criminal conduct,¹⁰ there is still strong support for the notion that new federal crimes should not be enacted unless some distinctive federal justification can be demonstrated. For example, in 1998 the American Bar Association's Task Force on Federalization of Criminal Law concluded "[t]o create a federal crime, a strong federal interest in the matters should be clearly shown, that is, a distinctly federal interest beyond the mere conclusion that the conduct should be made criminal by some appropriate governmental entity."¹¹

Many individuals and well respected bodies such as the American Bar Association and the Judicial Conference have attempted to describe the kinds of interests that are sufficient to warrant the creation of new federal crimes.¹² Not surprisingly, the standards they have proposed generally focus on the law enforcement purposes to be served by federalizing certain conduct, i.e., the need for federal investigations and prosecutions, in addition to or in lieu of state law enforcement efforts. For example, there is general agreement that federal criminal jurisdiction is appropriate in the case of conduct that interferes with federal interests, programs, or personnel.¹³ In this context, federal

We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local. In recognizing this fact we preserve one of the few principles that has been consistent since the Clause was adopted. The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States. Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.

United States v. Morrison, 120 S. Ct. 1740, 1754 (2000) (citations and footnote omitted).

¹⁰ For a description of the growth of federal criminal law and its increasing overlap with state law, see Strazzella, *supra* note 8, at 5-14.

¹¹ *Id.* at 49 (emphasis omitted).

¹² See generally NORMAN ABRAMS & SARA SUN BEALE, FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT 64-71 (3d ed. 2000) (surveying various proposals to define the scope of federal criminal jurisdiction).

¹³ See, e.g., COMMITTEE ON LONG RANGE PLANNING, JUDICIAL CONFERENCE OF THE UNITED STATES, LONG RANGE PLAN FOR THE FEDERAL COURTS, ch. 4 at 24 (recommendation 2(a)) (1995) (2000) <<http://www.uscourts.gov/lrp/CVRPGTOC.HTM>> [hereinafter LONG RANGE PLAN] ("No one seriously disputes that conduct directly injurious to or affecting the federal government or its agents should be subject to the exclusive jurisdiction of the federal investigative, prosecutorial, and judicial branches."); Sara Sun Beale, *Reporter's Draft for the Working Group on Principles to Use When Considering the Federalization of Criminal*

criminal law is necessary to prevent the frustration of federal programs and activities, and it also ensures uniform national regulation where Congress has preempted a regulatory field.¹⁴ When the federal government lacks such a direct interest, federal jurisdiction has ordinarily been justified on the ground of some impediment to effective state enforcement. For example, federal crimes often involve interstate or international conduct, which may be difficult or impossible for an individual state to prosecute.¹⁵ In other cases the availability of a federal prosecution is desirable because there is reason to doubt the willingness or competence of state and local authorities to prosecute certain offenses, such as high-level or widespread government corruption.¹⁶ The federal civil rights crimes enacted during the Reconstruction era and in 1968 were both responses to violence that state officials were unwilling or unable to prevent or punish.¹⁷ Other federal civil rights crimes deal with misconduct by state and local officials and interference with certain political or civil rights guaranteed by federal law.¹⁸ In those situations, there is an argument that state and local authorities cannot police their own conduct and that federal officials should assume the responsibility of protecting federal

Law, 46 HASTINGS L.J. 1277, 1295-98 (1995) [hereinafter Beale, *Reporter's Draft*] (reporting discussion and comparison of two proposals for defining areas where comparative advantage of federal prosecution over state prosecution can support federalization); John B. Oakley, *The Myth of Cost-Free Jurisdictional Reallocation*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 52, 58-59 (1996) (listing five non-exhaustive categories of criminal activity generally considered suitable for federal prosecution).

¹⁴ See LONG RANGE PLAN, *supra* note 13, at ch. 4 p. 24; Beale, *Reporter's Draft*, *supra* note 13, at 1296-97 (Sullivan proposal).

¹⁵ See, e.g., LONG RANGE PLAN, *supra* note 13, at ch. 4 p. 25 (recommendation 2(b)). In other cases the states may lack the resources or expertise to respond to an enterprise that is especially sophisticated, and federal resources and expertise may be necessary to prosecute effectively. See *id.* at 25 (recommendation 2(c)).

¹⁶ See *id.* at (recommendation 2(d)). This principle may be applied to the criminalization of certain subjects or areas, but it may also be applied to the exercise of federal jurisdiction in individual cases. See *infra* note 174 and accompanying text.

¹⁷ See Theodore Eisenberg, *Federal Protection of Civil Rights*, 2 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 711-15 (Leonard W. Levy et al. eds. 1986) (giving a brief account of the history of federal civil rights legislation and its enforcement). Eisenberg notes that "the original federal civil rights statutes, and their underlying constitutional amendments, were responses to outrages by states or to private outrages that states failed to ameliorate." *Id.* at 711; see also LONG RANGE PLAN, *supra* note 13, at ch. 4 p. 25 ("During the height of the civil rights era, there was a manifest need in some parts of the country for the federal government to prosecute acts of violence against civil rights workers when local law enforcement had moved reluctantly against the violators.").

¹⁸ See LAWRENCE, *supra* note 5, at 118-49 (categorizing the various civil rights enactments and recounting circumstances of their enactment). For a description of specific instances where Southern officials supported anti-black violence during the Reconstruction period, see Taslitz, *supra* note 5, at 776.

rights.¹⁹

With that background in mind, this article explores some of the policy issues raised by the Kennedy proposal. Section I describes the Kennedy proposal and examines the arguments offered in the Senate in favor of its adoption. Although it creates a broad new crime that would extend federal jurisdiction to many offenses, the proposal also reflects an intention to continue to rely almost exclusively on state and local prosecution of hate crimes. Instead of a regime of federal prosecution, the Kennedy proposal seeks to create a new partnership with state and local officials, with federal officials generally working behind the scenes to support state and local investigation and prosecution of hate crimes. Section II examines closely the law enforcement ramifications of the Kennedy proposal for this deployment of federal authority. Although a case can be made for the law enforcement benefits that would flow from the Kennedy proposal, these benefits are modest and to some degree speculative. Accordingly, the remainder of the article considers the proposal in terms of other justifications and effects. Sections III and IV seek to place the proposed hate crime within the political science literature regarding symbolic politics and within the legal literature on the expressive function of law and the role of law in the creation and support of social norms, social meaning, and status hierarchies. Section V returns to the question of the proper role of federal criminal law in light of the various aims that might be served by the proposed hate crime legislation.

I. THE KENNEDY PROPOSAL

The Kennedy proposal creates a new federal hate crime and provides for various forms of federal support for state and local enforcement of bias-motivated offenses. The proposal begins with a series of findings intended to provide a constitutional foundation for federal jurisdiction on the basis of the Commerce Clause²⁰ and the Thirteenth, Fourteenth, and Fifteenth

¹⁹ Cf. LONG RANGE PLAN, *supra* note 13, at 25 (noting that given the potential explosiveness of some civil rights actions, they may be more effectively handled by the federal government, and that charges of “a systematic use of excessive force by police officers or criminal interference with the exercise of constitutional rights also fall within this category”).

²⁰ The findings section of the June 2000 version of the Kennedy proposal recites that:

(6) Such violence substantially affects interstate commerce in many ways, including—by impeding the movement of members of targeted groups and forcing such members to move across State lines to escape the incidence or risk of such violence; and

(A) by impeding the movement of members of targeted groups and forcing such members to move across State lines to escape the incidence or risk of such violence; and

(B) by preventing members of targeted groups from purchasing goods and services, obtaining or sustaining employment or participating in other commercial activity.

(7) Perpetrators cross State lines to commit such violence.

(8) Channels, facilities, and instrumentalities of interstate commerce are

Amendments.²¹ This introductory section concludes that “[f]ederal jurisdiction over certain violent crimes motivated by bias enables Federal, State, and local authorities to work together as partners in the investigation and prosecution of such crimes”²² and that “the problem of crimes motivated by bias is sufficiently serious, widespread, and interstate in nature as to warrant Federal assistance to States and local jurisdictions.”²³

A. *The New Offense*

The Kennedy proposal defines a federal hate crime as consisting of serious assaultive conduct committed under circumstances that create federal jurisdiction.²⁴ There are two jurisdictional prongs. The first reaches the proscribed conduct where the victim was chosen because of his or her actual or perceived race, color, religion, or national origin,²⁵ and it requires no proof of any additional jurisdictional facts. This prong is premised upon Congress’s

used to facilitate the commission of such violence.

(9) Such violence is committed using articles that have traveled in interstate commerce.

146 CONG. REC. S5370-71 §__02 (daily ed. June 19, 2000).

²¹ The findings also recite that:

(10) For generations, the institutions of slavery and involuntary servitude were defined by the race, color, and ancestry of those held in bondage. Slavery and involuntary servitude were enforced, both prior to and after the adoption of the 13th amendment to the Constitution of the United States, through widespread public and private violence directed at persons because of their race, color, or ancestry, or perceived race, color, or ancestry. Accordingly, eliminating racially motivated violence is an important means of eliminating, to the extent possible, the badges, incidents, and relics of slavery and involuntary servitude.

(11) Both at the time when the 13th, 14th, and 15th amendments to the Constitution of the United States were adopted, and continuing to date, members of certain religious and national origin groups were and are perceived to be distinct “races”. Thus, in order to eliminate, to the extent possible, the badges, incidents, and relics of slavery, it is necessary to prohibit assaults on the basis of real or perceived religions or national origins, at least to the extent such religions or national origins were regarded as races at the time of the adoption of the 13th, 14th, and 15th amendments to the Constitution of the United States.

Id. § __02(10)-(11).

²² *Id.* § __02(12).

²³ *Id.* § __02(13). This section also states that “[t]he incidence of violence motivated by the actual or perceived race, color, religion, national origin, gender, sexual orientation, or disability of the victim poses a serious national problem,” that “[s]uch violence disrupts the tranquility and safety of communities and is deeply divisive,” and that “[e]xisting Federal law is inadequate to address this problem.” *Id.* § __02(1), 02(2), 02(4).

²⁴ *See id.* § __07(a) (“Whoever . . . willfully causes bodily injury to a person or through the use of fire, a firearm, 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 . . .”).

²⁵ *See id.* (creating 18 U.S.C. § 249(a)(1)).

authority to enforce the Reconstruction Amendments, particularly the Thirteenth Amendment.²⁶ The other prong reaches the proscribed assaultive conduct where the victim was chosen because of his or her actual or perceived religion, gender, sexual orientation, national origin, or disability.²⁷ This prong rests upon the Commerce Clause, and it requires proof of a commerce nexus in each case.²⁸ In the wake of the Supreme Court's decision invalidating a portion of the Violence Against Women Act,²⁹ the adequacy of these jurisdictional provisions has been both questioned³⁰ and defended.³¹

²⁶ See *id.* § __02(10)-(11).

²⁷ See 146 CONG. REC. S5371 §__7 (daily ed. June 19, 2000) (creating 18 U.S.C. § 249(a)(2)). Note that religiously-motivated crimes are covered by both clauses. This is apparently the result of some doubt that the Civil Rights Amendments reach religion as well as race, color, and national origin. See, e.g., *Combating Hate Crimes: Promoting a Responsive and Responsible Role for the Federal Government: Hearing Before the Senate Committee on the Judiciary*, 106th Cong. 49, 50-52 (1999) [hereinafter Senate 1999 Hearings] (statement of Akil Amar) (commenting that it may be difficult to bring religious bigotry under the Thirteenth Amendment); House 1999 Hearings, *supra* note 5 (statement of John C. Yoo) (noting that Thirteenth Amendment has never been extended to religion); *The Hate Crimes Prevention Act of 1997: Hearings on H.R. 3081 Before the House Committee on the Judiciary*, 105th Cong. 57, 57 (1998) [hereinafter House 1998 Hearings] (statement of John C. Harrison) (stating the Thirteenth Amendment does not give Congress power to reach private conduct based upon religion or national origin); *The Hate Crimes Prevention Act of 1998: Hearing on S.J. Res. 1529 Before the Senate Committee on the Judiciary*, 105th Cong. 40, 43 (1998) [hereinafter Senate 1998 Hearings] (statement of Lawrence Alexander) (declaring that the power to enforce the Thirteenth Amendment does not include the power to regulate crimes other than those connected with slavery). But see 146 CONG. REC. S5353-55 (daily ed. June 19, 2000) (letter from Department of Justice finding precedent in Supreme Court's interpretation of various civil rights statutes for application of Thirteenth Amendment to violence based upon victim's religion or national origin).

²⁸ The conduct in question would be subject to federal prosecution under this section if the offense occurred "during the course of, or as a result of, the travel of the defendant or the victim" in interstate commerce, or the defendant used a facility of interstate commerce or a weapon that had traveled in interstate commerce in connection with the offense, or the defendant interfered "with commercial or other economic activity in which the victim was engaged at the time of the conduct," or the offense itself "otherwise affected interstate commerce." 146 CONG. REC. S5371 (daily ed. June 19, 2000) (creating 18 U.S.C. § 249(a)(2)(B)).

²⁹ See *United States v. Morrison*, 120 S. Ct. 1740, 1759 (2000) ("Congress's effort in § 13981 [of the Violence Against Women Act] to provide a federal civil remedy can be sustained neither under the Commerce Clause nor under § 5 of the Fourteenth Amendment.").

³⁰ See, e.g., 146 CONG. REC. S5342-43, S5349-52, S5421-22 (daily ed. June 19, 2000) (statement of Sen. Hatch); see *id.* at S5427-28 (statement of Sen. Warner).

³¹ See, e.g., 146 CONG. REC. S5343-44 (daily ed. June 19, 2000) (statement of Sen. Durbin); see *id.* at S5353 (reprinting letter from Department of Justice which concludes that Congress has authority to adopt Kennedy proposal).

B. *Federal Assistance to State and Local Authorities*

The Kennedy proposal also offers various forms of support to assist state and local authorities in the investigation and prosecution of violent hate crimes. At the request of state or local law enforcement officials, the U.S. Attorney General is authorized to “provide technical, forensic, prosecutorial, or any other form of assistance in the criminal investigation or prosecution” of violent felony offenses motivated by bias.³² In addition, the Kennedy proposal establishes a program of annual grants of up to \$100,000 per state, to assist “with the extraordinary expenses associated with the investigation and prosecution of hate crimes,”³³ and a program of grants to fund state and local programs designed to combat hate crimes committed by juveniles.³⁴

C. *The Justifications Offered for the New Offense and the Nature of the Federal-State-Local Relationship Under the Kennedy Proposal*

By creating a broad new federal hate crime, while also distributing federal resources to strengthen state and local enforcement of hate crimes, the Kennedy proposal naturally raises the question of the need for a new federal offense and the division of responsibility and authority between federal, state, and local officials. This issue is highlighted by competing hate crimes legislation introduced by Senator Hatch, which provides both grants and technical assistance from the Department of Justice at the request of state and local authorities, but does not create broad new federal offenses.³⁵

The Senate debates in 2000 and the Congressional hearings held in 1998 and 1999³⁶ paint a fairly comprehensive picture of both the law enforcement justifications offered in support of the new offenses created by the Kennedy

³² See 146 CONG. REC. S5370 (daily ed. June 19, 2000) §__04(a)(1). The offense must be a crime of violence, as defined by 18 U.S.C. § 16, a felony under the laws of a state or Indian tribe, and either (1) be “motivated by prejudice based on the victim’s race, color, religion, national origin, gender, sexual orientation, or disability” or (2) be “a violation of the hate crime laws of the State or Indian tribe.” Note that in this respect the proposal places Indian tribal enforcement on a par with state and local law enforcement.

³³ *Id.* §__04(b). This program also applies to Indian tribes. See *id.* The proposal authorizes the appropriation of (but does not appropriate) \$5 million per year to carry out this program in 2001 and 2002. See *id.* §__04(b)(6).

³⁴ See *id.* §__05.

³⁵ See 146 CONG. REC. S5371-72 (daily ed. June 19, 2000) (reporting passage of Amend. 3474).

³⁶ In 1998 and 1999, both the House and the Senate held hearings on hate crimes. See Senate 1998 Hearings, *supra* note 27, at 18-27 (statement of Eric H. Holder, Jr., Deputy Attorney General, U.S. Department of Justice); House 1999 Hearings, *supra* note 27 (testimony of Eric H. Holder) [hereinafter Holder August 1999 Testimony]; Senate 1998 Hearings, *supra* note 5, at 35-36 (statement of William C. Sowder, Criminal District Attorney for Lubbock County, Texas); House 1998 Hearings, *supra* note 27, at 16-23 (statement of Bill Lann Lee, Acting Assistant Attorney General, Dept. of Justice, Civil Rights Division).

proposal and for the need to support state and local enforcement of hate crimes laws.

Supporters of the Kennedy proposal argued that gaps in the current federal hate crimes statute, 18 U.S.C. § 245, make it difficult (or impossible) for federal prosecutors to secure convictions in some serious cases of hate-motivated violence. Representatives from the Department of Justice and other proponents described various cases of racially-motivated violence that were difficult or impossible to prosecute under § 245 because the victim was not exercising some federally protected right at the time of the attack.³⁷ They argued that a new law was needed to criminalize assaultive conduct based upon racial, ethnic, or religious hatred, even if the defendant did not seek to prevent the victim from exercising any particular federal right.³⁸ Proponents of enacting a new hate crime also emphasized that federal law does not presently reach bias-motivated attacks on many of the victims covered by the Kennedy proposal, specifically attacks motivated by the victim's gender, sexual orientation, and disability.³⁹ Both Administration witnesses and others testified that these gaps in federal law have serious consequences. Some witnesses described instances in which state and local officials did not take violent attacks against members of the covered groups seriously, with the result that hate-motivated attacks were not prosecuted or were not treated as serious offenses.⁴⁰ In other cases detailed in the hearings, federal charges were

³⁷ See Lawrence statement, *supra* note 7; Senate 1999 Hearings, *supra* note 27, at 7 (statement of Eric H. Holder, Deputy Attorney General) [hereinafter Holder May 1999 Testimony]; Senate 1998 Hearings, *supra* note 27, at 4-6, 12-19 (testimony of Eric H. Holder, Deputy Attorney General); House 1998 Hearings, *supra* note 27, at 16-23 (statement of Bill Lann Lee, Acting Assistant Attorney General).

³⁸ See Holder May 1999 Testimony, *supra* note 37, at 22 (arguing that jurisdictional limitations have "undermined the vindication of the federal interest in fighting hate-based violence").

³⁹ See *id.*; House 1998 Hearings, *supra* note 27, at 59-61 (statement of Mark Bangerter) (supporting extension of federal authority to reach hate crimes based upon sexual orientation); see *id.* at 80-86 (statement of Kathryn J. Rogers, Executive Director NOW Legal Defense and Education Fund) (supporting extension of federal authority to reach gender-motivated violence).

⁴⁰ See, e.g., Lawrence statement, *supra* note 7; Holder August 1999 Testimony, *supra* note 36 (noting that according to a 1997 survey, 45% of those who reported hate crimes based upon sexual orientation "labeled their treatment by police as indifferent to hostile," and describing an incident in which local police declined to investigate as a hate crime the actions of a group of Denver youth who asphyxiated a paraplegic when they stuffed him upside down in a trash can); Holder May 1999 Testimony, *supra* note 37, at 23-25; House 1999 Hearings, *supra* note 5 (statement of Tony Orr) (describing case in which perpetrators of extremely violent assault motivated by sexual orientation were sentenced to 40 hours of community service); House 1998 Hearings, *supra* note 27, at 59-61 (statement of Mark Bangerter) (permanently disabled victim of attack motivated by sexual orientation describes how his case was ignored by local authorities); House 1998 Hearings, *supra* note 27, at 80 (statement of Kathryn J. Rogers) (describing gender motivated hate crimes that are

brought after state acquittals resulting from a miscarriage of justice, or after convictions followed by extremely lenient sentences not reflecting the seriousness of the offense.⁴¹

However, Administration witnesses were quick to point out that they did not anticipate a large increase in the number of federal prosecutions under the Kennedy proposal. To the contrary, they testified that there would be no more than a "modest increase" in the caseload under the current federal hate crime statute, 18 U.S.C. § 245.⁴² On average, there have been four to six prosecutions per year under § 245, and that section has never generated more than ten cases per year.⁴³ This pattern reflects not only the fact that § 245 is restricted to bias-motivated offenses involving the victim's exercise of a federally protected right, but also the effects of a statutory requirement that the Attorney General or another Justice Department official holding at least the rank of Assistant Attorney General must give written approval for each prosecution under this section.⁴⁴

inadequately prosecuted at the state level).

⁴¹ See Holder May 1999 Testimony, *supra* note 37, at 21-23 (describing cases from Indiana, Michigan, and Texas in which the government lost at trial due to the requirement of proof that the victim was attacked for his exercise of a federally protected right); Holder August 1999 Testimony, *supra* note 36 (describing cases from Michigan and Texas in which government lost at trial due to the requirement of proof that the victim was attacked for his exercise of a federally protected right).

⁴² See Holder May 1999 Testimony, *supra* note 37, at 11; Holder August 1999 Testimony, *supra* note 36; House 1998 Hearings, *supra* note 27, at 16-23 (statement of Bill Lann Lee).

⁴³ See Holder May 1999 Testimony, *supra* note 37, at 22 (stating that from 1993 through 1998 the Department of Justice brought only thirty-two federal hate crimes prosecutions, an average of fewer than six per year); Holder August 1999 Testimony, *supra* note 36; *see also* Senate 1998 Hearings, *supra* note 27, at 68-71, 80-88 (1998) (describing each individual prosecution between 1969 and 1998).

⁴⁴ The certification requirement in 18 U.S.C. § 245(a)(1) provides:

No prosecution of any offense described in this section shall be undertaken by the United States except upon the certification in writing of the Attorney General, the Deputy Attorney General, the Associate Attorney General, or any Assistant Attorney General specially designated by the Attorney General that in his judgment a prosecution by the United States is in the public interest and necessary to secure substantial justice, which function of certification may not be delegated.

18 U.S.C. § 245(a)(1) (1994).

The Kennedy proposal reformulates the certification requirement to provide that one of the designated officials must certify that any case prosecuted under the new sections meets one of the following criteria: there is reasonable cause to believe that the actual or perceived race, color, national origin, religion, sexual orientation, gender, or disability was a "motivating factor" underlying the offense; that the Attorney General or her designee has consulted with state officials and determined that (1) the state does not have jurisdiction or refuses to exercise its jurisdiction, or (2) the state has requested that the federal government assume jurisdiction or does not object to federal jurisdiction, or (3) actions by state or local officials "have or are likely to leave demonstrably unvindicated the Federal interest in

In supporting the Kennedy proposal, representatives from the Department of Justice testified that the main goal of the legislation was not to increase substantially the number of federal hate crime prosecutions, but rather to create a stronger federal-state partnership to prosecute hate crimes. The enactment of the new federal offenses is intended to create concurrent jurisdiction, thereby providing a legal basis for this partnership.⁴⁵ Witnesses from the Department of Justice emphasized that state and local prosecution would continue to be the norm and that federal resources and expertise should be made available to assist state and local government in a coordinated response.⁴⁶ The Department pointed to the success of the partnership approach in church arson cases and argued in favor of employing the same approach in the hate crimes cases.⁴⁷ Although the new federal authority would be employed mainly in support of state and local law enforcement, it would also enable federal authorities to bring “rare” federal prosecutions.⁴⁸

eradicating bias-motivated crime.” Amend. 3473, §__07 (b), 146 CONG. REC. S5371 (daily ed. June 19, 2000).

⁴⁵ Deputy Attorney General Holder testified:

The most important benefit of concurrent state and federal criminal jurisdiction is the ability of state and federal law enforcement officials to work together as partners in the investigation and prosecution of serious crimes. When federal jurisdiction does exist in the limited hate crimes contexts authorized by 18 U.S.C. 245, the federal government’s resources, forensic expertise, and experience in the identification and proof of hate-based motivations often provide an invaluable investigative complement to the familiarity of local investigators with the local community and its people. It is by working together cooperatively that state and federal law enforcement officials stand the best chance of bringing the perpetrators of hate crimes swiftly to justice.

Holder August 1999 Testimony, *supra* note 36.

Mr. Holder made the same statement in earlier testimony before the Senate. *See* Holder May 1999 Testimony, *supra* note 37, at 20.

⁴⁶ *See* Holder August 1999 Testimony, *supra* note 36 (describing examples of effective partnership approach, and predicting that “additional state-federal partnerships would result in an increase in the number of arrests and successful prosecutions analogous to that achieved through joint state-federal investigation in the church arson context”). Mr. Holder made the same statement in earlier testimony before the Senate. *See* Holder May 1999 Testimony, *supra* note 37, at 20-21.

⁴⁷ *See* Holder August 1999 Testimony, *supra* note 36 (noting that the Church Arson Task Force had worked with state and local officials to investigate 785 fires since 1995, resulting in arrest of 340 defendants, 80% of whom were prosecuted in state courts under state law); Holder May 1999 Testimony, *supra* note 37, at 20-21 (noting that ATF, FBI, and federal prosecutors “have collaborated with state and local officials in each and every church arson case that has occurred since January 1, 1995,” producing arrest rate double the national average for arson, with 80% of prosecutions being brought in state courts).

⁴⁸ Deputy Attorney General Holder testified:

Concurrent federal jurisdiction is needed to authorize the federal government to share its law enforcement resources, forensic expertise, and civil rights experience with state and local officials. And in rare circumstances—where state or local officials are unable or unwilling to bring appropriate criminal charges in state court, or where federal law

The Deputy Attorney General, who testified repeatedly on this point, emphasized that Departmental policy and a statutory requirement for both consultation and certification would keep the number of federal prosecutions for hate crimes low.⁴⁹ The Department would continue to follow its “backstop policy,” under which it generally defers to state and local authorities in the first instance, while at the same time making federal aid available to them (as was done, for example, in the state prosecution arising out of the murder of James Byrd, Jr.).⁵⁰ Further, the new hate crime statute proposed by Kennedy would require prior consultation with state and local authorities and would preclude federal prosecution unless the certifying official found that state authorities were not prosecuting, had sought or not objected to federal prosecution, or that the state prosecution had failed to vindicate federal interests.⁵¹

Both the hearings and the Senate debates also explored the role that the legislation might play in symbolic terms. That issue is discussed in section III.

II. LAW ENFORCEMENT IMPACT

In law enforcement terms, the issue is what the enactment of the new federal crime achieves, beyond what could be accomplished by providing the states with resources at their own request. The Hatch proposal highlights the fact that grants and all other forms of federal investigative and prosecutorial assistance to state and local authorities may be provided without creating a new federal offense. The Kennedy proposal creates a broadly defined offense that would encompass thousands of cases each year. It includes all bias-motivated attacks where victims are selected because of their race, color,

or procedure is significantly better suited to the vindication of the federal interest—the United States must be able to bring federal civil rights charges. In these special cases, the public is served when, after consultation with state and local authorities, prosecutors have a federal alternative as an option.

Holder August 1999 Testimony, *supra* note 36.

Mr. Holder made the same statement in earlier testimony before the Senate. *See* Holder May 1999 Testimony, *supra* note 37, at 20. *See* also the 1998 testimony of the head of the Civil Rights Division, who stated that in recent years the Department had brought fewer than six hate crimes prosecutions per year, and that “[w]e do not anticipate that the enactment of H.R. 3081 would result in any significant increase in these numbers.” House 1998 Hearings, *supra* note 27, at 16 (statement of Bill Lann Lee).

⁴⁹ *See* Holder August 1999 Testimony, *supra* note 36 (noting that “Department-wide policies . . . would impose additional limitations on the cases prosecuted by the federal government,” and that certification requirement in the Kennedy proposal “would ensure that the Department’s new areas of hate crimes jurisdiction would be asserted in a properly limited fashion”). Mr. Holder made the same statements in his earlier testimony before the Senate. *See* Holder May 1999 Testimony, *supra* note 37, at 25; *see also* Senate 1998 Hearings, *supra* note 37, at 18-19 (statement of Eric H. Holder).

⁵⁰ *See* Holder August Testimony, *supra* note 36; Holder May Testimony, *supra* note 37, at 19.

⁵¹ *See infra* text accompanying note 57.

religion, or national origin. It also covers all bias-motivated attacks where the victims were selected because of their religion, gender, sexual orientation, or disability, as long as the attacks have the requisite connection to interstate commerce. According to the FBI's Uniform Crime Report, 2,814 bias-motivated assaults were reported in 1998,⁵² and this number probably understates the incidence of bias-motivated attacks that would fall within the offense created by the Kennedy proposal.⁵³ How would the enactment of the Kennedy proposal affect the investigation and prosecution of these crimes?

As noted above,⁵⁴ neither the Congressional proponents of the Kennedy proposal nor the Department of Justice propose federal prosecutions for all, or even a large portion, of hate-motivated assaults. To the contrary, they assume that the certification procedure and administrative discretion will maintain the primacy of state prosecutions, so that federal hate crime prosecutions will be the exception rather than the rule. Indeed, the Administration's testimony in Congress describes federal prosecutions under the new crimes as "rare" and projects only a "modest increase" in the current average of six federal prosecutions per year. This testimony suggests that if the Kennedy amendment is enacted there will be no more than a handful of additional federal hate crime prosecutions per year. If there are so few federal prosecutions, there may be little or no impact in terms of law enforcement (beyond that resulting from the grant of authority to provide both technical and financial assistance to state and local authorities). I return below to the implications of the possibility that there will be no real impact on law enforcement. First, however, I will explore the potential for direct law enforcement effects through federal prosecutions and indirect effects on law enforcement in state prosecutions.

A. *The Direct Effect of Federal Prosecutions*

Assuming that the Administration's testimony correctly forecasts the future use of the new statutory authority, how could a handful of federal prosecutions per year have a significant effect in terms of law enforcement? If the cases in question are highly publicized, like the murder trials arising out of the Matthew Shepard and James Byrd murders, and the federal prosecution of the state patrolmen who assaulted motorist Rodney King, a few cases might be significant. Indeed, the prosecution of Stacy Koon and the other highway patrolmen who beat Rodney King is especially relevant here, because it was a

⁵² FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS, HATE CRIME STATISTICS, TABLE 3 (1998) (2000) <<http://www.fbi.gov/ucr.htm>>.

⁵³ Despite the fact that the FBI's statistics are not limited to cases involving the jurisdictional predicates that would limit the new offenses directed at victims because of their gender, sexual orientation, or disability, it is still likely that these figures understate the offenses that would fall within the terms of the new crimes. Authorities believe that the FBI's figures substantially undercount hate crimes, and their figures do not include gender-motivated offenses. *See id.*

⁵⁴ *See supra* text accompanying notes 42-51.

federal civil rights prosecution that followed an unsuccessful state prosecution. The widespread rioting and violence in Los Angeles following the state acquittal of those officers⁵⁵ demonstrates how the apparent failure of the criminal justice system in highly publicized cases can tear our fragile social fabric, and how important it can be to have a federal remedy available in a few important cases. Thus, one might argue that the impact of a new federal crime could be substantial even if only a few high profile prosecutions were brought each year. This is the most that can be said for the direct effect of a small number of prosecutions, and it depends upon the questionable assumption that many of the prosecutions under the new authority would receive this kind of public attention. If that assumption is incorrect, then the impact of a small number of low visibility cases would be quite limited. By the standards normally applied to federal programs, it is doubtful that a positive impact in the case of three, five, or even ten cases per year would be viewed as significant.

It should be noted, however, that the legislation itself would not guarantee that the number of prosecutions will be as low as the Department of Justice's predictions. The factors cited as restraints on the future use of the statute are subject to change. A future Administration could adopt a much more aggressive policy and seek to employ the new statutory authority as broadly as possible.⁵⁶ Given that possibility, the question is how much the certification process actually restricts the use of the new authority, procedurally and substantively. As a procedural matter, under the Kennedy proposal no federal prosecution could be brought under 18 U.S.C. § 249 without the prior approval of one of the assistant attorneys general, the Deputy or Associate Attorney General, or the Attorney General herself. While the requirement of certification by a high-level official would make the process more time consuming, it would not guarantee that the officials in question would be unwilling to grant the certification in a large number of cases, assuming that they received requests meeting the statutory criteria. One possible comparison

⁵⁵ The rioting that erupted in Los Angeles following the state verdict in *People v. Powell* killed at least 45 people, destroyed more than 5,000 buildings, and caused at least \$750 million in property damage. See generally Greg Braxton & Jim Newton, *Looting and Fires Ravage L.A.*, L.A. TIMES, May 1, 1992, at A1; Louis Sahagun & Carla Rivera, *Jittery L.A. Sees Rays of Hope*, L.A. TIMES, May 3, 1992, at A1; Douglas Jehl & Frederick M. Meier, *Bush Arrives in L.A., Calls for Healing*, L.A. TIMES, May 7, 1992, at A1; see also Symposium, *Los Angeles, April 29, 1992 and Beyond: The Law, Issues, and Perspectives*, 66 S. CAL. L. REV. 1313 (1993) (symposium of articles and essays relating to the King trial and resulting civil disturbance).

⁵⁶ At least one witness predicted that the Department would come under significant pressure from bias crime victims and advocacy groups to intervene in many cases to demonstrate the importance of the issues. See House 1999 Hearings, *supra* note 5 (statement of Kimberly A. Potter). But see *id.* (statement of Jack McDevitt) (speculating that only a limited number of cases would be referred by state and local authorities, who would want to maintain control of cases because of the potential for publicity).

is to the constitutional requirement that the president sign all federal legislation. Laying aside legislation that becomes effective when the president fails to act within the requisite period, it is still true that the president personally signs a great many statutes. Similarly, the Attorney General (or an assistant or deputy attorney general) might sign a large number of certifications in reliance on staff recommendations that the requisite criteria were met. So the question is really the nature of the substantive standards imposed by the certification requirement.

The Kennedy proposal allows certification authorizing a federal prosecution when any one of the following criteria is met:

- (A) the State does not have jurisdiction or does not intend to exercise jurisdiction;
- (B) the State has requested that the Federal Government assume jurisdiction;
- (C) the State does not object to the Federal Government assuming jurisdiction; or
- (D) the verdict or sentence obtained pursuant to State charges left demonstrably unvindicated the Federal interest in eradicating bias-motivated violence.⁵⁷

How much do these requirements limit the Department of Justice? Supporters described the certification process as one that protects state prerogatives,⁵⁸ and Senator Kennedy stated that the “very limiting” certification requirements “effectively give the States veto rights over Federal jurisdiction.”⁵⁹ In fact, however, the certification process permits federal prosecutors to override the actions of state officials. Under criterion A a federal prosecution can be brought whenever state officials decline to prosecute, and under D a federal prosecution can be brought when state officials prosecute but federal officials are dissatisfied with the results of the state’s efforts. Thus, federal officials can effectively overrule any state prosecutorial or sentencing decision they believe to be too lenient, as long as they comply with the certification process. If state officials disagree with the

⁵⁷ 146 CONG. REC. S5371 (daily ed. June 19, 2000), AMEND. 3473, §__07(b).

⁵⁸ See 146 CONG. REC. S5342 (daily ed. June 19, 2000) (remarks of Sen. Durbin) (denying that Kennedy proposal gives the federal government control and noting that certification procedure gives states the “first option” that will not be preempted by federal authorities); 146 Cong. Rec. S5346 (daily ed. June 19, 2000) (remarks of Sen. Jeffords) (certification procedure and consultation requirement will “ensure that we are not infringing on the rights of States to prosecute these crimes”); 146 Cong. Rec. S5302 (daily ed. June 16, 2000) (remarks of Sen. Wyden) (pointing out that under the Kennedy proposal the federal government will not be “coming in and saying: We are going to call all the shots, and preempt the local jurisdictions”).

⁵⁹ 146 CONG. REC. S5348 (daily ed. June 19, 2000) (statement of Sen. Kennedy).

decision to certify, it seems likely that they will have no legal recourse.⁶⁰ There is, therefore, some truth to Senator Hatch's argument that the Kennedy proposal does not really defer to state and local authorities.⁶¹ On the other hand, it is important to note that the allocation of federal prosecutorial authority to the United States Attorneys creates a situation in which local United States Attorneys will ordinarily be sensitive to local concerns,⁶² and there would be political recourse as well given the requirement that prosecutions under the Kennedy bill be approved by high level officials at the Justice Department.

How likely is it that there will be a change in the federal policy leading to a much more aggressive use of the proposed federal hate crime? There is no good way to make such a prediction. On the one hand, there are many examples of broadly written federal statutes that were initially intended to reach a narrow problem, and were later interpreted more broadly and employed more aggressively by the Department of Justice.⁶³ Similarly, in the context of civil rights enforcement, the government's enforcement of the 1964 Civil Rights Act became more aggressive over time (and has waxed and waned in different Administrations).⁶⁴ On the other hand, since the adoption of the

⁶⁰ The proposed statute does not deal explicitly with the question of judicial review of certification decisions. In analogous situations where standards limit federal charging prerogatives the courts have generally declined to review the exercise of prosecutorial discretion. See, e.g., ABRAMS & BEALE, *supra* note 12, at 676-77 (describing courts' refusal to enforce *Petite* Policy); see also 2 SARA SUN BEALE, ET AL., GRAND JURY LAW AND PRACTICE (2d ed. 1997) (describing judicial refusal to enforce prosecutorial standards in grand jury context). It should be noted, however, that these authorities generally dealt with voluntarily assumed administrative standards, not legislatively imposed standards.

⁶¹ See 146 CONG. REC. S5340 (daily ed. June 19, 2000) (remarks of Sen. Hatch).

⁶² See generally Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757 (1999) (noting that because United States Attorneys are drawn from each locality and are dependent on local enforcers' information networks they have incentives to be sensitive to local concerns).

⁶³ See generally Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345.

⁶⁴ For example, the EEOC initially refused to take seriously the prohibition against discrimination on the basis of sex. The first director of the EEOC stated that the inclusion of sex in the 1964 Civil Rights Act "was a 'fluke' that was 'conceived out of wedlock,'" and he also "stated that he and others at the EEOC believed that men were 'entitled' to female secretaries." GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 252-53 (1991) (quoting Rep. Martha Griffiths, 20 CONG. REC. 13689 (1966)). Eventually, however, the EEOC accepted its statutory mandate, and in 1980 it issued guidelines specifying that "sexual harassment" constitutes a violation of Title VII. See *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986). The current version of these guidelines is codified at 29 C.F.R. § 1604.11 (1999). The ebb and flow of the Administration's response can also be seen in its position on civil rights defenses such as business necessity. See, e.g., DAVID A. CATHCART, ET AL., *THE CIVIL RIGHTS ACT OF 1991* 22-23 (1993) (describing Bush Administration support of employers' position on the

existing hate crimes statute in 1968 the government has exercised its authority very sparingly.⁶⁵

In sum, because federal officials expect to bring only a few federal prosecutions each year, in law enforcement terms the direct effect of the new hate crimes created by the Kennedy proposal might be quite minimal. There is, however, a possibility for greater impact if the prosecutions are given high profile media treatment, or the statute is given a more aggressive interpretation by federal officials than is proposed by the Clinton Administration.

B. *The Indirect Effect of Federal Prosecutorial Authority*

The existence of new federal hate crimes might also have an indirect impact on state and local prosecutions. Both the Kennedy and Hatch proposals provide financial and technical support for state and local officials investigating and prosecuting hate crimes, but under the Hatch proposal—which creates no new federal offense—the federal government appears to be limited to a passive role, providing funds or technical expertise at the request of state and local officials. In contrast, the enactment of the new federal hate statute would give the federal government concurrent jurisdiction with the states, thus permitting federal officials to participate in the investigative phase without requiring any invitation or request from state authorities.

The Administration envisions a model where federal officials are intimately involved with state and local officials at each step of the investigation and prosecution of hate crimes, though the vast majority of the resulting prosecutions are brought in the state courts. This approach is modeled on the successful Church Arson Task Force.⁶⁶ This integrated approach is also reflected in the Attorney General's directive that federal-state-local hate crime working groups be established in each federal district,⁶⁷ and in the memorandum of understanding between the Department of Justice and the National District Attorneys Association (which negotiated on behalf of state prosecutors).⁶⁸ The memorandum, signed in 1998, covers the investigation and

particularity requirement in business necessity cases).

⁶⁵ See *supra* note 43 and accompanying text.

⁶⁶ See *supra* note 47 and accompanying text.

⁶⁷ In 1997, the Attorney General announced the formation in each federal district of "a working group consisting of federal, state, and local law enforcement, as well as community leaders and educators, to develop a comprehensive approach to hate crimes." MEMORANDUM FOR ALL UNITED STATES ATTORNEYS, IMPLEMENTATION OF THE HATE CRIME INITIATIVE (2000) <<http://www.usdoj.gov/ag/readingroom/hatecrimeinit.htm>>; see also MEMORANDUM OF UNDERSTANDING, NATIONAL DISTRICT ATTORNEYS ASSOCIATION AND DEPARTMENT OF JUSTICE, § V(A)(1) (July 2, 1998) [hereinafter MEMO OF UNDERSTANDING] ("[T]he Attorney General of the United States has asked all United States Attorneys to create or expand existing Hate Crime Working Groups in their federal districts to involve local, state, and federal law enforcement, as well as community leaders, in the development of a comprehensive approach to hate crimes.").

⁶⁸ MEMO OF UNDERSTANDING, *supra* note 67. A draft of the agreement that is

prosecution of cases involving hate crimes or the deprivation of rights by law enforcement officers acting under color of law. The memorandum requires that all "coordination-sensitive" hate crimes be reported at the earliest possible time to both federal and state authorities (ideally within 24 hours),⁶⁹ and that shortly thereafter those authorities consult or meet to determine whether to proceed with a state investigation, a federal investigation, or a coordinated or joint investigation.⁷⁰

This opportunity for immediate consultation, and the option of joint or coordinated investigations, gives federal officials a much greater opportunity to influence the course of state and local prosecutions. The immediate and continuing federal involvement might enhance the states' willingness to investigate and prosecute hate crimes vigorously, and it might also improve the quality and success of state investigations and prosecutions. This effect may be quite distinct from the availability of federal grants funding state prosecutions or providing federal technical resources on request. Federal influence would be the result of the development of close working relationships between federal, state, and local officials responsible for investigating and prosecuting hate crimes and of the consultation that would take place between federal officials and their state and local counterparts regarding the best way to proceed in individual cases. This would give federal officials a much greater influence on state cases than they currently have. State and local authorities would, of course, be aware that their federal counterparts could override any decision to decline to prosecute, to bring less serious charges, or to accept a plea to a lesser offense by bringing federal charges.⁷¹

Senator Hatch argued that these features of the Kennedy proposal gave the federal government too much power over state and local prosecutions:

The [Kennedy] amendment does not defer to State or local authorities at all. It would leave the Justice Department free to insert itself in a local hate crime prosecution at the beginning, middle or end of the prosecution,

substantially the same as the final agreement was published. *Draft Memorandum of Understanding Between the National Association of District Attorneys and the Department of Justice*, 32 PROSECUTOR 28 (Oct. 1998).

⁶⁹ MEMO OF UNDERSTANDING, *supra* note 67, § IV-V(C). The Memorandum of Understanding provides a lengthy definition of the term "coordination-sensitive incidents" that "includes" several different kinds of incidents, including (1) cases of serious damage to person or property where there are substantial differences between state and federal law, (2) cases presenting an important policy consideration, such as the involvement of organized militia or racial supremacists, (3) incidents that may provoke instability in the community, and (4) cases requiring investigative or prosecutorial resources that exceed those available to state and local authorities. *Id.* § IV-V(C).

⁷⁰ *See id.* § V(C)(2)-(3).

⁷¹ If state or local authorities decline to prosecute, the state "does not intend to exercise jurisdiction;" if they bring less serious charges or accept a plea to lesser charges the "verdict or sentence" could be said to leave the federal interest demonstrably unvindicated. *See supra* text accompanying note 57.

even after the local prosecutor has obtained a guilty verdict. Even if the Justice Department does not formally insert itself into the particular case, it nevertheless will be empowered by the legislation to exert enormous pressure on local prosecutors regarding the manner in which they handle the case—from charging decisions the plea bargaining decisions to sentencing decisions.⁷²

Although the direct effect of a handful of federal prosecutions per year in a nation of 250 million might be minimal unless those prosecutions fell consistently under a media spotlight, concurrent jurisdiction would create a situation in which federal officials could seek to influence a much greater number of state and local cases. Whether this would occur is rather speculative. It would depend upon many factors, including the willingness of individual state and local investigators and prosecutors to follow the course recommended in the memorandum of understanding and routinely to invite their federal counterparts to collaborate at the earliest moment. It would also be influenced by the willingness of federal investigators and prosecutors to allocate substantial resources to cases that would be brought by their state and local counterparts. In the past, federal officials have shown an unsurprising tendency to prefer cases in which they are the lead agency, for which their own internal systems seem to award greater credit.⁷³ Even if federal officials do participate more actively in a partnership, it remains to be seen how great an impact there would be on the bottom line, in terms of more intense and effective state and local investigations and prosecutions.

III. FEDERAL HATE CRIMES AS SYMBOLIC POLITICS

The previous section concludes that there may be some modest law enforcement benefits from the adoption of new federal hate crimes even if there will be little or no direct federal enforcement. But in law enforcement terms, the argument is hardly overwhelming. The relative weakness of the law enforcement justifications leads naturally to the question whether the Kennedy proposal might be serving other goals. Why might Congress (and the Clinton Administration) support hate crimes legislation that might have only negligible law enforcement benefits?

The theory of symbolic politics provides one possible explanation, as well as a lens through which to analyze the Kennedy proposal. Political scientist Murray Edelman coined the term symbolic politics in the 1960s.⁷⁴ Edelman

⁷² See 146 CONG. REC. S5340 (daily ed. June 19, 2000) (remarks of Sen. Hatch).

⁷³ Cf. JIM MCGEE & BRIAN DUFFY, MAIN JUSTICE: THE MEN AND WOMEN WHO ENFORCE THE NATION'S CRIMINAL LAWS AND GUARD ITS LIBERTIES 56 (1996) (under J. Edgar Hoover promotions and raises in the FBI were driven by the number of indictments, arrests, and convictions).

⁷⁴ See MURRAY EDELMAN, THE SYMBOLIC USES OF POLITICS (1964) [hereinafter EDELMAN, SYMBOLIC USES]; see also MURRAY EDELMAN, POLITICS AS SYMBOLIC ACTION: MASS AROUSAL AND QUIESCENCE (1971) [hereinafter EDELMAN, SYMBOLIC ACTION].

theorized that the mass public views political activity in symbolic terms,⁷⁵ and he distinguished between political activity, such as legislation, that produces tangible benefits and activity that conveys only symbolic reassurances.⁷⁶ Symbolic political acts evoke strong emotions, such as patriotic pride, or widely shared anxieties, in the public.⁷⁷

Edelman's work has helped explain why organized groups often obtain tangible benefits from either legislation or administrative action, while the public and consumers, who are the "ostensible beneficiaries," receive only symbolic reassurances.⁷⁸ Edelman also argued that government activity changes and mobilizes public opinion, thereby creating and changing the public's demands and expectations.⁷⁹

Although the Freudian elements of Edelman's work are not currently influential, a good deal of modern political science scholarship accepts the general notion that interest groups dominate political activity.⁸⁰ Influential pressure groups secure the enactment of taxes, subsidies, regulations, and other programs to raise their welfare by a process referred to as "rent seeking," in which rival groups offer campaign contributions, votes, and other incentives to legislators.⁸¹ Small interest groups actually have a political advantage over the general public, because of collective action problems in seeking support for

⁷⁵ See EDELMAN, *SYMBOLIC USES*, *supra* note 74, at 2-13, 26-42 (discussing political activity that produces tangible benefits).

⁷⁶ See *id.* at 2, 12, 22-27, 36-37 (discussing political activity that conveys only symbolic reassurances).

⁷⁷ See *id.* at 6. The term "symbolic politics" also takes on a broader connotation in some of the later political science literature, where symbolic politics are contrasted with the politics of self-interest. This literature explores the degree to which political behavior is explained by symbolic attitudes as opposed to short-term material self-interest, and finds (contrary to what economists might predict) that symbolic attitudes appear to have a major effect on issue voting. See, e.g., David O. Sears, et al., *Self-Interest vs. Symbolic Politics in Policy Attitudes and Presidential Voting*, 74 AM. POL. SCI. REV. 670 (1980). For an effort to explain how symbolic attitudes and self interest might, in the long term, be related, see Dennis Chong, *Values Versus Interests in the Explanation of Social Conflict*, 144 U. PA. L. REV. 2079 (1996).

⁷⁸ For example, some scholars have charged that many health, safety, and regulatory statutes are more symbolic than functional. See, e.g., John P. Dwyer, *The Pathology of Symbolic Legislation*, 17 ECOLOGY L.Q. 233, 236-50 (1990) (reviewing the political origins of section 112 of the Clean Air Act, 42 U.S.C. § 7412 (1982), which deals with hazardous air pollutants).

⁷⁹ See EDELMAN, *SYMBOLIC ACTION*, *supra* note 74, at 4-10 (explaining that governmental acts can provide clues to the public concerning its future status and security).

⁸⁰ See generally DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 12-37 (1991) (discussing the political impact of interest groups as viewed from the perspective of political science and economics).

⁸¹ See, e.g., William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 877 (1975) (concluding that "legislation is 'sold' by the legislature and 'bought' by the beneficiaries of the legislation").

broad public goods.⁸²

Interest group models provide an explanation for the phenomenon described by Edelman, in which politicians deliver legislation conferring tangible benefits on powerful interest groups, while they placate the general public with legislation or administrative action that provides only empty symbolic gestures. A number of scholars have suggested that much of the recent federal crime legislation can be explained as symbolic politics, which exploits the public's fear of crime.⁸³ Indeed, a comparative study by Anthony King concluded that various features of the American political system produce extreme electoral vulnerability and thereby create much greater incentives for such empty symbolic actions than do the British or German systems.⁸⁴

In King's view, one of the best examples of American symbolic politics is federal crime policy, where the imperative in the 1980s and 1990s has been to appear tough on crime. King notes that between 1981 and 1994 there were seven congressional election years, and in six of those seven years Congress passed a major crime bill (usually just prior to the election); in contrast, Congress passed only one crime bill in a non-election year.⁸⁵ As King notes, "[t]he correlation between election years and crime bills is almost perfect."⁸⁶ In his view, much of this legislation was "symbolic politics, the politics of the grand but empty gesture" intended to respond to voters' anxieties where there were few if any practical solutions at hand.⁸⁷

The theory of symbolic politics provides an explanation for the political salience of various issues that may have little tangible or practical importance but evoke intense emotions, such as whether to fly the Confederate flag over the statehouse or to return young Elian Gonzalez to Cuba. On the one hand,

⁸² See FARBER & FRICKEY, *supra* note 80, at 23 (citing the work of Mancur Olson to support the theory that small groups can organize more successfully to obtain circumscribed benefits from the government than can large groups which want a broader array of government benefits).

⁸³ See, e.g., ANTHONY KING, *RUNNING SCARED: WHY AMERICA'S POLITICIANS CAMPAIGN TOO MUCH AND GOVERN TOO LITTLE* 138-41 (1997); Brian T. Fitzpatrick, *Congressional Re-election Through Symbolic Politics: The Enhanced Banking Crime Penalties*, 32 AM. CRIM. L. REV. 1, 29 (1994) ("Merely passing a law can make an anxious public feel better."); Nancy E. Marion, *Symbolic Policies in Clinton's Crime Control Agenda*, 1 BUFF. CRIM. L. REV. 67, 67 (1997) ("Since crime cannot be significantly reduced through legislation, politicians must rely on symbolic policies to convey the message that they are doing something to solve the problem.").

⁸⁴ See KING, *supra* note 83, at 43-46.

⁸⁵ See *id.* at 153-54 (referencing Congressional enactment of the Brady Handgun Violence Prevention Act in 1993).

⁸⁶ *Id.* at 154 (listing the years in which Congress passed major crime legislation from 1981 through 1994).

⁸⁷ See *id.* at 140-42 (The majority of these bills created mandatory minimum sentences, especially for drug-related and violent crimes. King feels that such legislation "led to manifest injustices" and "may actually have increased [crime]."). *Id.*

such issues readily capture public interest, and generate strong emotions that may dictate electoral success or failure. Politicians cannot afford to ignore such issues. Indeed, American politicians have a great incentive deliberately to employ and emphasize such issues, while simultaneously satisfying various interest groups that lobby for more tangible legislative action.

Applying the framework developed by Edelman, the Kennedy hate crimes proposal could be seen as a classic example of symbolic politics, where both Congress and the Clinton Administration offer largely symbolic reassurances, rather than tangible or programmatic mechanisms to respond to the problem of bias-motivated crimes.⁸⁸

Moreover, the intense emotion and anxiety evoked by the highly publicized hate crimes, particularly the murders of Matthew Shepard and James Byrd, Jr., might be seen as increasing the public demand for symbolic reassurances. This situation also conforms to many of the elements of the pattern that Edelman identified as likely to promote symbolic legislation or administrative activity: a group seeks improvement in status through protest activity, appears to have an unfavorable political position compared to other reference groups, and responds strongly to symbols connoting suppression of threats.⁸⁹ Hate crimes legislation is supported by various groups that have been the victims of social and political discrimination; these groups might be thought to have an unfavorable political position,⁹⁰ and to be seeking to improve their status through protest activity (among other means).⁹¹ Arguably the Clinton

⁸⁸ Compare, for example, the federal "war on drugs" and the federal emphasis on prosecuting violent crime involving firearms, both of which involve the commitment of federal funds and personnel, and a significant increase in the number of federal prosecutions. From 1989 to 1998, the number of firearms cases filed in federal district courts increased 61%; in contrast, criminal filings as a whole increased by only 25%. See Patrick Walker & Pragati Patrick, *Trends in Firearms Cases From Fiscal Year 1989 Through 1998, and the Workload Implications for the U.S. District Courts* (2000) <<http://www.uscourts.gov/firearms/firearms00.html>>. Between fiscal 1997 and 1998, the federal criminal caseload increased by 14.8%, while the number of drug prosecutions increased by 19.2% and the number of weapons prosecutions increased by 14.4%. See ABRAMS & BEALE, *supra* note 12, at 16-17 (reprinting case statistics from 1994 to 1998). Drug cases now account for more than 40% of the federal docket. See *id.* at 14. There were 16,231 federal drug prosecutions in 1998, compared to seventy-seven civil rights prosecutions. See *id.* at 17-18. There was no clear trend in the number of civil rights prosecutions between 1994 and 1998. The number of prosecutions rose from 1994 until 1996, fell precipitously in 1997, and rose in 1998. See *id.* at 18.

⁸⁹ EDELMAN, *SYMBOLIC USES*, *supra* note 74, at 37 ("[L]aws as symbols must stand because they satisfy . . . interests that politicians fear will be expressed actively if a large number of voters are led to believe that their shield against a threat has been removed.").

⁹⁰ Distinctions can, of course, be drawn among the groups identified by the Kennedy proposal. Gender-motivated violence is directed principally against women, who make up more than half of the population and thus have the potential to wield more political power than other groups such as gays, lesbians, the disabled, or racial and religious minorities.

⁹¹ On the other hand, it is not clear that the groups supporting hate crimes legislation

Administration and supporters of the Kennedy proposal in Congress are seeking to obtain the political support of the groups interested in hate crimes legislation by giving them little more than a reassuring symbolic pat on the back.⁹²

Assessment of the Kennedy proposal as symbolic politics highlights some interesting issues. Coupling Edelman's work with more recent interest group theory suggests that effective interest group lobbying should secure real benefits, while the general public or less effective groups are given only symbolic reassurances. Is hate crimes legislation a good fit for this model? On the one hand, some of the groups in question, such as gays and lesbians, have not traditionally wielded much political power. Edelman and interest group theorists might predict that such groups would only be able to secure symbolic action, rather than more tangible benefits. Similarly, the horror the general public felt over the Byrd and Shepard cases could be quieted effectively by symbolic reassurances. This is consistent with a characterization of the Kennedy proposal as symbolic politics. On the other hand, it is at least equally plausible to argue that interest group theory would characterize hate crimes as rent seeking legislation by effective interest groups. Hate crimes legislation is generally supported by a coalition of groups. Because the Kennedy proposal covers crimes based upon the victim's race, religion, nationality, gender, sexual orientation, and disability, it would naturally attract support from a broad coalition of groups some of which have a track record of effective interest group pressure.⁹³ This issue has much greater salience for members of these groups than it does for other members of the general public. Though public fears might have been easily quieted by symbolic acts, there is no reason to think that effective interest groups would lobby for symbolic reassurances instead of tangible benefits. This perspective suggests a need to reevaluate the benefits that the groups in question could achieve through the Kennedy proposal.

One possibility is that the interest groups in question have their own sophisticated judgment of the law enforcement benefits offered by the

meet two other criteria that Edelman mentions, i.e., acting on stereotypes and responding strongly to symbols connoting threats.

⁹² Cf. House 1999 Hearings, *supra* note 5 (statement of John S. Baker, Jr.) (characterizing the House bill paralleling the Kennedy proposal as "yet another example of 'feel good' criminal law that does not accomplish what is hoped for and may bring about unfortunate and unintended results," explaining that including bias as an element of a crime will make convicting the criminal more difficult).

⁹³ See JOEL BEST, *RANDOM VIOLENCE: HOW WE TALK ABOUT NEW CRIMES AND NEW VICTIMS* 57-58 (1999) (noting that the term "hate crime" came to "establish a common cause among . . . well established groups dedicated to protecting the interests of African Americans . . . other racial minorities . . . and Jews." Gay and lesbian organizations fought to join this coalition and establish the "analogy between homosexuals and racial and religious minorities . . . [because] not everyone accepted the claim that homosexuals were simply another minority deserving equal protection.").

Kennedy proposal, and that they find these benefits to be significant. Even though relatively few prosecutions are anticipated under the new statutory authority, those particular cases may be significant, and it would not be surprising if supporters of the bill placed great importance on these cases. They may also believe that the federal partnership model will indeed improve state and local efforts to prosecute hate crimes effectively. On the other hand, this still leaves open the question why these interest groups would not press for a broader federal role and a substantially larger number of federal prosecutions.

Why would the groups supporting hate crimes legislation be content with a proposal that assumes the primacy of state and local enforcement and only a small number of federal prosecutions? The groups in question may recognize that ultimately a comprehensive solution to hate crimes must necessarily involve state and local enforcement because the federal criminal justice system is too small to accommodate all bias-motivated offenses.⁹⁴ Thus, some means to improve state and local enforcement is necessary, and proponents of hate crimes legislation may support a trial of the partnership model, which appears to provide federal officials with greater latitude in their dealings with state and local officials than would a federal grant system like that envisioned in the Hatch proposal. In this regard, it is important to note the record of previous federal grant programs to law enforcement. The Law Enforcement Assistance Administration received about \$7.5 million that was disbursed to state and local law enforcement, and most observers believe these funds were not used effectively.⁹⁵ The current federal program to fund 100,000 police officers

⁹⁴ It is possible that some or all of the interest groups in question might have reservations regarding a broader federal crime. In the case of the Violence Against Women Act (VAWA), the criminal provisions are drawn far more narrowly than the civil provisions, and this reflected the preferences of the groups supporting the VAWA. *See* Interview with Sally Goldfarb, in Durham, N.C. (Apr. 5, 2000). The supporters of the VAWA felt that local prosecutors had more experience with domestic violence, and supporters were reluctant to give broad authority to less experienced federal prosecutors, given the history of using sexual assault laws in a discriminatory fashion, particularly against African-American defendants. *See id.* The coalition lobbying for VAWA did not oppose the narrowly drawn criminal provision, but they were principally concerned with the civil provisions of the Act. *See id.* Although the VAWA demonstrates that victim-oriented interest groups do not inevitably favor broader federal criminal liability, it is unclear whether any similar motives might be found for the supporters of the Hate Crimes Prevention Act.

⁹⁵ *See generally, e.g.,* MALCOLM M. FEELEY & AUSTIN D. SARAT, THE POLICY DILEMMA: FEDERAL CRIME POLICY AND THE LAW ENFORCEMENT ASSISTANCE ADMINISTRATION 1968-78 (1980); NANCY E. MARION, A HISTORY OF FEDERAL CRIME CONTROL INITIATIVES, 1960-1993 at 240-41 (1994); Robert S. Diegelman, *Federal Financial Assistance for Crime Control: Lessons of the LEAA Experience*, 73 J. CRIM. L. & CRIMINOLOGY 994, 996-1001 (1982). LEAA has been described as “a ‘beleaguered, frustrated, and failed national effort—the kind of effort costly not only in terms of taxpayers’ money and legislator’s time but also to our sense of confidence in the ability of the national government to work, to solve problems, to govern.” MARION, *op cit.*, at 240, (quoting THOMAS E. CRONIN, ET AL.,

appears to be suffering from some of the same problems.⁹⁶ Advocates of vigorous hate crime prosecutions might hope that greater federal involvement with state and local law enforcement agencies might buttress the federal grants programs and might be attractive because other better options are not available.

Alternatively, the groups supporting the Kennedy proposal may prefer a larger federal role in the prosecution of hate crimes, but elect for tactical reasons not to press that claim at the present time. The interest groups in question may feel that the most important objective is to establish the general principle that hate crimes motivated by victims' gender, sexual orientation, or disability are proper subjects for federal criminal legislation. That principle may be more difficult to establish if the offense in question is projected to generate a large number of federal cases, because such a bill might arouse strong opposition from the Judicial Conference and others.⁹⁷ The enactment of this relatively narrow crime may be viewed as a first step, to be followed either by amending the statute to broaden its coverage or persuading the Administration to adopt a more inclusive approach that would approve a larger number of cases for federal prosecution.

Finally, the Kennedy proposal might also demonstrate how interest groups can derive very real benefits from what might be called symbolic political acts. This possibility, which challenges Edelman's dichotomy between legislation that produces tangible benefits and legislation that is merely symbolic,⁹⁸ is explored in the next section.⁹⁹

U.S. v. CRIME IN THE STREETS ix (1981)).

⁹⁶ See, e.g., U.S. GENERAL ACCOUNTING OFFICE, REPORT TO THE CHAIRMAN, COMM. ON THE BUDGET, AND THE CHAIRMAN, SUBCOMMITTEE ON CRIME, COMM. ON THE JUDICIARY, HOUSE OF REPRESENTATIVES, COMMUNITY POLICING: ISSUES RELATED TO THE DESIGN, OPERATION, AND MANAGEMENT OF THE GRANT PROGRAM 2-4 (1997) (midway through 6-year authorization of COPS program, 30,155 of the 100,000 officers were on the streets; COPS grants were not targeted on the basis of the greatest need for assistance; grant monitoring was limited; small communities were awarded most of the COPS, though larger cities received larger awards); see also Statement of Richard M. Stana, Assoc. Director of General Accounting Office, COMMUNITY POLICING: Observations on the COPS Program Midway Through Program Implementation, Testimony before the Subcommittee on Crime, Comm. On the Judiciary, House of Representatives (Oct. 28, 1999).

⁹⁷ The Chief Justice and judicial groups originally opposed the VAWA, but they dropped their opposition once the provision was redrafted to reduce the burden on the federal courts. See Sally Goldfarb, Address at Duke University Law School, Durham, N.C., (Apr. 5, 2000).

⁹⁸ Edelman recognizes that political action may be "a 'mix' of symbolic effect and rational reflection of interest in resources," EDELMAN SYMBOLIC USES, *supra* note 74, at 41, but in so doing still assumes an opposition between these two concepts.

⁹⁹ Cf. Chong, *supra* note 77, at 2080, 2132 (seeking to chart a middle course between rational choice and socio-psychological explanations of politics).

IV. THE EXPRESSIVE FUNCTION OF CRIMINAL LAW AND THE RELATION OF LAW TO NORMS AND SOCIAL CAPITAL

One of the most important arguments in support of the Kennedy proposal and the creation of the new federal hate crime has been the need to “send a message.” Many of the witnesses at the congressional hearings¹⁰⁰ as well as the Senators who participated in the debates¹⁰¹ saw this as a central function of

¹⁰⁰ Senate 1999 Hearings, *supra* note 27, at 29 (statement of Judy Shepard) (arguing that a federal hate crimes prevention act will send the “message that this country does not tolerate hate motivated violence” and make a “powerful statement . . . of a more tolerant America”); *id.* at 32-34 (statement of Jeanine Ferris Pirro, Westchester District Attorney) (arguing that hate crime laws will send a “message that our society is founded on freedom and tolerance, not on violence and divisiveness”); *id.* at 50 (statement of Akhil Reed Amar) (describing Kennedy proposal as “a noble effort to affirm the national government’s commitment to equality and to express its emphatic disapproval of those who harm others simply because of who the victims are—because, that is, of the victims’ race, religion, sex, orientation, or disability”); House 1998 Hearings, *supra* note 27, at 54 (statement of Cass Sunstein) (arguing that the Kennedy proposal would serve “‘expressive’ or symbolic functions, assuring people that they are worthy of equal concern and respect, and that Congress itself intends to ensure that they are not subject to the risk of criminal violence because of certain characteristics”).

¹⁰¹ 146 CONG. REC. S5281, S5302 (daily ed. June 16, 2000) (statement of Sen. Wyden) (“It is time . . . to send a strong and unequivocal message that we will not look the other way in the face of these crimes, that they will not be tolerated, that the full force of Federal law enforcement will be brought, and will be brought in conjunction with State and local authorities, to ensure that these violent acts are prosecuted and we have taken every step to deter them.”); *id.* at S5303 (statement of Sen. Lieberman) (“[T]his is another way for our society to express our disdain, to put it mildly, at acts of violence committed based on a person’s race, religion, nationality, gender, disability, or sexual orientation.”); *id.* at S5313, S5334 (daily ed. June 19, 2000) (statement of Sen. Levin) (“The Senate . . . [can] send a clear message that America is an all-inclusive nation—one that does not tolerate acts of violence based on bigotry and discrimination.”); *id.* at S5335 (statement of Sen. Levin) (“[T]his amendment will send the message that we are a country that treasures equality and tolerance” and that “[w]e will not condone the hate crimes that have plagued our nation”); *id.* at S5345 (statement of Sen. Breaux) (“This legislation . . . will send a clear message throughout this country that these types of activities in this country will not be tolerated . . . [and] that domestic terrorism and violence against people in our country based merely on who they are or what they believe is something that deserves national protection, and Federal legislation is, in fact, important.”); *id.* at S5346 (statement of Sen. Reed) (the proposed legislation is the best way “to reaffirm our commitment to the most basic of American values: the dignity of the individual and the right of that individual to be himself or herself”); *id.* at S5383, S5424-25 (daily ed. June 20, 2000) (statement of Sen. Kennedy) (Congress should “take a clear and unequivocal stand,” an “overwhelming statement of law” that “we are committed to equal protection under law”); *id.* at S5432 (statement of Sen. Feinstein) (“The Kennedy hate crimes amendment would send the right message: that those who commit violent acts because the victim is of a certain gender, religion, race, sexual orientation, or disability will be prosecuted because everyone—I repeat—everyone has a right to be free from violence and fear when they are going to school, work, travel, or doing

the Kennedy proposal. Proponents of this view have identified two key aspects of the message sent by the Kennedy proposal (and other hate crime legislation). First, it expresses strong social condemnation of bias crimes.¹⁰² Second, the condemnation of hate crimes implies a general affirmation of the societal value of the groups targeted by hate crimes and a recognition of their rightful place in society.¹⁰³ Hate crimes legislation is seen as reinforcing the community's commitment to equality among all citizens.

Analyzing these arguments under the rubric of symbolic politics assumes that symbolic action (like sending a message) is an empty form of reassurance. This section explores the possibility that law may play a valuable role in denouncing undesirable conduct and reinforcing desirable values. Using criminal law for these purposes finds support in classical work on the function of the criminal law, as well as more recent scholarship on the expressive function of law and the role law can play in the shaping of norms and in the allocation of social capital.

Although a significant strand of classical scholarship asserts that one important function of criminal law is the declaration and reinforcement of societal values and standards,¹⁰⁴ most theorists expected that prosecution and

something as simple as going to a movie.”); *id.* at S5433 (statement of Sen. Rockefeller) (“[I]t is vital to make a clear statement against all violent hate crimes against individuals because of race, color, religion, national origin, gender, sexual orientation, or disability.”).

¹⁰² See 146 CONG. REC. S5281, S5303 (daily ed. June 16, 2000) (statement of Sen. Lieberman); *id.* at S5334 (statement of Sen. Levin); *id.* at S5335 (statement of Sen. Levin); *id.* at S5345 (statement of Sen. Breaux); *id.* at 5432 (statement of Sen. Feinstein); *id.* at S5433 (statement of Sen. Rockefeller).

¹⁰³ See, e.g., FREDERICK LAWRENCE, PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW 167-69 (1990) (punishing hate crimes reflects the high value society places on equality); Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 465 (1999) (“[H]ate crime laws ‘send the message’ that . . . [it is] wrong to see the victim as lower in worth.” They reassure group members “that they are full members of society . . . [and] affirm the larger community’s commitment to . . . equality.”); House 1998 Hearings, *supra* note 27 (prepared statement of Cass Sunstein) (arguing that the Kennedy proposal would serve “‘expressive’ or symbolic functions, assuring people that they are worthy of equal concern and respect, and that Congress itself intends to ensure that they are not subject to the risk of criminal violence because of certain characteristics”).

¹⁰⁴ See, e.g., JOEL FEINBERG, DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY 98-118 (1970) (“[P]unishment surely expresses the community’s strong disapproval of what the criminal did [I]t is also a symbolic way of getting back at the criminal, of expressing a kind of vindictive resentment.”); NIGEL WALKER, PUNISHMENT, DANGER AND STIGMA: THE MORALITY OF CRIMINAL JUSTICE 28-30 (1980) (explaining that punishment of the offender is necessary to express society’s view that it does not tolerate the offense). In contrast, other scholarship has taken either a retributive or utilitarian approach, with the latter focusing on deterrence or incapacitation as the principal function of criminal law. For retributive accounts, see, for example IMMANUEL KANT, METAPHYSICAL ELEMENTS OF JUSTICE 137-44 (John Ladd trans., 2d ed. 1999) (1798) (discussing how the law of retribution determines a specific punishment); Michael S. Moore, *The Moral Worth of*

the infliction of punishment under the criminal laws would serve this function. For example, Durkheim argued that the function of criminal law is the denunciation of certain conduct, but he theorized that it is the act of punishment and suffering that affirms the collective standards of society and reinforces its social cohesion.¹⁰⁵ Given this emphasis on the critical role of punishing individual offenders, it is not clear that Durkheim's work provides any support for the enactment of criminal provisions if they will not be enforced. If the enactment of a federal hate crime law would facilitate more successful state and local prosecutions, then a new federal crime could indirectly bring about the kind of denunciation by conviction and punishment that would fulfill the function identified by Durkheim. But note that Durkheim focuses on the role of punishment. His theory thus provides no support for enacting a new federal offense if a federal grant program supporting state prosecutions would be equally effective in ensuring that offenders are convicted and punished, and Durkheim's theory lends no special support for the denunciatory effect of the passage of a federal hate crime law.

More recent work on the expressive function of law, particularly the relationship between law and norms, provides a more satisfactory theoretical basis for the creation of broadly phrased federal hate crimes that will seldom be prosecuted.¹⁰⁶ In contrast to an analysis that depends upon the effect of the

Retribution, in RESPONSIBILITY, CHARACTER, AND THE EMOTIONS 179, 181-87 (Ferdinand Schoeman ed. 1987); Herbert Morris, *Persons and Punishment*, 52 THE MONIST 475-76, 483-90 (1968) (discussing the appropriateness of punishing violators of the rules because such violations produce "a maldistribution in the benefits and burdens" within society); Jeffrie G. Murphy, *Three Mistakes About Retributivism*, 31 ANALYSIS 166, 166-69 (1971) (demonstrating that the "[r]etributive theory of punishment is not silly"). For a utilitarian account focusing on deterrence or incapacitation, see for example Johannes Andenaes, *The General Preventive Effects of Punishment*, 114 U. PA. L. REV. 949, 949-83 (1966) (discussing deterrence from theoretical, practical, and experimental perspectives).

¹⁰⁵ See EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 62-63 (W.D. Hall trans., 1984).

¹⁰⁶ Two assumptions that are subject to dispute underlie the theoretical work dealing with the law's function in creating social meaning and norms, and in shifting social capital. One of these assumptions is that the public is aware of the law and changes in the law. There is, however, empirical work suggesting that even major legal changes are not well known. See, e.g., JULIAN V. ROBERTS & LORETTA J. STALANS, PUBLIC OPINION, CRIME, AND CRIMINAL JUSTICE 35-52 (1997) (surveying research showing generally low levels of public knowledge of criminal laws, sentencing laws, and constitutional rights); GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 126 (1991) (describing research on the low level of public awareness of the Supreme Court and its decisions). For example, 90% of Ohio residents were unaware of the passage of a major state initiative to increase drug penalties, and Colorado residents were similarly unaware of legislation doubling the presumptive range of sentences under state law. See ROBERTS & STALANS, *supra* at 39; cf. Richard Lehne & John Reynolds, *The Impact of Judicial Activism on Public Opinion*, 22 AM. J. POL. SCI. 896 (1978) (finding that public approval ratings for a state supreme court did not vary from those for the executive and the legislature during a period

sanctions imposed, and thus requires active prosecution, the focus on norm creation and social capital explains how the adoption of a federal criminal law might achieve social benefits even if the new law were seldom employed. Recent scholarship has highlighted the importance of norms in the regulation of human behavior, and has sought to explain how norms develop and what role if any law can play in shaping norms. Richard McAdams has provided an account of norm development that suggests how a law such as the Kennedy proposal could play a role in developing norms that might ultimately reduce the incidence of hate crimes, even if the new federal crimes were seldom prosecuted. Cass Sunstein's account of norm entrepreneurs and norm cascades, and Jack Balkin's work on social capital also shed light on the purposes that a federal hate crime law might fulfill even if it were seldom enforced.

A. *Application of the Esteem-Based Theory of Norm Creation*

Noting that humans desire esteem, McAdams argues that the desire for esteem will generate norms under certain conditions, and that law can play a role in this process.¹⁰⁷ He theorizes that the necessary conditions for norm

when the court and the legislature were at odds in a prominent dispute over sources of funding for public schools; even in this situation, many members of the public apparently did not distinguish among positions taken by different branches of government). Note, however, that legislative activity has greater visibility than judicial activity, at least at the federal level. See Charles H. Franklin & Liane C. Kosaki, *Media, Knowledge, and Public Evaluations of the Supreme Court*, in CONTEMPLATING COURTS 352, 356-57 (1995) (Lee Epstein, ed.) (finding four times as many national news stories about Congress than about the Supreme Court).

Even if law is known, that does not necessarily mean that it is responsible for shaping important perceptions or changing behavior. Social scientists and legal scholars are exploring the degree to which law can be shown to have such effects, and how its impact compares to that of other forces, such as economic forces. There is, for example, currently a lively dispute about the question whether certain features of the United States legal regime that protect minority shareholders are essential to the development of dispersed corporate ownership, which in turn provides resources for economic growth. Compare John H. Coffee, *The Future as History: The Prospects for Global Convergence in Corporate Governance and Its Implications*, 93 NW. U. L. REV. 641, 704-05 (1999) (arguing in favor of the importance of the legal regime), with Frank H. Easterbrook, *International Corporate Differences: Markets or Law?* 9 J. APPLIED CORP. FIN. #4, at 23-29 (1997) (arguing that markets, rather than law, are determinative), and Brian R. Cheffins, *Does Law Matter?: The Separation of Ownership and Control in the United Kingdom*, ESRC Center for Business Research Working Paper No. 172, at 52-57 (2000) (finding that development of dispersed corporate ownership in England did not correspond to the adoption of legal protections for minority shareholders and that during the critical periods, other institutions provided minority shareholders with protections).

¹⁰⁷ Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 358-64, 391 (1997) (presenting the theory of esteem-based norms, describing the conditions necessary for their development, and concluding that "an important function

generation are (1) a sufficient consensus on the esteem worthiness of certain behavior, (2) an inherent risk that behavior will be noted or discovered by others, and (3) general knowledge of both the consensus and risk of discovery among the population in question.¹⁰⁸ McAdams argues that law can play an important role in shaping norms by publicizing consensus and by communicating the esteem consequences of behavior.¹⁰⁹

The existence of a consensus does not guarantee that it is generally known. Persons who hold a minority view may believe that they are in the majority, particularly when issues closely divide society. People tend to associate with others who share their views, to selectively interpret information, and accordingly to have an exaggerated sense of the typicality of their views.¹¹⁰ When this occurs, ignorance of the consensus retards the development of a norm by eliminating any reason to fear loss of esteem from failure to conform. Law can change this equation by publicizing the existence of the consensus, and thus making clear to the minority the potential for loss of esteem. In particular, the passage of legislation can signal majority support for a norm.¹¹¹

McAdams's esteem-based theory of social norms sheds light on several puzzling questions regarding hate crime legislation. First is the question how

of law is to shape or regulate norms”).

¹⁰⁸ See *id.* at 358-64 (elaborating on the requisite conditions for esteem-based norms: consensus, the risk of detection of non-compliance, and the resultant “esteem-norm”). For example, suppose there is a sufficient consensus that certain conduct—e.g., putting your children in car seats—is desirable, and there is a risk that others will discover whether you put your children in car seats. If parents are aware that the consensus exists and that their behavior can be observed by others, their desire for the esteem of others will influence them to place their children in car seats in order to avoid their neighbors' disapproval. As the usage of car seats increases, the apparent consensus is strengthened; at the same time the cost of failing to use a child seat increases, and the likelihood of compliance by individuals increases.

Why does not the consensus—which McAdams treats as one of the necessary conditions—itsself demonstrate that a norm already exists? Where one's behavior cannot be known by others, failure to conform to behavior that others esteem will bring no disapproval from others. Similarly, if one is ignorant of either the existence of a consensus or of the risk of discovery, one would not fear disapproval if one did not adopt the behavior in question.

¹⁰⁹ See *id.* at 397-407 (summarizing the expressive function of law and how it effects norms); see also Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 Nw. U. L. REV. 453, 473 (1997) (“The passage of criminal legislation . . . often reflects a critical level of support for an incipient norm . . . [and] sometimes nurtures the norm.”). Robinson and Darley make the interesting suggestion that American cultural diversity deprives us of a “pre-existing consensus on the contours of condemnable conduct that is found in more homogenous societies,” and thus increases our comparative reliance on criminal law for norm-nurturing. *Id.* at 474.

¹¹⁰ See McAdams, *supra* note 107, at 401 (explaining the “bias aptly named the ‘false consensus’ effect”).

¹¹¹ See *id.* at 402-03 (“[The legislators’] decision to enact or not to enact legislation . . . declares to the public a winning side.”).

laws enacted in a democracy can create norms that do not already exist. McAdams emphasizes the distinction between a consensus and a known consensus, and the law's potential for demonstrating the existence of a consensus. For example, public attitudes toward lesbians and gays are in a period of rapid change. Even if a majority accepts these groups as valued members of society and condemns assaults that target them, persons who do not share these views may be unaware of this consensus because they most often associate with others who share their views and they exaggerate the typicality of those views. In this situation, the passage of a law could publicize unmistakably the existence of the consensus, and hence the esteem costs of violating the developing norm. If McAdams' esteem theory is correct, the enactment of such a provision would accelerate the development of the norm, and increase compliance with it.

Note that under McAdams's theory the passage of the statute, rather than its enforcement by punishment, plays a distinctive role, because it can demonstrate indirectly the strength of support for the norm in the general population to which the legislature is responsive.¹¹² The publicity surrounding the legislative process and a bill's eventual enactment demonstrate the existence of a legislative majority, and this usually signals a similar majority view among the electorate.

How does this theory apply to the proposal to enact new federal hate crimes? McAdams' account of the role of law in norm creation can provide an explanation for the support for (and opposition to) the passage of federal hate crimes for which there are only weak law enforcement justifications. In law enforcement terms it is difficult to explain why additional federal hate crimes are needed when the conduct in question is already a crime under state law, and when federal prosecutions under the new law will be rare. McAdams' account suggests that the principal function of new federal hate crimes offenses might be that the debate and passage of such laws signals the existence of a national consensus denouncing bias-motivated crimes and affirming that the groups in question are full and equal members of society. The demonstration of such a consensus could itself have the effect of setting in motion the process of forming or strengthening a developing norm.

In terms of McAdams' esteem-based account of norm formation, there are differences between local, state, and federal legislation. In one respect, national laws appear to be inferior to local laws for purposes of norm

¹¹² For a different view of how the enactment of a statute, by itself, might change behaviors by creating or strengthening norms, see Robert Cooter, *Expressive Law and Economics*, 27 J. LEGAL STUD. 585, 593-96 (1998). Cooter theorizes that unenforced laws may improve behavior by solving collective action problems and thereby reaching Pareto superior equilibriums and/or causing a person to deliberately change his preferences through Pareto self-improvements. Note that Cooter limits his model to "social norms that contribute to productivity by increasing cooperation." *Id.* at 588. He suggests that this analysis might apply to racial discrimination in the American South, *see id.* at 592, but it is unclear whether he would extend it to hate crimes legislation.

generation. It appears that in general people care more about the opinions of those whom they know well. For that reason, a norm accepted by those in one's local community would be especially powerful. On the other hand, there is evidence that people do care about the good opinion of persons they have not met.¹¹³ Indeed the passage of a federal statute may have special value for norm creation, even if the law will seldom be enforced. The passage of a federal statute can demonstrate the existence of a national consensus. The passage of such a law publicizes the existence of a broad national community that may feel disrespect for states or localities that are out of the mainstream and do not accept the newly publicized national consensus. This makes individuals in states and localities aware of this broader community judgment.¹¹⁴ In this respect a federal enactment is quite different than a law

¹¹³ See generally Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV., text accompanying notes 10-17 (forthcoming 2000).

¹¹⁴ One factor that may play a role in the incentive to use federal crime legislation for expressive purposes is the changing landscape of American media ownership and news consumption. Several developments suggest the possibility that there will be a trend toward more national news and less local news, thereby increasing the payoff for using federal legislation for expressive purposes.

Consolidation is occurring in the newspaper industry, and national or international corporations are increasingly acquiring local newspaper companies. For example, the recent acquisition of the *Los Angeles Times* by the publisher of the *Chicago Tribune* is part of a trend toward media conglomerates that can offer advertisers outlets that will reach customers nationwide. See James Flanagan & Greg Miller, *Tribune-Times Mirror Merger: Purchase Is a Bet on Value of 'Old' Media in Internet Era*, L.A. TIMES, Mar. 14, 2000, at A1. This consolidation may be accompanied by a decrease in local news coverage and an increased reliance on more cost-effective use of national stories that can be incorporated throughout the chain. In addition, *USA Today* now offers a readily available (and popular) national newspaper. The typical local television channel now broadcasts to an area of more than 10,000 square miles, crossing city, county, and often state lines, which discourages the broadcast of local political or civic news. See Lawrence K. Grossman, *Why Local TV News Is So Awful*, 36 COLUM. JOURNALISM REV. 21 (1997).

¹ Use of the Internet to obtain news is increasing rapidly, and reliance on national network news, local television news, and newspapers is declining. In a May 2000 survey, 15% of respondents said they receive daily news reports from the Internet, up from 6% just two years earlier. The Pew Research Center for People and the Press, *Investors Now Go Online for Quotes, Advice: Internet Sapping Broadcast News Audience* (2000) <<http://www.people-press.org/media00rpt.htm>> (commenting on American's new reliance on internet news reports). In addition, 33% said they went online for news at least once a week. See *id.* Between 1993 and May 2000 the number of respondents who watched local TV news fell from 77% to 56%, the number who watched nightly network news dropped from 60% to 30%, and those who said they read a newspaper yesterday dropped from 58% to 46%. See *id.* These factors suggest a shift to a regional and national media focus is occurring. To the extent that they focus on law (rather than other topics such as sports, weather, and crime) regional and national media are likely to focus on legislation at the federal level, rather than undertaking to follow events in multiple states or individual communities.

passed by one or more individual states. For example, persons outside of Vermont can easily discount that state's passage of a law authorizing same-sex unions on the ground that it is an unusual or deviant local law that does not match the sentiments in their own communities. No such dismissive attitude is possible in the case of national legislation.¹¹⁵

McAdams' theory also responds to the objection that hate crimes legislation is unnecessary because the activity criminalized by hate crimes statutes (in the case of the Kennedy proposal, physical assault) is already a crime. Society is deeply divided on issues relating to sexual orientation. If we posit a situation where some members of society might be uncertain whether the disapproval of homosexual activity might justify attacks on homosexuals, and even earn one esteem in the eyes of others, then a law that focuses on this precise behavior may demonstrate a consensus on this issue that cannot be ignored even by those who are members of communities that abhor homosexuality.

Finally, McAdams' theory also recognizes that general social norms may not be universally adopted, even if law reinforces them. There are many instances of subgroups that define themselves in opposition to the norms of the general society. For example, teenagers frequently adopt styles of dress and behavior that they intend to be inconsistent with general norms. Similarly, skin heads and others may adopt views regarding various target groups that they know to be inconsistent with general societal views.

B. *Norm Entrepreneurs, Norm Bandwagons, and Social Meaning*

Cass Sunstein has noted that norms may change rapidly, and that "norm entrepreneurs" may play a role in bringing about such rapid changes.¹¹⁶ Norm cascades occur when there is a rapid shift in norms.¹¹⁷ How and why do such shifts occur? There can be many mechanisms, but Sunstein calls attention to the fact that individual political participants may act as norm entrepreneurs.

A norm may exist despite widespread dissatisfaction with it. There is often a disjunction between public behavior and expression, and how individuals

Thus, even though persons may care most about the esteem of persons in their local communities, national legislation may have an increasingly significant impact on the creation and shaping of norms by publicizing the existence of consensus, and hence increasing the potential for loss of esteem.

¹¹⁵ On the other hand, cynicism about national politics might hamper the effectiveness of such a signal. Some members of the public consider Washington and the federal government out of touch with real people and under the control of special interest groups. (Indeed, this view may be held by Murray Edelman and by many interest group theorists.) Persons who harbor such views may not view the passage of federal legislation as a signal of national consensus.

¹¹⁶ Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 912, 929-30 (1996) (arguing that society experiences continual changes in their norms).

¹¹⁷ See *id.* at 912 (arguing that societies often shift toward new norms).

actually think and feel.¹¹⁸ People hesitate to criticize a norm that others seem to accept. Norm entrepreneurs can exploit dissatisfaction with current norms and bring about change by alerting people to the fact that others share their complaints. Entrepreneurs also signal their own commitment to change, create coalitions, and work to make compliance with old norms seem more costly, and compliance with new norms more beneficial. Norm entrepreneurs seek to create a norm bandwagon, which occurs when the lowered cost of expressing new norms encourages an ever-increasing number of individuals to reject the old norms and embrace the new.¹¹⁹ If norm entrepreneurs' efforts are successful, society may reach a tipping point where adherence to the old norm produces disapproval. When changes of this nature occur with sufficient rapidity, they are referred to as norm cascades.

Like McAdams, Sunstein posits a crucial role for information. His norm entrepreneurs begin by alerting people to the fact that others share their views. While norm entrepreneurs might seek to do so by marches or boycotts, they might also use the political process. The passage of laws, as McAdams notes, can serve an important educational purpose. This is consistent with Sunstein's characterization of political leaders and others who campaign for legal change as norm entrepreneurs.¹²⁰ Following this logic, Senator Kennedy and other proponents of the federal hate crimes legislation may be seen as norm entrepreneurs who are seeking to demonstrate that a widespread coalition supports hate crimes legislation and the values that underlie the legislation. The object is ultimately to attract others to their norm bandwagon.

Sunstein, Larry Lessig,¹²¹ and others¹²² also draw attention to the concept of social meaning, and the government's role in the production of social meaning. As Lessig notes, government can seek to tie one thing to another to create a positive or negative association.¹²³ The Kennedy proposal treats as hate crimes attacks on groups that have traditionally been perceived quite differently, i.e., groups defined by race, color, religion, gender, sexual orientation, and disability. One effect of the Kennedy proposal would be to tie

¹¹⁸ See *id.* at 929 (arguing that “[p]eople often act in accordance with norms they wish were otherwise or even despise”); see also McAdams, *supra* note 107, at 364 (arguing that individuals will follow the consensus in order to gain esteem).

¹¹⁹ See Sunstein, *supra* note 116, at 929-30 (arguing that political actors can exploit dissatisfaction with existing norms in order to gain support).

¹²⁰ See *id.* at 929 (naming several political activists as norm entrepreneurs including Martin Luther King Jr., William Bennett, Louis Farrakhan, Catherine MacKinnon, Ronald Reagan, and Jerry Falwell).

¹²¹ See Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 947 (1995) (arguing that government acts to construct social norms).

¹²² See, e.g., Richard H. Pildes, *Why Rights Are Not Trumps: Social Meaning, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 725 (1998).

¹²³ See Lessig, *supra* note 121, at 1009 (“[T]he social meaning architect attempts to transform the social meaning of one act by . . . associating it with another social meaning that conforms to the meaning that the architect wishes the managed act to have.”).

together as “hate crimes” assaults that target members of any of these groups. It might change the social meaning of attacks on gays and lesbians, for example, if the law treated them the same as attacks that target the disabled or members of a religious or racial group.¹²⁴ The Kennedy proposal ties its provisions both to the traditional civil rights laws and to the newer traditions regarding equality for the disabled. Associating assaults against gays and lesbians with similar attacks on members of so many diverse groups may be an advantage in terms of social meaning. On the other hand, for purposes of signaling a consensus regarding the acceptability of targeting homosexuals, a statute that singled out such crimes might be more effective.

C. Symbolic Capital and Status Competition

J.M. Balkin’s analysis of social status and status competition provides another complementary lens for viewing the Kennedy proposal.¹²⁵ Drawing on work beginning with Max Weber, Balkin notes that status hierarchies are sustained by a system of social meanings in which one group receives more positive associations, while another receives more negative associations.¹²⁶ Status is hierarchical and relative or reciprocal in nature; a rise in the social status of one group requires a corresponding decrease in the status of another group (or groups).¹²⁷ For example, an increase in the status of African Americans diminished the elevated status that whites had previously held, because the superiority of whites depended upon the inferiority of African Americans. Social status includes approval and respect not only for one’s self, but also for one’s style of life, and such approval is demonstrated principally through symbolic activity. Social status is a valuable good encompassing dignity, honor, and moral approval,¹²⁸ and status capital can also be converted, to some degree, into other forms of economic and social power.¹²⁹

¹²⁴ See Best, *supra* note 93, at 58-59 (describing efforts of gay and lesbian groups to establish an analogy between homosexuals and racial and religious minorities).

¹²⁵ See generally J. M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2321 & n.20 (1997). Social status is the degree of prestige and honor that groups (and individuals) enjoy. See *id.* at 2321 & n.20 (citing, *inter alia*, Max Weber).

¹²⁶ See *id.* at 2323 (arguing that the identity of one group is defined by its relationship to the identity of another group). This point is easily understood in the context of India’s caste system, and it also applies to other status hierarchies, such as the legal and social dominance of whites over blacks in the American South prior to the Civil Rights movement.

¹²⁷ See Balkin, *supra* note 125, at 2328-29 (asserting that one has more status because others have correspondingly less status). Thus, status competition is zero-sum or non-Paretian. See *id.*

¹²⁸ See *id.* at 2327-28; see also Chong, *supra* note 77, at 2088 (“Rational individuals try to improve their life circumstances by increasing not only their material resources, but also their status and power.”).

¹²⁹ See Balkin, *supra* note 125, at 2327-28 (“Status is not identical to wealth, political power or other social goods, but it is often correlated with them.”); Chong, *supra* note 77, at 2088-89 (arguing that low status stigmatized groups experience disadvantages in

Balkin argues that many symbolic political disputes are forms of “status competition.”¹³⁰ As status groups compete for prestige and honor (as well as material resources), they often “fight over relatively minor changes in statutory provisions that often will have little effect on the actual practices of law enforcement.”¹³¹

Greater social status and esteem for a subordinate group necessarily means a relative loss of status and esteem for dominant groups. When a lower status group seeks symbolic approval, the dominant group or groups fear loss of status and esteem for their way of life. In such circumstances, the dominant groups will strenuously oppose even a seemingly trivial request for a minimum of respect by a subordinate group, perceiving it as a challenge to their own superiority.¹³² Any visible signs of increased status for a lower status group are hotly contested by other competing groups, who often couch their arguments in terms of moral condemnation.¹³³ Balkin applied this analysis to laws protecting homosexuals from discrimination. Since status is a zero-sum game, the increased social status signaled by laws protecting homosexuals from discrimination necessarily occurs at the expense of heterosexuals.¹³⁴ High status includes approval for one’s lifestyle, whereas the social disapproval of the stereotyped homosexual lifestyle is consistent with the group’s low status. In this context, tolerance of homosexuality conflicts with the baseline of social meanings and is resisted for that reason (often in moral terms).

Balkin’s account provides another way of explaining why many Senators and witnesses before Congress supported (or opposed) provisions in the

employment, housing, and social relations as a result of people’s attitudes and values). Chong, who attempts to defend a middle position between socio-psychological explanations and economic or rational choice models, provides an interesting account of various mechanisms by which values and norms may serve the rational interests of individuals and members of groups. *See* Chong, *supra* note 77, at 2091-2122.

¹³⁰ Balkin, *supra* note 125, at 2327.

¹³¹ *Id.* at 2326.

¹³² *See id.* at 2334 (arguing that when status barriers begin to collapse, the dominant groups react with “fear, anger, and hate”).

¹³³ Arguments about morality play an important role in debates about the rights of homosexuals, and Balkin notes that similar arguments played a role in other legal movements that can be understood as status competitions, such as the temperance movement (in which native-born Protestants sought to reassert their dominance over Catholics and immigrants), and the feminist movement (which is frequently accused of being destructive of family values). *See id.* at 2331-32. He characterizes these debates as genuine struggles over what forms of life should be honored and receive moral approval, noting that “[t]he word ‘morality’ itself comes from the Latin *mores*, or modes of life, and the two concepts remain deeply connected.” *Id.* at 2332.

¹³⁴ Every change in the semiotic status quo is seen as an increase in honor, prestige, and even special treatment, because it is a departure from a baseline view of homosexuality as immoral.

Kennedy proposal that are likely to have little direct law enforcement effect. Laws that treat bias-motivated assaults as distinctive harms worthy of federal prohibition accord status and prestige to the groups falling within the law's ambit. As they enhance the prestige of these protected groups, they also reduce the prestige of others who may no longer define themselves as superior. Further, by employing the civil rights rubric and tying bias attacks against gays and lesbians to attacks on the basis of race and religion, the Kennedy proposal also seeks to change the social meaning of the conduct in question, and to draw on historical ideological commitments to gain acceptance of, and consent to, status disestablishment.¹³⁵ This function of the proposal is in accord with Balkin's suggestion that changes in status hierarchies are often preceded by social movements that seek both status disestablishment and changes in social meaning, so that subordination comes to be seen as conflicting with deeply held beliefs about justice, equality and fair play.¹³⁶

V. REFLECTIONS ON THE NEW ROLE OF FEDERAL CRIMINAL LAW

The Kennedy hate crimes proposal exemplifies several trends in federal criminal law. The key elements of the strategy implicit in the Kennedy proposal are (1) a greater emphasis on the symbolism of the enactment of the law as compared to its enforcement, (2) a greater emphasis on the indirect impact of federal cooperation in state enforcement, and (3) the intention to bring only an occasional federal prosecution chosen from thousands of potential cases falling within the statute. This approach couples the expressive function of federal criminal law with the prosecutorial practice of cooperative federalism emphasizing active federal involvement in, and support of, state and local law enforcement. Although it builds on a traditional federal concern for civil rights, it implements that concern in an untraditional manner.

A. *Sending a Message*

Though all legislation may have some symbolic effect, there appears to be a trend towards a greater emphasis on this element in federal criminal legislation. As noted above,¹³⁷ much of the support for federal hate crimes legislation has been based upon the need to send a message condemning bias

¹³⁵ See Best, *supra* note 93, at 60.

¹³⁶ See Balkin, *supra* note 125, at 2338. Balkin notes the importance of forming alliances with powerful groups. For example, he states that the civil rights movement allied itself with northern business elites who wanted to reshape the culture of the South to their own ends. Balkin argues that the dismantling of unjust social hierarchies is one of the principal purposes of the American constitution, a document he argues was born out of a social and political revolution that sought to create a republican society as well as a republican form of government. *See id.* at 2345.

¹³⁷ Supporters of the Kennedy proposal urged the Senate to "send a message" by enacting hate crime legislation, and many of the witnesses at Senate hearings on hate crime legislation made the same plea. *See* text accompanying notes 100-103.

crimes and reaffirming society's commitment to equality and to the rights of the groups targeted by hate crimes. Indeed, one could argue that the Kennedy hate crimes proposal comes close to being exclusively symbolic, since the Administration has stated that it intends to bring no more than a handful of prosecutions—out of the thousands of potential cases—under the new law. The previous section discussed the theoretical support for using law for its symbolic or expressive function. This section takes up the question of the special implications of using criminal law—and particularly federal criminal law—in this fashion.

1. The Symbolism of Enacting a New Federal Crime

One way to think about this issue is to explore the difference between legislation enacting a new hate crimes offense—particularly legislation creating a federal offense—and other solely symbolic actions directed toward similar goals. For example, the legislation declaring Martin Luther King Day a national holiday¹³⁸ and President Clinton's proclamations of Gay and Lesbian Pride Month¹³⁹ and National Hispanic Heritage Month¹⁴⁰ serve many of the same symbolic functions as the proposed hate crimes law. Why not use the president's power to issue proclamations and the parallel congressional power to adopt resolutions to make symbolic statements,¹⁴¹ rather than enacting a broad new federal crime? Alternatively, why not send the same message through legislation that includes both strong statements of principle and concrete measures authorizing federal assistance to state and local authorities?¹⁴²

The traditional view is that criminal law carries a unique stigma and moral message not associated with other symbolic legal actions,¹⁴³ and that the

¹³⁸ See 5 U.S.C. § 6103(a) (1994).

¹³⁹ See Gay and Lesbian Pride Month, 65 Fed. Reg. 36051 (2000).

¹⁴⁰ See National Hispanic Heritage Month, 63 Fed. Reg. 49815 (1998).

¹⁴¹ See, e.g., H. Res. 254, 106th Cong. (1999) (expressing the sense of the House condemning recent hate crimes in Illinois and Indiana and stating that "crimes motivated by hatred against African-Americans, Jews, Asian-Americans, or other groups undermine the fundamental values of our Nation"); S. Res. 78, 105th Cong. (1997) (designating April 30, 1997 as "National Erase the Hate and Eliminate Racism Day" and requesting "that the President issue a proclamation calling upon the people of the United States and throughout the world to recognize the importance of using each day to take a stand against hate crimes and violence in their nations, states, neighborhoods, and communities").

¹⁴² See Senate 1999 Hearings, *supra* note 27, at 53 (statement of Akhil Amar proposing, inter alia, a federal civil right of action instead of a federal crime and a "stronger statement of principle," and suggesting that Congress declare that "Acting under our powers to protect the rights of every American citizen to freedom and equality, as contemplated by the Fourteenth Amendment, this Congress declares that all Americans are equal citizens, regardless of race, color, religion, national origin, gender, sexual orientation, or disability").

¹⁴³ See, e.g., Robinson & Darley, *supra* note 109, at 481 & n.64 (stating that many regulatory offenses have been criminalized instead of increasing civil sanctions in order to

enactment of a new crime typically garners greater public attention than a proclamation.¹⁴⁴

The Kennedy hate crimes proposal raises the question whether criminal law can continue to play this unique role if it either attenuates or severs its connection to criminal enforcement and the imposition of punishment. How would those to whom the message is addressed (potential victims or offenders as well as others in society) react if they knew the statute would seldom be enforced? What would the social meaning of the proposed statute be under those circumstances?¹⁴⁵

The other side of the coin is the question of the social meaning or expressive function of alternative methods of supporting and enhancing state and local enforcement. Does the general public interpret the symbolism of enacting a new crime (or enhancing the punishment for an existing crime) differently than the symbolism of a federal grant and technical assistance program that might yield similar results in improving the states' investigation and prosecution of hate crimes? The Congressional debates seem to assume that this is the case.

bring into play the "moral stigmatization that criminal liability brings but civil liability does not").

¹⁴⁴ In contrast, the designation of a national holiday has significant economic consequences and considerable symbolic importance, and the observance of the Martin Luther King holiday at the federal and state level has generated a good deal of public and political interest. There are significant financial limitations, however, on the number of days that can be designated as federal and state holidays.

¹⁴⁵ A similar issue sometimes arises in connection with efforts to repeal long-unenforced morals legislation, such as laws making fornication and adultery a crime. These efforts sometimes founder when legislators equate repeal of criminal prohibitions with approval of the conduct in question. Is a decision to leave such provisions on the books a precedent for the enactment of criminal laws that will not be enforced? One important difference is in the character of the current legislative action. In the case of existing morals legislation, the objections to repeal are based upon social meaning, and the assumption that the repeal of such laws would be understood as governmental approval of the conduct in question. Is the refusal to convey such a symbolic message by repeal the same as the positive action of enacting new crimes in order to denounce conduct that will not be prosecuted (at least by federal authorities)?

An additional complication to be confronted when assessing the social meaning of enactment without proposed enforcement is the question what information those on the receiving end of the "message" are likely to have about enforcement. As the proponents of the Kennedy bill envision the future, there would be few federal prosecutions but state enforcement would be enhanced by the federal-state-local partnership. This raises sharply the question of the degree to which public perceptions distinguish between federal and state/local law enforcement. Even if there is a mystique about federal law and the FBI, would the public (or would some of the groups most concerned) keep score separately on federal enforcement efforts as distinguished from state and local enforcement? On the one hand, the enactment of federal law to "send a message" presumes that the public is, to some degree, alert to this jurisdictional distinction. On the other hand, it seems unrealistic to push this idea too far.

Might this perhaps depend upon the packaging of the grant program and the political emphasis placed upon it? President Clinton effectively sent a message regarding his concern with crime and his willingness to get tough when he introduced his proposal (since enacted) to use federal funds to put 100,000 additional police on the streets. Would it be possible to design an equally effective message regarding other federal programs financing state anti-crime initiatives? If so, that raises the question of the advantages and disadvantages of each of the two approaches, a point to which I will return.

A related issue is whether the social meaning of a federal criminal enactment depends to some degree on the relative scarcity of such legislation. The public probably has no sophisticated understanding of federalism, but there seems to be a popular sense that federal law is distinctive and important, perhaps more important than state law. This sense is reflected in the phrase "make a federal case of it," which is generally understood to mean treating something as very important or even exaggerating its importance.¹⁴⁶ In the criminal context, the popular understanding of federal law may also be shaped by the image of the FBI as the nation's top crime-fighting agency. In drama and crime fiction, the FBI plays a role similar to that of Scotland Yard; it is brought in to crack the really tough cases. How would this social meaning be changed by a more self-conscious reliance on the expressive function of federal law to denounce certain conduct and reaffirm particular values, but no plan to follow up with a significant degree of federal enforcement? It is possible that the distinctive meaning of federal law could be eroded by overuse; if everything is federal, then this designation is no longer important, particularly when the designation as a federal crime is not accompanied by a significant federal enforcement effort.

One might respond that this situation will generate its own limitations, since Congress will have no incentive to play the federal crime card so frequently that it loses its impact. The difficulty with this analysis is that there may be perverse incentives at work. There may be a political incentive to introduce anti-crime initiatives, even at the point when they have become so common that they have lost much of their novelty and significance, because a vote against such a proposal may leave a member of Congress vulnerable to the accusation that she is soft on crime. Additionally, when symbolic anti-crime legislation is proposed, the absence of constraints that affect many other types of legislative proposals will undoubtedly affect the political dynamic. Most legislation imposes costs on the federal government, and those costs constrain Congress to a lesser or greater degree. Congress has a tremendous incentive to enact federal legislation that does not carry a federal price tag, such as unfunded mandates and purely symbolic legislation, even if it is not otherwise the best means of achieving the goals in question.

¹⁴⁶ See, e.g., *DICTIONARY OF AMERICAN SLANG* 359 (Robert L. Chapman ed., 3d ed. 1995) (defining the term as a verbal phrase which means to "overemphasize the importance of something; exaggerate or overreact").

2. Other Dangers in the Use of Symbolic or Expressive Criminal Legislation

There are also special dangers that may plague symbolic or expressive criminal legislation, because the character of the legislation will change the nature of the legislative and political process, and may even undermine the efficacy of criminal law.

One facet of the problem is the relatively unconstrained atmosphere likely to accompany the enactment of provisions that neither Congress nor the Department of Justice expects to see enforced. In the same way that critics charged that the rehabilitative ideal encouraged the adoption of harsh measures by disguising the real impact of criminal sanctions,¹⁴⁷ so too the belief that new federal crimes will not be enforced might encourage Congress to impose measures that are more expansive or extreme than it might otherwise adopt.¹⁴⁸ There might also be a tendency toward less care in drafting provisions that are seen as symbolic vehicles rather than statutes to be enforced.¹⁴⁹ These might seem to be harmless errors since by definition they would arise only when there was no intention to enforce the provisions in question, but the adoption of a criminal statute, unlike a proclamation, creates a law that can subsequently be enforced when administrative goals (or personnel) change. As in the case of the rehabilitative ideal, the possible disjunction between the legislature's

¹⁴⁷ See FRANCIS A. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE* 48-49 (1981) (arguing that rehabilitative regimes tend to inflict larger deprivations of liberty and volition on their subjects than overtly punitive programs, and an individual officer's sense of self-restraint may be weakened when disabilities such as loss of liberty are characterized as therapeutic).

¹⁴⁸ Attempts to expand the scope of federal criminal law to encompass new symbolic legislation might be counterproductive. If legislators press the envelope in terms of jurisdiction, they risk decisions holding that the legislation in question is beyond the power of Congress. Cf. *United States v. Morrison*, 120 S. Ct. 1740, 1754-55 (2000) (holding Congress lacked authority under the Commerce Clause to enact the civil remedies section of the Violence Against Women Act). This would be not only a legal setback, but it would also raise a new issue of the social meaning of the courts' decisions.

¹⁴⁹ See Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 *DUKE L.J.* 1, 76, 84-85 (1997) (finding that symbolic statutes can produce peculiar results because they are not written to be enforced, but judges must nonetheless make them work). For examples that may bear out this concern, see John P. Dwyer, *The Pathology of Symbolic Legislation*, 17 *ECOLOGY L.Q.* 233, 281-82 (1990) (finding that politically expedient, but unworkable, air pollution legislation forced the EPA to disregard its responsibility to implement the laws as written); Steve R. Johnson, *The Dangers of Symbolic Legislation: Perceptions and Realities of the New Burden-of-Proof Rules*, 84 *IOWA L. REV.* 413, 475-77 (1999) (positing that tax reform legislation "overpromised" by Congress will result in public dissatisfaction once litigation demonstrates the absence of real change); cf. House 1999 Hearings, *supra* note 5 (statement of John S. Baker, Jr.) (characterizing House bill paralleling Kennedy proposal as "yet another example of 'feel good' criminal law that does not accomplish what is hoped for and may bring about unfortunate and unintended results").

image of the provision and its real effect may create problems. Could such problems arise in the case of the Kennedy hate crimes proposal? Supporters point to the certification procedure as an effective means of policing the use of the law and keeping it within the bounds envisioned by Congress and the Department of Justice. However, as noted above,¹⁵⁰ the certification requirement imposes procedural restrictions that would make the approval of hate crime prosecutions more burdensome, but it does not impose any substantive limitations on federal prosecutions (regardless of the actions taken by state and local authorities). There would be no legal bar to an aggressive federal Administration bringing a large number of prosecutions under the proposed hate crimes statute, regardless of the objections of state and local authorities, or the adequacy of the actions these authorities were already taking. It should be noted, however, that there is no reason at this point to predict that such an aggressive Administration would arise. To the contrary, since the adoption of the existing hate crimes provisions in 1968 each Administration has exercised its authority very sparingly.

Greater reliance on criminal law's expressive function, uncoupled from an intention to enforce, may also change the nature of the legislative debates and their effect within society. When legislative debates presume the future enforcement of each criminal statute, a variety of topics are germane to the debate, including the scope of the statute, likely impact in particular kinds of cases, and its deterrent effect. When debate focuses on these topics, support for and opposition to the proposed statutes can be grounded on issues that do not go solely to the more socially divisive issues underlying the proposals. Dan Kahan has suggested that arguments about the likely deterrent effect of statutes frequently play this role, both in debates about hate crimes and in other contexts, such as the death penalty.¹⁵¹ Kahan demonstrates that in the case of conventional legislation, deterrence is generally regarded as a legitimate issue, and legislators and citizens often defend their positions in deterrence terms instead of more highly contentious expressive terms. Most such alternative forms of discourse are unavailable in the case of legislation that on its face is purely expressive, such as the legislation removing the Confederate flag from the South Carolina state capitol.¹⁵² To the extent that these face-saving alternatives are helpful in defusing social conflict, federal "criminal" laws that will not be enforced largely preclude this useful alternative. Indeed, this trend provides a nearly one-size-fits-all vehicle for placing such expressive debates

¹⁵⁰ See *supra* text accompanying notes 56-64.

¹⁵¹ See Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 414, 463-76 (1999) (asserting that deterrence arguments obscure underlying moral controversy, averting direct social and cultural conflict).

¹⁵² In the case of the South Carolina dispute, external pressure was generated by the NAACP boycott, which placed the state under economic pressure. This economic pressure provided legislators with an alternative explanation for their ultimate support for the relocation of the flag.

about social norms on the Congressional agenda, without the necessity of finding a particular factual predicate. Many debates about morals and social norms can be recast in terms of a federal crime if one assumes an offense that will seldom, if ever, be enforced.

Another important body of scholarship also suggests that there can be significant costs associated with attempts to use the expressive or symbolic function of criminal law to change norms and reallocate social capital. Tom Tyler and other social scientists have investigated the factors that motivate people to obey the law.¹⁵³ They have developed substantial evidence that people's belief in morality of the laws and the legitimacy of the legal authorities play a major role in compliance with the law (though fear of legal sanctions plays a role as well). Reliance on the morality and legitimacy of law to induce compliance, rather than on the imposition of sanctions, creates obvious advantages for society.¹⁵⁴ For this reason, it is desirable for the law to track closely existing morality, and for the legal system to maintain its perceived legitimacy.

Paul Robinson and John Darley have pointed out that when law intrudes into contentious matters of morality and violates deeply felt moral standards of some groups, it not only breaks the link between the law in question and the moral code, but also may erode the general sense of the law's legitimacy and moral force.¹⁵⁵ Robinson and Darley use the issue of abortion to illustrate their point, but the same argument might be made regarding at least one aspect of hate crime laws, i.e., the acceptance of homosexuality that may be implicit in the broader message of hate crimes legislation such as the Kennedy proposal.¹⁵⁶ To the extent that this implicit acceptance of homosexuality

¹⁵³ See, e.g., TOM R. TYLER, WHY PEOPLE OBEY THE LAW 57-68, 170-78 (1990) (citing empirical data supporting strong links between perceived congruence of laws and personal morality, legitimacy of government, and voluntary compliance with the law); Tom R. Tyler & Robert J. Boeckmann, *Three Strikes and You Are Out, but Why? The Psychology of Public Support for Punishing Rule Breakers*, 31 L. & SOC'Y REV. 237, 255, 258 (1997) (finding public support for punishment of law-breakers stems more from concerns about moral cohesion than from fears about crime risk and dangerousness); see also Robinson & Darley, *supra* note 109, at 468-71 (citing to sources that find individual compliance with laws due to fear of social disapproval and sense of personal morality).

¹⁵⁴ See Richard A. Posner & Eric B. Rasmusen, *Creating and Enforcing Norms, With Special Reference to Sanctions*, 19 INT'L REV. L. & ECON. 369, 369-70 (1999) (noting that norms are cheap because they do not require costly governmental enforcement).

¹⁵⁵ See Robinson & Darley, *supra* note 109, at 482-85 (predicting that laws supporting one side of divisive moral debate create a loss of the law's moral credibility among opponents, resulting in decreased public respect for the legislative process, judicial system and criminal law system as a whole).

¹⁵⁶ See *id.* at 482-83. Whether hate crimes legislation encompassing gender orientation includes such a message is debatable. Although many proponents emphasize a significantly narrower message disavowing violence, others—both proponents and opponents—interpret such legislation more broadly as signifying tolerance, acceptance, and recognition of the

conflicts with the deeply held religious and moral beliefs of a substantial part of the population, Robinson and Darley's analysis suggests that there is a risk of undermining respect for and voluntary compliance with law in general. As noted above, such moral concerns are frequently associated with laws that seek to reallocate social capital and change status hierarchies.¹⁵⁷ If, as suggested earlier, federal criminal law is highly publicized and widely seen as important, then any loss of legitimacy associated with the imprudent use of federal criminal legislation for such purposes might have a spillover effect, thereby undermining confidence in the criminal law in general, and not just federal criminal law.

B. *Federal Support of and Involvement in State Enforcement*

The Kennedy proposal calls for a partnership with state authorities based upon a broad swath of concurrent jurisdiction. This is an example of a trend in federal law enforcement toward a model of cooperative federalism, rather than a model of distinct state and federal spheres. Cooperation between federal and state law enforcement authorities is not new. To the contrary, in 1964 the Supreme Court referred to cooperation between state and federal officials "waging a united front against many types of criminal activity,"¹⁵⁸ and the multijurisdictional approach is a major element of the federal anti-drug strategy. The effort to use federal criminal law as a tool to bring about the integration of law enforcement and prosecutorial agencies also raises important issues.

In the case of anti-drug measures, federal-state law enforcement cooperation takes place in the context of a massive and complex federal program.¹⁵⁹ Since the 1970s the federal war on drugs has included major international initiatives, billions of dollars in domestic federal grants, the use of the military, and many thousands of federal drug prosecutions,¹⁶⁰ as well as a variety of cooperative

dignity and value of the groups in question. *See supra* text accompanying notes 100-01, 130-36.

¹⁵⁷ *See supra* notes 130-33 and accompanying text.

¹⁵⁸ *See* *Murphy v. Waterfront Commission*, 378 U.S. 52, 56 (1964) (employing the phrase "cooperative federalism").

¹⁵⁹ In FY 1999, for example, Congress authorized \$17.8 billion for drug control, including \$8.45 billion for the criminal justice system. Office of National Drug Control Policy, Executive Office of the President, Drug Data Summary (2000) <<http://www.whitehousedrugpolicy.gov/drugfact/factsheet.html>>. *See generally* OFFICE OF NATIONAL DRUG CONTROL POLICY, EXECUTIVE OFFICE OF THE PRESIDENT, NATIONAL DRUG CONTROL STRATEGY 2000 (2000) <<http://www.whitehousedrugpolicy.gov/policy/policy>>. For a brief overview of federal drug control strategy, see ABRAMS AND BEALE, *supra* note 12, at 276-86, and Sandra Guerra, *Domestic Drug Interdiction Operations: Finding the Balance*, 82 J. CRIM. L. & CRIMINOLOGY 1109 (1992).

¹⁶⁰ In 1998 drug cases accounted for 40.7% of the cases in the federal courts. U.S. Sentencing Commission, 1998 Annual Report: Distribution of Offenders in Each Primary Offense Category (2000) <<http://www.ussc.gov/ANNRPT/1998/fid-a.pdf>>; *see also* FEDERAL

federal-state law enforcement programs. Many aspects of the federal anti-drug initiatives have counterparts in other federal programs that are seen as exemplars of cooperative federalism, such as welfare, environment, and pollution control programs.¹⁶¹ For example, there are federal programs providing funding for state anti-drug initiatives modeled on federal programs; in some cases federal grants attach explicit strings requiring state compliance with federal standards as a condition of the receipt of federal funds.¹⁶²

Some early federal anti-crime funding efforts, particularly the Law Enforcement Assistance Administration, provided federal funds to state and local governments but did not encourage joint federal-state-local activities.¹⁶³ In contrast, many of the current anti-drug efforts involve using federal funding to integrate federal, state, and local enforcement efforts. For example, the asset forfeiture program utilizes the concept of equitable sharing, providing funds to state and local agencies in proportion to their participation in the investigation leading to drug forfeitures, and thereby encouraging state and local cooperation in the successful prosecution of federal cases involving forfeitable assets. Other federal programs create and fund multijurisdictional task forces.¹⁶⁴ The DEA's FY2000 funding request for state and local task

JUDICIAL CENTER, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 1999 (17,483 drug cases were commenced in the federal courts).

¹⁶¹ See, e.g., Robert P. Inman & Daniel L. Rubinfeld, *Rethinking Federalism*, J. ECON. PERSP. 43, 56-57 (1997) (analyzing the leeway provided to states by the Welfare Reform Act of 1996 under three identified principles of federalism: democratic, economic, and cooperative federalism); Elizabeth Rosan, *EPA's Approach To Endangered Species Protection In State Clean Water Act Programs*, 30 ENV'T'L L. 447, 452 (2000) (describing structure of Clean Water Act in terms of cooperative federalism); Stephen D. Sugarman, *Welfare Reform and the Cooperative Federalism of America's Public Income Transfer Programs*, 14 YALE L. & POL'Y REV. 123 (1996); Philip J. Weiser, *Chevron, Cooperative Federalism, and Telecommunications Reform*, 52 VAND. L. REV. 1 (1999). For a discussion of various models of federalism, including cooperative federalism, see THOMAS R. DYE, AMERICAN FEDERALISM: COMPETITION AMONG GOVERNMENTS 1-13 (1990).

¹⁶² See Sandra Guerra, *The Myth of Dual Sovereignty: Multijurisdictional Drug Law Enforcement and Double Jeopardy*, 73 N.C. L. REV. 1159, 1188-89 (1995) [hereinafter Guerra, *Multijurisdictional*] (describing how federal law requires states receiving grants to meet conditions such as comprehensive drug testing within their criminal justice systems and suspension of driving privileges for persons convicted of drug offenses).

¹⁶³ See, e.g., MALCOLM M. FEELEY & AUSTIN D. SARAT, THE POLICY DILEMMA: FEDERAL CRIME POLICY AND THE LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, 1968-78 at 4 (1980) (noting that legislation that created LEAA adopted a block grant approach, in which fighting crime would remain a state and local function, and federal government's primary role would be to provide revenues and ideas allowing states to develop programs for their own use); NANCY E. MARION, A HISTORY OF FEDERAL CRIME CONTROL INITIATIVES, 1960-93 56-58 (1994) (noting LEAA's block grant design was supported by Republicans and Southern Democrats in Congress, who felt that federal government should not involve itself directly in local police efforts).

¹⁶⁴ The Drug Enforcement Administration developed DEA State and Local Task Forces

forces is more than \$102 million dollars,¹⁶⁵ and the Department of Justice Asset Forfeiture fund FY2000 budget requests more than \$208 million for state and local assistance.¹⁶⁶

The Kennedy proposal, which was modeled on an earlier church arson program, suggests that the concurrent jurisdiction/joint task force approach may be moving from a few areas of special emphasis to the mainstream or even the norm. Rather than viewing federal and state enforcement agencies as largely distinct, with a few areas of overlap, increases in areas of concurrent jurisdiction and the proliferation of multijurisdictional task forces may become the rule rather than the exception.

This trend raises the fundamental question of the advantages and disadvantages of the current highly fragmented criminal justice system. The decentralization or balkanization of state law enforcement agencies is one of the most prominent features of the administrative structure of the criminal justice process in this country,¹⁶⁷ and authority is further separated between federal and local law enforcement. Within each state, police and prosecutorial agencies are generally separated, and both prosecutorial and police authority is divided into a large number of separate administrative units. It has been estimated that there are presently about 2,350 prosecutorial agencies in the United States,¹⁶⁸ and the fragmentation of police agencies is even greater. There are more than 15,000 police agencies within the state criminal justice system.¹⁶⁹ Most of these are units of local government. The general pattern has been to separate police and prosecutorial functions, and to place authority in the hands of small geographic units under local control. This ensures that

in the 1970s and Organized Crime Drug Enforcement Task Forces in the 1980s; both create multijurisdictional groups that bring together federal, state, and local law enforcement officials. These programs provide federal authorities with access to additional manpower and street-level intelligence, while state and local officials garner federal funds as well as the prestige of working as equals with federal officials. *See* Guerra, *Multijurisdictional*, *supra* note 162, at 1185-86. The High Intensity Drug Trafficking Areas program headed by Office of National Drug Control Policy funds more than 460 initiatives bringing together 35 federal law enforcement agencies and more than 1,000 state and local agencies. NATIONAL DRUG CONTROL STRATEGY 2000, *supra* note 159, at 68.

¹⁶⁵ *See* Department of Justice, Agency Budget Summary, Drug Enforcement Administration (2000) <<http://whitehousedrugpolicy.gov/policy/99ndcsbudget/assets.html>> (stating proposed DEA budget, including \$102 million allocated to state and local task forces).

¹⁶⁶ *See* Department of Justice, Agency Budget Summary (2000) <<http://www.whitehousedrugpolicy.gov/policy/99ndcsbudget/drug.html>> (detailing Assets Forfeiture Fund, including \$208 million for state and local assistance).

¹⁶⁷ HERMAN GOLDSTEIN, POLICING A FREE SOCIETY 131-32 (decentralized police function in the United States is one of most distinctive features of national system) (1977). *See generally* 1 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 1.9(C) (2d ed. 1999).

¹⁶⁸ *See* LAFAVE, *supra* note 164, at § 1.9(C).

¹⁶⁹ *See id.* (3,086 sheriffs' departments and 12,350 municipal police departments).

the local community will have substantial influence in assuring that law enforcement meets its needs and values, and the dispersion of responsibility also serves as a check on the potential for the abuse of governmental authority.¹⁷⁰ In this sense, the fragmentation within the state system complements the division of authority between federal and state government, and the inefficiency of the arrangement is part of its virtue. Federal-state-local task forces unite the deliberately fragmented criminal justice agencies.

The new cooperative federalism and particularly the multi-jurisdictional task force model of criminal enforcement also raise the question of the continued vitality of the dual sovereignty theory of Double Jeopardy.¹⁷¹ When there is concurrent jurisdiction and federal, state, and local officials are permanent partners in the investigation and prosecution of criminal cases, is it appropriate to "maintain the fiction that federal and state governments are so separate in their interests that the dual sovereignty doctrine is universally needed to protect one from the other?"¹⁷² Perhaps the federal financial incentives that encourage state and local cooperation with federal officials and programs provide a sufficient incentive to prevent attempts to nullify federal interests, without the need for the dual sovereignty doctrine.

C. Occasional Federal Enforcement in Areas of Concurrent Jurisdiction

The Kennedy proposal calls for broad concurrent jurisdiction but anticipates infrequent federal prosecution. In one sense this is nothing new: the overlap between federal and state law has increased to the point that for most major crimes there is at least a degree of concurrent jurisdiction. Federal law now reaches at least some instances of the following state law offenses: assault, bribery, car jacking, domestic violence, extortion, failure to pay child support, fraud, kidnapping, murder, obscenity and pornography, rape, robbery, weapons offenses, and, of course, drug offenses. In the case of many of these offenses, federal prosecutions are infrequent.¹⁷³

The expansion of concurrent jurisdiction accompanied by only occasional

¹⁷⁰ See Kevin R. Wright, *The Desirability of Goal Conflict Within the Criminal Justice System*, 9 J. CRIM. JUST. 209, 213-14 (1981) (arguing that fragmentation of current system is desirable because it promotes a balance of power and allows conflicts in community values to be played out and resolved).

¹⁷¹ See *United States v. All Assets of G.P.S. Automotive Corp.*, 66 F.3d 483, 497-99 (2d Cir. 1995) (calling for the Supreme Court to reevaluate the dual sovereignty doctrine in light of the "unparalleled" levels of cooperation between federal and state law enforcement officials, particularly in the area of drug enforcement); Guerra, *Multijurisdictional*, *supra* note 162, at 1192-1210 (arguing that dual prosecutions are appropriate only where two sovereigns have different laws, priorities and interests and that these factors are absent in the context of multijurisdictional drug task forces).

¹⁷² See *G.P.S. Automotive*, 66 F.3d at 499.

¹⁷³ See, e.g., Strazzella, *supra* note 8, at 21 (in FY 1997 there were no prosecutions under federal statutes criminalizing drive by shootings, interstate domestic violence, and failure to report child abuse; other statutes were used infrequently).

federal prosecutions raises two sets of issues. These issues flow from the existence of differences between the federal and state laws that will govern prosecutions for conduct that falls within the concurrent jurisdiction. One set of issues arises when cases that would otherwise be prosecuted in the state courts are prosecuted in the federal system because of the existence of concurrent jurisdiction. The selection of a small number of cases for prosecution in the federal courts raises questions of the appropriateness of allowing prosecutorial forum shopping in the criminal context, as well as issues regarding the disparate treatment of individual offenders. Other issues arise when cases over which federal jurisdiction exists are prosecuted in the state courts. In these cases, state rather than federal law defines the offense, establishes the penalty, and governs the procedures. The application of state law to cases falling within concurrent jurisdiction may frustrate federal interests or policies in some cases, and may lead to the efforts to bring state law into conformity with federal law.

1. Forum Shopping and Disparate Treatment

Officials of the Department of Justice have advocated granting broad concurrent federal jurisdiction that can be employed in a discretionary fashion in a select number of cases where federal investigative, prosecutive, or legal resources would make an important qualitative difference.¹⁷⁴ For example, a federal prosecution may be desirable because federal procedural rules are more favorable to the prosecution or federal law authorizes a longer sentence.¹⁷⁵ A policy allowing prosecutors to forum shop in this manner increases the likelihood of conviction and thus has clear law enforcement benefits.¹⁷⁶

¹⁷⁴ See Jamie S. Gorelick & Harry Litman, *Prosecutorial Discretion and the Federalism Debate*, 46 HASTINGS L.J. 967, 971 (1995) (arguing against limiting federal jurisdiction to "fixed-spheres" in favor of broader concurrent jurisdiction limited by prosecutorial discretion). When this article was written Ms. Gorelick was Deputy Attorney General and Mr. Litman was Deputy Assistant Attorney General.

¹⁷⁵ See, e.g., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, FEDERAL COURTS STUDY COMMITTEE 38 (1990) (dissenting statement of Assistant Attorney General Edward Dennis) (arguing inter alia that drug federal prosecutions are needed in order to make available wiretap authority, grants of immunity, and forfeiture authority that would not be available under the laws of some states); see also ABRAMS AND BEALE, *supra* note 12, at 646-48 (exploring factors that may affect the choice of jurisdiction in cases of concurrent jurisdiction, including differences in substantive law, penalties, procedures, evidentiary rules, and constitutional doctrines limiting investigative techniques and evidence gathering).

¹⁷⁶ For example, in one case involving three defendants accused of a racially motivated murder, state officials agreed that a federal prosecution would be more favorable to the prosecution because state law entitled each defendant to a separate trial, limited the admission of co-conspirators' statements, and likely would not have resulted in as long a period of incarceration as would occur under federal law. See Senate 1998 Hearings, *supra* note 27, at 33-34 (statement of William C. Sowder, District Attorney, Lubbock County, Texas).

On the other hand, allowing prosecutors to forum shop in order to avoid unfavorable state laws raises two important issues. The first issue is equity among similarly situated defendants, and the second is the appropriateness of state and federal officials attempting to evade state law.

When only a small percentage of similarly situated defendants are prosecuted under federal law, and the remainder under state law, similarly situated defendants may receive radically different treatment.¹⁷⁷ For example, in many situations the federal sentence is far harsher than the sentence available for the same conduct under state law, and thus the few defendants who are prosecuted under federal law will receive longer sentences than most others who engaged in identical conduct. Prosecutors may hope to achieve a deterrent effect by publicizing the harsh treatment in these rare federal prosecutions, but the same effect could be achieved by randomly selecting one out of each one hundred federal defendants for a much longer sentence, and highly publicizing that result. Few would argue that such a system would be fair, even if it did produce a deterrent effect, and it seems totally at odds with the goal of reducing unjustified sentence disparity under the Sentencing Reform Act and the federal Sentencing Guidelines. Yet concurrent federal and state jurisdiction allows essentially the same result when a handful of cases are plucked out of the state system and prosecuted in the federal system. If the defendants in these cases are similarly situated to their state counterparts, their different treatment in the federal system is hard to justify. On the other hand, if they are not similarly situated to others in the state system—if, for example, they have longer criminal records or they have engaged in much more serious conduct—then different treatment is warranted. All other things being equal, it is easier to achieve equitable treatment of similarly situated defendants who are prosecuted within the same jurisdiction (federal or state).

Concurrent jurisdiction creates a potential for disparity based upon prosecutorial discretion. At present, few legal tools are available to regulate or review the exercise of prosecutorial discretion. Although individual prosecutors may proceed entirely in good faith, disparate treatment of similarly situated offenders is virtually inevitable. The Department of Justice provides little guidance or regulation of federal prosecutors' case selection, no statutes or regulations provide standards, and judicial review is unavailable. Absent some greater effort to regulate prosecutorial discretion, the expansion of concurrent federal-state jurisdiction expands the potential for disparate treatment of similarly situated defendants.

Concurrent jurisdiction also provides an opportunity for prosecutors to evade unfavorable state laws. For example, Florida law is quite favorable to the defense in several respects, including an extensive right to pretrial discovery from the prosecution, and Florida prosecutors sometimes seek federal prosecutions in cases where state law will make it hard to prosecute an

¹⁷⁷ See generally Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979, 982 (1995).

individual defendant successfully.¹⁷⁸ In the civil context, the plaintiff's attorney would be expected to compare the benefits of proceeding with a claim in different fora, and to select the most favorable forum in which to bring the plaintiff's case. Should prosecutors do so as well, or are there some different constraints? State laws that grant rights to criminal defendants or place limitations on investigative or prosecutorial conduct reflect policy choices. Should state officials attempt to evade these policies—which have been imposed by the state legislature or courts—by asking their federal partners to bring federal charges? What if the policies in question are embedded in the state constitution? Concurrent federal-state jurisdiction provides an opportunity to nullify the policy choices implicit in state law, and an incentive for state actors to evade those requirements. One area in which this conflict has recently been highlighted is forfeiture law.¹⁷⁹ Laws in many states limit forfeitures (e.g., precluding forfeiture of a residence) or designate the proceeds of forfeiture for programs such as education or drug treatment. Because federal law lacks these limitations on forfeiture and divides the proceeds among the law enforcement agencies involved in the investigation, state officials frequently evade the restrictions imposed under state law by handing off property they have seized to federal officials and requesting that they adopt the forfeiture.¹⁸⁰ It seems doubtful that state officials who seek to avoid the policy choices implicit in state forfeiture laws act in a manner consistent with their duties under state law, and questionable whether federal officials should encourage such action by their state and local counterparts. Is the situation any different when state and local officials seek to avoid the impact of state laws restricting the investigation or trial of criminal cases?

It might be argued that federal law reflects a policy choice when it differs from state law, and that it is entirely appropriate for the federal policy to override the contrary state policy. That is clearly correct when Congress has preempted state law, but Congress does not ordinarily preempt state law when it enacts a new federal crime. To the contrary, the model is one of dual or concurrent jurisdiction. As the scope of concurrent federal-state jurisdiction expands and the task force/partnership model becomes the norm, the opportunities to nullify state law expand as well, in a fashion that neither federal nor state lawmakers have anticipated. Is the desire to evade state law an appropriate basis for the exercise of federal jurisdiction? Does it matter

¹⁷⁸ See, e.g., *United States v. Ucciferri*, 960 F.2d 953, 953 (11th Cir. 1992) (upholding federal prosecution sought in Florida case to take advantage of less stringent federal rules concerning search warrants, wire surveillance, and informants).

¹⁷⁹ See *Taking Cash Into Custody: A Special Report on Police and Drug Money Seizures* (2000) <<http://www.kcstar.com/projects/drugforfeit/index.html>> (detailing, in a series of articles, the evasion of state law by federal forfeiture statutes).

¹⁸⁰ See *id.*; see also Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 40-41 (1998) (arguing that forfeiture revenues are distorting government policymaking and law enforcement, and creating self-financing unaccountable law enforcement agencies).

which state law is at issue?¹⁸¹ This development raises questions academics and federal policy makers should consider carefully. Does it matter how strong a case for federal jurisdiction can otherwise be made? Does it matter how serious the offense in question?¹⁸² Note that where concurrent jurisdiction exists a federal prosecution can be used instead of a state prosecution to evade restrictive state laws, and under the dual sovereignty doctrine of Double Jeopardy a federal prosecution can also be brought after state prosecution if state law yields an unfavorable result. As noted above, the shift to an integrated model of joint federal-state investigation and prosecution raises the question whether the dual sovereignty model should be maintained.

One overriding issue is whether the current case-by-case approach to the exercise of federal jurisdiction is adequate where there is concurrent jurisdiction over an increasing percentage of serious offenses and federal and state officials work in a close continuing partnership, with federal officials providing behind-the-scenes support in many cases, and selecting occasional cases for federal prosecution. As I have argued elsewhere, one way to respond to the issue of disparate treatment of similarly situated offenders and the question when state laws should be overridden would be the promulgation of regulations by the Department of Justice providing standards or greater guidance on these issues.¹⁸³

2. Loss of Federal Control and the Incentive to Force Changes in State Law

A general reliance on state prosecutions in areas of concurrent jurisdiction has other consequences, which are, in essence, the other side of the coin: in the main, state rather than federal officials and laws will govern in cases of some degree of federal concern. When Congress enacts a new federal criminal statute, it indicates the presence of federal interests that may be compromised if federal officials defer to state prosecutions. A low level of federal enforcement means that in most instances state officials determine whether and what charges to bring. State law will govern both the substantive and procedural aspects of each prosecution. In state prosecutions, state law will provide the rules governing criminal investigations, the elements of the offense, the available defenses, the procedures for determining guilt or innocence, and the available sanctions. Some or all of these procedural and substantive standards may be different from, or even in conflict with, the relevant federal rules. Allocating cases to the states means that in the main

¹⁸¹ For example, state constitutional restrictions might deserve greater deference than state procedural rules. Similarly, there might be special concern when state officials evade state laws that channel forfeiture proceeds away from law enforcement, using federal procedures to obtain financial support for their own activities.

¹⁸² Cf. Gorelick & Litman, *supra* note 174, at 970-71 (describing judicious use of federal jurisdiction to prosecute members of gangs involved in murder and witness intimidation, using federal resources including witness protection program).

¹⁸³ See Beale, *supra* 177, at 1016-17.

state standards will govern, and this is a cost of relying on state enforcement. On the other hand, reliance on state enforcement also has significant advantages. It preserves the traditional federal-state balance in criminal enforcement,¹⁸⁴ and it avoids straining federal resources, particularly the limited resources of the federal judicial system.¹⁸⁵ As in other areas, this concern produces federal pressures to find ways to control state and local governments to bring them closer to federal norms. One traditional method employed in a variety of contexts is federal grants that come “with strings,” and other mechanisms of cooperative federalism.

CONCLUSION

A traditional federal approach to the problems of bias-motivated offenses would, like the Kennedy proposal, likely include the enactment of a new federal crime as well as the provision of aid to state and local law enforcement. A close analysis of the Kennedy proposal reveals that these traditional elements are being employed in a novel fashion. Instead of creating a new federal offense that will be prosecuted aggressively, the Kennedy proposal creates a new federal offense primarily as a means of sending a symbolic message and providing a legal basis for a partnership in which it provides behind the scenes assistance to state and local efforts.

Both the emphasis on symbolism and the effort to create a continuing federal-state partnership create issues that have been largely ignored in the debate over federal hate crimes legislation. Emphasis on the expressive function of federal criminal law has the potential to alter public perceptions, though it is not clear how that process will play out. The techniques for controlling the enforcement of a new crime are better understood than those for controlling the social meaning of such a law. It may create and strengthen valuable norms and bring about desirable shifts in social capital, but it might also undermine the moral force of the criminal law. The isolation of the symbolism or expressive function also changes the dynamic of the federal legislative process, and the related public debates. The other side of the proposal is the attempt to create a permanent partnership in which federal, state, and local officials work together to investigate and prosecute hate crimes in a task force model. The task force brings to bear resources in an efficient manner, but it strains the constitutional image of separate sovereigns each enforcing their own laws and takes a step towards the integration of the current autonomous police and prosecutorial agencies in the fragmented criminal justice systems within each state. Finally, the deliberate strategy of bringing rare federal prosecutions selected from among thousands of cases allows prosecutors to forum shop and negate state laws that embody state policies,

¹⁸⁴ See *supra* at pp. 1230-1231.

¹⁸⁵ See generally REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 175 (describing problem of overloading the federal courts with cases that could be brought in the state courts).

exposing a few defendants to different procedural and substantive laws, and different sentences, than all others who have committed the same conduct.

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