JUDICIAL ACTIVISM AND PROGRESSIVE LEGISLATION:

A STEP TOWARDS DECREASING HATE ATTACKS

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I. INTRODUCTION

Over the last several years, the issue of gay and lesbian rights has been a political hot topic. The area that has drawn the most attention lately is in the realm of civil unions and marriage. Vermont and Connecticut have passed civil union legislation increasing the rights of gays and lesbians.¹ Massachusetts went one step further. It actually permits gay marriage. In 2003 the Massachusetts Supreme Judicial Court (SJC), in Goodridge v. Department of Public Health, ruled that the state’s constitution does not prevent same-sex couples from marrying.² In the wake of the SJC’s opinion, the Massachusetts legislature introduced possible constitutional amendments defining marriage as between a man and a woman only.³ In the meantime, same-sex couples began to marry starting in May 2004.⁴ By December 2005 a total of 7,341 same-sex couples had been married in Massachusetts.⁵

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² 798 N.E.2d 941, 948 (Mass. 2003).
⁵ Id.
Other states have done the opposite. They have limited the rights of gays and lesbians by passing amendments to their state constitutions, which define marriage as between a man and woman only. This makes it virtually impossible for homosexuals to be on equal footing with their heterosexual counterparts.

This Article focuses on the impact that judicial decisions, such as the Goodridge opinion, and legislative acts increasing the rights of gays and lesbians have on “hate crimes.” In determining this impact, the Article will examine the historical treatment of gays and lesbians and anti-gay violence. It will also look at heterosexism and the Defense of Marriage Act, hate crime legislation, hate crime statistics, and hate attacks nationally and specifically in Vermont and Massachusetts.

II. HISTORICAL TREATMENT OF GAYS AND LESBIANS

Gays and lesbians in the United States, historically, have not been treated well. Starting as early as the colonial era, one could be executed by the government for sodomy. By the mid-twentieth century, the medical profession began considering homosexuality a mental illness. As such, many gays and lesbians were in fear of being institutionalized. In the 1940s and 1950s, the federal government started to openly treat homosexuals adversely. Congress dealt with homosexuals through the House UnAmerican Activities Committee and the Senate’s McCarthy Hearings. Homosexuals were considered a national menace, a threat to national security, and a threat to the stability of the country.

Congress, however, was not the only branch of the federal government that treated homosexuals poorly. President Dwight Eisenhower “issued an executive order listing ‘sexual perversion’ as disqualifying anyone from a federal job.” This prompted J. Edgar
Hoover and the FBI to lead a “national crackdown” on outing homosexuals.\textsuperscript{14} At that time, the federal government was the nation’s largest employer.\textsuperscript{15} It was believed that homosexuals were easy targets of blackmail and could be coerced into revealing national secrets or joining the communist party.\textsuperscript{16}

As a result of this crackdown, it became open season on homosexuals. This overt discrimination by the federal government led to more and more private discrimination. Private employers followed Eisenhower’s lead and started firing anyone they believed was homosexual.\textsuperscript{17} In addition, police across the country started to act as if they had been given a “no-holds-barred signal to harass, abuse and arrest homosexuals.”\textsuperscript{18} They would blackmail, entrap, and commit other abuses on them.\textsuperscript{19} The police traditionally have been violators of gay and lesbian civil rights.\textsuperscript{20} As such, attacks on gays and lesbians had gone unreported because victims actually experienced or perceived the police to be anti-gay.\textsuperscript{21} This was the climate and the catalyst for the Stonewall Riots of 1969.\textsuperscript{22} During these riots, members of the gay community fought back against the New York City Police who were constantly harassing patrons of gay bars.\textsuperscript{23} The riots lasted three days and served as the springboard to the Gay Liberation Movement.\textsuperscript{24} The movement focused on issues such as ending police abuse, discrimination in housing and employment, and repealing sodomy laws.\textsuperscript{25}

Finally in 1973, the American Psychiatric Association removed homosexuality from its list of psychological disorders.\textsuperscript{26} This helped

\begin{footnotes}
\item Id. at 37.
\item Id. at 38.
\item MURDOCH & PRICE, supra note 8, at 38.
\item Id.
\item Kevin T. Berrill & Gregory M. Herek, Violence Against Lesbians and Gay Men: An Introduction, 5 J. INTERPERSONAL VIOLENCE 269, 270 (1990).
\item See JACK LEVIN & JACK MCDEVITT, HATE CRIMES REVISITED: AMERICA’S WAR AGAINST THOSE WHO ARE DIFFERENT 155–170 (2002).
\item Kevin T. Berrill & Gregory M. Herek, Primary and Secondary Victimization in Anti-Gay Hate Crimes: Official Response and Public Policy, 5 J. INTERPERSONAL VIOLENCE 401, 403–04 (1990) [hereinafter Primary and Secondary Victimization in Anti-Gay Hate Crimes].
\item IRONS, supra note 7, at 457.
\item Id.
\item Id.
\item Id. at 457–58.
\item Jon S. Lasser & Michael C. Gottlieb, Treating Patients Distressed Regarding Their Sexual Orientation: Clinical and Ethical Alternatives, 35 PROF. PSYCHOL. RES. & PRAC. 194, 194 (2004); see also AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS § 302.00 (3d ed. 1980).
\end{footnotes}
to reduce the stigma that homosexuals were “sick.” The stigma, however, had many negative effects ranging from mild verbal assaults to harsh physical attacks.\footnote{Robert F. Meier & Gilbert Geis, Criminal Justice and Moral Issues 124–25 (2006).}


In addition to anti-discrimination laws in the employment arena, many other states have added sexual orientation to their hate crime statutes.\footnote{Anti-Defamation League, Anti-Defamation League State Hate Crime Statutory Provisions 1–2 (2005), available at http://www.adl.org/learn/hate_crimes_laws/State_Hate_Crime_Statutory_Provisions_chart.pdf.} They have expanded upon the traditional categories of race, ethnicity, religion, and disability.

Some states have gone even further to increase the rights of gays and lesbians. Three states recognize homosexual relationships similarly to heterosexual marriages. Two are in the form of civil unions (Vermont and Connecticut) and one (Massachusetts) actually allows marriage.\footnote{Vermont and Connecticut recognize civil unions through statute. VT. STAT. ANN. tit. 15, §§ 1201–1206 (2002); CONN. GEN. STAT. ANN. §§ 46b–38bb to 46b–38pp (West 2007). In Massachusetts, same-sex couples were allowed to marry in 2004 based on a ruling from the Supreme Judicial Court. See Goodridge v. Dept of Pub. Health, 798 N.E.2d 941, 969 (2003).}

Finally in 2003, the United States Supreme Court ruled that homosexuals have a right to liberty under the Due Process Clause to engage in consensual conduct in the privacy of their own home without intervention of the government.\footnote{Lawrence v. Texas, 539 U.S. 558, 578 (2003).}

III. VICTIMIZATION

Gays and lesbians have always had to endure violence against them, whether at the hands of law enforcement or private citizens. When people think of anti-gay violence, most think of personal...
attacks.

Kuehnle and Sullivan did a descriptive study investigating anti-gay victimization and reporting practices in 2001. They examined self-reported incidents to a victim program from a large northeastern city from January 1995 through September 1998. The analysis included 241 incidents. The gender identity in this study involved 179 males, fifty-two females, and ten transgendered individuals. Nearly 50% of the incidents involved a serious personal offense, and 39.4% involved other personal offenses, such as attempted assault and harassment.

Herek, Cogan, and Gillis interviewed 450 volunteers from a group of 2,259 sexual-minority adults from the Sacramento, California area. One of the questions they asked focused on “the varieties of hate crime victimization experienced by sexual minorities.” The responses “ranged from harassment and threats to physical assault.” One of the interviewees mentioned the murder of a friend.

In addition to these direct attacks of violence or harassment, gays and lesbians also face secondary discrimination. Berrill and Herek describe secondary discrimination as the negative treatment a victim receives when others, such as family members or employers, learn of the victim’s sexual orientation. Examples the authors used for this treatment are “loss of employment, eviction from housing, denial of public accommodations, and loss of child custody.” The authors go further and state that the government’s action or inaction toward secondary discrimination conveys the message to “perpetrators . . . and the rest of society that anti-gay hate crimes will not [go] punished and that secondary victimization of gay people is acceptable.” If this is true, then one could speculate that as long as the government continues to allow

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34 Id. at 930.
35 Id. at 932.
36 Id. at 933.
37 Gregory M. Herek et al., Victim Experiences in Hate Crimes Based on Sexual Orientation, 58 J. SOC. ISSUES 319, 320–21 (2002).
38 Id. at 320.
39 Id. at 324.
40 Id. at 324–25.
41 Primary and Secondary Victimization in Anti-Gay Hate Crimes, supra note 21, at 401–02.
42 Id. at 401.
43 Id. at 403.
homosexuals to be treated differently than heterosexuals, acts of violence against gays and lesbians shall not decrease.

IV. HETEROSEXISM AND THE INSTITUTIONALIZATION OF HATE

A. Institutionalization of Hate

As time progressed, hate and violence started to become institutionalized in American culture.\textsuperscript{44} Homosexuals would face felony imprisonment under sodomy statutes (unlike their heterosexual counterparts), forced psychiatric treatment, and termination from employment.\textsuperscript{45} Moreover, in the wake of harsh treatment by law enforcement, homosexuals were and still are reluctant to report the attacks on them.\textsuperscript{46} This reluctance could go as far as acting as a motivating factor for gays and lesbians to hide their victim status because of the perceived lack of support among law enforcement and the general public.\textsuperscript{47}

B. Heterosexism

Heterosexism is “an ideological system that denies, denigrates, and stigmatizes any non-heterosexual form of behavior, identity, relationship, or community.”\textsuperscript{48} One cannot turn a blind eye on this definition when examining the legal system. There are many examples of where it exists.

1. Sodomy

The most striking area of unequal treatment for homosexuals was in the application of criminal sodomy statutes. Sexual behavior has always been regulated to some degree. We have had laws punishing people for fornication, adultery, prostitution, and solicitation. Sodomy laws just followed suit. By 1961 all fifty states had some

\textsuperscript{44} See generally Morrow, supra note 9.
\textsuperscript{45} IRONS, supra note 7, at 457–58; see generally Morrow, supra note 9.
\textsuperscript{46} Kevin Berrill, Anti-Gay Violence: Causes, Consequences, and Responses, in BIASED CRIME: AMERICAN LAW ENFORCEMENT AND LEGAL RESPONSES 151, 161 (Robert J. Kelly ed., 1993); Primary and Secondary Victimization in Anti-Gay Hate Crimes, supra note 21, at 404.
\textsuperscript{47} Nadine Recker Rayburn et al., Base Rates of Hate Crime Victimization Among College Students, 18 J. INTERPERSONAL VIOLENCE 1209, 1211 (2003).
\textsuperscript{48} Amy M. Rey & Pamela Reed Gibson, Beyond High School: Heterosexuals’ Self-Reported Anti-Gay/Lesbian Behaviors and Attitudes, in SCHOOL EXPERIENCES OF GAY AND LESBIAN YOUTH: THE INVISIBLE MINORITY 65, 67 (Mary B. Harris ed., 1998) (citation omitted).
type of criminal sodomy statute. In 1986 when the infamous *Bowers v. Hardwick* case was decided, twenty-four states and the District of Columbia had sodomy statutes.

In *Bowers*, a police officer observed Mr. Hardwick engaging in a consensual sexual act with another adult male. This act occurred in the privacy of Mr. Hardwick’s own home. The act, however, was in violation of a Georgia sodomy statute.

Interestingly enough, during the oral argument for this case, it was said that no married couple had ever been charged under the Georgia sodomy statute, and it had only applied to homosexuals. Nonetheless, the Court upheld the statute and stated that homosexual sodomy was not a right protected by the Due Process Clause of the Constitution.

In 2003 *Bowers* was overturned by *Lawrence v. Texas*. The facts in this case were similar to *Bowers*. An adult male was engaged in a consensual sexual act with another adult male in the privacy of his own home. Both men were charged under a Texas statute which provided a criminal penalty for persons who engaged in deviate sexual intercourse with another individual of the same sex.

By the time the Court heard *Lawrence*, the number of states with criminal sodomy statutes had decreased from twenty-five, when *Bowers* was decided, to thirteen. Four of the states at the time only applied their statutes to homosexual conduct, not heterosexual conduct.

Governments were clearly implementing heterosexist policies and legislation when it came to sodomy statutes. Not only were heterosexuals not being charged with sodomy (this only refers to consensual acts among adults), but some states went as far as making it criminal only for homosexuals.

The decision in *Lawrence*, however, helped pave the way for equality for homosexuals. It directly overturned *Bowers*. The Court stated that there was a right to liberty under the Due Process Clause that gave the two men involved in the case the full right to

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50 *Id.* at 193–94.
51 *Id.* at 187–88.
52 *Id.*, supra note 7, at 459–60.
53 *Bowers*, 478 U.S. at 194.
55 *Id.* at 563.
56 *Id.* at 573.
57 *Id.*
engage in their conduct without intervention by the government.\footnote{Id. at 578.}

2. Employment

Another example of heterosexism and the law can be found in the employment arena. As discussed earlier, starting in the 1950s public and private employers began firing individuals solely based on their sexual orientation.\footnote{See supra text accompanying notes 13–17.} Today, some states still do not protect a person based on sexual orientation in the employment arena. However, strides are being made. Seventeen states and Washington, D.C. prohibit private employers from discrimination based on sexual orientation.\footnote{Davidson, Celebrating Recent LGBT Legislative Advances, supra note 28.} Seven more states prevent discrimination against public employees.\footnote{The Rights of LGBT Public Employees, supra note 29.} An executive order protects those employed by the federal government.\footnote{See id.}

3. Hate Crime Legislation

Hate crime legislation is another area of law where heterosexism is prevalent. Only thirty-two states have added sexual orientation to their hate crime statutes.\footnote{ANTI-DEFAMATION LEAGUE, supra note 30, at 1–2.} This is quite disturbing. Hate crime legislation is meant to protect members of groups that have traditionally been treated poorly by law enforcement and the legal system.\footnote{Edward Dunbar & Andres Molina, Opposition to the Legitimacy of Hate Crime Laws: The Role of Argument Acceptance, Knowledge, Individual Differences, and Peer Influence, 4 ANALYSES OF SOC. ISSUES & PUB. POLY 91, 93 (2004).} As discussed in the previous section, homosexuals have been treated poorly by law enforcement and the legal system.\footnote{See supra text accompanying notes 44–47.} By not including sexual orientation as a protected category, it perpetuates the idea that gays and lesbians can be treated harshly just because they are homosexual.

4. Marriage

All of the above examples demonstrate how heterosexism is embodied in the law. However, there is no better example of this than in the context of marriage. In 1996 the Defense of Marriage
Act (DOMA) was passed. This Act does a number of things, but most importantly, it defines “marriage” and “spouse” for the purpose of federal law. “[M]arriage” is defined as “a legal union between one man and one woman as husband and wife.” “[S]pouse” is defined as “a person of the opposite sex who is a husband or a wife.” DOMA not only limited the definitions of marriage and spouse to heterosexuals, it also allowed states and the federal government to not recognize any same-sex marriage in direct opposition to the Full Faith and Credit Clause of the Constitution. Following the federal government’s lead, many states have adopted their own DOMA-like statutes.

As of the end of 2005, there were only three states (Massachusetts, Vermont, and Connecticut) that recognized homosexual relationships in ways similar to heterosexual marriages. This recognition, however, had some conservatives nervous, in particular President George W. Bush. After the SJC in Massachusetts ruled that the denial of marriage to same-sex couples was a violation of the Massachusetts Constitution, President Bush pushed for a constitutional amendment defining marriage as between a man and woman only. Congress did not disappoint him. In March 2004 the Federal Marriage Amendment was proposed as a joint resolution. This proposal would not only prevent homosexuals from having the same rights as their heterosexual counterparts, but it would also constitutionalize discrimination. Section two of this proposal limits marriage in the United States to only the union of a man and a woman. Following the federal government’s lead, by the end of 2005, nineteen states had passed their own marriage amendments. Most defined marriage as between a man and a woman only. Hawaii’s amendment gives the legislature the power

68 Id.
69 28 U.S.C. § 1738C.
70 DOMA Watch, supra note 6.
73 S.J. Res. 40, 108th Cong. (2004). The joint resolution was introduced by Mr. Wayne Allard. Id.
74 Id. § 2.
to “reserve marriage to opposite-sex couples.”

5. Language

Heterosexism also exists in our language. According to Pierce in his article entitled *Language, Violence, and Queer People: Social and Cultural Change Strategies*, heterosexuals speak of homosexuals in symbolic opposites. He states that “[t]he distinction between heterosexual and homosexual persons is not based on any true differences, but on hierarchical opposites.” He continues further, stating that “[t]he term heterosexual becomes the primary term and represses the term homosexual. The homosexual person is produced in and through language to constitute the heterosexual’s negative.” Same-sex relationships were considered “unspeakable.” As a result of this labeling, we have maintained our negative attitude and stereotypes about same-sex love. By making it impossible for same-sex couples to marry, the government is reinforcing these negative attitudes and stereotypes.

V. HATE CRIMES

A. Hate Crime Legislation

There have been many hate crimes committed in the United States, but it was the deaths of James Byrd, Jr. and Matthew Shepard in 1998 that grabbed the attention of America.

On June 7, 1998, in Jasper, Texas, James Byrd, Jr. walked home on a hot summer night after attending a local house party. As he was walking, a pickup truck with three occupants slowed down and one of them asked if he wanted a ride. The gentleman agreed.

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77 Id.
78 Id.
79 Id. at 51–52.
81 Id. at 23.
Byrd did not know that the three men would savagely attack him, spray him with black paint, tie him to the back of the truck with a log chain, and, while still alive, drag him for three miles to his death.\textsuperscript{85} Byrd was killed because he was black.\textsuperscript{86} Four months later, on October 6, 1998, in Laramie, Wyoming, Matthew Shepard, a twenty-one year-old gay male, would be kidnapped, pistol-whipped, tied to a fence, and left for dead in the freezing temperatures.\textsuperscript{87} This was all done because of his sexual orientation.\textsuperscript{88} Six days later, Shepard would die from his injuries.\textsuperscript{89} The tragic deaths of these two men shocked the nation. They were so brutal, so heinous, and so repugnant that the hate crime legislation movement was energized and would receive the attention it deserved.\textsuperscript{90}

Criminal hate crime statutes make illegal bias-motivated violence toward an individual or group because of some real or perceived characteristic.\textsuperscript{91} These characteristics vary across states. Typically they include race, ethnicity, religion, sexual orientation, and sometimes gender.\textsuperscript{92} Twenty-four states have added sexual orientation to their hate crime statutes.\textsuperscript{93}

The protected characteristics in hate crime legislation are, generally speaking, immutable. A person cannot change his race. A person cannot change his ethnicity. A person may change his religion but, typically, will not. Likewise, when it comes to sexual orientation, most people do not change their sexual preferences. Lastly, although medically possible, most people do not change their gender.

In 1994 the Violent Crime Control and Law Enforcement Act was passed.\textsuperscript{94} This provided for a longer sentence when a hate crime

\textsuperscript{84} Id.
\textsuperscript{85} Id. at 4, 25–27.
\textsuperscript{86} Id. at 45.
\textsuperscript{87} Walt Boudlen, \textit{A Tribute to Matthew Shepard}, in \textit{From Hate Crimes to Human Rights: A Tribute to Matthew Shepard} 7, 7 (Mary E. Swigonski et al. eds., 2001).
\textsuperscript{88} Id. at 8.
\textsuperscript{89} Id.
\textsuperscript{91} Valerie Jenness, \textit{Engendering Hate Crime Policy: Gender, the "Dilemma of Difference," and the Creation of Legal Subjects}, 2 J. HATE STUD. 73, 77–78 (2002–03).
\textsuperscript{93} Id.
was committed on federal land because of a person’s “race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation.”

There has been much debate about whether or not the penalty enhancement provisions of hate crime legislation are constitutional. Hate crimes are considered violations of human rights. Some argue that the unique nature of hate crimes makes enhanced penalties appropriate because the penalties “are part of an effort to promote the maintenance of a civil society.” Unlike other crimes, “hate crimes tend to be excessively brutal.” Just consider the Byrd and Shepard cases. According to Levin and McDevitt, hate crimes not only tend to be very brutal, but they also tend to be random and committed upon strangers. This leads to members of the protected group feeling vulnerable and like potential victims. In addition, hate crimes tend to be committed by “multiple offenders.” This makes it more difficult for a victim to defend himself or herself. It is no wonder that advocates of the enhanced penalty provisions feel justified.

Opponents of the penalty enhancement provisions of hate crime statutes argue that they are unconstitutional. For example, Nearpass, in his article entitled The Overlooked Constitutional Objection and Practical Concerns to Penalty-Enhancement Provisions of Hate Crime Legislation, argues that penalty enhancement is nothing more than a form of cumulative punishment which the Supreme Court has repeatedly declared unconstitutional in light of the Double Jeopardy Clause. Others have argued that “hate crime laws [penalize freedom of] expression and the thoughts and ideas behind it.” The United States Supreme Court, however, in Wisconsin v. Mitchell, upheld a hate crimes law that had penalty enhancements because these crimes are “thought to inflict greater individual and societal harm . . . [and]

95 Id.
96 Mary E. Swigonski et al., Introduction to From Hate Crimes to Human Rights: A Tribute to Matthew Shepard, supra note 9, at 2.
97 Dunbar & Molina, supra note 64, at 93; see Donald A. Saucier et al., Effects of Victims’ Characteristics on Attitudes Toward Hate Crimes, 21 J. INTERPERSONAL VIOLENCE 890, 892–93 (2006).
98 Levin & McDevitt, supra note 20, at 17 (emphasis omitted).
99 Id. at 18.
100 Id. at 22.
101 Nearpass, supra note 90, at 548.
are more likely to provoke a retaliatory crime.”

VI. DOMA, MARRIAGE, CIVIL UNIONS, AND HATE ATTACKS

A. Hate Crime Statistics

In 1990 the federal government passed the Hate Crimes Statistics Act. This Act directs the Attorney General to collect data “about crimes that manifest evidence of prejudice based on race, religion, sexual orientation, or ethnicity.” In 1994 hate crimes involving disabilities were added.

In 1990 the FBI started to gather hate crime statistics. In 1991 there were 425 incidents reported that were based on sexual orientation, representing 8.9% of the total hate crime incidents reported. In 2004 there were 1,197 incidents reported based on sexual orientation, representing 15.6% of the total incidents reported.

Table 1 below lists the number of hate crime incidents reported from 1991 through 2004. It also shows the number of incidents based on sexual orientation and the percentage these incidents represent overall.

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105 Id.
109 Id.
Table 1. Hate Crimes Based on Sexual Orientation 1991–2004

<table>
<thead>
<tr>
<th>Year</th>
<th>Total Hate Crimes Incidents Reported</th>
<th>Total Reported Motivations Based on Incidents Involving Sexual Orientation</th>
<th>Percentage of Incidents Reported Involving Sexual Orientation</th>
</tr>
</thead>
<tbody>
<tr>
<td>1991</td>
<td>4,755</td>
<td>425</td>
<td>8.9</td>
</tr>
<tr>
<td>1992</td>
<td>6,623</td>
<td>767</td>
<td>11.6</td>
</tr>
<tr>
<td>1993</td>
<td>7,587</td>
<td>860</td>
<td>11.3</td>
</tr>
<tr>
<td>1994</td>
<td>5,932</td>
<td>685</td>
<td>11.5</td>
</tr>
<tr>
<td>1995</td>
<td>7,947</td>
<td>1,019</td>
<td>12.8</td>
</tr>
<tr>
<td>1996</td>
<td>8,759</td>
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<tr>
<td>1997</td>
<td>8,049</td>
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<tr>
<td>2004</td>
<td>7,649</td>
<td>1,197</td>
<td>15.6</td>
</tr>
</tbody>
</table>

Figure 1 shows in graph form the total number of hate crime incidents across all categories from 1991 through 2004.

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110 This table was compiled using statistics in the Leadership Conference on Civil Rights Education Fund Report. Leadership Conference on Civil Rights Education Fund, supra note 103, at 36; Offenders’ Reported Motivations in Percentages of Incidents, supra note 108.
Since 1991 there has been a steady increase in the percentage of hate crime incidents based on sexual orientation. One explanation for this could be the increase in overall reporting by law enforcement agencies throughout the country. The FBI started to collect these statistics in 1990. In 1991, only 2,771 agencies reported hate crimes. By 2004, 12,711 agencies reported hate crimes.\footnote{Anti-Defamation League, Hate Crime Statistics: Comparison of FBI Hate Crime Statistics 1991–2004 (2004) [hereinafter Comparison of FBI Hate Crime Statistics], available at http://www.adl.org/99hatecrime/fbi_comp_stats_14yr.pdf.}

What is interesting to note, however, are the increases starting in 1997. In 1997, hate incidents based on sexual orientation increased by 2.1%, climbing from 11.6% in 1996 to 13.7% in 1997.\footnote{Offenders’ Reported Motivations in Percentages of Incidents, supra note 108.} This percentage continued to rise, reaching its peak in 1999 at 16.7%.\footnote{Id.} The percentage of hate incidents based on sexual orientation rose 5.1% from 1996 to 1999, even though the overall number of incidents regardless of motivation dropped (8,759 reported in 1996, 7,876 reported in 1999).\footnote{Id.; Comparison of FBI Hate Crime Statistics, supra note 111.} This is reflected in Figure 2.
When looking at this timeframe, one cannot ignore the political climate regarding gays and lesbians. In 1996 the Federal Defense of Marriage Act (DOMA) was passed.\textsuperscript{115} It is no surprise that hate incidents based on sexual orientation increased during this period. The Federal Defense of Marriage Act is a condoned form of discrimination. Following the argument in the 1990 Berrill and Herek study,\textsuperscript{116} the government’s direct discriminatory action—never mind its action or inaction toward secondary discrimination—does convey the message to offenders and the rest of society that anti-gay hate crimes and secondary victimization are acceptable.

With the passage of DOMA-type legislation, it appears that hate attacks on gays and lesbians increase. In the alternative, when the government passes legislation that increases the rights of gays and lesbians, or in the case of Massachusetts, the court rules that gays and lesbians cannot be denied certain rights, hate attacks appear to decrease.

\textsuperscript{116} Primary and Secondary Victimization in Anti-Gay Hate Crimes, supra note 21, at 402–03.
B. Marriages and Civil Unions

In 2000 Vermont enacted legislation that would allow same-sex couples to enter into civil unions.\textsuperscript{117} Massachusetts followed closely with the SJC’s ruling in \textit{Goodridge} that the state’s constitution did not prevent same-sex couples from marrying.\textsuperscript{118} In an advisory opinion that followed, the court stated that “civil unions” in fact would be discriminatory and in violation of the Massachusetts Constitution.\textsuperscript{119} Marriage meant marriage. As a result, Massachusetts started issuing licenses to same-sex couples starting in May 2004.

1. Hate Crimes in Vermont and Massachusetts

The hate crime incidents that occurred in Vermont as reported to the FBI between 1996 and 2004 are provided in Table 2. From 2000 to 2004, there were a total of thirty-three hate crimes reported based on sexual orientation. The number of crimes decreased in 2000 and 2001 from eight and nine, respectively, to five, six, and five in 2002, 2003, and 2004, after the civil union legislation was enacted.


\textsuperscript{119} Opinions of the Justices to the Senate, 802 N.E.2d 565, 570 (Mass. 2004).
### Table 2. Vermont Hate Incidents

<table>
<thead>
<tr>
<th>Year</th>
<th>Total Hate Crime Incidents Reported</th>
<th>Total Reported Motivations Based on Sexual Orientation</th>
<th>Percentage of Incidents Reported Involving Sexual Orientation</th>
</tr>
</thead>
<tbody>
<tr>
<td>1996</td>
<td>4</td>
<td>Not provided</td>
<td>N/A</td>
</tr>
<tr>
<td>1997</td>
<td>3</td>
<td>Not provided</td>
<td>N/A</td>
</tr>
<tr>
<td>1998</td>
<td>13</td>
<td>3</td>
<td>23.1</td>
</tr>
<tr>
<td>1999</td>
<td>16</td>
<td>5</td>
<td>31.3</td>
</tr>
<tr>
<td>2000</td>
<td>19</td>
<td>9</td>
<td>47.4</td>
</tr>
<tr>
<td>2001</td>
<td>17</td>
<td>8</td>
<td>47.1</td>
</tr>
<tr>
<td>2002</td>
<td>18</td>
<td>6</td>
<td>33.3</td>
</tr>
<tr>
<td>2003</td>
<td>27</td>
<td>6</td>
<td>22.2</td>
</tr>
<tr>
<td>2004</td>
<td>28</td>
<td>5</td>
<td>17.9</td>
</tr>
</tbody>
</table>

*These statistics are compiled from the FBI’s Hate Crime Statistics 1996–2004.*

A similar decrease can be found in Massachusetts (Table 3). From 2000 to 2004, there were 428 hate crimes reported based on

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sexual orientation. In 2000, there were ninety-three; in 2001, there were 104; and in 2002, there were ninety-six. In 2003, the reported hate attacks decreased to sixty-nine and in 2004 to sixty-six.

Table 3. Massachusetts Hate Incidents 1996–2004

<table>
<thead>
<tr>
<th>Year</th>
<th>Total Hate Crime Incidents Reported</th>
<th>Total Reported Motivations Based on Sexual Orientation</th>
<th>Percentage of Incidents Reported Involving Sexual Orientation</th>
</tr>
</thead>
<tbody>
<tr>
<td>1996</td>
<td>454</td>
<td>40</td>
<td>8.8</td>
</tr>
<tr>
<td>1997</td>
<td>441</td>
<td>47</td>
<td>10.7</td>
</tr>
<tr>
<td>1998</td>
<td>431</td>
<td>80</td>
<td>18.6</td>
</tr>
<tr>
<td>1999</td>
<td>443</td>
<td>90</td>
<td>20.3</td>
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<td>2000</td>
<td>458</td>
<td>93</td>
<td>20.3</td>
</tr>
<tr>
<td>2001</td>
<td>584</td>
<td>104</td>
<td>17.8</td>
</tr>
<tr>
<td>2002</td>
<td>430</td>
<td>96</td>
<td>22.3</td>
</tr>
<tr>
<td>2003</td>
<td>403</td>
<td>69</td>
<td>17.1</td>
</tr>
<tr>
<td>2004</td>
<td>346</td>
<td>66</td>
<td>19.1</td>
</tr>
</tbody>
</table>

The hate incidents decreased in Massachusetts the same year in which the SJC ruled that same-sex marriages could not be denied under the Massachusetts Constitution.

These numbers are interesting in light of the fact that the years that the hate attacks decreased were the same years that, in Vermont, the legislature enacted civil union legislation and, in Massachusetts, the court said same-sex marriages could happen. On the flip side of this argument, when one looks at the enactment of DOMA in 1996, which can be considered a heterosexist piece of legislation, hate attacks were on the rise.

VII. LIMITATIONS AND RECOMMENDATIONS

The statistics used for this Article are very limited. Due to the novelty and rarity of same-sex marriages and civil unions, it will take several years to determine if increasing the rights of gays and lesbians actually decreases hate attacks. In addition, it will be interesting to note, as the Federal Marriage Amendment debate continues, whether there will be an impact on hate attacks based on sexual orientation. Nevertheless, both the federal and state governments have an obligation to treat their citizens fairly. They need to think carefully before enacting discriminatory legislation that could have a negative and potentially violent effect on a group of citizens that has historically not been protected.

VIII. CONCLUSION

Historically, homosexuals have not been treated well. The poor treatment has come not only from private citizens but directly from the federal, state, and local governments. Homosexuals not only have had to face violent attacks or the threat of violent attacks, but have also had to face discrimination by law enforcement, the courts, employment, and in their personal choices, such as marriage.

As seen in this Article, actions or inactions by the government have had a tremendous impact on this group of citizens. It is time to eliminate the heterosexist policies and legislation that exist. By doing so, we can truly examine the influence these policies have on hate attacks.