Which Bodies Count When They Are Bashed?: An Argument for the Inclusion of Transgendered Individuals in the Hate Crimes Prevention Act of 1999

Kara S. Suffredini

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WHICH BODIES COUNT WHEN THEY ARE BASHED?: AN ARGUMENT FOR THE INCLUSION OF TRANSGENDERED INDIVIDUALS IN THE HATE CRIMES PREVENTION ACT OF 1999

KARA S. SUFFREDINI*


On average, one transgendered individual is reported murdered every month. This high statistic does not account for hate crimes against transgendered individuals that are either not reported or are misrecorded as crimes motivated by sexual orientation bias. In this Book Review, the author explores this epidemic of violence against transgendered individuals. Juxtaposing two prominent hate crimes—the murders of Matthew Shepard in Wyoming and Brandon Teena in Nebraska—the author exposes the critical differences between hate crimes against transgendered individuals and hate crimes based on sexual orientation and the disparity between the institutional responses each receives. The author argues that these differences warrant the conclusion that hate crimes against transgendered individuals should not be left to fall under the “actual or perceived sexual orientation” provision of the Hate Crimes Prevention Act of 1999, but can and should receive express, individualized attention under the Act’s “actual or perceived gender” provision.

Stunned and frightened by the crowd’s unexpected fury, the police, at the order of Deputy Inspector Pine, retreated inside the [Stonewall Inn] bar. Pine had been accustomed to two or three cops being able to handle with ease any number of cowering gays, but here the crowd wasn’t cowering; it had routed eight cops and made them run for cover... [C]heerleaders led the crowd in shouts of “Gay power[,”]

* Staff Writer, BOSTON COLLEGE THIRD WORLD LAW JOURNAL (1999–2000). I dedicate this book review to the memories of Brandon Teena and Matthew Shepard; two men, too courageous for our time, whom we lost too soon. I extend a special thank you to Shereen D’Souza at the National Gay and Lesbian Task Force for her timely and enthusiastic research assistance.

447
and chorus lines [of drag queens] repeatedly belted out refrains of “We are the girls from Stonewall.”

The Stonewall riots occurred in the early morning hours of June 28, 1969. Many historians laud the riots as the event that transformed gay and lesbian social existence into the gay and lesbian civil rights movement. Indeed, every June, gay pride parades commemorate Stonewall in cities across the United States.

It is notable that the primary actors in the Stonewall Riots were transgendered. This fact testifies to an initial connection between transgenders and gays at the inception of the visible gay and lesbian civil rights movement. However, the discussion of this historic con-

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2 See id. at xvii, 190–92. The Stonewall Inn was a gay bar on Christopher Street in New York’s Greenwich Village. See id. at 181. New York police raided the Stonewall and arrested a sample of its patrons about once a month. See id. at 193. On the night of the riots, the patrons, drag queens and butch lesbians in particular, fought back against the police, locking the police in the bar for a time, damaging police cars, and pushing back lines of armed state troopers. See id. at 196–98, 200–01. A general state of unrest descended upon the area surrounding Christopher Street, and riots erupted during the five days following the raid. See id. at 205, 207–09. Out of the unrest came a self-realization of gay and lesbian mistreatment and solidarity, as well as the first organized attempts to create a gay political movement. See id. at xvii, 212.
3 See id. at xvii.
4 See id. at xviii. The first parade to commemorate Stonewall took place on June 28, 1970, and was named the “Christopher Street Liberation Day Parade.” See id. at xviii, 262, 271–72; URVASHIVAID, VIRTUAL EQUALITY 198 (1995).
5 See Elvia R. Arriola, Law and the Gendered Politics of Identity: Who Owns the Label “Lesbian”? 8 HASTINGS WOMEN’S L.J. 1, 27 (1997); see also DUBERMAN, supra note 1, at 203 (discussing the drag queen “girls” of Stonewall).
6 See generally Hasan Shafiqullah, Shape-Shifters, Masqueraders, & Subversives: An Argument for the Liberation of Transgendered Individuals, 8 HASTINGS WOMEN’S L.J. 195 (1997) (discussing the medical, scientific, legal, and theoretical definitions of transgenderism). I use “transgender” as an umbrella term to encompass cross-dressers, transvestites, androgyns, intersexuals, transsexuals, and those who combine elements of masculine and feminine gender roles. See id. at 197.
7 See generally Arriola, supra note 5 (discussing gender oppression as a fundamental connection between gay and transgendered individuals). I use “gays” as shorthand for gays/lesbians/bisexuals, but not for transgenders. See id. at 29 (urging the introduction and examination of resistance to the topic of transgenderism as a means to re-examine notions of respect for difference and diversity). I do this not to imply that transgenders are not included in the gay movement, but rather to facilitate my discussion of hate crimes against them as compared to hate crimes against gays. See id. In the hate crimes context, statistics on crimes based on gender transgression may be conflated with crimes based on sexual orientation. See Lisa Meyer, The Hidden Hate Epidemic, ADVOC., May 25, 1999, at 63. However, when transgender crimes are reported or understood as gay crimes, grave injustice results, both legally and personally, to individuals who are victimized because of their transgendered identity and to the transgender population as a whole. See id. at 63.
8 See DUBERMAN, supra note 1, at 196–97, 203; Arriola, supra note 5, at 26–27.
connection is noticeably absent from much of the discussion about, and between, the transgender and gay civil rights movements today.9

Editor Eric Brandt partially and perhaps unintentionally resurrects the historic connection between these groups in Dangerous Liaisons: Blacks, Gays, and the Struggle for Equality.10 In arguing that one of the most powerful connections between blacks and gays is that both groups suffer disproportionately from hate crimes,12 Brandt notes that gays are victims of violent attacks more often than any other group of individuals in the general population.13

In this analysis, however, Brandt fails to make any distinction between the rates of violence against gays and the rates of violence against transgendered individuals.14 This is a peculiar omission given that violence against transgendered individuals sparked the Stonewall Riots and, arguably at least, a visible gay and lesbian movement.15 Thus, in light of the shared history of violence between transgendered individuals and the gay and lesbian movement, Brandt’s analysis of the violence against gays is incomplete.16

In this Book Review, I propose to pick up where Brandt left off.17 Specifically, I explore violence against transgendered individuals and the important ways in which the expression of this violence belies animus that is both similar to and different from the animus that motivates hate crimes on the basis of sexual orientation. I hope to show that, although both transgenders and gays share a historic connection

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9 See generally Elvia R. Arriola, Faeries, Marimachas, Queens, and Lazzies: The Construction of Homosexuality Before the 1969 Stonewall Riots, 5 COLUM. J. GENDER & L. 33 (1995) (discussing the erasure of drag queens and other gender nonconformists in gay history). The gay movement struggles internally with whether or not to incorporate transgender issues into its agenda. See Mubarak Dahir, Whose Movement Is It?, ADVOC., May 25, 1999, at 50, 52; see also VAID, supra note 4, at 3, 59 (discussing the marginalization that transgenders felt early in the gay movement, and the recent efforts made to redefine the movement so as to include them).


11 See id. at 1, 4, 11 n.1. Brandt uses “gays” as shorthand for lesbian, gay, bisexual, and transgendered individuals.

12 See id. at 4.

13 See id.

14 See Brandt, supra note 10, at 1, 4, 11 n.1.

15 See DUBERMAN, supra note 1, at 194-203; see also supra notes 2-5 and accompanying text.

16 See Brandt, supra note 10, at 4; see also DUBERMAN, supra note 1, at 194-203.

17 See generally DANGEROUS LIAISONS, supra note 10.

to violence, the contemporary transgender experience with hate crimes is unique in crucial ways and necessitates an independent discussion as well as individualized protection.

The context for this discussion is the Hate Crimes Prevention Act of 1999 (HCPA).\(^1^9\) Thirty years after violence against transgendered individuals sparked the gay and lesbian movement, the HCPA sits in Congress.\(^2^0\) The HCPA would grant coverage, for the first time, on the basis of real or perceived sexual orientation and gender.\(^2^1\) My goal is to show that hate crimes against transgendered individuals should not be left to fall under the rubric of the sexual orientation provision but rather can and should fall under that of real or perceived gender.\(^2^2\) If the interpretation of this legal category included the transgender experience with violence, transgendered persons would receive two important benefits: the first signs of uniform protection, and the first federally legislated indication that violence against them is unacceptable.\(^2^3\)

Part I of this Book Review will provide the tools necessary for this discussion. I will explain the conflation of sex and gender, gender and sexual orientation, and transgenderism and sexual orientation.\(^2^4\) This discussion will demonstrate that transgenderism and sexual orientation are not only independent characteristics, but that each can and does occur without the other.\(^2^5\) In Part II, I will compare the accounts of two prominent hate crimes, the murders of Matthew Shepard and Brandon Teena, as a vehicle to explore the critical differences between hate crimes that occur because of an individual's sexual orientation and hate crimes that target transgendered individuals for transgressing gender norms.\(^2^6\) Finally, in Part III, I will discuss the historic exclusion of transgendered individuals from key hate crimes legislation, the language of the pending HCPA that can and should apply

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21 See S. 622 § 4; H.R. 1082 § 4.
22 See S. 622 § 4; H.R. 1082 § 4.
23 See infra notes 178–182.
24 See Francisco Valdes, Unpacking Hetero-Patriarchy: Tracing the Conflation of Sex, Gender and Sexual Orientation to Its Origins, 8 YALE J.L. & HUMAN. 161, 166–68 (1996); Cain, supra note 18, at 1323; Shafiqullah, supra note 6, at 196–98; see generally Julia A. Greenberg, Defining Male and Female: Intersectionality and the Collision Between Law and Biology, 41 ARIZ. L. REV. 265 (1999).
25 See generally Greenberg, supra note 24;
26 See Cain, supra note 18, at 1323; Shafiqullah, supra note 6, at 196–98; Francisco Valdes, supra note 24, at 166–68.; infra notes 129–52. See generally Greenberg, supra note 24.
to transgendered individuals, and the debate that surrounds this possible application. 27

I. BACKGROUND: THE PROBLEM IN CONTEXT

A. The Conflation of Sex and Gender

Sex generally refers to an individual’s anatomical/biological status 28 as a male or a female, while gender typically refers to an individual’s social role as masculine or feminine. 29 Implicit in these definitions is the assumption that sex determines gender, that there are only two biological sexes, and that there are therefore only two genders. 30 That is, an individual born biologically male will display masculine gender behaviors, while an individual born biologically female will display feminine gender behaviors. 31

The problem with these assumptions is that they are just that—assumptions. 32 According to Julie Greenberg, Professor of Law at Thomas Jefferson School of Law, “A binary sex paradigm does not reflect reality.” 33 While the categories male and female, masculine and feminine, occupy two binary poles, sex and gender range a spectrum. 34 In this view, sex does not determine gender; rather, gender is the per-

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27 See generally Andrew M. Gilbert & Eric D. Marchand, Note, Splitting the Atom or Splitting Hairs—The Hate Crimes Prevention Act of 1999, 30 St. Mary’s L.J. 931 (1999); infra notes 167–208.

28 See Greenberg, supra note 24, at 271 (noting that the biological aspect of one’s body that determines one’s sex is neither legally nor medically clear). Chromosomes and anatomy may be incongruent at birth, and sex is generally assigned by the birth attendant based on the external genitalia. See id. at 272. In cases where genitalia is ambiguous, sex may be assigned by surgery that creates the appearance of male or female anatomy. See id. In this Book Review, I will refer to sex as “anatomical sex,” since, regardless of other biological elements (i.e., chromosomes), anatomy is either the general indicator at birth, or it is surgically altered so as to be the general indicator during life. See id. at 271–73. For an excellent discussion of this issue—in particular, the ways that the medical and legal resolution of an individual’s incongruent genitalia and chromosomes suggest that sex may be more social construct than predetermined fact—see Greenberg, supra note 24, at 271–73. See also Shafiqullah, supra note 6, at 211–14.

29 See Cain, supra note 18, at 1332–33; Greenberg, supra note 24, at 271, 274; Shafiqullah, supra note 6, at 196; Valdes, supra note 24, at 164–66.

30 See Cain, supra note 18, at 1332–33; Greenberg, supra note 24, at 275; Shafiqullah, supra note 6, at 196; Valdes, supra note 24, at 164–66.

31 See Cain, supra note 18, at 1332–33; Greenberg, supra note 24, at 275; Shafiqullah, supra note 6, at 196; Valdes, supra note 24, at 164–66.

32 See Cain, supra note 18, at 1332–33; Greenberg, supra note 24, at 275; Shafiqullah, supra note 6, at 196; Valdes, supra note 24, at 164–66.

33 See Greenberg, supra note 24, at 275.

34 See id.
formance of one's sex. Millions of Americans display gender behaviors that do not comport with their sex. These individuals fall somewhere on Greenberg's spectrum between, rather than at, the two poles.

B. The Transgender: A Gender Conundrum

Perhaps the most cogent challenge to the assumption that sex determines gender comes from the transgender population. Transgenderism is the experience of incongruity between an individual's sex and gender. This experience can range from exhibiting gender behaviors that are outside the scope of what is socially permissible for one's sex, to being physically gender ambiguous, to having a gender orientation that aligns with that of the "opposite sex" coupled with a belief that one's sex is therefore incorrect. Because transgenderism is a spectrum of experiences, "transgender" is the umbrella term that encompasses cross-dressers, transvestites, androgynes, intersexuels, transsexuals, and those who simply mix and match elements of masculine and feminine gender roles.

55 See id. at 274–75; see also Valdes, supra note 24, at 164–66.
56 See Greenberg, supra note 24, at 275.
57 See id.
58 See generally id.
60 See id. at 237–44. An individual's gender orientation is the gender that the individual identifies as their gender, regardless of anatomy or biology. See id.
61 See id. at 238 (arguing that while males and females are different, "opposite sex" connotes a bipolar categorical that seems to ignore the variability between males and females and between men and women); see also supra text accompanying note 28.
62 See Greenberg, supra note 24, at 271, 275, 289–90.
63 See Coombs, supra note 39, at 239–40; Shafiqullah, supra note 6, at 196. Cross-dressers and transvestites are examples of individuals who exhibit gender behaviors that are outside the scope of their gender orientation. See Coombs, supra note 39, at 239–40; Shafiqullah, supra note 6, at 196. Cross-dressers are either men who dress in women's clothing or women who dress in men's clothing, without erotic overtones. See Coombs, supra note 39, at 239–40; Shafiqullah, supra note 6, at 196. In comparison, transvestites are generally heterosexual men who have an episodic desire to wear women's clothes and find women's clothing sexually arousing. See Coombs, supra note 39, at 239–40; Shafiqullah, supra note 6, at 196.
64 See Coombs, supra note 39, at 239–40, Shafiqullah, supra note 6, at 196. Androgynes and intersexuels are individuals who are physically gender ambiguous. See Shafiqullah, supra note 6, at 196. An Adam's apple is an example of an exterior physical trait that we commonly rely on as indicative of sex and gender. See id. Androgynes have gender ambiguous physiques, and therefore may not appear clearly male or female. See id. Genitalia is another example of physical characteristics that we rely on to discern, and, indeed, to assign male or female gender. See Coombs, supra note 39, at 239–40; Shafiqullah, supra note
C. The Conflation of Gender and Sexual Orientation

Not only is sex assumed to determine gender; it is used to presume sexual orientation.\(^4\) The presumption is that all individuals are heterosexual.\(^5\) That is, all individuals are attracted to, and only to, members of the opposite biological sex.\(^6\)

Part and parcel of this presumption is the assumption that gender indicates sexual orientation.\(^7\) The argument proceeds as follows: if sexual orientation is based on sex, and sex determines gender, then gender behavior and presentation indicate sexual orientation.\(^8\)

The most obvious problem with these assumptions again occurs in the context of the transgendered experience.\(^9\) Because the transgendered experience is by definition an experience of incongruity between biological sex and gender behavior, gender, in these cases, is not predictive of either sex or sexual orientation.\(^10\) Since gender is not predictive of sex or sexual orientation in the case of transgendered individuals, gender cannot be understood as an infallible indication of sex and sexual orientation.\(^11\)

II. Assumptions in (Re)Action: Hate Crimes Against Gays and Transgenders

However fallible these assumptions, the fact remains that gender is used as an indication of sex and, concomitantly, of sexual orientation.\(^12\) In particular, in the hate crimes context, individuals with incongruencies between their gender behavior and their biological sex

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6, at 196–97. Intersexed individuals, or intersexuals (traditionally known as hermaphrodites), have the sexual characteristics of both sexes. See Coombs, supra note 39, at 239–40; Shafiqullah, supra note 6, at 196–97.

Perhaps the most common examples of transgendered individuals are transsexuals. See Coombs, supra note 39, at 238. Transsexuals experience their gender as the opposite of their biological sex, and sometimes seek sex reassignment surgery in their effort align the two. See Coombs, supra note 39, at 238; Shafiqullah, supra note 6, at 196; see also Cain, supra note 18, at 1334.

Shafiqullah describes the use of the term "gender-fuck" to describe mixing and matching elements of gender roles. See Shafiqullah, supra note 6, at 197 n.15.

50 See Coombs, supra note 39, at 237–42; see generally Shafiqullah, supra note 6.
51 See Coombs, supra note 39, at 237–42; see generally Shafiqullah, supra note 6.
52 See Coombs, supra note 39, at 237–42; see generally Shafiqullah, supra note 6.
53 See Coombs, supra note 39, at 237–42; see generally Shafiqullah, supra note 6.
are frequently targets for attack. However, while the motivation for these attacks may be the victim's perceived sexual orientation, it may also be the victim's gender behaviors in and of themselves.

A. Hate Crimes Based on Sexual Orientation: The Murder of Matthew Shepard

Perceived sexual orientation was undoubtedly the impetus for events that transpired on October 6, 1998, in Laramie, Wyoming. That night, at the Fireside Bar, Aaron McKinney and Russell Henderson met, kidnapped, and killed the frail, 105-pound, five-foot, two-inch-tall Matthew Shepard.

According to McKinney's taped confession, McKinney and Henderson concocted their plan to kidnap Matthew while in the bar's bathroom. They decided that if they pretended that they were gay, they could lure Matthew, whom they evidently assumed was gay, into their truck and rob him.

Once outside the bar, however, their plan took a deadly turn. The two pistol-whipped Matthew and drove him out to a remote country road. They then lashed him to barbed-wire fence and took his shoes, ensuring that if he broke free, he could not walk back in the sub-freezing temperatures.

Before they left, they asked Matthew if he had seen the license plate of their truck. When Matthew read the numbers back, McKinney struck him with the pistol three more times, leaving him unconscious. Eighteen hours later, a passing cyclist found Matthew tied to the fence, unconscious but still alive. He never regained conscious-

57 See Paulson, supra note 56; Wypijewski, supra note 56, at 61, 63.
58 See Paulson, supra note 56.
59 See id.
60 See id.; Wypijewski, supra note 56, at 61–63.
61 See Meyer, supra note 7, at 61; Paulson, supra note 56; Wypijewski, supra note 56, at 61–63.
62 See Meyer, supra note 7, at 61; Wypijewski, supra note 56, at 61.
63 See Paulson, supra note 56.
64 See Meyer, supra note 7, at 63; Paulson, supra note 56.
65 See Gilbert & Marchand, supra note 27, at 932; Meyer, supra note 7, at 61.
ness. Six days later, on October 12, 1998, twenty-one-year-old Matthew Shepard died.

McKinney and Henderson targeted Matthew because he was gay. McKinney and his former girlfriend both testified that McKinney and Henderson specifically planned to pose as gay men in order to coax Matthew into their truck, implying that they suspected that he was gay. Additionally, by basing his defense to the crime on the admission of an uncontrollable reflex reaction to Matthew's sexual orientation, the so-called "gay-panic" defense, McKinney all but admitted that his motivation for hurting Matthew was Matthew's sexual orientation.

B. Hate Crimes Based on Transgenderism: The Murder of Brandon Teena

Similar to Matthew Shepard, Brandon Teena was the five-foot, four-inch, 105-pound, twenty-one-year-old victim of a brutal murder. Unlike Matthew, however, Brandon's killers did not target him because his gender expression led them to believe he was gay. Rather, Brandon's gender expression in and of itself made him the target of their brutal wrath.

Brandon Teena was transgendered. Although he was anatomically female, he referred to himself as a male, dressed in men's clothing, and dated women. According to David Bolkovac, who counseled

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66 See Meyer, supra note 7, at 61; Wypijewski, supra note 56, at 61–62.
67 See Meyer, supra note 7, at 62.
69 See Paulson, supra note 56; Harrington, supra note 68.
70 See Harrington, supra note 68.
71 Out of respect for Brandon's self-identity, I will refer to Brandon as Brandon Teena, not Teena Rae Brandon (Brandon's given name), and I will use male rather than female pronouns. See State v. Nissen, 560 N.W.2d 157, 165 (Neb. 1997); Worthington, supra note 55, at C1.
72 See Brandon v. Lotter, 976 F. Supp. 872, 873 (D. Neb. 1997), aff'd 157 F.3d 537 (8th Cir. 1998); see also Worthington, supra note 55.
73 See Lotter, 976 F. Supp. at 873–75; Nissen, 560 N.W.2d at 165–168.
74 See Lotter, 976 F. Supp. at 873–75; Nissen, 560 N.W.2d at 165–168.
75 I use the broad umbrella term "transgender" because I do not know what term Brandon used to identify himself, other than the fact that he rejected a lesbian identity. See Worthington, supra note 55 (statement by David Bolkovac, director of the Gay and Lesbian Resource Center at the University of Nebraska, who counseled Brandon in 1999, that "[Brandon] did not identify [himself] as a lesbian").
76 See Worthington, supra note 55; see also Lotter, 976 F. Supp. at 873.
Brandon at the University of Nebraska in 1992, “[Brandon] believed [he] was a man.” 77

Trouble began for Brandon when he moved to Falls City, Nebraska in October, 1993, leaving Lincoln, Nebraska, and a trail of forged checks behind. 78 Soon he began dating Lana Tisdel, through whom he met and became friends with John Lotter, Tisdel’s ex-boyfriend, and Lotter’s friend, Marvin (“Tom”) Nissen. 79

On December 15, Brandon was arrested for forging additional checks in Falls City. 80 After contacting the authorities in Lincoln, the Falls City Sheriff’s Department learned that Brandon Teena’s legal identity was the female Teena Brandon. 81 They locked him in the women’s section of the county jail and published his offenses in the women’s section of the town newspaper. 82 Fewer than 5,000 people populated Falls City. 83 Before long, those who knew Brandon knew that he was born female. 84

By the time Tisdel posted his bond, Brandon’s friendships with Lotter and Nissen were sour. 85 At a Christmas Eve party soon after Brandon’s release, Lotter teased and harassed Brandon, saying that he wanted to have sex with him. 86 Brandon made light of the harassment, insisting that Lotter “was going to have to get over it.” 87

Lotter and Nissen were not satisfied. 88 Later that same evening, still obsessed with Brandon’s gender, Lotter and Nissen forced Brandon into the bathroom. 89 In order “to determine what sex [he] was,” 90 they yanked his shirt up over his head and pulled his underpants down around his knees. 91 Nissen later stated that he felt assured that

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77 Worthington, supra note 55.
78 See id.; Lotter, 976 F. Supp. at 873.
79 See Worthington, supra note 55.
80 See id.
81 See id.
82 See id.
83 See id.
84 See Worthington, supra note 55.
85 See id.; see also State v. Nissen, 560 N.W.2d 157, 166 (Neb. 1997).
87 See id. at 874.
88 See id. at 875–76; see also Nissen, 560 N.W.2d at 165–68.
89 See Lotter, 976 F. Supp. at 874; Nissen, 560 N.W.2d at 166; see also Worthington, supra note 55.
90 See Nissen, 560 N.W.2d at 166.
91 See Lotter, 976 F. Supp. at 874; Nissen, 560 N.W.2d at 166; see also Worthington, supra note 55.
Brandon was female when he “pulled [Brandon’s] pants down and ‘felt the hair’ or ‘fur.’”

Lotter and Nissen were still not satisfied; after they had proved to themselves that Brandon was anatomically female, they forced Tisdel to look and to acknowledge Brandon’s anatomy. After Tisdel looked, Nissen knocked Brandon to the floor, kicked him in the ribs, and stepped on his back. Nissen later stated that he beat Brandon in the bathroom because of “Brandon’s lying about [his] gender.”

After the bathroom beating, Lotter and Nissen forced Brandon into Lotter’s car, drove him out to the parking lot of a deserted plant, and raped him. After the rapes, Nissen beat Brandon again, telling him that if he told anyone about the rapes, he and Lotter would “silence him permanently.”

Lotter and Nissen then took Brandon back to Nissen’s house. It was Christmas Day. While pretending to take a shower, Brandon escaped out the bathroom window and went to the police. He filed a report against Lotter and Nissen, and although police questioned the two men soon after, the police did not arrest them. On December 31, believing “a dead witness couldn’t testify,” Lotter and Nissen sought Brandon out at a friend’s house and killed him.

The facts and circumstances surrounding Brandon’s murder demonstrate that he was killed because he was transgendered. Lotter and Nissen punished Brandon because “[h]e was not male, as [he] had been representing [him]self,” a social crime of which dating women was a part; however, this fact was not emphasized in either the testimonies or the trials. Indeed, Lotter and Nissen stripped him, beat him, and raped him for the express purpose of proving to them-

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92 See Nissen, 560 N.W.2d at 166.
93 See id.; see also Worthington, supra note 55.
94 See Lotter, 976 F. Supp. at 874; Nissen, 560 N.W.2d at 166; Worthington, supra note 55.
95 See Nissen, 560 N.W.2d at 166.
96 See id. at 165; Brandon v. County of Richardson, 566 N.W.2d 776, 778 (Neb. 1997); Worthington, supra note 55; Lotter, 976 F. Supp. at 874.
97 See Brandon, 566 N.W.2d at 778; Lotter, 976 F. Supp. at 874.
98 Lotter, 976 F. Supp. at 874–75; Nissen, 560 N.W.2d at 165.
99 See Lotter, 976 F. Supp. at 874–75; Nissen, 560 N.W.2d at 165.
100 See Lotter, 976 F. Supp. at 874–75; Nissen, 560 N.W.2d at 165.
101 Brandon, 566 N.W.2d at 778–79; Lotter, 976 F. Supp. at 875; Nissen, 560 N.W.2d at 166.
102 Lotter, 976 F. Supp. at 875–76; Nissen, 560 N.W.2d at 167.
103 See Lotter, 976 F. Supp. at 873–74; Brandon, 566 N.W.2d at 776; Nissen, 560 N.W.2d at 157.
104 See Nissen, 560 N.W.2d at 165; Brandon, 566 N.W.2d at 776; Lotter, 976 F. Supp. 872.
selves, to Brandon’s girlfriend, and to Brandon himself that Brandon was a woman.105

C. The Institutional Reactions

It is in this environment of institutionalized intolerance that our senses are bombarded, almost daily, with incident after incident of violence and hate.

Judy Shepard106

Although Matthew’s and Brandon’s murders were similarly brutal, the response of the law enforcement authorities was strikingly, perhaps fatally, different.107 Within hours of Matthew’s attack, police in Wyoming apprehended Henderson for another crime, finding the truck, the gun, and Matthew’s shoes and credit card at the same time.108 Although officers held Henderson only briefly, within days they made the connection between Henderson, McKinney, the evidence acquired at Henderson’s prior arrest, and Matthew’s murder.109 The police then promptly arrested Henderson and McKinney.110

In contrast, the authorities in Brandon’s case seemed loath to act.111 During Brandon’s initial interview, the local sheriff, Charles Laux, focused more on Brandon’s gender expression than on the kidnapping and the rapes.112 Sheriff Laux referred to Brandon as “it,” discredited Brandon’s assertion that he was a virgin prior to the rapes, and insisted that he would need to know the answer to his question “why ‘do you make girls think you are a guy?’” before he could focus on the facts surrounding the rapes.113

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105 See Brandon, 566 N.W.2d at 776; Lotter, 976 F. Supp. at 872; Nissen, 560 N.W.2d at 157; Worthington, supra note 55.
107 See Lotter, 976 F. Supp. at 874–75; Nissen, 560 N.W.2d at 166; Wypijewski, supra note 56, at 61–63.
108 See Wypijewski, supra note 56, at 62.
109 See id.
110 See Paulson, supra note 56.
111 See Brandon v. County of Richardson, 566 N.W.2d 776, 778–79 (Neb. 1997); Lotter, 976 F. Supp. at 874–76; Nissen, 560 N.W.2d at 165–66.
112 See Lotter, 976 F. Supp. at 874–75.
After the interview, Brandon complained to his mother that Laux "just did not seem to give a damn about the rape[s]," and that "[he] did not want to go back to [Laux's] office because [he] thought [Laux] would continue to be mean and verbally abuse [him]" as in the first interview.\footnote{See Lotter, 976 F. Supp. at 875.}

Indeed, Laux's actions after the interview suggest that Brandon's intuition was correct.\footnote{See Brandon, 566 N.W.2d at 778–79; Lotter, 976 F. Supp. at 875; Nissen, 560 N.W.2d at 166.} When the deputy that Laux assigned to the investigation returned with physical evidence from the rape scene that corroborated Brandon's testimony, Laux refused to grant the deputy's request to arrest Lotter and Nissen.\footnote{Brandon, 566 N.W.2d at 779; Lotter, 976 F. Supp. at 875; Nissen, 560 N.W.2d at 165–66.} Instead, Laux delegated part of the investigation to the Falls City Police Department.\footnote{Brandon, 566 N.W.2d at 778.}

Once on the case, the Falls City police brought Lotter and Nissen to the station for voluntary questioning.\footnote{Brandon, 566 N.W.2d at 778; Lotter, 976 F. Supp. at 875; Nissen, 560 N.W.2d at 166.} In so doing, the police put Lotter and Nissen on notice that Brandon had sought the help of the authorities despite the threat of being "silenced."\footnote{See Lotter, 976 F. Supp. at 875; Nissen, 560 N.W.2d at 166.} Meanwhile, Laux continued to treat the danger that Lotter and Nissen posed to Brandon as a low priority, neglecting to obtain warrants for their arrests despite the sheriff's belief that he had sufficient information to apply for them.\footnote{Brandon, 566 N.W.2d at 778–79; Lotter, 976 F. Supp. at 875; Nissen, 560 N.W.2d at 165–66.}

The combination of the Falls City police investigation and Laux's delay was deadly.\footnote{See Brandon, 566 N.W.2d at 778–79.} Six days after the Falls City police alerted Lotter and Nissan of their status as suspects in Brandon's rape, Laux still had not obtained warrants for their arrest, and Lotter and Nissan hunted Brandon down and murdered him, just as they had threatened to do.\footnote{Brandon, 566 N.W.2d at 778–79; Lotter, 976 F. Supp. at 876; Nissen, 560 N.W.2d at 166.}

The unsympathetic and sluggish treatment of the police in Brandon's case, in stark contrast to the prompt response of the authorities after Matthew's murder, demonstrates the crucial role that Brandon's
transgenderism played in his death.\textsuperscript{123} Despite the brutality of the rape and the amount of physical evidence implicating Lotter and Nissen, Laux was more concerned with figuring Brandon out than with helping him out.\textsuperscript{124} Although attempts to hold Laux legally responsible for Brandon's death were unsuccessful, Laux's ignorance of and preoccupation with Brandon's transgenderism was hauntingly similar to the mindsets of Lotter and Nissen.\textsuperscript{125} The sluggish response of the Falls City police and of Laux in particular embodied a lack of institutional protection and sympathy, which ultimately played a critical role in Brandon's murder.\textsuperscript{126}

D. The Legislative Response

The actions that took the lives of Matthew Shepard and Brandon Teena were hate crimes.\textsuperscript{127} Matthew was kidnapped, beaten, hung, and stripped in freezing temperatures.\textsuperscript{128} Brandon was publicly humiliated, beaten, kidnapped, and raped.\textsuperscript{129} Both were murdered.\textsuperscript{130} Both crimes were overkill.\textsuperscript{131} Furthermore, these heinous crimes were more than attacks on Matthew and Brandon; they were assaults on the entire communities of which Matthew and Brandon were respectively a part.\textsuperscript{132}

However, despite these superficial similarities, these hate crimes differed from each other in crucial ways.\textsuperscript{133} First, and most fundamentally, they were different types of hate crimes.\textsuperscript{134} Matthew was a target because he was gay; Brandon was a target because he was transgen-

\textsuperscript{123} See Wypijewski, supra note 56, at 61–62; cf. Brandon, 566 N.W.2d at 778–79; Lotter, 976 F. Supp. at 874–76; Nissen, 560 N.W.2d at 165–66.
\textsuperscript{124} See Lotter, 976 F. Supp. at 874–75.
\textsuperscript{125} See Brandon, 566 N.W.2d at 778–79; Lotter, 976 F. Supp. at 874–76; Nissen, 560 N.W.2d at 165–66.
\textsuperscript{126} See Brandon, 566 N.W.2d at 778–79; Lotter, 976 F. Supp. at 876; Nissen, 560 N.W.2d at 166.
\textsuperscript{127} See Gilbert & Marchand, supra note 27, at 950 (defining hate crimes as crimes intended to send a message that members of certain groups are unwelcome).
\textsuperscript{128} See Meyer, supra note 7, at 61; Wypijewski, supra note 56, at 61–62.
\textsuperscript{129} See generally Lotter, 976 F. Supp. at 873–74.
\textsuperscript{130} See id. at 876; Wypijewski, supra note 56, at 61.
\textsuperscript{131} See Gilbert & Marchand, supra note 27, at 965 n.163 (stating that crimes against gays are often motivated by extreme hatred and result in gruesome, gratuitous mutilation); see also Lotter, 976 F. Supp. at 876 (two others were shot with Brandon, but Brandon was also stabbed).
\textsuperscript{132} See Gilbert & Marchand, supra note 27, at 950.
\textsuperscript{133} See infra notes 136–145.
\textsuperscript{134} See Lotter, 976 F. Supp. at 873–75; State v. Nissen, 560 N.W.2d 157. 165–168 (Neb. 1997); see also Meyer, supra note 7, at 61; Paulson, supra note 56.
Second, they received different institutional responses. Authorities responded to Matthew’s attack with timeliness and efficiency; authorities responded to Brandon’s attack with ignorance and inaction.

Perhaps the most important difference between the murders of Matthew and Brandon is that Brandon’s attack went largely unnoticed, while Matthew’s attack sparked a nationwide outcry for more expansive federal hate crime legislation. Although federal hate crime legislation has historically excluded crimes based on either sexual orientation or transgenderism, the currently proposed legislation, the Hate Crimes Prevention Act of 1999, explicitly includes hate crimes based on sexual orientation. It does not expressly include hate crimes against transgendered individuals. Although some lawmakers argue that the inclusion of sexual orientation would cover crimes against transgendered individuals, this assumption is dangerous given the different natures of and institutional reactions to these two types of crimes. Because of these critical differences, and despite the historic exclusion of transgender hate crimes from federal hate crimes legislation, these hate crimes can and should be covered independently of the sexual orientation provisions in the Hate Crimes Prevention Act of 1999.

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135 See Lotter, 976 F. Supp. at 874; Nissen, 560 N.W.2d at 165; see also Paulson, supra note 56.
136 See supra notes 107–50.
137 See id.
138 I would be remiss in suggesting that Brandon’s murder went completely unnoticed. Both a documentary and a feature length movie were made in an attempt to remember his life, his courage, and his lesson. See The Brandon Teena Story (Zeitgeist Films 1998); Boys Don’t Cry (Fox Searchlight 1999).
139 See Meyer, supra note 7, at 61–62 (stating that “the recent wave of attention to hate crimes has not included the transgendered”).
140 See Gilbert & Marchand, supra note 27, at 953–59 (providing a general overview of the historical development of categories of protected individuals in federal legislation addressing hate crimes).
142 S. 622 § 4; H.R. 1082 § 4.
143 See Dahir, supra note 9, at 50, 56; see also Meyer, supra note 7, at 62–63.
144 See S. 622, 106th Cong. § 4 (1999); H.R. 1082, 106th Cong. § 4 (1999); infra notes 147–60; supra notes 71–126.
III. MISSING IN ACTION: HATE CRIMES LEGISLATION AND A HISTORY
OF EXCLUSION

A. The Exclusion of Transgenders from Current Federal Hate Crimes
Legislation

Congress enacted the first federal hate crimes legislation, Section
245 of Title 18 of the United States Code (Section 245), as part of the
Civil Rights Act of 1968.145 A defendant charged with a crime under
Section 245 is charged with a hate crime as well as an underlying of­
fense such as assault or battery.146

Congress enacted Section 245 in response to the social turmoil
surrounding the desegregation of blacks from whites during the
1960s.147 As a result, Section 245's prohibition extends only to inter­
ference by force or threat of force with any person "because of his
race, color, religion or national origin."148 Enacted the year before the
transgendered "girls of Stonewall" marked the birth of a visible gay
movement,149 Section 245 does not include, explicitly or otherwise,
hate crimes against transgendered individuals.150

Since the 1968 enactment of Section 245, Congress has acknowl­
dged that hate crimes occur on bases other than race, color, religion,
and national origin.151 In 1990, Congress passed the Hate Crime Sta­
tistics Act (Statistics Act).152 The Statistics Act requires the Attorney
General of the United States to collect data on crimes based not only
on race, religion, and ethnicity, but also on disability and sexual ori­
entation.153 The purpose of the Act is to enable Congress to deter­
mine the frequency of hate violence in the United States and to assess
the effectiveness of existing hate crimes legislation.154

146 See Gilbert & Marchand, supra note 27, at 952.
(Supp. 1968) (detailing Congress' findings and purposes in enacting the Civil Rights Act of
1968).
148 See 18 U.S.C. § 245(b) (2).
149 See generally DUBERMAN, supra note 1.
150 See id.; see generally 18 U.S.C. § 245(b) (2).
151 See Gilbert & Marchand, supra note 27, at 955-59.
U.S.C. § 534 note (Supp. 1998)).
153 See id.; see also Gilbert & Marchand, supra note 27, at 955, 957.
154 See Gilbert & Marchand, supra note 27, at 955.
Although the Statistics Act serves as the first federally legislated acknowledgment that crimes on the basis of sexual orientation are hate crimes, it suffers from three major limitations. First, it provides only for the collection of data on hate crimes against certain groups, and not for the prosecution of those crimes. Second, this data collection is limited by the fact that the Attorney General does not require local law enforcement agencies to report hate crimes. Third, like Section 245, the Statistics Act does not include hate crimes against transgendered individuals.

B. The Possibility of Inclusion of Transgenders in the HCPA of 1999

Recently, lawmakers demonstrated an interest in assimilating the categories included in the Statistics Act into the protected categories of Section 245 by introducing a more inclusive hate crime bills in both houses of Congress. This legislation, known as the Hate Crimes Prevention Act of 1999 (HCPA), mirrors two bills that were introduced in both houses of Congress in 1998; however, the earlier bills lapsed because of the impeachment proceedings during that Congressional term.

A crucial element of the HCPA is that it would amend Section 245 to include hate crimes motivated by the "actual or perceived gender" of the victim. While possible, it is unclear whether or not "actual or perceived" gender will include transgendered individuals. In her testimony before the House Judiciary Committee, Riki Anne Wilchins, who serves as the executive director of The Gender Public Advocacy Coalition, indicated that the provision could include transgendered individuals. In detailing the provision’s potential application and importance to the transgendered community, Wilchins character-

155 See id. at 955-57.
156 See id.
157 See id. at 956; National Gay and Lesbian Task Force, Hate Crimes Prevention Act Passes Senate!: Fate Rests With House-Senate Conference Committee (July 23, 1999) (unpublished manuscript, on file with the National Gay and Lesbian Task Force) [hereinafter HCPA Passes Senate].
161 See S. 622 § 4; H.R. 1082 § 4.
162 See Meyer, supra note 7, at 63.
163 See Wilchins Testimony, supra note 113.
ized Brandon Teena’s murder as “an incident motivated by bias against Brandon’s perceived gender (i.e., the murderers perceived Brandon as a woman transgressing norms of gender expression[.].)” Additionally, other progressive organizations, such as the National Gay and Lesbian Task Force (NGLTF), support the idea that the HCPA’s gender provision should be understood to include transgendered individuals.

However, testimony in the House and the Senate does not clearly indicate transgender inclusion. This is due to the absence of floor debates about the bill, coupled with a lack of direct discussion about the extent of the gender provision’s coverage by the bill’s sponsors when they introduced it in Congress. For example, when he first introduced the bill to the Senate, Senator Edward Kennedy, one of the bill’s principle sponsors, mentioned that NGLTF supported the bill, but he did not detail NGLTF’s interpretation of the bill’s gender provision. Furthermore, Senator Kennedy attempted to bolster support for the bill by recounting recent hate crimes, but none of the crimes he listed involved a transgendered individual. Similarly, Senator Patrick Leahy, another principle sponsor of the bill, also recounted non-transgender hate crimes in his supporting statements.

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164 See id.
165 See Dahir, supra note 9, at 56.
166 See infra note 173 and accompanying text.
167 See HCPA Passes Senate, supra note 157. The HCPA was passed by the Senate on July 22, 1999, as an amendment to the Commerce-State-Justice (C-S-J) Appropriations Bill. See id. Since the House of Representatives did not include the HCPA in its version of the C-S-J Appropriations Bill, it was left to the House-Senate Conference committee to keep the HCPA language in the final version of the C-S-J appropriations bill. See id. However, the actual or perceived sexual orientation, gender, and disability provisions did not make it out of committee and onto the final appropriations bill. See Alan Fram, Lawmakers Drop Hate-Crimes Bill, Associated Press, Oct. 18, 1999, available in WL 28129594. Furthermore, President Clinton is expected to veto the bill, and it is uncertain whether an effort will be made to reintroduce the provisions during this congressional term. See id.
168 See infra notes 171–74.
170 See id.
Even more ominous than Senators Kennedy's and Leahy's failures to mention transgenders was Senator Ron Wyden's implied limitation of the gender provision to women, suggesting that coverage would not extend to transgenders.\textsuperscript{172} In his statement as a principle sponsor of the bill, Senator Wyden stated, "This bill [will] finally extend federal hate crime laws to cover attacks against women."\textsuperscript{173}

Because these statements by key sponsors of the HCPA do not clearly suggest that the legislative intent of the bill includes protection for transgenders, most "transgender activists fear that without explicit mention [transgendered individuals] will not be covered by the legislation. . . ."\textsuperscript{174} Although this fear has yet to be realized, it presents a difficult political conundrum for the bill's lobbyists who believe that if they advocate for the explicit inclusion of transgendered individuals, the bill will never pass.\textsuperscript{175}

C. Why Inclusion of Transgenders is Important

\textit{Our bodies are the battle grounds where a war to regulate and control gender expression is increasingly being fought.}

Riki Anne Wilchins\textsuperscript{176}

Although it is uncertain whether or not the provisions of the HCPA will explicitly or implicitly extend to transgendered individuals, it is strikingly clear that they should.\textsuperscript{177} The Gender Political Action Committee reports that, on average, one transgendered person is murdered every month.\textsuperscript{178} Indeed, five years after Brandon's murder, in 1998, the number of reported crimes against transgendered individuals increased by forty-nine percent over the previous year.\textsuperscript{179}

\textsuperscript{172} See 145 CONG. REC. S2,730–01, S2,732 (1999) (statement of Senator Ron Wyden) [hereinafter Wyden].
\textsuperscript{173} See id.
\textsuperscript{174} See Meyer, supra note 7, at 62.
\textsuperscript{175} See id.
\textsuperscript{176} See Riki Anne Wilchins, Brandon Teena Vigil (last modified July 28, 1999) <http://www.ftm-intl.org/Hist/Bran/stmnt.riki.html>.
\textsuperscript{177} See Meyer, supra note 7, at 63.
\textsuperscript{178} See Riki Anne Wilchins, Editorial from GenderPAC’s Executive Director (visited May 17, 2000) <http://www gpac.org/ptf/htm/itf144.html> [hereinafter Wilchins Editorial].
\textsuperscript{179} See Meyer, supra note 7, at 62 (quoting statistics from the National Coalition of Anti-Violence Programs).
However, this high percentage of hate crimes does not include unreported violence.\footnote{See id.} Hate crimes against transgendered individuals may go unreported for a variety of reasons, ranging from an assumption by authorities that an anatomical male wearing a dress is gay,\footnote{See id. at 63. Although authorities may assume that a transgendered individual is gay, it does not necessarily follow that the perpetrator of the crime was motivated by a similar belief and that the victim would then be protected under sexual orientation provisions. See Wilchins Testimony, supra note 113. In fact, the problem in such a scenario is that the crime is ignorantly classified and prosecuted as a crime based on sexual orientation, when in fact it was motivated by the victim’s transgenderism. See Meyer, supra note 7, at 62–63. If the HCPA were interpreted to cover crimes based on a victim’s transgenderism, it could help prevent the miscategorizations of these crimes because it would allow for funding to train local law enforcement officers in investigating and prosecuting these crimes. See HCPA Passes Senate, supra note 157.} to a lack of trust on the part of transgendered individuals that authorities who have belittled them will protect them in a crisis, as in Brandon’s case.\footnote{See Brandon v. Lotter, 976 F. Supp. 872, 875 (D. Neb. 1997), aff’d 157 F.3d 537 (8th Cir. 1998) (reciting Brandon’s refusal to cooperate with local authorities after an abusive initial interview with them); Meyer, supra note 7, at 63.} According to Kerry Lobel, executive director of the National Gay and Lesbian Task Force, “GLBT people often do not report hate crimes. . . because of the fear of discrimination by police; lack of interest or diligence on the part of the police; and lack of training in many police departments in working with members of the GLBT community.”\footnote{See Meyer, supra note 7, at 62.}

Furthermore, Lobel notes that while some of the more egregious hate crimes against transgendered individuals that are reported gain public attention, “countless others are ignored.”\footnote{See id. at 62–63.} Carrie Davis, a counselor at the Gender Identity Project at the Lesbian and Gay Community Services Center in New York City, suggests one reason for this lack of media attention—some transgendered people who have trouble finding employment turn to prostitution, and many media are uncomfortable or unwilling to report on the harassment or murder of a prostitute.\footnote{See Meyer, supra note 7, at 62.} However, these hate crime statistics continue to rise, and only the District of Columbia and four states, California, Minnesota, Missouri, and New Hampshire, currently interpret their hate crimes provisions to include transgendered individuals.\footnote{See National Gay and Lesbian Task Force Legislative Update, Hate Crimes Laws in the United States (Apr. 2000) <http://www.ngltf.org/downloads/hatemap0400.pdf>. The California and Minnesota laws expressly include gender identity, while the Missouri law
Interpreting "actual or perceived gender" to include transgendered individuals could be the first step in reversing the virtual death sentences imposed by society on this historically abused and ignored community.\(^{187}\) For example, the gender-obsessed murderers of Brandon Teena make clear that not all transgender hate crimes fall into the category of crimes motivated by a perceived sexual orientation.\(^{188}\) For this reason, reliance on the proposed provisions that would cover crimes based on sexual orientation to cover crimes against transgendered individuals is narrow-sighted and inadequate.\(^{189}\)

Furthermore, supporters of the HCPA promote its importance as a "federal backstop to ensure adequate punishment if local authorities are unable or unwilling to prosecute."\(^{190}\) The deadly delay of the local authorities responsible for protecting Brandon Teena in Nebraska and the fear of similar treatment that dissuades many transgendered victims from seeking institutional protection at all, demonstrates the importance of the role the HCPA could play in ensuring an adequate response to transgender hate crimes.\(^{191}\)

In addition to compensating for inadequate local investigations, the HCPA would also provide a means for correcting the limitations of local authorities.\(^{192}\) For example, the HCPA would make grants available to train local law enforcement officers in investigating, prosecuting, and preventing hate crimes.\(^{193}\) Sensitivity training for transgender hate crimes would not only address the ignorance and


\(^{187}\) See S. 622, 106th Cong. § 4 (1999); H.R. 1082, 106th Cong. § 4 (1999); Meyer, supra note 7, at 62 (stating reported attacks against transgendered individuals increased by 49% in 1998).

\(^{188}\) See supra notes Part II.B.

\(^{189}\) See Dahir, supra note 9, at 56; Meyer, supra note 7, at 62–63; supra notes Part II.B.

\(^{190}\) Henderson, supra note 106; see also Holder, supra note 172; Kennedy, supra note 169; Lawrence, supra note 171; Leahy, supra note 171; Wyden, supra note 172; HCPA Passes Senate, supra note 157 (stating that "between 1996 and 1997 there was an 83% increase in violence occurring in precincts and jails [by police officers in those precincts] and 21% increase in the number of victims who refused to report violence to the police").

\(^{191}\) See generally Brandon v. County of Richardson, 566 N.W.2d 776 (Neb. 1997); Meyer, supra note 7, at 63; see also HCPA Passes Senate, supra note 157.

\(^{192}\) See HCPA Passes Senate, supra note 157.

\(^{193}\) See id.
bigotry that abuses, discourages, and kills individuals like Brandon Teena, but it would aid local authorities in discerning between transgender hate crimes and crimes based on sexual orientation, thus leading to a more accurate perception of the prevalence of transgender hate crimes.194

In response to these benefits of the HCPA, opponents of the legislation argue that state laws are adequate to address the hate crimes problem and that federal legislation on the subject would create special rights for certain groups.195 However, the purpose of the HCPA is not to replace arguably adequate state laws, but only to serve as a federal back-up when and if local authorities do not serve and protect as state law requires them to do.196 It does not follow from the fact that the HCPA would play a supplemental role—assuming state laws are consistently and adequately enforced—that it should, therefore, not exist.197 Proponents for the HCPA support the principle that in matters of life and death, as hate crimes often are for transgendered individuals, guarantees are better than faith; it is better to be safe than sorry.198

Perhaps the most important aspect of including transgendered individuals within the protections of the HCPA's "actual or perceived gender" provision is they would be included in the HCPA's powerful message that "hate and bigotry will not be tolerated in America."199 "[T]here is symbolic value in Congressional condemnation of...hate crimes" urges Wade Henderson, executive director of the Leadership Conference on Civil Rights, and "federal law should reflect the federal interest in protecting all minorities from bigotry and hate-motivated violence."200 Indeed, according to Senator Kennedy, in a society that views diversity as a source of strength and adaptability, "it's an embarrassment that [Congress has not] already acted to close [the] glaring gaps in present law."201

194 See id.; see also Meyer, supra note 7, at 63.
196 See HCPA Passes Senate, supra note 157; see also Henderson, supra note 106.
197 See HCPA Passes Senate, supra note 157; see also Henderson, supra note 106; Kennedy, supra note 169; Lawrence, supra note 171; Leahy, supra note 171.
198 See HCPA Passes Senate, supra note 157; see also Henderson, supra note 106; Kennedy, supra note 169; Lawrence, supra note 171; Leahy, supra note 171.
199 See S. 622, 106th Cong. § 4 (1999); H.R. 1082, 106th Cong. § 4 (1999); Henderson, supra note 108; Wyden, supra note 172.
200 Henderson, supra note 106.
201 See Kennedy, supra note 169; Wilchins Testimony, supra note 113.
“Festering” in these gaps is both the bigotry of transgender hate crime perpetrators and the ignorance and lack of sympathy of the very institutions responsible for protecting these invisible, innocent victims.202 “[T]here also is a toll we are paying each year in other hate crimes that find less notoriety, but with no less suffering for the victims and their families,” Senator Leahy explains.203 Thus, the ante is high: with federally legislated awareness, sensitivity training, and protection stacked against a rising body count, transgendered people must rely on their Congressional representatives to declare that the phrase “actual or perceived gender” includes them.204

**CONCLUSION**

Eric Brandt’s book, *Dangerous Liaisons: Blacks, Gays, and the Struggle for Equality*, is comprised of cutting-edge essays by some of the most notable participants in the debate about the past, present, and future of civil rights movements.205 In such a progressive forum, it is surprising that Brandt’s discussion of hate crimes against gays fails to distinguish between violence against gays and violence against transgenders.206 Brandt’s conflation of violence against transgendered individuals with violence based on sexual orientation exemplifies both the inadequate response to and the interminable invisibility of hate crimes against transgenders.207

The statistics are staggering: at least one transgendered person is murdered every month because of their gender expression.208 In November, 1998, thirty years after the transgendered girls of Stonewall sparked a visible gay and lesbian movement, five years after Brandon Teena was murdered for being transgendered in Nebraska, and merely one month after Matthew Shepard’s murder in Wyoming incited a national debate over the question of whether or not to include sexual orientation in federal hate crime legislation, thirty-four-year-old transgendered Rita Hester was stabbed twenty times in the chest.

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202 See Brandon v. Lotter, 976 F. Supp. 872, 873 (D. Neb. 1997), aff’d 157 F.3d 537 (8th Cir. 1998); see also Kennedy, supra note 169; Meyer, supra note 7, at 63.
203 Leahy, supra note 171.
204 See S. 622 § 4; H.R. 1082 § 4; Meyer, supra note 7, at 63.
205 See generally DANGEROUS LIAISONS, supra note 10.
206 See Brandt, supra note 10, at 3–4.
207 See id.
208 See Wilchins Editorial, supra note 179.
in Massachusetts.209 In December, a thirty-six-year-old preoperative transsexual, Vianna Faye Williams, was stabbed nine times in her back, neck, and chest in New Jersey.210 In January, 1999, an eighteen-year-old cross-dresser who went by the name Lauryn Paige was found stabbed, with his throat cut, in a patch of woods in Austin, Texas.211 In February, an unknown man wearing women’s clothing was shot several times in a motel parking lot in Houston, Texas.212 In March, thirty-three-year-old transgendered Tracy Thompson was beaten on a country road in Georgia.213 All died.214

These are merely the reported crimes.215 Countless hate crimes against transgendered individuals go unreported, either because they are mischaracterized by law enforcement authorities or because the victims themselves fail to report them out of a fear of additional victimization by bigoted police officers.216

The historical ignorance, fear, and brutality surrounding transgendered individuals is real and pervasive, but it is not necessarily enduring. The recent proposal in Congress of the Hate Crimes Prevention Act of 1999 includes protection for crimes based on "actual or perceived" sexual orientation and gender.217 On the thirtieth anniversary of Stonewall218—the first united response to violence against transgendered individuals, which sparked a visible gay movement—it is ironic that the HCPA explicitly includes hate crimes based on sexual orientation but does not expressly cover hate crimes against transgendered individuals.219 Indeed, this scenario is not only ironic, but unfortunate, since, although some crimes against transgendered individuals are motivated by perceived sexual orientation, many are motivated by gender expression in and of itself.220 All transgender hate crimes could receive federally legislated visibility and protection under the HCPA’s provisions for “actual or perceived gender”—and they should.

209 See Brandon v. Lotter, 976 F. Supp. 872, 873 (D. Neb. 1997), aff’d 157 F.3d 537 (8th Cir. 1998); Meyer, supra note 7, at 61–62; see generally Duberman, supra note 1.
210 See id.
211 See id.
212 See id.
213 See id. at 61.
214 See Meyer, supra note 7, at 61.
215 See id. at 62.
216 See id. at 62–63.
218 See generally Duberman, supra note 1.
219 See S. 622 § 4; H.R. 1082 § 4.
220 See Meyer, supra note 7, at 62–63.
The purposes of the HCPA are uniquely compatible with the needs of the transgendered community. First, Congressional sponsors intend the legislation to serve only as a federal back-up for inadequate local investigations, which often result when law enforcement authorities either become preoccupied with understanding or mischaracterize the identities of transgender hate crime victims. Second, the legislation allows for monetary grants to train local law enforcement officers in investigating, prosecuting, and, ultimately, preventing hate crimes. Third, federally legislated acknowledgment and protection of the transgendered individual’s basic right to life and dignity would send a powerful message of acceptance and could serve as a deterrent to future crimes against them.

It is unclear whether Congress intends “actual or perceived gender” to include transgendered individuals or whether the HCPA will even become law during this Congressional term. However, thirty years after Stonewall, with the body count rising monthly, perhaps one transgender political organization has named itself best: “It’s Time America.”

221 See Wilchins Testimony, supra note 113.
222 See Henderson, supra note 106; HCPA Passes Senate, supra note 157.
223 See HCPA Passes Senate, supra note 157.
224 See Henderson, supra note 106; see also Kennedy, supra note 169; Lawrence, supra note 171; Leahy, supra note 171; Wyden, supra note 172.
225 See supra text accompanying note 167.
226 See It’s Time America, (visited May 17, 2000) <http://www.tgender.net/> (first nationally organized grassroots civil rights group seeking to secure and protect rights for transgendered individuals); see generally Duberman, supra note 1.