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# VERBAL HATE CRIMES IN THE WORKPLACE: THE EFFECT OF MENTAL AND EMOTIONAL INJURY OF THE LGBT COMMUNITY ON THE COMMERCE CLAUSE

*Elizabeth Olsen\**

*Mental and emotional abuse, particularly of the LGBT community in the workplace, is not a new phenomenon; however, it is one that is detrimental to both workers and companies, and is becoming increasingly prevalent as more workers are openly identifying as members of the LGBT community. The Hate Crimes Prevention Act should be amended to prevent verbal violence against protected characteristics in the workplace specifically, as workplace verbal abuse has as a significant an impact on companies and businesses, and, in turn, interstate commerce and the Commerce Clause.*

## INTRODUCTION

Hate crimes are not random.<sup>1</sup> By their very nature, they are a targeted attack upon a person's identity; the utmost identity that stems from an immutable characteristic<sup>2</sup> which leaves a person

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<sup>1</sup> Scott D. McCoy, *The Homosexual-Advance Defense and Hate Crime Statutes: Their Interaction and Conflict*, 22 CARDOZO L. REV. 629, 652 (2001).

<sup>2</sup> *Id.* An "immutable characteristic" is a characteristic "which its possessors are powerless to escape or set aside." *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 360 (1978).

feeling vulnerable.<sup>3</sup> Hate crimes<sup>4</sup> are defined as “crimes in which victims are selected as a result of their status as members of a particular minority group.”<sup>5</sup> During a hate crime, an aggressor, motivated by animus,<sup>6</sup> selects their target based upon actual or perceived immutable characteristics.<sup>7</sup> The Hate Crimes Prevention Act (“HCPA”) criminalizes behavior that causes “bodily injury” to a person based upon their “actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability.”<sup>8</sup> The term “bodily injury” refers to any *physical* injury to an individual, “but does not include solely emotional or physical harm to the person.”<sup>9</sup> This Note will argue that hate crimes are not purely acts of physical violence, but instead also include verbal violence that injures a person mentally and emotionally. This mental and emotional injury should also be protected under the HCPA by expanding the definition of what constitutes a hate crime. Moreover, the HCPA should be amended to prevent verbal violence against protected characteristics in the workplace specifically, as workplace verbal abuse has a significant impact on companies and businesses, and, in turn, interstate commerce and the Commerce Clause.<sup>10</sup>

This Note will focus on offenses involving “actual or perceived” gender, sexual orientation, and gender identity and will principally address Lesbian, Gay, Bisexual, and Transgender (“LGBT”) harassment, discrimination, verbal abuse, and mental and emotional violence in the workplace and its effect on the Commerce Clause. This Note focuses specifically on the United States statute governing hate crime acts, the HCPA, 18 U.S.C. § 249(a)(2)(B),

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<sup>3</sup> McCoy, *supra* note 1.

<sup>4</sup> This Note uses the terms “hate crime” and “bias crime” interchangeably.

<sup>5</sup> Craig L. Uhrich, Comment, *Hate Crime Legislation: A Policy Analysis*, 36 HOUS. L. REV. 1467, 1469 (1999).

<sup>6</sup> McCoy, *supra* note 1, at 643–44. In *Romer*, the animus at play was “moral disapproval of homosexual conduct.” *Romer v. Evans*, 517 U.S. 620, 644 (1996).

<sup>7</sup> McCoy, *supra* note 1, at 643–44.

<sup>8</sup> 18 U.S.C. § 249(a)(2)(A) (2009).

<sup>9</sup> § 249(c)(1).

<sup>10</sup> See *infra* Parts II, III, and IV.

which was enacted in furtherance of Commerce Clause ideals.<sup>11</sup> While it could be argued that protection against verbal violence in the workplace should extend to other historically persecuted groups such as racial, ethnic, and religious minorities and the disabled, this Note will focus on the LGBT community, specifically sexual orientation and gender identity. Other remedies, such as Title VII of the Civil Rights Act of 1964, protect and provide remedies to other protected classes, yet are insufficient in that they do not extend to the LGBT community.<sup>12</sup> Furthermore, this Note will argue that the HCPA should be amended to include protection against verbal hate crimes in the workplace in addition to physical violence and “bodily injury.”<sup>13</sup> Part I of this Note will explore the history of hate crimes and the enactment of the HCPA, as well as examine how the HCPA and the Commerce Clause interact. Part II will focus on mental and emotional injury, and the impacts of verbal abuse on individuals and the benefits of LGBT-supportive policies in the workplace. Part III will discuss the physical, mental, and emotional hate crimes targeted specifically toward the LGBT community inside and outside of the workforce. Part IV will focus on the proposed amendment of the HCPA to include protection against verbal hate crimes directed toward the LGBT community in the workplace. Part V will combat potential First Amendment arguments toward the “chilling” of free speech. Part VI discusses why other potential remedies or claims are insufficient to combat the workplace verbal abuse-Commerce Clause dilemma. Finally, Part VII will address inadequacies of other potential claims and remedies and reinforce why the HCPA should be amended to include workplace protection against verbal hate crimes directed toward the LGBT community in the workplace.

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<sup>11</sup> Sarah L. Harrington, *Validity, Construction, and Application of Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act*, Pub. L. No. 111-84, Div. E., 123 Stat 2835, 77 A.L.R. FED. 2d 103, § 5 (2013).

<sup>12</sup> See generally Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C., and 42 U.S.C.).

<sup>13</sup> See 18 U.S.C. § 249(a)(2)(A) (2009).

I. HISTORY OF HATE CRIMES: THE ENACTMENT OF THE HCPA  
AND THE COMMERCE CLAUSE AND HOW THE TWO INTERACT

Modern American hate-crime-prevention legislation can be traced back to and validated by the Civil War Amendments.<sup>14</sup> In 1865, the Thirteenth Amendment was passed with the goal of “justify[ing] Congress’ power to prohibit hate crimes against persons because of their race, color, religion, or national origin.”<sup>15</sup> Accordingly, the Thirteenth Amendment does not discuss or consider sex, sexual orientation, gender, or gender identity.<sup>16</sup> The Anti-Defamation League<sup>17</sup> created one of the first pieces of “model hate crimes legislation” in the United States in 1981, and states soon followed with similar versions of state hate crime statutes.<sup>18</sup> Though there is much variation locally around the United States in terms of what types of behavior are criminalized and which groups and characteristics are protected, there are generally three varieties of hate crime statutes adopted by the states.<sup>19</sup> The three typical variations of local hate crime statutes are as follows:

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<sup>14</sup> Harrington, *supra* note 11, at § 2.

<sup>15</sup> *Id.* at § 2.

<sup>16</sup> See U.S. CONST. amend. XIII.

<sup>17</sup> The Anti-Defamation League was founded in 1913:

on Jewish values that inform [their] work, how [they] operate and the changes [they] seek in the world. It has always meant stopping anti-Semitism and defending Jewish people. Today, it also means fighting threats to [their] very democracy, including cyberhate, bullying, bias in schools and in the criminal justice system, terrorism, hate crimes, coercion of religious minorities, and contempt for anyone who is different.

Today, the Anti-Defamation League has expanded from fighting “anti-Semitism and defending Jewish people” to “Combat[ting] Hate [and] Protect[ing] Communities”; “Confront[ing] Discrimination and Secur[ing] Justice”; “Stand[ing] Up for Israel”; and “Promot[ing] Respectful Schools and Communities.”

*What We Do*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/what-we-do> (last visited Mar. 29, 2019).

<sup>18</sup> ANTI-DEFAMATION LEAGUE, HATE CRIME LAWS 2, <https://www.adl.org/sites/default/files/documents/assets/pdf/combating-hate/Hate-Crimes-Law.pdf>.

<sup>19</sup> McCoy, *supra* note 1, at 646.

(1) “provisions for separate, substantive crimes in cases where the underlying predicate crime is committed ‘because of’ or ‘by reason of’ the victim’s characteristics of membership in an enumerated category”[;] (2) “enhance[ment] [of] the sentence of someone who commits a crime that is bias motivated[;] [t]hese hate crime statutes call for consideration at sentencing whether a defendant, when he committed the underlying crime, acted ‘because of’ the victim’s characteristics and, if so, impose a heightened penalty”[;] and (3) “[modeling of] hate crimes laws on the federal criminal civil rights laws by criminalizing acts that interfere with another’s civil rights because of bias.”<sup>20</sup>

While each of these three typical state variations on hate crime statutes are unique, each model “has the end result of enhancing the penalty or sentence for crimes motivated or inspired by hate or bias.”<sup>21</sup>

A boom in state hate crimes legislation occurred in the 1980s and by 2001, forty-three states and the District of Columbia had enacted some form of hate crime legislation, with twenty-four of the forty-four statutes encompassing the protection of “sexual orientation.”<sup>22</sup> Even further, as of January 2019 the number of states with hate crimes statutes had risen to thirty, with several states *still* not “address[ing] sexual orientation or gender identity.”<sup>23</sup> Of the thirty states that *do* provide protection for the LGBT community, eleven only provide protection for sexual orientation and ignore gender identity.<sup>24</sup> Furthermore, five states had yet to enact any kind of hate crime statute at all through September 2018.<sup>25</sup>

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<sup>20</sup> *Id.* at 646–49.

<sup>21</sup> *Id.* at 649.

<sup>22</sup> *Id.* at 644–45.

<sup>23</sup> *State Maps of Laws & Policies*, HUMAN RIGHTS CAMPAIGN (Dec. 1, 2017), <https://www.hrc.org/state-maps/hate-crimes>.

<sup>24</sup> *Id.*

<sup>25</sup> Carley Lanich, Ashley Hopko & Justin Parham, *State Hate Crime Laws Vary, Often Leaving Out LBGTQ Protections*, THE CTR FOR PUB. INTEGRITY (Sept. 5, 2018), <https://publicintegrity.org/federal-politics/state-hate-crime-laws-vary-often-leaving-out-lbgtq-protections/>.

Although state hate crimes legislation seems to follow one of three general models, a California study has shown that local models have “immense variation” in the definition of what constitutes a hate crime.<sup>26</sup> The variation is evident in terms of “how hate crime policy (1) recognizes some status provisions and not others, (2) circumscribes conduct that qualifies, and (3) identifies the elements of motivation required for the law to be invoked.”<sup>27</sup> Accordingly, California has been “at the forefront of hate crime policymaking,” and has one of the most complex hate crime statutes in the nation.<sup>28</sup> As a result, California accounts for “nearly one-quarter of the reported hate crimes nationwide.”<sup>29</sup> Even so, of the California localities which have hate crimes statutes, only twenty-four percent of the local agency statutes protect against “acts designed to induce fear or emotional suffering,” and instead focus on protecting against physical violence, similar to the majority of hate crime statutes around the nation.<sup>30</sup> Additionally, “less-stereotypical types of hate crimes, such as those based on . . . gender, are less likely to be classified as a hate crime” at all.<sup>31</sup> State hate crimes statutes also differ significantly in punishment for an act motivated by hate.<sup>32</sup> Only “[s]ome state laws make it possible to charge someone specifically for committing a hate crime, while others provide for increased sentencing for those convicted of underlying crimes, such as murder, rape, assault, or vandalism.”<sup>33</sup>

While there is vast variety in the number of state hate crimes statutes and the protection afforded by them,<sup>34</sup> one thing is certain: these state hate crimes statutes are insufficient in providing protection for LGBT individuals in the workplace. “[H]ate-crime laws are needed to give prosecutors the power to seek sentencing

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<sup>26</sup> Ryken Grattet & Valerie Jenness, *The Reconstitution of Law in Local Settings: Agency Discretion, Ambiguity, and a Surplus of Law in the Policing of Hate Crime*, 39 LAW & SOC’Y REV. 893, 918 (2005).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 906.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 920.

<sup>31</sup> *Id.*

<sup>32</sup> Lanich et al., *supra* note 25.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

proportional to the nature of the offense;<sup>35</sup> however, this can be highly challenging under state laws, which, due to their broad nature, may provide little to no actual justice.<sup>36</sup> For example, Utah is “the only state whose statute does not list specific [protected] factors, such as race or religion.”<sup>37</sup> The law is only written to “[prohibit] crimes committed ‘with the intent to intimidate or terrorize another person.’”<sup>38</sup> Salt Lake County, Utah District Attorney, Sim Gill, indicated that he “has never brought a successful hate-crime prosecution” due to the vague wording of the Utah hate crimes statute.<sup>39</sup> The inconsistency of state laws has led to difficulty in prosecuting perpetrators of hate crimes, and not only leaves individuals vulnerable, but leaves entire communities unprotected.<sup>40</sup> Gill stated that, “[j]ustice should not be the accident of geography . . . , [y]ou should not say that I have a measure of justice because I happen to live on this side of a geographic boundary versus across the street.”<sup>41</sup> However, that is exactly what state hate crimes statutes do: they segregate people and provide certain communities with little to no protection, depending solely on geographic boundaries.<sup>42</sup> This imbalance of justice demonstrates the importance of the implementation of the HCPA.<sup>43</sup>

#### A. *The Enactment of the HCPA*

The federal hate crimes statute, HCPA, 18 U.S.C. § 249, was enacted in 1981 to protect against hate crimes, and expanded 18 U.S.C. § 245 from solely the protection of race, ethnicity, national origin, and religion to include protection of gender, sexual orientation, gender identity, and disability.<sup>44</sup> However, the HCPA only protects against physical violence and “bodily injury,” and

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<sup>35</sup> *Id.*

<sup>36</sup> *See id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *See id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> 18 U.S.C. § 249 (2009); 18 U.S.C. § 245 (1996).



neither protects against verbal violence nor the corresponding mental and emotional injury.<sup>45</sup> The HCPA(a)(2)(B) reads:

A defendant will be held liable for violation of the HCPA if he “willfully causes bodily injury to any person or . . . , attempts to cause bodily injury to any person, because of the actual or perceived . . . gender, sexual orientation, [or] gender identity . . . of any person . . . ”<sup>46</sup> “occur[ing] during the course of, or as a result of, the travel of the defendant or the victim– (i)(I) across a State line or national border; or (i)(II) using a channel, facility, or instrumentality of interstate or foreign commerce” or when “the defendant uses a channel, facility, or instrumentality of interstate or foreign commerce in connection with” causing or attempting to cause such bodily injury; or (iii) “in connection with” causing or attempting to cause bodily injury, “the defendant employs a . . . device, or other weapon that has traveled in interstate or foreign commerce” or the causing or attempting to cause bodily injury (iv)(I) “interferes with commercial or other economic activity in which the victim is engaged at the time of the” causing or attempting to cause bodily injury or (iv)(II) “otherwise affects interstate or foreign commerce.”<sup>47</sup>

In order to prosecute under the HCPA, the conduct of the accused must be “sufficiently connected to” and impact interstate commerce.<sup>48</sup> In plain terms, § 249(a)(2)(A) of HCPA holds that a defendant will be prosecuted under the HCPA if he *physically* injures or attempts to *physically* injure a person because of his “gender, sexual orientation, or gender identity,” or what the defendant believes to be his “gender, sexual orientation, or gender identity.”<sup>49</sup> Further, the *physical* injury occurs during, or as a result

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<sup>45</sup> § 249.

<sup>46</sup> § 249(a)(2)(A).

<sup>47</sup> § 249(a)(2)(B).

<sup>48</sup> Harrington, *supra* note 11.

<sup>49</sup> § 249(a)(2)(A).

of, the travel of the interstate or foreign travel of the defendant or the victim; the defendant uses a “channel, facility, or instrumentality” of interstate or foreign commerce or travel to cause the victim’s *physical* injury; or the defendant uses an instrument which he has obtained through or as a result of interstate or foreign commerce to cause the victim’s *physical* injury.<sup>50</sup> One of the key provisions of the HCPA is § 249(a)(2)(B): the illegality of defendant’s interference with “commercial or other economic activity in which the victim is engaged at the time of [defendant’s] conduct,” as the provision links the defendant’s hateful behavior directly to a violation of the Commerce Clause in the workplace.<sup>51</sup>

Through the powers of the Commerce Clause, stemming from the United States Constitution, Congress has the enumerated power to “regulate Commerce with Foreign Nations, and among the several States, and with the Indian Tribes.”<sup>52</sup> The Supreme Court has provided three categories of activity that Congress “may properly regulate pursuant to this power: (1) use of channels of interstate commerce; (2) use of instrumentalities of interstate commerce; and (3) activities which substantially affect interstate commerce.”<sup>53</sup> Of all the provisions in the U.S. Constitution, the Commerce Clause is the most disputed in the courts, as no clause “has generated more cases than” the Commerce Clause.<sup>54</sup>

In *NLRB v. Jones & Laughlin Steel Corp.*, the Supreme Court held that Congress may regulate labor relations under its enumerated Commerce Clause power because labor relations “have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that [interstate] commerce from burdens and obstructions.”<sup>55</sup> The Supreme Court undoubtedly did not strive to give Congress unlimited power when interpreting the scope of the Commerce Clause, and was careful to consider that Congress’ Commerce Clause power “may not be extended so as to embrace effects upon interstate commerce so indirect and remote

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<sup>50</sup> § 249(a)(2)(B).

<sup>51</sup> § 249(a)(2)(B)(iv).

<sup>52</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>53</sup> Harrington, *supra* note 11, at § 2.

<sup>54</sup> DAVID FORTE, *COMMERCE, COMMERCE, EVERYWHERE: THE USES AND ABUSES OF THE COMMERCE CLAUSE*, (The Heritage Found. 2011).

<sup>55</sup> *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937).

that to embrace them . . . would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.”<sup>56</sup>

To the *Jones & Laughlin Steel* Court, the question of whether something has a “close and substantial relation to interstate commerce” is one of degree.<sup>57</sup> In determining degree, “[w]hatever amounts to more or less constant practice, and threatens to obstruct or unduly burden the freedom of interstate commerce is within the regulatory power of Congress under the [C]ommerce [C]lause.”<sup>58</sup> Congress determined that hate crimes and the “bodily injury”<sup>59</sup> that results therefrom had such a “close and substantial relation to interstate commerce”<sup>60</sup> that it needed to be regulated through the HCPA.<sup>61</sup> If “bodily injury”<sup>62</sup> is found to have a substantial impact on interstate commerce to the point where Congress seeks to regulate it, mental and emotional injury and verbal abuse should be afforded the same protections.

#### B. HCPA Interaction with the Commerce Clause

The passing of the HCPA by Congress has “survived the courts’ scrutiny”<sup>63</sup> in terms of First Amendment rights, Tenth Amendment protections, and relation to the Commerce Clause.<sup>64</sup> As the HCPA currently reads, it is crucial in helping facilitate the Commerce Clause and allowing for free flow of interstate commerce as the “activit[y] regulated . . . ha[s] a substantial impact on interstate commerce.”<sup>65</sup> When an object or a weapon is used to physically injure a protected individual under the HCPA and that weapon has “traveled in interstate commerce or [is] an instrumentality of interstate commerce,” the Commerce Clause is triggered and is a

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<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* (citing *Stafford v. Wallace*, 258 U.S. 495, 521 (1922)).

<sup>59</sup> 18 U.S.C. § 249 (2009).

<sup>60</sup> *N.L.R.B.*, 301 U.S. at 37.

<sup>61</sup> § 249.

<sup>62</sup> *Id.*

<sup>63</sup> Harrington, *supra* note 11, § 2.

<sup>64</sup> *Id.* §§ 5–7.

<sup>65</sup> *Id.* § 5.

proper governmental enforcement under Congress' enumerated powers.<sup>66</sup> Moreover, the HCPA was enacted to protect against "bodily injury"<sup>67</sup> which would interact or interfere with the Commerce Clause;<sup>68</sup> however, mental and emotional abuse in the workplace, like "bodily injury,"<sup>69</sup> specifically of LGBT workers, also has an enormous impact on interstate commerce,<sup>70</sup> and should be amended to reflect as such. Verbal violence which negatively impacts a worker's ability to contribute to the workforce affects two out of the three regulated activities under the Commerce Clause: (1) "the instrumentalities of interstate commerce or *persons* or things therein," and (2) "activities that have such a close and substantial relation to interstate commerce."<sup>71</sup>

Congress has found that hate crimes "motivated by the actual or perceived . . . gender, sexual orientation, [or] gender identity . . . of the victim" are a serious national threat because hate crimes target the core identity of communities, disrupting "the tranquility and safety of communities," while being "deeply divisive."<sup>72</sup> Specifically in terms of bias crimes, Congress has found that a "prominent characteristic of a violent crime motivated by bias is that it devastates not just the actual victim and the family and friends of the victim, but frequently savages the community sharing the traits that caused the victim to be selected."<sup>73</sup> These findings reflect that this violence is not strictly physical or limited to "bodily injury."<sup>74</sup> Statute 34 U.S.C. § 30501 continues to list the ways in which "[s]uch violence substantially affects interstate commerce[:]"

“(A) The movement of members of targeted groups is impeded, and members of such groups are forced

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<sup>66</sup> *Id.*

<sup>67</sup> See generally § 249 (discussing prosecutions for causing "bodily injury" to individuals based on suspect classifications).

<sup>68</sup> § 249(a)(2)(B)(iv).

<sup>69</sup> See generally § 249 (discussing "bodily injury" in connection with interstate commerce).

<sup>70</sup> See *infra* Parts II, III, and IV.

<sup>71</sup> *United States v. Lopez*, 514 U.S. 549, 555, 558 (1995) (emphasis added); U.S. CONST. art. I, § 8, cl. 3.

<sup>72</sup> 34 U.S.C. § 30501(1)–(2) (2017).

<sup>73</sup> § 30501(5).

<sup>74</sup> 18 U.S.C. § 249 (2009).

to move across State lines to escape the incidence or risk of such violence; (B) Members of targeted groups are prevented from purchasing goods and services, obtaining or sustaining employment, or participating in other commercial activity; (C) Perpetrators cross State lines to commit such violence; (D) Channels, facilities, and instrumentalities of interstate commerce are used to facilitate the commission of such violence; (E) Such violence is committed using articles that have traveled in interstate commerce.”<sup>75</sup>

Further, Congress has found that bias crimes have such a widespread and serious negative impact that is so “interstate in nature” that they “warrant Federal assistance to States, local jurisdictions, and Indian tribes.”<sup>76</sup> Nowhere in Congress’ findings is the hate crimes violence limited to physical or “bodily injury”<sup>77</sup> in its interaction with interstate commerce and the Commerce Clause.<sup>78</sup> This suggests that hate crimes can extend beyond physical harm into mental and emotional harm.

## II. MENTAL AND EMOTIONAL INJURY; IMPACTS OF VERBAL ABUSE; AND LGBT-SUPPORTIVE POLICIES

Verbal harassment and discrimination can have a large and long-lasting negative impact on an individual.<sup>79</sup> In *Stepter v. Avenal State Prison* for example, a prisoner was “harassed, threatened, and discriminated against on a daily basis[,]” including “sexual and other harassment, verbal hate crimes, threats, and discrimination[,]” resulting in signs of “mental pain, emotional pain, and distress.”<sup>80</sup> Verbal abuse that is directed toward an immutable characteristic of an individual can have an even more extreme impact on the individual as “[c]rimes of this nature attack the core identity of the

<sup>75</sup> § 30501(6)(A)–(E).

<sup>76</sup> § 30501(10).

<sup>77</sup> § 249.

<sup>78</sup> § 30501.

<sup>79</sup> See, e.g., *Stepter v. Avenal State Prison*, No. 1:11-cv-1637-MJS (PC), 2012 U.S. Dist. LEXIS 36042 at \*3 (E.D. Cal. Mar. 16, 2012).

<sup>80</sup> *Id.* at \*3.

victims,” and the “motivating factors behind these crimes relate to the victim’s individual qualities.”<sup>81</sup> When an immutable characteristic is attacked through means such as verbal assault, a victim may feel more helpless, as they are powerless to change the personal characteristic that prompted the attack.<sup>82</sup>

Accordingly, verbal violence impacts not only the direct victim, but also other members of the community who share the protected characteristic, a phenomenon described as “telegraph[ing] hatred to remote members of the victim’s community.”<sup>83</sup> Bias crimes against one individual in a community of a protected class are “message crimes[;]” they send an entire community the perpetrator’s message of hate based upon the immutable characteristic(s) shared by the entire community.<sup>84</sup> Specifically, when this harassment or discrimination occurs in the workplace, the victim may “have difficulty focusing on completing their work” and lose inspiration, motivation, and enthusiasm in their work.<sup>85</sup> This abuse affects the victims, but also those around the victim, including “co-workers or customers” who witness the abuse, whether or not they are members of the protected community.<sup>86</sup> Verbal abuse is a form of mental and emotional injury which impacts the individual victims, the larger community of shared characteristics, and, specifically, the workplace.<sup>87</sup> Individuals who are verbally attacked based on bias have their dignity threatened, and may feel hopeless because the attack was based upon something they are powerless to change.<sup>88</sup> The ripple effects of such attacks can lead to decreased work productivity and, by extension, the ability to contribute to interstate and foreign commerce.<sup>89</sup>

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<sup>81</sup> McCoy, *supra* note 1, at 651–52.

<sup>82</sup> *Id.* at 652.

<sup>83</sup> *Id.* at 652–53.

<sup>84</sup> *Id.* at 653.

<sup>85</sup> *Legal Consequences of Verbal Abuse*, RIGHT TO RESPECT (June 21, 2016), <https://www.righttorespect.com/legal-consequences-verbal-abuse/>.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*; McCoy, *supra* note 1, at 652.

<sup>89</sup> McCoy, *supra* note 1, at 651–53; *Legal Consequences of Verbal Abuse*, *supra* note 85.

Verbal hate crimes have a lasting impact on not only people, but companies as well.<sup>90</sup> “People organize and structure their experiences, interactions and realities through language”<sup>91</sup> and “employee emotional abuse is not just something that happens in a few workplaces; rather, it is widespread.”<sup>92</sup> “Not only are . . . workplace harassment incidents unfortunate in their own right, [they] can also negatively affect companies.”<sup>93</sup> In the workplace, “workers who report harassment and discrimination are less productive, more distracted, more fatigued at work, more likely to experience health issues, and more likely to search for a new job – all of which costs businesses money.”<sup>94</sup> Additionally, “[d]iscrimination directly causes job instability and high turnover, resulting in greater unemployment and poverty rates for gay and transgender people, as well as the wage gap between gay and straight workers.”<sup>95</sup>

Research has shown that where companies had an LGBT-supportive policy there was a “positive business relationship,” resulting in positive economic outputs because of (1) “greater job commitment;” (2) “improved health outcomes;” (3) “increased job satisfaction;” (4) “more openness about being LGBT;” (5) “improved workplace relationships;” (6) “less discrimination;” and

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<sup>90</sup> Pamela Lutgen-Sandvik, *The Communicative Cycle of Employee Emotional Abuse: Generation and Regeneration of Workplace Mistreatment*, MANAGEMENT COMMUNICATION QUARTERLY 1, 33 (May 1, 2003), [https://www.natcom.org/sites/default/files/pages/NCA\\_Anti-Bullying\\_Resources\\_Lutgen-Sandvik\\_2.pdf](https://www.natcom.org/sites/default/files/pages/NCA_Anti-Bullying_Resources_Lutgen-Sandvik_2.pdf).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> KAMDEN K. STRUNK, PH.D. & WILLIAM C. TAKEWELL, M.ED., LGBT BIAS AND DISCRIMINATION: OCCURRENCE, OUTCOMES, AND THE IMPACT OF POLICY CHANGE 4–5 (Aug. 2014), <https://osf.io/preprints/socarxiv/exrju/download>.

<sup>94</sup> *Id.* at 5.

<sup>95</sup> Crosby Burns & Jeff Krehely, *Gay and Transgender People Face High Rates of Workplace Discrimination and Harassment*, CENTER FOR AM. PROGRESS (June 2, 2011), <https://www.americanprogress.org/issues/lgbt/news/2011/06/02/9872/gay-and-transgender-people-face-high-rates-of-workplace-discrimination-and-harassment/>.

(7) “increased productivity” among employees.<sup>96</sup> Based on studies and research conducted by the Williams Institute, multiple business stakeholders and employers “have suggested that LGBT-supportive policies would bring about the following specific benefits that would have a positive impact on the corporate bottom line” by:

- (1) “improv[ing] recruitment and retention of talented employees”;
- (2) generating “new ideas and innovations . . . by drawing on a workforce with a wide range of characteristics and experiences”;
- (3) “attracting and better serving a diverse customer base”;
- (4) increasing employee productivity”;
- (5) “securing business with public sector clients that require employment nondiscrimination or domestic partner benefits policies”;
- and (6) “boosting morale and employee relations by responding favorably to requests from employees or unions.”<sup>97</sup>

There are numerous reasons why the prevention of mental and emotional injury resulting from workplace verbal abuse, harassment, and discrimination should be a higher priority for both employers and legislators alike. The negative impact that verbal abuse has on employee productivity and, in turn, company output and success, should be alarming to those looking to increase and maintain high levels of interstate and foreign commerce. As is evident from studies in which employers have implemented LGBT-supportive policies, fostering a supportive and non-discriminatory working environment is conducive to increased productivity and, in turn, increased business revenue and greater facilitation and promotion of interstate and foreign commerce.<sup>98</sup> Verbal hate crimes have a prominent and lasting impact both inside and outside the workforce.

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<sup>96</sup> M.V. LEE BADGETT, LAURA E. DURSO, ANGELIKI KASTANIS & CHRISTY MALLORY, *THE BUSINESS IMPACT OF LGBT-SUPPORTIVE WORKPLACE POLICIES 2* (The Williams Inst., May 2013), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Business-Impact-of-LGBT-Policies-May-2013.pdf>.

<sup>97</sup> *Id.* at 5.

<sup>98</sup> *See id.* at 26.



### III. GENERAL DISCRIMINATION AND HATE CRIMES TOWARD THE LGBT COMMUNITY INSIDE AND OUTSIDE OF THE WORKFORCE

There is a longstanding pattern of discrimination toward the LGBT community.<sup>99</sup> American “society has held negative stereotypes and assumptions about homosexuality that, in effect, treat gays and lesbians like second class citizens,”<sup>100</sup> resulting in the LGBT community “suffer[ing] from discriminatory and unequal treatment in nearly every area of their lives.”<sup>101</sup> This unequal treatment undoubtedly includes the workforce.

In 2017 there were 1,295 reported incidents of sexual orientation, gender, or gender identity hate crime acts; 1,524 known victims of sexual orientation, gender, or gender identity hate crime acts; and 1,427 known perpetrators of sexual orientation, gender, or gender identity hate crimes.<sup>102</sup> During the 2011-2015 time period, twenty-two percent of hate crimes reported were against victims who were targeted for their sexual orientation.<sup>103</sup> Despite these reported statistics, the Bureau of Justice Statistics announced on June 29, 2017 that the vast majority, fifty-four percent, of hate crimes in the United States go unreported.<sup>104</sup> In nearly all reported hate crime victimizations in 2017, the perpetrator “used hate language”<sup>105</sup> to accompany the physical harm and “bodily injury,”<sup>106</sup> demonstrating that words are extremely central to the

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<sup>99</sup> Tiffany L. King, *Working Out: Conflicting Title VII Approaches to Sex Discrimination and Sexual Orientation*, 35 U.C. DAVIS L. REV. 1005, 1011 (2002).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 1012.

<sup>102</sup> *2017 Hate Crime Statistics*, FED. BUREAU OF INVESTIGATION, <https://ucr.fbi.gov/hate-crime/2017/tables/table-1.xls> (last visited Mar. 29, 2019).

<sup>103</sup> *Majority of Hate Crime Victimizations Go Unreported to Police*, BUREAU OF JUSTICE STATISTICS (June 29, 2017, 12:00 AM) <https://www.bjs.gov/content/pub/press/hcv0415pr.cfm>.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> 18 U.S.C. § 249 (2009).

hate crime act itself.<sup>107</sup> While “hate crimes are the highest investigative priority in the [Federal Bureau of Investigation’s] civil rights program,”<sup>108</sup> hate crime data reporting is still non-mandatory,<sup>109</sup> and the FBI is not doing enough to investigate these crimes. As a result, there is a dire urgency for change to “reduce violent crime in America” and to protect “our core values as Americans.”<sup>110</sup>

In a 2017 Gallup survey, over 11 million U.S. adults, or 4.5 percent of the population, self-identified as “lesbian, gay, bisexual, or transgender,” up from 4.1 percent in 2016 and 3.5 percent in 2012.<sup>111</sup> This increase has been fueled primarily by millennials, born between 1980 and 1999.<sup>112</sup> In 2017, when asked the question of whether millennials “identify as lesbian, gay, bisexual, or transgender,” 8.2 percent answered “yes.”<sup>113</sup> This percentage is a forty percent increase from the 5.8 percent of millennials answering “yes” to the same question in 2012.<sup>114</sup> As millennials continue to age and increasingly enter the workforce, a larger percentage of the United States workforce population will identify as LGBT since a larger number of millennials identify as LGBT,<sup>115</sup> increasing the importance of protecting against verbal hate crimes in the

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<sup>107</sup> *Majority of Hate Crime Victimization Go Unreported to Police*, *supra* note 103.

<sup>108</sup> *2017 Hate Crime Statistics*, *supra* note 102.

<sup>109</sup> Jordan Dashow, *New FBI Data Shows Increased Reported Incidents of Anti-LGBTQ Hate Crimes in 2016*, HUMAN RIGHTS CAMPAIGN (Nov. 13, 2017), <https://www.hrc.org/blog/new-fbi-data-shows-increased-reported-incidents-of-anti-lgbtq-hate-crimes-i>.

<sup>110</sup> Devlin Barrett, *Hate Crimes Rose 17 Percent Last Year, According to New FBI Data*, THE WASH. POST (Nov. 13, 2018), [https://www.washingtonpost.com/world/national-security/hate-crimes-rose-17-percent-last-year-according-to-new-fbi-data/2018/11/13/e0dcf13e-e754-11e8-b8dc-66cca409c180\\_story.html?noredirect=on&utm\\_term=.9a3cf0ea5463](https://www.washingtonpost.com/world/national-security/hate-crimes-rose-17-percent-last-year-according-to-new-fbi-data/2018/11/13/e0dcf13e-e754-11e8-b8dc-66cca409c180_story.html?noredirect=on&utm_term=.9a3cf0ea5463).

<sup>111</sup> Tim Fitzsimons, *A Record 4.5 Percent of U.S. Adults Identify as LGBT*, *Gallup Estimates*, NBC NEWS (May 25, 2018, 10:22 AM), <https://www.nbcnews.com/feature/nbc-out/record-4-5-percent-u-s-adults-identify-lgbt-gallup-n877486>.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

workplace. As more and more people openly identify as members of the LGBT community, their status as members of this historically and continuously discriminated-against group will become easier to target and therefore in need of greater protection. Inherently, hate crimes based upon race or sex discrimination are made against a person with physically identifiable characteristics; however, sexuality and gender-identity are not necessarily visually readily apparent.<sup>116</sup> It is significant that a growing population is openly acknowledging its membership in the LGBT community because of the risk of this previously-hidden community being more open to targeted discrimination.

Despite several laws in place today regarding sexual orientation and gender identity in the workplace, discrimination is still extremely prevalent for workers who identify as LGBT.<sup>117</sup> For example, in a 2017 study, “[o]ne in four LGBT employees report experiencing employment discrimination in the last five years.”<sup>118</sup> Additionally, “[n]early one in [ten] LGBT employees have left a job because the environment was unwelcoming”<sup>119</sup> and “52.8 percent of LGBT employees report that discrimination negatively affected their work environment.”<sup>120</sup> Currently, there is no federal law or United States Supreme Court ruling explicitly “barring employment discrimination on the basis of sexual orientation or gender identity;”<sup>121</sup> however, this may change in the future as federal circuit courts have been split with regard to whether Title VII of the Civil

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<sup>116</sup> James Lobo, *Behind the Venire: Rationale, Rewards and Ramifications of Heightened Scrutiny and the Ninth Circuit’s Extension of Equal Protection to Gays and Lesbians During Jury Selection in Smithkline v. Abbott*, 56 BCLRESUP 106, 118 (2015) (“... the would-be juror’s classification (as an African-American or a woman, respectively) is usually perceptible, sexual orientation is not a characteristic that can always be easily identified.”)

<sup>117</sup> See 2017 *Workplace Equality Fact Sheet*, OUT AND EQUAL, <http://outandequal.org/2017-workplace-equality-fact-sheet/> (last visited Mar. 29, 2019).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

Rights Act of 1964 covers sexual orientation.<sup>122</sup> However, even if that were to occur, the protections granted by Title VII would still be insufficient to protect against verbal hate speech in the workplace in relation to interstate and federal commerce.<sup>123</sup> Protecting verbal hate speech in the workplace is crucial not only for those whose LGBT status is known to their co-workers, but also for those who have not publicly identified as LGBT as well.<sup>124</sup> “According to one study, LGBT people [who have not identified themselves to their coworkers or supervisors as LGBT] are 73 percent more likely to say they’ll leave their companies within the next three years” because they do not feel comfortable in the workplace environment.<sup>125</sup> Further, “78 percent of transgender people felt more comfortable at work after transition[ing], and believe their workplace performance improved.”<sup>126</sup> However, with the continued lack of legal protection, and high prevalence of verbal discrimination and verbal hate crimes, employees are less likely to identify themselves as LGBT to those they interact with while at work.<sup>127</sup> If employees who identify as LGBT, an ever-growing population, are leaving work within three years or not performing to the best of their ability because of hostility, discrimination, or verbal hate crimes at work, then the state of the workforce and commerce, including interstate and foreign commerce, will be detrimentally impacted and impede the ideals of the Commerce Clause.<sup>128</sup>

Accordingly, there is a vast array of case law that reflects the prevalence of discrimination based upon sexual orientation in the workplace.<sup>129</sup> However, these situations of discrimination are often

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<sup>122</sup> Daniel Weissner, *U.S. Appeals Court Says Title VII Covers Discrimination Based on Sexual Orientation*, REUTERS (Feb. 26, 2018, 10:39 AM), <https://www.reuters.com/article/us-usa-lgbt/u-s-appeals-court-says-title-vii-covers-discrimination-based-on-sexual-orientation-idUSKCN1GA201>.

<sup>123</sup> See *infra* Part VI.

<sup>124</sup> See generally *2017 Workplace Equality Fact Sheet*, *supra* note 117.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> Burns & Krehely, *supra* note 95.

<sup>129</sup> See, e.g., *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018); *Vickers v. Fairfield Medical Center*, 453 F.3d 757 (6th Cir. 2006); *Dawson v. Bumble & Bumble*, 398 F.3d 211 (2d Cir. 2005); *Medina v. Income Support*

not prosecuted under the HCPA because they do not rise to the level of physical abuse or “bodily injury.”<sup>130</sup> Nevertheless, this does not mean they have a lesser impact on both the individual and interstate and foreign commerce. For example, one man, who self-identified as gay, was approached at work “without provocation” and “hit several times in the face” by a coworker who admitted that he assaulted the victim due to his sexual orientation.<sup>131</sup> After the victim was struck, neither he nor the perpetrator were able to go back to work on “the production line,” resulting in their company “losing productivity at both work stations for approximately nine hours.”<sup>132</sup> A woman, also discriminated against at work because of her sexual orientation, was “punished because her status as a gay female did not comport with [her supervisor’s] gender stereotypes,” causing her to “experience a hostile work environment.”<sup>133</sup> Because of her sexual orientation, the woman was passed up for a promotion by a “less qualified individual” and “someone had tampered with her [work] equipment.” Both of these woman’s incidents were non-physical and would not qualify as “bodily injur[ies],”<sup>134</sup> yet they directly interfered with both the victim’s work productivity and her ability to contribute to the workforce. A result which presumably also negatively impacted interstate and foreign commerce.

In yet another example of workplace harassment, “a superintendent of an all-male crew on a construction site” was frequently verbally harassed at work by coworkers based on his sexual orientation.<sup>135</sup> Upon reporting, the victim of the harassment was sent home without pay by his supervisor because “[the

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Division., New Mexico, 413 F.3d 1131 (10th Cir. 2005); *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061 (9th Cir. 2002); *Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257 (3d Cir. 2001); *Blum v. Gulf Oil Corp.*, 597 F.2d 179 (5th Cir. 1979); *Winstead v. Lafayette Cnty. Bd. of Cnty. Comm’rs*, 197 F.Supp.3d 1134 (N.D. Fla. 2016).

<sup>130</sup> 18 U.S.C. § 249 (2009).

<sup>131</sup> *United States v. Hill*, 182 F. Supp. 3d 546, 548 (E.D. Va. 2016).

<sup>132</sup> *Id.*

<sup>133</sup> *Evans v. Georgia Regional Hospital*, 850 F.3d 1248, 1251 (11th Cir. 2017).

<sup>134</sup> § 249.

<sup>135</sup> *E.E.O.C. v. Boh Bros. Const. Co., LLC.*, 731 F.3d 444, 449 (5th Cir. 2013).

supervisor] feared ‘further problems.’”<sup>136</sup> The sending home of an employee results in a direct loss of manpower and a lower completion of work, directly impacting productivity and commerce.<sup>137</sup> The case law surrounding non-physical violence toward individuals in the workplace is extremely prevalent.<sup>138</sup> Although discrimination can take many different forms, including both verbal and physical abuse, it is hard to dispute that this discrimination occurs, and further that it has a detrimental impact on individuals as people and as contributing employees.<sup>139</sup>

#### IV. PROPOSED HATE CRIMES PREVENTION ACT AMENDMENT

Considering the increasing incidence of non-physical, but emotionally harmful hate crimes directed towards the LGBT community, the HCPA must be amended to protect the LGBT community from verbal bias crimes that give way to mental and emotional harm in the workplace. It is evidenced through studies, case law, and academic scholarship that discrimination based on sexual harassment in the workplace is prevalent,<sup>140</sup> and that such discrimination in the form of verbal abuse has a detrimental effect on the LGBT community.<sup>141</sup> Congress took great leaps when implementing the HCPA, which is the “first statute allowing federal criminal prosecution of hate crimes motivated by the victim’s actual or perceived sexual orientation or gender identity.”<sup>142</sup> Along with “remov[ing] . . . existing jurisdictional obstacles to prosecutions of certain race- and religion-motivated violence”<sup>143</sup> and “add[ing] new federal protections against crime based on gender, disability, gender identity, or sexual orientation,”<sup>144</sup> the HCPA was implemented to

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<sup>136</sup> *Id.* at 450.

<sup>137</sup> *Id.* at 450–51.

<sup>138</sup> See cases cited *supra* note 129.

<sup>139</sup> Burns & Krehely, *supra* note 95.

<sup>140</sup> See cases cited *supra* note 129.

<sup>141</sup> See *Stepter v. Avenal State Prison*, No. 1:11-cv-1637-MJS (PC), U.S. Dist. LEXIS 36042 at \*3 (E.D. Cal. Mar. 16, 2012).

<sup>142</sup> *Hate Crime Laws*, U.S. DEP’T OF JUST. (Oct. 15, 2018), <https://www.justice.gov/crt/hate-crime-laws>.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

regulate interstate and foreign commerce.<sup>145</sup> In order to prosecute and “obtain a conviction” under the HCPA, the crime must have been in or affected interstate or foreign commerce.<sup>146</sup>

In *United States v. Morrison*, the Court contemplated the impact of violent crimes on interstate commerce.<sup>147</sup> The Majority determined that “[t]he Constitution requires a distinction between what is truly national and what is truly local.”<sup>148</sup> The HCPA, enacted before *Morrison*, was specifically implemented to protect against violence that had an interstate or foreign reach by criminalizing violence that resulted in “bodily injury” and “occur[red] as a result of . . . the travel of the defendant or the victim” or that “interfere[d] with commercial or other economic activity in which the victim is engaged at the time of the conduct” or that “otherwise affects interstate or foreign commerce.”<sup>149</sup> It is hard to deny that daily workplace and on-the-job activities would be considered “commercial or other economic”<sup>150</sup> activities, as employees are engaged in work that is directly commercially or economically benefiting their employer.<sup>151</sup> As Congress has shown by regulating hate crimes through the Commerce Clause, there is clearly a great deal of correlation between hate crimes and interstate and foreign commerce.<sup>152</sup> In 2016 alone, the Department of Justice filed 7,227 hate crime offenses,<sup>153</sup> further evidencing that the HCPA is

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<sup>145</sup> *See id.*

<sup>146</sup> *The Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act of 2009*, U.S. DEP’T OF JUST. (Oct. 18, 2018), <https://www.justice.gov/crt/matthew-shepard-and-james-byrd-jr-hate-crimes-prevention-act-2009-0>.

<sup>147</sup> *United States v. Morrison*, 529 U.S. 598, 609 (2000).

<sup>148</sup> *Id.* at 617–18.

<sup>149</sup> 18 U.S.C. § 249 (2009).

<sup>150</sup> *Id.*

<sup>151</sup> Erika Welz Prafder, *Hiring Your First Employee*, ENTREPRENEUR, <https://www.entrepreneur.com/article/83774> (last visited Mar. 29, 2019).

<sup>152</sup> § 249; Margaret K. O’Leary, *Have No Fear (Of “Piling Inference Upon Inference”): How United States V Comstock Can Save The Matthew Shepard And James Byrd, Jr. Hate Crimes Prevention Act*, 97 CORNELL L. REV. 931, 933 (2012).

<sup>153</sup> *Justice Department Update on Hate Crimes Prosecutions*, U.S. DEP’T OF JUST. (June 29, 2018), <https://www.justice.gov/opa/pr/justice-department-update-hate-crimes-prosecutions>.

extremely relevant to interstate and foreign commerce; otherwise there would be no offenses that fall within the jurisdiction of the HCPA in terms of meeting both the “bodily injury” and “interstate or foreign commerce”<sup>154</sup> requirements.

The increasingly large number of individuals who openly identify as LGBT further supports an amendment to the HCPA. As of 2017, eleven million, or 4.5 percent of the population identified as “lesbian, gay, bisexual, or transgender.”<sup>155</sup> This increase has been fueled primarily by millennials, which is critical as they are continuing to enter the workforce, and become more at risk of being targeted based on their sexual orientation or gender identity.<sup>156</sup> As millennials continue to enter the workforce, a larger percentage of the United States workforce population will identify as LGBT, further showing the direness of protecting verbal hate crimes in the workplace.<sup>157</sup> Moreover, studies have shown that a large number of LGBT employees are uncomfortable and leaving the workforce due to their sexual orientation or gender identity.<sup>158</sup>

It is highly likely that physical “bodily injury”<sup>159</sup> does not have a greater impact on “interstate and foreign commerce”<sup>160</sup> than verbal discrimination and hate crimes that lead to mental and emotional injury. Based on studies, reports, academia, and case law, bodily injury does not have a greater impact on commerce than verbal injury,<sup>161</sup> and the HCPA needs to be amended to reflect as such. The HCPA must be amended to include, in addition to “bodily injury,”<sup>162</sup> mental and emotional injury as a result of verbal bias crimes targeted toward LGBT individuals in the workplace. Mental and emotional injury toward a growing workforce population will undoubtedly continue to have an increasingly negative effect on production,

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<sup>154</sup> § 249.

<sup>155</sup> Fitzsimons, *supra* note 111.

<sup>156</sup> *Id.*

<sup>157</sup> *See id.*

<sup>158</sup> *See, e.g., 2017 Workplace Equality Fact Sheet, supra* note 117.

<sup>159</sup> § 249.

<sup>160</sup> *Id.*

<sup>161</sup> *See supra* Parts II, III and IV.

<sup>162</sup> § 249.



productivity, and the output of goods, services, and ideas that travel though interstate and foreign commerce.<sup>163</sup>

#### V. “CHILLING” OF FIRST AMENDMENT RIGHTS; A COUNTERARGUMENT

Although the need for revising the HCPA is clear, amending the Act is not without its challenges. One challenge that may be brought as a result of amending the HCPA to include workplace verbal hate crimes toward LGBT workers is a violation of the perpetrator’s First Amendment right to free speech.<sup>164</sup> The First Amendment protects an individual’s freedom of speech, save for “fighting words,” “true threats,” or “advocacy that is directed to inciting or producing imminent lawless action.”<sup>165</sup> However, “employees, for all practical purposes have no speech rights in the workplace due to the state action doctrine and the at-will employment doctrine.”<sup>166</sup> Moreover, in the workplace, “[h]arassment by co-workers is sometimes tacitly condoned or encouraged by the employer,” which is perhaps a “subtle way” of pushing out women or minorities.<sup>167</sup> Surely this is the kind of conduct that Congress would have wanted to prevent when implementing the Commerce Clause, as pushing out skilled, underrepresented workers unquestionably reduces the effect of interstate commerce.<sup>168</sup>

When determining if an individual’s otherwise protected right can be revoked to serve a larger state or national interest, the judicial system must balance the “tension between [an individual] right and a state interest.”<sup>169</sup> No right is “absolute” because “the rights of different people often conflict, and a right subject to no limitations

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<sup>163</sup> See Strunk & Takewell, *supra* note 93.

<sup>164</sup> U.S. CONST. amend. I.

<sup>165</sup> Glenn v. Holder, 690 F.3d 417, 422 (6th Cir. 2012).

<sup>166</sup> Mark Oring & S.D. Hampton, *When Rights Collide: Hostile Work Environment vs. First Amendment Free Speech*, 31 UWLA L. REV. 135, 148 (2000).

<sup>167</sup> *Id.* at 149.

<sup>168</sup> See, e.g., Badgett et al., *supra* note 96; Michael J. Fellows, *Civil Rights - Shades of Race: An Historically Informed Reading of Title VII*, 26 WENGLR 387, 396 (2004).

<sup>169</sup> Oring & Hampton, *supra* note 166, at 166.

whatsoever would eventually infringe [upon] someone else's rights."<sup>170</sup> While it may be argued that an individual's right to a harassment-free workplace should be balanced with an individual's right to freedom of speech, the larger issue is the need to reconcile an individual's right to free speech with the government's enumerated power to protect interstate commerce under the Commerce Clause.<sup>171</sup> As demonstrated, verbal violence toward a protected class can have a detrimental impact upon the protected individual's wellbeing, including their personal life, and more importantly for the balancing effect, professional work life.<sup>172</sup> The professional life of individuals impacts the economic strength of their performance, and "if [the] government is too weak, it will be unable to prevent wealthier and powerful private individuals and organizations from exploiting and oppressing those who are weaker."<sup>173</sup> If protected individuals are being oppressed in the workplace through verbal violence and mental and emotional abuse, the workforce, and in turn, the work output and product, will also be oppressed and negatively impacted.<sup>174</sup> The judiciary will weigh the factors at play<sup>175</sup> and likely determine that Congress' interest in

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<sup>170</sup> *Id.*

<sup>171</sup> See U.S. CONST. art. I, § 8, cl. 3.

<sup>172</sup> See *supra* Parts II and III; *Legal Consequences of Verbal Abuse*, *supra* note 85.

<sup>173</sup> Oring & Hampton, *supra* note 166, at 161.

<sup>174</sup> See, e.g., *Legal Consequences of Verbal Abuse*, *supra* note 85.

<sup>175</sup> The problem in any case . . . is to arrive at a balance between the interests of . . . a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees . . . . [there are] two inquiries to guide interpretation of the constitutional protections accorded to . . . employee speech . . . . The first requires determining whether the employee spoke as a citizen on a matter of public concern. If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech . . . . If the answer is yes, then the possibility of a First Amendment claim arises. The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public. This consideration reflects the importance of the relationship between the speaker's expressions and

promoting interstate commerce through the Commerce Clause outweighs an individual's right to free speech in the workplace when such free speech prohibits an individual in the workforce from producing a positive work product.<sup>176</sup>

#### VI. OTHER POTENTIAL REMEDIES OF VERBAL VIOLENCE TOWARD LGBT PEOPLE IN THE WORKPLACE

Verbal hate crimes against the LGBT community must be addressed. Several other potential remedies of verbal violence toward LGBT people in the workplace could be proposed to counteract the increasing verbal hate crimes, however none of them are adequate to remedy the detrimental impact that verbal workplace violence against LGBT people has on interstate commerce. The inadequacies following potentially proposed claims that victims could bring will be addressed one-by-one: Equal Protection; Infliction of Mental and Emotional Distress; and Title VII of the Civil Rights Act.

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employment. A government entity has broader discretion to restrict speech when it acts in a role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations.

*Garcetti v. Ceballos*, 547 U.S. 410, 417–18 (2006).

<sup>176</sup> Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services . . . . The First Amendment interests at stake extend beyond the individual speaker . . . . The Court's approach [in balancing individual and State interests] acknowledged the necessity for informed, vibrant dialogue in a democratic society. It suggested, in addition, that widespread costs may arise when dialogue is repressed . . . . The Court's decisions, then, have sought both to promote the individual and societal interests that are served when employees speak as citizens on matters of public concern and to respect the needs of government employers attempting to perform their important public functions.

*Id.* at 418–20.

### A. Equal Protection

The Fourteenth Amendment Equal Protection Clause requires “persons similarly situated [to] . . . be treated alike.”<sup>177</sup> When the complaint involves a protected class, the victim must show that the perpetrator “acted with an intent or purpose to discriminate against the [victim] based upon [the victim’s] membership in a protected class.”<sup>178</sup> Additionally, the victim must show that he or she was “intentionally treated differently from others” who were “similarly situated” and that there was “no rational basis for the difference in treatment.”<sup>179</sup> While this may glean relief for the individual victim,<sup>180</sup> it does not necessarily have a deterrent effect,<sup>181</sup> and therefore does nothing to remedy the negative impacts on interstate commerce under the Commerce Clause, and is therefore an insufficient remedy.

### B. Infliction of Mental and Emotional Distress

Another potential, but insufficient remedy is intentional infliction of emotional distress. To succeed on a claim for relief under the tort of intentional infliction of mental and emotional distress, the victim must demonstrate four elements: “(1) the [perpetrator] must act intentionally or recklessly; (2) the [perpetrator’s] conduct must be extreme and outrageous; and (3) the conduct must be the cause (4) of severe emotional distress.”<sup>182</sup> Once again, while intentional infliction of emotional distress may provide individual relief for the victim, the tort claim does not necessarily deter discriminatory behavior of perpetrators in the workplace,<sup>183</sup>

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<sup>177</sup> *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985); U.S. CONST. amend. XIV, § 1.

<sup>178</sup> *Lee v. City of Los Angeles*, 250 F.3d 668, 686 (9th Cir. 2001).

<sup>179</sup> *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000).

<sup>180</sup> *Id.*

<sup>181</sup> See *Five Things About Deterrence*, NATIONAL INSTITUTE OF JUSTICE (June 6, 2016), <https://nij.gov/five-things/pages/deterrence.aspx>.

<sup>182</sup> *Elements of Intentional Infliction of Emotional Distress*, THE CLIMATE CHANGE AND PUB. HEALTH LAW SITE, <https://biotech.law.lsu.edu/courses/tortsf01/iieem.htm> (last visited Mar. 29, 2019).

<sup>183</sup> *Five Things About Deterrence*, *supra* note 181.

and does nothing to protect interstate commerce or the Commerce Clause. Therefore, it is also an insufficient remedy.

### C. Title VII of the Civil Rights Act

While Title VII of the Civil Rights Act (“Title VII”) could also be a proposed remedy, it “applies only to the workplace and only affects speech that creates a hostile and abusive work environment.”<sup>184</sup> Title VII is not all-inclusive of issues of verbal violence that could occur in the workplace.<sup>185</sup> Title VII reads: “It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”<sup>186</sup> Accordingly, Title VII makes it unlawful for employers to discriminate against employees because of certain protected characteristics; however it is silent with regard to co-worker or peer actions and verbal violence or discrimination, and is unclear as to whether or not gender, gender identity, or sexual orientation are encompassed under “sex” and are even protected at all.<sup>187</sup> Additionally, due to the wording and limit of scope of Title VII, Title VII does not have a deterrent effect and does nothing to protect

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<sup>184</sup> Oring & Hampton, *supra* note 166, at 144.

<sup>185</sup> *Know Your Rights: Title VII of the Civil Rights Act of 1964*, THE AM. ASS’N OF UNIV. WOMEN, <https://www.aauw.org/what-we-do/legal-resources/know-your-rights-at-work/title-vii/> (last visited Mar. 29, 2019).

<sup>186</sup> 42 U.S.C.A. § 2000e-2(a)(1) (West, Westlaw through Pub. L. No. 116-5).

<sup>187</sup> The United States Supreme Court has not yet ruled on whether Title VII of the Civil Rights Act of 1964 protects discrimination based on sexual orientation. The federal circuit courts have addressed the question, but have been split with regard to whether or not Title VII protects against sexual orientation discrimination. *See Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 131–32 (2d 2018) (holding that sexual orientation is a protected characteristic under Title VII of the Civil Rights Act of 1964 because “sexual orientation discrimination is a form of sex discrimination.”); *Evans v. Georgia Reg’l Hosp.*, 850 F.3d 1248, 1257 (11th Cir. 2017) (holding that sexual orientation is not a protected characteristic under Title VII of the Civil Rights Act of 1964 because “that the harasser is, or may be, motivated by hostility based on sexual orientation is . . . irrelevant.”).

interstate commerce or the Commerce Clause and is therefore an insufficient remedy.<sup>188</sup>

Further, verbal bias crimes in the workplace directed toward a protected individual should be handled criminally, not civilly.

[M]any states have legislated into the criminal law the idea that crimes motivated by hate should be punished more severely than equivalent crimes not motivated by hate. The decision to criminalize and punish more severely hate-motivated crimes reflects the fact that such crimes inflict unique harm on their victims and society and thus deserve greater punishment.<sup>189</sup>

A “basic precept” of criminal law is “[t]he idea that punishment of a person’s conduct should be proportional to and linked with a person’s blameworthiness and culpability.”<sup>190</sup> Not only will amending the HCPA to include criminalization of verbal assault in the workplace on LGBT individuals support the government’s regulation of interstate commerce under the Commerce Clause, but it will also help to deter such actions and behaviors to begin with which will promote a more inclusive society and community.<sup>191</sup>

## VII. INSUFFICIENCIES OF REMEDIES AND IMPORTANCE OF DETERRENCE

In addition to the insufficiency of the above-mentioned remedies<sup>192</sup> in addressing workplace verbal workplace abuse, the stated remedies also fail to deter workplace verbal hate crimes in the first place.<sup>193</sup> Criminalizing workplace verbal hate crimes will work to deter discriminatory behavior of perpetrators in the workplace and to protect interstate commerce and regulations of the Commerce Clause.<sup>194</sup> The HCPA seeks to “expan[d] the federal definition of

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<sup>188</sup> See *Know Your Rights: Title VII of the Civil Rights Act of 1964*, *supra* note 185.

<sup>189</sup> McCoy, *supra* note 1, at 634.

<sup>190</sup> *Id.* at 650.

<sup>191</sup> See *id.*

<sup>192</sup> See *supra* Part VI.

<sup>193</sup> See *supra* Part VI.

<sup>194</sup> See McCoy, *supra* note 1, at 655.

hate crimes, enhance[e] the legal toolkit available to prosecutors and increase[e] the ability of federal law enforcement to support our [country's] state and local partners."<sup>195</sup> The enactment of the HCPA "signaled to the world an enduring commitment to the most fundamental of American values, and it voiced an unwavering belief in the strength of our diversity."<sup>196</sup>

The amendment of the HCPA to include, in addition to protection against "bodily injury,"<sup>197</sup> protection against verbal bias crimes and mental and emotional injury, "presents an opportunity to evaluate our progress and renew our dedication to eradicating hate-driven violence."<sup>198</sup> The HCPA was implemented with the goal of "add[ing] new protections against crimes based on gender . . . , gender identity or sexual orientation" and "remov[ing] unnecessary jurisdictional obstacles that interfer[e] with [the United States'] prosecution of racially and religiously-motivated violence" in addition to gender, gender identity, and sexual orientation.<sup>199</sup> All of the cases that have been prosecuted under the HCPA "help [to] highlight the impact of this monumental law," and reiterate that "our legal system must protect all people – regardless of what they look like, where they worship, whom they love and whether they have a disability – from hateful violence."<sup>200</sup> The HCPA prompts us to remember and fulfill "the promise of our founding ideals" through the eradication of hate in America.<sup>201</sup> Through criminalization of hateful, animus-motivated behavior against protected groups of people, the HCPA seeks to reinforce the ideals of diversity and

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<sup>195</sup> *Commemorating Our Commitment to Fighting Hate-Driven Violence*, U.S. DEP'T OF JUSTICE ARCHIVES (Oct. 29, 2015), <https://www.justice.gov/archives/opa/blog/commemorating-our-commitment-fighting-hate-driven-violence>.

<sup>196</sup> *Id.*

<sup>197</sup> See 18 U.S.C. § 249 (2009).

<sup>198</sup> *Commemorating Our Commitment to Fighting Hate-Driven Violence*, *supra* note 195.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

inclusivity, unity, acceptance, freedom, understanding, and happiness.<sup>202</sup>

The United States founders sought, and the Government continues to seek to further “our founding ideals”<sup>203</sup> of equality in large part through governmental powers and governmental enforcement.<sup>204</sup> “A Constitution embodies a society’s foundational beliefs and ideals;”<sup>205</sup> “a Constitution can also define the country to itself, reflecting back to the whole society those foundational beliefs and ideals;”<sup>206</sup> and “[it] can give the people of the country a sense of shared identity and values, a sense of unity and purpose – and thus be an ongoing source of a country’s values.”<sup>207</sup> Our nation’s Founders gave Congress the Constitutional enumerated power to regulate interstate and foreign commerce through the Commerce Clause.<sup>208</sup> Through the enactment of the HCPA, Congress sought to regulate commerce through its enumerated power by prosecuting the conduct of a perpetrator if he physically injures or attempts to physically injure a person because of that person’s “gender, sexual orientation, or gender identity,” or what the defendant believes to be their “gender, sexual orientation, or gender identity,” and the physical injury occurs during or as a result of the travel of the interstate or foreign travel of the defendant or the victim; the defendant uses a “channel, facility, or instrumentality” of interstate or foreign commerce or travel to cause the victim’s physical injury; or the defendant uses an instrument that he has obtained through or as a result of interstate or foreign commerce to cause the victim’s

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<sup>202</sup> See generally Robert Pondiscio, *What Every American Should Know*, U.S. NEWS & WORLD REPORT (Jan. 11, 2016), <https://www.usnews.com/opinion/knowledge-bank/articles/2016-01-11/top-10-civic-ideals-and-cultural-principles-that-every-american-should-know>.

<sup>203</sup> *Commemorating Our Commitment to Fighting Hate-Driven Violence*, *supra* note 195.

<sup>204</sup> See Paul Gewirtz, *Constitutional Enforcement: Who Should Do It and How?*, 4 CHINA LAW REVIEW 1, 1 (Oct. 2016), <https://law.yale.edu/system/files/china-law-documents/gewirtzconstitutionalismarticleenglishincompletedraft222016.pdf>.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> U.S. CONST. art. I, § 8, cl. 3.



physical injury.<sup>209</sup> The HCPA utilizes Congress' power to regulate interstate and foreign commerce while recognizing the interactions with and ensuring the security of protected groups of people.<sup>210</sup>

## CONCLUSION

Congress enacted the HCPA to regulate physical abuse and "bodily injury"<sup>211</sup> to mitigate the negative impacts that it has on interstate and foreign commerce,<sup>212</sup> but the HCPA fails to consider verbal hate crimes and mental and emotional injury. Mental and emotional injury is extremely prevalent, particularly in the workforce and toward the LGBT community.<sup>213</sup> To further Congress' goal of mitigating commercial loss through the enactment of the HCPA,<sup>214</sup> the HCPA must be amended to include verbal hate crimes and violence toward LGBT individuals in the workplace to prevent mental and emotional injury that impacts productivity and business output.<sup>215</sup>

As a federal statute, the HCPA needs to supersede the inconsistent, conflicting, and often altogether missing state statutes in order to provide protection from verbal abuse and violence toward LGBT individuals in the workplace.<sup>216</sup> This can be accomplished by amending the HCPA to include verbal bias crimes, resulting in mental and emotional suffering and injury, toward members of the

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<sup>209</sup> 18 U.S.C. § 249(a)(2)(A)–(B) (2009).

<sup>210</sup> See generally *id.*

<sup>211</sup> *Id.*

<sup>212</sup> § 249(a)(2)(B).

<sup>213</sup> See Michael Friedman, Ph.D., *The Psychological Impact of LGBT Discrimination*, PSYCHOLOGY TODAY (Feb. 11, 2014), <https://www.psychologytoday.com/us/blog/brick-brick/201402/the-psychological-impact-lgbt-discrimination>.

<sup>214</sup> See Brianne Szopinski, *Mississippi Man First to be Prosecuted and Sentenced Under Federal Hate-Crime Statute*, SYRACUSE L. REV., <http://lawreview.syr.edu/mississippi-man-first-to-be-prosecuted-and-sentenced-under-federal-hate-crime-statute/> (last visited April 9, 2019) ("Because Congress passed section (a)(2) of the Act under its Commerce Clause power, the government must establish that the hate crime occurred in or affected interstate or foreign commerce.").

<sup>215</sup> See Friedman, *supra* note 213.

<sup>216</sup> See *supra* Part I.

LGBT community in the workplace. Verbal hate crimes should be included in the HCPA in addition to physical “bodily injury”<sup>217</sup> in order to promote interstate commerce and uphold the HCPA’s consistency with the ideals of the Commerce Clause.<sup>218</sup>

It is evident that when LGBT employees and workers are supported and protected in the workplace, productivity increases, and a healthier working environment where people are more likely to stay and provide healthy workmanship occurs.<sup>219</sup> The Commerce Clause, which seeks to promote and regulate interstate and foreign commerce, “extends to those activities intrastate which *so affect* interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce.”<sup>220</sup> Verbal abuse leading to mental and emotional injury of LGBT employees in the workplace undoubtedly can be classified as an “activit[y] intrastate which so affect[s] interstate commerce.”<sup>221</sup> Therefore, to attain the “legitimate end[s]” of both encouraging security of a protected class of citizens and promoting interstate commerce,<sup>222</sup> the HCPA should be amended to include verbal abuse and its negative mental and emotional injury effects on LGBT employees in the workforce.

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<sup>217</sup> § 249.

<sup>218</sup> *Id.*; U.S. CONST. art. I, § 8, cl. 3.

<sup>219</sup> *See, e.g.*, BADGETT ET AL., *supra* note 96.

<sup>220</sup> Randy E. Barrett & Andrew Koppelman, *The Commerce Clause*, CONSTITUTION CENTER, <https://constitutioncenter.org/interactive-constitution/interpretations/section8-commerce> (last visited Mar. 29, 2019) (quoting *United States v. Darby*, 312 U.S. 100, 118 (1941)).

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*