

Oregon Hate Crime Laws
Internship Findings and Final
Report

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Introduction and Overview

This internship was created in a joint venture by the Oregon Commission on Hispanic Affairs, Oregon Commission on Black Affairs, Oregon Commission on Asian Affairs, the Oregon Department of Justice, Oregon Advocacy Commission, and supervised by Professor Carrasco. The purpose of this position was to look at Oregon hate crime laws and compare them to other states' laws and federal statutes for possible improvements. The position started in the middle of May 2012 and ended August 2nd, 2012. Over that time it has become my opinion that the areas of research and recommendations divide largely into two parts, law and policy. While most of the focus has been on legal comparisons and investigation for Oregon-specific laws, some policy recommendations are also made. Finally, at the end of this report are suggestions for future research and study that would be beneficial for the prevention of hate crimes, and what a possible legislative amendment could look like based on this research.

Background

Almost all states have some legislation regarding hate crimes or bias-motivated crimes. One of the general features of a hate crime law is that it prohibits certain actions by one person motivated by bias against another based on the other's characteristics. Generally speaking that characteristic is immutable but states do have the ability under a rational relation basis to create other categories for protection. Most states have provisions for categories such as race, color, religion, and national origin ancestry ethnicity sex, gender, or gender identity, sexual orientation, and disability. However, some states have created provisions for such characteristics as age,¹ creed,² political affiliation,³ alienage,⁴ and membership in an organization.⁵

Generally, there are three ways states punish bias-motivated crimes. The first is to create a new independent crime, which outlines specific conduct that is being regulated and list punishments. The second enhances the penalty for committing a parallel crime if the offense was motivated by bias. Third, there are statutes that give the court discretion to increase the punishment of the individual if they find their actions were motivated by bias, usually by adding more time or increasing the level of offense.

Oregon's Criminal Statutes and Constitutional challenges

Oregon's two main criminal statutes are the first type of bias-crime statutory

¹ See, e.g., D.C. Code Ann. § 22-4001; Fla. Stat. Ann. § 775.085; Iowa Code Ann. § 729A.1; La. Rev. Stat. Ann. § 14:107.2; Minn. Stat. Ann. §§ 609.2231, subd. 4, § 609.595, subd. 1(a) and 2, 609.749, subd. 3(1); Neb. Rev. Stat. § 28-111; N.Y. Penal Law §§ 240.30, 240.31, and 485.05; Vt. Stat. Ann. tit. 13, § 1455.

² See, e.g., 720 Ill. Comp. Stat. Ann. § 5/12-7.1 and 730 Ill. Comp. Stat. Ann. § 5/5-5-3.2(a)(10); La. Rev. Stat. Ann. § 14:107.2; Mont. Code Ann. §§ 45-5-221 and 45-5-222; N.H. Rev. Stat. Ann. § 651:6.I(g).

³ See, e.g., Iowa Code Ann. § 729A.1; S.C. Code Ann. § 16-17-560; W. Va. Code § 61-6-21.

⁴ See, e.g., Conn. Gen. Stat. Ann. § 46a-58; R.I. Gen. Laws § 11-53-3 (repealed, eff. July 2, 1998).

⁵ See, e.g. La. Rev. Stat. Ann. § 14:107.2.A

construction.⁶ Intimidation in the first degree requires two or more people acting together and covers physical injuries and threats. Intimidation in the second degree only requires one person and covers damages to property, offensive physical contact, threats to the target individual, and threats to individual's family. There is also a civil provision that allows someone to sue civilly for a violation of either of the first two.⁷ In the past there have been challenges to the statutes that help describe their boundaries and how they provide protections. The following is a discussion of the major cases challenging the constitutionality of Oregon's intimidation statutes.

State v. Plowman held that ORS 166.165 is not void under either the Oregon Constitution or United States Constitution for vagueness or violations of free expression.⁸ The appeals court below affirmed the defendant's conviction per curiam only citing State v. Hendrix 107 Or. App. 734 (1991) decided that same day.⁹

Plowman and three codefendants attacked two Mexican men at a convenience store while shouting "white power," calling them wetbacks, and demanding the victims speak English.¹⁰ A jury found Plowman and two friends guilty of violating ORS 166.165, among other charges.¹¹ Plowman argued that the statute's phrasing "because of their perception of [the victim's] race, color, religion, national origin or sexual orientation" was unconstitutionally vague under both the Oregon and Federal Constitution due process clauses and allowed for prosecution whenever one of the categories was involved.¹² The Court rejected the argument under both constitutions saying the statute is sufficiently clear and explicit about what conduct is forbidden and the phrase "because of their perception" simply means their perception does not have to be accurate.¹³ Further, the term "because of" does not allow prosecution whenever races of the parties differ; rather it requires the state to show a causal connection between perception and conduct.¹⁴

Plowman also argued that the statute restrains his right to free expression of his opinion and his right to speak under both the Oregon and Federal Constitution because, "a violation of it 'must necessarily be proved by the content of his speech or associations.'"¹⁵ The Court rejected this under both constitutions saying the statute is prohibiting effects, not expressions of opinions or target conduct on basis of expressive content respectively.¹⁶

Finally, Plowman reiterated the principles stated in State v. Robertson, 293 Or. 402, (1982), categorizing laws possibly violating Or. Const. art. I, § 8 into one of three types: (1) laws directed at speech *per se*; (2) laws directed at speech-caused harm; and (3) laws directed at harm *per se* and do not refer to speech.¹⁷ Plowman held that the statute falls into the third category because it does not refer to speech and, "Persons can commit

⁶ ORS 166.165, 166.155. Intimidation in the first and second degree, respectively.

⁷ ORS 30.198.

⁸ 314 Or. 157 (1992)(en banc), certiorari denied 508 U.S. 974 (1993).

⁹ Plowman, 107 Or. App. 782 (1991).

¹⁰ 314 Or. at 160.

¹¹ Id. at 159.

¹² Id. at 161

¹³ Id.

¹⁴ Id. at 162.

¹⁵ Id. at 163.

¹⁶ Id. at 163-64.

¹⁷ Id. at 164 (citing State v. Robertson, 293 Or. 402 (1982)).

that crime without speaking a word, and holding no opinion other than their perception of the victim's characteristics.”¹⁸ The Court upheld the trial court’s verdict.¹⁹ Plowman is followed by 18 other courts and distinguished in three concurring and dissents only.²⁰

State v. Hendrix held ORS 166.165 does not violate the free expression provisions under the Oregon or US Constitution, nor is it unconstitutionally vague under either constitution’s due process clauses.²¹ Hendrix arises out of the same event as Plowman, beating two Mexican men at a convenience store while shouting racial insults.²² Hendrix differs from Plowman because the defendant claimed he himself never made any statement about race or national origin during the beatings.²³ A jury found Hendrix and two friends guilty of violating ORS 166.165, among other charges.²⁴ On appeal, the court found that even though Hendrix himself did not shout racial epithets, a jury could infer his motive by his actions, which includes participating in the beating after his friends attacked and shouted at the victims.²⁵

Hendrix also claimed the statute was unconstitutional under the free expression provisions of both the Oregon and US Constitution because it punishes belief.²⁶ The court rejected this argument saying the statute regulates physical attacks that are the results of the opinions, not the opinions of subjects of communication themselves.²⁷

Hendrix further claimed, the statutory phrase “because of their perception of” is vague, lacks certainty, and therefore violates the privileges and immunities clause in the Oregon and US Constitution.²⁸ The court said the statute was not so vague because “a person of common intelligence can understand from its language the conduct that is prohibited.”²⁹ Also, the statute is, “sufficiently explicit to provide notice of what conduct is forbidden” under the due process clause of the US Constitution Fourteenth Amendment.³⁰ The court affirmed Hendrix’s conviction.³¹ Hendrix is followed by two other courts.³²

Hendrix was appealed to the Supreme Court of Oregon but on evidentiary issues, not constitutional ones.³³ The Oregon Supreme Court upheld the conviction saying that

¹⁸ 314 Or. at 165.

¹⁹ Id. at 169.

²⁰ LEXIS, 05-16-2012; *See: City of Eugene v. Miller*, 318 Or. 480, 494 (1994); State v. Maynard, 138 Or. App. 647, 660 (1996) *vacated*, 327 Or. 582 (1998) and *adhered to on reconsideration*, 168 Or. App. 118 (2000); State v. Stoneman, 132 Or. App. 137 (1994) *rev'd*, 323 Or. 536 (1996).

²¹ State v. Hendrix, 107 Or. App. 734 (1991)(en banc), aff'd 314 Or. 170, certiorari denied 508 U.S. 974.

²² Id. at 737-38.

²³ Hendrix at 738.

²⁴ Id. at 736.

²⁵ Id. at 738.

²⁶ Id. at 739.

²⁷ Id. at 739-740.

²⁸ Id. at 740.

²⁹ Id. at 740-741.

³⁰ Id. at 741.

³¹ Id. at 742.

³² LEXIS, 05-16-2012.

³³ State v. Hendrix, 314 Or. 170 (1992)(en banc).

even though Hendrix never himself shouted racial insults, a jury could still infer his intent by his participation in the beatings while his codefendants shouted the racial insults.³⁴

State v. Beebe held that ORS 166.155 does not deny equal protection under the Oregon or US Constitution and it is constitutionally permissible under a rational basis to enhance punishment for conduct motivated by racial animus.³⁵ Beebe was charged with violating ORS 166.155 by throwing a man to the ground intent to harass, annoy, and alarm because of the victim's race.³⁶

Beebe claimed the statute denied equal protection under both the Oregon and US Constitution because, “ . . . it gives greater protection to a victim who is assaulted because of his race, color, religion or national origin than to another person who is assaulted for some other reason.”³⁷ The court denied Beebe's claim because, “[a]nyone may be a victim of bigotry” and, “[t]he statute distinguishes between acts of harassment which are motivated by racial . . . animus and [those] which are not. . .”³⁸

Beebe held that it is constitutionally permissible under a rational basis to enhance punishment for conduct motivated by racial animus if there is a rational basis for the distinction.³⁹ The court found there was a rational basis because of legislative concern for social harm where, “[s]uch confrontations therefore readily—and commonly do—escalate from individual conflicts to mass disturbances.”⁴⁰ Furthermore, Beebe said previous enhancements based on conduct or intent, such as and murder of a police officer or kidnapping for ransom, have been upheld as valid.⁴¹ The appeals court reversed and remanded the trial court's sustaining of Beebe's demurrer.⁴²

Simpson v. Burrows held that an award of punitive tort damages for “true threats” under the intimidation statutes was not barred by Oregon Constitution Article I, § 8 general prohibition of punitive damages based solely on expressive conduct.⁴³ Simpson owned a town lodge in Christmas Valley Oregon and alleged that Burrows circulated and mailed letters to town residents that were hostile to Simpson because she was a lesbian.⁴⁴ Among other claims, Simpson sued under ORS 30.190 (later renumbered 30.198) for the tort of intimidation under ORS 166.155.⁴⁵

Burrows argued punitive damages under ORS 30.190(2)(b) are barred by Or.Const. Art. I, § 8, which prevents punitive damages for actions based solely on expressive conduct, because his intimidation via letters was solely expressive conduct.⁴⁶ However, Simpson said “true threats” are not protected expression under the Oregon

³⁴ Id. at 174.

³⁵ 67 Or. App. 738 (1984).

³⁶ Id. at 740.

³⁷ Id. at 741.

³⁸ Id.

³⁹ Id. at 742

⁴⁰ Id.

⁴¹ Id. at 741-742.

⁴² Id. at 742.

⁴³ 90 F. Supp. 2d 1108 (2000).

⁴⁴ Id. at 1113.

⁴⁵ Id.

⁴⁶ Id. at 1129, (citing *Hall v. The May Dep't Stores*, 292 Or. 131, 146–47 (1981) (award of punitive damages for intentional infliction of emotional distress accomplished by speech runs afoul of speech protections of Art. I, § 8 of Oregon Constitution); *Wheeler v. Green*, 286 Or. 99, 119 (1979) (punitive damages not recoverable when tort liability based on the content of speech)).

Constitution and plaintiffs can be awarded punitive damages for true threats.⁴⁷ The court said, “The proper inquiry is ‘whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault.’”⁴⁸ Based on the nature and content of Burrow’s letters, the court found they were true threats and not entitled to constitutional prevention of punitive damages.⁴⁹

In conclusion, courts have found the intimidation statutes ORS 166.165, 166.155, and 30.198 constitutional because they regulate conduct, not the speech or content. Further, the provisions are not unconstitutionally vague or overbroad because they clearly outline what conduct is prohibited. Also, the statutes do not afford more protection to people who are assaulted due to their category because anyone may be a victim of bigotry. Finally, punitive damages are allowed for intimidation tort claims if they are a “true threats” because “true threats” don’t have Constitutional expression protections.

Provisions not included in Oregon’s laws

When comparing Oregon hate crime provisions to other states and federal statutes there are two main areas where additions could be made. The first is in the category of classifications not covered, the second area is conduct not covered. Categories include age, gender, ancestry, homelessness, and ethnicity. Conduct includes interfering with exercise of civil rights, and disturbing religious meetings at their meeting places.

Categories

The category of age contextually deals mostly with the elderly and is often based on the actual or perceived vulnerability of the elderly.⁵⁰ According to the US Department of justice, “The prevailing stereotype of elderly fraud victims is that they are poorly informed, socially isolated individuals -- potentially suffering from mental deterioration-- who cling to old-fashioned ideas of politeness and manners that interfere with their ability to detect fraud.”⁵¹ The American Association of Retired Persons and U.S. Senate Special Committee on Aging also discuss the victimization of elderly people as an issue mostly in regards to fraud.⁵² While fraud itself is not an action covered by the current or suggested amendments to the Oregon intimidation statutes, the concern helps show the need in affording protections to the classification of age. Furthermore, “[c]ompared with violent crime victims in other age groups, elderly victims of non-lethal violence are less likely to use self-protective measures, such as arguing with the offender, running away, calling for help, or attacking the offender.”⁵³

⁴⁷ *Id.*

⁴⁸ *Id.* at 1129-30 (quoting *Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 372 (9th Cir.1996)).

⁴⁹ *Id.* at 1130.

⁵⁰ Dylan Fallik, *Incomplete Protection: The Inadequacy of Current Penalty Enhancement Provisions in Deterring Fraud Schemes Targeting the Elderly*, 18 *Elder L.J.* 335, 338 (2011)

⁵¹ *Id.* at 338- 339.

⁵² *Id.*

⁵³ Helia Garrido Hull, *The Not-So-Golden Years: Why Hate Crime Legislation Is Failing A Vulnerable Aging Population*, 2009 *Mich. St. L. Rev.* 387, 392 (2009).

The category of gender is arguably the biggest gap for classification coverage given American history regarding gender discrimination, women's suffrage, and feminism. In fact, many states already include provisions for gender or sex.⁵⁴ While it may be self evident, Weisburd and Levin note:

While the forms of gender-related crime vary, the message is constant; and it is a message of domination, power, and control. Socially constructed gender roles, predominantly characterized by male domination and female subordination, are enforced by various means along a coercive continuum. Moreover, the weak societal response in opposition reinforces the message that women are legitimate victims, appropriate targets for rage or outlets for anger.⁵⁵

Furthermore, "[r]ecognition of a gender category would properly place gender-motivated deprivations of civil rights on equal legal footing with other analogous deprivations based on race, national origin, religion, and sexual orientation."⁵⁶ Legitimizing gender as a protected class would "It also would send a clear message that gender-motivated crime is not merely a "private" or "family" matter, but instead a status-based civil rights violation that has the effect of denying an entire class of citizens of their rights."⁵⁷

Many states also include the category of ancestry.⁵⁸ "Ancestry may be defined as 'family descent or lineage.'"⁵⁹ The term "ancestry" can help to cover categories of individuals that don't quite fit in categories such as race, but are often still subject to bias based on their category. For example, often "race" is used interchangeably with "ethnicity," "ancestry," "culture," "color," "national origin," and even "religion."⁶⁰ However, "...individuals who share skin color often have very different ancestry, as is the case for sub-Saharan Africans, New Guinea highlanders, and Australian aborigines..."⁶¹ Furthermore, "'national origin' does not extend to many other

⁵⁴ See, e.g., Ariz. Rev. Stat. Ann. § 13-702.C.14; See, e.g., Cal. Penal Code §§ 422.6, 422.7, 422.75, and 1170.75; D.C. Code Ann. § 22-4001; 720 Ill. Comp. Stat. Ann. § 5/12-7.1(a); Iowa Code Ann. § 729A.1; La. Rev. Stat. Ann. § 14:107.2; Me. Rev. Stat. Ann. tit. 5, § 4684-A; Mich. Comp. Laws Ann. § 750.147b; Minn. Stat. Ann. §§ 609.2231, subd. 4, § 609.595, subd. 1(a) and 2, 609.749, subd. 3(1); Miss. Code Ann. § 99-19-301; Mo. Ann. Stat. § 557.035; Neb. Rev. Stat. § 28-111; N.H. Rev. Stat. Ann. § 651:6.I(g); N.J. Stat. Ann. §§ 2C:12-1.e, 2C:33-4.d, and 2C:44-3.e; N.Y. Penal Law §§ 240.30, 240.31, and 485.05; N.D. Cent. Code § 12.1-14-04; R.I. Gen. Laws § 12-19-38; R.I. Gen. Laws § 11-5-13 (repealed, eff. July 12, 1998); Vt. Stat. Ann. tit. 13, § 1455; W. Va. Code § 61-6-21; Wash. Rev. Code Ann. § 9A.36.080(1). Hawaii Revised Statutes § 846-51.

⁵⁵ Steven Bennett Weisburd & Brian Levin, "on the Basis of Sex": Recognizing Gender-Based Bias Crimes, 5 Stan. L. & Pol'y Rev. 21, 27 (1994)

⁵⁶ *Id.* at 42

⁵⁷ *Id.* at 42-43

⁵⁸ See, e.g., Cal. Penal Code §§ 422.6, 422.7, 422.75, and 1170.75; Colo. Rev. Stat. § 16-11-103(5)(n), 18-9-111(2), and 18-9-121; Del. Code Ann. tit. 11, § 1304(a)(2) and § 4209(e)(1)(v); Fla. Stat. Ann. § 775.085; Idaho Code § 18-7902; 720 Ill. Comp. Stat. Ann. § 5/12-7.1 and 730 Ill. Comp. Stat. Ann. § 5/5-5-3.2(a)(10); Iowa Code Ann. § 729A.1; Me. Rev. Stat. Ann. tit. 5, § 4684-A; Miss. Code Ann. § 99-19-301; Neb. Rev. Stat. § 28-111; N.Y. Penal Law §§ 240.30, 240.31, and 485.05; Okla. Stat. Ann. tit. 21, § 850; R.I. Gen. Laws § 12-19-38; Tenn. Code Ann. § 39-17-309; Vt. Stat. Ann. tit. 13, § 1455; Wash. Rev. Code § 9A.36.080(1); W. Va. Code § 61-6-21; Wis. Stat. § 939.645(1)(b).

⁵⁹ Juan F. Perea, Ethnicity and Prejudice: Reevaluating "National Origin" Discrimination Under Title VII, 35 Wm. & Mary L. Rev. 805, 832 (1994).

⁶⁰ Sharona Hoffman, Is There A Place for "Race" As A Legal Concept?, 36 Ariz. St. L.J. 1093, 1096-97 (2004)

⁶¹ *Id.* at 1118.

circumstances in which the country of one's origin is not at issue. For example, light skinned individuals who have an African-American ancestor or atheists who have Jewish ancestry are not covered by the 'national origin' concept."⁶² Ancestry would be an important inclusion to Oregon's intimidation statutes because it would provide protection to people who don't easily fit in one of the existing categories.

Homelessness as a protectable category might be debatable since it is not an immutable characteristic that one is born into.⁶³ It's only recently that states have been adding homelessness as a protected category under hate crimes.⁶⁴ Maine was the first to do so.⁶⁵ However, if the reason for not including a classification as a protected class is because the individual was not born into it, this would leave many people with disabilities without protection. The same could be said for religion.

Furthermore, "homeless people have been recognized as a class in court in order to bring suit against city policies that adversely affected or discriminated against them as a group because they were homeless."⁶⁶ For example, in Pottinger v. City of Miami the court called homelessness an involuntary status.⁶⁷ Pottinger held that Miami's practice of arresting homeless persons for performing such activities as sleeping, standing, and congregating in public places violated Eighth Amendment and right to travel.⁶⁸ Also, state ordinances under which homeless persons were arrested were unconstitutionally overbroad, the homeless individuals rights to privacy were not violated, and the seizure of their personal belongings violated the Fourth Amendment.⁶⁹ Homeless people are a vulnerable population because "Children, families, the mentally ill, veterans, victims of domestic abuse, people with disabilities, and people of color make up the fabric of the homeless population."⁷⁰ Also, homeless people, lacking the resources for adequate living conditions, would not likely be able to seek legal protections or remedies. If anything, "In many communities, the homeless have a tenuous relationship with law enforcement and fail to report acts of violence because of a perception that the police do not care what happens to the homeless."⁷¹ Implementing homelessness as a categorical protection would help deliver the message that bias-motivated violence against one of the more helpless groups of people in society is unacceptable.

Finally, the category of ethnicity is also not in Oregon's intimidation statutes, but is included in other states.⁷² The category of ethnicity is a bit broader than the others in that it, "consists of a set of ethnic traits that may include, but are not limited to: race,

⁶² Id. at 1147.

⁶³ *See*, Kate Davidson, Debating Homeless Hate Crimes, NPR, Oct. 18, 2009, available at <http://www.npr.org/templates/story/story.php?storyId=113916951>.

⁶⁴ Jeff McDonald, Should "Bum-Bashing" Be A Hate Crime?, 15 Pub. Int. L. Rep. 115, 116 (2010)

⁶⁵ *See*, Me. Rev. Stat. tit. 17-A, § 1151(8)(B) (West, Current with emergency legislation through Chapter 702 of the 2011 Second Regular Session of the 125th Legislature)

⁶⁶ Raegan Joern, Mean Streets: Violence Against the Homeless and the Makings of A Hate Crime, 6 Hastings Race & Poverty L. J. 305, 325 (2009)

⁶⁷ 810 F. Supp. 1551, 1562-65, 1992 WL 414704 (S.D. Fla. 1992)

⁶⁸ Id. at 1569.

⁶⁹ Id. at 1575, 1573.

⁷⁰ Sarah Finnane Hanafin, Legal Shelter: A Case for Homelessness As A Protected Status Under Hate Crime Law and Enhanced Equal Protection Scrutiny, 40 Stetson L. Rev. 435, 439 (2011)

⁷¹ Id. at 458.

⁷² *See, e.g.*, Ala. Code § 13A-5-13; Conn. Gen. Stat. Ann. § 53a-181b (repealed, 2000); 2000 Conn. Acts 00-72, §§ 1 to 3 (Reg. Sess.); Fla. Stat. Ann. § 775.085; Miss. Code Ann. § 99-19-301.

national origin, ancestry, language, religion, shared history, traditions, values, and symbols, all of which contribute to a sense of distinctiveness among members of the group.”⁷³ While similar to ancestry, it is not as reliant on family lineage. One of the best example areas it comes up in is the distinction between “Latinos” and “Hispanics” living in the United States.⁷⁴ Sandrino-Glasser discusses the difficulties the US Census Bureau has had with trying to categorize American citizens and immigrants who were from a wide variety of Central and South American origin, but still didn’t identify with the categories of “Spanish” or “Hispanic.”⁷⁵ Still, these people are likely to be perceived as belonging to a minority group and associated with the status, which has caused problems with issues of equal protection and other rights.⁷⁶ For this reason, Oregon would benefit by the addition of ethnicity to the intimidation statutes because it would provide protection to people who don’t easily fit in one of the existing categories.

Conduct

Compared to Oregon, some states have statutes that reference or are similar to federal criminal civil rights laws.⁷⁷ Generally, they make it a hate crime if the offender, because of bias-motivation, interferes with the exercise of rights under the US Constitution, State Constitution, or laws of the United States.⁷⁸ For example, Cal. Penal Code §§ 422.6 and 422.7 are very similar to 18 U.S.C.A. § 242. It is because of this that the court in People v. Lashley noted several rights protected by California or federal law might have been involved in the defendant’s shooting of a black person.⁷⁹ One of those rights included the constitutional right to privacy.⁸⁰ Another state whose bias law is similar to 18 U.S.C.A. § 242 is Massachusetts.⁸¹ In Com. v. Stephens, some Cambodian people were attacked near their home.⁸² Among other things the court said the victims had the state constitutional right to be safe and secure and to use one’s property peacefully and the right to use public streets and sidewalks free from discrimination or restriction on account of race, color, or national origin.⁸³ If similar provisions were

⁷³ Perea, *supra* at 833.

⁷⁴ Gloria Sandrino-Glasser, Los Confundidos: De-Conflating Latinos/as' Race and Ethnicity, 19 Chicano-Latino L. Rev. 69, 123 (1998)

⁷⁵ *Id.* at 130.

⁷⁶ *Id.* at 150.

⁷⁷ See 18 U.S.C.A. §§ 241, 242, 245, and 42 U.S.C.A. § 3631. Cal. Penal Code §§ 422.6 and 422.7; Mass. Gen. Laws Ann. ch. 265, § 37. See also People v. Lashley, 1 Cal. App. 4th 938, 2 Cal. Rptr. 2d 629, 634–35 (2d Dist. 1991), construction approved of and adopted in In re M.S., 10 Cal. 4th 698, 42 Cal. Rptr. 2d 355, 896 P.2d 1365, 1373 n.5 (1995); In re Joshua H., 13 Cal. App. 4th 1734, 17 Cal. Rptr. 2d 291 (6th Dist. 1993); Com. v. Stephens, 25 Mass. App. Ct. 117, 515 N.E.2d 606, 608–09 (1987).

⁷⁸ See, e.g., Alaska Stat. § 11.76.110; Cal. Penal Code §§ 422.6 and 422.7; Conn. Gen. Stat. Ann. § 46a-58; Del. Code Ann. tit. 11, § 1304(a)(1); Iowa Code Ann. § 729.5.1; Me. Rev. Stat. Ann. tit. 17, § 2931; Mass. Gen. Laws Ann. ch. 265, § 37; N.Y. Civ. Rights Law § 40-c; N.D. Cent. Code §§ 12.1-14-04 and 12.1-14-05; Tenn. Code Ann. § 39-17-309; Utah Code Ann. § 76-3-203.3; W. Va. Code § 61-6-21(b) and (c). See also, Kan. Stat. Ann. § 44-1027; Neb. Rev. Stat. § 20-344; Okla. Stat. Ann., tit. 25, § 1506.9.

⁷⁹ 2 Cal. Rptr. 2d 629, 635–36 (2d Dist. 1991).

⁸⁰ *Id.* at 636 (citing Cal. Const. art. I, § 1).

⁸¹ See Mass. Gen. Laws Ann. ch. 265, § 37 (West 2012).

⁸² 25 Mass. App. Ct. 117, 117-120 (1987).

⁸³ *Id.* at 124 (citing Mass. Declaration of Rights, art. 1 and Mass. Gen. Laws ch. 272, §§ 92A and 98).

included in the Oregon Intimidation statutes, it could likely cover conduct that isn't proscribed through ORS 166.165 or 166.155.

Some states passed statutes proscribing conduct that disturbs religious meetings or assemblies.⁸⁴ Others include any meeting that has a lawful purpose.⁸⁵ Challenges to such statutes have arisen under vagueness of the word “disturb” and conduct prohibited but have been unsuccessful.⁸⁶ Further, some challenges have been made saying that some of the proscribed conduct of interference might include protected speech.⁸⁷ This might be an issue with Oregon given the extra protection the state gives to freedom of expression, which is why part of this area is recommended for further evaluation. Still, the court in Riley held that the defendant's speech or views were not the target of the statute, but rather the manner which it was conveyed.⁸⁸

Finally, there is a small addition to the Oregon statutes that could be made in regards to State civil actions, ORS 30.200. This is the inclusion of the Attorney General to the list of State officials who can pursue a civil claim for relief. The addition of the State Attorney General is not uncommon, as other states have already done so.⁸⁹ In 2009, The Oregon Attorney General John Kroger appointed Portland lawyer Diane Schwartz Sykes to lead the Oregon Department of Justice Civil Rights program, which had been eliminated during the recession of the 1980s.⁹⁰ In personal interviews and conversations with Sykes, she expressed interest for her division to also be able to pursue civil actions for hate crimes, which might also lighten the load on the local District Attorney.⁹¹ In instances where the DA cannot meet the burden of proof for a criminal charge, a civil remedy can serve to ensure that the victim still receives compensation for his or her injuries and injunctive relief to prevent the reoccurrence of hate crimes by a perpetrator.⁹²

Provisions not likely includable

One of the areas I was asked to research was the constitutionality a “fighting

⁸⁴ See, e.g., Cal. Penal Code § 302; D.C. Code Ann. § 22-1114; Fla. Stat. Ann. §§ 871.01; Idaho Code § 18-6201 (repealed, eff. July 1, 1994); Mass. Gen. Laws Ann. ch. 272, § 38; Mich. Comp. Laws Ann. § 752.525; Miss. Code Ann. § 97-35-17; Nev. Rev. Stat. Ann. § 201.270; N.M. Stat. Ann. § 30-13-1; N.Y. Penal Law § 240.21; N.C. Gen. Stat. § 14-288.4(a)(7); Okla. Stat. Ann. tit. 21, § 915; R.I. Gen. Laws § 11-11-1; S.C. Code Ann. § 16-17-520; Va. Code Ann. § 18.2-415; W. Va. Code § 61-6-13.

⁸⁵ See, e.g., Fla. Stat. Ann. § 871.01; Mo. Ann. Stat. § 79.450.2; N.M. Stat. Ann. § 30-13-1; R.I. Gen. Laws § 11-11-1; Va. Code Ann. § 18.2-415.

⁸⁶ See, e.g., Riley v. District of Columbia, 283 A.2d at 819; Weidner v. State, 380 So. 2d at 1286; S.H.B. v. State, 355 So. 2d at 1176. See also, State v. Orzen, 493 P.2d at 768; D.L.B. v. State, 707 So. 2d 844 (Fla. Dist. Ct. App. 2d Dist. 1998), decision approved, 720 So. 2d 202 (Fla. 1998).

⁸⁷ See, e.g., Riley, 283 A.2d at 819; Weidner, 380 A.2d at 1286; S.H.B., 355 So. 2d at 1176; People v. Morrissey, 161 Misc. 2d 295, 614 N.Y.S.2d 686 (City Crim. Ct. 1994), aff'd as modified, 172 Misc. 2d 854, 661 N.Y.S.2d 904 (App. Term 1997).

⁸⁸ Riley, 283 A.2d at 824.

⁸⁹ See, e.g., Cal. Civil Code §§ 52(c) and 52.1(a); Mass. Gen. Laws Ann. ch. 12, § 11H; Minn. Stat. Ann. § 307.082; N.H. Rev. Stat. Ann. §§ 354-B:1 et seq.; N.J. Stat. Ann. § 2A:53A-21.c; N.C. Gen. Stat. § 99D-1(b); 42 Pa. Cons. Stat. Ann. § 8309(b); Vt. Stat. Ann. tit. 13, § 1458; W. Va. Code Ann. § 5-11-20(b).

⁹⁰ <http://www.doj.state.or.us/releases/2009/rel100509.shtml> accessed July 30th, 2012.

⁹¹ Interview with Diane Schwartz Sykes, Senior Assistant Attorney General, Civil Rights Unit Oregon Department of Justice, Portland, Or. (Jul. 13, 2012).

⁹² Id.

words” doctrine with bias motivation in mind, and the Oregon harassment statute ORS 166.065. The idea was that some states have statutes that proscribe verbal harassment and it wasn’t readily apparent if Oregon did. My research showed that the harassment statute does have a sort of "fighting words" provision but it was held unconstitutional in 2008. Further research suggests that the OR Constitution would not support a fighting words doctrine since OR does not allow a balancing test for suppression of speech. Also, it is not a historical exception under Robertson. This leaves the clear cutoff at actual threats,⁹³ which is already covered.⁹⁴

The case finding part of the harassment statute unconstitutional is State v. Johnson.⁹⁵ Here, Defendant was charged for making racist, obscene, and homophobic insults over an amplified system to two women, one White one African American, during a traffic stop for about five minutes.⁹⁶ The basis for finding that the statute was unconstitutional under Oregon's constitution was that the phrasing "abusive words or gestures, in a manner intended and likely to provoke a violent response" was facially overbroad because it "extend[s] to political, social, and economic confrontations that range from union picket lines to the protagonists on a host of divisive issues, and thus include a wide range of protected speech."⁹⁷ I'm doubtful that it could be amended to cure the constitutional defect for a few reasons.

First, the Court said the statute may, "protect a hearer or viewer from exposure to a reasonable fear of immediate harm due to certain types of expression, but it cannot criminally punish all harassing or annoying expression."⁹⁸ However, once it does cross the line of reasonable fear of immediate harm it is already covered by ORS 166.165(1)(b) or 166.155(1)(c). Further, the Court said statutes, "whose real focus is on some underlying harm or offense may survive the adoption of Article I, section 8, while those that focus on protecting the hearer from the message do not."⁹⁹ Also, "The harm that the statute seeks to prevent—harassment or annoyance—generally is one against which the Oregon Constitution does not permit the criminal law to shield individuals when that harm is caused by another's speech."¹⁰⁰

Second, I don't think a "fighting words" provision would survive constitutionality either. Fighting words are an exception to free expression under Chaplinsky v. New Hampshire.¹⁰¹ However, Chaplinsky uses a balancing test and the Oregon constitution forbids balancing tests for suppression of speech.¹⁰² Further, the Court in Johnson said that the constitutional issues only applied to criminal provisions, and made no comment on civil actions.¹⁰³

⁹³ Burrows, supra n. 46.

⁹⁴ ORS 166.165(1)(b), 166.155(1)(c)

⁹⁵ 345 Or. 190 (2008).

⁹⁶ Id. at 192

⁹⁷ Id. at 196.

⁹⁸ Id. at 197.

⁹⁹ Id.

¹⁰⁰ Id.

¹⁰¹ 315 US 568 (1942)

¹⁰² State v. Stoneman, 323 Or 536, 542, (1996).

¹⁰³ Johnson at 197 n.5.

Other underlying harm for proscribing speech

However, if there were some other verbal or expressive harm caused to the person the speech was directed at, especially one with bias-motivation, it might be able to survive a constitutional challenge. Research was then directed at seeing if there are any tort standards that could be used as a basis for criminal proscription. After examining Oregon's tort laws the best fit seems to be the intentional infliction of emotional distress (IIED). The question then became: under Oregon law, is it possible to include intentional infliction of emotional distress as a criminal offense addition to the intimidation statutes? The answer is likely not for a few reasons. Emotional distress is historically a damages claim, which is already included in the civil intimidation provision. Results of criminalizing intentional infliction of emotional distress (IIED) could prove unwieldy and ineffective. Oregon law for IIED generally requires some physical injury or contract. Of the few exceptions allowed, few involve bias elements. Of those, the bias aspect is limited to being a factor in consideration with other actions by the defendant, and cannot stand alone. Further, the durational requirements for IIED generally go beyond a single instance. The following cases outline IIED claims.

Generally speaking, emotional distress claims are not allowed without a physical impact or injury, but there can be exceptions to this rule.¹⁰⁴ The exceptions come from intentional torts, including IIED.¹⁰⁵ In order to succeed in a claim for IIED a plaintiff must show: "(1) Defendants intended to inflict severe emotional distress on plaintiff; (2) The acts did cause severe emotional distress and; (3) The defendant's acts consisted of 'some extraordinary transgression of the bounds of socially tolerable conduct'" or exceeded "any reasonable limit of social toleration."¹⁰⁶ According to McFanty v. Staudenraus no special relationship between the parties for the level of intent necessary, just that the defendant intended to inflict the emotional distress and that it was substantially certain to happen.¹⁰⁷

The following cases outline applicability of a bias motivated IIED provision. In Brewer v. Erwin the court said that insults, ill temper, and offensive jokes are not actionable conduct, and that that people are expected to endure these under contemporary standards of behavior.¹⁰⁸ Arguably, a bias motivated IIED tort might be distinguishable because it involves a level of animosity and harm that goes beyond harsh or inappropriate behavior common in day-to-day life. For example, the court in State v. Beebe said the legislature's rational basis interest for the Intimidation statute ORS 166.155 was valid because bias motivated conduct causes social harm, and wanting to prevent retaliation by the offended group was a legitimate state interest.¹⁰⁹ This could be bolstered by the case MacCrone v. Edwards Center, Inc. which states that even a single incident may be

¹⁰⁴ See Hammond v. Central Lane Communications Center, 312 Or. 17, 22-23 (1991); Chouinard v. Health Ventures, 179 Or. App. 507, 513-514 (2002).

¹⁰⁵ Hammond, 312 Or. at 22.

¹⁰⁶ Patton v. I.C. Penney Co., Inc., 301 Or. 117, 122 (1986) (quoting Hall v. May Dept. Stores Co., 292 Or. 131, 135, 137 (1981)); Schiele v. Montes, 231 Or. App. 43, 48 (2009).

¹⁰⁷ 321 Or. 532, 543-551 (1995).

¹⁰⁸ 287 Or 435, 457 (1979).

¹⁰⁹ 67 Or. App. 738, 742 (1984)

actionable.¹¹⁰ Furthermore, courts examine extreme and outrageous behavior as a fact-specific inquiry “on a case-by-case basis, considering the totality of the circumstances.”¹¹¹ Also, “[D]epending on the circumstances, insults or harassment directed to individuals on the basis of historically disfavored personal characteristics more readily transgress contemporary social bounds than do other forms of antagonistic behavior.”¹¹² So, bias-based insults or harassment differ in kind from other insults and are potentially offensive in the extreme, satisfying the third element of the tort¹¹³

In Lathrope-Olson, a Native American highway crew woman claimed her supervisor constantly called her “squaw,” made sexist remarks, threatened to push her into traffic, and repeatedly locked her out of the crew van when it was raining or snowing and no other shelter was near.¹¹⁴ The appeals court said that “acts of racism and sexual harassment are not simply rude and boorish, but are more properly characterized as the kind of conduct that a jury could find was intended to inflict deep, stigmatizing and psychic wounds on another person.”¹¹⁵ Further, the court said based on the totality of the circumstances, it was a question for the jury and overturned the trial courts grant of summary judgment to the defendant.¹¹⁶

However, in Clemente v. State, plaintiff brought action against her employer for gender discrimination, retaliation for making a gender discrimination complaint, and IIED.¹¹⁷ The trial court dismissed the claims based on issue preclusion.¹¹⁸ The appeals court reversed the trial court’s ruling on issue preclusion but said the court did not err in dismissing the IIED claim.¹¹⁹ The court said the plaintiff, “was not exposed to violence, nor was she repeatedly and viciously ridiculed. At most, she was subjected to an insensitive, mean-spirited supervisor who might have engaged in gender-based, discriminatory treatment...”¹²⁰

Thus, considering that IIED claims must be examined in the totality of the circumstances, it appears that bias-motivated speech or expression would only be a factor in a situation and is accompanied with other affronts to the individual. Unfortunately, this would likely make criminalizing bias-motivated IIED not very functional for trying to proscribe harassing speech or conduct.

¹¹⁰ 160 Or App 91, 100–101 (1999). See also Babick v. Oregon Arena Corp., 333 Or 401, 412–413 (2002) (defendant employer exposed plaintiff security guard to physical attack by concertgoers whom plaintiff had detained earlier).

¹¹¹ Lathrope-Olson v. Oregon Dept. of Transp., 128 Or App 405, 408 (1994).

¹¹² Williams v. Tri-County Metropolitan Transp. Dist. of Oregon, 153 Or App 686, 690 (1998)

¹¹³ See also Hofsheier v. Farmers Ins. Exchange, 154 Or App 538, 543 (1998) (“in Oregon, [racial] discrimination may form the basis for common law claims for intentional infliction of emotional distress”).

¹¹⁴ Lathrope-Olson, at 407.

¹¹⁵ Id. at 408.

¹¹⁶ Id.

¹¹⁷ Clemente v. State, 227 Or App 434, 436 (2009).

¹¹⁸ Id.

¹¹⁹ Id. at 442.

¹²⁰ Id. at 443.

Policy findings and comparisons

The other segment of this internship deals in part with policy findings in relation to hate crimes and some of the approaches other states have taken to help ameliorate the problem. As mentioned earlier, the scope of the internship focused mostly on legal aspects of Oregon hate crime laws. Later in this report are recommendations for future research, particularly in regards to Oregon-specific policies that could be enacted. The following is a general overview of ideas suggested and implemented by other states and organizations. Of these, there are three main areas that policies tend to focus on. They are school education, police training and policies, and some alternative division of government working with local hate crime policies.

Education

Education of children through public schools is an approach that aims to nip bias-motivated action in the bud, hopefully before it even becomes a problem for the individual later in life. For example, California enacted legislation for schools to “Adopt policies directed toward creating a school environment in kindergarten and grades 1 to 12, inclusive, that is free from discriminatory attitudes and practices and acts of hate violence.”¹²¹ In part, the statute requires schools to, “Prepare guidelines for the design and implementation of local programs and instructional curricula that promote understanding, awareness, and appreciation of the contributions of people with diverse backgrounds and of harmonious relations in a diverse society.”¹²² The education is not only for the students but is also for teachers and administrators for learning how to recognize bias-motivated conduct and address it.¹²³ In furtherance of this, California requires their education department to provide training for school personnel on hate crime issues.¹²⁴ Schools and the children attending them are not immune to incidents of hate crimes.¹²⁵ Policies that educate school personnel and students about hate crime and diversity also help protect the children from possible bias-motivated harassment and violence in the school.¹²⁶

The importance of youth education is also recognized by the federal government. For example, the Office of Juvenile Justice and Delinquency Prevention “provided a \$50,000 grant for the development of a school-based curriculum to address prevention and treatment of hate crimes by juveniles” and the “Education Development Center Inc. (EDC) developed a curriculum and pilot tested it in schools in Massachusetts, New York, and Florida. EDC in fiscal year 1996 worked to provide the curriculum and related

¹²¹ Cal. Educ. Code § 233(a)(1) (West 2012)

¹²² Cal. Educ. Code § 233(b)(1) (West 2012)

¹²³ Cal. Educ. Code § 233(a)(4)-(7) (West 2012)

¹²⁴ See Cal. Educ. Code § 233.8 (West 2012)

¹²⁵ Daniel R. Clark, Chapter 955: California's Response to Rising Hate Crimes Among California's Youth, 32 McGeorge L. Rev. 517, 518 (2001).

¹²⁶ Justin Wieland, Peer-on-Peer Hate Crime and Hate-Motivated Incidents Involving Children in California's Public Schools: Contemporary Issues in Prevalence, Response and Prevention, 11 U.C. Davis J. Juv. L. & Pol'y 235, 247 (2007)

training to school districts and juvenile justice agencies.”¹²⁷

Police

Public policy with state police is one of the bigger areas of policy concern. Despite all the hate crime legislation that could be passed and written in books, arguably “...bias crimes do not legally exist until the police say they do.”¹²⁸ Bell describes police as “street-level bureaucrats”¹²⁹ and most hate crime legislation enforcement is based on the discretion of the police.¹³⁰ Often times a bias-motivated crime can go un-charged because of the officer’s lack of training, social norm of not considering an action bias-motivated, or not caring about bias-motivated crimes at all.¹³¹ Some states, including Oregon, have statutes requiring training of law enforcement officers in identifying, addressing, reporting, and recording hate crimes.¹³² Still, the effectiveness of such programs and legislation would likely be bolstered by placing extra emphasis on recognizing hate crimes and doing follow-up training afterwards.¹³³

From personal experience, Oregon might benefit from having a more publically accessible and better catalogued hate crime report. Oregon Annual Uniform Crime Reports are available as annual compilations on the Oregon State Police’s website for years going back to 1995.¹³⁴ Part of these reports includes bias-motivated crimes using the FBI’s categorical definitions and lists some of the characteristics of the incidents including categories and crimes.¹³⁵ However, they do not show the specific correlation between the categories, i.e. what type of offender committed what time of crime against what type of victim.¹³⁶ Still, this type of reporting would be possible since the forms used in submitting incidents to the Law Enforcement Data System would allow for this.¹³⁷

In regards to what gets reported, one report outlines various reasons why some people don’t report hate incidents. These include but are not limited to: lack of knowledge about hate crimes and how the laws are applied, fear of retaliation for reporting, fear of again being victimized by law enforcement or a belief that law enforcement does not want to address hate crimes, lack of proficiency in the English language and of knowing how to report hate crimes, and fear of being identified as an undocumented immigrant and being deported.¹³⁸ In order to address some of these

¹²⁷ Bureau of Justice Assistance, [A Policymaker’s Guide to Hate Crimes](#). U.S. Dept. of Justice Office of Justice Programs, p. 36. (Mar. 1997), retrieved Jul. 17, 2012 from www.ncjrs.gov/pdffiles1/bja/162304.pdf.

¹²⁸ Jeannine Bell, [Policing Hatred: Police Bias Units and the Construction of Hate Crime](#), 2 Mich. J. Race & L. 421, 423 (1997)

¹²⁹ Id. at 448 (quoting Michael Lipsky, *Street-Level Bureaucracy* at xi (1980)).

¹³⁰ Id. at 454.

¹³¹ Id. at 451-456.

¹³² See, e.g., 20 Ill. Comp. Stat. Ann. § 2605/55a(A)31; Mass. Gen. Laws Ann. ch. 6, § 116B; Minn. Stat. Ann. § 8.34 (requiring training for prosecuting attorneys); Or. Rev. Stat. Ann. § 181.642; Pa. Stat. Ann. tit. 71, § 251(a.1).

¹³³ Bell at 459-60.

¹³⁴ http://www.oregon.gov/OSP/CJIS/annual_reports.shtml retrieved Jun. 18, 2012

¹³⁵ Id.

¹³⁶ Id.

¹³⁷ www.oregon.gov/OSP/CJIS/docs/BIAS_FORM.pdf retrieved Jun. 18, 2012

¹³⁸ [Reporting Hate Crimes, The California Attorney General’s Civil Rights, Commission on Hate Crimes](#), <http://caag.state.ca.us/publications/civilrights/reportingHC.pdf> at p. 11.

issues, California created a pamphlet in multiple languages that officers can hand out to people they've identified as victims of hate incidents.¹³⁹ The pamphlet seeks to educate people about hate crimes in general, their options if they are a victim, and whom they can get in touch with.¹⁴⁰ One example of outreach I was able to find was Oregon's DOJ website which has a multi-lingual page where people can report hate crimes.¹⁴¹ This was also one of the suggestions in the California Attorney General's report.¹⁴²

The National Crime Prevention Council (NCPC) suggests a related strategy of placing "a substation within or close to immigrant neighborhoods. Employing bilingual community service officers, distributing bilingual crime prevention materials, and being open to developing a greater cultural sensitivity can help law enforcement improve relationships, gain the trust of the community, and better help them address local crime problems."¹⁴³ As a success story of such a strategy, the NCPC talks about the WINGS program in Iowa dealt with a local Vietnamese gang terrorizing the ethnic community by hiring a special police officer, training him in key Vietnamese phrases and cultural sensitivity training.¹⁴⁴ Because of this, the local community developed a working relationship with the officer and was not afraid to report incidents for investigation.¹⁴⁵

Alternative division of government

Finally some organizations advocate the creation of an independent governmental body to deal with these specific issues. For example, the California Attorney General's report suggests creating a human relation commissions to sponsor hate violence prevention and response networks and providing it with financial support.¹⁴⁶ This commission would train network participants, develop a standardized directory of services for victims of hate crimes and hate incidents, and include other community organizations and religious institutions in the network that represent the diversity of the population in the area to be served.¹⁴⁷ This would also serve to be a non-uniformed face that individuals could reach out to if they come from a background where they fear law enforcement or military officials.

The commission could also be used for community outreach via different mediums and methods. The NCPC talks about possible means of media outreach that could be accomplished such as television, newspapers, "community events focusing on reducing prejudice and cover the events for the community... festivals, documentaries, and PSAs"¹⁴⁸ It could serve to educate communities not only about diversity issues, but provide them with information about hate crimes and their options, similar to the

¹³⁹ <http://oag.ca.gov/civil/content/hatecrimes>, retrieved Jul. 16, 2012.

¹⁴⁰ Id.

¹⁴¹ http://www.doj.state.or.us/help/explain_report_a_crime.shtml retrieved Jul. 16, 2012

¹⁴² <http://caag.state.ca.us/publications/civilrights/reportingHC.pdf> at p. 23.

¹⁴³ <http://www.ncpc.org/topics/hate-crime/strategies/strategy-raising-cultural-awareness> retrieved Jul. 16, 2012.

¹⁴⁴ Id.

¹⁴⁵ Id.

¹⁴⁶ Reporting Hate Crimes, supra at p. 24.

¹⁴⁷ Id.

¹⁴⁸ <http://www.ncpc.org/topics/hate-crime/strategies/strategy-media-campaigns-about-community-standards-for-tolerance> retrieved Jul. 16, 2012.

pamphlet that California's police hand out.

Areas for future research

While the findings of this research do address some issues, there are still other areas that would be beneficial to look into. Dividing again into two main areas are legal suggestions and policy suggestions. This is not to say future research should be limited to these areas, but they would be great for continuing in this line of work and probably lead to further investigations.

One suggestion is to look into the necessity of "color of law" provisions for government officials and police officers who could possibly be offenders of hate crimes, and their possible state immunity. Government and law enforcement individuals are valued as gatekeepers and guardians for the community. However, to deny that they are human and ignore the shortcomings being human would hinder justice for possible victims of hate crimes by these officials. I am not entirely sure such a provision would be necessary or if there are already related statutes. Still, it would be good to research either way.

Another suggestion is to see about aiding and abating provisions for hate crimes. One of the concerns for hate crimes comes from hate groups and gangs recruiting youth and others for commission of hate crimes. This would be a useful tool in preventing and punishing hate groups that get others to do their bidding, while remaining largely untouched. This would also send a message to the community that groups that advocate and recruit others for hate violence are not tolerated.

Along those lines, some suggestions have been in regards to speech conduct, specifically inciting others to riot. As mentioned before, this might be protected speech under the Oregon constitution but it is still another facet that would better define the boundary of proscribable speech in regards to bias motivation.

Finally, there is the possibility of having anti-cross burning statutes and proscribing other hate symbols. Some states have passed legislation regulating such actions if they are narrowly tailored as threats, on private property, with a certain mens rea requirement.¹⁴⁹

As far as policy research suggestions go, they generally also focus on the three areas of education, police, and governmental commissions. Broadly speaking, it would help to look into Oregon's education policies. One of the other concerns brought up which was unable to be investigated is what happens to all the hate crime charges after arrest? Are they plea-bargained out? Are they dropped? How many are actually followed through.

In regards to Oregon police training it would be helpful to know the specific instructions and curriculum given to police officers. What are they being taught? What does it encompass? Are they required to have follow-up training or testing years later? If so what is the frequency?

¹⁴⁹ See, e.g., Cal. Penal Code § 11411; Del. Code Ann. tit. 11, § 805; Fla. Stat. Ann. § 876.17, § 876.18 (survived First Amendment challenge in *State v. T.B.D.*, 656 So. 2d 479 (Fla. 1995)), § 876.20; Md. Ann. Code art. 27, § 10 (unconstitutional in *State v. Sheldon*, 332 Md. 45, 629 A.2d 753 (1993)); N.C. Gen. Stat. § 14-12.12(a); S.C. Code Ann. § 16-7-120 (unconstitutional in *State v. Ramsey*, 311 S.C. 555, 430 S.E.2d 511 (1993)).

Finally, it would be helpful to know if Oregon is specifically doing anything about diversity educations and bias-motivation education in secondary schools and colleges. Similar to the educational policies mentioned earlier, it would be worthwhile to see if such policies exist and if not, would Oregon benefit from having them? Again, these suggestions are in no way meant to be limiting, but are guidance for any future investigations that I feel would be helpful with addressing the issue of hate crimes in Oregon.

Possible Legislative Amendment

Below is an outline of what a possible amendment proposal could look like for the Oregon intimidation statutes based on the findings of this research. It's worth noting that there are similarities between this and the proposed 2011 Oregon Senate Bill No 44 from the Oregon Seventy-Sixth Legislative Assembly, which never made it out of committee. In many ways, the suggestions of SB 44 reflect the findings of my research and make some pretty straight-forward suggestions, like renaming "crime of intimidation" to "hate crime." This outline is in no way definitive but could be helpful in guidance for future proposals. The wording in strikethrough signifies deletions, the wording in blue highlights signify additions.

ORS 166.165 could be amended to read:

166.165. (1) Two or more persons acting together commit the ~~crime of intimidation~~ a **hate crime** in the first degree, if the persons:

- (a)(A) Intentionally, knowingly or recklessly cause physical injury to another person because of the actors' perception of that person's race, color, religion, **national origin, age, ancestry, ethnicity, gender, homelessness**, disability or sexual orientation or ~~national origin~~; or
- (B) With criminal negligence cause physical injury to another person by means of a deadly weapon because of the actors' perception of that person's race, color, religion, national origin, ethnicity, gender, disability or sexual orientation or national origin;
- (b) Intentionally, because of the actors' perception of another person's race, color, religion, **national origin, age, ancestry, ethnicity, gender, homelessness**, disability or sexual orientation or ~~national origin~~, place another person in fear of imminent serious physical injury; or
- (c) Commit such acts as would constitute the crime of ~~intimidation~~ a **hate crime** in the second degree, if undertaken by one person acting alone.

(2) A person commits a hate crime in the first degree if the person:

(a) Intentionally, knowingly or recklessly causes physical injury to another person because of the actor's perception of the other person's race, color, religion, national origin, ethnicity, gender, disability or sexual orientation; or

(b) With criminal negligence causes physical injury to another person by means of a deadly weapon because of the actor's perception of the other person's race, color, religion, national origin, age, ancestry, ethnicity, gender, homelessness, disability or sexual orientation.

(2) (3) ~~Intimidation~~ A hate crime in the first degree is a Class C felony.

ORS 166.155 could be amended to read:

166.155. (1) A person commits the ~~crime of intimidation~~ a hate crime in the second degree if the person:

(a) Tamper or interferes with property, having no right to do so nor reasonable ground to believe that the person has such right, with the intent to cause substantial inconvenience to another because of the person's perception of the other's race, color, religion, national origin, age, ancestry, ethnicity, gender, homelessness, disability or sexual orientation or ~~national origin~~;

(b) Intentionally subjects another to offensive physical contact because of the person's perception of the other's race, color, religion, national origin, age, ancestry, ethnicity, gender, homelessness, disability or sexual orientation or ~~national origin~~; or

(c) Intentionally, because of the person's perception of race, color, religion, national origin, age, ancestry, ethnicity, gender, homelessness, disability or sexual orientation or ~~national origin~~ of another or of a member of the other's family, subjects the other person to alarm by threatening:

- (A) To inflict serious physical injury upon or to commit a felony affecting the other person, or a member of the person's family; or
- (B) To cause substantial damage to the property of the other person or of a member of the other person's family.

(d) Intentionally, because of the person's perception of race, color, religion, national origin, age, ancestry, ethnicity, gender, homelessness, disability or sexual orientation of the other interferes with the exercise or enjoyment of rights secured by the United States Constitution or the laws of the United States or of rights secured by the Constitution of Oregon.

(e) Intentionally creates a disturbance of religious meeting or any public meeting that has a lawful purpose. The acts of disturbance of must be such that a reasonable person would expect them to be disruptive. Finally, the acts must, in fact, significantly disturb the assembly.

(2) ~~Intimidation~~ A hate crime in the second degree is a Class A misdemeanor.

(3) For purposes of this section, 'property' means any tangible personal property or real property.

ORS 30.200 could be amended to read:

30.200. (1) If ~~any~~ the Attorney General or a district attorney has reasonable cause to believe that any person or group of persons is engaged in violation of ORS 166.155 or 166.165, the Attorney General or a district attorney may bring a civil claim for relief in the appropriate court, setting forth facts pertaining to such violation, and request such relief as may be necessary to restrain or prevent such violation. In addition to any other available remedy, the court:

(a) May order the person or group to make restitution in specific amounts to any person who suffered any ascertainable loss of money or property as a result of the violation.

(b) May make any additional orders or judgments as may be necessary to restore to any person in interest any moneys or property, real or personal, of which the person was deprived as a result of the violation.

(c) May impose a penalty of not more than \$250,000.

(d) Shall award reasonable attorney fees, expert witness fees and investigative costs to the Attorney General or district attorney if the Attorney General or district attorney prevails in the action.

(e) May award reasonable attorney fees and expert witness fees to a defendant who prevails in an action under this section if the court determines that the Attorney General or district attorney had no objectively reasonable basis for asserting the claim or no reasonable basis for appealing an adverse decision of the trial court.

(2) A temporary restraining order may be granted without prior notice to the person or group if the court finds there is a threat of immediate harm to the public health, safety or welfare. Such a temporary restraining order shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the person restrained consents that it may be extended for a longer period.

(3) Any claim for relief under this section does not prevent any person from seeking any other remedy otherwise available under law.

ORS 30.198 should be amended to read:

30.198. (1) Irrespective of any criminal prosecution or the result thereof, any person

injured by a violation of ORS 166.155 or 166.165 shall have a civil action to secure an injunction, damages or other appropriate relief against any and all persons whose actions are unlawful under ORS 166.155 and 166.165.

(2) Upon prevailing in such action, the plaintiff may recover:

- (a) Both special and general damages, including damages for emotional distress; and
- (b) Punitive damages.

(3) The court shall award reasonable attorney fees to the prevailing plaintiff in an action under this section. The court may award reasonable attorney fees and expert witness fees incurred by a defendant who prevails in the action if the court determines that the plaintiff had no objectively reasonable basis for asserting a claim or no reasonable basis for appealing an adverse decision of a trial court.

(4) The parent, parents or legal guardian of an unemancipated minor shall be liable for any judgment recovered against such minor under this section, in an amount not to exceed \$5,000.

(5) Actions brought under this section shall be commenced within one year from the violation. However, whenever any complaint is filed by the Attorney General or a district attorney under ORS 30.200 to prevent, restrain or punish violations of ORS 166.155 or 166.165, running of the statute of limitations with respect to every private right of action under this section and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof.

(5) Actions brought under this section shall be commenced within one year from the violation. However, whenever any complaint is filed by the Attorney General or a district attorney under ORS 30.200 to prevent, restrain or punish violations of ORS 166.155 or 166.165, running of the statute of limitations with respect to every private right of action under this section and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof.

ORS 181.550 could be amended to read:

181.550. (1) All law enforcement agencies shall report to the Department of State Police statistics concerning crimes:

- (a) As directed by the department, for purposes of the Uniform Crime Reporting System of the Federal Bureau of Investigation.
- (b) As otherwise directed by the Governor concerning general criminal categories of criminal activities but not individual criminal records.
- (c) Motivated by prejudice based on the perceived race, age, ancestry, ethnicity, gender, homelessness color, religion, sexual orientation, national origin, sexual orientation, ethnicity, gender, marital status, political affiliation or beliefs, membership or activity in or on behalf of a labor organization or against a labor

organization, physical or mental disability, age, economic or social status or citizenship of the victim.

(d) And other incidents arising out of domestic disturbances under ORS 133.055 (2) and 133.310 (3).

(2) All law enforcement agencies shall report to the Department of Justice, in accordance with rules adopted by the Department of Justice, statistics concerning crimes motivated by prejudice based on the perceived race, color, religion, national origin, ethnicity, gender, disability or sexual orientation of the victim.

(2) (3) The Department of State Police shall prepare:

(a) Quarterly and annual reports for the use of agencies reporting under subsection (1) of this section, and others having an interest therein;

(b) An annual public report of the statistics on the incidence of crime motivated by prejudice based on the perceived race, age, ancestry, ethnicity, gender, homelessness, color, religion, sexual orientation, national origin, sexual orientation, ethnicity, gender, marital status, political affiliation or beliefs, membership or activity in or on behalf of a labor organization or against a labor organization, physical or mental disability, age, economic or social status or citizenship of the victim;

(c) Quarterly and annual reports of the statistics on the incidence of crimes and incidents of domestic disturbances; and

(d) Special reports as directed by the Governor.

Correlating Oregon statutes that reference ORS 166.165, 166.155, 30.198, 30.200, and 181.550 for categorical, offense provisions, and punishment references should also be amended to reflect proposed changes. For efficiency and to save space they are not included in their entirety but are as follows: ORS 131.602, 90.396, 163.707, 166.715, 137.225, 137.712.