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Bridging the First Degree Murder Gap: Eliminating Sentencing Disparities for Hate Crimes in California

Amilia Sanders

Code Sections Affected

Penal Code § 190.03 (new).

AB 208 (Knox); 1999 STAT; Ch. 566

I. INTRODUCTION

Prior to Chapter 566, a perpetrator of a hate crime who targeted and killed her victim because of her race, color, religion, nationality, or country of origin received a more stringent penalty than an individual who targeted her victim because of her victim's sexual orientation, gender, or disability.¹ For example, suppose Amanda intentionally shot her victim because she was Asian American, and Brenda intentionally shot her victim because she was physically disabled. Assuming that the victims survived the attacks, both Amanda and Brenda would be subject to penalty enhancements for targeting a victim who belonged to a protected class of individuals.² However, if the victims died as a result of the attacks, only Amanda, who targeted her victim because of race, would face a *mandatory* maximum penalty of death or a *mandatory* minimum penalty of life in prison without the possibility of parole.³ Brenda, who targeted her victim because of disability, would face no such mandatory sentence.⁴ Instead, the murderer of a disabled victim would face standard penalties governed by California homicide law including death, life in prison without the possibility of parole, or anywhere from 25 years to life in prison.⁵

Introducing Chapter 566, Assemblymember Wally Knox attempts to lessen the disparity between penalties imposed upon individuals who commit crimes based on race, color, religion, nationality, or country of origin and those imposed on

1. CAL. PENAL CODE §§ 190.2(a)(16), 422.75(a) (West Supp. 2001).

2. *Id.* § 422.75(a) (West 1999).

3. *See id.* § 190.2(a) (West 1999) (imposing a penalty of death or life in prison without the possibility of parole if the perpetrator is found guilty of first degree murder and one of the enumerated special circumstances are found to exist); *see also id.* § 190.2(a)(16) (West 1999) (imposing a penalty of life in prison without the possibility of parole or death only if "[t]he victim was intentionally killed because of his or her race, color, religion, nationality, or country of origin").

4. *See infra* Part III.A (explaining the state of California homicide and hate crimes law prior to the enactment of Chapter 566).

5. *See id.* § 190(a) (West Supp. 2001) (stating that, "[e]very person guilty of murder in the first degree shall be punished by death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life").

individuals who commit crimes based on sexual orientation, gender, or disability.⁶ Assemblymember Knox argues that the current disparity in California law sends potential perpetrators, like Brenda, the message that some individuals are less valuable than others.⁷ Chapter 566 imposes a mandatory sentence of life in prison without the possibility of parole for first degree murders committed because of the victim's sexual orientation, gender, or disability.⁸ Thus, both Amanda and Brenda, in the above example, would be subject to a penalty of life in prison without the possibility of parole.

While Chapter 566 purports to bring uniformity to California hate crimes law, opposition to the law does exist.⁹ Additionally, as with all hate crimes legislation, concerns about the effect that Chapter 566 may have on individuals' First Amendment right to free speech also exist.¹⁰ However, with the rise in the commission of hate crimes in California and the impact that hate crimes have on their victims and minority groups, legislation is needed to convey the message that hate crimes, no matter who they target, will no longer be tolerated.¹¹ Chapter 566 effectively punishes hate crimes without chilling free speech by focusing on the perpetrator's conduct, not thought, and by the inclusion of an express causation requirement.¹²

II. BACKGROUND

A. *The Prevalence of Hate Crimes Based on Sexual Orientation, Gender, and Disability*

Violent crimes committed against individuals due to their gender, sexual orientation, and disability are increasing at an alarming rate.¹³ Approximately 7 out

6. Letter from Wally Knox, Assemblymember, to Governor Gray Davis 1 (Sept. 8, 1999) [hereinafter Knox-Davis Letter] (copy on file with the *McGeorge Law Review*).

7. *Id.*

8. CAL. PENAL CODE § 190.03(a) (enacted by Chapter 566).

9. *See infra* Part V.B (outlining the opposition of the American Civil Liberties Union and the California Public Defender's Association to Chapter 566).

10. *See infra* Part V.D (describing two United States Supreme Court cases, one of which invalidated a hate crimes statute on First Amendment grounds and the other which rejected a First Amendment challenge to a state hate crimes statute).

11. *See infra* Part II.A (describing the rise in the commission of hate crimes in California); *see infra* Part II.B (explaining the impact that hate crimes have on their victims, minority groups, and society).

12. *See infra* Part V.D (explaining that Chapter 566 complies with United States Supreme Court guidelines for hate crimes statutes by punishing conduct). Additionally, Chapter 566 adopts the California Supreme Court's interpretation of "because of" requiring the bias motivation to be either the cause in fact or substantial factor in the commission of the hate crime). *Id.*

13. *See* State Action: *State Issues: Protecting Citizens from Hates Crimes*, available at www.cfpa.org/issues/hate_crimes/talk.cfm (last visited Feb. 1, 2001) (copy on file with the *McGeorge Law Review*) (stating that "[w]hile violent crime overall is dropping, hate crimes are on the rise in America. From 1991 to 1995, reported hate crimes almost doubled from 4,558 to 7,947").

of every 1,000 women in the United States are victims of rape.¹⁴ Additionally, at least one-fifth of all American women are physically assaulted by a male partner.¹⁵ Furthermore, over one-half of all women murdered in the United States were murdered by their male partners.¹⁶

Hate crimes against gays are also on the rise, and they are becoming more violent.¹⁷ Recently, a number of high profile hate crimes against gays have been brought to light by the media. In October of 1998, Matthew Shepard was beaten, tied to a fence, and left to die.¹⁸ Four months later, Billy Jack Gaither was beaten to death with the handle of an axe and then set on fire.¹⁹ In March of 1999, Henry Edward Northington's severed head was placed in a walkway known as a meeting place for homosexual men.²⁰ In July of 1999, Gary Matson and Winfield Scott Mowder were shot to death in their bed.²¹

Furthermore, one in five lesbian women and one in four gay men in the Sacramento area has been the victim of a hate crime since their sixteenth birthday.²² Close to 18% of all hate crimes committed in California were committed against individuals on the basis of their sexual orientation.²³ This number is second only to hate crimes committed in California on the basis of race or ethnicity.²⁴

Statistics regarding the number of individuals in the United States who are victims of crimes due to disability are not widely available.²⁵ Disability was only recently added as a category to the Hate Crimes Statistics Act and the Federal

14. See AMERICAN PSYCHOLOGICAL ASSOCIATION: HATE CRIMES TODAY: AN AGE-OLD FOE IN MODERN DRESS 10 (1998) [hereinafter *Hate Crimes Today*] (reporting that 7.2 out of every 1000 women were victims of rape in 1998); see *infra* Part V.C. (explaining that although not every act of violence against a woman is a hate crime, society should rethink its attitude toward completely excluding crimes against woman has even possibly constituting a hate crime).

15. See *Hate Crimes Today* (noting that an estimated two million women, at least to 21% of all women are physically assaulted by a male partner each year); *id.*

16. See *id.* (indicating that from 1980 to 1985, 52% of all women murdered in the United States were murdered by their male partners).

17. See generally Myriam Marquez, *Laws Do Little to Protect Gays*, SUNDAY GAZETTE-MAIL, July 25, 1999 (citing reports by the National Coalition of Anti-Violence Programs) (copy on file with the *McGeorge Law Review*).

18. See generally *Slain Student's Mom to Speak at Anti-Hate Rally*, CHICAGO TRIB., Sept. 13, 2000 (stating that Mathew Shepard "was found tied to a fence, brutally beaten and left to die").

19. See generally John Koch, *Weak Look at Antigay Attitudes*, BOSTON GLOBE, Feb. 15, 2000 (describing Billy Jack Gaither's death as "an outtake from 'Goodfellas'").

20. See Seattle Gay News Online, *Beheading Stuns Gay Community in Virginia*, available at www.sgn.org/Archives/sgn.3.12.99/beheading.htm (last visited Feb. 1, 2001) (explaining that Henry Edward Northington's head was found "placed squarely in the center of [a walkway leading to "a popular summertime meeting place for gays]").

21. See generally *Supremacists Accused of Synagogue Arsons*, SALT LAKE TRIB., at A7, Mar. 18, 2000 (describing the arrest of two men for shooting Gary Matson and Winfield Scott Mowder in their home).

22. *Hate Crimes Today*, *supra* note 14, at 11.

23. See California Department of Justice, *Hate Crime in California, 1996*, available at www.caag.state.ca.us/cjsc.hatecrim.html [hereinafter Department of Justice website] (last visited June 29, 2000) (copy on file with the *McGeorge Law Review*) (reporting that 362 out of 2,054 hate crimes committed in California in 1996 were committed against individuals on the basis of their sexual orientation).

24. *Id.*

25. See *Hate Crimes Today*, *supra* note 14, at 12 (noting that such statistics are not available from the American Psychological Association).

Bureau of Investigation only started collecting information regarding disabled victims in 1997.²⁶ However, in 1996, the California Department of Justice reported that 2 out of 2,054 reported hate crimes were committed against individuals because of physical or mental disabilities.²⁷

B. *The Impact of Hate Crimes on Families and Society*

While the victims of hate crimes endure the ultimate suffering, hate crimes also traumatize the victim's families as well.²⁸ Family members often feel guilty for not being able to protect their loved ones from hate crime perpetrators.²⁹ Additionally, these feelings of guilt and depression affect the family members' performance at school or work.³⁰ Family members also lose trust in the criminal justice system if the perpetrator is not caught or is not punished to the full extent of the law.³¹

In addition to the emotional trauma that families endure, they may also experience severe financial difficulties. If the victim of the hate crime dies as a result of the crime, the family may be responsible for funeral expenses and medical bills.³²

Extending beyond families of victims, hate crimes also impact society as a whole.³³ Hate crimes can effectively intimidate members of the community to which the hate crime victim belonged.³⁴ Members of the targeted community harbor feelings of vulnerability and feel neglected by law enforcement agencies.³⁵ If members of the targeted communities are left to feel this way, they become suspicious and less trusting of members of other groups.³⁶

Additionally, increased fear within a community actually leads to a decrease in reports of hate crimes committed against members of that community.³⁷ Community members targeted as hate crime victims are often apprehensive about reporting additional hate crimes because of the fear of retaliation by the perpetrator.³⁸

26. *Id.* (stating that the category was added in 1994).

27. See Department of Justice website, *supra* note 23 (reporting that .01% percent of the hate crimes reported in 1996 were committed because of the victim's physical or mental disability).

28. PFLAG, *Hate Crimes Hurt Families*, available at www.pflag.org/hatecrimes/hatecrimes_main.htm (last visited Feb. 1, 2001).

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. American Psychological Association, *Testimony of the American Psychological Association on the Hate Crimes Prevention Act, Submitted to the House Judiciary Committee*, July 21, 1998, at 2, available at www.apa.org/ppo/pi/hcpa.html (last visited May 12, 1999) [hereinafter APA Testimony].

34. State Action, *Protecting Citizens from Hate Crimes: Overview* at www.cfpa.org/issues/hatecrimes/index.cfm (last visited Feb. 1, 2001).

35. *Id.*

36. *Id.*

37. APA Testimony, *supra* note 33, at 2.

38. *Id.*

III. EXISTING CALIFORNIA AND FEDERAL LAW

A. Existing and California “Hate Crimes” Law

Existing California law imposes a penalty of at least 25 years in prison for a defendant who is found guilty of murder in the first degree.³⁹ However, if a defendant is found guilty of first degree murder and special circumstances are found to exist, the defendant faces an increased penalty of death or life in prison without the possibility of parole.⁴⁰ Existing California law enumerates these special circumstances.⁴¹ These special circumstances include, for example, a defendant who intentionally kills her victim because of her race, color, religion, nationality, or country of origin.⁴²

Before the enactment of Chapter 566, only three hate crimes provisions existed under California law—Chapter 566 creates the fourth.⁴³ First, California Penal Code Section 422.75 provides for a sentence enhancement of one, two, or three years, on top of any other sentence the defendant receives, if the defendant committed a felony and targeted his victim because of the victim’s color, religion, race, nationality, gender, disability, or sexual orientation.⁴⁴

Second, California Penal Code Section 422.6 protects citizens from violations of their civil rights.⁴⁵ Any person who interferes with another’s civil rights because of the victim’s actual or perceived sexual orientation, race, gender, disability, religion, or national origin can receive a punishment of one year in jail, monetary fines, and community service.⁴⁶

39. CAL. PENAL CODE § 190(a) (West Supp. 2001).

40. *Id.* § 190.2(a) (West Supp. 2001); *see Lewis v. Witek*, 927 F. Supp. 1288, 1294 (stating that “[f]irst degree murder with the special circumstance of murder for financial gain is punishable by death or life imprisonment without possibility of parole”).

41. CAL. PENAL CODE § 190.2(a)(1)-(21) (West Supp. 2001) (listing as additional examples of special circumstances where the murder was intentionally carried out for financial gain, where the victim was a peace officer or federal law enforcement officer, where the victim was a prosecutor, where the murder was committed during the commission of a felony, and where the murder occurred while firing a weapon from a car).

42. *Id.* § 190.2(a)(16) (West Supp. 2001) (stating that, in pertinent part, a special circumstance exists where “[t]he victim was intentionally killed because of his or her race, color, religion, nationality, or country of origin”); *see In re Sassounian*, 9 Cal. 4th 535, 541, 887 P.2d 527, 530, 37 Cal. Rptr. 446, 446 (1995) (stating that the jury “found true a national origin special-circumstance allegation—specifically, that petitioner intentionally killed [the victim] because he was Turkish—which enhanced punishment to either death or life imprisonment without possibility of parole”).

43. *See generally* CAL. PENAL CODE § 422.75(a) (West 1999); *id.* § 422.6 (West 1999); *id.* § 422.7 (West 1999).

44. *Id.* § 422.75(a) (West 1999).

45. *See id.* § 422.6 (West 1999) (providing: “[n]o person, whether or not acting under color of law, shall by force or threat of force, willfully injure, intimidate, interfere with, oppress, or threaten any other person in the free exercise or enjoyment of any right or privilege secured to him or her by the Constitution or laws of this state or by the Constitution or laws of the United States because of the other person’s race, color, religion, ancestry, national origin, disability, gender, or sexual orientation, or because he or she perceives that the other person has one or more of those characteristics”).

46. *Id.* at § 422.6(c) (West 1999).

Third, California Penal Code Section 422.7 provides, except in the case of a person sentenced under the above statute, a person can receive a punishment of one year in jail, a monetary fine, and community service if the perpetrator interfered with the constitutional rights of the victim on the basis of the victim's perceived or actual race, religion, sexual orientation, gender, and disability. Moreover, the crime must have occurred under specific circumstances that are charged in pleading.⁴⁷

B. Federal Law

A variety of federal statutes address different components of criminal conduct motivated by bias.⁴⁸ Under Section 245(b)(2) of Title 18 of the United States Code, entitled "Federally Protected Activities," federal law allows for prosecution of a defendant if the defendant targets his victim because of race, color, religion, or national origin while the victim was engaged in a federally protected activity or right.⁴⁹ Some examples of these activities include voting, employment, and court service.⁵⁰ However, this section excludes defendants who target their victims because of sexual orientation, gender, or disability.⁵¹

In 1990, the Hate Crime Statistics Act was enacted requiring the Attorney General to collect data on crimes motivated by prejudice against sexual orientation, religion, race, disability, or ethnicity.⁵² The information is collected from local law enforcement agencies and published in a yearly report.⁵³ The Hate Crimes Statistics Act allows police officers to chart the geographic distribution of hate crimes in order to target potential perpetrators and to meet the needs of targeted victims and

47. CAL. PENAL CODE § 422.7 (West 1999); *see id.* § 422.7(a)-(c) (West 1999) (stating that the following must be charged in the pleading: "[t]he crime against the person of another either includes the present ability to commit a violent injury or causes actual physical injury;" "[t]he crime against property causes damage in excess of five hundred dollars;" "[t]he person charged with a crime under this section has been convicted previously of a violation of subdivision (a) or (b) of Section 422.6, or has been convicted previously of a conspiracy to commit a crime described in subdivision (a) or (b) of Section 422.6").

48. *See* 18 U.S.C. § 245(b)(2) (2000); Hate Crimes Statistics Act, Pub. L. No. 101-275, 104 Stat. 140 (codified as amended in 28 U.S.C. 534); 42 U.S.C. § 1398 (1995).

49. *See* 18 U.S.C. § 245(b)(2) (2000) (stating:

"[w]hoever, whether or not acting under color of law, by force or threat of force, willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with" a person because of her race, color, religion or national origin and because she was enrolling or attending any public education institution, participating in a state sponsored program, applying for employment with a State agency, and serving in any State court").

50. *Id.*

51. Human Rights Campaign, *The Hate Crimes Prevention Act of 1999, H.R. 1082/S. 622*, available at www.hrc.org/issues/leg/hcpa/index.html (last visited July 13, 2000) (copy on file with the *McGeorge Law Review*).

52. Hate Crimes Statistics Act, Pub. L. No. 101-275, 104 Stat. 140 (codified as amended in 28 U.S.C. 534).

53. Anti-Defamation League, *Hate Crimes Laws: Federal Initiatives*, available at www.adl.org/99/hatecrime/federal.html (last visited Jan. 9, 2001) [hereinafter *Federal Initiatives*] (copy on file with the *McGeorge Law Review*).

not modify or create new law, but instead codifies two recent California Supreme Court decisions.⁶⁵

V. ANALYSIS

A. Support

The Los Angeles County District Attorney's Office, the County of Los Angeles, and Assemblymember Wally Knox, the sponsor of the bill, all support Chapter 566 because it brings uniformity to hate crimes legislation in California.⁶⁶ The disparity in punishments between hate crimes based on religion, race, or ethnicity and those based on gender, sexual orientation, and disability gives society the impression that society condones crimes against certain groups of people.⁶⁷ Additionally, hate crimes based on gender, sexual orientation, and disability are seldom reported to authorities, if reported at all.⁶⁸ Accordingly, Chapter 566 sends society the message that these crimes will not be tolerated and a mandatory penalty of life in prison without the possibility of parole will act as proper deterrence.⁶⁹

B. Opposition

The California Public Defenders Association (CPDA) opposes Chapter 566 for the very reason that it was introduced—it brings uniformity to California hate crimes legislation.⁷⁰ The CPDA argues that Chapter 566 requires the court to impose mandatory sentencing on a murderer who has targeted her victim because of his or her actual or perceived disability, gender, or sexual orientation.⁷¹ The CPDA

65. See generally *People v. Superior Court of San Diego County (Aishman)*, 10 Cal. 4th 735, 896 P.2d 1387, 42 Cal. Rptr. 2d 377 (1995); *In re M.S.*, 10 Cal. 4th 698, 896 P.2d 1365, 42 Cal. Rptr. 2d 355 (1995).

66. See Letter from Steve Zehner, Principal Deputy County Counsel, County of Los Angeles, to Senator John Vasconcellos, Chair, Senate Public Safety Committee 1 (June 10, 1999) (on file with the *McGeorge Law Review*) (stating: "Assembly Bill 208 makes the punishment for crimes based upon disability, gender, or sexual preference consistent with those based upon race, religion or national origin"); see also Letter from Gil Garcetti, District Attorney, and James R. Provenza, Special Assistant District Attorney, Los Angeles County District Attorney's Office, to Assembly Floor, Concurrence File 1 (Sept. 3 1999) (on file with the *McGeorge Law Review*) (stating "AB 208 will make the hate crime homicide law co-extensive with other hate crime laws by including gender, disability, and sexual orientation"); Knox-Davis Letter, *supra* note 6, at 1 (stating that "[Chapter 566] reduces the disparity in penalties for first degree murder based on different grounds of hatred").

67. Knox-Davis Letter, *supra* note 6, at 1.

68. *Id.* at 2.

69. *Id.*

70. See Letter from the Law Offices of Barry Broad to All Members of the Assembly 1 (June 1, 1999) (on file with the *McGeorge Law Review*) (stating on behalf of the California Public Defenders Association that the circumstances of each individual murder case are different and should be taken into consideration by the court during sentencing).

71. *Id.*

opposes mandatory sentencing and feels that the circumstances surrounding each crime are different and should be considered during sentencing.⁷²

The ACLU claims that all first degree murders should be punishable by mandatory life in prison regardless of the motivation behind the actual murder.⁷³ Unlike the CPDA, the ACLU contends that even more uniformity should be brought to the law governing first degree murder.⁷⁴ While Chapter 566 expands penalties for hate-based murders to include murderers targeting victims based on gender, disability, or sexual orientation, it does not impose a mandatory sentencing scheme for all first degree murder cases.⁷⁵ The ACLU regards this disparity as unfair and opposes Chapter 566's special treatment of certain types of first-degree murders⁷⁶

C. *The Significance of the Inclusion of Gender as a Hate Crime*

Traditionally, state hate crimes statutes have not included gender as a classification in hate crimes statistics and criminal statutes.⁷⁷ Policymakers have articulated many justifications for excluding violence against women as a hate crime such as the notion that existing criminal statutes governing sexual assault and domestic violence already track violence against women, crimes against women are so common that a distortion of hate crimes statistics would result, and that women are usually attacked by acquaintances who target the woman for her particular characteristics.⁷⁸ However, gender-based crimes are extremely similar to other forms of hate crimes and should be included in hate crimes legislation.⁷⁹

There is a misconceived notion that existing criminal statutes adequately address gender-based crimes.⁸⁰ Violence against women that is not domestic violence or sexual assault, is not tracked by either federal or state law and law enforcement

72. *Id.*

73. See Letter from Francisco Lobaco, Legislative Director, and Valeria Small Navarro, Legislative Advocate, American Civil Liberties Union to Assemblymember Knox 1 (Apr. 8, 1999) (on file with the *McGeorge Law Review*) (explaining that the ACLU is "opposed to carving out exceptions and raising the penalty to [life in prison without the possibility of parole] for certain types of murders").

74. *Id.*

75. *Id.*

76. See *id.* (stating that "[i]f the author were willing to make all first degree murder cases, including those with special circumstances under Penal Code Section 190.2, subject to [life in prison without the possibility of parole] or 25 years to life, we would be willing to reconsider our position").

77. California Association of Human Relations Organizations, *Rethinking Violence Against Women as Hate Crimes*, 1998, available at www.cahro.org/html/hateagainstwomen.html [hereinafter CAHRO website] (last visited Jan. 9, 2001) (stating that the "heartening advances" that federal and California law have made in addressing the problem of hate crimes "have not included gender-based crimes"); see Anti-Defamation League, *Hate Crimes: Introduction, 1999*, available at www.adl.org/99hatecrime/penalty.html [hereinafter ADL website] (last visited January 9, 2001) (reporting that only 19 out of the 41 states with hate crimes statutes included gender as a classification) (copy on file with the *McGeorge Law Review*).

78. CAHRO website, *supra* note 77.

79. See ADL website, *supra* note 77 (stating that "[g]ender based crimes, like other hate crimes, have a special psychological and emotional impact which extends beyond the original victim").

80. CAHRO website, *supra* note 77.

agencies do not know how prevalent violence against women has become.⁸¹ Additionally, just because most women are attacked by acquaintances who choose the women for her particular characteristics does not mean that the act of violence was not primarily based on gender.⁸²

However, not all crimes against women are perpetrated on the basis of gender.⁸³ Prosecutors have discretion in identifying which crimes against women qualify as hate crimes based on the amount of concrete evidence available for prosecution.⁸⁴ And, although prosecutors can prosecute a case of domestic violence or sexual assault as a hate crime, the prosecutor may decide that existing criminal statutes impose a harsh enough penalty; therefore, penalty enhancements for hate crimes may be unnecessary in that situation.⁸⁵ Unfortunately, prosecutorial discretion in choosing which crimes against women qualify as hate crimes could result in inconsistencies that would be contrary to the interests of justice. For example, two prosecutors, each trying a rape crime with similar facts, could reach different decisions as to whether to prosecute the crime as a hate crime.

D. Evidentiary Requirements of Intent and the First Amendment

The United States Supreme Court decided two cases in the early 1990's which guided states in determining what kind of hate crimes statutes were violative of the First Amendment. Hate crimes statutes, such as Chapter 566, which criminalize the defendant's conduct, not thought process, were held by the Supreme Court to be constitutional under *Wisconsin v. Mitchell*.⁸⁶ However, statutes which criminalize words and phrases have been held to be unconstitutional.⁸⁷

An example of a statute that was held to be unconstitutional can be found in *R.A.V. v. City of St. Paul*.⁸⁸ In this case, the Supreme Court held a Minnesota statute

81. *Id.*

82. *See id.* (explaining that even though domestic violence is often viewed in the context as a dispute between two individuals, domestic violence actually has its roots in "western cultural prescriptions" which promote the subordination of women).

83. ADL website, *supra* note 77; *but see* Civilrights.org, *Examples of Hate Crime Violence Against Women Because They Are Women*, available at http://www.civilrights.org/crlibrary/issues/hate_crimes/faces/examples/women.html (last visited Feb. 1, 2001) (describing a Massachusetts case in which a "serial batterer" was determined to have violated the state's hate crime law for committing a hate crime on the basis of gender. Four women retold their stories of abuse, rape, death threats and battery that they suffered at the defendant's hands. Additionally, the defendant "called the women 'whores,' 'bitches,' and 'sluts,' and made derogatory comments [that all women, including the victims were not as strong or intelligent as men]").

84. ADL website, *supra* note 77.

85. *Id.*

86. 508 U.S. 476, 487-88 (1993).

87. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992) (invalidating a state statute which regulated the content of a message instead of the conduct of the speaker).

88. *R.A.V.*, 505 U.S. at 396.

unconstitutional on First Amendment grounds.⁸⁹ The Court found that “such a content- and view-point based regulation of hate expression” was unconstitutional on its face.⁹⁰ The majority held that despite the state’s strong interest in protecting groups that have historically been subject to discrimination, the Minnesota statute, regulating the content of the message, unconstitutionally abridged on a person’s right to free speech.⁹¹

However, in *Wisconsin v. Mitchell*, the Supreme Court rejected a constitutional challenge to a Wisconsin statute, very similar to Chapter 566, which imposed an enhanced penalty on a defendant who “intentionally selects the person against whom the crime [is committed] because of the race, religion, color, disability, sexual orientation, national origin, or ancestry of that person.”⁹² The Court held that the statute was directed toward criminalizing the defendant’s conduct and not his thought; therefore, the statute did not abridge an individual’s First Amendment rights.⁹³ Additionally, the Court found that there was little chance that the statute would suppress free speech because a defendant’s bias-based motivation must be connected with the criminal act.⁹⁴

In addition to focusing on the defendant’s conduct, Chapter 566, in order to further mitigate the possible impact that the legislation has on free speech, contains a “because of” provision codifying the decisions of two California Supreme Court cases.⁹⁵ Although the two court cases were interpreting three other provisions in the California Penal Code, Chapter 566 explicitly states that the phrase “because of” as used in the statute embraces the interpretation of the phrase as determined in *People v. Superior Court of San Diego County (Aishman)*⁹⁶ and *In re M.S.*⁹⁷

In *People v. Superior Court*, a defendant was on trial for assaulting Mexican men who had allegedly raped a defendant’s wife.⁹⁸ As evidence of bias motivated intent, the prosecution, seeking a sentence enhancement under California Penal Code Section 422.75, introduced evidence that one of the defendants stated that he was looking forward to “hitting home runs with Mexicans.”⁹⁹ The California Supreme Court held, after interpreting identical language in other statutes, that “the bias motivation must have been a cause in fact of the offenses, and when multiple

89. *Id.* at 381; see also Lisa S.L. Ho, Comment, *Substantive Penal Hate Crime Legislation: Toward Defining Constitutional Guidelines Following the R.A.V. v. City of St. Paul and Wisconsin v. Mitchell Decisions*, 34 SANTA CLARA L. REV. 711, 713 (1994).

90. *R.A.V.*, 505 U.S. at 381.

91. *Mitchell*, 508 U.S. at 396.

92. ADL website, *supra* note 77.

93. *Mitchell*, 508 U.S. at 489.

94. *Id.* at 488-89.

95. CAL. PENAL CODE § 190.3(c) (enacted by Chapter 566).

96. 10 Cal. 4th at 735, 896 P.2d 1387, 42 Cal. Rptr. 2d at 377 (1995).

97. 10 Cal. 4th at 698, 896 P.2d 1365, 42 Cal. Rptr. 2d at 355 (1995).

98. *Aishman*, at 738, 896 P.2d at 1388, 42 Cal. Rptr. 2d at 378-79.

99. *Id.* at 738, 896 P.2d at 1388, 42 Cal. Rptr. 2d at 379.

concurrent causes exist, the bias motivation must have been a substantial factor in bringing about the offense.”¹⁰⁰

The California Supreme Court, on the same day, in deciding *In re M.S.*, interpreted the Legislature’s use of the phrase “because of” in California Penal Code Sections 422.6 and 422.7 as requiring the bias motivation to be a “cause in fact of the offense,” or, if multiple motives exist, the bias motivation must be a “substantial factor in bringing about the crime.”¹⁰¹ The court stated that the principles attached to the “because of” language of the statute comply with traditional notions of criminal justice.¹⁰²

VI. CONCLUSION

Chapter 566 effectively narrows the disparity in punishments for hate crimes based on race, ethnicity, or religion and those based on sexual orientation, gender, and disability by imposing a mandatory sentence of life in prison without the possibility of parole for hate crimes based on the latter set of characteristics.¹⁰³ The past disparity in punishment had negative effects on minority communities in California. The disparity in punishment may have lead some groups to feel as if they were less important than others.¹⁰⁴ Additionally, members of targeted communities were less likely to report the occurrence of hate crimes because they felt that they would not be punished by the full weight of the law.¹⁰⁵ This, of course, causes a discrepancy in statistics regarding the number of hate crimes that actually occurred which could lead law enforcement officials to underestimate the severity of the problem.¹⁰⁶ The fact that the California Legislature finally took the necessary step of addressing hate crimes based on gender, disability, and sexual orientation sends the citizens of California the message that these types of crimes are a prevalent problem in California and will no longer be tolerated.

100. *Id.* at 741, 896 P.2d at 1390, 42 Cal. Rptr. 2d at 381.

101. *In re M.S.* at 719, 896 P.2d at 1377, Cal. Rptr. 2d at 368.

102. *Id.* at 720, 896 P.2d at 1377, 42 Cal. Rptr. 2d at 720.

103. *See supra* Part IV (laying out the elements of the new California Penal Code Section 190.03 enacted by Chapter 566).

104. *See* SENATE RULES COMMITTEE, FLOOR ANALYSIS OF AB 208, at 6 (Sept. 2, 1999) (stating that the American Psychological Association reports that “[i]n some settings there is a perception by offenders that society sanctions attacks on certain groups”).

105. *See id.* at 7 (explaining that hate crimes against individuals on the basis of their sexual orientation were less likely to be reported); *see id.* at 6 (reporting that “[t]here is a common misconception that all such heinous murders will be punished by the full weight of law”).

106. *See id.* at 7 (stating that because hate crimes against individuals on the basis of their sexual orientation were less likely to be reported, the “extent of hate crimes based on sexual orientation is understated”).