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THE MATTHEW SHEPARD AND JAMES BYRD, JR., HATE CRIMES PREVENTION ACT: A CRIMINAL LAW PERSPECTIVE

Meredith Boram*

I. INTRODUCTION

[H]ate crimes... leave deep scars not only on the victims, but on our larger community. They weaken the sense that we are one people with common values and a common future. They tear us apart when we should be moving closer together. They are acts of violence against America itself...

As part of our preparation for the new century, it is time for us to mount an all-out assault on hate crimes, to punish them swiftly and severely, and to do more to prevent them from happening in the first place. We must begin with a deeper understanding of the problem itself.¹

1998 was a banner year for people killing out of enhanced animus.² On June 7, 1998, James Byrd Jr., a 49-year-old African-American man, accepted a ride from three white men who, instead of taking him home, beat him, took off his clothes, chained him naked to the back of their truck, and dragged him to his death.³ On October 6, 1998, Matthew Shepard, a 21-year-old gay college student, also accepted a ride and was not taken home. Instead he was driven to a remote area, tied to a fence, beaten within an inch of his life, and left to die.⁴ These brutal killings were committed because of animus

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² Animus is defined as “[i]ll will” and class-based animus is a “prejudicial disposition toward a discernible, usu[ally] constitutionally protected, group of persons.” Animus, BLACK’S LAW DICTIONARY (9th ed. 2009).
⁴ Id. at 51. A passerby found Shepard 18 hours later barely alive. Id. He remained in a coma for several days then died on October 12, 1998. Id.
towards the victims’ race and sexual orientation, and, consequently, brought hate crimes\(^5\) to the nation’s attention.\(^6\)

At that time, the Civil Rights Act\(^7\) provided the only substantive federal offense that punished crimes committed out of enhanced animus. However, coverage limitations made successful prosecutions under the Civil Rights Act especially difficult.\(^8\) The murders of Byrd and Shepard highlighted the limitations of the Act; most significantly that it did not include sexual orientation as a protected class.\(^9\) Thus, in direct response, the fact that Byrd’s murderers could have been prosecuted under the Civil Rights Act, but Shepard’s murderers could not, led Congress to begin efforts to ameliorate the Act’s deficiencies.\(^10\)

Despite the public outcry after Shepard’s brutal murder,\(^11\) most Americans maintained some degree of animus towards LGBT people.\(^12\) During the 1990s, this LGBT animus\(^13\) was such a widespread problem that Congress even passed legislation rooted in it.\(^14\) Society’s acceptance of LGBT animus meant that any bill that included sexual orientation as a protected class faced an uphill

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5. A hate crime is an “attack upon the person or property of an individual motivated by hatred of a characteristic of that person, such as race, religion, gender, sexual orientation, or ethnicity.” Theresa Suozzi et al., Crimes Motivated by Hatred: The Consti tutionality and Impact of Hate Crime Legislation in the United States, 1 SYRACUSE J. LEGIS. & POL’Y 29, 31 (1995).

6. On October 15, 1998, the U.S. House of Representatives passed a resolution condemning the murder of Matthew Shepard as a hate crime. ALTSCHILLER, supra note 3, at 51.


9. Id.


11. The Lesson of Matthew Shepard, N.Y. TIMES (Oct. 17, 1998), http://www.nytimes.com/1998/10/17/opinion/the-lesson-of-matthew-shepard.html (“It is a murder that seems to have aroused the deepest decent sympathies of the nation, a case in which law, religion, love, dignity and politics all seem on the side of a dead young gay man. It is a rare moment, and politicians and preachers had better take a lesson.”).


13. For this Comment “LGBT animus” will mean “animus towards LGBT people.”

battle,\textsuperscript{15} which is the reason it took Congress eleven years to pass such a bill.

In 2009, Congress finally passed the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act (Shepard-Byrd Act), which created a substantive offense for crimes committed because of animus, including LGBT animus.\textsuperscript{16} While signing the bill into law, President Obama stated that, "[a]fter more than a decade of opposition and delay, we’ve passed inclusive hate crimes legislation to help protect our citizens from violence based on what they look like, who they love, how they pray or who they are."\textsuperscript{17} Codified as 18 U.S.C. § 249(a), the Shepard-Byrd Act punishes anyone who "willfully causes bodily injury to any person or . . . attempts to cause bodily injury to any person, because of the actual or perceived religion [or] national origin . . . of any person,"\textsuperscript{18} or, "the actual or perceived . . . gender, sexual orientation, gender identity, or disability of any person."\textsuperscript{19} The Shepard-Byrd Act seeks to deter hate crimes by enhancing the punishment of criminal conduct motivated by animus.\textsuperscript{20}

The Shepard-Byrd Act, as with similar state hate crimes statutes, poses problems for scholars because of First Amendment concerns,\textsuperscript{21} but it also causes technical problems for prosecutors in how to prove the animus motivation for the criminal conduct.\textsuperscript{22} The latter has

\textsuperscript{15} See infra Part III.
\textsuperscript{16} 18 U.S.C. § 249 (2012). Originally titled the Local Law Enforcement Hate Crimes Prevention Act, Congress adopted the name to honor Shepard and Byrd.
\textsuperscript{17} Perry Bacon Jr., Obama Signs Bill Expanding Hate Protection to Gays, WASH. POST (Oct. 29, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/10/28/AR2009102804909.html.
\textsuperscript{18} 18 U.S.C. § 249(a)(2) (emphasis added).
\textsuperscript{19} Id.
\textsuperscript{22} See People v. Superior Court (Aishman), 896 P.2d 1387, 1390 (Cal. 1995) ("The People have joined issue with real parties on the proper interpretation of ‘because of,’ urging us to construe the phrase as requiring proof the bias motive was a ‘substantial motivating factor’ in the commission of the offense. The People express concern lest the causation element of [the California hate crimes statute] become an impossible burden for the prosecution in hate crimes cases.").
caused courts to misinterpret “because of” in the Shepard-Byrd Act as requiring causation analysis for conviction.\textsuperscript{23} While the exact causation standard varies, most courts use a “substantial motivating factor” standard or some variation thereof. In \textit{United States v. Miller}, sixteen defendants were convicted under the Shepard-Byrd Act using the significant motivating factor standard,\textsuperscript{24} but on appeal, the Court overturned the convictions, holding that the Shepard-Byrd Act requires satisfying a stricter but-for standard.\textsuperscript{25} Scholars and courts are fundamentally wrong in the way that they interpret the Shepard-Byrd Act because they do not approach it from a criminal law perspective.\textsuperscript{26} The misplacement of causation analysis for traditional mens rea analysis, regardless of which causation standard is used, is wrong.\textsuperscript{27} This Comment contends that the “because of” language in the Act adds a nuance to the mens rea,\textsuperscript{28} that, much like premeditation and deliberation in a first-degree murder trial, can and must be proven beyond a reasonable doubt.\textsuperscript{29} The purpose of the Shepard-Byrd Act is to enhance the punishment for animus-based crimes\textsuperscript{30} and the use of causation analysis not only misinterprets the plain language of the statute,\textsuperscript{31} but also frustrates this clearly designated purpose.\textsuperscript{32}

Part II of this Comment provides background on the fundamental principles of criminal law and the ways the government proves mens rea in homicide cases. Part III examines our nation’s history of LGBT animus, and the Supreme Court’s rulings on legislation rooted in it. Part IV explains the evolution of federal statutory protection against animus-based crimes from the Civil Rights Act to the Shepard-Byrd Act. Part V provides the facts, holding, and

\textsuperscript{23} See, e.g., United States v. Miller, 767 F.3d 585, 592–93 (6th Cir. 2014) (emphasizing a “substantial” motivating factor standard or some variation of it for the causation element).

\textsuperscript{24} Id.

\textsuperscript{25} Id. at 593 (explaining that the “because of” language requires the government to prove that the assault would not have occurred but-for the defendant’s animus).

\textsuperscript{26} While some scholars have applied criminal law principles to the Shepard-Byrd Act, all did so from the perspective that punishing the animus motivation was foreign in criminal law, but this Comment contends the opposite is true and this disconnect actually stems from a societal acceptance of LGBT animus. \textsuperscript{See infra} Part VI.D.

\textsuperscript{27} \textit{See infra} Part VI.

\textsuperscript{28} The additional nuance is “because of animus.” \textit{See infra} Part VI.

\textsuperscript{29} \textit{See infra} Part II.


\textsuperscript{31} \textit{See infra} Part VI.

\textsuperscript{32} \textit{See infra} Part VI.
problematic result of Miller. Part VI explains the purpose of the Shepard-Byrd Act, and the reasons it, combined with the plain meaning of the Act, can only signify mens rea analysis. This Part goes on to explain how the animus motivation required by the Act fits into traditional mens rea analysis, using the Civil Rights Act, state capital murder statutes, and the anti-animus doctrine as support. Lastly, this Comment applies the recommended mens rea analysis to the facts of Miller.

II. CRIMINAL LAW BACKGROUND

When English settlers founded America, they imported the English common law, which became the basis for law in the United States. In the nineteenth century, the states began to enact comprehensive statutory criminal codes, both codifying common law crimes and creating new ones. Whether statutory or common law, criminal law aims to protect society by prohibiting conduct deemed harmful and assigning the appropriate penalty imposed on those who engage in such conduct.

A. Fundamental Principles of Criminal Law

The most fundamental principle in criminal law is that a crime consists of either an act or omission, known as the actus reus, and the requisite mental state, known as the mens rea. The physical conduct must occur contemporaneously with the requisite mental state. As Blackstone stated, “to constitute a crime against human
laws, there must be, first a vicious will, and secondly, an unlawful act consequent upon such vicious will." 39

Originally, criminal law was designed to punish intentional behavior or behavior where the offender had knowledge that his conduct would result in harm. 40 Over time, criminal law evolved to include certain crimes born out of negligence or recklessness. 41 However, a fundamental concept remained: conduct can be intentional or negligent, but it cannot be both. 42

In most criminal law cases causation is not at issue because the injury is directly tied to the defendant's criminal act. 43 However, when it is at issue, causation only applies to the actus reus. 44 If causation is at issue, causation analysis is used to find the most culpable or negligent person and come up with a theory to pin liability back to them. 45 If supervening forces are present in a particular case, the court must analyze whether the defendant's conduct set into motion a chain of events that ultimately caused the result. 46

B. Fundamental Ways Juries Infer Mens Rea in Homicide Cases

Courts have been sorting out how to infer mens rea for many years, even nuanced mens rea like specific intent. 47 Murder, defined as the

39. 4 WILLIAM BLACKSTONE, COMMENTARIES 21.
40. See LAFAVE, supra note 33, § 1.2(b), at 14, § 5.4, at 365–66.
41. See MODEL PENAL CODE § 2.02(1) (AM. LAW INST. 1962).
43. See LAFAVE, supra note 33, § 6.4(a). The factual cause requires "that the result would not have happened in the absence of the [defendant's] conduct[,]" sometimes referred to as a "but for" cause. Id. at § 6.4(b), at 467. For example, if "A shoots at B, who is hit and dies, we can say A caused B's death." Id. at 467–68. Whereas if "A inflicts a mortal wound on B, who, though dying, has an hour to live; then X, acting independently, kills B instantaneously. Can it be said that A has in fact caused B's death?" Id. at 469.
44. See id. § 6.4(a), at 466.
45. Id.
46. MODEL PENAL CODE § 2.03(2)(b); see also Commonwealth v. Soto, 693 A.2d 226, 229 (Pa. 1997) ("Criminal liability as a principal actor may attach provided that the defendant's actions in bringing about the victim's death were not overridden by an independent, overriding, factor.").
intentional killing of another with malice, provides the oldest understanding of mens rea in criminal law. Prosecutors can use any of four theories to prove malice, but only two apply to intentional killings: the specific intent to kill and the intent to cause serious bodily injury. Malice is usually inferred from the facts. Most simply, when the defendant uses a deadly weapon, the government is entitled to the inference that the offender possessed the intent to kill or the intent to cause serious bodily injury. A model jury instruction states, “You may infer malice from the deliberate use of a deadly weapon, unless, from all the evidence, you have a reasonable doubt as to whether malice existed.” Even when a deadly weapon is not used, the jury may infer malice from “any deliberate willful and cruel act against another, however, sudden.”

While all murders are horrible acts of violence, criminal law recognizes that murders committed under certain circumstances are particularly egregious. The most common example is premeditation and deliberation of the specific intent to kill, which aggravates second-degree murder to first-degree. Courts define premeditation and deliberation as the moment of contemplating what it means to

48. Malice is defined as the “state of mind which results in the intentional doing of a wrongful act to another without legal excuse or justification, at a time when the mind of the actor is under the control of reason.” VA. PRAC. JURY INSTRUCTIONS § 79.15.
49. LAFAVE, supra note 33, § 14.1, at 416.
50. The four theories are: “(1) intent-to-kill murder; (2) intent-to-do-serious-bodily-injury murder; (3) depraved-heart murder; and (4) felony murder.” Id.
51. Id. at § 14.2, at 428, § 14.3, at 434.
52. Id. at § 14.2(b), at 429–31.
53. VA. PRAC. JURY INSTRUCTIONS § 79:17.
54. Id. § 79:15.
55. Examples of circumstantial evidence used to prove a defendant’s premeditation and deliberation include:
   (1) want of provocation on the part of the deceased, (2) conduct and statements of the defendant before and after the killing, (3) threats made against the victim by defendant, (4) ill will or previous difficulty between the parties, and (5) evidence that the killing was done in a brutal manner.
   State v. Saunders, 345 S.E.2d 212, 215 (N.C. 1986) (quoting State v. Calloway, 291 S.E.2d 622, 625–26 (N.C. 1982)). Motive often helps the government prove the specific intent to kill and it also helps to show premeditation and deliberation. However, motive is not an independent element of the crime, rather it is usually specific evidence of conduct that helps the jury infer that the defendant had the requisite mens rea at the time of the actus reus. Gardner, supra note 47, at 727.
56. Most jurisdictions in the United States divide murder into varying degrees for purposes of limiting the more severe punishment to the more culpable criminal defendants. LAFAVE, supra note 33, § 14.7, at 476–77.
kill another human being.\footnote{Bullock v. United States, 122 F.2d 213, 213–14 (D.C. Cir. 1941).} Premeditation and deliberation is an added nuance to the \textit{mens rea}, and must be proven in addition to the specific intent to kill; and if both are proven, the defendant is deserving of enhanced punishment.\footnote{Id.} Another circumstance that may raise the egregiousness of the murder is the identity of the victim. Courts have upheld statutes which punish a defendant who killed another person specifically because of the kind of person the victim was, more severely than if the defendant killed another person.\footnote{Since the Supreme Court upheld Georgia’s capital murder statute in \textit{Gregg v. Georgia}, 428 U.S. 153 (1976), Congress and state legislatures have enacted statutes that allow a judge or jury to punish a defendant who killed another person. \textit{Id.} at 186. \textit{Gregg} upheld Georgia’s capital murder statute because the statute particularized which type of first degree murderers were more culpable than others and could be sentenced to death. \textit{Id.} at 206. After \textit{Gregg}, defendants who killed particular people faced harsher punishment meaning a life sentence or death, but the jury did not automatically have to sentence the defendant to death. \textit{Id.}} For example, Virginia’s capital murder statute\footnote{VA. CODE ANN. § 18.2-31 (2012).} “makes the intentional killing of a police officer capital murder when the homicide was committed ‘for the purpose of interfering with the performance of his official duties.’”\footnote{Delong v. Commonwealth, 362 S.E.2d 669, 675 (Va. 1987).} This adds an additional knowledge layer in the \textit{mens rea} analysis and, like the specific intent to kill and premeditation and deliberation, is inferred from the facts.\footnote{Id. at 676.}

\textit{Mens rea} can also lower a defendant’s culpability for intentional killings where it proves the defendant lacked the requisite malice.\footnote{See, e.g., United States v. Brown, 287 F.3d 965, 974–75 (10th Cir. 2002) (comparing murder to manslaughter).} Self-defense is the simplest example, but another is voluntary manslaughter, which is defined as “an intentional homicide committed under extenuating circumstances which mitigate, though they do not justify or excuse, the killing.”\footnote{LAFAVE, supra note 33, § 15.2, at 491. The latter, often called “heat of passion,” requires the defense to prove: (1) that there was a “reasonable provocation”; (2) that the defendant was “in fact provoked”; (3) that a reasonable person if so provoked would not “have cooled off in the interval of time between the provocation and the delivery of the fatal blow”; and (4) the defendant did not in fact cool off. \textit{Id.} at § 15.2(a), at 492–94.}
caused the offender to lose self-control.\textsuperscript{65} The courts’ continued allowance of this defense, and juries’ acceptance of it, exemplifies the systemic LGBT animus that riddles the judicial system and society to this day.

III. SOCIETY’S LGBT ANIMUS AND THE DEVELOPMENT OF THE ANTI-ANIMUS FRAMEWORK

In the early 1990s, before the murder of Matthew Shepard, the push for federal hate crime legislation coincided with the mobilization of the push for marriage equality.\textsuperscript{66} At a time when equal protection for racial minorities was beginning to face less resistance, the fight for LGBT rights was met with vigorous opposition from a majority of Congress openly expressing LGBT animus.\textsuperscript{67} The Supreme Court expressed similar LGBT animus in \textit{Bowers v. Hardwick},\textsuperscript{68} but eventually rejected animus motivation for legislation as unconstitutional,\textsuperscript{69} and, through a series of subsequent decisions, developed a framework for proving animus behind pieces of legislation.\textsuperscript{70} The framework provides a starting point for proving animus motivation for criminal conduct under the Shepard-Byrd Act.\textsuperscript{71} Congressional LGBT animus shaped how and when the Shepard-Byrd Act passed, and similar LGBT animus is reflected in how prosecutors and courts have misinterpreted the Act since.

\textbf{A. The History of LGBT Animus}

In 1986, the Supreme Court upheld the criminalization of homosexual sodomy in \textit{Bowers v. Hardwick}.\textsuperscript{72} The Court’s animus towards gay men in \textit{Bowers} illustrates the anti-LGBT climate that dominated the United States into the 1990s.\textsuperscript{73} In 1994 Congress

\textsuperscript{65. Cynthia Lee, \textit{Masculinity on Trial: Gay Panic in the Criminal Courtroom}, 42 Sw. L. Rev. 817, 818–19 (2013). Matthew Shepard’s killers asserted this defense, but were unsuccessful. \textit{Id.} at 823.}


\textsuperscript{67. \textit{See infra} notes 113–14, 131 and accompanying text.}

\textsuperscript{68. 478 U.S. 186, 196 (1986), \textit{overruled by} Lawrence v. Texas, 539 U.S. 558 (2003).}

\textsuperscript{69. \textit{See} Romer v. Evans, 517 U.S. 620, 647 (1996).}


\textsuperscript{71. \textit{Id.} at 205.}

\textsuperscript{72. 478 U.S. at 192 (“It is obvious to us that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy. Proscriptions against that conduct have ancient roots.”).}

\textsuperscript{73. \textit{Id.} at 192–94.}
passed DADT, which permitted the military to dishonorably discharge service members solely because of their sexual orientation. Then in 1996, Congress passed DOMA as a direct response to information that the Hawaii Supreme Court might order the State to recognize same-sex marriages. States subsequently passed similar legislation rooted in animus. For example, Colorado passed a Constitutional Amendment that “wiped away all existing antidiscrimination protection that specifically protected gay men and lesbians at every level and in every department of state government.” The Supreme Court eventually struck down that Colorado amendment in Romer v. Evans, holding that it was “born of animosity toward the class of persons affected” and “if the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.” Romer was the first decision to condemn animus motivation with principles that would evolve into the Anti-Animus Framework fully realized in United States v. Windsor.

B. Anti-Animus Constitutional Framework

Through subsequent cases, the Supreme Court developed a framework to help prove whether animus was the motivation for drafting, discussing, and enacting a particular piece of legislation. This Comment will refer to this as the Anti-Animus Framework (the Framework). The Framework “addresses the deeply problematic

74. See DADT, supra note 14.
75. Id. (stating a member shall be separated from the armed forced if the member (1) “engaged in . . . a homosexual act or acts”; (2) “has stated that he or she is a homosexual or bisexual, or words to that effect”; or (3) “has married or attempted to marry a person known to be of the same biological sex”).
76. See DOMA, supra note 14.
77. Section 2 of DOMA prevented states from requiring recognition of same-sex marriage and § 3 ensured that the federal courts did not have to recognize a same-sex marriage granted by any state. Id.
79. Carpenter, supra note 70, at 210.
80. 517 U.S. at 635.
81. Id. at 634.
82. The Supreme Court’s decision in United States v. Windsor topped off an animus quadrilogy striking down state and federal acts that it held were “driven by animus toward a group of people.” Carpenter, supra note 70, at 183.
83. See id. at 204–05.
84. Id. at 243.
potential of a democratic republic [that] consistently oppress[es] a politically unpopular minority.”

To be deemed unconstitutional, the impermissible degree of animus must be a substantial factor in the legislation’s passage, not necessarily the sole factor, but rather where examining objective factors leaves little doubt that the bill passed because of animus. The Framework examines a variety of factors that may give rise to the “inference that animus was a material influence in the government’s decision.” The factors include: “the statutory text”; “the political and legal context of passage, including a historical background demonstrating past discriminatory acts, and a departure from the usual substantive considerations governing the decision”; “the legislative history accompanying passage”; the legislation’s practical impacts or effects, including tangible or dignitary interests of the targeted class of people; and “the utter failure of alternative explanations to offer legitimate ends along with means that really advance those ends.” The Court applied these factors to Section three of DOMA in *Windsor*, ultimately holding that it supported the inference that the passage was the purposeful product of animus towards lesbian and gay couples. Although the Framework applies to animus motivation behind legislation, it provides guidance on relevant facts from which animus can be inferred.

IV. THE EVOLUTION FROM THE CIVIL RIGHTS ACT TO THE SHEPARD-BYRD ACT

Civil Rights legislation, although not considered hate crime legislation, was a precursor to the modern hate crime laws. The unequal treatment of racial minorities created the need for Civil Rights legislation in the 1960s, and modern hate crime legislation is a descendent of that same need to protect certain classes of citizens from animus-based violence. Courts correctly looked to

85. *Id.* at 226.
86. *Id.* at 232.
87. *Id.* at 245.
88. *Id.* at 245-46.
89. *Id.* at 284.
91. *Id.*
interpretations of the Civil Rights Act when interpreting the Shepard-Byrd Act.\textsuperscript{92}

\textbf{A. The Civil Rights Act as a Precursor to Modern Hate Crime Legislation}

The 1968 Civil Rights Act, codified as 18 U.S.C. § 245(b)(2), sought to provide a remedy for the violence committed against black citizens during the civil rights movement.\textsuperscript{93} Under this statute, the government “must prove that the defendant, motivated by bias, attacked a victim who was participating in a state or local activity. The offender’s prejudice need not have been the sole motivating factor.”\textsuperscript{94} There were two major limitations for successful prosecutions under the Civil Rights Act: the requirement of a nexus to participating in a state or local activity, and the inclusion of only race, color, religion, or national origin as protected classes.\textsuperscript{95} Nevertheless, it gave prosecutors a way to combat civil rights crimes\textsuperscript{96} by enhancing the punishment for crimes committed because of racial animus.

Courts generally interpreted “because of” in the Civil Rights Act to require that the defendant’s conduct be motivated by racial animus.\textsuperscript{97} Courts frequently used causation language, such as substantial reason or substantial motivating factor, when articulating whether a defendant possessed the requisite amount of animus motivation at the time of the criminal act.\textsuperscript{98} However, the courts still engaged in \textit{mens rea} analysis. In \textit{United States v. Bledsoe}, the defendant, a white man, beat a black, gay man to death with a baseball bat.\textsuperscript{99} After an acquittal by a state jury, the federal government investigated and

\textsuperscript{92.} See id. Although this Comment contends courts incorrectly applied these standards. See infra Part VII.


\textsuperscript{94.} Id.

\textsuperscript{95.} Meli, supra note 30, at 935; see generally Pub. L. No. 90-284, 82 Stat. 73.

\textsuperscript{96.} Today, these crimes would be considered hate crimes. See supra note 5.

\textsuperscript{97.} See, e.g., United States v. Ebens, 800 F.2d 1422, 1429 (6th Cir. 1986).

\textsuperscript{98.} See, e.g., United States v. McGee, 173 F.3d 952, 957 (6th Cir. 1999) (“So long as racial animus was a substantial factor, other motivations are not relevant.”); \textit{Ebens}, 800 F.2d at 1429 (upholding defendant’s conviction under U.S.C. § 245(b)(2)(B), the Court recognized that there may have been additional motivations behind the assault, but the jury nonetheless could have reasonably found that defendant’s conduct was “motivated by” the victim’s race).

\textsuperscript{99.} United States v. Bledsoe, 728 F.2d 1094, 1095–96, 1098 (8th Cir. 1984) (finding that the killing was intentional, as the defendant afterward told his friend “he had killed a ‘black faggot’”).
charged the defendant under the Civil Rights Act.\textsuperscript{100} The defendant was subsequently tried, convicted, and sentenced to life in prison.\textsuperscript{101} On appeal, he argued that the jury instructions did not clearly set out the elements of the crime, and that if anything, the evidence only proved that he killed the victim because of the victim’s sexual orientation.\textsuperscript{102} The court upheld the jury instructions, stating that “[t]he district court clearly stated that the prosecution must prove, beyond a reasonable doubt, that the [defendant] attacked [the victim] because of his race . . . . The additional information concerning the possible presence of other motivating factors simply restates the law on mixed motives.”\textsuperscript{103} \textit{Bledsoe} demonstrates how jury instructions under the Civil Rights Act use criminal law principles and correctly identify that “because of” signals \textit{mens rea} analysis.\textsuperscript{104}

\textbf{B. The History of Hate Crime Legislation}

Federal and state hate crime legislation initially took the form of recording and sentence enhancement statutes, then later substantive hate crime statutes.\textsuperscript{105} Congress enacted the Hate Crimes Statistics Act of 1990 (HCSA) to record and track hate crimes.\textsuperscript{106} State sentence enhancement statutes lengthened the punishment for hate crimes during criminal sentencing.\textsuperscript{107} Opponents challenged state sentence enhancing statutes on First Amendment grounds, arguing that the statutes illegally punished protected speech.\textsuperscript{108} The Supreme Court resolved this concern in 1993, finding that enhanced punishment for crimes committed because of animus did not violate the First Amendment.\textsuperscript{109} In direct response, Congress passed the
Violent Crime Control and Law Enforcement Act (VCCLEA),\textsuperscript{110} which instructed the United States Sentencing Commission to provide a sentence enhancement for federal crimes identified as a hate crime by the trier of fact.\textsuperscript{111} VCCLEA defined hate crime as "a crime in which the defendant intentionally selects a victim . . . because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person."\textsuperscript{112}

Both the HCSA and the VCCLEA included sexual orientation as a protected class, major victories for LGBT advocates, but the language of the HCSA and its legislative history revealed that extreme LGBT animus still dominated Congress.\textsuperscript{113} Congress only agreed to include sexual orientation if express anti-LGBT language was also included.\textsuperscript{114} For example, § 2 of the HCSA states, "schools should not de-emphasize the critical value of American family life. Nothing in this Act shall be construed, nor shall any funds appropriated to carry out the purpose of the Act be used, to promote or encourage homosexuality."\textsuperscript{115} Additionally, during debate on the HCSA members of Congress repeatedly emphasized that sexual orientation does not deserve the same protections as race.\textsuperscript{116} "The road to Selma did not lead to the right to sodomy . . . Homosexual behavior is a completely different category of activity[,] which cannot be seriously considered even an analogue of race or gender. The freedom train has been hijacked."\textsuperscript{117}

Conversely, some states enacted substantive hate crime statutes with protections for LGBT people, but the statutes contained varied language, preventing any meaningful understanding of how to interpret and implement state hate crime statutes.\textsuperscript{118} Professor

\footnotesize
\begin{itemize}
\item \textsuperscript{111} See Trout, supra note 20, at 137.
\item \textsuperscript{112} 28 U.S.C. § 994 note (1994) (Direction to United States Sentencing Commission Regarding Sentencing Enhancements for Hate Crimes).
\item \textsuperscript{114} 28 U.S.C. § 534 note (1990).
\item \textsuperscript{115} Id.
\item \textsuperscript{116} 135 CONG. REC. 13,499 (1989) (statement of Rep. Dannemeyer) ("In my opinion, our society should not enshrine homosexuality on a pedestal alongside race and religion as the primary focus of our civil rights laws.").
\item \textsuperscript{117} Id. at 13,951.
\item \textsuperscript{118} Compare VA. CODE ANN. § 52-8.5 (2002) (defining a hate crime as a crime against a person or his property perpetuated because of "race, religion or ethnic origin"), with MD. CODE ANN., CRIM. LAW § 10-304 (LexisNexis 2009) (defining a hate crime as a
Frederick Lawrence identified two main types of hate crimes statutes: the "racial animus model," and the "discriminatory selection model." The racial animus model punishes a defendant when the trier of fact determines that the defendant committed the crime, at least in part, because of his or her hatred towards a particular group of people. The "discriminatory selection model" punishes the defendant if he or she selected the victim on the basis of the victim's affiliation with a particular group. This type of statute is broader than the racial animus model because it does not require animus motivation. Most state hate crime statutes do not fit in either model and contain ambiguous language that define the crime as those that occur "because of" or "by reason of" the victim's membership with a particular group or malicious intent. While states addressed the need for substantive hate crime statutes, Congress did not consider it a national problem until 1998.

In 1998, the horrific murders of James Byrd, Jr. and Matthew Shepard brought hate crimes to the nation's attention. Every subsequent legislative session, Congress introduced a bill creating a substantive hate crimes offense, and each year it was defeated because of Congress's LGBT animus. Without sexual orientation as a protected class, Congress could have easily passed the bill in...
1998, but as quick as Congress condemned Shepard’s murder,\textsuperscript{127} there was an overwhelming consensus that LGBT animus was not as vicious a will as racial animus.\textsuperscript{128} A prior version of the Shepard-Byrd Act nearly passed in 2002, which caused opponents to expressly voice their LGBT animus.\textsuperscript{129} Yet in 2009, the members of Congress who did not have LGBT animus reached a majority allowing Congress to finally pass the Shepard-Byrd Act.\textsuperscript{130}

\section*{C. The Passage and Impact of the Shepard-Byrd Act}

The legislative history of the Shepard-Byrd Act highlights the substantive and symbolic significance of passing federal hate crimes legislation with sexual orientation and gender identity included as protected classes.\textsuperscript{131} Throughout the Congressional Record members emphasized this bill’s importance: “Hate crimes do more than threaten the safety and well-being of individuals. Hate crimes do more than inflict incalculable pain and suffering on individual victims. Hate crimes target groups and terrorize communities . . . Let’s vow that we will not turn a blind eye to hatred and violence in America.”\textsuperscript{132}

The Shepard-Byrd Act fixed the two major limitations in prosecuting under the Civil Rights Act\textsuperscript{133} by eliminating the jurisdictional requirement to obtain a conviction for racial and religious animus,\textsuperscript{134} and expanding the protected classes to include “gender, disability, sexual orientation, or gender identity of any person.”\textsuperscript{135}

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\textsuperscript{127} See supra note 6. \\
\textsuperscript{128} See supra notes 116–17 and accompanying text. \\
\textsuperscript{129} 148 CONG. REC. 9,768 (2002) (statement of Sen. Kyl) (“The bill is intended to take the unprecedented step of making transsexuals and transvestites a federally protected class . . . . But I believe Congress should accept that not all human impulses are necessarily healthy, that not every desire should be pursued . . . .”). \\
\textsuperscript{131} See supra notes 15–19 and accompanying text. \\
\textsuperscript{133} See discussion supra Part IV.A. \\
\textsuperscript{135} Matthew Shepard & James Byrd, Jr., Hate Crimes Prevention Act of 2009, U.S. DEP’T OF JUSTICE, http://www.justice.gov/crt/about/crm/matthewshepard.php [hereinafter DEPARTMENT OF JUSTICE]. This subsection was enacted using Congress’ commerce power, therefore, to convict someone the government must prove the crime was in or affected interstate commerce.
Congress enacted the Shepard-Byrd Act to enhance the punishment for violence motivated by animus because such crimes “disrupt[] the tranquility and safety of communities and [are] deeply divisive.”\footnote{136} Accordingly, an offender’s criminal conduct coupled with the contemporaneous animus towards the victim’s protected status makes the offender more culpable and deserving of enhanced punishment.\footnote{137} Such an offense harms an entire community not only the individual victim of the crime, which increases the culpability of the criminal conduct.\footnote{138} Lastly, a conviction under the Shepard-Byrd Act educates society by showing that if you choose to act on your hatred for others, you will face enhanced punishment.\footnote{139}

In the committee mark-up of the hate crimes bill, members of Congress expressed concern about the “because of” language, specifically, how to prove the offender’s state of mind.\footnote{140} Proponents of the bill continuously emphasized that varying punishment based on an offender’s state of mind or motivation for acting is not new or unique in criminal law. Representative Scott analogized the Shepard-Byrd Act with the statutory grading of murder, stating that “all of these are crimes already, these are violent acts . . . [there] is nothing new about state-of-mind crimes.”\footnote{141} Additionally, Representative Tammy Baldwin, a sponsor of the bill, compared the state of mind proscribed under the Shepard-Byrd Act with that in murder for hire statutes, stating, “[j]ust as we do right now with contract [k]illing versus random acts of violence. We often look at the animus in criminal law. This is a very specific way . . . . We differentiate in our criminal statutes, time and time again, based on motivation, animus, et cetera. This is entirely consistent with that.”\footnote{142}

The Shepard-Byrd Act’s plain language and clear legislative history support interpreting “because of” to require animus motivation for conduct, but the courts have used an alternative
Most prosecutions under the Shepard-Byrd Act have imported the “substantial motivating factor” language from prosecutions under the Civil Rights Act; however, instead of using it to explain the requisite mens rea, courts used it in place of the mens rea analysis. In United States v. Jenkins, the Court expressed frustration with the varying standards: “[T]his case stands for the rather unremarkable proposition that our actions are really never the consequence of one motivation. Congress could not have meant for ‘because of’ to stand for the proposition that only when motivated by no other factors than sexual orientation should the law apply.”

V. UNITED STATES V. MILLER

Decided on August 27, 2014, United States v. Miller was the first to hold that the Shepard-Byrd Act requires the defendant’s animus to be the sole cause of the injury. This narrow interpretation of “because of” entirely frustrates the purpose of the Shepard-Byrd Act.

A. Facts of the Case

On September 6, 2011 at 10:30 pm, Barb Miller was startled by hard knocks on her front door. Late night visitors were unusual for the Miller household, but, to Barb’s relief, she noticed a man “dressed Amish” outside, so she opened the front door. Twelve adults and two small children entered her home, including several of Barb’s estranged children. The men, wearing miner-style headlamps, pulled Barb’s husband out of bed and held him in a chair. Barb testified that during the assault “all the boys [were] standing above [her husband], holding him down, screaming into his face and ... com[ing] up with the shears. ... Cutting his hair. ... He was crying and begging.” The female assailants quickly turned
to Barb, removing and destroying her prayer cap, and cutting her waist long hair to chin length. 153

The assailants were members of the Bergholz Amish community led by Bishop Samuel Mullet. 154 The community developed a reputation among the Amish Country for the strange teachings of Bishop Mullet 155 and the abandonment of basic Amish practices. 156 The assault on the Millers was the first of five violent attacks planned and executed by members of the Bergholz community. 157 The assailants documented each attack by taking pictures as they cut off the male victims’ beards and the female victims’ hair, taking pieces of the hair as trophies. 158 The attacks left nine victims and the surrounding Amish Country paralyzed in fear. 159 Beards in the Amish Country hold extreme religious significance and are a “public symbol of cultural and religious identity.” 160

Since the crimes were religiously motivated, 162 prosecutors charged each of the sixteen defendants with multiple counts of committing a federal hate crime under the Shepard-Byrd Act. 163 At trial, the District Court used the “significant motivating factor” standard, 164 instructing the jury that for a conviction the government must have proved that “a person’s actual or perceived religion was a significant motivating factor for a [d]efendant’s action even if he or she had other reasons for doing what he or she did as well.” 165 The jury found the sixteen defendants guilty of four of the five counts under the Shepard-Byrd Act. 166

153. Id. at 5.
154. Id. at 28.
155. Id. at 50.
156. Id. at 51 (explaining that Bishop Mullet replaced traditional worship services with weekly social meetings at his home).
158. KRAYBILL, supra note 148, at 5–7.
159. Id. at 15.
160. Id. (“Amish families who had never locked their doors now locked them . . . . The sheriff’s offices in both Jefferson and Holmes Counties received dozens of calls from Amish people asking about their safety and how to protect themselves.”).
161. Id. at 17.
162. At trial the prosecutors used Bishop Mullet’s statement to the media explaining the reason or the beard attacks as “[i]t’s all religion,” arguing that the defendants attacked the victims because of the manner in which they practiced the Amish religion. Id. at 105.
164. Id. at 591.
165. Id. (internal quotation marks omitted).
166. Id. at 596.
On August 27, 2014, the U.S. Court of Appeals for the Sixth Circuit overturned the convictions, asserting that the significant motivating factor definition of “because of” used in the jury instruction “does not sufficiently define the prohibited conduct.”

On October 10, 2014, the U.S. Department of Justice petitioned for an en banc review of this decision, arguing that the panel’s interpretation and application of the statute was incorrect, but the review was subsequently denied.

B. Problematic Result

The Miller decision is fundamentally wrong and illustrates why any causation analysis used to interpret the Shepard-Byrd Act frustrates the purpose of the Act. The Court mostly relied on the Supreme Court’s decision in Burrage v. United States; there the victim died from a drug overdose after taking a cocktail of drugs, including heroin sold to him by the defendant, but the record revealed that it was impossible to prove that but-for the heroin, the victim would have lived. The lower court instructed the jury that under the particular sentence enhancement provision, the heroin only needed to be a contributing factor to the victim’s death. The Supreme Court reversed, holding that “at least where use of the drug distributed by the defendant is not an independently sufficient cause of the victim’s death or serious bodily injury, a defendant cannot be liable under the penalty enhancement provision . . . unless such use is a but-for cause of the death or injury.”

Burrage is a classic causation case because the proscribed actus reus—selling heroin that resulted in death—could not be proven beyond a reasonable doubt. Miller, as with most hate crimes cases, is not. The Miller holding and all causation analysis allows judges and juries to override the guiding purpose of the Shepard-Byrd Act, the deterrence of animus-based violence, by finding that the offender had some other motive for the criminal conduct.

167. Id. at 592.
172. Id. at 886.
173. Id. at 892.
174. Id.
VI. RECOMMENDED MENS REA ANALYSIS FOR PROVING ANIMUS MOTIVATION

Congress enacted the Shepard-Byrd Act in response to the murders of James Byrd Jr. and Matthew Shepard. While the Act is not limited to murderous conduct, for purposes of this section, this Comment is only referring to hate crime murders. The actus reus prohibited by the Shepard-Byrd Act is "willfully caus[ing] bodily injury" or the attempt thereof. If the statute ended there, the requisite mens rea proscribed would be malice and could be inferred from the actus reus. However, the purpose for enacting the Shepard-Byrd Act was to add a nuance to the mens rea, and that added nuance is because of animus. For it is not the identity of the victim that makes the defendant more culpable, it is the defendant’s animus towards that identity or perceived identity.

A. Recommended Interpretation of the Shepard-Byrd Act

The Shepard-Byrd Act is necessary to take conduct that is more abhorrent than the usual murder, because of the defendant’s animus, and make available an enhanced penalty range for that abhorrent conduct. For example, where a second-degree murder carries a 5-40 year sentence and the defendant is prosecuted under the Shepard-Byrd Act, if the prosecutor can prove the defendant had the additional mens rea, the penalty range offered to the jury may be enlarged to 5 years to life. This does not mean that the jury must give the enhanced duration, 40 years to life, it merely makes it available if the jury finds that the animus is so abhorrent that 40 years is not enough. This amplification, because of animus, was the purpose for enacting the Shepard-Byrd Act. The additional animus is the circumstance that makes this murder more egregious. Accordingly, if

176. See Bacon, supra note 17.
177. See supra notes 3–4 and accompanying text. Since all hate crimes are intentional acts the only theories for proving malice are the intent to kill and intent to cause serious bodily injury.
179. That is already proscribed as criminal assault.
180. Although it does not say "because of animus towards to victim’s protected status" this is the only reading that makes sense. See id.
181. See Meli, supra note 30, at 964–65.
182. This is how aggravating circumstances in capital murder cases operate. See supra note 59 and accompanying text.
183. See supra note 59 and accompanying text.
the prosecutor chose not to prosecute Shepard's murderers for a hate crime under state law, and instead charged voluntary manslaughter under the Shepard-Byrd Act, the federal government could choose to step in, investigate, and potentially bring federal charges.

B. How to Analyze Animus Motivation as Part of the Mens Rea

Courts already have a roadmap for setting a potential punishment as more severe for killing a particular person. To analyze animus as an additional nuance to the mens rea, it can be treated like premeditation and deliberation of the specific intent to kill. This additional layer of mens rea is similar to the additional circumstances that can elevate first-degree murder to a capital offense, such as killing a police officer. The prosecutor must present facts from which the jury can infer that the defendant's animus colored the specific intent to kill. For example, in first-degree hate crime murder prosecutions, the government must prove animus motivation in addition to the premeditation and deliberation of the specific intent to kill. Animus is the motive and has to be proven beyond a reasonable doubt. Where motive helps prove premeditation and deliberation of the specific intent to kill, motive is how to prove animus mens rea under the Shepard-Byrd Act. The animus motivation can be proven with circumstantial evidence of state of mind, just like any other criminal offense. “In cases involving a necessary finding of specific intent, a jury may draw inferences of subjective intent from evidence of the defendant’s objective acts, and from circumstantial evidence.”

To prosecute a hate crime murder under the Shepard-Byrd Act, the government would have to prove two layers of the mens rea: the

185. See supra note 65, at 820.
186. See DEPARTMENT OF JUSTICE, supra note 135.
187. See supra note 59 and accompanying text.
188. See supra notes 55–57 and accompanying text.
189. See supra notes 60–62 and accompanying text.
190. See supra notes 55, 57–58 and accompanying text.
191. See supra notes 55, 57–58 and accompanying text.
192. See supra note 58 and accompanying text.
193. See supra note 55.
194. See supra note 55.
intent to cause serious bodily injury or intent to kill, amplified by the animus toward the victim’s protected identity.\textsuperscript{196} While the intent to cause serious bodily injury cannot be elevated to first-degree murder, the defendant could still face enhanced punishment if charged with a hate crime under the Shepard-Byrd Act.\textsuperscript{197} For example, if Matthew Shepard’s attackers beat him because he was gay but he did not die until four days later, the punishment should be more in line with a premeditated and deliberated killing as opposed to just a bar fight, because of the offender’s animus.

The Framework the Court used to determine the animus motivation behind Section 3 of DOMA provides further guidance for proving animus behind criminal conduct.\textsuperscript{198} For example, the Framework looks into the legislative history of a piece of legislation, seeking statements made by members of congress indicative of motive or purpose to the bill. In a hate crime prosecution, the government must look at what the defendant said before, during, and after the murder to help uncover his or her motive for acting.\textsuperscript{199} Similarly, in prosecutions under Virginia’s capital murder statute, the government can prove a defendant killed a police officer for the purpose of interfering with his official duties, by looking at statements of the defendant indicating that he was avoiding arrest.\textsuperscript{200} These are two examples of ways courts determine state of mind or motive at a given time, and analysis under the Shepard-Byrd Act should not be different.

C. Application to the Miller Facts

Analyzing the facts of Miller using this Comment’s proposed mens rea analysis requires the government to prove the defendants’ animus towards the victims’ Amish faith.\textsuperscript{201} First, the prosecutor can present

\textsuperscript{196} See supra notes 18–20 and accompanying text.
\textsuperscript{197} See supra notes 18–20 and accompanying text.
\textsuperscript{198} See Carpenter, supra note 70, at 221.
\textsuperscript{199} See, e.g., Jaynes v. State, 216 S.W.3d 839, 848 (Tex. Ct. App. 2006) (affirming jury’s guilty verdict of aggravated assault with a deadly weapon under the Hate Crimes Act where witnesses testified that the defendant directed racial slurs at the victim “before, during, and after the assault,” which was sufficient to establish that the defendant intentionally selected the victim because of a bias or prejudice against the victim’s race).
\textsuperscript{200} See supra notes 60–62 and accompanying text; see also Evans v. Commonwealth, 284 S.E.2d 816, 818–20 (Va. 1981) (finding statements made by the defendant to other inmates that he intended to escape and had nothing to lose to be admissible to show defendant’s state of mind prior to killing an officer in his effort to escape).
\textsuperscript{201} See supra Part III.B.
facts from which the jury could infer this religious animus, such as the manner and nature of the assault. The prosecutor could argue that the *Miller* defendants chose to cut off the male victims’ beards because of the significance of beards in the Amish faith. This significance is clearly tied to the victims’ protected identity. This would be the equivalent of if Matthew Shepard’s attackers had sodomized him during the attack, because the prosecutor could argue that the method of assault is circumstantial evidence of animus towards Shepard’s sexual orientation. Thus proving that at the time of the attack the defendant’s *mens rea* included animus towards Shepard because he was, or his attackers perceived him to be, gay. From this the jury could infer that the attacker’s actions were rooted in animus towards Shepard’s sexual orientation. In *Miller*, the government presented expert “testimony at trial [that] demonstrate[d] that the parties disagreed about the doctrinal significance of the beard and about whether the cutting of the beard (and hair) was acceptable. Defendants knew that their conduct would inflict great harm because of the victims’ religious beliefs on these issues.” Additional testimony “indicat[ed] that cutting off hair and beards is ‘a religious degrading[].’” One of the defendants even testified “the beard and hair cuttings ‘would help stop people’ from ‘being . . . Amish hypocrites[].’” The manner of the assaults, coupled with this testimony, is evidence from which the jury could infer religious animus.

Each of the defendants in *Miller*, as with all criminal defendants, would have the opportunity to rebut the state’s case and demonstrate to the jury that he or she did not have the specific intent at the time of committing the alleged crime. That is precisely what the defense did in *Miller*, arguing that the attacks were motivated by “a mix of interpersonal issues—parental mistreatment, personality conflicts, harassment, power struggles, and interference with family

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202. See supra note 162 and accompanying text.
203. See supra note 162 and accompanying text.
205. See United States v. Miller, 767 F.3d 585, 609 (Sargus, J., dissenting).
206. Again, the jury may reject this inference.
207. *Miller*, 767 F.3d at 607 (Sargus, J., dissenting).
208. *Id.*
209. *Id.*
210. LAFAVE, supra note 33, at § 9.1(a)(1).
relationships[,] to create reasonable doubt as to the defendants' motivation for the attacks.

Ultimately, the jury would weigh the circumstantial evidence of the defendant's state of mind presented by each side to decide whether the assault was colored with animus. After reviewing the motive evidence, the jury could infer the defendant's \textit{mens rea} at the time of the act.\textsuperscript{212} The \textit{Miller} court drew attention to the fact that the jury only found the defendants guilty of four of the five counts under the Shepard-Byrd Act: "the mixed verdict casts some doubt on the idea that a faith-inspired manner of assault \textit{necessarily} equals a faith-inspired motive for assault."\textsuperscript{213} While the court used this as support for a but-for standard over the existing substantial motivating factor standard, if the same result were to occur using the recommended \textit{mens rea} analysis, the mixed verdict would likely indicate that the jury found the government did not prove the animus motivation beyond a reasonable doubt. This Comment is not arguing that the jury should find sufficient evidence to convict the \textit{Miller} defendants using the \textit{mens rea} analysis, rather, that the jury must be properly instructed or the Shepard-Byrd Act serves no purpose.

\textbf{D. The Bigger Picture}

Scholars and courts have fetishized the phrase "because of" in the Shepard-Byrd Act since its enactment.\textsuperscript{214} However, all of the prior controversy came with the mentality that this statute operated as something new in criminal law, but, in reality, the only thing new was whom it chose to protect. While "because of" can signal causation analysis in certain tort and criminal cases where causation is at issue, it does not always require causation analysis, and it does not in the Shepard-Byrd Act. The misplacement of causation analysis is the result of tension between the level of protection afforded to LGBT people under the Shepard-Byrd Act, and the level society is willing to accept.\textsuperscript{215}

\begin{footnotesize}
\begin{enumerate}
\item \textit{Miller}, 767 F.3d at 590–91 (majority opinion). Additionally, the defense could provide circumstantial evidence to support these motives, including testimonial evidence about prior familial conflicts. \textit{Id.} at 594–95.
\item See \textit{supra} note 55 and accompanying text.
\item \textit{Miller}, 767 F.3d at 596.
\item See \textit{supra} Part IV.A–B.
\item With the major shift in society's acceptance of LGBT people, now is the time to revisit the Shepard-Byrd Act from a purely criminal law perspective.
\end{enumerate}
\end{footnotesize}
VII. CONCLUSION

Just as Congress cannot purposefully act on its LGBT animus to cause legal or economic harm,\textsuperscript{216} individuals cannot act on their LGBT animus to cause physical harm. The intentional, premeditated and deliberated killing of a police officer for the purpose of interfering with his official duties deserves enhanced punishment,\textsuperscript{217} and so does violence motivated by animus. Congress passed the Shepard-Byrd Act because intentional, harmful conduct motivated by animus cannot be tolerated.\textsuperscript{218} However, an acceptance of LGBT animus has colored the lens through which courts and scholars have interpreted the Shepard-Byrd Act, clouding the reality that allowing for enhanced punishment based on an additional nuance to the \textit{mens rea} is not only common place in criminal law, but is dictated by the plain language and purpose of the Act.

\textsuperscript{216} See supra Part III.B.
\textsuperscript{217} See supra notes 61–62 and accompanying text.
\textsuperscript{218} See supra note 136 and accompanying text.