

# Protecting the Homeless Under Vulnerable Victim Sentencing Guidelines: An Alternative to Inclusion in Hate Crime Laws

Katherine B. O'Keefe

---

## Repository Citation

Katherine B. O'Keefe, *Protecting the Homeless Under Vulnerable Victim Sentencing Guidelines: An Alternative to Inclusion in Hate Crime Laws*, 52 Wm. & Mary L. Rev. 301 (2010), <https://scholarship.law.wm.edu/wmlr/vol52/iss1/7>

PROTECTING THE HOMELESS UNDER VULNERABLE  
VICTIM SENTENCING GUIDELINES: AN ALTERNATIVE TO  
INCLUSION IN HATE CRIME LAWS

TABLE OF CONTENTS

INTRODUCTION .....	302
I. ENHANCED PUNISHMENTS .....	305
<i>A. Hate Crime Laws</i> .....	306
<i>B. Vulnerable Victim Sentencing Guidelines</i> .....	308
<i>C. Criticisms of Enhanced Punishments</i> .....	309
II. DEHUMANIZATION OF THE HOMELESS .....	310
III. PROTECTING THE HOMELESS UNDER VULNERABLE VICTIM SENTENCING GUIDELINES .....	313
<i>A. Vulnerable Victim Sentencing Guidelines as a         Flexible Alternative to Hate Crime Statutes</i> .....	314
<i>B. Applying Vulnerable Victim Sentencing         Guidelines to the Homeless</i> .....	317
1. <i>The Fundamental Purpose of Vulnerable             Victim Sentencing Guidelines</i> .....	317
2. <i>Specific Court Cases Involving the Federal             Vulnerable Victim Sentencing Guideline</i> .....	320
<i>a. Homelessness as a Factor</i> .....	320
<i>b. Homelessness as a Proxy for Vulnerability</i> .....	322
CONCLUSION .....	325

## INTRODUCTION

Michael Roberts was a homeless<sup>1</sup> man living in Daytona Beach, Florida, when he was brutally attacked and killed by four teenage boys in May 2005.<sup>2</sup> One of the boys was only fourteen years of age,<sup>3</sup> and another admitted to being high at the time of the attack.<sup>4</sup> The boys beat Roberts in three separate attacks, using sticks to hit him and fracture his skull.<sup>5</sup> They also jumped on a log placed on his chest, breaking his ribs.<sup>6</sup>

This kind of violence exhibited toward the homeless is not uncommon, and such attacks are alarmingly random and brutal.<sup>7</sup> Both law enforcement officials and researchers agree that the number of attacks on the homeless has increased over the past several years.<sup>8</sup> In absolute terms, there have been 880 documented attacks on the homeless over the past decade—244 of which were fatal.<sup>9</sup> These attacks have occurred in fifty-five different cities across

---

1. For the purposes of this Note, the United States Code shall provide the definition of “homeless.” See 42 U.S.C. § 11302(a) (2006) (defining a homeless person as “(1) an individual who lacks a fixed, regular, and adequate nighttime residence; and (2) an individual who has a primary nighttime residence that is ... (c) a public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings”). According to the U.S. Department of Housing and Urban Development, 42 percent of the nation’s homeless population, counting both families and individuals, is unsheltered. U.S. DEP’T OF HOUS. & URBAN DEV., THE 2008 ANNUAL HOMELESS ASSESSMENT REPORT i (2009), available at [www.hudhre.info/documents/4thHomelessAssessmentReport.pdf](http://www.hudhre.info/documents/4thHomelessAssessmentReport.pdf) [hereinafter GOVERNMENT HOMELESS REPORT]. When this Note mentions a statistic, unless specified, the figure includes both the sheltered and unsheltered homeless populations.

2. Ashley Fantz, *10-Year-Olds Attack, Beat Homeless Man, Police Say*, CNN.COM, Mar. 30, 2007, <http://www.cnn.com/2007/US/03/29/homeless.attack/index.html>.

3. *Id.*

4. Amy Green, *Attacks on the Homeless Rise, With Youths Mostly To Blame*, N.Y. TIMES, Feb. 15, 2008, at A12.

5. Fantz, *supra* note 2.

6. *Id.*

7. For example, in Hollywood, a local man was charged with stabbing two homeless men and injuring a third in broad daylight. Eric Lichtblau, *Attacks on Homeless Bring Push to Broaden Laws on Hate Crimes*, N.Y. TIMES, Aug. 8, 2009, at A1. In Los Angeles, a homeless man was doused in gasoline and lit on fire. *Id.* And in Jacksonville, North Carolina, a man was attacked in the back of a strip mall and stabbed in the abdomen with a broken beer bottle. *Id.*

8. *Id.*

9. NAT’L COAL. FOR THE HOMELESS, HATE, VIOLENCE, AND DEATH ON MAIN STREET USA 18 (2009), available at [http://www.nationalhomeless.org/publications/hatecrimes/hate\\_report\\_](http://www.nationalhomeless.org/publications/hatecrimes/hate_report_)

the United States.<sup>10</sup> And consistent with the beating death of Michael Roberts, the perpetrators were mostly men and teenage boys who committed these horrendous acts of violence simply for the thrill of it.<sup>11</sup>

These trends are troubling, especially because the threat of violence against the homeless may increase as the number of people living on the streets grows. Although it is uncertain whether the homeless population will expand in the near future, two factors make this prediction a distinct possibility. First, the ongoing wars in Afghanistan and Iraq are increasing the number of veterans living on the streets; in 2007 alone, the Department of Veterans Affairs reported that over 400 homeless persons were veterans of the wars in Afghanistan and Iraq.<sup>12</sup> Indeed, war veterans are more susceptible to becoming homeless because they frequently suffer from post-traumatic stress disorder or traumatic brain injuries.<sup>13</sup> To cope with these conditions, many veterans turn to alcohol and drugs, which makes it harder for them to maintain an existence in mainstream society.<sup>14</sup> Moreover, those veterans who have been on multiple tours in Afghanistan or Iraq often experience difficulty adjusting back into family and work life.<sup>15</sup> As long as the wars continue, and more soldiers return to U.S. soil, this problem of neglected, homeless veterans has the potential to escalate.<sup>16</sup>

The second factor that will likely contribute to an expanding homeless population is the recent economic downturn and the housing crisis. Foreclosures are forcing individuals and families to leave their homes and seek shelter elsewhere. In 2009, an average of 10 percent of the people living in homeless shelters had lost their

---

2008.pdf [hereinafter COALITION HOMELESS REPORT].

10. *Id.* at 23-24.

11. Lichtblau, *supra* note 7, at A1; *see also* COALITION HOMELESS REPORT, *supra* note 9, at 10, 20 (finding that, in 2008, 43 percent of the attacks on the homeless were committed by teenagers between the ages of 13 and 19, 73 percent of the accused or convicted attackers were under the age of 25, and 106 of the 109 accused or convicted attackers were male); Green, *supra* note 4, at A12 (stating that many attacks are made by young men who view attacking the homeless as a sport).

12. Erik Eckholm, *Surge Seen in Number of Homeless Veterans*, N.Y. TIMES, Nov. 8, 2007, at A22. This figure is in addition to the estimated 196,000 veterans from other wars. *Id.*

13. *Id.*

14. *See id.*

15. *Id.*

16. *See id.*

homes to foreclosure.<sup>17</sup> In the Midwest, high foreclosure and unemployment rates were factors for 15 percent of the newly homeless.<sup>18</sup> California, Michigan, and Florida also have a large number of newly homeless individuals and families due to high foreclosure rates.<sup>19</sup> As long as the housing and job markets stay depressed, home foreclosure is sure to be a factor in the potential growth of the country's homeless population.

In response to the rise in violence against the homeless and the potential growth in the homeless population, many advocacy groups have urged legislatures to pass legal reforms that deter such violence by punishing more severely those who attack the homeless. These groups advance two principal ways to accomplish this objective. The first is to add the homeless to federal and state hate crime statutes, an approach that Maryland has already adopted.<sup>20</sup> The second is to apply federal and state vulnerable victim sentencing guidelines to those who are convicted of attacking the homeless.<sup>21</sup> This Note explores the reasons why vulnerable victim sentencing guidelines provide a viable and preferable alternative to hate crime statutes for protecting the homeless against violent crimes.<sup>22</sup>

Part I of this Note explores the theories that support hate crime statutes and vulnerable victim sentencing guidelines, and then analyzes the general criticisms of enhanced punishments. Part II

---

17. See Peter S. Goodman, *From Foreclosure to the Car to a Shelter Bed*, N.Y. TIMES, Oct. 19, 2009, at A1. Although this Note is mainly concerned with those homeless who do not seek the protection of shelters, statistics for those homeless who live on the street are unreliable and widely unavailable.

18. See *id.*

19. *Id.* at A17. Interestingly, California and Florida were the two states with the highest number of attacks on the homeless. See COALITION HOMELESS REPORT, *supra* note 9, at 23-24.

20. See MD. CODE ANN. CRIM. LAW § 10-301 (West 2009). The District of Columbia also approved a measure to include the homeless in its hate crime laws. See Lichtblau, *supra* note 7, at A1. Legislatures in California, Florida, Ohio, South Carolina, and Texas are considering legislation that would add penalties for attacks on the homeless. *Id.* at A11. Similarly, in 2009, Representative Eddie Bernice Johnson, a Democrat from Texas, proposed a bill in the U.S. House of Representatives to add the homeless to the Hate Crime Statistics Act, 28 U.S.C. § 534 (2006). See H.R. 3419, 111th Cong. (2009).

21. See *infra* Part III.

22. For general application and illustrative purposes, this Note focuses on the federal vulnerable victim sentencing guideline, as compared to the federal hate crime sentencing guideline, rather than delving into state-specific law. State law, however, is extremely important in prosecuting criminal defendants, and is mentioned when appropriate.

examines the dehumanization of the homeless through laws affecting their livelihood and shows that, in theory, laws reflect the values of society. Part III analyzes the application of vulnerable victim sentencing guidelines to those convicted of attacking the homeless, and explains why this approach is practical. This Note argues that the homeless do not belong in hate crime statutes because homelessness is not an immutable trait, nor is it a category that applies equally to everyone. Instead, legislatures should add homelessness to vulnerable victim sentencing guidelines so that courts will be required to take into account the homelessness of the victim when calculating the advisory sentencing range. Vulnerable victim sentencing guidelines provide the greater protection that society should give to the homeless, can be applied by the judicial system immediately,<sup>23</sup> and supply a flexible, rather than stagnant, standard.

## I. ENHANCED PUNISHMENTS

Advocates for the homeless have proposed two forms of enhanced punishment to protect the homeless against violent crimes: hate crime laws and vulnerable victim sentencing guidelines. All enhanced sentencing guidelines piggyback onto other criminal statutes.<sup>24</sup> For both hate crime and vulnerable victim enhancements, however, the federal sentencing guidelines are advisory and not mandatory.<sup>25</sup> Parts I.A and I.B will discuss these two enhanced

---

23. Even if homelessness is not immediately added to vulnerable victim sentencing guidelines, the judge could choose to use homelessness as a factor in determining the appropriate sentence for the defendant if the guideline has a catchall phrase. *See infra* note 38 and accompanying text.

24. *See* FREDERICK M. LAWRENCE, PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW 93 (1999). For example, consider a defendant who has beaten a homeless man unconscious and is charged with and convicted of aggravated assault. Under the federal sentencing guidelines, aggravated assault carries with it a base offense level of fourteen. U.S. SENTENCING GUIDELINES MANUAL § 2A2.2(a) (2009). If the defendant has no prior criminal history, the sentencing range provided by the guidelines for a level fourteen offense is fifteen to twenty-one months imprisonment. *Id.* § 5A. If the court finds that the homeless victim is “vulnerable” under section 3A1.1(b), then the offense level is increased by two levels, to level sixteen, thus increasing the sentencing range to twenty-one to twenty-seven months. *See id.* §§ 3A1.1(b), 5A.

25. *See* *United States v. Booker*, 543 U.S. 220, 259 (2005). This development has not rendered the sentencing guidelines ineffective. In fact, the Supreme Court later stated that

punishments in more detail, and Part I.C will discuss criticisms of both.

### A. *Hate Crime Laws*

Both federal and state legislatures have enacted hate crime statutes. The main federal hate crime sentencing guideline that calls for enhanced punishment states:

If the finder of fact at trial or, in the case of a plea of guilty or nolo contendere, the court at sentencing determines beyond a reasonable doubt that the defendant intentionally selected any victim or any property as the object of the offense of conviction because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person, increase [the punishment] by 3 levels.<sup>26</sup>

Although most states have a version of this law, each statute's definitions, scope, penalties, and punishment enhancements vary greatly. The basic premise is that a victim of a hate crime was

---

the guidelines should always be the "starting point and the initial benchmark" for sentencing in a district court, even though they are no longer the only factor that needs to be considered. *Gall v. United States*, 552 U.S. 38, 49 (2007). The Supreme Court recently expanded on this holding, stating that the sentencing court should calculate a sentence range using the guidelines, but then determine if the range is appropriate given the set of facts. *Nelson v. United States*, 129 S. Ct. 890, 891 (2009). The Court also held that the district court can no longer presume that the sentencing guidelines are reasonable. *Id.* at 892. Subsequent court decisions have found that, under *Nelson*, the guidelines are still an important factor in deciding the defendant's sentence; however, the reasonableness of the sentence prescribed by the guidelines must be determined by the arguments given by both parties and any other factors that the sentencing court finds compelling. *See, e.g., United States v. Davila-Gonzalez*, 595 F.3d 42, 48 (1st Cir. 2010) (distinguishing "between according a presumption of reasonableness to the [federal sentencing guidelines] ... and finding that the [guidelines], in a particular case, represent[] an appropriate sentencing range") (emphasis omitted); *United States v. Alexander*, 339 F. App'x 941, 945 (11th Cir. 2009) (arguing that, following the outcome in *Nelson*, the district court did not err in sentencing when it listened to the arguments of both parties and required a "compelling reason" for a downward departure from the sentence prescribed by the guidelines); *United States v. Bain*, 586 F.3d 634, 638 (8th Cir. 2009) (finding that the district court did not apply a presumption of reasonableness when determining a sentence, but instead properly considered the sentencing guideline as an important factor among many to consider).

26. U.S. SENTENCING GUIDELINES MANUAL, *supra* note 24, § 3A1.1(a).

attacked because of a particular protected aspect of his or her identity, not for whom he or she is as a person.<sup>27</sup>

The main goal of hate crime statutes is to protect certain self-identifying groups: individuals brought together around a shared purpose and a sense of loyalty regarding a particular characteristic.<sup>28</sup> A self-identifying group is something stronger than a random collection of people with a common identity trait.<sup>29</sup> It has been observed that this common attribute often is immutable or costly to change.<sup>30</sup> This observation is certainly true when it comes to a characteristic such as race or gender. Immutability, however, has not been the sole factor in determining which groups hate crime legislation should protect. State hate crime statutes may also include other, arguably mutable, personal traits, such as religious belief, marital status, and political affiliation.<sup>31</sup> Although there is no definite consensus as to which groups should be included in hate crime laws, the laws generally protect self-identifying groups.

Hate crime laws try to accomplish two additional intangible goals. A hate crime leaves an ongoing fear in the targeted self-identifying group within a particular community.<sup>32</sup> Hate crime laws try to ameliorate that fear by both increasing public awareness of the violence committed against a certain group in society, and providing protection to groups that are commonly marginalized by law en-

---

27. See Michael Blake, *Geeks and Monsters: Bias Crimes and Social Identity*, 20 LAW & PHIL. 121, 123 (2001).

28. *Id.* at 125-26.

29. *Id.*

30. See, e.g., *id.* at 125; Raegan Joern, *Mean Streets: Violence Against the Homeless and the Makings of a Hate Crime*, 6 HASTINGS RACE & POVERTY L.J. 305, 327 (2009).

31. See, e.g., D.C. CODE § 22-3701 (2009) (“Bias-related crime” means a designated act that demonstrates an accused’s prejudice based on the actual or perceived race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, family responsibility, homelessness, physical disability, matriculation, or political affiliation of a victim.”) (emphasis added); IOWA CODE § 729A.2 (2009) (“Hate crime” means one of the following public offenses when committed against a person or a person’s property because of the person’s race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age, or disability, or the person’s association with a person of a certain race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age, or disability.”) (emphasis added); W. VA. CODE § 5-11-20 (2009) (providing protection on the basis of “race, color, religion, sex, ancestry, national origin, political affiliation or disability”) (emphasis added). Religion is not immutable and is usually not thought of as being costly to change in a monetary sense, but in all states that have enacted hate crime legislation, religion or creed is listed among the protected identity groups.

32. See Blake, *supra* note 27, at 132; Joern, *supra* note 30, at 328.



forcement and the courts.<sup>33</sup> These laws send an important message to society that crimes against certain groups will not be tolerated, and thus deserve a heightened level of punishment.

### *B. Vulnerable Victim Sentencing Guidelines*

As is the case with hate crime laws, federal and state legislatures have also passed vulnerable victim sentencing guidelines. The federal vulnerable victim sentencing guideline provides that “[i]f the defendant knew or should have known that a victim of the offense was a vulnerable victim, increase [the punishment] by 2 levels.”<sup>34</sup> A “vulnerable victim” is defined as one “who is unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct.”<sup>35</sup> The vulnerability of a victim is also a sentencing factor written into several state laws, with Alaska specifically naming homelessness in its statute.<sup>36</sup> It should be noted, however, that these state provisions identify particular characteristics that render a victim vulnerable, thus limiting protection to those groups.<sup>37</sup> In comparison, the federal

---

33. Jane Spade & Craig Willse, *Confronting the Limits of Gay Hate Crimes Activism: A Radical Critique*, 21 CHICANO-LATINO L. REV. 38, 39-41 (2000).

34. U.S. SENTENCING GUIDELINES MANUAL, *supra* note 24, § 3A1.1(b)(1).

35. *Id.* § 3A1.1 cmt. n.2.

36. *See, e.g.*, ALASKA STAT. § 12.55.155(c)(5) (2009) (stating that the sentencing court can impose a sentence above the stated range if “the defendant knew or reasonably should have known that the victim of the offense was particularly vulnerable or incapable of resistance due to advanced age, disability, ill health, homelessness, or extreme youth or was for any other reason substantially incapable of exercising normal physical or mental powers of resistance”); ARK. CODE ANN. § 16-90-804(c)(2)(B) (West 2009) (declaring that the sentencing judge may depart from the presumptive sentence when “[t]he offender knew or should have known that the victim was particularly vulnerable or incapable of resistance due to extreme youth, advanced age, disability, or ill health”); FLA. STAT. ANN. § 921.141(5)(m) (West 2009) (describing an aggravated circumstance as when “[t]he victim of the capital felony was particularly vulnerable due to advanced age or disability, or because the defendant stood in a position of familial or custodial authority over the victim”); KAN. STAT. ANN. § 21-4716(c)(2)(A) (2008) (stating that an aggravating factor includes when “[t]he victim was particularly vulnerable due to age, infirmity, or reduced physical or mental capacity which was known or should have been known to the offender”); OR. REV. STAT. ANN. § 137.085 (West 2009) (asserting that, in determining if a sentence enhancement is warranted, “the court shall give consideration to a victim’s particular vulnerability to injury in such case, due to the victim’s youth, advanced age or physical disability”).

37. *See, e.g.*, ALASKA STAT. § 12.55.155(c)(5) (limiting probation to characteristics such as “age, disability, ill health, homelessness or extreme youth”).

standard includes a catchall clause providing protection to *anyone* “who is otherwise particularly susceptible to ... criminal conduct.”<sup>38</sup>

The vulnerable victim sentencing adjustment attempts to protect particular groups within society, but these groups do not self-identify through a specific characteristic. Instead, the groups are based around characteristics that make the members of that group especially “vulnerable” or “susceptible” to criminal conduct.<sup>39</sup> In other words, a group may have a particular trait in common, such as advanced age, but it is not the advanced age that affords them protection. Instead, it is the vulnerability that may come from advanced age that grants them special protection under the vulnerable victim sentencing enhancement. Because of the victim’s perceived vulnerability, the defendant has demonstrated a greater depravity in his choice of victim, and thus should be punished in accordance with this greater depravity.<sup>40</sup>

Whereas both the hate crime statutes and the vulnerable victim statutes attempt to protect certain groups in society, they differ in the type of groups that they aim to protect. Hate crime statutes base enhanced punishment on a particular group’s shared characteristics and whether the victim was harmed because he or she was a member of that group. The vulnerable victim sentencing guidelines, however, are applied after the court conducts a case-by-case assessment of the victim’s individual characteristics. Although the two enhanced punishments protect different groups in society, they work in similar ways, and thus share the same criticisms.

### *C. Criticisms of Enhanced Punishments*

Enhanced punishment has come under fire for being a superficial solution to deeply-rooted societal intolerances.<sup>41</sup> Some have argued that hate crime statutes act as a band-aid, relying on “the criminal justice system and that system’s punitive measures” to correct

---

38. U.S. SENTENCING GUIDELINES MANUAL, *supra* note 24, § 3A1.1 cmt. n.2.

39. Lu-in Wang, *Recognizing Opportunistic Bias Crimes*, 80 B.U. L. REV. 1399, 1421 (2000).

40. See Jay Dyckman, *Brightening the Line: Properly Identifying a Vulnerable Victim for Purposes of Section 3A1.1 of the Federal Sentencing Guidelines*, 98 COLUM. L. REV. 1960, 1962 (1998).

41. Most of this criticism has been about hate crime statutes, rather than vulnerable victim sentencing guidelines; however, the criticism can usually be applied to both types of sentence enhancements.

problems that are embedded in society's prejudices.<sup>42</sup> By focusing on the punishment of individuals, the legislature is stating that the people committing violent acts are the problem, substantially ignoring the practices or institutions that create the prejudice in the first place.<sup>43</sup> Enhanced punishment statutes also draw a dichotomous line between biased and nonbiased actions based on acts of violence, essentially ignoring smaller acts of injustice that perpetuate the identity group's subordination.<sup>44</sup>

Although it is true that enhanced sentences do not address the underlying, systemic problems that cause the prejudice against certain groups, they do send an important message to the community about how these particular crimes should be treated. Enhanced punishment shows community condemnation of a particular crime.<sup>45</sup> In essence, the legislation identifies one class of criminal action that is more deserving of harsh punishment than similar crimes.<sup>46</sup> This enhanced punishment validates the notion that the community is willing to lend extra protection to certain groups that may be more susceptible to criminal conduct. In conjunction with efforts to treat systemic problems, enhanced sentences can be a very powerful tool in combating prejudice.

## II. DEHUMANIZATION OF THE HOMELESS

Society's dehumanization of the homeless has played a role in the increased vulnerability of the group. If a society's laws treat a subsection of its population as second-class citizens, then it follows that society as a whole will do the same. African Americans fighting

---

42. Spade & Willse, *supra* note 33, at 43; *see also* Paula C. Johnson, *The Social Construction of Identity in Criminal Cases: Cinema Verité and the Pedagogy of Vincent Chin*, 1 MICH. J. RACE & L. 347, 384-85 (1996).

43. *See* Sally Kohn, *Greasing the Wheel: How the Criminal Justice System Hurts Gay, Lesbian, Bisexual, and Transgendered People and Why Hate Crime Laws Won't Save Them*, 27 N.Y.U. REV. L. & SOC. CHANGE 257, 272 (2002); *see also* Spade & Willse, *supra* note 33, at 46.

44. Spade & Willse, *supra* note 33, at 46.

45. *See* Depp v. State, 686 P.2d 712, 721 (Alaska Ct. App. 1984); *see also* Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 463 (1999); Jordan Blair Woods, Comment, *Taking the "Hate" Out of Hate Crimes: Applying Unfair Advantage Theory To Justify the Enhanced Punishment of Opportunistic Bias Crimes*, 56 UCLA L. REV. 489, 539-40 (2008).

46. Blake, *supra* note 27, at 138.

for their civil rights and homosexuals fighting for adoption rights used this argument, which may also be applied to the homeless.<sup>47</sup>

Moreover, across the country, laws criminalize certain actions of the homeless in particular situations.<sup>48</sup> For example, St. Petersburg, Florida, passed six new ordinances in 2007 that prohibited activities such as panhandling, storing belongings on public property, and sleeping in various outdoor public areas.<sup>49</sup> Kalamazoo, Michigan, has an ordinance prohibiting sleeping in public parks.<sup>50</sup> Although no one has been convicted of violating this ordinance, several people have been arrested and numerous homeless persons have been ticketed for violating it.<sup>51</sup> Additionally, law enforcement often perform “sweeps” of certain areas known to house the homeless in an effort to drive them elsewhere, often destroying their personal belongings and makeshift shelters in the process.<sup>52</sup> In Las Vegas, for example, “crackdowns” on homeless encampments have made the homeless more visible—and vulnerable—than ever.<sup>53</sup> Some of these homeless have resorted to living in flood tunnels, which can fill within seconds, in order to be less vulnerable to human threats.<sup>54</sup>

These laws and their enforcement cement the status of the homeless as second-class citizens by infringing on their livelihood and disrespecting their property. This dehumanization has trickled into society’s perception of the homeless. “Bum fight” videos have become extremely popular on the Internet.<sup>55</sup> These videos depict boys and young men beating the homeless, or show the homeless

---

47. See Marisa Gonzalez, Note & Comment, *If You Can't Fix It, You've Got To Stand It: Lofton v. Secretary of Department of Children and Family Services and the Florida Adoption Statute's Discrimination Against Homosexuals and Foster Children*, 7 WHITTIER J. CHILD & FAM. ADVOC. 277, 309-10 (2008).

48. See Tami Iwamoto, *Adding Insult to Injury: Criminalization of Homelessness in Los Angeles*, 29 WHITTIER L. REV. 515, 528 (2007) (discussing the criminalization of actions such as sleeping and sitting).

49. NAT'L LAW CTR. ON HOMELESSNESS & POVERTY & NAT'L COAL. FOR THE HOMELESS, HOMES NOT HANDCUFFS: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 36 (2009), available at [http://www.nationalhomeless.org/publications/crimreport/CrimzReport\\_2009.pdf](http://www.nationalhomeless.org/publications/crimreport/CrimzReport_2009.pdf) [hereinafter CRIMINALIZATION REPORT].

50. KALAMAZOO, MICH., CODE OF ORDINANCES § 33-23 (2009).

51. CRIMINALIZATION REPORT, *supra* note 49, at 41.

52. *Id.* at 10.

53. Lichtblau, *supra* note 7, at A1.

54. *Id.* at A11.

55. *Id.*

fighting each other in exchange for money, alcohol, or food.<sup>56</sup> A recent search of “bum fight” on YouTube yielded a result of 10,600 videos.<sup>57</sup> Moreover, because of hostility from the police, the criminal justice system, and society at large, the homeless are usually reluctant to seek proper remedies when subjected to violence.<sup>58</sup>

Despite this trend of dehumanization, conditions for the homeless have improved in some areas. In 2006, the Ninth Circuit found that an ordinance that criminalized sitting, lying, or sleeping on public streets and sidewalks violated the Eighth Amendment’s prohibition of cruel and unusual punishment when it was enforced against all people, at all times, and in all places within Los Angeles.<sup>59</sup> Although the court’s opinion is a positive step in the right direction, it points out that narrower statutes in force in other major U.S. cities do not violate the Eighth Amendment because they do not apply at all times and in all places.<sup>60</sup> Courts also have started to compare the status of being homeless with that of being an alcoholic or a drug addict.<sup>61</sup> Although this may be seen by some as a negative comparison, it simply puts the homeless within a category of persons who should not be punished for their status alone. To clarify, a homeless individual, like a drug addict or an alcoholic, should not be punished for “an involuntary act or condition if it is the unavoidable consequence of [his or her] status or being.”<sup>62</sup> These individual court decisions show a growing understanding of the needs of the homeless.

Some cities have taken a more lenient approach to the enforcement of ordinances that overwhelmingly affect the homeless, or have instituted programs meant to benefit the homeless. A city manager in Ventura, California, for example, has allowed car-camping in designated areas for those homeless who have a car in

---

56. *See id.*

57. YouTube, <http://www.youtube.com> (last visited Mar. 3, 2010).

58. *See Spade & Willse, supra* note 33, at 40.

59. *Jones v. City of Los Angeles*, 444 F.3d 1118 (9th Cir. 2006), *vacated*, 505 F.3d 1006 (9th Cir. 2007). Although the opinion was vacated, and is thus nonbinding authority, it is still informative and persuasive. *See Lehr v. City of San Francisco*, 624 F. Supp. 2d 1218, 1225-26 (E.D. Cal. 2009).

60. *Jones*, 444 F.3d at 1123.

61. *See id.* at 1131-37 (discussing *Robinson v. California*, 370 U.S. 660 (1962), in which the Supreme Court found that being addicted to the use of narcotics is a status, and not an act, and thus the State may not punish an addict who has not committed a separate act).

62. *Id.* at 1135.

which to sleep.<sup>63</sup> In Daytona Beach, Florida, the city is working with service providers and local businesses to provide the homeless with temporary housing in exchange for their time and manpower in cleaning up the downtown area.<sup>64</sup> In Cleveland, instead of restricting food sharing programs like some other cities have chosen to do, the local government is working with outreach services to improve food distribution to the city's homeless.<sup>65</sup>

In sum, being homeless is not illegal, but certain actions that are important to the livelihood of the homeless, when exhibited in certain areas, are illegal. This criminalization labels the homeless as second-class citizens. Due to their treatment as second-class citizens, the homeless are more likely to be treated in a dehumanizing manner, ranging from avoidance on the street, to exploitation of their status in degrading videos, to the more extreme violence that has been inflicted on certain members of the population. Although additional protection for those who break the law is not the proper solution, it is partly the dehumanizing aspect of these laws that make the homeless susceptible to violence. Therefore, the homeless deserve consideration as vulnerable victims under the federal vulnerable victim sentencing guideline. To take it one step further, the potential protection of the homeless under the guidelines is a natural extension of the process of rehumanizing the status of homelessness.

### III. PROTECTING THE HOMELESS UNDER VULNERABLE VICTIM SENTENCING GUIDELINES

Vulnerable victim sentencing guidelines are an appropriate, existing method to protect the homeless from violence. First, homelessness is a mutable characteristic of a person's identity, and because it encompasses only a subsection of the population, it cannot and does not apply to everyone equally. Additionally, homelessness is a condition that society is constantly trying to improve through various social services and programs. A flexible standard is more suitable for such a subsection of society. Second,

---

63. Goodman, *supra* note 17, at A17.

64. See CRIMINALIZATION REPORT, *supra* note 49, at 12.

65. *Id.* at 30.

protecting the homeless under the federal vulnerable victim sentencing guideline logically follows from the reasoning behind present applications of the guideline. Part III.A explores the flexibility of the vulnerable victim sentencing guidelines and Part III.B discusses its current and potential application.

*A. Vulnerable Victim Sentencing Guidelines as a Flexible Alternative to Hate Crime Statutes*

As a group, the homeless require a flexible standard to provide them with increased protection, but most of the recent legislation regarding crimes against the homeless proposes adding the homeless as a protected class under inflexible hate crime statutes.<sup>66</sup> Although this is a viable option, and hate crime statutes are necessary and important to protect certain groups against discriminatory violence, expanding the scope of the protected identity groups to encompass the homeless would dilute the power of the laws.<sup>67</sup> Hate crime legislation protects self-identifying groups that have a shared sense of purpose.<sup>68</sup> Inclusion of the homeless would change this underlying purpose.

Unlike groups protected by hate crime statutes, the homeless are not a self-identifying group. Because homelessness is usually involuntary, it is generally not a welcome addition to a person's identity.<sup>69</sup> Soaring unemployment and home foreclosures have driven many individuals and families out onto the street.<sup>70</sup> These people are homeless solely because of the economic downturn, and it can hardly be assumed that homelessness is a desirable or permanent part of their self-identity. Additionally, mental illness is one of the leading causes of homelessness because states often fail to support deinstitutionalized persons suffering from psychiatric problems.<sup>71</sup> Mental illness is not a choice, and even if it can be treated, it is an immutable characteristic of a person's being.<sup>72</sup> It

---

66. See *supra* note 20 and accompanying text.

67. Allison Marston Danner, *Bias Crimes and Crimes Against Humanity: Culpability in Context*, 6 BUFF. CRIM. L. REV. 389, 446-47 (2002).

68. See *supra* notes 28-31 and accompanying text.

69. See Blake, *supra* note 27, at 125-26.

70. See Lichtblau, *supra* note 7, at A1; see also *supra* notes 17-19 and accompanying text.

71. Iwamoto, *supra* note 48, at 521.

72. *Id.*

would be hard to say that homelessness caused by mental illness is an appreciated aspect of one's identity. Because homelessness is usually an unwanted addition to a person's sense of self, it is impossible to conclude that the homeless as a group have a shared sense of purpose or loyalty toward one another.<sup>73</sup> Hate crime statutes should not afford protection to a group like the homeless, who do not have a shared purpose.

Moving past the theoretical basis of hate crime statutes, these laws play into "identity politics."<sup>74</sup> In order for any legislature to include a certain identity group in its hate crime legislation, that group needs to have activists lobbying on its behalf; those groups that are too weak or scattered to have a political voice, such as the homeless, will be left out of the political process.<sup>75</sup> Because of this problem, and because legislatures determine the border delineating who deserves protection by hate crime legislation, it could take a long time for the homeless to be added as a protected group.<sup>76</sup> Legislatures can be slow to react, and may not react at all. For example, only thirty-two states have hate crime statutes that protect on the basis of sexual orientation, "twenty-eight on the basis of gender, and less than ten include disability."<sup>77</sup> In contrast, the vulnerable victim sentencing guideline is a flexible standard. Courts may apply the extra protection in any jurisdiction that allows for a vulnerable victim sentencing enhancement based on any factor, regardless of whether it is specifically enumerated in the statute.<sup>78</sup>

Lastly, the characteristics included in hate crime laws are either immutable or ones that can be applied equally to all persons.<sup>79</sup> For example, the "disability" category does not apply to all persons because not all persons have a disability; however, a disability is an immutable characteristic of a person's being. And although religion

---

73. See *supra* notes 28-31 and accompanying text.

74. Spade & Willse, *supra* note 33, at 39.

75. See *id.* at 39-40.

76. See Blake, *supra* note 27, at 124.

77. COALITION HOMELESS REPORT, *supra* note 9, at 35.

78. It certainly would be more effective to add homelessness as a factor to vulnerable victim sentencing guidelines, but in the meantime, a broad construction of the guidelines could suffice.

79. See generally Scott Steiner, *Habitations of Cruelty: The Pitfalls of Expanding Hate Crime Legislation to Include the Homeless*, 45 CRIM. L. BULL. ART 4 (2009) (arguing that the homeless should not be included in hate crime statutes because hate crime statutes are intended to protect everyone equally).



is not an immutable characteristic of a person's identity, the protection that the category provides applies to all persons equally. It applies, for example, if a person is attacked for being Episcopalian, Muslim, or atheist; *all persons* are protected by the inclusion of religion in hate crime statutes.

Homelessness as a protected category does not fit into either of these generalizations. Although there are chronic homeless individuals, it is not an immutable characteristic of a person's identity. Additionally, homelessness as a category does not protect all persons equally. It protects only those who are, in fact, homeless. For the homeless, a more flexible standard, such as the vulnerable victim sentencing guideline provides greater—and more appropriate—protection.

An argument against the use of vulnerable victim sentencing guidelines to deal with violence against the homeless is that they do not address the harm caused by “bias crime.”<sup>80</sup> But if this claim is true, then it is also true of hate crime statutes. Both hate crime statutes and vulnerable victim sentencing guidelines have the same end result: a harsher sentence for someone who targets a specific victim based on a perceived identity or vulnerability. Neither approach, however, can adequately address the harm without addressing the systemic problems that led to the prejudice in the first place. Instead, “society needs to use legislation that is flexible enough to accommodate varying prejudices and consequently better equipped to promote equality of protection in a changing environment.”<sup>81</sup> The recognition of certain groups as having a legally protected identity can evolve over time, and this is especially true of the homeless.<sup>82</sup> It is a fraction of the population that society as a whole is actively trying to shrink through government and nonprofit programs.<sup>83</sup> Additionally, it is a mutable status that does not include everyone within the scope of its protection. It

---

80. See, e.g., Joern, *supra* note 30, at 331.

81. Alon Harel & Gideon Parchomovsky, *On Hate and Equality*, 109 *YALE L.J.* 507, 536 (1999).

82. Compare *Jones v. City of Los Angeles*, 444 F.3d 1118 (9th Cir. 2006), with *Joyce v. City and County of San Francisco*, 846 F. Supp. 843 (N.D. Cal. 1994) (homelessness was deemed a “condition” that was *not* constitutionally protected in *Joyce*, but in *Jones*, which was decided twelve years later, homelessness was a status that *could be* protected constitutionally by the Eighth Amendment).

83. See Steiner, *supra* note 79, at 18-19.

makes little sense to add to hate crime statutes an identity category that is mutable, applies to only a certain subsection of the population, and is a condition that society is constantly trying to ameliorate. An identity of this type is much better suited to the underlying purpose of vulnerable victim sentencing guidelines.

### *B. Applying Vulnerable Victim Sentencing Guidelines to the Homeless*

Applying an enhanced sentence to those who commit acts of violence against the homeless is a natural extension of vulnerable victim sentencing guidelines. The homeless fall easily into the underlying justification for the statute, as it has been defined by the federal courts and interpreted by scholars.<sup>84</sup> The courts could apply the vulnerable victim sentencing guideline to defendants found guilty of crimes against the homeless because the definition of “vulnerable victim” includes the catchall phrase “who is otherwise particularly susceptible to the criminal conduct.”<sup>85</sup> Alternatively, the federal and state legislatures could amend their guidelines to include the homeless within the definition of vulnerable victim, as Alaska has done.<sup>86</sup>

#### *1. The Fundamental Purpose of Vulnerable Victim Sentencing Guidelines*

The underlying motivation of the federal vulnerable victim sentencing provision is to give extra protection from criminal activity to those in society who need it.<sup>87</sup> By definition, homeless persons lack the protection of physical shelter. The actions of the homeless, some of which are necessary for living, are often illegal.<sup>88</sup> Additionally, the homeless are victimized through cruel YouTube videos and other outlets that treat them as second-class

---

84. See discussion *infra* Part III.B.1.

85. U.S. SENTENCING GUIDELINES MANUAL, *supra* note 24, § 3A1.1 cmt. n.2.

86. See *supra* note 36; see also ME. REV. STAT. ANN. tit. 17-A, § 1151(8)(B) (2006) (allowing judges to consider a victim’s homeless status when considering sentencing for the offender).

87. See *United States v. Castellanos*, 81 F.3d 108, 110-11 (9th Cir. 1996) (“[T]he victims to whom § 3A1.1 applies are those who are in need of greater societal protection.”); see also *Dyckman*, *supra* note 40, at 1987; *Harel & Parchomovsky*, *supra* note 81, at 531.

88. See *supra* notes 48-53 and accompanying text.

citizens.<sup>89</sup> In 2008 alone, there were 106 reported violent acts committed against the homeless.<sup>90</sup> In sum, because they have been deemed socially acceptable targets, the homeless as a group are more vulnerable than the general population, and thus deserve the protection afforded under vulnerable victim sentencing guidelines.<sup>91</sup>

Crimes against the homeless are not always violent, nor are homeless victims always sympathetic. But victims need not be sympathetic or have suffered greatly in order to qualify as vulnerable.<sup>92</sup> This definitional standard is key for those homeless who may not receive much sympathy from society, namely, those who are homeless because of alcoholism or drug addiction. Such lack of sympathy within vulnerable victim sentencing guidelines is important for those crimes that are less horrific than the homeless man who was stabbed in the stomach with a broken bottle<sup>93</sup> or the homeless man set on fire,<sup>94</sup> but are nonetheless deserving of some enhanced punishment because the defendant chose a more vulnerable member of society as his or her victim.

One of the key elements in applying a vulnerable victim sentencing guideline is the defendant's choice of victim. In order to be eligible for the sentence enhancement, "the defendant generally must have singled out the vulnerable victim[] from a larger class of potential victims."<sup>95</sup> In many cases, the defendant could easily have committed an act of violence against a nonhomeless person, but the homeless person was singled out as a target because of the perception that the homeless are second-class citizens within society.<sup>96</sup> In

---

89. See *supra* notes 55-58 and accompanying text.

90. COALITION HOMELESS REPORT, *supra* note 9, at 19. These violent acts included fifty-four beatings, twenty-seven deaths, nine rapes, eight shootings, three men set on fire, and five incidents involving police harassment or brutality. *Id.*

91. See Wang, *supra* note 39, at 1428-29 (discussing several reasons why some groups are more vulnerable than others).

92. See Dyckman, *supra* note 40, at 1987.

93. See Lichtblau, *supra* note 7, at A1.

94. See *id.*

95. United States v. McCall, 174 F.3d 47, 50 (2d Cir. 1998).

96. For example, when William Sigler, who plead guilty to the second-degree murder of Samuel Webster Hood, Jr., a homeless man in Frederick, Maryland, was told that the victim whose murder was being investigated was Hood's, he responded, "Oh him, he's just a beggar, a vagrant." COALITION HOMELESS REPORT, *supra* note 9, at 62. Similarly, a homeless man in Boston was murdered in broad daylight, yet only one witness has come forward because, as one man describes, there is a "[d]on't ask, [d]on't tell" policy, in which most people simply ignore what they see. *Id.* at 65.

addition to this perception, the homeless are often singled out for other reasons that make them vulnerable, such as being intoxicated or sleeping in public.<sup>97</sup> Indeed, on any single night, approximately half of all homeless individuals are unsheltered.<sup>98</sup> Being publicly exposed for twenty-four hours per day puts the homeless at risk for robbery, harassment, beatings, and worse. Additionally, homeless victims may be sleeping at the time of the attack or suffering from mental or physical ailments, any of which would make it much less likely that they could protect themselves from the crime.

When imposing a harsher sentence because of the vulnerable victim sentencing guideline, courts should focus on the extent to which the victim could defend him or herself from the crime.<sup>99</sup> According to precedent, this inquiry should be done on a case-by-case basis.<sup>100</sup> The vulnerable victim sentencing enhancement thus would not apply simply because the victim is homeless. But in most, if not all, cases, the homeless are particularly vulnerable because of their inability to protect themselves from criminal attack.

Courts should also apply the vulnerable victim sentencing enhancement when defendants target a victim either because they think that the victim would not report the crime or that law enforcement would not take the crime seriously.<sup>101</sup> The homeless often do not report crimes because of hostility that they have received from law enforcement and society.<sup>102</sup> George Siletti, a former homeless drifter, said that “[p]eople seem to pick on the most vulnerable because they really think that they won’t do nothing

---

97. A defendant may pick homeless persons who appear intoxicated for a target because they are less able to put up a fight and identify the attacker. *See, e.g., id.* at 78-79. The same is true for homeless persons who are attacked while sleeping. *See id.* at 79; *see also infra* notes 116-30 and accompanying text.

98. GOVERNMENT HOMELESS REPORT, *supra* note 1, at ii.

99. *See United States v. Crispo*, 306 F.3d 71, 83 (2d Cir. 2009) (finding that a three- or four-year-old child is a vulnerable victim within the context of kidnappings); *United States v. Dupre*, 462 F.3d 131, 144 (2d Cir. 2006) (finding that a group of evangelical Christians were no less likely to be vulnerable to fraud than the general population).

100. *See Crispo*, 306 F.3d at 83 (explaining that a court should not apply the vulnerable victim sentencing enhancement simply because a victim was a member of a particular class or group). *But see Wang*, *supra* note 39, at 1426 (arguing that courts properly apply the vulnerable victim sentencing adjustment in cases where the defendant chose the victim from a particular social group based on the perception that the *group* is socially vulnerable).

101. *Wang*, *supra* note 39, at 1426.

102. *See COALITION HOMELESS REPORT*, *supra* note 9, at 10; *Green*, *supra* note 4, at A12.

[sic].”<sup>103</sup> So even if a homeless individual was attacked, and he or she was not sleeping or handicapped in any way, the vulnerable victim sentencing enhancement could still apply. The homeless individual would be vulnerable due to the fact that the defendant thought the victim would not report the crime, or, if reported, law enforcement would not do anything about it.

Applying vulnerable victim sentencing enhancements to the homeless is consistent with the underlying purpose of the enhancement. The homeless are less able to protect themselves from crime, and are in dire need of more protection from society. They are often robbed or attacked because the attacker thinks that the homeless individual will not report the crime or that law enforcement will not take the crime seriously. All of these justifications can work on a case-by-case basis, which is how courts currently apply the sentencing enhancement.

## *2. Specific Court Cases Involving the Federal Vulnerable Victim Sentencing Guideline*

Examining several cases in which courts have applied an enhanced sentence after finding that the victim had been particularly vulnerable clarifies how the standard would also apply to a homeless victim. In one set of cases, courts found homelessness to be a factor in making a victim vulnerable for purposes of the statute. In a second set of cases, courts discuss factors that could assist in finding a homeless victim vulnerable in conjunction with his or her homeless status.

### *a. Homelessness as a Factor*

In *United States v. Irving*, the Second Circuit found that a victim was vulnerable independent of his age because he was homeless and without parental supervision.<sup>104</sup> Irving had been convicted of traveling outside the United States to engage in sex with a minor.<sup>105</sup> He appealed the decision, arguing, amongst other things, that the

---

103. Green, *supra* note 4, at A12.

104. 554 F.3d 64, 75 (2d Cir. 2009).

105. *Id.* at 67.

vulnerable victim sentencing enhancement was not applicable to the offense because the offense already took into account the age of the victim.<sup>106</sup> The court disagreed, finding that other factors also made the victim vulnerable. One of these factors was the victim's homelessness coupled with a lack of parental supervision.<sup>107</sup>

Similarly, the Seventh Circuit has decided two cases in which homelessness was a factor in applying the vulnerable victim sentencing adjustment. In the first, *United States v. Bragg*, the court allowed a sentencing enhancement because the victims were "particularly susceptible due to their poverty, homelessness and other factors."<sup>108</sup> The defendants were convicted of fraudulently using Social Security numbers to obtain false identification cards for workers hired from a homeless shelter in order to further their conspiracy to remove asbestos in violation of the Clean Air Act.<sup>109</sup> In the defendants' appeal, they raised the argument that economic status can never be a factor in finding a victim particularly vulnerable.<sup>110</sup> The court skirted a direct response to this argument by stating that the sentencing judge did not rely solely on the victims' unemployment.<sup>111</sup> In addition to the victims' homelessness, the judge also considered that the victims may have been suffering from illiteracy, drug and alcohol addiction, and psychiatric problems when ruling that they were vulnerable for purposes of the statute.<sup>112</sup>

The second Seventh Circuit case, *United States v. Julian*, held that the victim's homeless status was a valid factor in determining whether to apply the vulnerable victim sentencing enhancement. Julian was convicted of aiding and abetting the transportation of a minor in foreign commerce with the intent to engage the minor in prostitution.<sup>113</sup> In this case, the homelessness of the minor was the *only* deciding factor in applying the vulnerable victim sentencing adjustment because the defendant had already received a separate

---

106. Courts should not apply the vulnerable victim adjustment if "the factor that makes the person a vulnerable victim is incorporated in the offense guideline." U.S. SENTENCING GUIDELINES MANUAL, *supra* note 24, § 3A1.1 cmt. n.2.

107. *Irving*, 554 F.3d at 75.

108. 207 F.3d 394, 399 (7th Cir. 2000).

109. *Id.* at 396-98.

110. *Id.* at 398.

111. *See id.* at 400.

112. *Id.*

113. 427 F.3d 471, 478 (7th Cir. 2005).

and distinct sentencing enhancement based upon the age of the victim.<sup>114</sup>

Although the crimes in all three of these cases are quite different from the crimes discussed throughout this Note,<sup>115</sup> that difference is not a bar to consideration of the homelessness of the victim in cases involving violence against the homeless. First, in *Irving* and *Julian*, the court deemed the victims vulnerable solely *because* they were homeless. Second, in all three of the cases discussed above, the victims were especially vulnerable to being coerced into committing illegal acts because of their homelessness. In those cases, the victims were taking part in the crime *with* the defendant, although not necessarily voluntarily. Thus, homelessness should be a factor in applying the vulnerable victim sentencing enhancement when the defendant is committing the crime *against* the victim. The victims in all three cases arguably had some degree of choice in participating in the crime, but were found to be particularly susceptible to falling prey to such a decision because of their homelessness. By contrast, homeless people do not voluntarily become victims of violent crimes, yet they are particularly vulnerable to being attacked because of the very fact that they are homeless. It follows that, once a court determines that homelessness can be a factor when applying the vulnerable victim sentencing adjustment, it remains a factor to consider regardless of the crime.

*b. Homelessness as a Proxy for Vulnerability*

Even without homelessness as an independent consideration, however, there are other factors that courts have recognized as rendering a victim vulnerable that are closely linked with homelessness. For example, some courts have considered the consciousness of the victim. The Seventh, Eighth, and Ninth Circuits have found a sleeping victim vulnerable for purposes of applying the sentencing enhancement. The Ninth Circuit case, *United States v. Wetchie*, has been cited numerous times for its application of the vulnerable

---

114. *Id.* at 489-90.

115. None of the crimes discussed in Part III.B.2.a involved violence per se toward the victim, and two of the three crimes were sexual in nature.

victim sentencing guideline to a sleeping victim.<sup>116</sup> The defendant sexually assaulted his victim while she was sleeping in a youth center.<sup>117</sup> The court found that because the victim was assaulted while sleeping, she was unable to resist or cry out for help until the assault was already underway or finished.<sup>118</sup> Additionally, the assault may not have occurred had the victim been awake; in other words, the fact that the victim was asleep may have encouraged the defendant to commit the criminal act.<sup>119</sup> To summarize, the Ninth Circuit considered two factors: (1) the ability of the victim to defend him or herself while sleeping, and (2) the opportunity the sleeping victim gives to a potential criminal.

Similarly, in *United States v. Plenty*, the Eighth Circuit deemed a victim vulnerable for the sole reason that she was asleep when the crime occurred.<sup>120</sup> The defendant was convicted of breaking and entering the victim's residence and assaulting her in her sleep.<sup>121</sup> The defendant awoke the victim by punching her in the face, and dragged her out of the house while continuing to punch and kick her.<sup>122</sup> In reliance on *Wetchie*, the court found that because the victim was asleep, she could not procure help, run away, or defend herself.<sup>123</sup> Therefore, the court declared the victim to be vulnerable under the United States Sentencing Guidelines.<sup>124</sup>

In another case, *United States v. Newsom*, the district court held that the victim was vulnerable because she was asleep while the defendant, who was subsequently convicted of child pornography, filmed her.<sup>125</sup> The Seventh Circuit, relying in part on *Plenty* and *Wetchie*, narrowed the district court's decision by stating that simply being watched or videotaped while unaware is not enough to render a victim vulnerable.<sup>126</sup> In *Newsom*, however, the defendant also

---

116. 207 F.3d 632 (9th Cir. 2000). For a more recent Ninth Circuit case involving the vulnerable victim sentencing enhancement and a sleeping victim, see *United States v. Snow*, 184 F. App'x 618 (9th Cir. 2006).

117. *Wetchie*, 207 F.3d at 633.

118. *Id.* at 634.

119. *Id.*

120. 335 F.3d 732, 735 (8th Cir. 2003).

121. *Id.*

122. *Id.* at 733.

123. *Id.* at 735.

124. *Id.*

125. 402 F.3d 780, 785 (7th Cir. 2005).

126. *Id.*



moved the victim's underwear, which "would have been impossible had [the victim] been awake."<sup>127</sup> This language implies that some unwanted physical contact with the victim while the victim is asleep is necessary in order to render the victim vulnerable.

These cases make clear that the state of being *asleep* renders a victim "particularly susceptible to ... criminal conduct"<sup>128</sup> for purposes of applying the vulnerable victim sentencing enhancement. Although two of the cases involve sex crimes, *Plenty* shows that finding a sleeping victim vulnerable for purposes of the sentencing enhancement is appropriate in assault cases as well. The homeless are often forced to sleep in public, and attacks are common while they are sleeping.<sup>129</sup> Of course, applying the vulnerable victim sentencing adjustment is fact specific, but these precedents could be extended to cases in which a homeless victim was attacked while sleeping.<sup>130</sup>

Finally, age and physical and mental condition are enumerated as factors to consider in the federal vulnerable victim sentencing guideline.<sup>131</sup> Although this Note advocates that the homelessness of a victim alone should be a consideration in applying the vulnerable victim sentencing enhancement—and in fact should be added as a specified factor in the guidelines—age and physical and mental condition can clearly bolster the case for administering the increased sentence. The age range of homeless victims for the past ten years is four months to seventy-four years of age.<sup>132</sup> On either end of the spectrum, the age of the homeless victim probably renders the victim vulnerable for purposes of the statute. Additionally, persons with severe mental illness represented over a quarter of all sheltered homeless individuals, and persons with chronic substance abuse problems accounted for over a third of all sheltered homeless individuals.<sup>133</sup> Again, these factors affecting the physical and mental

---

127. *Id.*

128. U.S. SENTENCING GUIDELINES MANUAL, *supra* note 24, § 3A1.1 cmt. n.2.

129. *See, e.g.*, COALITION HOMELESS REPORT, *supra* note 9, at 64, 68-71, 73, 79-83 (reporting incidents of homeless individuals being attacked or robbed while they are sleeping).

130. Those homeless who cannot secure a bed in a shelter usually end up sleeping in a public area and are thus more vulnerable to crime while asleep.

131. U.S. SENTENCING GUIDELINES MANUAL, *supra* note 24, § 3A1.1 cmt. n.2.

132. COALITION HOMELESS REPORT, *supra* note 9, at 18.

133. *See* GOVERNMENT HOMELESS REPORT, *supra* note 1, at 17. The use of statistics for the sheltered homeless is necessary in this case because these particular statistics are more

condition of a homeless victim would reinforce a court's application of the vulnerable victim sentencing enhancement. In general, these cases illustrate how courts have used homelessness as a factor in the application of vulnerable victim sentencing guidelines, along with how courts can consider additional factors particularly suited to the homeless in conjunction with the homeless victim's status in the guidelines' application.

### CONCLUSION

Enhanced punishments are a useful tool in communicating society's condemnation of a particular type of crime. Hate crime statutes and vulnerable victim sentencing guidelines both offer enhanced punishments based on the criminal's choice of victim. Hate crimes protect self-identifying groups based on either an immutable characteristic or a characteristic that applies to everyone equally. By contrast, vulnerable victim sentencing guidelines protect those within society who are deemed more vulnerable based on a particular trait that is either set forth in the statute or delineated by the court.

The homeless deserve the extra protection of enhanced punishment. With the downturn in the economy, the flurry of housing foreclosures, and the wars in Iraq and Afghanistan, it seems likely that the homeless population is due to increase, at least in the near future. Along with this growth in population comes the increased threat of violence against the homeless. In addition to being attacked by individual members of society, the homeless are also subject to laws that criminalize their livelihood. Enhanced punishment laws reflect the notion that the homeless are not second-class citizens, and they condemn the unusually brutal crimes committed against the homeless. Although homeless advocates tend to champion the addition of the homeless to hate crime statutes, protection under vulnerable victim sentencing guidelines is a better alternative.

Protection of the homeless is better suited to a more flexible standard than that which hate crime legislation provides. Homelessness is a mutable trait that does not apply to everyone, and society is constantly trying to find ways to shrink the homeless population. In

addition, the status of homelessness makes an individual physically more vulnerable to crimes than the general population. Because of these reasons, homelessness, at least on a *theoretical* level, is better suited to vulnerable victim sentencing guidelines.

Homelessness is better suited to protection under the vulnerable victim sentencing guideline on a *practical* level as well. Certain courts have already found that homelessness is a factor in rendering a victim vulnerable for purposes of the federal statute. Other factors also exist, such as whether the victim was asleep, and the victim's age, physical condition, and mental health. In addition to the homelessness of the victim, consideration of these factors would strengthen the case for applying the sentencing enhancement when the court is weighing whether to apply the standard. In jurisdictions where the catchall vulnerable victim's phrase is utilized, courts can currently begin applying the vulnerable victim sentencing guidelines. In all jurisdictions, especially those without the catchall phrase, legislatures must take steps to write new statutes that include the homeless as a protected category, or amend existing statutes. Either way, it is imperative that the legal system act to protect the most vulnerable and unfortunate in society from violent crimes. Covering the homeless under vulnerable victim sentencing guidelines is an excellent beginning to achieving that goal.

*Katherine B. O'Keefe*\*

---

\* JD Candidate 2011, William & Mary School of Law; B.A. 2006, magna cum laude, Brown University. Many thanks to my parents, Bill and Cynthia, for their unending love and support; to my friends for their constant encouragement; and to the Law Review staff for their hard work.