

IN THE SUPREME COURT FOR THE STATE OF NEBRASKA

JOANN BRANDON, as Personal Representative
of the Estate of Teena Brandon, Deceased,

Plaintiff-Appellant,

v.

THE COUNTY OF RICHARDSON, NEBRASKA,
and Charles B. Laux, Richardson County Sheriff,

Defendants-Appellees.

Appeal from the District Court of Richardson County, Nebraska
The Honorable Orville L. Coady, District Judge

BRIEF OF AMICI CURIAE

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PRELIMINARY STATEMENT

[V]iolence motivated by prejudice and hatred . . . hurts us all. Anybody who thinks that in the world of today and tomorrow, that he or she can hide from the kind of poison that we see in various places in our country, is living in a dream world. Whether we like it or not, our futures are bound together, and it is time we acted like it.

- President William J. Clinton, at the November 10, 1997, White House Conference on Hate Crimes.

Brandon Teena was the victim of not one, but two, brutal hate crimes in his short life. On Christmas Day, 1993, Thomas M. Nissen and John L. Lotter drove Brandon to a rural area in Nebraska where they savagely raped him in Lotter's car. Five days later, he was dead, viciously murdered by these same men. Nissen and Lotter committed these heinous acts for no reason other than Brandon's choice to identify himself in a way that offended them. This case is not about them. Rather, this case is about what was (and what was not) done by the police, in the last five days of Brandon's life. (*Amici* use the masculine pronoun to refer to Brandon Teena throughout this Brief, both to respect his self-identification as male in the last days of his life and to acknowledge the identity for which he was murdered.)

All crimes of violence motivated by group prejudice are tragedies born of intolerance and bigotry, and the hate-motivated murder of Brandon was certainly no exception. Nevertheless, his death was reprehensible for an additional reason: it could have been, and should have been, prevented. Indeed, this Court already has determined that, because Brandon reported the rape and offered to assist the authorities in prosecuting the crime, the defendants were duty-bound to protect him from Lotter and Nissen's foreseeable violent retaliation. This case speaks directly to the defendants' failure to carry out that duty.

This Court's recognition of the duty to protect was a powerful statement that the law will not tolerate inaction when the assistance of law enforcement officials is sought by a victim who is "different" from them in some way. The duty to protect, however, is more than a

mere symbol — it is the foundation upon which the criminal justice system is built. The effectiveness of that system depends upon the crime victims' active participation. When citizens lose faith that the system will afford them adequate protection, they do not report the crimes committed against them, which, in turn, hinders the entire criminal justice system's ability to apprehend and prosecute criminals.

The duty to protect is of particular importance in the context of hate crimes. Hate crimes pose an especially sinister threat to the criminal justice system and to the very fabric of American society. Hate crimes are not only among the most brutal types of crimes, but are also among the most likely to be repeated. When victims of hate crimes face the prospect of subjecting themselves to an inhospitable criminal justice system, vast underreporting is the result. Moreover, hate crimes breed a climate of fear, perniciously affecting both the targeted community as well as society at large.

An effective duty to protect assures victims and the groups to which they belong that the criminal justice system will provide safety and comfort, not additional risks and possible maltreatment. But, like all legal duties, the duty to protect can serve these important purposes only if it is meaningfully enforceable in a court of law. The trial court's decision in this case to allow law enforcement to shift its liability to Lotter and Nissen eviscerates the duty to protect established by this Court, a result that is unjust and inimical to the purposes the duty to protect serves. The great weight of authority has recognized this injustice and declined to sanction the approach to apportionment adopted by the trial court. This Court should do the same.

ARGUMENT

Like her child before her, Joann Brandon has attempted to invoke the protections of the Nebraska justice system. The system already has failed her once, when law enforcement officials did not respond adequately to her child's brave report of the crime he suffered. Joann

Brandon then sought and (momentarily) found justice for her child in the courts when this very tribunal held that, under the facts as alleged, the defendants owed Brandon a duty of protection. In imposing this duty, this Court joined the majority of courts that have recognized that a strong duty to protect immeasurably serves the criminal justice system by encouraging crime victims to come forward and cooperate with law enforcement in prosecuting their offenders.

The trial court failed to grasp the significance of this Court's holding. Indeed, its approach to apportionment divests this Court's express recognition of a duty to protect of all meaning. If the law imposing a duty to protect is to have any meaning, apportionment should not be permitted under these circumstances. Joann Brandon, in seeking justice once again, simply asks this Court to restore substance to its earlier decision.

I. APPORTIONMENT OF LIABILITY AND THE DUTY TO PROTECT

Like other states, Nebraska permits apportionment of liability in certain circumstances. *See* Neb. Rev. Stat. § 25-21, 185.10 (1999). The trial court applied this statute to apportion liability between intentional tortfeasors (Lotter and Nissen) and a negligent tortfeasor (Sheriff Laux) whose specific duty it was to protect against the intentional tort. However, nowhere does the statute authorize or even mention allocation of liability where both negligent and intentional torts are alleged. Nor should this Court imply such authority.

The "clearly prevailing view" on apportioning liability between negligent and intentional tortfeasors is that comparative negligence statutes, like Nebraska's, have no application to intentional torts. *See* Allan L. Schwartz, *Applicability of Comparative Negligence Principles to Intentional Torts*, 18 A.L.R.5th 525 (1994); *see also* *Veazey v. Elmwood Plantation Assocs., Ltd.*, 650 So.2d 712, 718 n.9 (La. 1994) (describing the "majority view" as not permitting apportionment). Numerous courts have rejected apportionment of liability between intentional and negligent tortfeasors under the rules of comparative fault. *See, e.g., Whitehead v.*

Food Max of Miss., Inc., 163 F.3d 265, 280-82 (5th Cir. 1998); *Welch v. Southland Corp.*, 952 P.2d 162, 165 (Wash. 1998); *Merrill Crossings Assocs. v. McDonald*, 705 So.2d 560, 562 (Fla. 1997); *Turner v. Jordan*, 957 S.W.2d 815, 823 (Tenn. 1997); *Veazey*, 650 So.2d at 718-720; *McLean v. Kirby Co.*, 490 N.W.2d 229, 244 (N. Dak. 1992); *Kansas State Bank & Trust Co. v. Specialized Transp. Servs., Inc.*, 819 P.2d 587, 606 (Kan. 1991).

Moreover, the Third Restatement of the Law of Torts (the “Restatement”), although allowing apportionment in some situations, recognizes the importance of joint and several liability where the negligent tort alleged is a failure to protect from an intentional tort.

Section 14 of the Restatement states:

A person who is liable to another based on a failure to protect the other from the specific risk of an intentional tort is jointly and severally liable for the share of comparative responsibility assigned to the intentional tortfeasor in addition to the share of comparative responsibility assigned to the person.

Restatement (Third) of Torts: Apportionment of Liability § 14 (2000). The rationale underpinning this rule is that allowing apportionment of liability to the intentional tortfeasor would fatally undermine the duty to protect:

This would leave the person who negligently failed to protect the plaintiff with little liability and the injured plaintiff with little or no compensation for the harm. Yet when the risk of an intentional tort is the specific risk that required the negligent tortfeasor to protect the injured person, that result significantly diminishes the purpose for requiring a person to take precautions for this risk.

Id. cmt. b.

Many courts and commentators have agreed with the Restatement and concluded that apportionment eviscerates the duty to protect. Courts have found, for instance, that apportionment of intentional and negligent tort liability in cases involving the duty to protect “reduces the negligent person’s incentive to comply with the applicable duty of care” and concluded that “fairness dictates that [the negligent defendant] should not be permitted to rely

upon the foreseeable harm it had a duty to prevent so as to reduce its liability.” *Turner*, 957 S.W.2d at 823; *accord McLean*, 490 N.W.2d at 244. Scholars agree that apportionment of intentional and negligent tort liability “in negligence cases based on a duty to protect another from criminal attack . . . reduce[s] the duty to a nullity by requiring juries to include the criminal in allocating fault.” Theresa L. Fiset, *Comparative Fault as a Tool to Nullify the Duty to Protect*, 27 *Stetson L. Rev.* 699, 712-13 (1997). Comparative apportionment rules “may virtually eliminate third party obligations. Juries required to compare rapist and third-party liability will often find the rapist largely, if not entirely, responsible.” Ellen M. Bublick, *Citizen No-Duty Rules: Rape Victims and Comparative Fault*, 99 *Colum. L. Rev.* 1413, 1425 (1999).

“To require comparison distorts the protections a plaintiff should be able to claim from a defendant’s duty to protect.” *Cortez v. University Mall Shopping Ctr.*, 941 F. Supp. 1096, 1099 (D. Utah 1996). Apportionment, as contemplated by the trial court, is tantamount to eliminating the duty to protect entirely. As discussed more fully below, that result should not stand.

II. HOLDING LAW ENFORCEMENT OFFICIALS ACCOUNTABLE FOR THEIR DUTY TO PROTECT WILL ENCOURAGE FUTURE VICTIMS OF HATE CRIMES TO COME FORWARD AND PROSECUTE

Proper allocation of liability to the officials who failed to protect a crime victim from further, and foreseeable, harm after reporting is particularly important in the context of hate crimes. Hate crimes are excessively brutal and increasingly common, both nationally and in Nebraska. Yet the ability of law enforcement to respond to hate crimes is hampered by victims’ reluctance to report such crimes – a reluctance that may be reduced through enforcement of a meaningful duty to protect.

A. Hate Crimes Are a Nationwide Epidemic

Hate crimes are crimes motivated by hatred of or bias against the victim because of the victim's race, color, religion, national origin, ethnicity, gender, sexual orientation, or gender identity. *See, e.g.*, 28 U.S.C. § 994; Minn. Stat. § 611A.79. In the last decade, the FBI has documented a steady rise in hate crimes. From 1996-98, an annual average of 8,187 hate crimes were reported, compared with only 4,558 in 1991 – an 80% increase. *See* Criminal Justice Information Services Division, FBI, *Hate Crime Statistics 1991-1998* (1999) (hereinafter “FBI Statistics”). A further breakdown of the numbers reveals the depth of the epidemic. In the United States, approximately 8 African-Americans, 3 Caucasian-Americans, 3 gay persons, 3 Jewish persons, and 1 Hispanic become victims of hate crimes *every day*. *See* Hate Crime (visited June 25, 2000) <<http://www.ncvc.org/special/hatec.htm>>.

Hate crimes are a nationwide cancer to which the State of Nebraska is not immune. Nebraska has seen the number of reported hate crimes committed within its borders escalate. *See, e.g.*, FBI Statistics 1996-98 (1999) (indicating that the number of reported hate crimes in the state rose from only 3 in 1996 to 52 by 1998). Of the hate crimes reported in 1998 in Nebraska, 21 were motivated by racial bias, 16 by sexual-orientation bias, 11 by ethnicity or national origin bias, 2 by religious bias, and 2 by multiple biases. *See id.* Although the Brandon Teena tragedy drew the attention of the world, these figures clearly indicate that his is but one of many tragedies that have occurred in Nebraska and throughout the nation.

B. Victims' Underreporting and Fear of Retaliation Hamper Law Enforcement's Response

While the reported statistics reveal that hate crimes are a significant nationwide problem, they reflect just the tip of the iceberg. Beneath the reported numbers lies a simple, disturbing truth: a majority of hate crime victims do not even report the crimes committed against them. *See* FBI Statistics 1996, at 2 (1997). Victims of hate crimes fail to come forward for two primary reasons: fear of retaliation at the hands of the perpetrator, and an entrenched distrust of police and the criminal justice system. *See, e.g.,* Frederick M. Lawrence, *The Case for a Federal Bias Crime Law*, 16 Nat'l Black L.J. 144, 148 (1999); Joseph M. Fernandez, *Bringing Hate Crime into Focus: The Hate Crimes Statistics Act of 1990*, 26 Harv. C.R.-C.L. L. Rev. 261, 291 (1991) Fernandez, Joseph M., *Bringing Hate Crime into Focus: The Hate Crimes Statistics Act of 1990*, 26 Harv. C.R.-C.L. L. Rev. 261 (1991) New York City Gay and Lesbian Anti-Violence Project, *A Report Of The National Coalition of Anti-Violence Programs* (1999) The International Association of Chiefs of Police, *Responding to Hate Crimes* (visited July 21, 2000) <<http://theiacp.org/pubinfo/pubs/hatecrime.htr>> Infrequent Hate-Crime Reports Linked to Fear of Retaliation, *The Courier-Journal*, Louisville, K.Y., Apr. 16, 1995, at B4 Chen, Katherine, *Including Gender In Bias Crime Statutes: Feminist and Evolutionary Perspectives*, 3 Wm. & Mary J. Women & L. 277 (1997) O'Malley, Jack, *A Prosecutor's Guide to Hate Crimes* (1994) Levin, Brian, *Bias Crimes: A Theoretical and Practical Overview*, 4 Stan. L. & Pol'y Rev. 165 (1993) Barnes, Arnold & Ephross, Paul, *The Impact of Hate Violence on Victims: Emotional and Behavioral Responses to Attacks*, 39 Soc. Work 247 (1994) Levin, Jack & McDevitt, Jack, *Hate Crimes: The Rising Tide of Bigotry and Bloodshed* (1993) Anti-Defamation League of B'nai B'rith, *Hate Crime Statutes: A 1991 Status Report* (1991) (noting that perpetrators of hate crimes seek to "subdue victims, make them comply, disarm them, or take their worldly goods"). Victims of bias crimes also require hospitalization four times more frequently than do victims of

non-bias assaults. See Kristen L. Taylor, *Treating Male Violence Against Women as a Bias Crime*, 76 B.U. L. Rev. 575, 582 (1996). Commentators have theorized that the excessive violence characteristics of hate crimes may represent an attempt by perpetrators to quite literally, wipe out the identity of the victim. See Kevin T. Berrill & Gregory M. Herek, *Primary and Secondary Victimization in Anti-Gay Hate Crimes: Official Response and Public Policy*, in *Hate Crimes* 25 (Berrill & Herek, eds., 1992).

The recurring nature and excessive brutality of hate crimes should come as no surprise. Their perpetrators find encouragement in two factors: the historic reluctance of hate crime victims to come forward and prosecute their tormentors, and the concomitant perception held by hate crime perpetrators that their criminal activities will go unpunished. Both factors are well-documented. See, e.g., *Report Of The NCAVP, supra*, at 22 (1999) (reporting incidents and explaining that “a characteristic of many of those who commit [hate crime] offenses . . . is that they believe their victims will never report their crimes, or that if they do, the police will take the perpetrators’ side”).

The link between the duty to protect and increased reporting of crime cannot be questioned. One court has noted “a concern that failure to impose a duty of protection would discourage citizens from cooperating with law enforcement officials.” *Morgan v. District of Columbia*, 468 A. 2d 1306, 1312-13 (D.C. 1983). Because victims fear that reporting a crime will create a risk of retaliation and that the police will not come to their aid, the brutal cycle of violence is perpetuated. Indeed, this is exactly what happened to Brandon Teena. An environment in which crime victims *expect* recurring retaliation and consistently fail to seek the assistance of law enforcement officials has no place in American society.

C. The Specter of Secondary Victimization By Law Enforcement Compounds the Problem

Victims also fail to report hate crimes because they fear that the system itself will further victimize them, a phenomenon described as “secondary victimization.” *See* Berrill & Herek, *supra*, at 293. The complicity of law enforcement officials in the victimization process represents a “profound violation of the egalitarian ideal and the anti-discrimination principle that have become fundamental not only to the American legal system, but also to American culture as well.” Lawrence, *supra*, at 148. Indeed, the notion that those who *do* elect to turn to the criminal justice system – like Brandon Teena – may endure a secondary victimization is repugnant to the principle that justice is available to all without distinction.

For this reason, the Department of Justice (“DOJ”) emphasizes the “unique position” occupied by police officers, which enables them “to help victims cope with the immediate trauma of [] crime and to help restore their sense of security and control over their lives.” United States DOJ, Office for Victims of Crime, *First Response to Victims of Crime*, at 1 (Jan. 2000). The DOJ exhorts officers to “help victims by understanding the three major needs they have after a crime has been committed: the need to feel safe; the need to express their emotions; and the need to know ‘what comes next.’” *Id.* at 1-2. The record in this case clearly reveals behavior that fell well short of what law enforcement officials should have done.

Nationwide data suggest that Teena Brandon’s experience of secondary victimization was not anomalous. Studies confirm that victims of hate crimes, like victims of rape, are often blamed for the incident by police, prosecutors, judges, and jurors. *See* Berrill & Herek, *supra*, at 294. Indeed, police officers themselves commit a significant portion of reported hate crimes. *See, e.g.,* Symposium, *Hate Crimes, Homosexuals, and the Constitution*, 29 Harv. C.R.-C.L. L. Rev. 387, 414 (1994); NGLTF Policy Institute, *Anti-Gay/Lesbian Violence, Victimization & Defamation in 1993* (1993). Secondary victimization goes hand in hand with underreporting; lesbian and gay male victims, for instance, frequently cite their fear of

victimization at the hands of the police as the primary reason they choose not to report a crime. See Berrill & Herek, *supra*, at 294; see also Gary D. Comstock, *Victims of Anti-Gay/Lesbian Violence*, in *Journal of Interpersonal Violence* 4, at 101 (finding that 67% of those who had declined to report had experienced or perceived the police to be anti-gay and that 14% feared abuse from the police). Many groups fail to report hate crimes due to a general fear “that the criminal justice system is biased against [them] and, consequently, that law enforcement authorities will not be responsive.” American Psychological Association, *Hate Crimes Today: An Age-Old Foe In Modern Dress*, at 4 (1998) (hereinafter “APA”).

The threat of secondary victimization, like the specter of retaliation, informs victims’ responses to the hate crime itself. One of the most common reactions to both primary and secondary victimization is a loss of faith in law enforcement and the criminal justice system as a whole. This case is a striking example: Brandon Teena did precisely what the criminal justice system asked him to do. He reported the crimes against him and offered to participate in their prosecution. But the officers whom he trusted failed him completely. The experiences of victims such as Brandon Teena reinforce the perception that the criminal justice system condones prejudice and discrimination. Only a meaningful duty to protect all victims can begin to restore faith that the police, at least, can be trusted.

III. THE BENEFITS OF ENFORCING A MEANINGFUL DUTY TO PROTECT WILL REVERBERATE THROUGHOUT SOCIETY

A ruling barring apportionment in cases involving the duty to protect will hold law enforcement accountable, which in turn will encourage victims to come forward, report crimes, and cooperate in prosecutions. Victims of hate crimes will know that law enforcement officials are bound by law to protect them and that the courts will enforce that duty where necessary. Restored confidence in the system yields several benefits.

The Criminal Justice System Will Benefit Through an Improved Ability to Prosecute Hate Crimes

An effective duty to protect and the resulting increases in reporting would further several fundamental goals of the criminal justice system. Our criminal justice system “depends largely on victims to report crimes and testify against criminals.” Paul G. Cassell, *Balancing the Scales of Justice: The Case For and the Effects of Utah’s Victims’ Rights Amendment*, 1994 Utah L. Rev. 1373 (1994). President Clinton has noted the link between low reporting rates for hate crimes and the broader goals of the criminal justice system: “[A] lot of hate crimes still go unreported. . . . If a crime is unreported, that gives people an excuse to ignore it.” Remarks by the President at White House Conference on Hate Crimes, November 10, 1997 (visited June 5, 2000) <<http://www.whitehouse.gov/Initiatives/OneAmerica/19971110-2429.html>>. Scholars have emphasized that “to ensure its smooth functioning, the criminal justice system must avoid alienating victims.” Karen L. Kennard, *The Victim’s Veto: A Way to Increase Victim Impact on Criminal Case Dispositions*, 77 Calif. L. Rev. 417, 425 (1989).

A legal system that encourages the reporting of crimes permits law enforcement officials to respond more effectively to hate crimes, by arresting and prosecuting more perpetrators than they can without victim assistance. *Cf.* Corinne Casarino, *Civil Remedies in Acquaintance Rape Cases*, 6 B.U. Pub. Int. L.J. 185, 190-91 (1996) (noting that increased reporting of rape would lead to more prosecutions and convictions). This strengthened law enforcement response will, in turn, deter potential future offenders and help prevent recidivism. Indeed, the fundamental goals of the criminal justice system *depend* on the cooperation of crime victims, and a strong duty to protect will help ensure that these goals are realized.

A. Society At Large Will Benefit From Improved Responses to Hate Crimes, Promoting Equality

Beyond the criminal justice system, a meaningful duty to protect is important to society at large. Hate crimes are message crimes – the offender intends to send a message to an entire group that it is unwelcome in a particular neighborhood, school, or workplace. The impact of hate crimes tends to resonate widely, profoundly impacting both the “target community” – *i.e.*, the community that shares the race, religion, ethnicity, sexual orientation or gender identity of the victim – and society at large.

1. Hate Crimes Profoundly Affect the Entire Target Community

Researchers have characterized hate crimes as offenses that create “climates of fear.” *See, e.g.*, Lu-in Wang, *The Transforming Power of Hate*, 71 S. Cal. L. Rev. 47, 120 (1997). This climate of fear stems from the perception of members of the target community that they are next. The non-victim members of the target community perceive the crime “as if it were an attack on themselves directly and individually.” Lawrence, *supra*, at 153; *see also* Wang, *supra*, at 120 (“Thus, even target group members who have never been crime victims may feel that they are particularly vulnerable and incorporate the view of themselves as targets into their assumptive worlds.”).

The element of personalized threat felt by other members of the targeted community impairs their civil rights. *See* Wang, *supra*, at 123. For example, non-victims in the targeted community often exhibit many qualities observed in actual victims, including: behaving defensively, withdrawing from or foregoing particular activities, avoiding certain locales, switching jobs, selling homes, pulling children from schools, or otherwise adjusting their lives in an effort to avoid attracting attention. *See id.* Surveys of non-victim members of groups that are typical targets of hate crimes reveal that a substantial majority of such respondents not only

expect to become victims of hate crimes, but that they have modified their behavior, often dramatically, in order to reduce the risk of attack. *See, e.g.,* Berrill & Herek, *supra*, at 20.

2. The Impact of Hate Crimes Reach Further to Undermine Social Harmony

The reverberations of hate crimes do not stop with the target community. The effects on society are just as sinister. Hate crimes harm society at large in two ways. First, hate crimes incite inter-group tensions, often promoting widespread hostility and aggression. *See, e.g.,* Levin, *supra*, at 167 (explaining that because perpetrators target entire communities, the magnitude of the force can rapidly spiral out of control, thereby “ignit[ing] community disorder”). Congress has recognized that hate crimes disrupt the “tranquility and safety of communities and [are] deeply divisive.” H.R. 3081, 105th Cong. (1997).

Second, bias crimes inhibit the attainment of equality for all segments of society. *See, e.g.,* Taylor, *supra*, at 586. In other words, bias crimes violate “not only society’s general concern for the security of its members and their property, but also the shared value of equality among its citizens and racial and religious harmony in a heterogeneous society.” Lawrence, *supra*, at 154. Hate crimes implicate social histories of prejudice, discrimination, and oppression that “divide our nation, rend the national fabric, and stigmatize our communities.” Andrew Gilbert & Eric D. Marchand, *The Hate Crimes Prevention Act of 1999*, 30 St. Mary’s L.J. 931, 936 (1999). The state has a profound interest in preventing cycles of retaliatory violence spurred by bias-motivated incidents and in minimizing the risk of community unrest.

B. Improved Trust in Law Enforcement Also Benefits the Individual Victims

Hate crimes are fundamentally different from other categories of crime because, unlike random or economically-motivated crimes, hate crimes “strike at the very core of [the victim’s] identity.” Lawrence, *supra*, at 150. Hate crimes cause a heightened sense of vulnerability and “a significantly greater level of psychological symptoms” than other crimes. *Id.* at 151. Hate crimes typically cause “[i]ntense feelings of vulnerability, anger, and depression, physical ailments and learning problems, and difficult interpersonal relations.” APA, *supra*, at 4; *see also* Gregory M. Herek, J. Roy Gillis, & Jeanine C. Cogan, *Psychological Sequelae of Hate Crime Victimization Among Lesbian, Gay, and Bisexual Adults*, at 3-4 (1999) (finding that hate crime victims manifested greater psychological problems of various types). That victims experience these dramatic psychological effects is unsurprising, given the remarkably brutal nature of most hate crimes. *See supra* Part II-C.

Because hate crimes are profoundly traumatic, victims face unique psychological and social barriers to recovery. Victims can surmount these barriers more easily if they feel free to seek assistance and support openly. *See* APA, *supra*, at 4. Experts have noted several ways in which reporting the crime assists in the healing process:

In addition to its importance for the criminal justice system, reporting the incident has several potential benefits for the survivor. It can offer a constructive channel for anger, increase feelings of efficacy, and provide the satisfaction of helping to protect other members of the community from the sort of victimization one has experienced.

Linda Garnets, Gregory M. Herek, & Barrie Levy, *Violence and Victimization of Lesbians and Gay Men: Mental Health Consequences*, in *Hate Crimes*, *supra*, at 220. Law enforcement officials have also recognized the beneficial effects of reporting crimes. *See* United States DOJ, *First Response to Victims of Crime* 3 (2000) (noting that “[v]ictims need to air their emotions

and tell their story after the trauma of the crime” and outlining appropriate law enforcement support).

Hate crime victims can assist their own healing process by reporting the crimes committed against them — yet they will be unlikely to report those crimes unless they know they will be protected by an unbiased criminal justice system. Without an effective duty to protect, the criminal justice system cannot offer these assurances, and victims will continue to suffer needlessly.

CONCLUSION

Hate crimes like the one that took Brandon Teena’s life pose a menacing threat to the citizens of Nebraska. And like Brandon Teena, those citizens look to the criminal justice system when victimized by predators like Thomas Nissen and John Lotter. The rule previously announced by this Court requires that the system provide this protection. Here, however, the trial court simply paid lip service to this rule of law and, in doing so, eviscerated the duty to protect. If public officials entrusted with the duty to protect are permitted to abdicate responsibility by shifting their liability to criminals who committed the precise act they were negligent in failing to prevent, the duty to protect loses all meaning. Nebraska should join other states in recognizing that such a result is unjust and legally unsupportable. The decision of the district court on apportionment of liability should be reversed.

Respectfully submitted,

The American Civil Liberties Union Foundation, the Anti-Defamation League, the National Asian Pacific American Legal Consortium, the National Coalition of Anti-Violence Programs, the National Organization for Women Legal Defense and Education Fund, People For the American Way, the Puerto Rican Legal Defense and Education Fund, and the Southern Poverty Law Center, *Amici Curiae*

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