1-1-2017

Proving Hate: The Difficulties of Successfully Prosecuting Bias-Motivated Crimes

Shirin Afsous
*Suffolk University Law School*

Follow this and additional works at: [https://dc.suffolk.edu/jtaa-suffolk](https://dc.suffolk.edu/jtaa-suffolk)

Part of the Litigation Commons

**Recommended Citation**

This Comments is brought to you for free and open access by Digital Collections @ Suffolk. It has been accepted for inclusion in Suffolk Journal of Trial and Appellate Advocacy by an authorized editor of Digital Collections @ Suffolk. For more information, please contact dct@suffolk.edu.
I. INTRODUCTION

Hate crimes are criminal offenses committed against individuals or property which are motivated, in whole or in part, by the perpetrator’s bias against an individual or a group based on race, religion, ethnic/national origin, gender, age, disability, or sexual orientation.\(^1\) Criminal activity

\(^*\)Shirin Afsous is a 2015 Moot Court Honor Board/Journal of Trial & Appellate Advocacy alum. She is currently working as a judicial law clerk at the Superior Court of the District of Columbia.

\(^1\) See Responding to Hate Crimes: A Police Officer’s Guide to Investigation and Prevention, INT’L ASSN’N OF CHIEFS OF POLICE, http://www.theiacp.org/ViewResult?SearchID=123 (last visited May 26, 2017) (defining hate crime). This definition was developed at the 1998 International Association of Chiefs of Police (“IACP”) Summit on Hate Crime in America. Id. For the purposes of this article, “hate crime,” “bias crime,” and “bias motivated crime,” are used interchangeably. Some scholars argue the term “hate crime” carries a certain misconception, namely that the crime is committed by the perpetrator’s hatred of the victim. See FREDERICK M. LAWRENCE, PUNISHING HATE 9 (ed. 1999). Scholars, including Lawrence, use the term “bias crime” to emphasize that the key consideration in evaluating these crimes is the bias or prejudice the perpetrator holds toward the victim. Id. Regardless of the term used to encapsulate hate crimes:

Crimes of hate transcend their immediate victims and cast a shadow of fear and terror throughout entire communities . . . [w]e are not talking about the obvious physical damage inflicted during a hate motivated attack. We are referring to the fear, the terror, that one experiences when faced with a passionate rejection because of what one is. An absolute stranger looks at you and hates you.
motivated by bias or hate is distinct from all other criminal conduct. Unlike other forms of violent crimes, most hate crimes are committed by a group of individuals against a complete stranger or group of strangers. Hate crimes have been a pervasive portion of the legal scheme in the United States since the creation of the nation. The term “hate crime” or


2 See Michael Liebennan, The Law vs. Violent Bigotry: The Case for Strong Hate Crime Laws in the United States, in Donald Altschiller, Hate Crimes: A Reference Handbook 104-06 (3d ed. 2015) (discussing policy framework for hate crimes). As a primary matter, such crimes occur because of the perpetrator’s bias or animus against a characteristic is intrinsic to the victim. Id. at 104. Secondly, hate crimes impact the victim and the victim’s community in a profoundly emotional and psychological way. Id. Lastly, hate crimes are often message crimes, meant to instill fear within a minority community, and the message is delivered in a manner making it difficult to misunderstand. Id. at 105. In Virginia v. Black, a case involving a First Amendment challenge to the Commonwealth of Virginia’s cross-burning statutes, Supreme Court Justice Sandra Day O’Connor wrote:

"The burning cross often serves as a message of intimidation, designed to inspire in the victim a fear of bodily harm. Moreover, the history of violence associated with the Klan shows that the possibility of injury or death is not just hypothetical... when a cross burning is used to intimidate, few if any messages are more powerful."

Id. (quoting Virginia v. Black, 538 U.S. 343, 357 (2003)).

3 See Jack Levin & Jack McDevitt, Hate Crimes: The Rising Tide of Bigotry and Bloodshed 16 (1993) (noting 64% of hate crimes are committed by two or more offenders). This may be attributed to a few reasons: (1) there is safety in numbers—“most are basically cowards”; (2) it gives the offender a degree of anonymity; and (3) it gives the offender psychological support for his actions—violence escalates among members of the group as each tries to prove himself. Id. at 17-18. Although most hate crimes are committed in groups, usually they are not committed by organized hate groups such as the Ku Klux Klan, as most people may believe; generally, they are committed by unorganized groups of individuals. See Kristin L. Taylor, Note, Treating Male Violence against Women as a Bias Crime, 76 B.U. L. Rev. 575, 581-82 (1996) (discussing multiple stranger attackers).

4 See generally James B. Jacobs & Jessica S. Henry, The Social Construction of a Hate Crime Epidemic, 86 J. Crim. L. & Criminology 366 (1996) (attempting to deconstruct claim that United States was experiencing “a hate crime epidemic”). Though the specific definition of “hate crime” or “bias crime” may vary by state, generally the term refers to a crime against persons or personal property motivated in whole or in part by racial, ethnic, religious, gender, sexual orientation and other prejudices. Id. at 366. The term “hate crime” was coined in 1985 by Representatives John Conyers (D-Mich.), Barbara Kennelly (D-Conn.), and Mario Biaggi (D-N.Y.), when they co-sponsored the “Hate Crime Statistics Act” in the House of Representatives. See H.R. Con. Res. 1048, 101st Cong. (1990) (enacted). The bill directed the U.S. Attorney General to collect and publish statistics on the nature and number of crimes motivated by racial, religious, and ethnic prejudice. Harbani Ahuja, Note, The Vicious Cycle of Hate: Systemic Flaws in Hate Crime Documentations in the United States and the Impact on Minority Communities, 37 Cardozo L. Rev. 1867, 1874 (2016). From an unfortunate history of discrimination against various target immigrant groups and lynchings of African Americans in the South, hate crimes have developed and adapted over time to include a wide variety of activities, including vandalism of places of worship. See Preface to Anti-Immigration in the United States: A Historical Encyclopedia, at xvii—xviii (Kathleen R. Arnold ed., 2011). The history of the United States is plagued with examples of hate crimes, including murders, church bombings, attacks on
“bias crime” did not become part of the legal lexicon until the mid-1980s, when legislation was passed to identify and tackle the issues of groups being targeted on the basis of race, religion, sexual orientation, and ethnicity. Starting in 1990, Congress mandated federal documentation of hate crimes to be published and annotated in the Hate Crimes Statistics Act. Based on this Congressional mandate, the Federal Bureau of Investigation (“FBI”) has published annual reports on hate crime statistics nationwide based on reports by law enforcement at both the local and national levels. The reason for this national response to the hate crime epidemic, as some have called it, is because “hate crimes do not occur in a vacuum; they are a violent manifestation of prejudice, which can be pervasive in the wider community.” Despite the broad and lasting impact peaceful African American protestors during the civil rights movement in the 1960s, the white-supremacist movement, and the Ku Klux Klan. See id.


7 See CJIS-UCR Program, supra note 6, at 1-2 (discussing purpose and scope of program). Some have argued the FBI documentation reveals systematic flaws in the government’s ability to properly document and report hate crimes, thus failing to protect minority communities. See Ahuja, supra note 4, at 1869; Hansdeep Singh et al., Perpetuating Discrimination: How the U.S. Government’s Compliance with the Underreporting of Hate Crimes Leads to a Failure to Protect Minority Groups and Effectively Combat Hate Crimes 1 (2014), available at http://binternet.ochhr.org/Treaties/CRD/Shared%20Documents/USA/INT_CERD_MSG_USA_17772_E.pdf.

of hate crimes on minority communities, only a small portion of crimes are labeled, charged, and prosecuted as hate crimes each year. All types of crimes affect society as a whole, however, bias crimes cause entire communities to fall victim to the perpetrator, because “[w]hat is essential about bias-motivated violence is that the perpetrator is drawn to commit the offense by the victim’s race, ethnicity, religion, or national origin.”

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

While a majority of states have implemented their own state-specific legislation concerning hate crimes or bias motivated crimes, prosecutors face many challenges in successfully prosecuting these cases. The problems facing prosecutors stem from the manner in which they must prove their case and convince either a jury or a judge concerning the hate or bias a defendant had against a victim at the time of the act.

shown the typical perpetrator of a hate crime most often is a young male between fourteen and twenty-four years old. Katherine Chen, Note, Including Gender in Bias Crime Statutes: Feminist and Evolutionary Perspectives, 3 WM. & MARY J. WOMEN & L. 277, 281 (1997), see also LEVIN & MCDENVITT, supra note 3, at 60-61 (stating typical perpetrator dislikes entire classes of people and feels threatened by groups). “Serious hate crimes receive media attention and public officials respond accordingly. As a result, we often see the hate crime offender as a distinct type of individual, one that is unlike ordinary citizens.” CAROLYN TURPIN-PETROSMO, UNDERSTANDING HATE CRIMES: ACTS, MOTIVES, OFFENDERS, VICTIMS, AND JUSTICE 103 (2015).

9 See Megan Sullaway, Psychological Perspectives on Hate Crime Laws, 10 PSYCHOL. PUB. Pol’y & L. 250, 250 (2004). Even when charged and prosecuted as hate crimes, “inadequate law enforcement investigation of biased motives, ineffective prosecution, and improper punishment for the perpetrator” cause minority groups to feel further victimized by a system that fails them. Ahuja, supra note 4, at 1872 (citing HATE CRIME LAWS, supra note 8, at 21).

10 Fredrick M. Lawrence, The Punishment of Hate: Toward a Normative Theory of Bias-Motivated Crimes, 93 MICH. L. REV. 320, 321 n. 4., (1994). “Many instances of personal, violent crimes may be motivated all or in part by hatred for the victim. If, however, there were no bias motivation, this conduct would not be considered a civil rights crime.” Id. (citing Frederick M. Lawrence, Civil Rights and Criminal Wrongs: The Mens Rea of Federal Civil Rights Crimes, 67 TUL. L. REV. 2113, 2117 n.5 (1993)).


12 See Benjamin B. Wagner, Unique Approaches for a Unique Type of Crime: Prosecuting Hate Crimes (on file with U.S. Dep’t of Justice).
II. HATE CRIMES AND THE CONSTITUTION

In addition to the formulaic investigation required into the specific motive behind the crime, prosecutors face the challenge of overcoming potential constitutional and political arguments. Critics of hate crime legislation raise concerns of constitutionality and implications of the First Amendment by objecting to the punishment of individuals based on their expression of ideas protected under free speech. ‘[B]igotry cannot be outlawed, but hate crime laws demonstrate an important commitment to confront and deter criminal activity motivated by prejudice.’ In

---

13 See Avlana Eisenberg, Expressive Enforcement, 61 UCLA L. Rev. 858, 884 (2014) (discussing underreporting of hate crimes); Scotting, supra note 1, at 859 (“[T]he hate crime problem is much more serious than even the statistics report as a result of drastic underreporting by both law enforcement agencies and victims themselves.”). The First Amendment does not protect violence, “only when an individual commits a crime based on those biased beliefs and intentionally targets another for violence or vandalism that a hate crime statute can be triggered.” ALTSCHILLER, supra note 2, at 106.

14 See Jeannine Bell, Symposium, Deciding When Hate Is a Crime: The First Amendment, Police Detectives, and the Identification of Hate Crime, 4 RUTGERS RACE & L. REV. 33, 34 (2002) (discussing difficulties of controlling hateful behavior “without offending the First Amendment by silencing speech”); Phyllis B. Gerstenfeld, Smile When You Call Me That!: The Problems with Punishing Hate Motivated Behavior, 10 BEHAV. SCI. & L. 259, 278-80 (1992) (discussing First Amendment implications). Some opponents even have argued that hate-crime statutes fail to advance legitimate criminal justice ends. See Hate Crimes Laws—The ADL Approach, ANTI-DEFAMATION LEAGUE, 13 (2012), https://www.adl.org/sites/default/files/documents/assets/pdf/combating-hate/Hate-Crimes-Law-The-ADL-Approach.pdf (quoting The Local Law Enforcement Hate Crimes Prevention Act of 2007: Hearing on H.R. 1592 Before the Subcomm. on Crime, Terrorism, & Homeland Security of the H. Comm. on the Judiciary, 110th Cong (2007) (statement of Frederick M. Lawrence, Dean, and Robert Kramer, Research Professor of Law, George Washington University Law School) available at http://judiciary.house.gov/media/pdfs/Lawrence070417.pdf) (arguing “punishment of hate crimes alone will not end bigotry in our society.”). “The laws serve a symbolic function, not a practical one.” Jeff Jacoby, Punish Crime, Not Thought Crime, in ALTSCHILLER, supra note 2, at 100. Jacoby argues despite the emotionally charged nature of bias motivated crimes, the victim’s reaction and the community’s response are the same for any violent crime, with or without the added element of bias. Id. at 101. “In fact, the law has no business intensifying the punishment for violent crimes motivated by bigotry at all. Murderers or arsonists or terrorists should be prosecuted and punished with equal vehemence regardless of their agenda.” Id. In contrast, proponents of hate crime statutes argue bias crimes are “designed to intimidate the victim and members of the victim’s community, leaving them feeling fearful, isolated, vulnerable, and unprotected by the law.” Lieberman, supra note 2, at 103. Lieberman argues hate crimes are unlike other crimes because the damage they inflict affects “the fabric of our society and fragment[s] communities.” Id.

Wisconsin v. Mitchell, the Supreme Court upheld the view that a defendant's motive for committing a hate crime may be identified and separated from issues of constitutionally protected speech. The Mitchell decision stands for the proposition that hate crimes do not constitute expressive conduct or speech protected by the First Amendment. The First Amendment does not protect violence. The Court categorically rejected the notice that there is an "apparently limitless variety of conduct [that] can be labeled as 'speech' whenever the person engaging in the conduct intends thereby to express an idea."


See id. at 489 (holding "The First Amendment . . . does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent."). But see James Weinstein, Hate Crime and Punishment: A Comment on Wisconsin v. Mitchell, 75 OR. L. REV. 345, 384 (1994) (concluding court failed to provide guidance on application of statutes without infringing on First Amendment).

See Mitchell, 508 U.S. at 489-90. In Mitchell, a group of young African American men gathered at an apartment complex and discussed a scene from the movie “Mississippi Burning,” in which “a white man beat a young black boy who was praying.” Mitchell asked them: “Do you all feel hyped up to move on some white people?” Id. at 480 (quoting Brief for Petitioner at 4, Wisconsin v. Mitchell, 508 U.S. 476 (1993)). A young boy walked by the group and Mitchell said: “You all want to fuck somebody up? There goes a white boy; go get him.” Id. (quoting Brief for Petitioner, supra, at 4-5). Mitchell then counted to three and pointed in the boy’s direction. Id. Thereafter, the group ran toward the boy, beat him severely, and stole his tennis shoes. The boy remained in a coma for four days following this incident.


Many defense attorneys and constitutional scholars argued the Wisconsin statute punished thoughts. See, VALERIE JENNESS & RYKAN GRATTEI, MAKING HATE A CRIME: FROM SOCIAL MOVEMENT TO LAW ENFORCEMENT 115 (2001); Alisha Prinvale, Bigots Beware: Wisconsin v. Mitchell and the Legalization of Penalty Enhancement, 11 BYU. PRELAW REV. 25, 28-30 (1997). In its amicus curiae brief, the Wisconsin Association of Criminal Defense Lawyers stated, “the right of all people to assert their opinion, regardless of how unpopular or odious, must be preserved . . . the Wisconsin statute does not even attempt to punish one for the harm caused by the expression of hurtful opinion. Such expression, however, is absolutely protected by the First Amendment, regardless of the pain or fear it may engender.” ALTSCHILLER, supra note 2, at 27-28.

United States v. O’Brien, 391 U.S. 367, 376 (1968). An early challenge to hate crimes laws involved a group of white supremacists who burned a cross in an African American family’s yard in St. Paul, Minnesota, on June 21, 1990. See R.A.V. v. City of St. Paul, 505 U.S. 377 (1992). In R.A.V. v. City of St. Paul, the defendant was convicted of violating the municipal bias-motivated crime ordinance, banning cross-burnings and swastika displays. See id. at 179-80. The statute stated that these actions “arouse anger, alarm, or resentment in others on the basis of race, color, creed, religion or gender.” Id. at 380. The Supreme Court reversed the Supreme Court of Minnesota’s decision, which held that the ordinance unconstitutionally restricted speech on the basis of its content. Id. The majority concluded the ordinance applied only to “fighting words” that insult or provoke violence “on the basis of race, color, creed, religion, or gender.” Id. at 391-96. The court held a jurisdiction may prescribe unprotected speech on the basis of its content, but it may not criminalize speech in a protective manner. See id.
Although bias crimes have occurred through American history, legislation specifically combating hate crimes only was enacted within the last few decades. The first federal hate crimes statute, the Civil Rights Act of 1968, was passed by Congress and signed into law by President Lyndon Johnson. The main federal hate crime statute, 18 U.S.C. § 245,
was enacted as part of the Civil Rights Act of 1968 to combat racial violence against civil rights workers. That statute prohibits the use of force, or threat of force, to injure, intimidate, or interfere with, or attempt to injure, intimidate, or interfere with a person because of his or her race, color, religion, or national origin, and/or because of that person’s participation in any one of six enumerated federally protected activities.\(^{23}\)

The statute provides, in pertinent part:

(b) Whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with—

(2) any person because of his race, color, religion or national origin and because he is or has been—

(A) enrolling in or attending any public school or public college;
(B) participating in or enjoying any beneﬁt, service, privilege, program, facility or activity provided or administered by any State or subdivision thereof;
(C) applying in or enjoying employment, or any perquisite thereof, by any private employer or any agency of any State or subdivision thereof, or joining or using the services or advantages of any labor organization, hiring hall, or employment agency;
(D) serving, or attending upon any court of any State in connection with possible service, as a grand or petit juror;
(E) traveling in or using any facility of interstate commerce, or using any vehicle, terminal, or facility of any common carrier by motor, rail, water, or air;


The statute is deﬁcient on two grounds: (1) no federal jurisdiction exists unless the victim engaged in one of the enumerated federally protected activities, and a nexus exists between the crime and the federally protected activity; and (2) there is no federal protection for hate crimes committed because of bias based on gender, sexual orientation, or disability.

Scotting, supra note 1, at 855.

Following the Civil Rights Act of 1968, Congress passed the Hate Crime Statistics Act in 1990, which requires the Attorney General to collect data “about crimes that manifest evidence of prejudice based on race, religion, sexual orientation, or ethnicity.”25 “In May 1995, the United States Sentencing Commission announced its implementation of a three-level sentencing guidelines increase for hate crimes . . .”26 The amendment took effect on November 1, 2015.27

One of the most significant recent additions to the federal scheme concerning hate crimes is the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009.28 This Act expanded the federal definition of hate crimes, enhanced the legal tools available to prosecutors, and increased the ability of federal law enforcement to assist state and local enforcement partners.29 Prior to the Act, there was no single Federal hate

(Id.


26 ALTSCHILLER, supra note 2, at 12.


crime statute, forcing prosecutors to rely upon a variety of civil rights statutes or violent crime statutes to prosecute hate crimes.\textsuperscript{30}

Each state defines which criminal activities constitute hate or bias crimes differently, and some states have narrower definitions of hate crime activities or protected groups than others.\textsuperscript{31} Hate crime legislation increased after the Anti-Defamation League ("ADL") released a model hate crime statute in 1981.\textsuperscript{32} Most state hate crime laws take the form of enhancements increasing punishment for an underlying crime.\textsuperscript{33} Penalty-enhancement laws for hate crime help to deter individuals from committing such crimes.\textsuperscript{34} Typically, the hate crime enhancement requires prosecutors to prove the crime was committed because of the victim's actual or

\begin{quote}
authorizing the Attorney General to assist to federal and state officials. ALTSCHELLER, supra note 2, at 17. Prior to its enactment, federal jurisdiction over hate crimes was limited to certain civil rights offenses. \textit{Id.}

\textsuperscript{30} See Wagner, supra note 12. "The scope of federal jurisdiction under some of these statutes was often unclear and, as a result, hate crime prosecutions frequently involved extensive litigation regarding collateral jurisdictional elements." \textit{Id.}

\textsuperscript{31} See Maroney, supra note 6, at 567, 589-93 (discussing state hate crime laws). In addition to commissions to study the problem, bias policies and procedures were developed by police departments and prosecutors, and hate crime laws were debated and passed by both the state and federal governments. \textit{Id.} at 589-95.

\textsuperscript{32} See Hate Crime Laws, \textit{ANTI-DEFAMATION LEAGUE} 2-3 (2012), available at http://www.adl.org/assets/pdf/combating-hate/Hate-Crimes-Law.pdf. The ADL's legal approach centers around penalty enhancement—i.e., a defendant's sentence may be enhanced if he or she intentionally selects a victim based upon a perception of the victim's race, religion, national origin, sexual orientation, or gender. \textit{Id.} The 1981 model statute included five components: (1) identifying a hate crime as a two-tiered criminal act, the predicate or base offense and the element of animus toward the victim because of actual or perceived characteristics; (2) the enhanced penalty element; (3) institutional vandalism; (4) availability of civil actions for hate crime victims; and (5) states collecting and maintaining hate crime data reported to law enforcement." TURPIN-PETROSINO, supra note 8, at 57.

\textsuperscript{33} See Hate Crime Laws, supra note 32, at 2. "Many federal and state criminal laws provide different penalties for crimes depending on the victim's special status .... Legislators have legitimate and neutral justifications for selective protection of certain categories of victims and enhanced criminal penalties-based on their judgment of the social harm these crimes cause." Michael Lieberman & Steven M. Freeman, \textit{Confronting Violent Bigotry: Hate Crime Laws and Legislation, in 1 THE PSYCHOLOGY OF HATE CRIMES AS DOMESTIC TERRORISM: U.S. AND GLOBAL ISSUES} 43, 44 (Edward Dunbar et al. eds., 2016). The size and penalty enhancement varies by state. For example, "[i]n Vermont, a hate crime is subject to double the maximum prison term, while under Florida's enhancement provision, the maximum possible sentence is tripled." JAMES B. JACOBS \\& KIMBERLY POTTER, \textit{HATE CRIMES: CRIMINAL LAW AND IDENTITY POLITICS} 30 (1998).

\textsuperscript{34} See Hate Crime Laws, supra note 32, at 2. "In an amicus brief before the Supreme Court, the Anti-Defamation League and other groups wrote that 'law enforcement officials believe these laws can have a deterrent effect by making clear that hate crimes will be considered particularly serious crimes and will be dealt with accordingly.'" David L. Hudson, Hate Crimes 25 (2009) (quoting Brief of Amici Curiae the Anti-Defamation League, et al. in Support of Petitions for Writ of Certiorari, Wisconsin v. Mitchell, 508 U.S. 476 (1993) (Nos. 92-515, 92-568), 1992 WL 12012031 at *8).
perceived race, religion, nationality, country of origin, disability, gender, or sexual orientation. The prosecutor must legally prove beyond a reasonable doubt that the offender’s bias or hate was a \textit{substantial factor} behind the commission of a crime. Given the difficulties of proving a defendant’s unknown prejudice, successfully prosecuting hate crimes is difficult.

Institutional vandalism statutes are a second form of legislation aimed at combating hate crimes. These statutes are “designed to punish bias-motivated defacement, desecration, or destruction of house of worship, religious schools and institutions, and cemeteries.” Under many statutes, the penalty for institutional vandalism varies with the amount of damage inflicted, and some statutes do not explicitly require that the actor be motivated by bias.

\section*{IV. INVESTIGATING HATE CRIMES}

Numerous factors, including citizen non-reporting and law enforcement shortcomings, make it difficult to assess an accurate number of hate crimes nationwide. “We do know, however, that hate crimes continue to be a major problem, and that they tend to increase when the political or social environment becomes emotionally charged in ways that can be associated with particular communities.” Investigating hate crimes sometimes requires extensive time and dedication from law enforcement agencies. For example, the process of investigating a hate crime may involve interviewing witnesses, collecting evidence, and determining the motive of the perpetrator.

\begin{footnotesize}
\begin{enumerate}
\item See \textit{Hate Crime Laws}, supra note 32, at 2. As of 2012, “only 31 states and the District of Columbia include sexual orientation-based crimes in penalty-enhancement hate crime legislation; only 26 states and the District of Columbia include coverage of gender identity-based crimes; and only 36 states and the District of Columbia include coverage for disability-based crimes.” \textit{Id.} at 4 (citing state statutes denoting special protections for LGBTQ and disabled community). On June 15, 2004, the U.S. Senate approved legislation that expanded federal hate crime protection to include sexual orientation, gender, and disability. \textit{Altschiller}, supra note 2, at 16. It was later incorporated in a different form into the Matthew Shepard-James Byrd statute. \textit{Id.}
\item See \textit{Paul Bergman, Criminal Law: A Desk Reference} 184 (2011) (discussing the high burden placed on prosecutors in hate crime prosecutions); \textit{Phyllis B. Gerstenfeld, Hate Crimes: Causes, Controls, and Controversies} 84 (3d. ed., 2013) (noting frustration felt by prosecutors in meeting high legal standard); \textit{Jenness \& Grattet, supra} note 19, at 117 (analyzing early court decisions considering proportionality of bias to prove hate crime). “The illegal bias need not be the sole reason for the crime for a hate crime law to apply.” \textit{Bergman, supra.}
\item But see \textit{Gerstenfeld, supra} note 36, at 76 (“Of course, in some cases, it is not nearly so difficult to determine the offender’s motive. If someone paints a swastika on a synagogue or lights a cross on the lawn of the black family in the neighborhood, it is hard to think of any reasonable explanation other than bias.”).
\item \textit{Hate Crimes Laws—The ADL Approach}, supra note 14, at 4.
\item See \textit{Jacobs \& Potter, supra} note 33, at 85-86.
\item See \textit{Wagner, supra} note 12.
\end{enumerate}
\end{footnotesize}
enforcement officers and may include social media and other Internet sites.\textsuperscript{41} Although many hate crimes go unreported, those crimes that are reported face many potential barriers such as responding officers misinterpreting or misreporting hate crimes as bias-motivated crimes.\textsuperscript{42} Regardless of the legal and statutory schemes available, if police officers fail to classify crime hate crimes as such, they will proceed ordinary criminal violations.\textsuperscript{43}

Unlike other crimes, hate crimes are unique in that they contain two intrinsic elements: hate crimes involve (1) a predicate offense and (2) a bias motivation. Thus, law enforcement agencies and task forces must investigate the primary predicate offense while also connecting the predicate offense to a bias motivation based on evidence.\textsuperscript{44} “In other crimes, you have the first two but evidence of motivation is not required. Even though they may say it all the time on TV that you’re looking for

\textsuperscript{41} See generally Danielle Keats Citron, Hate Crimes in Cyberspace (2016) (preventing online harassment through legal precedent). Many individuals and groups are targeted online, adding an extra investigatory burden to officers. Id. at 50. In Hate Crimes in Cyberspace, Danielle Keats Citron argues for more narrowly tailored legislation directed at protecting women from online hate crimes. See id. at 13-14, 38, 48. She specifically discusses the fear that if new laws are added to this end, prosecutors may overreach and charge non-hate crimes as hate crimes. Id. at 188. Further, she advises lawmakers “to proceed cautiously . . . to avoid turning so-called repugnant behavior into crimes.” Id. at 188.

\textsuperscript{42} See Gerstenfeld, supra note 36, at 69 (discussing police responses to hate crimes).

\textsuperscript{43} See Joseph Goldstein, Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice, 69 Yale L.J. 543, 554 (1960). Prosecutors and advocates need to recognize and account for this broad police discretion in determining whether a crime is classified as a hate crime. See id. “Police decisions not to invoke the criminal process largely determine the outer limits of law enforcement.” Id. at 543 (footnote omitted). In an attempt to assist prosecutors, “[t]he Civil Rights Division has held trainings for thousands of law enforcement officials—federal, state, and local—to ensure that first responders to an . . . act of violence know what questions to ask and what evidence to gather . . . to allow prosecutors to make an informed assessment of whether a case should be prosecuted as a hate crime . . . .” Autschiller, supra note 2, at 18. Even in cases where the general public may think the perpetrator clearly acted based on a bias toward the victim(s), police and prosecutors still evaluate whether to charge the incident as a hate crime. See Amy B. Wang, A Man Assumed a Store’s Indian Owners were Muslim, So He Tried to Burn it Down, Police Say, Wash. Post: Post Nation (Mar. 12, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/03/12/police-man-started-dumpster-fire-to-run-the-arabs-out-of-our-country-the-victims-were-indian/?utm_term=.778ca50b43c (discussing Florida man’s desire to “run the Arabs out of our country”[1]).

\textsuperscript{44} See Laura Med, Note, Hate Crime and Punishment: Why Typical Punishment Does Not Fit the Crime, U. Ill. L. Rev. 921, 936 (2014) (footnotes omitted) (“Hate crime laws do not work without police officer enforcement . . . . Every time the police arrest or fail to arrest someone, it is a political decision. Whether something is reported as a hate crime, or prosecuted as a hate crime, is entirely up to the discretion of law enforcement.”); Kercher et al., Crime Victims’ Inst., Sam Houston St. Univ., Hate Crimes 20 (2008), http://www.crimevictimsinstitute.org/documents/Hate%20Crimes%20Final.pdf (“A crucial phase in assisting victims of a hate crime is the officer’s identification of the crime as bias motivated.”).
motivation, in an ordinary crime, you aren’t.” \(^{45}\) Requiring law enforcement officers to investigate the motive for a crime (i.e. uncovering the perpetrator’s beliefs) complicates the investigation process. \(^{46}\) Because incidents may be prosecuted as regular crimes or hate crimes, officers may find it easier to investigate a bias crime as a “regular” crime. \(^{47}\) In fact, some opponents of hate crime statutes argue that if a defendant can be punished for an underlying criminal offense, then the motivation is irrelevant. \(^{48}\) However, proponents of hate crime statutes argue such legislation is necessary to protect communities that become affected by bias crimes. \(^{49}\) Due to the impact of hate crimes on the victim, target


\(^{47}\) See Bell, supra note 23 (highlighting arguments presented by hate crime statute critics).

\(^{48}\) See Stephen M. Hass et al., Assessing the Validity of Hate Crime Reporting: An Analysis of NIBRS Data (July 2011), available at http://www.djcs.wv.gov/ORSP/SAC/Documents/ORSP_WV_Hate_Crime_Report.pdf. In Assessing the Validity of Hate Crime Reporting, the authors address the accuracy of hate crime statistics and identify problems associated with hate crime data collection. See id. Specifically, the authors provide imperial data arguing that many police officers do not recognize a hate crime unless it is “the type that makes national headlines”—i.e. “what officers refer to as a ‘clear-cut case.’” Id. at 18.

\(^{49}\) See id. The implications of the protections afforded to individuals by hate crime statutes validate the feelings of fear and persecution felt by minority communities. See Obama Signs Hate Crimes Bill Into Law, CNN (Oct. 28, 2009, 7:39PM), http://www.cnn.com/2009/POLITICS/10/28/hate.crimes/. For example, at the federal level, when President Obama signed the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, he hailed it as a crucial step that “help[s] protect our citizens from violence based on what they look like, who they love, how they pray.” Id. “Obama’s remarks highlighted the link between the modern federal hate crime law and its civil rights era predecessor, emphasizing the importance of the new legislation as a way to combat violent attacks against people based on core features of their identity.” Avlana Eisenberg, Article, Expressive Enforcement, 61 UCLA L. REV. 858, 867-68 (2014). “I don’t believe that a bias or hate bill by itself is going to do anything to reduce crime. But . . . the message that we’re focusing on people who have malice in their hearts or hate or a bias towards an individual or group . . . maybe the time has come for us to send (that message) out there.” See id. at 870. Despite an attempt to send a message to minority
communities, and society as a whole, one can easily infer why legislators and activists have called for higher punishment on the hate crimes instead of the underlying criminal offense.\textsuperscript{50}

V. PROSECUTING HATE CRIMES

Despite the enactment of state and federal statutes to protect minority groups affected by hate crimes, either at the community or individual level, prosecuting hate crimes remains both complicated and arduous.\textsuperscript{51}

Hate crimes attack fundamental rights. The principle of equal rights is a core principle in every democratic state. . . . Hate crimes are an extreme form of prejudice, since the victim is attacked because of his or her membership in a group. To the attacker, one member of that group is interchangeable with any other. Thus, hate crimes deny the human dignity and individuality of the victim and attack the principle that each individual is communities, both at a federal and state level, that there are legal protections in place against bias-motivated crimes, many victims still do not come forward. See generally id. “[T]here is reason to believe that, despite increased bias crime reporting by police agencies, a majority of bias crime victims do not report incidents at all. Victims' distrust of the police, language barriers, and fear of either retaliation by the offender or public exposure generally may well lead to systematic underreporting of bias crimes.” ALTSCHILLER, supra note 2, at 41 (quoting Frederick Lawrence, Hate Crimes, in ENCYCLOPEDIA OF CRIME AND JUSTICE 776 (Joshua Dressler ed., 2d ed., 2001). Due to the greater effect hate crimes on a target community, they are seen as “message crimes,” (i.e., they send “a message that members of a certain groups are not wanted in a particular neighborhood, community, workplace or college campus.” Hate Crimes Prevention Act of 1997: Hearing on H.R. 3081 Before the H. Comm. on the Judiciary, 105th Cong. 143 (1998) (testimony of Jack McDevitt, Law Professor & Co-Director, Center for Criminal Justice Policy Research, Northeastern University Law School), available at http://commdocs.house.gov/committees/judiciary/hju57839_0.HTM. In discussing the effects of a hate crime on the target community, Frederick Lawrence states:

Members of the target community of a bias crime experience that crime in a manner that has no equivalent in the public response to a parallel crime. The reaction of the target Community not only goes beyond mere sympathy with the immediate bias crime victim, but exceeds empathy as well.

FREDERICK M. LAWRENCE, PUNISHING HATE 42 (ed. 2009).

\textsuperscript{50} See LAWRENCE, supra note 1, at 60. The greater punishment is due to the culpability of the offender. See id. The underlying offense, sometimes called a parallel offense by commentators, lacks the specific motive of a hate crime by itself. See id.

\textsuperscript{51} See generally Meli, supra note 44, at 924 (discussing surge in state and federal legislation to address hate crimes since 1980's). See also Bell, supra note 23 (noting difficulties of investigating and prosecuting hate crimes).
entitled to the equal protection of the law. As guardians of the rule of law and defenders of constitutional rights, prosecutors play an essential role in ensuring that fundamental rights are given meaning. The effective prosecution of hate crimes upholds and protects democratic values.\textsuperscript{52}

\textbf{A. The Prosecutor’s Burden of Proof}

Despite the adoption of hate crime statutes at the state level, prosecutors continue to grapple with the daunting task of meeting their burden under the very legislation that was established to assist the criminal justice system.\textsuperscript{53} Generally, these statutes increase the criminal penalties for perpetrators of racial violence.\textsuperscript{54} “[H]ate crimes are not different from other types of crimes,” except that prosecuting these crimes includes the requirement of proving the offender’s bias or hate as he perpetrated the crime.\textsuperscript{55} “In other words, the statutes require prosecutors to demonstrate the accused’s criminal conduct was motivated by racism.”\textsuperscript{56} Not only must the bias be proven, but the prosecutor must show that the bias caused the criminal conduct.\textsuperscript{57}


\textsuperscript{53} See generally \textit{FRANK S. PEZZELLA, HATE CRIME STATUTES: A PUBLIC POLICY AND LAW ENFORCEMENT DILEMMA} (2016). “From the prosecutor’s viewpoint, the threshold for proving bias motivation jeopardizes the likelihood of a conviction for either the bias, or for that matter, the parallel non-bias crime.” \textit{Id.} at 74.

\textsuperscript{54} See James Morsh, Comment, \textit{The Problem of Motive in Hate Crimes: The Argument against Presumptions of Racial Motivation}, 82 J. CRIM. L. \& CRIMINOLOGY 659, 660 (1991) (introducing hate crime statutes). Legal theorists have pondered how and why hate crime offenders choose their victims, beyond mere bias. See Scotting, \textit{supra} note 1, at 860. For example, Troy Scotting argues:

Hate crime offenders, “frequently motivated by a belief that the victim deserves punishment,” select their victim “as a means of pouring out their anger against the class as a whole.” The offender has a stereotyped view of the victim’s class, and the hate crime may be a result of such causes as resentment, current events, desire to achieve “power and domination” over the other group, and insecurities of the offender. \textit{Id.} (footnotes omitted).

\textsuperscript{55} \textit{GERSTENFELD, supra} note 36, at 76.

\textsuperscript{56} Morsh, \textit{supra} note 54, at 660.

\textsuperscript{57} See \textit{JACOBS \& POTTER, supra} note 33 (weighing bias as proof for criminal motive); Rebecca McCray, \textit{Prosecuting Hate Crimes Is Hard. Here’s Why}, \textit{TAKEPART} (June 18, 2015) http://www.takepart.com/article/2015/06/18/why-its-so-hard-prosecute-hate-crimes (discussing Charleston, South Carolina church shooting). In a fatal shooting of nine people at a historic black church in South Carolina, prosecutors faced the difficult task of showing “concrete evidence that a suspect’s crime was directly motivated by bias against a group of people . . .” McCray, \textit{supra}.
Prosecutors must prove a complex set of facts to pursue and secure a criminal conviction under existing state hate crime statutes. Similar to any other criminal statute, a hate crime statute requires the prosecutor to prove the accused's mens rea (guilty mind). Legal scholars distinguish between motive and intent by defining intent as "the purpose to use a particular means to achieve some definite result," and motive as "the cause or moving power which impels action to achieve that result." Legal scholars have argued that, by incorporating such stringent proof of bias motivation into the language of hate crime statutes, prosecutors are unable to prosecute hate crimes effectively, except in "the most egregious and clear cases of bias motivation."

The prosecutor also must prove that the accused committed the underlying criminal conduct "because of" or "by reason of" that person's race, religion, national origin, sexual orientation, or disability. Not only is obtaining reliable proof of the offender's motive a challenging endeavor, but the prosecutor then also must prove the biased component of the offense beyond a reasonable doubt. Additionally, the Supreme Court has held that Due Process requires that "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." Another example of the strict standard of proof can be seen in a 2013 case where two African American teenagers were accused of shooting a white college student in Oklahoma. Despite social-media posts containing derogatory comments about Caucasian people, prosecutors did not have enough evidence to pursue hate-crime charges. Even in the 2012 fatal shooting of African-American teenager Trayvon Martin, prosecutors were unable to charge the crime as bias motivated. Despite social pressure and discussions about how these crimes clearly are based on race, prosecutors cannot pursue hate crime charges without sufficient evidence. See id.

Another example of the strict standard of proof can be seen in a 2013 case where two African American teenagers were accused of shooting a white college student in Oklahoma. See id. Despite social-media posts containing derogatory comments about Caucasian people, prosecutors did not have enough evidence to pursue hate-crime charges. Id. Even in the 2012 fatal shooting of African-American teenager Trayvon Martin, prosecutors were unable to charge the crime as bias motivated. Id. Despite social pressure and discussions about how these crimes clearly are based on race, prosecutors cannot pursue hate crime charges without sufficient evidence. See id.

Another example of the strict standard of proof can be seen in a 2013 case where two African American teenagers were accused of shooting a white college student in Oklahoma. See id. Despite social-media posts containing derogatory comments about Caucasian people, prosecutors did not have enough evidence to pursue hate-crime charges. Id. Even in the 2012 fatal shooting of African-American teenager Trayvon Martin, prosecutors were unable to charge the crime as bias motivated. Id. Despite social pressure and discussions about how these crimes clearly are based on race, prosecutors cannot pursue hate crime charges without sufficient evidence. See id.
Although the *Apprendi* decision did not reject penalty enhancement for hate crime cases, it did hold that the prosecutor must establish a hate-crime charge during the trial, not following the completion of the evidence. In addition to the legal burden a prosecutor must establish, hate-crimes cases require cooperation from victims and sometimes victims’ communities. For this reason, many prosecutor offices, including the United States Attorney’s Office, have reached out to minority groups and organizations. Due to the challenges facing prosecutors in establishing the motive element of hate crime offenses, “[t]hey are prosecuting only those cases in which evidence is compelling and success is likely.” Unfortunately, hate crimes are not reported as often as the public might think, and, even when they are, victims often feel dissatisfied with the outcome:

Community members are understandably unhappy when an apparently race-, gender- or religion-based crime against someone they perceive as one of their own isn’t prosecuted as a hate crime. But this isn’t necessarily was charged with second-degree possession of a firearm for an unlawful purpose, which carried a prison term of five to ten years. *Id.* The charge did not refer to New Jersey’s hate crime statute, which allowed the trial judge to enhanced his sentence if, by a preponderance of the evidence, the defendant committed the crime “with a purpose to intimidate a person or group of individuals” because of, inter alia, his, her, or their race. *Id.* After *Apprendi* pleaded guilty, the prosecutor filed a motion to enhance the sentence, and the court enhanced his sentence to twelve years of imprisonment. *Id.* at 469-70. The Court reversed the judgment because the New Jersey procedure was “an unacceptable departure from the jury tradition.” *Id.* at 497.

---

64 See *id.; ALTSCHELLER, supra note 2*, at 23-24 (discussing same).

66 See *Wagner, supra note 12*. These steps are essential “to win the trust of victims and their communities, which is critical to the success of hate crime prosecutions.” *Id.* “In partnership with human rights groups, civic leaders and law enforcement, officials have found they can advance police-community relations by demonstrating a commitment to be both tough on hate crime perpetrators and sensitive to the special needs of hate crime victims.” *Id.; see also Hate Crime Laws, supra note 32*, at 3.
67 *JENNESS & GRATTET, supra note 19*, at 152.
because of prosecutorial bias: It may simply be a function of how difficult it is to prove such cases, experts say. 68

B. Jury Selection

In addition to the high burden a prosecutor must meet to try a bias-motivated crime successfully, he or she also must selecting a fair and impartial jury. In every jury case, the prosecution and defense must selection a fair and impartial jury to hear the case. 69 The challenge in hate-crime trials is that prosecutors must question prospective jurors regarding their beliefs about hate crimes, the defendant’s bias, and the juror’s own prejudices. 70

VI. CONCLUSION

At a basic level, hate crimes or bias-motivated crimes, are crimes committed against an individual because of the victim’s perceived or actual race, national origin, ethnicity, religion, or sexual orientation. Studies indicate that criminal acts motivated by hatred are more violent and more likely to result in serious injury to the victim. 71 Because the victim is


69 See U.S. CONST. amend. VI (proclaiming rights of criminally accused). The Sixth Amendment states:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Id.

70 See 1 Barbara Perry, Hate Crimes 100 (2009) (discussing history of American hate groups). For example, “some prospective jurors may have the impression that hate crime statutes improperly infringe First Amendment rights,” and, therefore, would be “more likely to acquit the defendant.” Id. Prosecutors must navigate the delicate conversation of assessing a potential juror’s biases against hate crime statutes and the victim(s) in the case. Id.

71 See Francesca Mirabile, Guns and Hate Crime: What We Know (and Don’t Know) About the Role Firearms Play in Bias Attacks, THE TRACE (March 21, 2017), https://www.thetrace.org/2017/03/guns-hate-crimes-bias-attacks (discussing hate crimes
chosen based on a specific characteristic, he or she is interchangeable with any other member of that class or group. This notion sets hate crimes apart from other types of crimes because an act against one individual is perceived as an act against the entire group.

Unfortunately, prosecuting hate crimes is challenging for law enforcement and prosecutors. Sometimes, victims are fearful of stepping forward or lack confidence in local police establishments to pursue the offender(s) vigorously. Other times, victims fail to report hate crimes because they are reluctant to acknowledge their sexual orientation, immigration status, or other qualifying information to law enforcement, for fear of community backlash or police data collection. Meanwhile, crimes reported to police go unreported as hate crimes because law enforcement does not perceive find evidence of bias or hate at the time of the investigation.

Finally, investigators have to “dig deeper” than the average criminal act to obtain the evidence necessary to prosecute the crime. Because establishing motive and intent are key elements of proving hate crimes, investigators must work diligently to locate evidence relevant to the defendant’s state of mind before and during the crime. Despite their best efforts, law enforcement and investigators are incapable of obtaining the true thoughts and internal decisions that lead an individual from thinking biased thoughts and acting on those thoughts in all hate crime cases. Current hate crime statutes provide adequate grounds for prosecution in cases where the perpetrator clearly chose the victim(s) based on an inherent characteristic. However, the system fails minority and protected communities in cases where the perpetrator’s bias cannot be easily ascertained. Ultimately, these trends show the need of law enforcement officers and prosecutors to continue, and even, increase their outreach efforts to marginalized communities in an attempt to further open two-way channels of trust and communication.

committed between 2010 and 2015). “Hate crime data collected through victim surveys and law enforcement agencies indicate that most incidents don’t involve a gun. Those that do, however, tend to draw the most media attention because they often have the most frightening implications.” Id.