

The Hate Debate

Constitutional and Policy Problems

Every year, I issue a challenge to the students in my Hate Crimes class. Any student who can convince me that hate crime laws either are or are not constitutional receives an automatic A in the class. So far, no student has successfully met the challenge, and, despite having studied the laws for over two decades, I remain firmly on the fence. I am not the only one who has had difficulty with this issue; organizations such as the American Civil Liberties Union have suffered from internal divisions concerning their stand on hate crime laws, and scholars and even judges have expressed their own ambivalence (see In Focus 2.1). This ambivalence is due not to lack of thought on the matter, but rather to the strength of the arguments both for and against the constitutionality of hate crimes legislation. In this chapter, we explore those arguments, and perhaps you will be able to reach your own conclusions.

The constitutionality of hate crime laws, though it has sparked much vigorous debate, is not the only dilemma regarding these laws. There are also a number of serious policy concerns about the scope and use of the laws, and in this chapter we explore those issues as well. Among the major issues I discuss are which groups to protect with the laws, problems with identifying and prosecuting hate crimes, and the potential paradoxical effects of hate crimes legislation.

IN FOCUS 2.1

Ambivalence About Hate Crime Laws

Many people have had a difficult time deciding whether hate crime laws are constitutional. In the first quote presented here, a justice of the Wisconsin Supreme Court, dissenting from that court's decision to overturn Wisconsin's hate crimes law, expressed her own ambivalence.

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The Wisconsin Supreme Court's decision was later overruled by the United States Supreme Court, which agreed with Justice Abrahamson that the law met constitutional standards:

Had I been in the legislature, I do not believe I would have supported this [hate crime] statute. I do not think this statute will accomplish its goal; I would direct the state's efforts to protect people from invidious discrimination and intimidation in other directions. As a judge, however, after much vacillation, I conclude that this law should be construed narrowly and should be held constitutional. (Justice Shirley Abrahamson [dissenting], *Wisconsin v. Mitchell*, 485 N.W.2d 807, 818 [Wis. 1992]; *rev'd* 508 U.S. 476, 1993)

As civil rights attorney Susan Gellman (1991) asserts here, Justice Abrahamson is not alone in her indecision:

The debate over [hate crime] laws is occurring not merely between traditional allies, but between one side and itself. Moreover, whenever either viewpoint prevails, whether in the legislature, the courts, or even in a purely academic argument, its proponents do not seem very happy about it. They can see very well their opponents' point of view, and in fact largely agree with it. (p. 334)

Even organizations have experienced difficulty in reaching a consensus, as described as follows by law professor James B. Jacobs and attorney Kimberly Potter (1998):

Civil libertarians, torn between commitments to equality and free speech, are divided on this question. On the one hand, for example, the national American Civil Liberties Union (ACLU), in its amicus brief to the U.S. Supreme Court in *Wisconsin v. Mitchell*, defended the extra punishment imposed by the Wisconsin hate crime law. . . . On the other hand, the Ohio chapter of the ACLU and the Center for Individual Rights submitted amicus briefs opposing the statute. (pp. 111–112)

Hate Crime Laws and the Constitution

Motive

Some of the strongest arguments against hate crime laws have focused on the First Amendment's protections of speech and association. The problems are related to a unique aspect of hate crime laws: They are the only kind of laws for which motive is an element of the crime.

Many laypeople, and even some legal scholars, confuse motive and intent. Most crimes contain some intent requirement, also known as *mens rea*. For example, in California (and in most other states), a conviction for murder requires proof that the offender acted with "malice aforethought," whereas vehicular manslaughter requires that the offender drove with "gross negligence." Essentially, intent refers to

the degree to which a person meant to commit a particular action or cause a particular result.

On the other hand, motive refers to the reason *why* a person commits a particular act. Motive is virtually never made an element of crimes (Candeub, 1994; Gardner, 1993; Gaumer, 1994). If someone robs a bank, it is bank robbery, regardless of whether the robber wanted to use the money to buy medicine for a dying mother or to finance a pornography habit. His or her motive, be it compassion or greed and prurience, is immaterial as far as proving the crime itself is concerned (although in some cases, motive might be taken into consideration during sentencing).¹

Hate crimes are the exception to this rule. If I punch a person because I dislike his choice of football teams, it is ordinary battery. In California, I could receive a fine of up to \$2,000 or 6 months in jail. However, if I punch a person because I dislike his religion, it is a hate crime and I face an additional \$10,000 fine and another year in jail. In both cases, my intent, or *mens rea*, is the same: I willfully used force against my victim. But the reason why I used force—in other words, my motive—is different.

Punishing motive leads to some particularly thorny problems. From the constitutional perspective, it raises the arguments that hate crimes amount to thought crimes and that hate crime laws impermissibly penalize speech and group affiliation. As I discuss in the “Identifying and Prosecuting Hate Crimes” section later in this chapter, it also causes policy dilemmas, because motive is difficult to determine and prove.

Are Hate Crimes Thought Crimes?

Discussion of Hate Crimes as Unconstitutional

A basic principle of American jurisprudence is that thoughts alone, no matter how abhorrent, cannot be punished. The Constitution does not explicitly protect thought, but at least as early as 1929, the Supreme Court recognized that the First Amendment’s provisions imply freedom of thought (see In Focus 2.2). Expression of those thoughts—again, even when they are repugnant—is also protected, as was explicitly held by the Supreme Court in *R. A. V. v. St. Paul*.

IN FOCUS 2.2

The Supreme Court on Thought Crimes

If there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate. (Justice Holmes, dissenting, in *United States v. Schwimmer*, 1929)

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At the heart of the First Amendment is the notion that an individual should be free to believe as he will. (Justice Stewart, in *Abod v. Detroit Board of Education*, 1977)

If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of any idea simply because society finds the idea itself offensive or disagreeable. (Justice Brennan, in *Texas v. Johnson*, 1989)

Many commentators, as well as some judges, have argued that hate crime laws constitute punishment of thought crimes and therefore violate the First Amendment. As in my previous example, imagine that I have punched Able because of his football preference and Baker because of his religious preference. The acts are identical; the only difference between the scenarios is the thoughts that are going through my head as I attack. But I am liable to receive harsher punishment for hitting Baker than for hitting Able. Does this not amount to punishing my thoughts?

Numerous legal scholars have made this argument (see, e.g., Brooks, 1994; Degan, 1993; Fleisher, 1994; Gaumer, 1994; Gellman, 1991, 1992; Gey, 1997; Jacobs & Potter, 1997, 1998; Redish, 1992). At least two courts have agreed. In 1992, the Wisconsin Supreme Court struck down its state's hate crimes law. The court held, "The hate crime statute violates the First Amendment directly by punishing what the legislature has deemed to be offensive thought . . . Without a doubt, the hate crime statute punishes bigoted thought" (*Wisconsin v. Mitchell*, 1992, pp. 811–812). This decision, as we will see, was later overturned by the U.S. Supreme Court.

The Ohio Supreme Court also declared its state's law unconstitutional: "Enhancing a penalty because of motive . . . punishes the person's thought, rather than the person's act or criminal intent" (*Ohio v. Wyant*, 1992, p. 454). This court also discussed why it is dangerous to punish bigoted thought: What, then, would stop the legislature from enhancing penalties for crimes committed because of opposition to abortion or war, or any other viewpoint?

Discussion of Hate Crimes as Constitutional

Other commentators and courts, on the other hand, have strongly disagreed with these assertions (see, e.g., Grannis, 1993; Lawrence, 1999, 2008; Micacci, 1995; Selbin, 1993). They argue that although hate crime laws may appear on their face to punish thought, in fact they do comply with the Constitution. Several points are made in support of this view.

First, although laws that consider motive as an element of a crime are rare, law does consider motive in some situations. One such scenario is a sentencing decision, in which the sentencing authority (usually the judge) may take into account the defendant's motive. In fact, in 1983 in *Barclay v. California*, the U.S. Supreme

Court held that a trial judge properly considered the defendant's racial animus toward his victim when sentencing the offender to death.² If motive can properly be considered by a judge, then why can the legislature not essentially mandate that certain motives will increase punishment? Some courts have been persuaded by this argument; for example, both a Florida appeals court (*Dobbins v. Florida*, 1992) and a California appeals court (*California v. Joshua H.*, 1993) upheld hate crime laws partially on this basis.

The other situation in which motive matters is in civil antidiscrimination cases, such as under the federal Title VII. If an employer fires someone because she does not like his taste in music, it violates no law. If she fires him because of his race, it does.

Of course, the laws' critics have countered these arguments. Determining the appropriate sentence for someone who has already been convicted of a crime is significantly different from convicting someone of a crime itself. Furthermore, the impact of aggravating circumstances such as biased motives in sentencing decisions is tempered by the fact that the sentencer may also consider mitigating circumstances. For example, suppose the perpetrator had been the victim of repeated racial attacks himself, and thus had developed fear of and animosity toward the victim's race. Hate crime laws would leave no opportunity for him to present this evidence.

As for the comparison to antidiscrimination laws, critics point out that there are important differences between civil and criminal law. Nobody will go to prison or lose citizenship rights for discriminating in housing or employment or education; they might for committing a hate crime. Because of the unique gravity of criminal sanctions, our legal system traditionally places greater restrictions on what criminal sanctions the government may impose, and how. Furthermore, as one scholar pointed out (Fleisher, 1994), it is often exceedingly difficult to determine whether a person acted because of the plaintiff's or victim's race—in other words, it is often difficult to determine motive. (I discuss this point in greater detail later in this chapter.) In civil discrimination cases, a plaintiff is often aided by the fact that the defendant has exhibited a pattern of discriminatory acts against other people. In hate crime cases, it would be rare that a prosecutor would be able to find such a pattern on the part of a defendant.³ Therefore, to delve too deeply into a defendant's motive in a criminal case is to raise a matter that criminal law, with its great need for certainty of guilt, should not consider.

The second argument that the supporters of hate crimes legislation make is that these laws do not punish thought at all, but rather conduct. Although thought and expression are protected by the First Amendment, conduct is not. Florida's Fifth Circuit Court of Appeal, for example, explained that it was not the defendant's opinions that were punished, but rather his act of choosing his victim because of the victim's group. The Oregon Supreme Court agreed (*Oregon v. Plowman*, 1992). In other words, the defendant is free to think all the bigoted thoughts he wishes; it is only when he acts on those thoughts that he will be penalized. From the critics' perspective, however, the fact remains that the actual observable behavior committed by the offender is identical to behaviors that were

not motivated by bias, and yet only the offender with bigoted thoughts will receive an enhanced sentence.

The laws' supporters counter this with a third argument: Hate-motivated crimes, they assert, are not identical to other crimes. They differ in other dimensions, most notably their effects on the victims and the community. This is the same issue discussed at length in Chapter 1. As we have seen, there are strong and credible claims that hate crimes are qualitatively different from other crimes, but those claims are not yet strongly supported by empirical evidence.

The Law's Answer to the Puzzle: Wisconsin v. Mitchell

Perhaps now the source of many people's ambivalence on the constitutionality of hate crime laws is clear. The arguments on both sides seem very persuasive, and clearly there is much room for reasonable people to differ in their views. I believe this problem is a bit like one of those figure-ground perceptual puzzles commonly found in psychology textbooks. Is the drawing a vase or two faces? A rabbit or a duck? There is no right solution to these puzzles: The answer lies in an individual viewer's own perceptions. A hate crimes law can be logically interpreted as either punishing thought or punishing behavior.

Unlike perceptual puzzles, the law gives us (as it must) definitive answers to these dilemmas. In the case of hate crime laws, the answer on this issue was given by the U.S. Supreme Court when it ruled on *Wisconsin v. Mitchell* in 1993. The events of the case unfolded as follows:

One evening in Kenosha, Wisconsin, a group of African American teenagers was discussing a scene from the movie *Mississippi Burning* (Zollo, Colesberry, & Parker, 1988) in which a white man beats a black child. Todd Mitchell, 19, asked his friends, "Do you all feel hyped up to move on some white people?" Shortly afterward, 14-year-old Gregory Riddick, who was white, happened to walk by on the other side of the street. Mitchell said, "You want to fuck somebody up? There goes a white boy; go get him," and he pointed at Riddick. The group ran at Riddick and beat him severely enough to leave him in a coma for 4 days. It was possible that he suffered permanent brain damage. They also stole his tennis shoes.

Mitchell was convicted of aggravated battery, which in Wisconsin brings a maximum sentence of 2 years. However, because the jury found that Mitchell was motivated by Riddick's race, he was subject to the hate crime penalty enhancement statute. He was sentenced to 4 years in prison.

When Mitchell appealed his conviction, the Wisconsin Supreme Court declared the hate crimes law unconstitutional. However, a year later the U.S. Supreme Court heard the case. That Court unanimously held that Wisconsin's law (which was similar to the Anti-Defamation League [ADL] Model Hate Crime Law) met constitutional muster. Essentially, the Court was persuaded by the arguments discussed previously in this chapter: It found that motive is an element of antidiscrimination laws and sentencing considerations, that the law punished conduct rather than thought, and that bias-motivated offenses were worse than other crimes (see In Focus 2.3).

IN FOCUS 2.3**Excerpts From *Wisconsin v. Mitchell***

Justice Rehnquist, writing for a unanimous Court:

In *Barclay* we held that it was permissible for the sentencing court to consider the defendant's racial animus in determining whether he should be sentenced to death, surely the most severe "enhancement" of all. And the fact that the Wisconsin Legislature has decided, as a general matter, that bias-motivated offenses warrant greater maximum penalties across the board does not alter the result here. For the primary responsibility for fixing criminal penalties lies with the legislature.

... Whereas the ordinance struck down in *R. A. V.* was explicitly directed at expression (*i.e.*, "speech" or "messages")... the statute in this case is aimed at conduct unprotected by the First Amendment.

Moreover, the Wisconsin statute singles out for enhancement bias-inspired conduct because this conduct is thought to inflict greater individual and societal harm. For example, according to the State and its *amici*, bias-motivated crimes are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest. ... The State's desire to redress these perceived harms provides an adequate explanation for its penalty-enhancement provision over and above mere disagreement with offenders' beliefs or biases. (pp. 486–487)

As discussed in Chapter 1, the Supreme Court also held in *Virginia v. Black* (2003) that it is permissible to punish a person for burning a cross, even on his own property, if he does so with the intent to intimidate others.

Do Hate Crime Laws Have a "Chilling Effect"?

Aside from the thought crimes issue, the consideration of motive in hate crime cases creates another First Amendment problem. Naturally, jurors cannot read defendants' minds to determine whether their acts were precipitated by bigotry. Therefore, motive must frequently be determined through circumstantial evidence. This evidence most often takes one or more of these forms: First, that there was no other apparent motive; second, that the defendant uttered slurs around the time of the crime; and third, that the defendant was affiliated with a hate group. It is the latter two kinds of evidence that raise First Amendment issues.

As we have already discussed, even distasteful expression such as burning a cross is protected by the Constitution. Under the First Amendment's freedom of association clause, people also have the right to join groups, even hate groups such as the skinheads or the Ku Klux Klan. Of course, speech and group membership are frequently used as evidence in criminal trials. For example, a prosecutor might prove premeditation in a murder case by showing that prior to the killing the offender said to a witness, "I'm going to kill him." The problem with hate crimes, however, is that their motives are proven almost exclusively by the defendants'

speech and groups. Consider, for example, the cases in In Focus 2.4; in all these cases, the hate crime conviction rested almost entirely on the defendants' biased words. Furthermore, research had demonstrated that evidence of defendants' use of racial slurs or possession of white supremacist literature increases the likelihood that they will be convicted (Levin, Rabrenovic, & Ferraro, 2007; Saucier, Hockett, & Wallenberg, 2008).

IN FOCUS 2.4**Sampling of Hate Crime Cases***Ohio v. Wyant, 1992*

The defendant, who was white, and the victim, who was black, had rented adjoining campsites. The victim complained to park officials about the volume of Wyant's radio, and the officials made Wyant turn it down. Later, the victim heard Wyant say to a companion, "We didn't have this problem until those niggers moved in next to us. . . . I ought to shoot that black motherfucker. . . . I ought to kick his ass."

Oregon v. Plowman, 1992

The defendant, along with three companions, approached two men outside a convenience store. One of Plowman's friends asked one of the men if he had any cocaine. When the man said no and started to walk away, Plowman and his friends began beating the other men. During the attack, they shouted such things as, "Talk in English, motherfucker," "White power," and "They're just fucking Mexicans."

California v. Joshua H., 1993

Kiley, the victim, had been involved in an extended feud with his neighbors, the H. family. The H. family had sued Kiley after his tenant's dog bit Mrs. H., and the H. family was upset because when Kiley mowed his lawn, grass clippings blew onto their driveway. Kiley felt that the family was harassing him because he was gay. One afternoon (with video camera rolling), Kiley mowed his lawn. A member of the H. family later left a pile of dirt and grass on his front porch, which Kiley threw onto their driveway. That evening, 17-year-old Joshua H. accosted Kiley, demanding he clean up the grass. He then began punching and kicking Kiley. During the attack, Joshua and his family shouted out such things as, "Come on, let's get it on, you faggot queer," and "Where are you going, faggot, you going to suck some faggot dick?"

Illinois v. Nitz, 1996

The Nitz family, which was white, lived across the street from the Gaines family, which was black. The families were involved in frequent altercations with each other. Among other things, the children of the two families got into shouting matches with each other, Mr. Nitz accused Mrs. Gaines of calling the police to get his car towed, and Mr. Nitz and his son used racial slurs when talking to and referring to the Gaines family. In a 1-year span, the police

responded to 65 incidents involving the two households. Mr. Nitz was charged with several crimes, including disorderly conduct and contributing to the delinquency of a minor.

Nebraska v. Mayfield, 2016

Late one night in March 2015, Cameron Mayfield walked to his neighbor's house, stole their rainbow Pride flag, and took it back to his house, where he poured gasoline on it. Then he carried it back to the neighbors' house and set the flag on fire. At trial, he claimed it was just a drunken prank, that he wasn't aware it was a Pride flag, and that he didn't know his neighbors were a lesbian couple. The judge didn't believe Mayfield's story, however. He was convicted of a felony hate crime, for which he received 2 years' probation.

Critics argue that to rest a hate crime conviction nearly exclusively on proof of constitutionally protected activities comes perilously close to punishing those activities themselves. Furthermore, some claim that hate crime laws will have a chilling effect, in that people will be afraid to utter (constitutionally protected) unpopular words or join (constitutionally protected) unpopular groups for fear they may later be subjected to hate crime prosecution. One commentator, for example, wrote, "When ordinary speech can be used to show racial or ethnic prejudice allegedly betraying an impermissible motive, as it can under [the hate crime] statute, there will be a chilling effect on first amendment rights" (Mazur-Hart, 1982, p. 212). The Wisconsin Supreme Court, too, found that "opprobrious though the speech may be, an individual must be allowed to utter it without fear of punishment by the state" (*Wisconsin v. Mitchell*, 1992, p. 816). Finally, these critics point out that heavy reliance on such things as racial slurs and group membership to determine motive is poor policy; many people may utter slurs during the heat of an argument, regardless of their actual motivation, and even avowed racists are not always motivated by racism.

Others, including the U.S. Supreme Court, have not been convinced by these arguments. Evidence of a defendant's prior speech is common in criminal trials of all kinds, and there is a significant difference between making speech an element of a crime and using speech to prove a crime. Furthermore, in *Wisconsin v. Mitchell*, the Supreme Court found it "unlikely" and "speculative" that hate crime laws would have any chilling effect on protected speech and association with certain groups.

Other Constitutional Issues

Although the First Amendment arguments against hate crime laws are probably the strongest, additional claims have been made as well, with varying degrees of success. These have primarily been based on two provisions within the Fourteenth Amendment: the equal protection clause and the due process clause.

Fourteenth Amendment: Equal Protection Clause

The equal protection clause was intended to protect people from discrimination by the government. Of course, in reality, the government discriminates all the time. For example, only citizens over the age of 18 may vote, and only men are required to register for the draft. In practice, unless a law discriminates on the basis of certain “suspect categories,” such as race or religion, the Supreme Court has interpreted the clause to allow differentiation, as long as the law is supported by a legitimate state interest. This is called the “rational relationship” test.

In a few cases, defendants have claimed that hate crime laws violate the equal protection clause because they give greater protection to some victims (those chosen on the basis of their group) than to others. Only one defendant has prevailed on this claim (in *Oregon v. Beebe*, 1984), and even then only in the trial court; the appellate court later overturned the trial court’s decision, finding that the law was based on a legitimate interest in preventing bias-based crime because that type of crime might have greater impact on the community (Gerstenfeld, 1992). For the purposes of this court’s analysis, it was not necessary to prove that hate crimes actually are more harmful, but rather that they reasonably might be.

Fourteenth Amendment: Due Process Clause

The Fourteenth Amendment’s due process clause is, from a legal standpoint, quite complicated. In a nutshell, it is meant to ensure that laws are fair, both in substance and in implementation. Two types of claims have been made about hate crime laws under the due process clause. The first of these is that the laws are so vague as to lead an ordinary person to be uncertain of their meaning (Gellman, 1991; Gerstenfeld, 1992). Sometimes the claims concern the terminology that is used within the laws, such as “color,” “intentionally selects,” and “harass”; at other times, the issue centers on the interpretation of the law as a whole: Must the defendant be entirely motivated by the victim’s group, or are mixed motives included? What if the defendant believes that the victim belongs to a particular group but is, in fact, mistaken?⁴ What if the offender commits a crime not because of the victim’s group, but rather because of whom the victim has been associating with?

Like the equal protection challenges, the vagueness challenges have, by and large, not been successful. For the most part, the terms and interpretations seem open to reasonable understanding. One exception to this, perhaps, is Florida’s law, which enhances a penalty when, during the commission of a crime, the offender “evidences prejudice.” Despite at least one jury’s confusion about what this phrase meant (*Richards v. Florida*, 1992) and the judge’s refusal to further explain or define it, the Florida Supreme Court found that the law was not impermissibly vague (*Florida v. Stalder*, 1994). It did so by interpreting the law narrowly to include only those types of offenses in which the perpetrator was actually motivated by the victim’s group, as opposed to those committed for some other reason, and in which the perpetrator utters slurs or otherwise shows bias.

Another state that defines hate crimes in what is, arguably, a vague fashion is Utah. Under that state's law, "any person who commits any primary offense with the intent to intimidate or terrorize another person" is subject to increased penalties (Utah Code 76-3-203.3). Both commentators and prosecutors have argued that the law's lack of specificity has made its enforcement difficult (McEntee, 2011).

One other rare case of a court declaring a hate crimes law unconstitutionally vague occurred in Georgia. Georgia's law prohibited crimes committed because of "any prejudice or bias." In *Botts v. Georgia* (2004), the Georgia Supreme Court unanimously held that this language was overbroad and could lead to people being punished for nearly any bias, no matter how "obscure" or "whimsical." As of 2016, Georgia had not replaced the law with a new one with more specific language.

The second type of due process claim—that facts that result in sentence enhancements must be proven to a jury beyond a reasonable doubt—arose in a case from New Jersey (*Apprendi v. New Jersey*, 2000). Charles Apprendi fired his rifle at the home of a black family who had recently moved into an all-white neighborhood. Apprendi pleaded guilty to several counts of unlawful possession of weapons. Under New Jersey's law, the judge rather than the jury was to determine whether he was motivated by bias, and the standard of proof was the more lenient preponderance of the evidence rather than reasonable doubt. The only evidence of bias was a statement Apprendi made to a police officer, and later retracted, that he had fired the shots because he did not want the family to live there. The judge found that it had been a hate crime, and Apprendi was sentenced to 12 years in prison. Without the hate crime enhancement, he would have received 10 years.

After the New Jersey courts rejected his appeal, Apprendi's case went to the U.S. Supreme Court. In a 5–4 decision, the Court held that New Jersey's law was unconstitutional. Due process, the Court held, requires that any fact, other than a prior conviction, that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.

The *Apprendi* decision is interesting from several standpoints. You will remember that one rationale the Court used in *Mitchell* to uphold hate crime laws was that motive is traditionally considered by sentencers when determining a punishment. In *Apprendi*, however, the Court significantly reduced this power of sentencers. From a practical standpoint, the *Apprendi* decision is apt to have little effect on most hate crimes, because in most states it was already the jury's job rather than the judge's to determine motive. However, the decision is likely to have significant impact on most states' sentencing procedures in general (Huigens, 2002; Smith, 2001).

Clearly, there are many constitutional issues concerning hate crime laws. For a summary of relevant Supreme Court decisions, see Table 2.1. The arguments are, at times, complex. Reasonable minds can, and do, differ concerning these matters. But constitutional issues are by no means the only potential problems with the laws. In the next sections, we discuss several policy problems, many of which are at least as difficult to resolve as the constitutional ones.

Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act

As discussed in Chapter 1, the federal hate crime law is new enough that legal challenges are only in the beginning stages. It is likely that the law will face scrutiny on several grounds. For example, it could be argued that the law exceeds Congress's authority under the interstate commerce clause. As previously mentioned, the defense attorney for Frankie Maybee contended that the law also goes beyond the bounds permitted by the Thirteenth Amendment.

In 2012, 16 members of an Amish group in Ohio were charged under the federal hate crime law for attacking members of an opposing Amish sect, forcibly cutting their beards and hair. They claimed that the law should not apply to attacks committed against members of their own religion, and also that the charges violated their First Amendment rights to freedom of religion. However, the federal district judge rejected these arguments ("Judge Rejects Ohio," 2012). The Sixth Circuit Court of Appeals later overturned the convictions, but because the judge gave erroneous jury instructions and not because of problems with the law itself (*United States v. Miller*, 2014).

A new challenge of the federal law appeared in 2016 in the case of Dylann Roof, a young white man who killed nine black people in a South Carolina church in 2015. South Carolina does not have a hate crime law, but the U.S. Justice Department charged Roof with multiple violations of the federal law. But before the case went to court, defense attorneys claimed that the charges exceeded the federal government's powers under the Commerce Clause and interfered with the state's ability to prosecute him (Lewontin, 2016). As I write this, the trial court has not yet ruled on these claims.

Table 2.1 U.S. Supreme Court Cases on Hate Crimes

<i>Barclay v. Florida</i> (1983)	Defendant's racial animosity toward the victim may be considered when determining whether to sentence the defendant to death.
<i>R. A. V. v. City of St. Paul</i> (1992)	Hate speech laws violate the First Amendment.
<i>Dawson v. Delaware</i> (1992)	Defendant's racist beliefs cannot be considered at sentencing if they were unrelated to the crime.
<i>Wisconsin v. Mitchell</i> (1993)	Hate crime laws are constitutional.
<i>Apprendi v. New Jersey</i> (2000)	Motive must be determined by jury rather than judge, and standard of proof is beyond a reasonable doubt.
<i>Virginia v. Black</i> (2003)	States may punish people who burn crosses with the intent to intimidate others.

Which Groups Should Be Protected?

As discussed in Chapter 1, hate crime laws come into effect when a person commits a crime and when that crime is motivated by the victim's group. Each state lists the types of groups that are protected under these laws and, of course, not all kinds of groups are included. For example, suppose I decide to rob a person because I believe she is wealthy or because her job (e.g., she is a convenience store clerk) makes her vulnerable. This robbery would generally not be considered a hate crime because neither socioeconomic status nor type of employment is usually a protected category. And, most likely, these types of crimes would not fall into most people's subjective definitions of "hate" crimes. So what kinds of groups should be included within this legislation? This issue has turned out to be a contentious one.

All states with hate crime laws include at least crimes based on race, ethnicity (or national origin), and religion (Gerstenfeld, 1992). Some states include only those categories. Others, on the other hand, include many additional groups (Grattet, Jenness, & Curry, 1998). Iowa and New York, for example, list 10 protected categories (see Table 2.2).

The decision about which groups to include is important and often contentious. Recall that Chapter 1 concluded that one of the primary values of hate crime laws is symbolic: They send a message that certain types of behavior are intolerable. What message does it send, then, when a particular group is excluded from the list?

Table 2.2 Groups Protected by Hate Crime Laws in Selected States

State	Groups Protected
California	Race, ethnicity, religion, nationality, disability, gender, or sexual orientation
Idaho	Race, color, religion, ancestry, or national origin
Iowa	Race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age, or disability
Louisiana	Race, age, gender, religion, color, creed, disability, sexual orientation, national origin, or ancestry
Missouri	Race, color, religion, national origin, sex, sexual orientation, or disability
New York	Race, color, national origin, ancestry, gender, religion, religious practice, age, disability, or sexual orientation
North Dakota	Sex, race, color, religion, or national origin
Ohio	Race, color, religion, or national origin
Oregon	Race, color, religion, sexual orientation, disability, or national origin

Sexual Orientation

When it comes to deciding which groups should be protected by hate crime laws, probably the issue that has been the subject of the most debate is whether to include sexual orientation. Currently, 31 states have laws that include sexual orientation. Several states (e.g., Florida and Missouri) did not originally include this category but later added it to their statutes. Efforts to add sexual orientation have failed in other states. For instance, an attempt in 2015 to add sexual orientation and gender identity to Virginia's law failed in committee. A similar effort in Utah in 2016 was struck down by a state senate vote in 2016.

Inclusion of sexual orientation as a protected group has also been hotly debated in Congress. When the Hate Crime Statistics Act was being considered in 1989, a group of senators led by Jesse Helms vehemently opposed the inclusion of sexual orientation (Jacobs & Potter, 1998; Peek, 2001). Remember, this law did nothing but require the Department of Justice to collect data from local law enforcement agencies; it did not actually create a federal crime. But some members of Congress did not want hate crimes against gays and lesbians to even be monitored. Not surprisingly, then, one of the contributing factors to the repeated failure of passage of the federal Hate Crime Prevention Act (eventually known as the Matthew Shepard Act) was this issue. In 1999, as mentioned in Chapter 1, two competing hate crime laws were introduced in Congress, one sponsored by Edward Kennedy and one by Orrin Hatch. The Kennedy bill explicitly included crimes based on sexual orientation, whereas the Hatch bill did not (Peek, 2001). Although both House and Senate versions of the Act in 2009 included protection on the basis of sexual orientation, the additional inclusion of a death penalty provision in the Senate version was acknowledged by many to be just another attempt to avoid the enactment of the legislation (see, e.g., National Gay and Lesbian Task Force, 2009b). The version of the Act that was eventually signed into law did include sexual orientation and did not include the death penalty provision.

In addition, while research indicates that most people in the United States support the existence of hate crime laws in general, people are less likely to favor inclusion of sexual orientation as a protected category and are less likely to conclude that an act was a hate crime when it was motivated by the victim's sexual orientation (Johnson & Byers, 2003; Steen & Cohen, 2004).

Why is there such controversy over this issue? It is not because offenders are rarely motivated by sexual orientation; in fact, as Chapter 5 discusses, gays and lesbians are among the most frequent victims of hate crimes. Nor is it due to lack of advocacy on behalf of gays and lesbians. Gay and lesbian organizations were among the earliest and strongest supporters of hate crimes legislation (Jenness & Broad, 1997). Instead, the problem has to do with the symbolic nature of hate crime laws. Those who oppose homosexuality are afraid that including sexual orientation within the hate crime laws will send a message that the government approves of homosexuality and that doing so will even open the door to inclusion of gays and lesbians within federal civil rights acts and other laws. "Today hate crimes, tomorrow same-sex marriage" seems to have been the fear of some. Now that certain civil

rights protections have, in fact, been extended to gays and lesbians, the future of these arguments is unclear.

Some members of Congress have been quite unambiguous in voicing these fears. During the debate on the Hate Crime Statistics Act, Senator Helms wrote an amendment that would have “condemned homosexuality, rejected it as a lifestyle, condemned government support for extending civil rights to homosexuals, and called for strict enforcement of state sodomy laws” (Jacobs & Potter, 1998, p. 71). In response, and as a compromise, several other senators authored a second section of the bill that emphasized the importance of family life, and stated that the Act should not be construed so as to promote or encourage homosexuality. The bill eventually passed both the Senate and House with the compromise amendment included.

Aside from the moral issues surrounding homosexuality, another reason that has been given for excluding this category from hate crimes legislation is that sexual orientation is a choice. Only immutable characteristics such as race and ethnicity, this argument goes, should be protected. There are serious flaws in this line of reasoning. As Lawrence (1999) points out, there exists considerable credible scientific evidence that sexual orientation is not, in fact, a choice, but rather a function of genes and environment (pp. 18–19). Second, if sexual orientation is a choice, then so is religion. Yet nobody seriously contends that religion should not be protected by hate crime laws. Some laws include other categories as well that are certainly at least as mutable as sexual orientation: political affiliation, labor organization activity, and economic status. The general weakness of this argument suggests that it is merely a (rather transparent) front for the morals-based claim against homosexuality.

Regardless of the strength of these arguments, however, the fact remains that they have frequently been successful. As a result, in many jurisdictions, gay bashing is not a hate crime. The repercussions of this could be serious. As Lawrence (1999) asserts, “Failure to include sexual orientation implies that gays and lesbians are not as deserving of protection as racial, religious, or ethnic minorities, and that sexual orientation is not as serious a social fissure line as race, religion, and ethnicity” (p. 20). Even worse, it is possible that the calculated exclusion of this category puts an implicit governmental seal of approval on violence against gays and lesbians (see, e.g., Herek & Berrill, 1992b; Perry, 2001, pp. 179–223).

Gender

The second category that has inspired much debate is gender. The arguments here are quite different, however. Although it is debatable whether sexual orientation is a choice, people clearly do not select their own gender (unless one counts transgender people and, even then, gender identity is, according to research, not determined by the individual). Furthermore, although conservative politicians feel comfortable in stating their opposition to homosexuality and governmental support of homosexuality, very few would openly speak against women, who are the

most common victims of gender-based hate crimes. Nevertheless, the inclusion of gender has been controversial and is not strongly supported by public opinion (Jenness, 2003; Saucier, Brown, & Mitchell, 2006).

The ADL changed its model hate crimes law in 1996 to include crimes based on gender. Some states followed suit, but by 2016, only 31 states included gender or sex in their laws (ADL, 2011a). Gender-based hate crimes were not originally included within the federal Hate Crime Statistics Act, but the Act was later amended to include them. The federal hate crime law includes gender-motivated crimes.

Several commentators have argued that gender-based crimes fall into the same pattern as crimes based on race and religion (see, e.g., Chen, 1997; Goldscheid & Kaufman, 2001; Lawrence, 1999; McPhail, 2002; Pendo, 1993; Weisburd & Levin, 1994) and so ought to be included within hate crimes legislation. Weisburd and Levin (1994), for example, point out that gender, like race and religion, is included in antidiscrimination laws and that gender-based crimes such as spousal abuse and rape may, like race-based crimes, be intended to maintain a particular group's subordinate status. Perry (2001) argues,

[b]y leaving gender out of the hate crime equation, legislators are recreating the myth that gendered violence is an individual and privatized form of violence, unequal to the public and political harm suffered by racial or religious minorities, for example. (p. 210)

On the other hand, several arguments have been made against including gender, as is clear from the fact that many statutes exclude this category. One claim is that it is unnecessary to include gender-based crimes because these offenses are already punished by laws against rape and domestic violence. One flaw in this argument is that for *all* hate crime cases, the underlying offense is already punishable by other laws. It is true that a relatively small percentage of, say, assaults or vandalisms are motivated by the victim's group. The question is whether all rapes and cases of domestic violence are motivated by the victim's gender. This is a difficult question. In most rape cases, the man likely would not have attacked the victim had she not been female, but does this mean he attacked her *because* she is female? Similarly, a heterosexual man would likely not even be in an intimate relationship with a person unless she was female. But does that mean he strikes his wife *because* she is female? Certainly, these are questions for philosophers and psychologists to ponder!

A second flaw in this argument is that not all gender-based crimes are rapes or domestic abuse. In 1989, Marc Lepine murdered 14 women in an engineering class at the University of Montreal, all the while shouting, "I hate feminists!" (Chen, 1997, p. 277). Obviously, Lepine's crime was neither rape nor domestic abuse. Similarly, in 2006, Charles Carl Roberts entered an Amish schoolhouse in rural Pennsylvania and, after allowing the male students to leave, shot the girls, killing five and wounding an additional five (Jones & Partlow, 2006). In 2009, after posting a blog in which he complained that women didn't like him, George Sodini opened fire on women at a fitness club in Bridgeville, Pennsylvania. He killed

three of them and injured nine more before committing suicide (Associated Press, 2009). More recently, in 2014, Elliot Rodger killed six people at University of California Santa Barbara and injured 14 others before killing himself. Before the murders, he uploaded a YouTube video and mailed family and friends a manifesto in which he said he wanted to punish women for rejecting him (Nagourney, Cieply, Feuer, & Lovett, 2014). In fact, it is difficult to see how these incidents were substantially different from that of Buford Furrow, who in 1999 shot five people at a Jewish community center near Los Angeles and then murdered a Filipino American postal carrier.⁵

A second argument that is made against including gender is the “floodgates” argument: Because of the frequency of rapes and domestic assaults (the FBI reported more than 84,000 rapes in 2014, compared with about 6,400 hate crimes; Department of Justice, 2016a), the criminal justice system will be overwhelmed with these types of hate crimes. Hate crime recording and tracking will suffer, as will prosecutions of other types of hate crimes. The ADL (2001), however, concluded that in those jurisdictions where gender is included, the reporting system has not been overwhelmed, nor have prosecutors been distracted from prosecuting other kinds of hate crimes, because prosecutors have used their discretion in determining the types of gender-related crimes for which hate crime charges are appropriate. Many years later, and with more states having added gender to their hate crime laws, the pattern remains the same: Very few hate crime cases of any kind are prosecuted, and gender-based crimes have not overwhelmed the system. One study suggests why this might be the case. Scrivens (2011) studied nine police officers in Canada and found that the officers rarely viewed gender-motivated violence as a hate crime.

Interestingly, some feminists have also argued against including gender in hate crime laws. Instead of fearing that rapes and domestic violence will engulf other types of hate crimes and diminish their attention, they are worried about just the opposite: that rape and domestic violence will be subsumed under the larger rubric of bias crime, and thus will be largely forgotten. Again, however, there is no evidence that this has been the case.

Some critics have claimed that gender-based crimes should not be included as hate crimes because those who commit such offenses do not really “hate” women, at least in the same sense that white supremacists hate blacks and Jews. However, some gender-based offenders clearly *do* hate women in exactly that sense. Elliot Rodger, Marc Lepine, and George Sodini are good examples of this. Moreover, despite the name “hate crime,” most hate crimes do not technically require hate: They require only that the offender choose the victim because of the victim’s group, not that the offender actually *hate* the victim. For instance, several states include disability or handicap in their law, and some include age. If a person specifically chose to rob disabled or elderly people because they were disabled or elderly, and thus seemed to be easy targets, those acts would still be covered by hate crimes legislation, regardless of whether the person had any actual animosity toward his or her victims.⁶

Finally, opponents of gender-based hate crime laws maintain that gender-based crimes are unlike other kinds of bias crimes because the gender-based victim is individualized. She is not the victim of happenstance, interchangeable with all others of her sex. Frequently, she and the offender know each other well. This is all undoubtedly true for many victims of domestic violence and some victims of rape. It was not true, however, for the 14 women whom Marc Lepine killed. Nor for the 14 women killed by George Henard in 1991, when he drove his pickup through the window of Luby's Cafeteria in Killeen, Texas, and then opened fire with a semiautomatic rifle (Levin & McDevitt, 1993, p. 93).⁷ Nor for the two dozen or more women Ted Bundy raped and murdered, nor for George Sodini's and Charles Carl Roberts's victims, nor most of Elliot Rodger's victims.

Moreover, undoubtedly some victims of "traditional" hate crimes also knew the offender or were not selected at random. For example, as Weisburd and Levin (1994, p. 37) point out, Emmett Till was not randomly chosen to be lynched; he was intentionally selected because he had transgressed social norms (he was African American and had whistled at a white woman). Jacobs and Potter (1998) cite the murders of Martin Luther King, Medgar Evers, and Meyer Kahane as further examples of hate crimes in which the victim was particularly selected (p. 73).⁸ In fact, some recent research suggests that a substantial percentage of people who commit hate crimes on the basis of race, religion, or sexual orientation did know their victims beforehand (Mason, 2005).

Mason-Bish (2012) interviewed policymakers, lobbyists, and officials in England and Scotland and found that those who opposed including gender in British hate crime laws used essentially the same arguments as opponents in the United States.

Levin and McDevitt (1993) have proposed a compromise on the issue of gender-based crimes. They suggest that such crimes be considered hate crimes when, and only when, the victim is "interchangeable"—that is, whenever the perpetrator was looking to harm any woman, not a particular woman, and the victim was simply a stranger picked at random. No state has explicitly adopted this idea. However, it may very well be that this is essentially the route that many prosecutors do take in practice when deciding which charges to bring against a defendant. It would be interesting if empirical research were to be conducted on this subject. McPhail and DiNitto (2005) found that prosecutors knew little about gender-based hate crimes and were very unlikely to prosecute gender-based crimes as hate crimes.

Long before Congress passed a federal hate crimes law, it passed a law that aimed specifically at gender-based violence, the Violence Against Women Act (VAWA). As discussed in Chapter 1, the Supreme Court held that this Act exceeded Congress's authority. Conversely, although most states have some sort of general hate crimes law, few, if any, have the equivalent of the VAWA (although, of course, all have statutes concerning rape and domestic violence). Some urged Congress to include gender in a federal hate crimes law (see, e.g., Corsi, 2009), and in fact, the Matthew Shepard Act does include gender. Table 2.3 summarizes state hate crimes legislation on sexual orientation and gender.

Table 2.3 Does Your State Protect Sexual Orientation and Gender?

<i>State</i>	<i>Sexual Orientation</i>	<i>Gender</i>
Alabama	N	N
Alaska	N	Y
Arizona	Y	Y
Arkansas	N	N
California	Y	Y
Colorado	Y	N
Connecticut	Y	Y
Delaware	Y	N
District of Columbia	Y	Y
Florida	Y	N
Georgia	N	N
Hawaii	Y	Y
Idaho	N	N
Illinois	Y	Y
Indiana	N	N
Iowa	Y	Y
Kansas	Y	N
Kentucky	Y	N
Louisiana	Y	Y
Maine	Y	Y
Maryland	Y	Y
Massachusetts	Y	N
Michigan	N	Y
Minnesota	Y	Y
Mississippi	N	Y
Missouri	Y	Y
Montana	N	N

(Continued)

Table 2.3 (Continued)

<i>State</i>	<i>Sexual Orientation</i>	<i>Gender</i>
Nebraska	Y	Y
Nevada	Y	Y
New Hampshire	Y	Y
New Jersey	Y	Y
New Mexico	Y	Y
New York	Y	Y
North Carolina	N	Y
North Dakota	N	Y
Ohio	N	N
Oklahoma	N	N
Oregon	Y	Y
Pennsylvania	N	N
Rhode Island	Y	Y
South Carolina	N	N
South Dakota	N	N
Tennessee	Y	Y
Texas	Y	Y
Utah	N	N
Vermont	Y	Y
Virginia	N	N
Washington	Y	Y
West Virginia	N	Y
Wisconsin	Y	N
Wyoming	N	N

Transgender Identity

Much of the focus on gender-based hate crimes has been on crimes against women. However, violence against transgender people is also a significant problem. In recent years, there have been high-profile cases in which transgender individuals

have been murdered. For example, Gwen Araujo, 17, was killed by four young men in Newark, California, in 2002. Brandon Teena was raped and murdered in Falls City, Nebraska, in 1993 (this crime was later portrayed in the film *Boys Don't Cry* [Pierce, 1999]). Tyli'a Mack, 21, was stabbed to death on the street outside a Washington, DC, transgender community organization in 2009. Other, nonlethal, cases have attracted some media attention. In April 2011, a transgender woman in Baltimore was severely beaten in a McDonald's by two teenagers while restaurant employees and most patrons failed to intervene. One employee even recorded the attack on his cell phone and later put the video online (Rosen, 2011).

Although there is ample anecdotal evidence that hate crimes against transgender people are frequent, there is little empirical research on the subject. One Australian study, however, indicated high rates of violence against this group (Moran & Sharpe, 2004). Stotzer (2009) looked at U.S. data from a number of sources and concluded that transgender people have increased risk of many kinds of violence, especially sexual violence. A focus group study conducted among 11 Canadian trans women revealed that they had experienced repeated violence and harassment and that victimization had brought them fear and isolation, as well as a perceived need to shield their identities (Perry & Dyck, 2013).

In 2011, very large survey was conducted among 7,500 transgender people in the United States. The results were disheartening. About two-thirds of respondents reported significant discrimination, often in multiple contexts. Many respondents reported that they had been harassed by police (22%) or felt uncomfortable seeking police assistance (46%). Compared to national averages, the respondents were more likely to live in poverty, to have dropped out of school, to be homeless, to engage in behaviors that put their health at risk, and to have attempted suicide. Experiences were especially bad for transgender people of color. Although the survey did not explicitly ask about hate crime victimization, it is clear that transgender people suffer high level of systemic bias (Grant et al., 2011).

Another indication of the degree of systemic bias against transgender people are the "bathroom bills" proposed in several states in 2015 and 2016. Under these laws, people who use public bathrooms (and, often, changing rooms) that do not conform with the gender on their birth certificates could be convicted of crimes. In other words, transgender people who use bathrooms assigned to the gender with which they identify could go to jail. These laws were ostensibly proposed to protect women and children from sexual predators, but those explanations ring false in light of the fact that there have been no documented bathroom attacks committed by transgender people (but many documented attacks *against* transgender people). Nonetheless, North Carolina signed its bathroom bill into law in 2016. As of this writing, bills in six other states remain pending, have died, or were vetoed by the governor. At the same time, the media have reported a rash of incidents of harassment against transgender and non-gender-conforming people who were attempting to use public bathrooms (Allen, 2016).

In some cases involving transgender people, the victims have been sex workers or homeless, which both also put them at greater risk of violence, and it may be difficult to determine whether the attacks were actually hate crimes.

The first hate crime conviction in the United States for the murder of a transgender victim occurred in April 2009, when Allen Andrade was convicted in Colorado for beating 18-year-old Angie Zapata to death with a fire extinguisher (“Transgender Murder,” 2009). Seventeen states currently include gender identity or transgender status as a protected category, as does the federal hate crimes law. In 2014, 109 hate crimes against transgender or non-gender-conforming people were reported to the FBI (Department of Justice, 2015b); research suggests, however, that the actual numbers of hate crimes were much higher than that.

Homelessness

In recent years, some have advocated for including another protected category to hate crime laws: homelessness. An example of these kinds of crimes occurred in San Diego in 2016, where a man attacked at least four sleeping homeless people in separate incidents, beating them and setting them on fire. Two of the victims died and two received life-threatening injuries (Figueroa, Hernandez, Winkley, & Garrick, 2016).

Empirical research on the extent of violence against the homeless is scant, but advocacy groups contend that it is a serious problem. According to the National Coalition for the Homeless (2014), for example, there were 109 documented attacks against the homeless in 2013, and 18 of these resulted in the victims’ deaths. Another source states that there were 880 reported attacks on homeless people between 2000 and 2010, and 244 of these victims died (O’Keefe, 2010). A reenactment of one of these attacks is shown in Photo 2.1. Advocates claim that attacks on the homeless share many characteristics with those based on traditional hate crime categories such as race and sexual orientation (Al-Hakim, 2015; Wachholz, 2005).

Homelessness has been added as a category to hate crimes legislation in Florida, Maine, Maryland, and the District of Columbia. It has also been considered in Alaska, California, Ohio, Rhode Island, South Carolina, and Texas, but it is not included in the federal law. At least one commentator (O’Keefe, 2010) has argued that instead of protecting the homeless under hate crime laws, judges should use sentencing guidelines that permit enhanced sentencing when victims are vulnerable.

Police and Emergency Personnel

In 2016, Louisiana became the first state to encompass public safety personnel within its hate crime. Police, fire fighters, and other emergency services employees are included in the legislation, which is popularly called “Blue Lives Matter.” The name is a twist on “Black Lives Matter;” the movement begun in protest against police shootings of black men and is indicative of the larger conflict and discussion on violence by and against police.

At a Black Lives Matter protest in Dallas, Texas in July 2016, a sniper who apparently was deliberately targeting white policemen killed five officers and injured nine other people. This was the deadliest event for U.S. police officers since the terrorist attacks on September 11, 2001. Perhaps predictably, several additional jurisdictions

immediately proposed Blue Lives Matter legislation. As I write this, it is unclear which places will follow Louisiana's lead.

Proponents argue that emergency personnel risk their lives and are often targeted for violence and therefore deserve extra protection. But critics point out that a majority of states already provide enhanced penalties for assaulting or killing police officers. Moreover, some argue that it's unwise to include professions within hate crime laws, which should instead focus on immutable characteristics such as race or sexual orientation and should focus on marginalized groups. Some people fear that Blue Lives Matter laws will be used to silence those who wish to dissent against police actions and will distract attention from the true problems associated with biased police.

Factors That Affect States' Decisions About Which Groups to Protect

Why is there so much differentiation between states about which groups are protected by hate crime laws? Several researchers have studied the factors that influence whether and when a state creates hate crimes legislation. These factors include economic, political, and sociodemographic conditions within the state, as well as the activities of neighboring states (Grattet et al., 1998; Soule & Earle, 2001). For example, states that are wealthier, that have Democratic majorities in the legislature, or that have had much media attention relating to hate crimes are faster to pass hate crime laws (Jenness & Grattet, 1996; Soule & Earle, 2001).



Photo 2.1

SOURCE: iStockphoto.

Grattet and colleagues (1998) also found that these factors influence the content of hate crime laws. So does timing: States that waited longer to enact hate crimes legislation tend to protect more categories. This is probably because the earliest laws that were passed protected relatively few groups, whereas later laws successively added more categories. Therefore, states that entered relatively late in the game had more complex laws on which to model their own.

There are clearly important regional characteristics of hate crime laws. States along the West Coast and in the Northeast are much more likely to protect sexual orientation than are states in the Southeast, Midwest, and Mountain regions. This may be attributable, in part, to the relatively liberal politics prevalent in the West and Northeast. Soule and Earle (2001) found that, in general, states that had repealed their sodomy laws were more likely to adopt hate crime laws and did so earlier than other states.

A series of recent studies suggests that people's own power status as well as the status of presumed victims may affect support for hate crime legislation. Mallett, Huntsinger, and Swim (2011) conducted four studies in which participants were asked for their reactions to various hate crime scenarios and policies. The researchers found that people who were members of relatively powerful groups and who therefore might be motivated to maintain current social systems supported hate crime punishments less when those punishments threatened current power statuses.

Activist groups and social movements also play a part in determining who is protected by hate crime laws (Grattet & Jenness, 2001a; Jenness & Broad, 1997; Jenness & Grattet, 1996).⁹ There is value in being recognized as a victimized group, just as there might be risk in being excluded (e.g., exclusion may send a message that a particular group is not worth protecting). Jacobs and Potter (1998) argue that the process of deciding who will be protected, which they call "identity politics," is divisive and counterproductive:

By redefining crime as a facet of intergroup conflict, hate crime laws encourage citizens to think of themselves as members of identity groups and encourage identity groups to think of themselves as victimized and besieged, thereby hardening each group's sense of resentment. That in turn contributes to the balkanization of American society, not its unification. (p. 131)

Chakraborti and Garland (2012) agree with this point, arguing that, "approaching the issue of inclusion through the lens of group identity politics merely exacerbates existing problems, creating divisions among communities of identity rather than highlighting the shared nature of their victimization" (p. 3). They also argue that focusing on group identity when defining hate crimes ignores the needs of less traditionally defined victims, such as a young woman in England who was murdered in 2007 due to her goth appearance (Garland, 2010). Chakraborti and Garland (2012) contend that, instead, hate crime protection should depend on whether victims are chosen because they are marginalized, vulnerable, or "different." From a legislative standpoint, however, it is unclear how laws could be written to achieve these goals without becoming unconstitutionally broad or vague.

NARRATIVE PORTRAIT

The interactions between the police and the LGBTQ community in Seattle have made some fascinating and historically significant changes over the past 70 years. What had originally started off as an adversarial, oppressive and frequently confrontational coexistence has morphed into one of the nation's most progressive relationships between the two entities.

To understand the significance of these changes, one must first turn back the pages of history. Following the end of World War II in 1945, Seattle police came under intense scrutiny due to its lack of organizational effectiveness over the preceding 20 years. Military veterans were being hired into the ranks of the police force at levels seldom seen in the past, and the accompanying regimentation, bravado, power, and loyalty would soon reflect those images in the future policemen and commanders of Seattle's police force.

By the early 1960s the subculture within the Seattle PD remained virtually unchanged and void of accountability. Some officers would engage in questionable behavior including the "shaking down" of businesses and criminals in exchange for looking the other way. The payoff system was well known to the business and criminal community and basically an accepted practice because all those involved benefited to some degree. The exception was those businessmen who did not benefit by this system, including the owners of Seattle's gay bars, which operated in a clandestine manner due to society's post-Victorian moral codes. Some of Seattle's officers would not limit themselves to collecting their illicit money at the standard monthly rate from the owners of these establishments, but would charge additional fees under the threat of blackmail. Subtle threats of maintaining a constant police presence at these gay bars, "outing" customers, or potentially denying liquor licenses was routine. These actions, in conjunction with increased enforcement of homosexual activity in the city's parks made for a strained relationship between the police and Seattle's gay community. These actions in combination with other events nationwide triggered an explosive reaction in the mid-1960s when one of the city's gay bar owners exposed to the press the inner workings of Seattle's police payoff system. The resulting fallout was years of grand jury investigations, convictions, firings, and a complete overhaul of the SPD.

By the early 1970s, the city of Seattle became increasingly supportive of LGBTQ rights, eventually passing one of the nation's first domestic partnership laws. Historically, police agencies across the nation engaged in the practice seeking out personal (and disqualifying) information during the hiring process for their officers, including questions regarding one's sexual orientation—a practice virtually abandoned by 1980. Although the SPD had hired many female officers since 1911, it was assumed and accepted by their male counterparts that they were lesbian unless otherwise proven.

My life as a gay police officer

I began my career as a law enforcement officer at the age of 18, in 1980, for a small eastern Washington Sheriff's Office and for obvious reasons chose not to come out. At the time I was hired by Seattle in 1983, there was only one openly gay male serving on the police

(Continued)

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force and he endured challenges that his straight colleagues did not. Based on my exposure to the nation's attitude toward the LGBTQ community during the 1960s & '70s, combined with the knowledge that I needed to prove my abilities as a police officer first, I chose to remain closeted in my profession. This decision was re-enforced in the late 1980s when our Police Guild President chose to testify in front of Congress against gays serving in the military. His decision enraged me and resulted in the Police Chief, Mayor, and Council all denouncing his actions.

As I carefully observed the police culture changing within my agency in respect to LGBTQ acceptance, my confidence increased and I chose to "come out" in 1992 to my very accepting squad. In 2014, I was asked by our chief to become the SPD's first full-time LGBTQ Liaison officer, responsible for further uniting the LGBTQ community and the police officers who serve within it. By 2015, I created the nation's first police sponsored program to protect the victims of anti-LGBTQ crimes called SPD SAFE PLACE Initiative that is now becoming a national model for other law enforcement agencies to follow (see SpdSafePlace.com). It has resulted in a 23% increase in the level of trust between the LGBTQ community and the SPD.

In 2016, Seattle police has approximately 60 to 80 openly gay, lesbian, and transgender officers serving in its ranks, including all levels of command and specialty units. Today's police officers in Seattle are fully accepting of their LGBTQ coworkers and community members—an amazing and monumental shift in cultural acceptance that is fast becoming a national model.

Identifying and Prosecuting Hate Crimes

After a state has decided which groups to include in its hate crimes law and the constitutional issues have been settled by the courts, the way is clear to successfully find and prosecute people who victimize others out of bias, right? Wrong! Consider Table 2.4, which shows hate crime data from California for the past 20 years. California data are included here because California is one of the few states that issue a comprehensive annual hate crime report.

Each year in California, complaints are filed (that is, criminal charges are brought) for only about 10% to 20% of all known hate crime offenders, and 80% to 90% of these offenders are never charged with a hate crime (California Department of Justice, 2015). Furthermore, even when a complaint is filed, only about half the cases result in a hate crime conviction. The result? Fewer than 10% of the people whom police report as committing a hate crime are ever convicted of one.¹⁰ The situation is even worse when we consider that probably far fewer than half of all hate crimes are even reported to the police.

It is clear that if a person chooses to commit a crime because of the victim's group, that person has a very small likelihood of being punished for a hate crime.

Table 2.4 Reported Hate Crimes and Hate Crime Convictions in California

Year	<i>Offenses Reported to Police</i>	<i>Suspects</i>	<i>Hate Crime Complaints Filed by Prosecutors</i>	<i>Hate Crime Convictions</i>
2014	979	799	148	50
2013	1,072	875	196	68
2012	1,174	937	158	49
2011	1,347	1,010	204	74
2010	1,425	1,092	230	70
2009	1,427	1,202	283	131
2008	1,837	1,472	353	128
2007	1,931	1,627	330	110
2006	1,702	1,612	276	140
2005	1,691	1,589	330	137
2004	1,770	1,495	277	139
2003	1,815	1,629	304	128
2002	2,009	1,963	351	164
2001	2,265	2,479	314	136
2000	2,002	2,107	360	213
1999	2,001	2,021	372	174
1998	1,801	1,985	244	131
1997	2,023	2,206	313	223
1996	2,321	2,441	182	87
1995	1,965	2,225	187	107

SOURCE: California Department of Justice. (2015).

This is not because most hate crime offenders are criminal masterminds capable of pulling off the perfect crime. Nor is it due to lack of appropriate legislation—as we have already seen, most states now have hate crime laws. Instead, the problems lie in the nature of hate crimes themselves and with the process by which the laws are enforced. We begin with the first people who are usually aware that a hate crime has occurred: the victims.

Victims' Reporting of Hate Crimes

Several years ago, the house where one of my students lived was vandalized. Someone spray-painted slurs related to her sexual orientation on the garage and front door. She called the police, and two officers soon arrived and made a report. They were polite, but before they left, one of them turned to her and said, "You know, if you don't want this to happen, you shouldn't be so obvious about being a lesbian."

Speaking to me about this incident some months later, my student was angry at the police. Not only did she believe that they had insulted her, but she also thought that they were blaming her for being a victim. She felt victimized twice: once by the vandal and then again by the police. "If that ever happens to me again," she told me, "I won't call the police."

A member of a local LGBT advocacy organization told me a similar story. He and his partner were threatened, the assailant even going so far as to shoot at their apartment window. The police response was that the victims should be more careful about "advertising" their sexual orientation. This man told me he lost a great deal of trust in local law enforcement that day and would hesitate to report future crimes.

I do not know how typical these cases were of police responses in their cities, and I do not know if they were ever placed in that position again. However, theirs are good examples of a well-documented phenomenon: Many victims of hate crimes do not report the crime to the police. And, almost always, if the crime is not reported, the police remain unaware that it happened, it never gets included in the official hate crime data, and the perpetrator is never punished.

Of course, it is impossible to know exactly what percentage of hate crimes get reported to police. In general, people frequently do not report crimes. In 2014, for example, the Department of Justice (2015c) estimated that only 46% of violent crimes, and only 37% of property crimes, were reported. Some have estimated that the rates are even lower for hate crimes. Perry (2001), for example, states that less than 20% of hate crimes against gays and lesbians are reported (p. 216), and Levin (1999) estimates that fewer than one in three hate crimes in general is reported. A 2013 report based on the National Crime Victimization Survey estimated that about 260,000 hate crimes occur each year in the United States (Bureau of Justice Statistics, 2013). If that number is accurate, only about 2.5% of hate crimes get reported to police—a proportion much lower than most offenses and also much lower than even the gloomiest estimates.

Reporting rates may be especially low under certain conditions. Zaykowski (2010) found that members of minority groups were less likely than members of the majority to report crimes in general and that this difference was even more marked when the crimes were race-based hate crimes. After focus group interviews with people from a variety of groups, Wong and Christmann (2008) reported that victims were especially unlikely to report nonviolent hate crimes.

There are a variety of reasons why victims of hate crimes may not report the offenses to the police. In 2001, the California Attorney General's Civil Rights

Commission on Hate Crimes issued a report on issues involved in reporting hate crimes (California Attorney General, 2001); the report was based on a series of forums that were held throughout the state. The Commission identified a number of reasons why hate crimes often go unreported:

1. Lack of knowledge about what hate crimes are and how the laws are applied;
2. Denial by the victim(s) that a hate crime was perpetrated;
3. Fear of retaliation by the perpetrator for reporting;
4. Fear of being revictimized by law enforcement or a belief that law enforcement does not want to address hate crimes;
5. Shame for being a victim of hate crime;
6. Cultural or personal belief that one should not complain against misfortunes;
7. Fear of being exposed as gay, lesbian, bisexual, or transgender to one's family, employer, friends, or the general public;
8. Lack of English language proficiency and knowledge of how to report hate crimes;
9. Fear of being identified as an undocumented immigrant and being deported;
10. Fear on the part of people with disabilities who use caregivers that the caregivers who have committed hate crimes against them will retaliate and leave them without life-supporting assistance; and
11. Inability of some people with disabilities to articulate when they have been a victim of hate crime (p. 11).

Based on these findings, the commission made several recommendations (see In Focus 2.5).

IN FOCUS 2.5

Recommendations of the California Attorney General's Civil Rights Commission on Hate Crimes

1. The state Department of Justice should launch a multilingual public information campaign about hate crimes, and about community, civil, and criminal resources.
2. The state Department of Justice should establish a toll-free hotline for reporting hate crimes and an online incident reporting form. Victims who use these resources should be referred to the appropriate local law enforcement agency.

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3. Legislation and support should be created for local human rights commissions to sponsor hate crime prevention and response networks.
4. Training and resources should be provided for educational institutions.
5. Training on hate crimes should be required for all law enforcement officers, as well as dispatchers and other staff.
6. Funding should be provided to local law enforcement agencies so they can partner with local community agencies to prevent and respond to hate crimes.
7. Training should be required for corrections personnel.
8. Training should be provided for prosecutors.

SOURCE: Adapted from California Attorney General. (2001).

Other commentators have largely agreed with the Commission's assessments on reporting (see, e.g., Perry, 2001). People who are victims of hate crimes are disproportionately likely to be relatively powerless. In fact, arguably, a primary reason why offenders commit these crimes is to maintain their victims' powerless position (see, e.g., Wang, 2002). These victims are also often members of groups that have traditionally had poor relations with the police. And these victims frequently have language or cultural barriers that keep them from communicating with law enforcement. For a large majority of the hate crimes that occur in the United States, the existence of hate crime laws is simply a nonissue because the government will never become aware that they occurred.

Police Responses to Hate Crimes

Assuming a victim of a hate crime does actually report the incident to the police, many potential barriers exist between the reporting of the crime and the offender's eventual conviction. One barrier is that the responding police officer may not interpret or report the crime as hate motivated. This is an important problem because police officers are vested with more discretion than any other actors within the criminal justice system and because in most cases they act as gatekeepers to that system (Bell, 1997, 2002a; Franklin, 2002; Walker & Katz, 1995).

Again, a personal experience might help illustrate the issue. Several years ago, I was engaging in a research project that involved contacting law enforcement agencies throughout the country and asking for their hate crime data. The results were quite illuminating. Although some agencies were able to quickly provide very complete information, others were not. For example, an officer in Idaho (which was

home to several hard-core white extremist groups) informed me that they did not have any hate crimes because “we don’t really have any minorities in Idaho.” In fact, a later study, in which the researchers surveyed people who lived in Idaho, revealed that a significant number reported they had been victims of hate crimes (Stohr, Vazquez, & Kleppinger, 2006). In other cities, several officers with whom I spoke had no idea what a hate crime was.

The data that I did collect were often subject to odd inconsistencies. In 1993, San Francisco reported 319 hate crimes, whereas neighboring San Jose reported only 27 (Gerstenfeld, 1998). San Jose actually has slightly more people than San Francisco, and both cities have diverse populations. Is San Francisco a hotbed of intolerance, whereas San Jose is a paragon of brotherhood and peace? A more likely way to explain these data is to note that in 1993, San Francisco had a hate crime unit, but San Jose did not. Milwaukee, Wisconsin, with a population roughly two thirds of San Francisco’s, reported only two hate crimes in the third quarter of 1993. Like San Jose, Milwaukee did not have a hate crime unit. San Francisco’s numbers were probably high because that city had had officers trained to recognize hate crimes and because dealing with these crimes was an explicit priority of the police department.

Several potential explanations exist for why a police officer may not record an incident as a hate crime, even when the victim believes that it was. The first of these is that the officer himself or herself may be biased against the victim’s group. Unfortunately, prejudice exists as much within law enforcement agencies as within the rest of society. Well-publicized incidents of police-officer-perpetrated bigotry, such as the sexual assault of Haitian immigrant Abner Louima by several New York City officers, abound in towns and cities across the country (Perry, 2001; Walker & Katz, 1995), and accusations of law enforcement bias are currently dominating the news. Furthermore, there have been incidents in which individual police officers have been identified as members of white supremacist groups (Novick, 1995). Assuming, however, that the officers are relatively unbiased, there are several other reasons why their recording of an incident may differ from the victims’ interpretations. As we have already discussed, the determination of motive is problematic and subjective; what I consider to have been a theft provoked by my race, you might consider just an ordinary robbery (Bell, 1997; Garofalo & Martin, 1993). Officers may also have received little or no training in identifying a hate crime. And, even when police believe that a hate crime has in fact occurred, they may have personal or departmental reasons for wanting to avoid recording it as such: Perhaps they wish to avoid the additional bureaucratic requirements attendant to hate crimes in many jurisdictions, perhaps they believe that hate crimes are not a legal category worth pursuing, or perhaps their department wishes to underplay the prevalence of bias in their city (Bureau of Justice Assistance, 1997; Maroney, 1998).

Several researchers have examined the factors that influence police hate crime reporting. Martin (1995) examined the behavior of the Baltimore County, Maryland, Police Department. She found that reporting behavior varied a great deal from officer to officer, and she identified a number of variables that were

associated with whether a suspected hate crime case was later verified, including the race of the victim and the victim's own perception of the event. She also discovered that this department's interpretation of hate crimes may have been overzealous. One person she interviewed said that the department "has trained the officers to the point that if there's graffiti, they assume it's [a hate crime]" (p. 308). As a result, "a sizable proportion of the cases contain bias that is a secondary motivation, . . . an additional motivation, . . . or even an afterthought" (p. 317). Martin concluded that "what is defined as 'bias motivated' is arbitrary and results in statistical reports that are uninterpretable and may be misleading" (p. 323).

Boyd, Berk, and Hamner (1996) also questioned the reliability and validity of hate crime data. They looked at hate crime reporting in two divisions of a large metropolitan police department. Consistent with Martin's (1995) results, they found significant differences between the way the two divisions classified hate crimes, with one focusing more on the offender's motive and the other on any facts of the case that were potentially related to bias. For example, an incident occurred in the first division in which the victim, who was driving his truck, was followed by a group of five teenagers. When he pulled over, they taunted him with racial slurs and hit him with a steering wheel lock. Because the victim admitted to police that he may have accidentally cut off the suspects' car while driving, the division concluded that this was not a hate crime (Boyd et al., 1996, p. 836). On the other hand, someone in the second division drove golf carts recklessly across a golf course, damaging the carts and some landscaping. The complainant said that this incident happened on the eve of Rosh Hashanah and that 2 years earlier, a similar incident had also occurred on that day. This was recorded as a hate crime (p. 843).

The Boyd and colleagues (1996) study also highlighted a number of other potential problems with law enforcement and hate crimes. Many of the officers disliked the additional paperwork required by the department's hate crime policy, and they questioned whether hate crimes should be a special crime category at all. Some officers were reluctant to call anything a hate crime unless it was as obvious as a cross burning on the property of an African American family, whereas others would classify domestic violence as a hate crime because the husband and wife hated each other. In general, acts by juveniles were likely to be interpreted as simple irresponsibility rather than hate crimes. And some officers felt that hate crimes were not real crimes at all but simply human nature. One officer said, "A couple of fruits get bashed—that's not a crime. That's normal. There are just two types of crime—dope and cars. The rest is just stupidity. I say dope and stolen cars are the only calls worth my time. Not fruit bashing and not these domestic calls" (p. 827).

Using focus interviews and surveys, Nolan and Akiyama (1999) looked at the individual and departmental variables that influenced hate crime reporting (see In Focus 2.6). Like previous researchers, they found important differences from officer to officer and agency to agency.

IN FOCUS 2.6

Factors Influencing Police Hate Crime Reporting

Individual encouragers:

- Departmental policy mandates reporting
- Belief that early identification of problem is key to effective solution
- Belief that it's an important part of the job
- Belief that it will help prevent problems
- Belief that reporting will prevent officer liability
- Belief that hate crimes are morally wrong
- Encouraged to report by department officials
- Encouraged and supported by supervisors and colleagues
- Clear, understood, and accepted department policy
- Belief that reporting hate crimes benefits victims and communities
- Internal checks ensure officers don't misidentify hate crime
- Being recognized by other officers as good at investigating and recording hate crime
- Desire to be considered a good police officer
- Reporting hate crimes is encouraged and rewarded by the department
- Personal desire to comply with departmental policy

Individual discouragers:

- Belief that reporting hate crimes is not viewed as important by department officials
- Too much additional work
- Sometimes runs counter to officer's personal beliefs
- Belief that hate crimes are not serious
- Belief that hate crimes should not be treated as special
- Little concern for some minority groups
- Not the job of police (more like social work)
- Not recognized or rewarded for reporting hate crimes
- Informally encouraged to adjust complaints due to the large number of calls for service
- Lack of common definition of hate crime
- Fear that incident will be blown out of proportion
- Officers already too busy
- Personally opposed to supporting gay and minority political agendas
- Lack of training
- Victims do not want to assist in prosecution

SOURCE: Adapted from Nolan, J. J., & Akiyama, Y. (1999).

Another study on police reporting of hate crimes was conducted by Bell (2002a) in a large metropolitan police department with a hate crimes task force. Bell concluded that officers did not rely on the perpetrators' language alone to determine whether a crime was hate motivated, contrary to the fears of some First Amendment scholars. Instead, the two most important factors were whether the victim and offender were of different groups and whether bias rather than some other emotion appeared to have motivated the crime. The use of these criteria is likely to result in a rather conservative approach because they would weed out cases in which the offender had multiple motives or was acting out bias toward his own group. Based on these criteria, the police might not report cases in which the offender and the victim were the same on one identity dimension (e.g., race) but different on another (e.g., sexual orientation).

Stump (2011) studied the factors that influenced police officers' decisions regarding hate crimes in one small city. Although there were formal guidelines that officers were supposed to follow, more often their decisions were affected by a number of informal factors. These included the number of offenders, the role of the media, the amount of harm to the victim, how sympathetic the victim was, and whether the offender's behavior appeared to be extreme or unusual.

Recently, Lyons and Roberts (2014) examined clearance rates in hate crime cases—that is, the proportion of reported offenses that resulted in arrests. The researchers found that, overall, clearance rates were significantly lower for hate crimes than for other crimes. Characteristics of the offense mattered as well. Hate crimes committed by whites against nonwhites were the most likely to result in an arrest, perhaps because of agency priorities or perhaps because they best fit officers' conceptions of what hate crime involves.

In some jurisdictions (generally larger cities), police reporting of hate crimes is further complicated because it requires a two-step process. Officers who initially respond to the call must first identify a crime as being hate motivated. The case is then referred to a special bias crime unit, which verifies it as a hate crime. In these jurisdictions, the opportunities for an offense to be disqualified from the hate crime reporting system are increased, and there is also the possibility of friction between or disparate goals among the ordinary patrol officers and the bias crime unit.

In general, then, it seems quite evident that hate crime reporting varies from place to place and officer to officer. The specific philosophy of a particular police department may affect responses to hate crimes, as may the department's relationships with local interest groups and the proportion of the population that belongs to minority groups (Cronin, McDevitt, & Farrell, 2007; Jenness & Grattet, 2005; King, 2007).

A variety of programs, initiatives, and policies have been created to try to improve police reporting of hate crimes. One common route is for a police department to create a specialized hate crimes unit or task force. This might consist of a single officer in smaller jurisdictions or several officers in larger ones. Typically, officers in this unit have specialized training and are called in to investigate whenever a hate crime is suspected. The exact number of bias crime units nationwide is unknown. In 1990, the Department of Justice estimated that there were approximately 450 of these units

in the country, but a study by Walker and Katz (1995) concluded that this number was likely overinflated. Moreover, they also found that only half the departments they surveyed that had bias crime units or special procedures provided the officers with any formal training on hate crimes. Thus, in some cases at least, there may be “far less to [bias crime units] than meets the eye” (p. 42).

A second, and related, strategy is for a department to have special procedures for handling suspected hate crime cases (Bell, 1997). The ADL (1988) published a collection of procedures, including model guidelines and reporting forms. Although official procedures and policies may help standardize reporting, there is also the danger that they will backfire. If police believe that hate crime reporting procedures are too unwieldy or time-consuming, they may be hesitant to invoke them (Boyd et al., 1996; Bureau of Justice Assistance, 1997).

Finally, many jurisdictions require training in hate crimes for police officers. California, for example, has required that all future police officers receive some training on hate crimes while they are at the law enforcement academy (California Attorney General, 2001). In addition, several national agencies assist in police officer training. The Office for Victims of Crime has made available a detailed bias crime training manual (McLaughlin, Brilliant, & Lang, 1995). The Southern Poverty Law Center offers an online course on hate crimes for law enforcement officers and publishes a free quarterly magazine on hate crimes and hate groups. The Simon Wiesenthal Center conducts training sessions for police officers.

Training requirements are hardly universal, however. Although California requires some hate crime training in the academy, it does not mandate how much. And it does not require any ongoing training or education for officers who went through the academy prior to 1993 or for other support personnel such as dispatchers. Most states have no hate crime training requirement at all.

Furthermore, training alone is probably not the answer. A study by Sloan, King, and Sheppard (1998) concludes that simply providing more training to police will not necessarily improve reporting. The available training materials themselves do not always accurately reflect the true legal and practical definitions of hate crimes (Walker & Katz, 1995). Moreover, improved training will not necessarily overcome all the other obstacles to reporting, such as those found in the Nolan and Akiyama (1999) study.

Jenness and Grattet (2004) found that police departments with hate crime policies were more likely to report hate crimes. Nolan, McDevitt, and Cronin (2004) concluded that “ambiguous situations . . . may be more the rule than the exception when it comes to identifying bias crimes” (p. 92). These authors have developed a model that is intended to assist law enforcement agencies to more accurately identify and record hate crimes. It contains 21 categories of acts, each with an example, and is meant to help police more accurately differentiate between crimes that are bias motivated and those that are not.

Even when police do report hate crimes, it is important to note that extreme caution must be used in interpreting the data. As the research shows, reporting tends to be extremely inconsistent from officer to officer and place to place. In addition, the data can be influenced by a variety of external factors. These can include

police-related variables such as the creation of or activities of a bias crime unit. For example, when Ottawa recorded the third-highest rate of hate crimes in Canada in 2006, local police, criminologists, and community leaders cited the Ottawa police department's proactive approach to hate crimes—including the existence of a hate crime unit—as a primary cause for the high reported numbers (Butler, 2008). When Arkansas experienced a huge spike in reported hate crimes—177 in 2003, compared to none the previous year—officials explained that problems with using a new reporting system were to blame. One town of 4,000 people reported 38 race-based hate crimes that year, even though fewer than 10 blacks lived in that town (Reese, 2004).

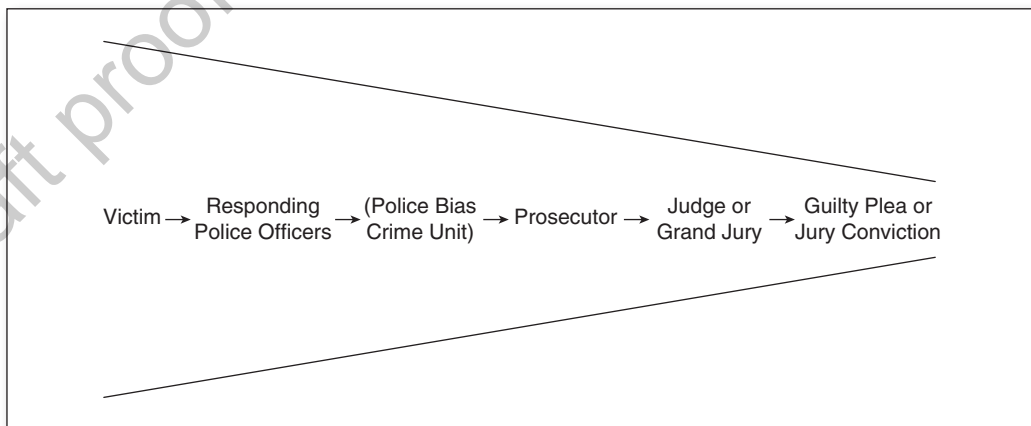
Local and national events might also affect hate crime data (Gerstenfeld, 1998). After the Rodney King incident, many cities experienced a surge in race-related violence, and after the September 11 attacks, there was a sudden increase in attacks on Muslims and Middle-Easterners (and even those who were mistaken for them; Gerstenfeld, 2002; Kaplan, 2006; Hanes & Machin, 2014). Using police reports to determine patterns or trends in hate crimes is therefore problematic to say the least.

Prosecuting Hate Crimes

Of all the hate crimes that occur, very few make it past the first two hurdles to conviction (the victim and the police). But those that do are faced with additional barriers (see Figure 2.1): The prosecutor has to decide to file hate crime charges; a judge has to determine that probable cause exists to try the defendant;¹¹ and the defendant has to either plead guilty to those charges or be found guilty by a jury. All these barriers are difficult to overcome.

Prosecutors, like police, have a large amount of discretion. There are few controls on what charges they choose to bring, whether they choose to bring charges at all, and in what plea-bargaining processes they engage (Maroney, 1998). In most

Figure 2.1 Barriers to Hate Crime Convictions



jurisdictions, district attorneys are elected officials. Their offices, therefore, may be sensitive to political and social pressures, as well as the need to maintain high conviction rates. In some places, they may also be faced with overburdened or limited resources.

Furthermore, prosecutors may have even less training on hate crimes than police officers do. It is not a topic that receives much (if any) coverage in most law school curricula, nor is it a common subject in continuing legal education seminars. Prosecutors in some large cities may have had experience with previous hate crime cases and may even be part of a hate crime task force. San Francisco is an example of one such city. In smaller jurisdictions, however, because of the rarity of hate crime cases and the absence of special units or task forces, prosecutors may have little or no familiarity with these kinds of cases. In their interviews with prosecutors in Texas, for example, McPhail and DiNitto (2005) found that the prosecutors had little knowledge about gender-based hate crimes.

It is also important to point out that prosecutors, like police officers, may be influenced by their own biases (Hernandez, 1990). Consciously or unconsciously, their decisions about which charges to bring may be affected by their personal feelings about the victim and the perpetrator.

A prosecutor's decision not to charge an individual with a hate crime can sometimes raise public outcry. An example of this occurred in 2006 in Jena, Louisiana, when white students hung three nooses from a tree outside the high school. Traditionally, only white students had sat under the tree, but the previous day some African American students had sat there. None of the white students were charged with a hate crime. Several violent episodes at the high school ensued, and, when six African American students subsequently beat a white student, they were charged with attempted murder. The victim was not seriously injured, and all six eventually pleaded guilty to simple battery. Critics claimed that the prosecutors' decisions were the result of bias against African Americans (Surgeon, 2008).

Partially in response to the Jena case, Lawson (2008) argued that failure to prosecute hate crime cases results in increased victimization of vulnerable groups. She recommended, therefore, that prosecutorial discretion be reduced in these cases by requiring grand jury input or permitting victims to privately bring criminal charges. No jurisdiction has adopted these recommendations, however, and it is unlikely that any will.

More recently, a law professor who was originally from Sri Lanka was stabbed in the neck as he waited at a train station in Champaign, Illinois. The attacker allegedly yelled, "This is my country!" during the attack. But the prosecutor chose not to file hate crime charges because, he said, the other charges—attempted murder and aggravated battery—carry heavier penalties. But local community leaders believed that a hate crime should have been charged as well (Dahl, 2011).

In some cases, the victims may agree with prosecutors' decisions not to charge for hate crimes. In 2015, Jacina Scamahorn was attacked in Spokane, Washington, apparently because she is transgender. The assailants shouted slurs about gender identity and sexual orientation, and hit her hard enough to break facial bones. But when the prosecutor decided to drop hate crime charges, Scamahorn supported

that choice out of concern that she would be maligned at trial. According to an interview with her, “If the case had gone to trial, Scamahorn believed lawyers for the defendants would attempt to ‘turn my being transgender into a three-ring circus.’” (Holden, 2015).

In a sense, hate crime cases are no different from other kinds of crime, which all have to survive the same series of decision makers. And there are other types of infrequent offenses, such as capital murder, in which the attorneys involved may have had little or no relevant experience. However, hate crimes have one important distinction: They require that each of the decision makers determine the offender’s motive (Franklin, 2002).

Determination of another person’s motive is inherently subjective. None of us can read the offenders’ minds and, except in rare cases, perpetrators are savvy enough not to admit that they committed the crime because of the victim’s group. Unfortunately, most of the time, most of us are quite poor at interpreting the reasons behind other people’s behavior. Our interpretations are subject to our own biases and expectations.

What is worse, we frequently tend to be inaccurate in interpreting our own motives (Gerstenfeld, 1992). Psychological literature is full of examples of people failing to understand their own behavior, and some therapists spend careers trying to help their patients overcome this difficulty. Even the causes of simple acts can be unclear. Why did I eat that candy bar this afternoon? Was I hungry? Bored? Addicted to chocolate? Influenced by hormones? Compensating for some emotional distress? If I cannot identify the motive behind such an uncomplicated act as a midday snack, how can we expect people to determine the motives of other people in such complex behaviors as criminal offenses—and to do so, as the law demands, beyond a reasonable doubt?

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 only black family in the neighborhood, it is hard to think of any reasonable explanation other than bias. As we have already mentioned, however, many potential hate crime cases are not so clear. Consider, for example, the case of Randal Lee Krager (see In Focus 2.7).

IN FOCUS 2.7

The Case of Randal Lee Krager

Randal Lee Krager lived in a racially diverse neighborhood in Portland, Oregon. On the night of April 17, 1992, the girlfriends of Krager and his roommate walked to a nearby convenience store. When the women did not return when expected, Krager (who was white and 18 years old) and his roommate left their apartment to look for them. They found them involved in a confrontation with two black men, one of whom was 34-year-old Jacob Johnson. The testimony at trial was conflicting; Krager’s roommate said he saw the women being struck, whereas Johnson’s friend said the women were slapping them.

The four men soon began arguing with each other. Johnson (who had a blood alcohol level of .11) waved around a beer bottle. Krager's friend pushed him. Krager claimed that Johnson continued to threaten him with the bottle, although there was also testimony that Johnson dropped the bottle after being pushed. Krager then punched Johnson in the face. Johnson fell and struck his head on the ground, fracturing his skull. He was in a coma for several days and may have suffered permanent brain damage.

When police arrested Krager, they learned he was a skinhead. One of his hands had a swastika tattoo. A grand jury indicted Krager for second-degree assault but refused an indictment on hate crime charges. Krager was subsequently convicted of second-degree assault. The judge, however, doubled his sentence to 3 years, largely because the judge was "satisfied the incident was motivated by bigotry and anti-black racism."

SOURCES: "Jury to Get Complicated Assault Case" (1992) and "Judge Doubles Sentence" (1992).

It is impossible to know whether Krager would have hit Johnson had Johnson been white. Perhaps he would have stepped into any altercation involving his girlfriend. On the other hand, perhaps his anger was fueled, at least in part, by Johnson's race. In fact, Krager himself likely could not know whether he would have reacted differently if Johnson had been white.

If you were the victim of this crime, do you think you would believe that this was a hate crime? How would your view change if you were the responding police officer? The prosecutor? A member of the grand jury? The trial judge? A member of the community in which Krager and the victim lived? Would anybody even have suspected that this was a hate crime had Krager not belonged to a white supremacist group?

Some years after the first edition of this book came out, I was surprised to receive an e-mail from Krager himself. He's given me permission to reprint his message, which you can read in In Focus 2.8.

IN FOCUS 2.8

Krager's Response

I recently read a section about me in a book I believe you wrote. I appreciate that it looked at the case from a factual basis and not from a political view point. To answer your question you posed in the chapter, yes I would have responded the same or worse had Mr. Johnson been Caucasian. The incident had nothing to do with race, which the Grand Jury determined as well. The fact the Judge, Steinbock (Member of the Jewish Lawyers Guild) doubled my sentence for racial bias contrary to the findings of the Grand Jury was a pure act of political

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retribution for his perception of my beliefs at the time. If I had been out doing some sort of hate crime I would not have been in my pajamas and would have tied my shoes. I was looking for Tanya who I liked at the time, it's just that simple. There were also many more of Johnson's friends on the scene who left before police arrived, which is often neglected in reporting on the incident. I was an 18-year-old kid surrounded by grown men in their 30s who were drunk and/or high. I was in fact, scared shitless and in a hurry to get the girls and get out of there. Had I had my head caved in by Johnson's 40 oz. beer bottle and been the one in a coma the police would not have even investigated it. It was a wrongful conviction, but considering I was no angel, I always figured I had it coming for other things I had gotten away with and never complained.

I have put political activism behind me recently, but just wanted to tell you I appreciate a scholar looking at an issue from all aspects, which is rare in the educational system these days.

A fairly recent high-profile case underscores the ambiguity of motive. In 2010, Tyler Clementi and Dharun Ravi were roommates at Rutgers University. Ravi used a webcam to secretly view and record Clementi kissing another man in their room; he shared the recording with some of his friends as well. Clementi became aware of the spying via Twitter postings. A few days later, he committed suicide by jumping off the George Washington Bridge. Ravi was initially charged with invasion of privacy, but hate crime charges were eventually added as well. Although he denied that his decision to spy on Clementi was motivated by bias against his roommate's sexual orientation, Ravi was convicted. He could have faced 10 years in prison and deportation (he was born in India but had been a legal U.S. resident since he was 6), but instead was sentenced to 30 days in jail (Lynch, 2012).

While some civil rights groups argued that Ravi's sentence was too lenient, the judge who presided over his trial called New Jersey's hate crime statute "muddled" (Di Iorio, 2012). Were Ravi's actions in fact motivated by the fact that Clementi was gay? Would he have spied on his roommate had Clementi's encounters been with a woman instead? The jury determined that Ravi was motivated by bias, but perhaps his lenient sentence was influenced, at least in part, by doubts on the part of the judge.

A small incident that occurred near Washington, DC, in 2016 also illustrates the potential ambiguity of these cases. A minor squabble occurred at a traffic light when one driver hesitated too long and the other driver honked. The one who hesitated—Kerlina Aviles—eventually followed the other driver into a parking lot. The other driver and her daughter were both wearing hijabs (hair coverings worn by some Muslim women). Angry words were exchanged, some of them allegedly anti-Muslim—an accusation Aviles denied. Aviles splashed the other driver and her daughter with scented baby oil. She was later charged with a hate crime, but claimed anti-Muslim bias had nothing to do with her actions (Morse, 2016).

In ambiguous cases, reliable determination of the offender's motive becomes impossible. Jurors and others who are required to undertake this task will inevitably have their perceptions colored by their own biases and by extraneous factors that, legally, should not be considered. Although it is not feasible to study the influences on jurors' decisions in real hate crime cases, several studies have attempted to address this issue.

Marcus-Newhall, Blake, and Baumann (2002) conducted a series of experiments in which they asked participants to read a brief scenario describing a possible hate crime. The race of the defendant and of the victim was varied, as was the degree of peer support the defendant had received for his behavior. The researchers also collected data on participants' races, as well as their political affiliation. Participants were asked to state how certain they were of the defendant's guilt and were asked to choose a sentence for him. The researchers found that the participants' decisions were significantly affected by the race of the offender and victim, by the race of the participants, and also by the participants' political views. All these are extralegal factors that should not influence the outcome of a case.

I conducted a similar mock-juror study (Gerstenfeld, 2003). In this study, participants read a somewhat lengthier scenario of an ambiguous case (adapted, in fact, from Krager's case). I varied the offenders' and victims' races and also measured the participants' level of racism. Contrary to my own expectations, as well as the results of the Marcus-Newhall and colleagues (2002) study, neither race nor racism generally affected participants' decisions. I did find, however, that people were significantly less likely to determine the act was a hate crime if the victim and offender were of the same group than if they were of different groups. Although this might make sense—people might reasonably be expected to be more biased against other groups than their own—it does ignore the fact that hate crimes can, and do, occur between people of the same race.

Other experiments have also shown an influence of extralegal factors in perceptions of what constitutes a hate crime. Craig (1999) and Craig and Waldo (1996), for example, found that reactions to and interpretations of hate crimes were affected by participants' races and the race of the victim.

It should not be surprising that race may play a part in decision making in hate crime cases. Ample research has demonstrated that race affects decisions in criminal cases in general, not just among juries, but among other components of the criminal justice system as well, such as prosecutors and judges (see, e.g., Baldus & Woodworth, 1998; Nickerson, Mayo, & Smith, 1986; Pfeifer & Ogloff, 1991; Sommers & Ellsworth, 2000; Ugwuegbu, 1979). Not only is there no good reason to suspect that hate crimes are any different than other crimes in this regard, but, in light of the particular subjectivity involved in determining motive, it is possible that hate crime cases may be even *more* influenced by factors such as race (Maroney, 1998).

Much of the discussion about motive and hate crimes has centered on the constitutional issues discussed at the beginning of this chapter. First Amendment problems, however, are not the only problems created when a determination of motive is required. Among other things, it makes it much more difficult to obtain

accurate convictions of hate crime offenders. When a potentially high rate of inaccurate convictions combines with serious reporting difficulties among both victims and police officers, it calls into question the wisdom and utility of hate crime laws.

Paradoxical Effects of Hate Crime Laws

Most advocates of hate crimes legislation are genuinely concerned with the insidious effects of bigotry and see these laws as a viable and even necessary means of combating those effects. Many critics of the laws share the same concerns, but some of them worry that hate crime laws might actually result in the paradoxical effect of harming members of minority groups.

Hate Crime Laws Might Inspire Complacency

One way that hate crime laws might be counterproductive is that they might inspire complacency among policymakers. By the relatively simple act of enacting hate crimes legislation, politicians may feel that they have done their part to combat prejudice. It is politically expedient for them to pass this legislation: They can satisfy civil rights activists while simultaneously appearing tough on crime (Maroney, 1998). And advocacy groups might also find themselves so busy addressing the relatively rare problem of hate-motivated crime that they largely overlook the much more common (albeit subtle) problems of bias in employment, education, housing, and other facets of everyday life. This dilemma is made worse by the fact that, as discussed in Chapter 1, hate crime laws will probably have very little direct effect on hate. Gellman (1991) is one author who has made this point:

If enacting a largely ineffective ethnic intimidation statute allows us to feel that we have taken steps to eliminate bigotry and bias-related crime and thus reduces somewhat or even entirely our feeling of the urgency of doing more, the enactment of the law ultimately *slows* the process of combating bigotry. (p. 389)

Some empirical evidence supports this argument. Soule and Earle (2001) found that states that had initially enacted hate crime data collection or civil legislation were significantly slower to adopt hate crime laws. These authors refer to this as a “buffer” effect and conclude that “data collection and private civil redress statutes, when unaccompanied by criminalization, serve to deflect pressure for hate crime laws while not actually providing important protections for potential hate crime victims” (p. 294). The federal government may be a good example of this; although it created the Hate Crime Statistics Act in 1990, it was another 19 years before Congress passed a meaningful federal hate crimes law (see Chapter 1).

McDonald (2009) takes the complacency argument one step farther. When police and prosecutors fail to bring charges against hate crime perpetrators, he argues, immigrant victims of hate crimes may feel even more marginalized and alienated.

Hate Crime Laws Might Cause Resentment of Minorities

A second risk of hate crime laws is that they will inspire resentment of minorities (Gerstenfeld, 1992). This phenomenon is similar to the way in which children often dislike the “teacher’s pet” (Gellman, 1991). Members of the general public, who are usually uninformed about the realities of how the laws work, may feel that certain groups are getting special treatment.

White supremacist groups appear to be taking advantage of this angle. Several of their websites, for example, state (incorrectly) that the laws protect only minorities, not white people. Some of them (e.g., David Duke’s site at www.davidduke.com) claim that the laws result in the persecution of white Christians. Some also decry what they call the “real” hate crimes—crimes committed by blacks against whites—and claim that the government and the media are ignoring those happenings. It is unclear how many people are actually convinced by this rhetoric, but the extremist groups seem to think it is worth their while to post these messages.

There is ample historical evidence that when members of powerful groups feel threatened, they sometimes react with threats or violence toward those over whom they wish to maintain power. As I discuss in Chapter 4, the Ku Klux Klan was created as a direct response to the emancipation of slaves, and its membership has surged during times when African Americans and other minorities have pushed for equality. Similarly, the gay rights movement and the improved fairness that the LGBT community has fought for have resulted in the creation of antigay groups and, at times, violent acts. It is conceivable that some people view hate crime legislation as a threat to their power, especially if those people read propaganda that asserts that hate crime laws protect only minorities.

Hate Crime Laws Might Disempower Minorities

A third, more troubling possibility is that hate crime laws could be used to disempower minorities. The government is hardly a neutral bystander when it comes to bias; in fact, it has a long history of perpetuating and encouraging bias (Maroney, 1998). To do so is self-serving because it protects the status of those in power. As Perry (2001) argues, “[t]he state is embedded in the processes of legitimizing and defining difference, and of constructing a racialized and gendered hegemonic formation” (p. 182). Is it not possible that hate crime laws could be used to disenfranchise the people they were meant to protect?

Maroney (1998) argues that hate crime laws arose very quickly and rapidly became assimilated into criminal justice institutions. As a result, “anti-hate-crime measures now reflect the culture and priorities of those institutions and therefore inadequately alter those institutions’ treatment of hate crime and its victims” (p. 568).

Lest this sound like radicalism or some sort of conspiracy theory, consider historical events. For example, in 1956, the Alabama attorney general used state incorporation requirements to attempt to oust the NAACP from Alabama.

The attorney general enjoyed 8 years of success in the courts in this endeavor until the U.S. Supreme Court finally ruled the effort unconstitutional (*NAACP v. Alabama*, 1964). Alabama also tried to require the NAACP to turn over the names and addresses of all its members (*NAACP v. Alabama*, 1958). Also in 1956, Louisiana tried to expel the NAACP via the state laws on registering organizations (ultimately, the state failed; *Gremillion v. NAACP*, 1961). In 1957, Virginia sought to use its statutes prohibiting solicitation by lawyers to restrain the NAACP from providing legal assistance in civil rights cases (this was also held unconstitutional in *NAACP v. Button*, 1963).

Clearly, states have not hesitated to use what appear to be neutral statutes to try to weaken individuals or groups who question the status quo. Had hate crime statutes existed during the 1960s, is it not possible that civil rights activists could have been charged with hate crimes? After all, is not a sit-in at a segregated lunch counter arguably a trespass committed because of race (see In Focus 2.9)?

IN FOCUS 2.9

The Case of Michael Hamm

I first became interested in hate crimes when I read an article on the front page of the August 25, 1991, issue of the *New York Times*. Police in Punta Gorda, Florida, had been called to a domestic disturbance. When white officer Stephen Keyes arrived at the scene, Michael Hamm, who is black, said to him, "I'll shoot you, white cracker." Hamm was subsequently charged with violating Florida's hate crimes law, which could have increased his sentence from 1 to 3 years.

This case raised a number of interesting questions. Was this an example of the state using hate crimes legislation to disempower a person of color? Was this the type of incident for which these laws were created? How is prejudice or bias to be determined in a case like this? When Hamm called Keyes a "cracker," was that a manifestation of prejudice? (The *Times* article pointed out that Senator Bob Graham of Florida once proudly campaigned as a "Graham cracker" and Atlanta once had a minor league baseball team called the Crackers.)

Eventually, amid much public outcry, the prosecutor dropped all charges against Hamm for lack of evidence.

SOURCE: Rohter (1991).

Again, there is some empirical support for the argument that hate crime laws could be used to disempower members of minority groups. Official hate crime data have consistently shown that, although African Americans are disproportionately likely to be the victims of hate crimes, they are also disproportionately likely to be identified as the perpetrators (Franklin, 2002; Gerstenfeld, 1998). For example, in Minnesota, approximately 2.2% of the population is African American. In 1993, however, 36.9% of the reported hate crime victims were black, as were 34% of the

reported offenders (Gerstenfeld, 1998, pp. 40–41). In 2014, according to the Federal Bureau of Investigation, 23.2% of the offenders were black; about 12% of the United States population is African American (Department of Justice, 2015a).¹²

The reasons for this pattern are unclear. It is possible that, due to factors such as economic deprivation and anger over racism, blacks actually do commit more hate crimes. On the other hand, it is possible that victims, witnesses, and police officers are more likely to interpret a crime as hate motivated when the offender is white than when he or she is black (Gerstenfeld, 2003). It could also be a statistical fluke: Because whites are the majority in most places, a person of any race who chooses a crime victim at random is probably going to choose a white victim. Incidents between a white offender and white victim are unlikely to be interpreted as hate crimes, whereas those between a black offender and a white victim might. Whatever the explanation (and, clearly, this issue merits more research), this is a troubling trend. Other authors have shared the concern that hate crime laws might be used disproportionately against minorities (see, e.g., Adams & Toth, 2006).

One author (Fleischauer, 1990), acknowledging that minorities may be disproportionately subject to hate crime penalty enhancement, suggests that this problem be prevented by exempting minorities from prosecution under hate crime laws. This proposal, however, is untenable. Not only would it open the laws to legitimate (and probably successful) challenges based on the equal protection clause of the Fourteenth Amendment, but it also ignores the fact that many hate crimes are committed by members of one minority group against members of another (Perry, 2001).

Hate Crime Laws Might Increase Prejudice

A final risk of hate crime laws is that rather than reducing prejudice through their symbolic message they will actually increase it. On the level of the individual offender, this seems quite likely; a defendant will probably not reform his or her bigoted ways after being convicted of a hate crime. To the contrary, the conviction may actually increase his or her standing among peers by making him or her into a martyr and a hero. The perpetrator may also blame the group to which the victim belongs—after all, if it were not for that group, he or she would not have been found guilty of a crime. Moreover, incarcerating a racist will hardly reform him or her. Prisons and jails are among the most prejudice-ridden institutions in our society. Prison gangs are usually organized along racial and ethnic lines, and they sometimes have ties to external extremist organizations.

On a larger scale, it is questionable whether hate crime laws will reduce prejudice in the community in general. Two psychological theories might predict the opposite. First, the theory of attitudinal inoculation predicts that if people have never been exposed to weak counterarguments to beliefs they hold, they are especially vulnerable to strong arguments later. It is akin to being vaccinated: Initial exposure to a weak form of the virus provides resistance to the virus in its full form (Cohen, 1964). Hate crime laws might discourage people from openly expressing

biased beliefs. People who never hear these types of beliefs might later fall under the influence of a particularly persuasive, bigoted speaker.

Cognitive dissonance theory might also predict a paradoxical effect of hate crime laws. According to this theory, when people are given a small reward for acting in a way contrary to their beliefs, they may change those beliefs. The explanation for this phenomenon is that they conclude that the reward was not large enough to justify their actions, so therefore they assume that their actions must really reflect their beliefs. Similarly, if people are threatened with only small punishments for certain behaviors, they may conclude that they avoided those behaviors because they actually did not want to perform them. On the other hand, when people are given large rewards (or threatened with large punishments), their beliefs do not change. They assume that their behavior is due to the reward (or punishment) rather than intrinsic motivations (see, e.g., Carlsmith, Collins, & Helmreich, 1966; Deci, 1975; Festinger & Carlsmith, 1959; Lepper & Greene, 1975). This is referred to as the *overjustification effect* (Tang & Hall, 1995).

Because hate crime laws increase the penalties for bias-motivated behaviors, they may trigger the overjustification effect. That is, individuals who have biased beliefs may conclude that their restraint from committing hate crimes is due not to lack of desire to commit them but rather to the possibility of harsh punishment. They will not internalize unbigoted ideologies and may therefore continue to act out their prejudice in ways that are not illegal. Furthermore, if the laws are ever repealed, their rationale for not committing hate-motivated acts will disappear, and they may be even more likely to commit those acts.

At this point, it is merely conjecture whether hate crime laws have the kinds of effects that attitudinal inoculation and cognitive dissonance theories would predict. Nobody has conducted an empirical examination of these particular questions. However, both theories are well supported by several decades of research, so their potential effects are certainly worth considering.

NARRATIVE PORTRAIT

Prosecuting Hate Crimes

Wendy L. Patrick is a San Diego deputy district attorney. As a member of the Special Operation/Hate Crime Unit, she is responsible for prosecuting hate crimes. She also belongs to the San Diego Hate Crime Coalition and the Hate Crime Registry Management Team, and she has made numerous presentations on the topic. In this piece, she discusses the satisfactions and frustrations of her job.

Introduction

The most satisfying part of being a hate crime prosecutor is the same as the most frustrating part: striving to achieve justice for victims. It is satisfying when we can identify and prosecute a hate crime suspect; it is frustrating when, despite our best efforts, we cannot.

Hate crimes are message crimes. They affect more than the particular individual who was targeted—they affect the entire community. Hate crime victims cannot take precautionary measures to defend themselves, because they are targeted solely due to who they are.

Hate Crime Laws

Most hate crime laws take the form of enhancements that increase punishment for an underlying crime. Hate crime enhancements require us to prove that the crime was committed due to the victim's actual or perceived race, color, religion, nationality, country of origin, ancestry, disability, gender, or sexual orientation. Legally, we need to prove that the suspect's bias was a substantial factor behind the commission of the crime. Hate crime enhancements make lesser crimes (misdemeanors) punishable as more serious crimes (felonies). Serious crimes that are already felonies may be punishable by an additional term in custody if we can prove the hate crime allegation.

Hate Crimes and Hate Incidents

Hate crimes are criminal acts committed against someone due to their membership in one of the protected classes. Hate incidents are noncriminal acts of discrimination, such as speaking racial slurs or distributing racist leaflets. Although hate incidents are not punishable as crimes, we encourage law enforcement to document them for tracking purposes and future use.

A Voice for Victims

Many hate crime victims are reluctant to report their victimization. Some are unaware of hate crime laws; others don't trust the police and don't believe they will receive any help. Some fear retaliation; others fear deportation. In all cases, they suffer from a range of negative emotions that are unique to hate crime victims.

Hate crime victims are targets. When people are victims of hate crimes, the fear of revictimization may lead to feelings of helplessness and isolation. They feel degraded, frustrated, and worst of all, they are afraid. These emotions ripple through the particular community targeted by hate crime offenders, leading to outrage, blame, retaliation, and collective fear.

As a hate crime prosecutor, I can help. If we are able to charge a suspect with the hate crime, we become the voice the victim never had. We become not only the victims' advocate, but also a spokesperson for their community, sending the message that bigotry will not be tolerated. Herein lies the most rewarding part of my job. The frustrating part, as explained next, is that we cannot always find the perpetrator.

Unsolved Hate Crimes

Statistically, most hate crimes go unsolved. The reason is that most hate crimes are attacks on strangers that result in little or no information about the suspect. The victims of these unsolved cases thereby suffer the additional adverse emotion of frustration that their offender will not be brought to justice. This frustration, like the outrage of the crime itself, also ripples through

(Continued)

(Continued)

the victim's community. We in law enforcement often find ourselves in the unenviable position of having to explain to an upset hate crime victim or community member that, despite our best efforts, we do not have a suspect.

The Power of Partnerships

The partnerships between prosecutors, law enforcement, community groups, and victim advocacy groups bring hope to hate crime victims even if we cannot solve their crime. We track all reported hate crimes and hate incidents, and share information and intelligence with law enforcement agencies. This cooperation, combined with increased public participation, increases our chances of locating and prosecuting hate crime offenders. Our partnership with community groups increases the visibility and public awareness of hate crimes, and our partnerships with victim advocacy groups allow us to offer hate crime victims support and sometimes even financial assistance, even if we cannot find the perpetrator. Some hate incidents that cannot be prosecuted criminally are referred to private attorneys, who may pursue a civil rights cause of action on behalf of the victim.

The Future

Although we cannot realistically expect to eradicate hate crimes, we do hope to make a difference. We will work tirelessly to educate our community that they have a right to be free from hate crimes, and we seek to send a message to hate crime offenders that we will prosecute them to the fullest extent of the law. In the balance, the opportunity to help hate crime victims regain their dignity outweighs the frustration of unsolved cases. I am looking forward to the opportunity to continue making a difference—the most rewarding part of my job.

SOURCE: Reprinted with permission.

Conclusion

The constitutional dilemmas concerning hate crime laws are surely interesting and can lead to some lively debates. Among legal scholars, these issues remain quite contentious. Although the philosophical questions remain, the practical questions have largely been answered by the Supreme Court. Hate crime laws, as long as they comport with certain substantive and procedural requirements, are constitutional. However, the discussion about the wisdom, utility, and implementation of these laws is far from over because many important policy concerns still remain.

Discussion Questions

1. If you were a judge who had to rule on the constitutionality of hate crime laws, how would you rule and why? Which arguments do you find most convincing? If you were a state legislator, would you support hate crimes legislation?
2. Whose job do you think it should be to determine a defendant's motive in hate crime cases: the jury's or the judge's? What leads you to this conclusion? What do you think the standard of proof should be?
3. If you were writing a hate crimes law, which groups would you include? What are the dangers of over- or underinclusion?
4. Assess the assertion that by excluding sexual orientation from hate crime laws, the government implicitly condones violence against gays and lesbians.
5. Discuss the relationship between hate crimes and the crimes of rape and domestic assault. Are all rapes and domestic assaults hate crimes? Should gender-based crimes be included in hate crime legislation? Would doing so diminish the attention paid to rapes and domestic assaults? Conversely, would inclusion of gender-based crimes lessen the focus on hate crimes based on categories such as race and religion?
6. Jacobs and Potter (1998) argue that hate crime laws actually increase inter-group conflict. What is the basis for this argument? Do you agree? How would you design a study to examine this question?
7. Why are so few hate crimes reported to the police? What strategies or programs might help increase reporting? Do you think the recommendations of the California Attorney General's Civil Rights Commission on Hate Crimes will be followed and, if so, do you think they will be effective?
8. Based on the research presented in this chapter, what policies or procedures would you recommend to improve police reporting of hate crimes?
9. Describe the many barriers to obtaining a hate crime conviction. In general, do you believe that these barriers are good, in that they may act to screen out unmeritorious cases? Given the very small percentage of cases that actually make it through, do you believe hate crime laws still have merit?
10. What factors might affect a jury's decision in a hate crime case? How would you design a study to examine these factors? If you found that juries' decisions were heavily influenced by extralegal factors such as race, what would be the policy implications?
11. If you had been a juror in Dharun Ravi's case, what evidence would have helped you decide whether his acts were hate crimes? Before the trial,

Ravi claimed that he had a close friend who was gay. Would this be relevant to your decision?

12. Some critics have argued that hate crime laws might actually hurt the people they were intended to protect. What is the basis of this argument? How convincing do you find it? What kinds of empirical evidence would you look for to support or refute it?
13. If you were a policymaker, what questions about hate crimes would you want to see pursued? Who should pursue them? Scientists? The government? Advocacy groups? What are the potential advantages and disadvantages of each of these?

Internet Exercises

1. Visit a few websites of police agencies to see what information, if any, they have about hate crimes. Here are a few places to start: the Los Angeles Police Department (www.lapdonline.org), the New York City Police Department (www.nyc.gov/nypd), and the Boston Police Department (www.cityofboston.gov/police/). How complete, accurate, and helpful is the information available on these sites? You might also try visiting some prosecutors' sites, such as the Los Angeles County District Attorney's Office (<http://da.co.la.ca.us>).
2. The FBI publishes annual hate crime reports (www.fbi.gov/ucr/ucr.htm), as does the state of California (ag.ca.gov/cjsc/pubs.php#hate). In addition to looking at data from a single year, you can examine trends over several years. After you read these reports, and considering what you now know about hate crime reporting, what conclusions do you draw?
3. Take a look at this report on discrimination experienced by transgender people in the United States: http://www.thetaskforce.org/static_html/downloads/reports/reports/ntds_full.pdf. If you were to conduct a similar survey (of transgender people or of members of another group) what questions would you ask? In what ways can surveys like this help us form policies, and what are their limitations?

Suggested Readings

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- Jacobs, J. B., & Potter, K. (1998). *Hate crimes: Criminal law and identity politics*. New York, NY: Oxford University Press.
- Kraybill, D. J. (2014). *Renegade Amish: Beard cutting, hate crimes, and the trial of the Bergholz barbers*. Baltimore, MD: Johns Hopkins University Press.
- Sherry, M. (2010). *Disability hate crimes: Does anyone really hate disabled people?* Surrey, UK: Ashgate.

Notes

1. The distinction between motive and intent is, legally, quite complex. For an extensive discussion, see Gardner (1993).
2. However, in a later case, the Court held that the defendant's racist beliefs could not be considered during sentencing if they did not relate specifically to the crime (*Dawson v. Delaware*, 1992).
3. Absent previous hate crime convictions (which would probably be inadmissible), such a pattern could generally be shown only through evidence of the defendant's hate group membership and/or bigoted speech. As I discuss later in this chapter, the use of such evidence raises important First Amendment questions in and of itself.
4. Some statutes deal directly with this issue by stating that an act is a hate crime if it is motivated by the offender's perception of the victim's group, as well as the victim's actual group.
5. Actually, there was one important difference between these two cases. After shooting the women, Lepine turned his gun on himself. Furrow, however, did not. He ultimately pleaded guilty to 16 federal charges and was sentenced to life without parole ("Furrow Pleads Guilty to Shootings," 2001).
6. As an example, in the 3 weeks preceding August 16, 2002, the Associated Press (2002) reported that five men over 70 years of age had been robbed in the neighborhood near the California Capitol.
7. Henard blamed women for the ills of society and had once tried to file a civil rights complaint against the "white women of the world."
8. King and Evers were both African American civil rights leaders who were murdered by white men. Kahane was the leader of a militant Jewish group; he was killed by an Egyptian man in 1990.
9. Interestingly, however, Soule and Earle (2001) and Grattet and colleagues (1998) found no relationship between the presence of an ADL office in a particular state and the likelihood or speed of that state passing a hate crimes law.
10. It should be noted that these data do slightly underestimate the effect of hate crime laws in that they do not include offenders who were initially charged with a hate crime but who, pursuant to a plea bargain, pleaded guilty to the underlying offense. The existence of the hate crime charge, and the threat of penalty enhancement, may encourage some defendants to plead guilty when they otherwise would not have or to plead guilty to a more serious charge.
11. In a few states, as well as in federal cases, this decision is made by a grand jury instead of a judge.
12. The FBI report does not specify how many of the victims were black. However, 36.2% of the offenses were classified as antiblack.

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