UCLA LAW REVIEW

Expressive Enforcement

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ABSTRACT

Laws send messages, some of which may be heard at the moment of enactment. But much of a law's expressive impact is bound up in its enforcement. Although scholars have extensively debated the wisdom of expressive legislation, their discussions in the context of domestic criminal law have focused largely on enactment-related messaging, rather than on expressive enforcement. This Article uses hate crime laws—the paradigmatic example of expressive legislation—as a case study to challenge conventional understandings of the messaging function of lawmaking. The Article asks: How do institutional incentives shape prosecutors' enforcement decisions, and how do these decisions affect the message of hate crime laws?

To answer that question, the Article presents original data from the first multistate qualitative empirical study of hate crime prosecution. The findings help to explain a paradox: In archetypal hate crime cases involving animus directed at a victim's core identity features—such as race or sexual orientation—prosecutors may decline to include hate crime charges because of statutory incentives, difficulty of proving motive, and concerns about jury reaction. Conversely, hate crime enforcement may be appealing to prosecutors in precisely those cases that are least likely to further the expressive purposes of hate crime laws. After exploring this mismatch, the Article identifies some areas where there may be irreconcilable tensions between the expressive goals of legislators and the incentives of prosecutors and, in other areas, offers recommendations to align legislative goals with enforcement practices.

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The author would like to thank Rachel Brewster, Michael Coenen, James Coleman, Seth Davis, Sharon Dolovich, Ronald Eisenberg, David Fagundes, Richard Fallon, Charles Fried, Jacob Gersen, John Goldberg, Jim Greiner, Janet Halley, Carissa Hessick, Michael Klarman, Adriaan Lanni, Frederick Lawrence, Lawrence Lessig, Angela Littwin, William Magnuson, Daniel Meltzer, Bernadette Meyler, Marc Miller, Martha Minow, Sonja Starr, Carol Steiker, Matthew Stephenson, Jeannie Suk, Susannah Barton Tobin, Mark Tushnet, Robert Weisberg, and participants in the Climenko Workshop at Harvard Law School for thoughtful comments and suggestions. Thanks also to the prosecutors and advocates who graciously volunteered their time and shared their insights. Bradley Oppenheimer provided excellent research assistance.

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INTRODUCTION

Laws send messages.[1] The enactment of legislation itself sends a signal that society endorses a certain message. But much of a law's communicative impact is not felt until later and is bound up with whether and how the legislation is enforced. Notably, the actors making enforcement decisions have incentives and resource constraints that may differ considerably from those of legislators. In this Article, I use the example of hate crime legislation to explore why enforcement decisions made against the background of those constraints may result in a mismatch between lawmakers' intended message and that delivered by enforcement.

Legislative history suggests that hate crime law proponents intended to send a strong message of tolerance and equality, signaling to all members of society that hatred and prejudice on the basis of identity will be punished with extra severity.[2] Senator Ted Kennedy, one of the main supporters of federal hate crime legislation, explained, "Just as hate crimes have been characterized as 'message crimes,' passage of the Hate Crimes Prevention Act will send a clear message that the nation intends to do all it can to punish those who commit acts of violence fueled by hatred."[3] Similar expressive rhetoric can be found throughout state and federal legislative history and focuses on the importance of sending a message condemning hateful motives and favoring tolerance.[4]

Hate crime laws are primarily designed to address archetypal cases involving (1) animus; (2) a defendant who belongs to one identity group and a victim who belongs to a different group; and (3) a choice of victim that is largely symbolic, such that one victim is interchangeable with, and serves as a representative of, other members of the victim's identity group.[5] The outer limits of hate crime prosecution are jurisdiction specific, but when all three factors are present, the underlying crime could be charged as a hate crime according to any jurisdiction's

1. *See* Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995); Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339 (2000); Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725 (1998); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996).
2. The expressive theory behind hate crime legislation is well documented. *See, e.g.*, Sara Sun Beale, *Federalizing Hate Crimes: Symbolic Politics, Expressive Law, or Tool for Criminal Enforcement?*, 80 B.U. L. REV. 1227, 1265–66 (2000); Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 463–67 (1999).
3. Edward M. Kennedy, *Hate Crimes: The Unfinished Business of America*, BOS. B.J., Jan./Feb. 2000, at 6, 23 (footnote omitted).
4. *See infra* Part I.B.
5. *See infra* Part I.C. Here, archetypal refers not to a normative ideal of hate crime legislation but to a distillation from positive law.

hate crime statute. By contrast, in a nonarchetypal case, one or more of the three aforementioned factors is missing, and the case may appear less like a hate crime and more like an ordinary crime of opportunity.

At present, hate crime laws are on the books in forty-eight states and the District of Columbia.[6] In 2009, President Obama signed the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act,[7] which protects victims targeted based on their race, color, religion, national origin, actual or perceived gender, sexual orientation, gender identity, or disability. In some states, hate crime laws prohibit targeting based on traits such as age, political affiliation, and personal appearance.[8]

Scholars tend to examine hate crime legislation as a homogeneous unit across jurisdictions,[9] and most either decry the laws as unnecessary and unconstitutional or praise the laws for their positive message and vision of a more tolerant society.[10] Despite the prevalence of these normative discussions about hate crime enactment, hate crime enforcement and specifically institutional incentives at the enforcement stage remain largely undocumented and undertheorized.

This Article fills that gap in the academic literature, challenging conventional understandings about the messaging function of hate crime laws and empirically documenting enforcement practices. It presents the first multistate qualitative empirical study of hate crime prosecution, compiling original data from semistructured interviews with fifty-two prosecutors from twenty-three states and the District of Columbia about their enforcement decisions.[11]

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6. *See infra* Appendix II: State Hate Crime Laws.
7. Pub. L. No. 111-84, 123 Stat. 2835 (2009).
8. *See, e.g.*, D.C. CODE § 22-3701(1) (2001) ("'Bias-related crime' means a designated act that demonstrates an accused's prejudice based on the actual or perceived race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, family responsibility, homelessness, physical disability, matriculation, or political affiliation of a victim . . . ."); W. VA. CODE ANN. § 5-11-20 (LexisNexis 2007) (protecting those targeted on the basis of "race, color, religion, sex, ancestry, national origin, political affiliation or disability").
9. *See, e.g.*, Lu-in Wang, *Unwarranted Assumptions in the Prosecution and Defense of Hate Crimes*, CRIM. JUST., Fall 2002, at 4. On the rare occasion that a vertical approach is used and specific aspects of a jurisdiction's hate crime legislation are explored, the scholarly inquiry is generally limited to the development of a particular state's hate crime law without reference to parallel developments in other jurisdictions. *See, e.g.*, Alex Ginsberg, Note, *Hate Is Enough: How New York's Bias Crimes Statute Has Exceeded Its Intended Scope*, 76 BROOK. L. REV. 1599 (2011).
10. Some scholars have also focused on whether a particular identity group, such as homeless individuals, should be included as a protected category in federal or state hate crime legislation. *See, e.g.*, Scott Steiner, *Habitations of Cruelty: The Pitfalls of Expanding Hate Crime Legislation to Include the Homeless*, 45 CRIM. L. BULL. 810 (2009); Raegan Joern, Note, *Mean Streets: Violence Against the Homeless and the Makings of a Hate Crime*, 6 HASTINGS RACE & POVERTY L.J. 305 (2009).
11. My work is the first qualitative study of hate crime prosecution to examine more than one state and to interview more than sixteen prosecutors. Two dissertations in the social sciences included

The Article asks: How do institutional incentives shape prosecutors' enforcement decisions, and how does the pattern of enforcement complement or undermine the message of hate crime enactment? It adopts an expansive definition of enforcement that includes not only ultimate punishment but also law enforcement decisions from initial police investigation through prosecutors' charging decisions. While other scholars have focused exclusively on the expressive dimension of punishment,[12] I argue that prosecution itself takes on an expressive dimension that can either further the message of a statute's enactment or contradict it.

A stark contrast emerges between the goals of hate crime laws as envisioned by legislators and the practical realities of prosecutorial discretion in deciding whether to add a hate crime charge. While drafters of early hate crime legislation focused on addressing those manifestations of identity-based hate that risk traumatizing communities and rendering individuals vulnerable based on their group identity,[13] prosecutorial incentives may cut against charging such archetypal cases as hate crimes.

Consider a recent case in Houston, Texas. On April 22, 2006, two white teens with ties to the white supremacist movement brutalized David Ritcheson, a seventeen-year-old Hispanic boy. Local papers reported that the defendants "dragged the victim into a backyard and then sodomized him with a plastic pipe from a patio table umbrella," poured bleach on him, and left him for dead.[14] Witnesses testified that the attackers called Ritcheson a "wetback" and a "spic" as

interviews with prosecutors from a single state, and one of these focused exclusively on a single office. *See* Stephanie D. Cappadona, Which Bias Crimes Get Prosecuted? An Analysis of Bias Motivated Incidents and Prosecutions in the City of Boston, Massachusetts 2007–2008 (Apr. 20, 2011) (unpublished Ph.D. dissertation, Northeastern Univ.) (on file with author) (drawing on interviews with fifteen Assistant District Attorneys in Boston); Beverly Anne McPhail, Constructing Justice: Prosecutorial Decision Making in Hate Crime Enhancements (Dec. 2002) (unpublished Ph.D. dissertation, Univ. of Tex. at Austin) (on file with author) (drawing on interviews with sixteen prosecutors in Texas). For a comprehensive treatment of empirical methods in legal analysis, see ROBERT M. LAWLESS ET AL., EMPIRICAL METHODS IN LAW (2010). For details of the study's methodology, see *infra* Part II.A. and Appendix I: Qualitative Methodology.

12. *See, e.g.*, JOEL FEINBERG, *The Expressive Function of Punishment*, *in* DOING & DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY 95 (1970); Jean Hampton, *An Expressive Theory of Retribution*, *in* RETRIBUTIVISM AND ITS CRITICS 1 (Wesley Cragg ed., 1992).

13. Proponents of hate crime legislation have referred to crimes motivated by hate as "attack[ing] the victim not only physically but at the very core of his identity" and as resulting in "[s]tigmatization . . . shown to bring about 'humiliation, isolation and self-hatred.'" Frederick M. Lawrence, *The Evolving Federal Role in Bias Crime Law Enforcement and the Hate Crimes Prevention Act of 2007*, 19 STAN. L. & POL'Y REV. 251, 255–56 (2008).

14. Jaime Castillo, *Is Harris County Prosecutor Thinking What Makes a Hate Crime?*, SAN ANTONIO EXPRESS-NEWS, May 6, 2006, at 1B.

they continued to beat him long after he was already unconscious.[15] Ritcheson's attackers were covered in "White power and swastika tattoos" and one of his attackers had recently assaulted two other Hispanics, nearly killing one of them.[16]

Despite the fact that this case featured the characteristics of an archetypal hate crime, prosecutors did not charge either of the defendants with a hate crime enhancement.[17] This provoked an outcry from interest group leaders who expressed feelings of betrayal; while they fought hard to pass hate crime legislation, the lack of enforcement suggested that they had achieved only a symbolic victory. Newspapers teemed with opinion pieces insisting that this was a hate crime and should be charged as such.[18] More than 30 legislators signed a letter imploring Chuck Rosenthal, the Harris County District Attorney, to add a hate crime charge.[19]

So why did prosecutors refuse to charge this case as a hate crime? Mike Trent, the Harris County prosecutor, explained that adding hate crime charges in this case would have had no legal effect because it was already a first-degree felony and could not be elevated any higher.[20] A look at the relevant hate crime statute confirms that, in Texas, a hate crime charge, if proven, would increase the defendant's sentence by one category except in the case of class A misdemeanors and first-degree felonies. Indeed, in the Ritcheson case, a hate crime charge, even if proven, could not have increased the defendants' sentencing range.

In implementing hate crime laws, prosecutors may share legislators' objectives, but not in isolation. They are also motivated by efficiency concerns, such as the difficulty of proving that a crime was motivated by animus or the fact that, even if one did prove animus, conviction on a hate crime charge might increase an

15. *Local Law Enforcement Hate Crimes Prevention Act of 2007: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 110th Cong. 67 (2007) [hereinafter *Hearing*] (statement of David Ritcheson). Ritcheson testified:

> After I was sucker-punched and knocked out, I was dragged into the backyard for an attack that would last for over an hour. Two individuals, one an admitted racist skinhead, attempted to carve a swastika on my chest. After they stripped me naked, they burned me with a cigarette, and I was kicked by the skinhead's steel-toed army boots.

Id.

16. *Id.*

17. *Id.* at 68. Ritcheson testified: "[D]espite the obvious bias motivation of the crime, it is very frustrating to me that neither the State of Texas nor the Federal Government was able to use hate crime laws to prosecute my attackers." *Id.*

18. Some reports juxtaposed this heinous violent attack with other significantly less severe assaults that were charged as hate crimes, highlighting the inconsistency of hate crime prosecution. *See, e.g.*, Castillo, *supra* note 14.

19. *Id.*

20. *No Hate Crime Charges After Brutal Attack*, NBC NEWS (Apr. 28, 2006, 2:49 PM), http://www.nbcnews.com/id/12530133#.UuB3AtLTlaQ.

already lengthy prison sentence only incrementally, if at all. This might dissuade a prosecutor from adding a hate crime charge despite substantial evidence of bias motivation.

Conversely, when a hate crime law carries a substantial extra penalty, it might be used strategically by prosecutors in nonarchetypal cases, in which one or more of the three archetypal factors are absent, to encourage a plea bargain to lesser charges. Consider New York's hate crime statute, which includes age, defined as sixty and older, as a protected category. Enterprising prosecutors from the Queens' Elder Fraud Unit recently have begun including hate crime charges in cases of alleged swindling involving elderly victims in which there is no evidence of animus. While the legislation's preamble focuses on animus, asserting that "[c]rimes motivated by invidious hatred toward particular groups not only harm individual victims but send a powerful message of intolerance and discrimination to all members of the group to which the victim belongs,"[21] the statute itself does not explicitly require a showing of animus. Thus, a defendant who "intentionally selects" a victim because of a protected characteristic can be charged under New York's hate crime statute whether the defendant was motivated by identity-based prejudice or a determination that the victim would be an easy target.[22] Furthermore, in New York a conviction for theft of less than $1 million carries no mandatory prison time, whereas a conviction for "Grand Larceny as a Hate Crime" carries a minimum of one year in prison and could result in a sentence of up to twenty-five years. This creates the following paradox: Hate crime laws may turn out to be most appealing to prosecutors, and therefore most used, in cases that do not involve identity-based animus, thus diluting the laws' intended message promoting group tolerance.

After examining the mismatch between enactment goals and enforcement realities, this Article considers ways in which legislators might more effectively preserve the intended message of hate crime legislation by better aligning prosecutorial incentives with legislative expression.[23] As a starting point, when enacting expressive legislation, legislators should consider carefully what messages they may be sending both ex ante to potential victims and defendants upon passage of the laws and ex post based on predictions of how prosecutors will use these laws in practice. Legislators who intend for hate crime laws to express social values be-

21. N.Y. PENAL LAW § 485.00 (McKinney 2008).

22. *Id.* § 485.05.

23. Legislators concerned with the disparity between hate crime legislation and prosecution might also choose to repeal the legislation entirely, an approach that some scholars support. *See, e.g.*, JAMES B. JACOBS & KIMBERLY POTTER, HATE CRIMES: CRIMINAL LAW & IDENTITY POLITICS 145 (1998) (favoring a policy decision to "repeal the new wave of hate crime laws and enforce the generic criminal laws evenhandedly and without prejudice").

yond enactment might take steps to encourage prosecutors to use the legislation in (and only in) archetypal hate crime cases, while remaining mindful of the broader criminal law context of which hate crime prosecution is only a part. While there is no one-size-fits-all way to reconcile messages of enactment with those of enforcement, an inquiry into enforcement incentives and effects is a necessary first step toward resolving the disconnect between legislative and prosecutorial messaging.

The Article proceeds in three Parts. Part I introduces the history and development of hate crime laws, highlighting the legislative desire to send a message decrying bigotry and promoting tolerance. Part II examines hate crime enforcement, documenting prosecutorial incentives as they relate to charging decisions and the expressive effects of these enforcement decisions. Part III recommends ways to improve coordination between institutional actors by better aligning prosecutorial incentives with legislative expression, a crucial step toward communicating a coherent message in the hate crime context and throughout criminal law.

I. THE ENACTMENT OF HATE CRIME LEGISLATION

To explore the relationship between the promulgation and enforcement of hate crime laws, it is first necessary to situate the enactment of hate crime legislation in the criminal law lexicon. This Part outlines the origins, development, and expressed purpose behind hate crime legislation. It also examines the academic justifications for hate crime laws, highlighting the rhetorical dominance of expressive theory.

A. Origins and Development

The Civil Rights Act of 1968,[24] signed into law during the riots that followed the assassination of Martin Luther King Jr., is the most direct precursor to modern hate crime legislation.[25] It permitted federal prosecution of anyone who

24. Pub. L. No. 90-284, 82 Stat. 73. The 1968 Act was intended as a follow-up to the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, legislation designed to give "all Americans the right to be served in facilities which are open to the public—hotels, restaurants, theaters, retail stores, and similar establishments," as well as "greater protection for the right to vote." John F. Kennedy, President of the U.S., Address on Civil Rights (June 11, 1963) (transcript available at http://millercenter.org/president/speeches/detail/3375).

25. Some scholars trace the origin of hate crime legislation back to the Ku Klux Klan Act of 1871, enacted by the U.S. Congress to combat lynching and other bias-motivated violence in the post–Reconstruction Era South. ROBERT J. KACZOROWSKI, THE POLITICS OF JUDICIAL

"by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with any person because of his race, color, religion or national origin" while the victim attempted to engage in federally protected activities such as voting, attending school, and enjoying public accommodations.[26] The words "by force," combined with the historical backdrop of the statute—persecution of African Americans by whites on the basis of race—suggest the legislation's preoccupation with combating hateful, intergroup conduct, or the threat thereof, which was intended to intimidate the victim along with other members of the victim's identity group. Despite these early efforts, however, federal prosecution under the Act was rare because of the requirement that a victim be engaged in a federally protected activity and the limited categories of victims protected by the legislation.[27] Federal efforts to track hate crimes were also stymied because, despite Congressional requirements to collect hate crime data, local and state reporting to federal authorities was (and remains) voluntary.[28] Many jurisdictions therefore do not submit any data.[29]

INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS, 1866-1876, at 53–55 (1985). The Ku Klux Klan Act declared it a federal offense to:

> [C]onspire together, or go in disguise upon the public highway or upon the premises of another for the purpose, either directly or indirectly, of depriving any person or any class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State from giving or securing to all persons within such State the equal protection of the laws.

Ch. 22, § 2, 17 Stat. 13, 13 (codified as amended at 42 U.S.C. §§ 1983, 1985, 1986 (2006)). Few convictions were made under the Klan Act and, even when the Justice Department obtained convictions, Southern judges often refused to enhance sentences based on evidence of bias. *See* KACZOROWSKI, *supra*.

26. 18 U.S.C. § 245 (b)(2) (2012).

27. Ryken Grattet & Valerie Jenness, *The Birth and Maturation of Hate Crime Policy in the United States*, 45 AM. BEHAV. SCIENTIST 668 (2001).

28. In 1990, Congress passed, and President George H. W. Bush signed into law, the Hate Crime Statistics Act (HCSA), the first federal legislation requiring the Justice Department to collect data on crimes that "manifest evidence of prejudice based on race, religion, sexual orientation, or ethnicity" from law enforcement agencies nationwide and to publish an annual summary of the findings. Hate Crime Statistics Act, Pub. L. No. 101-275, 104 Stat. 140 (1990) (codified as amended at 28 U.S.C. § 534 note (2012)). In 1994, Congress expanded coverage of the HCSA, passing the Violent Crime Control and Law Enforcement Act (VCCLEA), which required the Federal Bureau of Investigation (FBI) to report on crimes based on disability. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796. The VCCLEA also required the U.S. Sentencing Commission to establish guidelines for sentencing that would increase penalties for those convicted of hate crimes under federal law. *Id.* tit XXVIII, § 280003, 103 Stat. at 2096 (codified at 28 U.S.C. § 994 (2012)).

29. For example, in 2005, neither New York City nor Phoenix submitted hate crimes data. *Hearing*, *supra* note 15, at 87 (statement of Jack McDevitt, Assoc. Dean, Northeastern Univ.); *see* ANTI-

Various attempts to expand the scope of federal hate crime legislation, including the Hate Crimes Prevention Act of 1997, the Hate Crimes Prevention Act of 1999, and the Local Law Enforcement Hate Crimes Prevention Act of 2007, were unsuccessful.[30] In 2009, however, at a packed White House ceremony and following an outpouring of support by interest groups, advocacy organizations, and victims' families, President Barack Obama signed into law the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, which expanded the categories of protected victims to include those targeted because of actual or perceived gender, sexual orientation, gender identity, and disability.[31] Obama hailed the hate crimes bill as a crucial step that would "help protect our citizens from violence based on what they look like, who they love, how they pray."[32] While the 2009 Act was significantly more expansive than its 1968 precursor,[33] Obama's remarks highlighted the link between the modern federal hate

DEFAMATION LEAGUE, COMPILATION OF FBI HATE CRIME STATISTICS ACT DID NOT REPORT (DNR) AND ZERO REPORTING (Nov. 2011) (on file with author).

30. Each of these federal hate crime bills died in committee. *See* Isabelle Cutting, *Hate Crimes Legislation, Now Riding on the DoD Bill*, OPEN CONGRESS BLOG (July 17, 2009), http://www.opencongress.org/articles/view/1106-Hate-Crimes-Legislation-Now-Riding-on-the-DoD-Bill. Other attempts to target hate crimes have also failed. For example, the Violence Against Women Act (VAWA) was included in Title IV of the VCCLEA and provided $1.6 billion to enhance the investigation and prosecution of violent crimes perpetrated against women. Violence Against Women Act of 1994, Pub. L. No. 103-322, tit IV, 108 Stat. 1902 (codified at 42 U.S.C. § 13981 (2006)). VAWA's Subtitle C also created a federal civil remedy, on top of existing state remedies, for violence motivated by gender-based animus. *Id.* § 40032, 108 Stat. at 1941-42 (codified at 42 U.S.C. § 13981(c)). In 2000, the U.S. Supreme Court struck down Subtitle C for exceeding congressional power, though the funding provisions of the Act remained in effect. United States v. Morrison, 529 U.S. 598 (2000). While the Court agreed with the government that there was a "voluminous congressional record" supporting the "assertion that there is pervasive bias in various state justice systems against victims of gender-motivated violence" and that "state-sponsored gender discrimination violates equal protection unless it serves important governmental objectives," the majority ruled that, even if there is unconstitutional state action, that action justifies Congress in targeting only the state actors, not private parties. *Id.* at 599–600, 620–21 (citations omitted) (internal quotation marks omitted).

31. The 2009 Hate Crimes Prevention Act was attached to the National Defense Authorization Act for Fiscal Year 2010. Pub. L. No. 111-84, 123 Stat. 2190 (2009). Congress grounded its authority for enacting federal hate crime legislation in the Thirteenth Amendment (for the categories of race and ethnicity) and the Commerce Clause (for the other categories of religion, gender, sexual orientation, gender identity, and disability). *See* Lawrence, *supra* note 13, at 272. Many have questioned the constitutionality of the Act but, to date, no plaintiffs have successfully challenged it. *See, e.g.*, United States v. Beebe, 807 F. Supp. 2d 1045 (D.N.M. 2011). For an academic challenge to the constitutionality of federal hate crime legislation, see John S. Baker, Jr., United States v. Morrison *and Other Arguments Against Federal "Hate Crime" Legislation*, 80 B.U. L. REV. 1191 (2000).

32. *Obama Signs Hate Crimes Bill Into Law*, CNN (Oct. 28, 2009), http://edition.cnn.com/2009/POLITICS/10/28/hate.crimes/index.html.

33. The 2009 Act dispensed with the federal nexus requirement for the protected categories of race and ethnicity; however, the new protected categories, such as sexual orientation and gender

crime law and its civil rights era predecessor, emphasizing the importance of the new legislation as a way to combat violent attacks against people based on core features of their identity.

Given that, until recently, the scope of federal hate crime legislation was extremely limited, most hate crime prosecutions occur at the state level. The earliest state hate crime proposals date back to the 1980s and were supported by both civil rights and victims' rights movements.[34] Today, only Georgia and South Carolina lack hate crime statutes.[35] All existing state hate crime statutes include the categories of race, ethnicity, and religion. Some states include the additional federally protected categories of disability, sexual orientation, gender, and gender identity.[36] A few states have expanded the protected categories further to include such categories as age, political affiliation, and personal appearance.[37]

B. Legislative Focus on "Sending a Message"

An examination of the legislative debates over hate crime laws suggests that legislators drafted the laws to send a strong message of tolerance and equality to perpetrators and victim groups alike and to signal to all members of society that hatred and prejudice based on identity will be punished with extra severity. Excerpts from legislative hearings over the past two decades illustrate the persistence of expressive rhetoric focusing on "sending a message."[38]

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identity, still require a federal nexus. National Defense Authorization Act for Fiscal Year 2010 §§ 4701–4713.

34. Terry A. Maroney, Note, *The Struggle Against Hate Crime: Movement at a Crossroads*, 73 N.Y.U. L. REV. 564, 579 (1998). In 1981, the Anti-Defamation League of B'nai Brith (ADL), perceiving that the number of hate crimes nationwide was rising sharply and that the criminal justice system was failing to handle the prosecution of hate crimes effectively, proposed a model hate crime statute. The language of the ADL statute was adopted by a majority of those states that passed hate crime legislation. STEVEN M. FREEMAN ET AL., ANTI-DEFAMATION LEAGUE, HATE CRIMES LAWS: A COMPREHENSIVE GUIDE 1, 2–3 (1994). According to the model hate crime statute, a penalty enhancement could elevate the punishment for an underlying crime if the defendant acted against persons or groups "on account of their actual or perceived race, color, religion, national origin, or sexual orientation." *Anti-Defamation League's Model Legislation: A Primer for Action*, *in* BIAS CRIME: AMERICAN LAW ENFORCEMENT AND LEGAL RESPONSES 206, 207 (Robert J. Kelly ed., rev. ed. 1993).

35. For a comparison of state statutes, see *infra* Appendix II: State Hate Crime Laws.

36. At present, thirty-two states cover sexual orientation, thirty-one cover disability, twenty-eight cover gender, and seven cover gender identity. *See infra* Appendix II: State Hate Crime Laws. Five states cover all the federally protected categories. *Infra* Appendix II: State Hate Crime Laws.

37. Ten hate crime statutes cover age, four cover homelessness, three cover political affiliation, and one covers matriculation and personal appearance. *Infra* Appendix II: State Hate Crime Laws.

38. An examination of the relevant legislative history reveals the predominance of expressive rhetoric in debates about hate crime laws. *See, e.g.*, *The Matthew Shepard Hate Crimes Prevention Act of 2009: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. (2009); *Hearing*, *supra* note 15; *Bias Crimes:*

Expressive rhetoric saturates the congressional debates over federal hate crime legislation. For example, Senator Levin encouraged the U.S. Senate to "send a clear message that America is an all-inclusive nation—one that does not tolerate acts of violence based on bigotry and discrimination"—and stressed that hate crime legislation "will send the message that we are a country that treasures equality and tolerance."[39] Senator Rockefeller described the legislation as "vital to make a clear statement against all violent hate crimes,"[40] and Senator Feinstein affirmed that hate crime legislation "would send the right message."[41] Senator Cardin also referred to the message sent through hate crime legislation, explaining, "The message when we pass this—and I certainly hope that we will pass this—is that America has made a priority protecting people from violence because of diversity, that diversity is embraced in America as our strength."[42]

State lawmakers have also emphasized their desire to send a message through the enactment of hate crime legislation. Just after the enactment of the Texas hate crime statute, the bill's Senate sponsor, Rodney Ellis, declared, "This is truly an historic day for the state of Texas . . . . The Texas Senate has sent a

Hearing Before the Subcomm. on Crime & Criminal Justice of the H. Comm. on the Judiciary, 102d Cong. (1992).

39. 146 CONG. REC. S5334–35 (daily ed. June 19, 2000) (statement of Sen. Carl Levin); *see also* 146 CONG. REC. S5345 (daily ed. June 19, 2000) (statement of Sen. John Breaux) (urging the U.S. Senate to "send a clear message throughout this country that these types of activities in this country will not be tolerated"); 146 CONG. REC. S5302 (daily ed. June 16, 2000) (statement of Sen. Ron Wyden) (describing the need "to send a strong and unequivocal message that we will not look the other way in the face of these crimes, that they will not be tolerated"); 146 CONG. REC. H9965 (daily ed. Oct. 13, 1999) (statement of Rep. Gregory Meeks) (urging Congress to "send a loud and clear message that those who want to hate others because they are different than they, it will not be tolerated"). Senator Lieberman also spoke in distinctly expressive terms, suggesting that hate crime legislation was "another way for our society to express our disdain . . . at acts of violence committed based on a person's race, religion, nationality, gender, disability, or sexual orientation." 146 CONG. REC. S5303 (daily ed. June 16, 2000) (statement of Sen. Joseph Lieberman).

40. 146 CONG. REC. S5433 (daily ed. June 20, 2000) (statement of Sen. Jay Rockefeller).

41. 146 CONG. REC. S5432 (daily ed. June 20, 2000) (statement of Sen. Dianne Feinstein); *see also* 145 CONG. REC. H3066 (daily ed. May 12, 1999) (statement of Rep. James McGovern) (emphasizing the broader harm caused by hate crimes to victims and their communities as the reason why a stern opposing message is crucial and highlighting the need to "send a clear and powerful message that we will not tolerate these violent acts which not only change the life of the victim, but affect the entire community"); 145 CONG. REC. H9961 (daily ed. Oct. 13, 1999) (statement of Rep. Jan Schakowsky) ("The Hate Crimes Prevention Act is such an opportunity to send a clear and powerful message that the safety of all people is a priority and anyone who threatens that safety will face the consequences."); 153 CONG. REC. H4445 (daily ed. May 3, 2007) (statement of Rep. Rush Holt) ("By making our Nation's hate crimes statutes more comprehensive, we will take a needed step in favor of tolerance and against prejudice and hate-based crime in all its forms. This legislation sends a strong message that hate-based crime cannot be tolerated and will be vigorously prosecuted.").

42. *The Matthew Shepard Hate Crimes Prevention Act of 2009: Hearing Before the S. Comm. on the Judiciary*, *supra* note 38 (statement of Sen. Ben Cardin).

message that our state is not a safe haven for hate."[43] The text of New York's hate crime statute recognizes "the gravity of hate crimes" and the extensive harm resulting from hate-motivated crimes, which "not only harm individual victims but send a powerful message of intolerance and discrimination to all members of the group to which the victim belongs."[44]

Those skeptical of hate crime laws echo proponents of the legislation in their use of expressive rhetoric. Senator Joseph Bruno, the majority leader of the New York Senate who blocked the hate crime legislation for eleven years before changing course and deciding to support it, explained,

> "I don't believe that a bias or hate bill by itself is going to do anything to reduce crime. But . . . the message that we're focusing on people who have malice in their hearts or hate or a bias towards an individual or group . . . maybe the time has come for us to send (that message) out there."[45]

Even avowed detractors of hate crime legislation have used expressivist rhetorical constructions. For example, in decrying the wisdom of hate crime laws, Representative Gohmert focused on the "message" of hate crime legislation. He quipped, "[T]he message of the hate crime legislation today is apparently this: If you are going to shoot, brutalize or hurt someone, the majority in Congress begs you not to hate us while you are shooting or brutalizing us. Please make it a random, senseless act of violence."[46]

C. Archetypal Hate Crimes

State hate crime statutes differ substantially, but they can be divided into two main categories: those that define hate crimes as motivated substantially or in part by "animus" or "prejudice" against the victim because of the victim's group membership,[47] and those that do not require a showing of animus but merely require that the victim be "intentionally selected" on the basis of group member-

43. Press Release, State Sen. Rodney Ellis, Senate Passes Byrd Act (May 7, 2001), *available at* http://www.senate.state.tx.us/75r/Senate/Members/Dist13/pr01/p050701b.htm.
44. N.Y. PENAL LAW § 485.00 (McKinney 2008).
45. Jordan Rau & Liam Pleven, *Bias Bill Is Expected to Advance*, NEWSDAY (USA), June 7, 2000, at A07.
46. *Hearing*, *supra* note 15 (statement of Rep. Louie Gohmert).
47. *See, e.g.*, FLA. STAT. ANN. § 775.085(1)(a) (West Supp. 2013) ("The penalty for any felony or misdemeanor shall be reclassified . . . if the commission of such felony or misdemeanor evidences prejudice based on the race, color, ancestry, ethnicity, religion, sexual orientation, national origin, homeless status, mental or physical disability, or advanced age of the victim[.]").

ship.[48] A typical animus-based hate crime statute requires proof of "prejudice," "bigotry and bias," or "hostility" based on the victim's group identity.[49] These statutes insist that the prosecutor prove that the defendant targeted the victim based on group identity and that hatred or prejudice was a central motivating factor in the crime. By contrast, discriminatory selection statutes do not require proof of animus, but only that the defendant intentionally selected the victim because of the victim's protected characteristic.[50] Despite this statutory distinction, legislative history suggests that legislators enacted hate crime laws, regardless of statutory formulation, to further the "state interest in preventing crimes and threats motivated by bigotry and bias."[51] Therefore, while not every hate crime statute technically requires animus, the desire to combat intergroup prejudice and discrimination appears to have motivated the enactment of the legislation across jurisdictions.[52]

When all three components of an archetypal hate crime—prejudice based on a protected characteristic, intergroup targeting, and symbolic victimization—are present, the underlying crime could be charged as a hate crime according to

48. *See, e.g.*, DEL. CODE ANN. tit. 11, § 1304(a) (2007) ("Any person who commits, or attempts to commit, any crime as defined by the laws of this State, and who intentionally . . . [s]elects the victim because of the victim's race, religion, color, disability, sexual orientation, national origin or ancestry, shall be guilty of a hate crime.").

49. *See* FLA. STAT. ANN. § 775.085 (providing for a penalty enhancement if the crime "evidences prejudice based on" designated protected categories); MASS. GEN. LAWS ch. 22c, § 32 (LexisNexis 2010) (defining a hate crime as "any criminal act coupled with overt actions motivated by bigotry and bias"); N.H. REV. STAT. ANN. § 651:6(I)(f) (2007) (extending the sentence of any offender who "[w]as substantially motivated to commit the crime because of hostility towards the victim's religion, race, creed, sexual orientation" and other protected categories). For a list of sample hate crime statutes, *see* FREDERICK M. LAWRENCE, PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW 178–97 (1999).

50. For examples of discriminatory selection statutes, see DEL. CODE ANN. tit. 11 § 1304 (2007); VA. CODE ANN. § 18.2-57 (2009); WIS. STAT. § 939.645 (2011–12).

51. *See, e.g.*, WASH. REV. CODE § 9A.36.078 (West 2009) (Finding of Washington's Malicious Harassment statute). For a detailed treatment of the distinctions between animus-based statutes and discriminatory selection statutes, see LAWRENCE, *supra* note 49, at 29–39.

52. It is also no coincidence that many hate crime bills have been named in memory of victims of intergroup hatred. *See, e.g.*, David Ray Ritcheson Hate Crime Prevention Act, H.R. 262, 111th Cong. (2009); Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, § 4701, 123 Stat. 2190, 2835 (2009); James Byrd Jr. Hate Crimes Act, TEX. PENAL CODE ANN. § 12.47 (West 2011). Also notable is the choice of featured speakers—victims and victims' family members—at hearings on proposed hate crime legislation. *See, e.g.*, *Hearing*, *supra* note 15, at 69–70 (featuring David Ritcheson, victim of a bias-motivated assault); *The Hate Crimes Prevention Act of 1998: Hearing on S.J. Res. 1529 Before the S. Comm. on the Judiciary*, 105th Cong. 36–39 (1998) (featuring Frances Mullins, daughter of James Byrd, Jr., for whom the federal hate crime legislation was eventually named); *Bias Crimes: Hearing Before the H. Subcomm. on Crime and Crim. Justice of the Comm. on the Judiciary*, *supra* note 38, at 6–8 (featuring Peg Rivera, sister-in-law of Julio Rivera, whose killer confessed, "I killed him because he was gay").

any jurisdiction's hate crime statute.[53] By contrast, a nonarchetypal case is missing one or more of these factors and may appear less like a hate crime and more like a crime of opportunity.

Nonarchetypal cases test the boundaries of hate crime legislation, calling into question how narrowly the category of hate crimes should be circumscribed. For example, some scholars and practitioners argue that rape and domestic violence should be prosecuted routinely as hate crimes.[54] Others, however, note that rape is already understood to be a heinous crime, and the existing punishment for a convicted rapist is severe.[55] Furthermore, to call rape a hate crime by definition even in the absence of any demonstration that the victim was selected as an identity group symbol may dilute the meaning of a hate crime. Some rape cases involve a particular relationship between two individuals such that no plausible argument could be made that the victim was chosen as a symbol or repre-

53. Many scholars assume that all categories of hate crime protection involve immutable traits. *See, e.g.*, LAWRENCE, *supra* note 49, at 40 ("[T]he bias crime victim cannot reasonably minimize the risks of future attacks because he is unable to change the characteristic that made him a victim."). This approach lacks persuasive force because, for example, age is immutable while religion is not, and while all hate crime statutes cover religion, only a few cover age. This fact indicates that our intuition about age and religion as hate crime categories may not be related to their immutability.

Others query whether history (and especially historical persecution) should be a factor. *See, e.g.*, Allison Marston Danner, *Bias Crimes and Crimes Against Humanity: Culpability in Context*, 6 BUFF. CRIM. L. REV. 389, 450 (2002) ("Bias crime statutes should be limited to crimes committed against members of groups that experience discrimination . . . ."). If so, we would want to limit hate crime charges to whites who harm blacks, men who harm women, heterosexuals who harm homosexuals, and so forth. Yet for equal protection reasons, the reciprocal harms must also be covered. History does reveal, however, what kinds of intergroup harms have been particularly egregious and stigmatizing in the past and may inform what protected categories are appropriate for inclusion.

54. *See* Elizabeth A. Pendo, *Recognizing Violence Against Women: Gender and the Hate Crimes Statistics Act*, 17 HARV. WOMEN'S L.J. 157 (1994); Eric Rothschild, *Recognizing Another Face of Hate Crimes: Rape as a Gender-Bias Crime*, 4 MD. J. CONTEMP. LEGAL ISSUES 231 (1993); Kristin L. Taylor, *Treating Male Violence Against Women as a Bias Crime*, 76 B.U. L. REV. 575 (1996); Steven Bennett Weisburd & Brian Levin, *"On the Basis of Sex": Recognizing Gender-Based Bias Crimes*, 5 STAN. L. & POL'Y REV. 21 (1994); Kathryn M. Carney, Note, *Rape: The Paradigmatic Hate Crime*, 75 ST. JOHN'S L. REV. 315 (2001).

55. Before 1977, when the Supreme Court struck down the use of capital punishment in rape cases on Eighth Amendment grounds, rape was one of only a few crimes deemed death eligible. Coker v. Georgia, 433 U.S. 584, 598–600 (1977); *see also* JOSEPH A. MELUSKY & KEITH A. PESTO, CRUEL AND UNUSUAL PUNISHMENT: RIGHTS AND LIBERTIES UNDER THE LAW 52 (2003). This is a common refrain among lawmakers who oppose the inclusion of gender in hate crime laws. *See, e.g.*, Joe Cutbirth, *Hate-Crime Bill Slows in Austin as Scope Widens*, FORT WORTH STAR-TELEGRAM, Apr. 1, 1993, at 1 ("[W]e have very specific rape statutes, and we have sexual abuse statutes, and we have family violence statutes. . . . Crimes against women that are gender-specific crimes, we have other mechanisms to take care of . . . ." (quoting Texas State Rep. Scott Hochberg) (internal quotation marks omitted)). Of course, this argument would also apply to any crime that could result in a lengthy sentence without the use of hate crime legislation, such as murder or aggravated assault.

sentative of a group. In some cases, there might be a plausible, even if inexcusable, misunderstanding. By contrast, the case of a serial rapist who victimizes women in such a way that one woman becomes a mere representative of women generally seems to fit squarely under even a narrow definition of hate crime.[56]

Another nonarchetypal case might involve a crime motivated by animus in which the victim was targeted as a representative of the victim's group but the defendant and victim are part of the same identity group. The main wrinkle here involves the level of granularity or specificity with which the group is defined. An example is when the relevant subgroups (such as different denominations of a single religion) are so distinct in appearance or lifestyle that they may function, in context, as separate groups. Imagine, for instance, a secular defendant of a religion targeting an orthodox member of that same religion by violently attacking him while poking fun at his religiously-inspired looks and lifestyle. Or the reverse: Imagine a situation in which a secular individual is targeted and accused of being a heathen by an orthodox adherent of that same faith.

Some might argue for extending hate crime legislation to cover such a case based on the notion that these two groups, while technically part of the same religion, are distinct enough that prosecuting such crimes as hate crimes is necessary to fulfill the expressive goals of the legislation. Others might support a rebuttable presumption that such a violent intragroup crime is not a hate crime but that hate crime legislation would be appropriate when there was strong evidence of group-based animus and when the two subgroups are distinct enough such that the threat of communal victimization would be possible. Arguably, when such a threat is lacking, it might be more likely that community policing and intragroup shaming could address the problem, making hate crime charges unnecessary in such situations.[57]

56. Cases involving criminals other than rapists who target individuals based on gender could also qualify as violent, intergroup hate crimes. For example, in 2006, Charles Carl Roberts IV drove to an Amish school, gun in hand, and after dismissing the boys, bound the remaining ten young girls together, shooting each of them and then killing himself. Jon Rutter & Eric G. Stark, *Dishwasher Turned Killer*, LANCASTER ONLINE (Sept. 11, 2013, 7:33 PM), http://lancasteronline.com/article/local/26564_Dishwasher-turned-killer.html. This analysis could also apply in some domestic violence cases, though such cases are more nuanced as there is necessarily a prior relationship between the parties that makes symbolic victimization less likely. For an examination of efforts to use antidiscrimination law to address domestic violence, see Sally F. Goldfarb, *Applying the Discrimination Model to Violence Against Women: Some Reflections on Theory and Practice*, 11 AM. U. J. GENDER SOC. POL'Y & L. 251 (2003).

57. *See* MARTHA C. NUSSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW 230–33 (2004); Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate*, 54 VAND. L. REV. 2157, 2222–28 (2001).

Finally, consider an intergroup crime in which the victim was targeted based on membership in a protected category but there was no evidence of bias or prejudice.[58] For example, imagine a pickpocket who targets gay men because of her belief that they are more likely to carry large sums of money. In this case, the pickpocket may have chosen her victims based on a protected characteristic, but there was no animus involved. Moreover, while she may have chosen a gay victim because of a preconception about his sexuality, his sexual orientation was not in and of itself the reason for targeting but instead served as a proxy for "good target." This case lacks both animus and symbolic victimization, two of the three factors that comprise an archetypal hate crime. As such, it more closely resembles a crime of opportunity than a hate crime.

D. Academic Justifications

Three strands of debate have dominated academic conversations about hate crime legislation: the statutes' constitutionality, their conformity to established theories of criminal law, and their practical wisdom as instruments to root out bias-motivated conduct.[59] While some still contend that hate crime statutes are unconstitutional because of their impact on free expression,[60] as a practical matter, the U.S. Supreme Court put this argument to rest in 1993 when it upheld Wisconsin's penalty enhancement provision as consistent with First Amendment freedoms.[61] Consequently, the most salient scholarly debates of the last twenty years have focused on the theoretical legitimacy and the practical wisdom of hate crime legislation.[62]

58. *See* Cecil J. Hunt, II, *In the Racial Crosshairs: Reconsidering Racially Targeted Predatory Lending Under a New Theory of Economic Hate Crime*, 35 U. TOL. L. REV. 211 (2003) (favoring the addition of a new category of "economic hate crime" to punish those found guilty of racialized predatory lending); *see also* Lisa M. Fairfax, *The Thin Line Between Love and Hate: Why Affinity-Based Securities and Investment Fraud Constitutes a Hate Crime*, 36 U.C. DAVIS L. REV. 1073 (2003) (advocating the inclusion of affinity fraud—in which members of an identity group defraud other members of that same group—as a hate crime). As most affinity fraud involves intragroup harm, such cases would not be characterized as archetypal hate crimes.

59. Janine Young Kim, *Hate Crime Law and the Limits of Inculpation*, 84 NEB. L. REV. 846, 847 (2006).

60. JACOBS & POTTER, *supra* note 23, at 128.

61. Wisconsin v. Mitchell, 508 U.S. 476 (1993) (upholding Wisconsin's hate crime statute by unanimous vote). For a discussion of the legal landscape immediately following the *Wisconsin v. Mitchell* decision, see Lawrence Crocker, *Hate Crimes Statutes: Just? Constitutional? Wise?*, 1992/1993 ANN. SURV. AM. L. 485.

62. *See* LAWRENCE, *supra* note 49; Claudia Card, *Is Penalty Enhancement a Sound Idea?*, 20 LAW & PHIL. 195 (2001). There are also constitutional debates about federal hate crime legislation related to the scope of federal power, but these are not relevant to individual state hate crime statutes. *See* Frederick M. Lawrence, *Federal Bias Crime Law Symposium*, 80 B.U. L. REV. 1437, 1448 (2000).

This Part examines the principal theoretical groundings for hate crime laws—retributivism, utilitarianism, and expressivism—demonstrating that expressive theory encapsulates aspects of both retributive and utilitarian justifications.[63] This expansive understanding of expressive theory explains its rhetorical dominance in debates on hate crime legislation.

1. Retributivism

Proponents of a retributivist approach contend that hate crime laws are justified if enhanced penalties are proportional,[64] either corresponding to the greater wrongdoing that results from hate crimes themselves or to the offenders' greater culpability due to their hate motives.[65] The greater wrongdoing thesis posits that enhanced penalties for hate crime perpetrators are appropriate since hate crimes cause more severe physical and psychological injuries to principal victims, vicarious injuries to members of a victim's identity group, and unique harms to society.[66] Harm theorists point to preliminary evidence suggesting that hate crimes are more likely to involve physical assaults and greater physical injury to victims.[67] They also focus on psychological trauma to the immediate victims, maintaining that hate crime victims, to a greater degree than victims of parallel non-hate motivated crimes, "tend to experience psychological symptoms such as depression or withdrawal, as well as anxiety, feelings of helplessness, and a pro-

63. Some scholars include expressivism as a subcategory of retribution. *See* Carissa Byrne Hessick, *Motive's Role in Criminal Punishment*, 80 S. CAL. L. REV. 89, 113 (2006). I separate it out for expository purposes in order to highlight its role in the academic and legislative debates concerning hate crime legislation and to illustrate its relationship to both retributivism and utilitarianism.

64. *See* ANDREW ASHWORTH, SENTENCING AND CRIMINAL JUSTICE 72–73 (3d ed. 2000); Hampton, *supra* note 12; Michael S. Moore, *The Moral Worth of Retribution*, *in* PRINCIPLED SENTENCING: READINGS ON THEORY AND POLICY 110 (Andrew von Hirsch et al. eds., 3d ed. 2009).

65. Anthony M. Dillof, *Punishing Bias: An Examination of the Theoretical Foundations of Bias Crime Statutes*, 91 NW. U. L. REV. 1015, 1024 (1997) (describing the "wrongdoing-culpability framework" as the central hypothesis of modern, retributive theory).

66. For a detailed discussion and critique of the greater wrongdoing thesis, see Heidi M. Hurd & Michael S. Moore, *Punishing Hatred and Prejudice*, 56 STAN. L. REV. 1081 (2004).

67. LAWRENCE, *supra* note 49, at 39; *see also* JACK LEVIN & JACK MCDEVITT, HATE CRIMES: THE RISING TIDE OF BIGOTRY AND BLOODSHED 11 (1993) (noting that 30 percent of hate crime victims require hospital treatment, as compared to only 7 percent of the victims of parallel crimes, and that almost 75 percent of all hate-motivated assaults result in physical injury while only 29 percent of all assault victims experience physical injury). These statistics are based on an analysis of Boston police department records from 1983 through 1987. *Id.* While they could support the authors' premise that "hate crimes are particularly violent," the statistics could also indicate that only the more serious cases are likely to be identified as hate crimes. Of course, simply because a crime has been identified as a hate crime does not necessarily mean it will be charged as such. *See infra* Part II.B.

found sense of isolation."[68] They further point to collateral harms, claiming that members of a hate crime victim's identity group "perceive that crime as an attack on themselves directly and individually."[69] Finally, harm theorists contend that hate crimes are more likely than parallel, non-hate-motivated crimes to "trigger chain reactions," to cause a "breakdown in citizens' sense of order and security," and to "increase the polarization of a society."[70]

Those who focus on the culpability of the defendant suggest that a defendant who is motivated by hatred is more culpable than one motivated by other emotions.[71] The culpability thesis may be especially tempting to some because it is less vulnerable than the greater wrongdoer thesis to empirical disagreements about special harms.[72] But some scholars contend that hate crime legislation is indefensible because it punishes on the basis of character rather than actions.[73]

2. Utilitarianism

While a retributivist approach seeks to punish offenders according to what they deserve for past wrongdoing, a utilitarian approach seeks to reduce future crimes.[74] Central to a utilitarian framework are incapacitation and deterrence.[75]

68. LAWRENCE, *supra* note 49, at 40.
69. *Id.* at 41–42.
70. Hurd & Moore, *supra* note 66, at 1091–92 (citing LAWRENCE, *supra* note 49, at 42–43; Weisburd & Levin, *supra* note 54, at 26–27).
71. Recent psychological experiments lend support to the culpability thesis. Nadine Recker Rayburn et al., *Bystanders' Perceptions of Perpetrators and Victims of Hate Crime: An Investigation Using the Person Perception Paradigm*, 18 J. INTERPERSONAL VIOLENCE 1055, 1063 (2003) (finding that subjects "perceive[d] the perpetrators in the hate crime scenarios as more culpable" than those in otherwise identical, non-hate-motivated scenarios). These findings help to explain the political feasibility of hate crime legislation. Dhammika Dharmapala et al., *Belief in a Just World, Blaming the Victim, and Hate Crime Statutes*, 5 REV. L. & ECON. 311, 320 (2009) ("The public will tend to support hate crime enhancements because citizens view the hate motivation as making the perpetrator more culpable and therefore more deserving of punishment.").
72. Kim, *supra* note 59, at 893. Critics, however, point to the necessity of shared norms (to determine who is more and less culpable) in order for the culpability thesis to have traction. *Id.*
73. Hurd & Moore, *supra* note 66, at 1095, 1129–30. Hurd and Moore reject hate crime legislation for this reason. For a general discussion of liberal conceptions of the Good versus the Right, see JOHN RAWLS, POLITICAL LIBERALISM (1993). *See also* Amartya Sen, *Capability and Well-Being*, *in* THE QUALITY OF LIFE 30 (Martha Nussbaum & Amartya Sen eds., 1993).
74. Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 454 (1997).
75. Rehabilitation is also a component of utilitarianism but has not been used widely as a justification for hate crime legislation. Some, however, have suggested that, given the young age of many hate crime offenders, rehabilitation may be possible in some cases. *See, e.g.*, Abraham Abramovsky, *Bias Crime: Is Parental Liability the Answer?*, 1992/1993 ANN. SURV. AM. L. 533, 537; Jordan Blair Woods, Comment, *Addressing Youth Bias Crime*, 56 UCLA L. REV. 1899, 1904 (2009). A few courts have included community service and tolerance training as part of sentencing. *See, e.g.*, Ed

Some in favor of hate crime laws have argued that hate crime offenders are particularly dangerous and therefore should be incapacitated longer than those who commit parallel crimes.[76] In certain jurisdictions, conviction of a hate crime can be used by a judge to deny probation or parole.[77]

Proponents of a utilitarian approach prioritize the creation of efficient behavioral incentives and would support a penalty enhancement based on hate motive if the defendant's actions could be deterred.[78] While no reliable empirics are available, utilitarian supporters of hate crime legislation claim that enhanced penalties are warranted to counterbalance strong impulses motivated by animus and to impress on offenders and would-be offenders that their criminal actions will not go unnoticed.[79]

Recent psychological findings that most individuals ascribe to a belief in a just world, or the just world bias, have been used to justify penalty enhancements for hate crime perpetrators on utilitarian grounds.[80] According to this understanding, individuals, because of their belief in a just world and in order to make sense of seemingly senseless violence, are prone to attributing negative characteristics to hate crime victims (blaming the victim, as it were).[81] Doing so helps to restore one's belief in a just world and serves to make the victim's suffering appear more deserved. Scholars have argued that, in the hate crime context, this may result in more crimes against other members of the victim group, perpetuating discrimination and even increasing overall rates of violence.[82] The just world bias theory suggests that enacting hate crime legislation focuses at-

Stannard, *Probation Given in Hate Crime*, NEW HAVEN REG. (May 16, 2009, 12:00 AM), http://www.nhregister.com/general-news/20090516/probation-given-in-hate-crime.

76. LAWRENCE, *supra* note 49, at 62–63.

77. *See, e.g.*, KY. REV. STAT. ANN. § 532.031(3)–(4) (LexisNexis 2008) ("The finding that a hate crime was a primary factor in the commission of the crime . . . may be utilized by the sentencing judge as the sole factor for denial of probation . . . [and] may be utilized by the Parole Board in delaying or denying parole to a defendant.").

78. Tracey L. Meares et al., *Updating the Study of Punishment*, 56 STAN. L. REV. 1171, 1175 (2004).

79. Kahan, *supra* note 2, at 467. Opponents argue that since, according to utilitarian principles, a penalty is useful only inasmuch as it deters social harms, if there is no evidence that hate crimes cause greater harm, there is also no utilitarian need for greater penalties. *See id.* at 468. Others reject a utilitarian justification for hate crime laws for different reasons, asserting that hate crime offenders, "the most alienated, hostile, and sociopathic members of society," are unlikely to be deterred by the threat of criminal sanctions. James B. Jacobs, *Implementing Hate Crime Legislation Symbolism and Crime Control*, 1992/1993 ANN. SURV. AM. L. 541, 543.

80. Dharmapala et al., *supra* note 71, at 315.

81. *See id.* at 315–16.

82. *See id.* at 333–34. While further empirical study would be necessary to test this theory, the application of the just world bias to hate crimes is particularly disturbing and could support consideration of increased penalties to counterbalance this tendency to blame the victim and, by extension, the victim's group.

tention on the culpability of the perpetrator and forces observers to revise their negative beliefs about the victim and the victim's group, thus deterring other would-be offenders.[83]

3. Expressivism

Expressive theory, which highlights the influence of law on social norms,[84] contains strands of both retributivism and utilitarianism and has been a popular academic justification for hate crime legislation.[85] Expressivist arguments that sound in retributivism focus on countering morally blameworthy messages with positive ones.[86] By enacting hate crime laws, legislators signal that perpetrators of hate crimes are more culpable than those who commit parallel crimes and that hate crimes result in greater social harm than do crimes that are not motivated by bias.[87]

While some scholars discuss expressivism as a subcategory of retributivism,[88] many modern expressivist arguments are actually utilitarian, focusing on changing social norms and behavior through the persuasive and acculturating force of law.[89] Social norm theorists posit that, since laws express the values of a

83. *See id.* at 334. While, arguably, this rationale could be used to support all criminal punishment, hate crimes could be understood as unique inasmuch as they blur the line between the victim and the victim's identity group. Thus, whereas if X robs Y, one might be inclined to blame Y for being in the wrong place at the wrong time or to fathom another reason why Y deserved what he got, if X assaults Y because of a protected characteristic, one might be inclined to believe not only that Y deserved what he got but also that other identity group members deserve similar treatment.

84. For an explanation and defense of expressive theories of law, see Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV 1503, 1531–64 (2000). For a general critique of the norms school and its application to criminal law, see Robert Weisberg, *Norms and Criminal Law, and the Norms of Criminal Law Scholarship*, 93 J. CRIM. L. & CRIMINOLOGY 467 (2003).

85. *See supra* note 2. This Article focuses on expressivism as the dominant justification for hate crime legislation not as a normative matter but as a descriptive one. The Article examines hate crime legislation on the same terms set out by legislators who have enacted the laws in order to explore how the intended message of enactment relates to or is undermined by the enforcement of hate crime laws. The Article thus focuses not on whether expressive aspirations of legislators are justifiable but on whether, assuming that legislators do have expressive aspirations, such aspirations are met and, if not, why not.

86. *See generally* FEINBERG, *supra* note 12, at 95.

87. This self-conscious signaling is arguably the value-add of expressive theory and what distinguishes it from a retributive account.

88. *See* Hessick, *supra* note 63.

89. In fact, some critics of expressive theory argue that expressivism overlaps so much with utilitarianism that it does not deserve distinction as an independent theory. *See, e.g.*, Heidi M. Hurd, *Expressing Doubts About Expressivism*, 2005 U. CHI. LEGAL F. 405, 429 ("[T]he expressivist promised more. He promised us a theory of punishment independent of the traditional theories of

society,[90] the enactment of hate crime legislation demonstrates the existence of a consensus denouncing hate crimes and supporting tolerance and pluralism.[91] Hate crime legislation is therefore understood to send a message to society rather than only to specific offenders or would-be offenders.[92] It is this self-conscious desire to "send a message," along with the notably transparent rhetoric that accompanies it, that distinguishes expressive theory from the conventional understanding of utilitarianism.

Proponents of hate crime legislation have argued that if a perpetrator sends a message of hatred to the victim and the victim's group, the state in turn should send a message that such hatred is not acceptable in our pluralistic society. Dan Kahan refers to this veritable "call and response" as a dialogue between crime and punishment.[93] The defendant, through the commission of a hate crime, speaks, and society, through punishing the defendant's actions with an enhanced penalty, responds.[94] According to expressive theory, when a prosecutor adds a hate crime charge in an archetypal hate crime case, she may be said to send messages to the defendant, to the victim and the victim's identity group, and to society. An expressivist account identifies the message to the defendant as one of stigma and denunciation, to the victim and victim's group as one of valuation, and to society as one of a commitment to tolerance and equality. By contrast, expressive theory suggests that when a prosecutor opts against adding a hate crime charge despite substantial evidence of bias motive, the opposite expressive message is sent.[95]

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punishment, and thus independent of claims that it will be an effective means of advancing the utilitarian's agenda.").

90. *See generally* Robert C. Ellickson, *The Evolution of Social Norms: A Perspective From the Legal Academy*, *in* SOCIAL NORMS 35 (Michael Hechter & Karl-Dieter Opp eds., 2001).

91. *Cf.* McAdams, *supra* note 1, at 364–65.

92. Beale, *supra* note 2, at 1254–55; *see also* Jacobs, *supra* note 79, at 545–47.

93. Kahan, *supra* note 2, at 463.

94. Opponents of hate crime legislation also draw on expressive language. They respond that punishing hate crime perpetrators with enhanced penalties sends a message that victims of other non-hate-related crimes matter less in the eyes of the law. *Id.* at 466. Critics also maintain that hate crime legislation criminalizes certain beliefs; for example, if crimes motivated by antigay animus result in heightened punishment, this may be seen to criminalize so-called "pro-family" beliefs. James Brooke, *Gay Man Dies From Attack, Fanning Outrage and Debate*, N.Y. TIMES, Oct. 13, 1998, http://www.nytimes.com/1998/10/13/us/gay-man-dies-from-attack-fanning-outrage-and-debate.html (quoting Steven A. Schwalm of the Family Research Council).

95. Expressive theory suggests that, especially in archetypal hate crime cases, nonenforcement can negate the expressive message of hate crime legislation. Instead of feeling valued and protected, hate crime victims and their identity group members may believe (with good reason) that the legislation is merely symbolic, designed as a means of legislative catharsis but without any bite. Or worse, identity group members may perceive not merely a general lack of hate crime enforcement but, specifically, a problem of biased enforcement that disparately impacts their identity group. For a discussion of the possibility that selective enforcement of hate crimes might result in the unintended consequence of a disparate impact on minorities, see Martha Minow, *Regulating*

In 1999, Kahan speculated that, as the hate crime legislation debate progressed, expressivist arguments would fall into disfavor and more empirically grounded deterrence arguments would gain traction among legislators and others.[96] He claimed that, because it is a comparatively young debate, "[b]oth sides continue to speak in an unselfconscious expressive idiom that makes their true motivations transparent,"[97] but suggested that, over time, "participants in the hate crime debate [will] recoil from the cultural tension that expressive claims reveal," and deterrence arguments will become more widespread.[98] Despite Kahan's predictions, however, the legislation's proponents have continued unabashedly to speak in expressive terms through the present day.[99]

As expressive rhetoric permeates academic and legislative discourse about hate crime legislation, it also provides a baseline from which to examine hate crime enforcement. While a rich scholarly debate has examined what messages are sent and to whom at the moment of hate crime law enactment, the messaging function of enforcement remains comparatively neglected. Part II looks to the facts on the ground in order to examine enforcement practices and to draw preliminary conclusions about how legislative messaging may be affected or even undermined by hate crime enforcement.[100]

II. THE ENFORCEMENT OF HATE CRIME LEGISLATION

This Part focuses on the institutional incentives that influence prosecutorial charging decisions, documenting the tensions between promulgation and enforcement of hate crime legislation. As the district attorney's charging decision is generally the first public pronouncement of how the criminal justice system regards a particular crime, the Article will focus on this aspect of enforcement and nonenforcement, drawing on firsthand accounts of prosecutors to supplement

Hatred: Whose Speech, Whose Crimes, Whose Power?—An Essay for Kenneth Karst, 47 UCLA L. REV. 1253, 1258 (2000).

96. Kahan, *supra* note 2, at 474–76 (maintaining that deterrence arguments should appeal to those citizens who feel dispassionately about hate crime legislation, to those who detest a public debate that involves moralizing, and to the "strategically sophisticated" supporters of the legislation).

97. *Id.* at 463.

98. *Id.*

99. *See* Hurd & Moore, *supra* note 66, at 1111 ("Of all the purported justifications . . . , this claim that hate/bias crime legislation sends a message to counteract the message of hate/bias-motivated offenders seems to be *the* justification that most persuades proponents of such legislation."); *supra* Part I.B.

100. Notably, an inquiry into the realities of hate crime enforcement is also crucial to determining whether utilitarian and retributivist goals are being met. But this discussion is outside the focus of this Article.

the theoretical discussion of statutory, political, and other factors involved in charging decisions.

Preliminary results suggest that, whether intentionally or not, prosecutors send expressive messages through their charging decisions and that hate crime legislation in practice may undermine the messages sent by hate crime law enactment.[101] Despite the enthusiasm with which interest groups and other proponents have celebrated the enactment of hate crime legislation, the practical results of hate crime laws have been mixed. In archetypal hate crime cases involving intergroup, identity-based animus, prosecutors may opt against adding hate crime charges because of statutory incentives, concerns about jury reaction, or other political or historical factors. In non-bias-motivated cases, prosecutors may add dubious hate crime charges in an effort to assert their leverage at the plea-bargaining stage. This discrepancy is striking because of its effects both on the morale of those interest groups that have prioritized the enactment of these laws, and on public perception of the worth and viability of hate crime legislation.

A. The Qualitative Study

To better understand the incentives that influence prosecutorial charging decisions, I conducted a set of interviews with fifty-two prosecutors in twenty-four jurisdictions across the country[102] asking them about the statutory factors that influence their charging decisions as well as the role of cultural and regional factors. While some statistical information is available in the form of Federal Bureau of Investigation (FBI) statistics and voluntary state and district reports, many offices do not publish detailed information on hate crime charging, making conversations with individual prosecutors about the practices and policies of their respective offices a necessary supplement.[103] These interviews represent

101. *See infra* Part II.D.

102. These jurisdictions include Alabama, California, Colorado, Connecticut, the District of Columbia, Florida, Iowa, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oregon, Tennessee, Texas, Utah, and Washington. These confidential interviews with prosecutors are numbered 1–52 in order to preserve their anonymity.

103. I used semistructured interviews as a means to explore prosecutorial charging decisions. While I developed an outline of topics to be discussed in each interview, I did not follow a fixed script. Rather, the outline organized the interview and allowed me the flexibility to ask follow-up questions when appropriate. For examples of this technique in the law review literature, see Margareth Etienne, *The Declining Utility of the Right to Counsel in Federal Criminal Courts: An Empirical Study on the Diminished Role of Defense Attorney Advocacy Under the Sentencing Guidelines*, 92 CALIF. L. REV. 425, 436 (2004); Herbert M. Kritzer, *Seven Dogged Myths Concerning Contingency Fees*, 80 WASH. U. L.Q. 739, 742–43 (2002); Leslie C. Levin, *The Ethical World of Solo and Small Law Firm Practitioners*, 41 HOUS. L. REV. 309, 318 (2004); Angela Littwin, *Beyond*

the first scholarly inquiry into the details of hate crime prosecution across a broad range of jurisdictions.[104]

Given the dearth of hate crime prosecutions generally,[105] I limited my interviews to prosecutors from offices in urban, metropolitan districts with populations of at least 200,000 people.[106] I selected a variety of offices based on size, region of the country, and type of hate crime statute in order to collect contrasting examples to illustrate the range of factors that might affect prosecutors when faced with a hate crime case. In offices that included designated individuals who oversaw hate crime cases, whether as part of a hate crime unit or not, I interviewed prosecutors who were in charge of hate crime enforcement efforts. In offices that did not have such designated individuals, I spoke to line prosecutors who had been working in the office for at least five years in order to get a sense of how the office dealt with hate crime cases over time. In some instances, a prosecutor from one office provided a name of someone in another office who had dealt with hate crime cases. My interviews thus involved a combination of preselecting offices based on statutory and geographic diversity and using a snowball approach.[107] In the interviews, prosecutors discussed the various dynamics that influenced their charging decisions in both archetypal and nonarchetypal cases.[108] The most salient factors affecting hate crime prosecution to emerge during our

Usury: A Study of Credit-Card Use and Preference Among Low Income Consumers, 86 TEX. L. REV. 451, 456–57 (2008); Mark C. Miller, *A Legislative Perspective on the Ohio, Massachusetts, and Federal Courts*, 56 OHIO ST. L.J. 235, 240 n.25 (1995); Jacqueline E. Ross, *Undercover Policing and the Shifting Terms of Scholarly Debate: The United States and Europe in Counterpoint*, 4 ANN. REV. L. & SOC. SCI. 239 (2008). For examples in the social science literature, see *infra* note 287.

104. *See supra* note 11.

105. *See infra* Part II.B. Since many offices do not keep records of hate crime charges, there are no statistics available indicating how many hate crimes are prosecuted per year in the United States. Valerie Jenness, *Hate Crimes*, *in* THE OXFORD HANDBOOK ON CRIME AND PUBLIC POLICY 524, 538 (Michael Tonry ed., 2009). A Department of Justice report, however, confirmed that "only 20 percent of reported hate crimes result in arrest," suggesting that underreporting concerns would be exacerbated at the charging stage. *Hearing*, *supra* note 15, at 13. Furthermore, out of over 2000 respondents to a survey of chief prosecutors in state court systems about what felonies their offices prosecute, 72.2 percent indicated that their offices did not prosecute any hate crime cases (another 9.6 percent reported "missing data"). Jenness, *supra*, at 539. Of all the felony crimes listed, only "telemarketing fraud" and "excessive police force" received a lower percentage of offices that prosecuted the crimes. *Id.*

106. These offices, by virtue of their larger size, are also in a position to affect more people.

107. For general information on snowball sampling techniques, see Douglas D. Heckathorn, *Respondent-Driven Sampling: A New Approach to the Study of Hidden Populations*, 44 SOC. PROBS. 174 (1997).

108. For further details about how the semistructured interviews were conducted, see *infra* Appendix I: Qualitative Methodology.

discussions included police underreporting, statutory language, and concerns about appealing to a jury.[109]

This study is purely qualitative, and I do not claim that the prosecutors selected are a representative sample of all U.S. prosecutors. But these results do go beyond case studies from one or two jurisdictions, and I supplemented them by interviewing interest group leaders whose work involves combating hate crimes nationwide.[110] I interviewed prosecutors from a variety of jurisdictions that used different kinds of hate crime laws and faced differing resource constraints. The commonalities seen in many of their responses, notwithstanding these underlying differences, suggest themes that may be fairly widespread in the prosecution of hate crimes.[111]

B. Nonenforcement in Archetypal Cases

1. Underreporting of Hate Crimes

By the year 2000, 12,000 law enforcement agencies in all fifty states participated in hate crime data collection.[112] Strikingly, 80 percent of reporting agencies routinely reported no hate crimes.[113] In 2010, for example, cities reporting no hate crimes included Miami, FL, Newark, NJ, and New Orleans, LA. Cities that did not report at all in 2010 included Louisville, KY, Toledo, OH, and Honolulu, HI.[114]

109. Of course, there is no guarantee that the information provided by prosecutors with whom I spoke is an accurate representation, even of their own experiences. But each interviewee was informed that our interview would be anonymous, and given that many spoke critically about their offices and charging policies, I did not have reason to doubt the accuracy of any statements included in this Article. Additionally, the experiences chronicled were diverse enough that the prosecutors did not seem to be speaking according to script but instead appeared to be thoughtfully considering the questions I posed and engaging with them openly and honestly in light of their experiences.

110. These confidential interviews are labeled A–N. Interest group leaders' perspectives provided a useful counterpoint to the prosecutors' accounts. *See* LAWLESS ET AL., *supra* note 11, at 47 ("[The] use of multiple approaches to hone in on a problem from a number of directions is known as a process of converging operations or triangulation." (emphasis omitted)).

111. Interviewing a range of prosecutors helps to illuminate regional and cultural differences between offices and to make the study more robust. *See generally id.*; ROBERT S. WEISS, LEARNING FROM STRANGERS: THE ART AND METHOD OF QUALITATIVE INTERVIEW STUDIES (1994).

112. Valerie Jenness, *The Emergence, Content, and Institutionalization of Hate Crime Law: How a Diverse Policy Community Produced a Modern Legal Fact*, 3 ANN. REV. L. & SOC. SCI. 141, 146 (2007). Jurisdictions included in the Uniform Crime Reports contain more than 85 percent of the U.S. population. *Id.*

113. Jenness, *supra* note 105, at 533.

114. *See* ANTI-DEFAMATION LEAGUE, COMPILATION OF FBI HATE CRIME STATISTICS ACT DID NOT REPORT (DNR) AND ZERO REPORTING (Nov. 2011) (on file with author).

The number of reported hate crimes varies widely depending on the source, making it extremely difficult to identify reliable data on hate crime incidents. Nonetheless, research suggests that hate crimes are underreported both by victims to police and by individual law enforcement agencies to the FBI, leading to FBI statistics that drastically understate the prevalence of hate crimes nationally.

For example, the National Crime Victimization Survey recently reported an average of 210,000 hate crime victims annually based on victim reports.[115] Yet research suggests that only 40 percent of hate crimes generally and about 10 percent of hate crimes motivated by bias against gay, lesbian, and transgendered victims specifically are reported to police.[116] Indeed, some victim groups may be especially afraid of law enforcement and therefore unlikely to report a hate crime against a member of their group.[117]

Moreover, research suggests that there is a notable discrepancy between the number of hate crimes reported to police and the number of hate crimes reported by law enforcement agencies to the FBI.[118] The FBI bases its statistics on infor-

115. CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 209911, HATE CRIME REPORTED BY VICTIMS AND POLICE 1 (2005). The National Crime Victimization Survey data are obtained from a representative sample of approximately 90,000 households (nearly 160,000 persons). *Id.*

116. GLEN KERCHER ET AL., CRIME VICTIMS' INST., HATE CRIMES 18 (2008); LYNN LANGTON & MICHAEL PLANTY, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 234085, HATE CRIME, 2003–2009, at 6 (2011). These numbers suggest that hate crime reporting is as low as or even lower than sexual assault reporting, long considered one of the most underreported crimes. *See Reporting Rates*, RAPE, ABUSE & INCEST NAT'L NETWORK, http://www.rainn.org/get-information/statistics/reporting-rates (last visited Feb. 15, 2014) (suggesting that only 40 percent of sexual assaults are reported to the police). Of course, victimization surveys and crime reports will never be perfectly consistent: Just as different understandings of what constitutes consent (or lack thereof) will affect reporting in the sexual assault context, different understandings of what constitutes a hate crime will yield disparate numbers in surveys and other reports in the hate crime context. Thus, people could question claims of underreporting of hate crimes, as scholars have done with rape. *See, e.g.*, Neil Gilbert, *Realities and Mythologies of Rape*, 29 SOCIETY 4 (1992) (highlighting a discrepancy between how a researcher defined rape and how women characterized their own experiences). Certain factors, however, such as the lack of mandatory reporting by police, suggest that the FBI statistics may drastically underestimate hate crime numbers regardless of these definitional problems.

117. NAT'L COAL. OF ANTI-VIOLENCE PROGRAMS, HATE VIOLENCE AGAINST LESBIAN, GAY, BISEXUAL, TRANSGENDER, QUEER, AND HIV-AFFECTED COMMUNITIES IN THE UNITED STATES IN 2011, at 8 (2012). One Washington prosecutor explained, "[T]he transgendered community is particularly fearful of law enforcement, just like immigrants and some ethnic minorities." Interview 5.

118. Of course, aside from suggesting underreporting by law enforcement, this discrepancy could also suggest overreporting by victims. Even assuming, however, that victims may have an overly expansive understanding of what constitutes a hate crime, these numbers (along with the fact that 80 percent of law enforcement agencies do not report any hate crimes), Jenness, *supra* note 105, at 533, suggest that there is a significant amount of underreporting by law enforcement. Additionally, if large numbers of victims who report hate crimes actually misunderstand the legal parameters for a

mation submitted by law enforcement agencies throughout the nation, and therefore they are dependent on the individual agencies' compliance with reporting requirements.[119] In recent years, the FBI reported approximately 7000 hate crimes per year,[120] fewer than 5 percent of hate crimes reported by victims.

Even when a victim reports a hate crime and police get involved, the case may never be investigated as a hate crime if a bias motive is not flagged by police.[121] Many prosecutors acknowledged that hate crime legislation was likely underused and attributed this phenomenon to a lack of police awareness about hate crime statutes.[122] In most jurisdictions, police are the first movers when it comes to hate crime charges, and they are expected to suggest what charges prosecutors should file. Many prosecutors agreed, "If police don't flag a motive, it will likely go unnoticed."[123]

Police reporting methods vary by jurisdiction, and three different approaches emerged from the interviews. In some offices, a special police unit or task force exists to combat hate crimes, and in these offices, police in the designated unit are expected to investigate and report a possible bias motive.[124] Other offices may not have a special task force but expect police to check a box on their reporting forms to indicate possible bias motive. Finally, in some offices, no such box exists on the police form and all judgments about the existence and

hate crime charge, that would raise doubts about how effective expressive aims of the legislation can be if misunderstood by so many victims.

119. *See* FED. BUREAU OF INVESTIGATION, HATE CRIME STATISTICS 2004, at 1 (2005), http://www2.fbi.gov/ucr/hc2004/tables/HateCrime2004.pdf.

120. *See Comparison of FBI Hate Crime Statistics (2011–2000)*, ANTI-DEFAMATION LEAGUE, http://www.adl.org/assets/pdf/combating-hate/FBI-HCSA-2011-2000-Comparison.pdf (last updated Dec. 2012).

121. For an examination of hate crime policing on the ground, including a discussion of structural, institutional, and demographic factors that dissuade police officers from enforcing hate crimes, see JEANNINE BELL, POLICING HATRED: LAW ENFORCEMENT, CIVIL RIGHTS, AND HATE CRIME (2002).

122. *See, e.g.*, Interviews 3, 7, 9. This view corroborates studies of police departments suggesting that, unless there are specific departmental policies regarding hate crime enforcement and these policies are part of routine police training, police officers are unlikely to report possible hate motives. *See, e.g.*, Jennifer Balboni & Jack McDevitt, *Hate Crime Reporting: Understanding Police Officer Perceptions, Departmental Protocol, and the Role of the Victim*: *Is There Such a Thing as a "Love" Crime?*, 3 JUST. RES. & POL'Y 1 (2001).

123. Forty-six of fifty-two prosecutors speculated that if police did not flag evidence of bias, prosecutors in their jurisdiction would likely not notice a bias motive. A few, however, mentioned that even if police neglect to flag bias cases, evidence of bias sometimes emerges during the process of interviewing witnesses and the victim. One prosecutor explained, "I meet with the victim in each case to hear their story. If they explain that there's a bias factor, we might follow up." Interview 14.

124. Studies of hate crime policing have suggested that when a police department includes a specialized hate crime task force or bias unit, police officers are more likely to report and investigate possible hate motives. *See* Balboni & McDevitt, *supra* note 122, at 23.

prosecution of bias motives are deferred to prosecutors. Notwithstanding these distinctions among police departments, prosecutors across the board speculated that hate crimes were significantly underreported by police.[125]

In a few large cities (such as Boston and New York City), an entire task force or police unit is devoted to hate crimes. For example, the New York City Police Department Hate Crime Task Force receives notice if a police department duty captain determines that the facts of a case appear to include a bias motive, and this triggers a Hate Crime Task Force investigation.[126] But local prosecutors explained that even in New York and other larger cities with task forces dedicated to investigating possible hate crimes: "[W]here there's a vicious assault, determining motive isn't always a top priority for police; their key objective is to identify the perpetrator. They're not focused on the hate crime aspect."[127]

Few jurisdictions have police officers whose jobs are focused solely on investigating possible hate crimes. What differentiates the remaining jurisdictions is whether police are trained to recognize hate crimes and, if so, how they communicate a possible bias motive to the prosecutor. Of special importance is whether police are prompted to answer questions about motive on police report forms and whether they are instructed to flag cases according to expansive or narrow parameters.[128]

Among those prosecutors who expressed concern that archetypal hate crime cases often were not flagged as such, many highlighted the existence of a "possible bias motive" box on police report forms as the best way for police to flag possible hate crimes.[129] In D.C., for example, "law enforcement flags any interaction with a civilian that raises a hate crime flag. They're flagged if potentially a hate crime. The intention is to catch anything that raises issues."[130] Nonetheless, even prosecutors in jurisdictions that include a "possible bias motive" box on their police forms still assumed that many hate crime cases fall under the radar because police are "under tremendous pressure" and "preoccupied with other aspects of the crime scene."[131]

125. Forty-nine of fifty-two prosecutors mentioned that they believed police significantly underreport hate crimes. Interest groups leaders also repeatedly mentioned police underreporting. Interviews A–E.
126. Interview 28.
127. Interviews 27, 28, 30.
128. Interviews 15, 24, 31.
129. For example, in some states, such as Michigan, police fill out a form that includes the question whether or not there was a possible ethnic intimidation motive and boxes to check labeled "yes" and "no." Interviews 7, 9, 14.
130. Interview 31.
131. Interviews 5, 6, 9. Many prosecutors emphasized that police are not to blame, as their responsibilities are vast and they are under tremendous pressure; one prosecutor maintained that being a cop in his notoriously crime-ridden city is the "toughest job in the state." Interview 14.

While police reporting may be unreliable even in jurisdictions where routine forms include a "possible bias" box, in jurisdictions that lack such a box, prosecutors reported that police almost certainly will not flag the defendant's motive. In states where there are no boxes to check for possible bias motive, many prosecutors indicated that "we don't see it charged by police," observing this as an anomaly since, in areas other than hate crimes, "officers tend to overcharge."[132]

Some prosecutors theorized that police may resent what they perceive as special rights for minorities and, consequently, police may not be inclined to flag a possible bias motive.[133] Research also suggests that police officers nationwide are more likely to classify a crime as bias motivated when people of color are the offenders than when people of color are the victims or survivors.[134]

2. Statutory Influences on Charging Decisions

The vast theoretical literature on prosecutorial incentives suggests that among the factors that motivate prosecutors are a desire to win cases, to realize personal political gains, to process cases efficiently, to promote fairness, and to deter crime.[135] Conversations with prosecutors often touched on the relationship between these general incentives and the likelihood that a prosecutor would pursue hate crime charges in a particular case.[136] Prosecutors noted the conflict that

132. A few prosecutors were uncertain if there was any box to check indicating possible bias motive. Interviews 2, 36. One considered whether prosecutors would even look for signs of motive if there was such a box and police had checked it, resolving, "It's doubtful; I know I don't." Interview 18.

133. Interviews 1, 29.

134. NAT'L COAL. OF ANTI-VIOLENCE PROGRAMS, HATE VIOLENCE AGAINST LESBIAN, GAY, BISEXUAL, TRANSGENDER, QUEER AND HIV-AFFECTED COMMUNITIES IN THE UNITED STATES IN 2010, at 22 (2011). This finding holds true even within the gay, lesbian, and transgendered communities. According to a 2010 report about hate violence against members of the gay, lesbian, and transgendered communities, "[p]olice refused bias classification to 25% of survivors and victims of color as compared to 25% of white people in hate violence incidents that were reported to police." *Id.* These statistics could be a result of misclassification by victims, or they could indicate selective enforcement of hate crime statutes. *See supra* note 118.

135. *See, e.g.* Sonja B. Starr, *Sentence Reduction as a Remedy for Prosecutorial Misconduct*, 97 GEO. L.J. 1509, 1524–30 (2009) (describing hypothetical prosecutors, each of whom values one of these factors as paramount). For examples of empirical studies that test these theoretical models, see Edward L. Glaeser et al., *What Do Prosecutors Maximize?: An Analysis of the Federalization of Drug Crimes*, 2 AM. L. & ECON. REV. 259 (2000); Todd Lochner, *Strategic Behavior and Prosecutorial Agenda Setting in United States Attorneys' Offices: The Role of U.S. Attorneys and Their Assistants*, 23 JUST. SYS. J. 271 (2002); *see also* Stephanos Bibas, *Rewarding Prosecutors for Performance*, 6 OHIO ST. J. CRIM. L. 441 (2009); Alafair S. Burke, *Prosecutorial Passion, Cognitive Bias, and Plea Bargaining*, 91 MARQ. L. REV. 183 (2007); Sanford C. Gordon & Gregory A. Huber, *The Political Economy of Prosecution*, 5 ANN. REV. L. & SOC. SCI. 135 (2009).

136. The interviewees were limited to line prosecutors and did not include any elected district attorneys. Unlike line prosecutors, elected district attorneys are subject to some of the same electoral pressures as legislators and may want to curry favor with the same contingents. Further research would be

might emerge between these factors, for example, when a desire for justice in prosecuting a hate crime might run counter to a desire for efficiency or the desire to win. These conflicts may be at least partially responsible for the dearth of hate crime prosecutions nationally.

Official data on hate crime prosecution are derived from reports by the U.S. Department of Justice, state attorneys general, and the National Prosecutors Survey.[137] While most district attorney offices do not keep records about the disposition of hate crimes (such as the number of cases that have been reported, charged, pled, and tried),[138] studies that have examined these numbers in individual offices suggest that only a minuscule percentage of hate crime cases reported are actually charged as such by prosecutors.[139]

Indeed, even in cases flagged by police for possible bias motive, an examination of prosecutorial incentives reveals that in many archetypal hate crime cases a prosecutor has no incentive to include hate crime charges, and may even have incentives not to do so. A prosecutor's charging decision is subject to a balancing of incentives, and if the burden of proving a hate crime charge outweighs the possible benefit, a prosecutor has no incentive to use hate crime legislation. The language of a hate crime statute and its statutory context (the way the statute interfaces with other criminal statutes) may preclude its use in many archetypal hate crime cases.

State hate crime statutes either serve as a penalty enhancement, adding onto the penalty associated with the underlying offense by a specified amount when a prosecutor proves a bias motive, or they create a separate standalone offense for bias motive. Even within these two categories, however, there is tremendous variation between states with respect to how hate crime charges could actually affect a defendant's sentence. In the interviews, prosecutors across jurisdictions refer-

necessary to explore the degree to which interest groups may exert pressure on elected district attorneys to enforce hate crime statutes in certain cases and to what degree (and under what circumstances) these tactics might be successful.

137. Jenness, *supra* note 105, at 537–38.

138. Hate crime data is not unique in this regard, and other scholars have lamented the unavailability of information on case dispositions in criminal law generally. *See, e.g.*, Marc L. Miller & Samantha Caplinger, *Prosecution in Arizona: Practical Problems, Prosecutorial Accountability, and Local Solutions*, 41 CRIME & JUST. 265, 266 (2012).

139. *See, e.g.*, Eric Dexheimer, *Texas Hate Crime Law Has Little Effect*, STATESMAN (Jan. 24, 2012, 9:56 AM), http://www.statesman.com/news/statesman-investigates/texas-hate-crime-law-has-little-effect-2116587.html (documenting the last decade of hate crime prosecutions in Texas, where approximately 2000 bias-motivated crimes were reported—about 200 per year—and only ten defendants were convicted under the statute, with all but one as part of a plea agreement). California is a rare exception, both in terms of data collection and hate crime prosecution. In 2006, of the 363 hate crime cases referred to prosecutors, 272 were filed as hate crimes and 140 resulted in hate crime convictions. Jenness, *supra* note 105, at 540.

enced the particular language of their state's statute as the most salient factor in determining whether they were inclined to add hate crime charges in a given case.[140] While most prosecutors did not mention expressive concerns as influential when determining whether to add a hate crime charge, a few suggested that any expressive message intended by the legislators would be ineffective if not accompanied by increased punishment to demonstrate that the state was serious in its proclaimed efforts to combat hate violence.[141]

An examination of some of these statutory variations is crucial to understanding why some prosecutors may not have an incentive to include hate crime charges in archetypal cases. For example, in a penalty enhancement state, a prosecutor might not have sufficient incentive to include a hate crime charge if proof of a bias motive would not elevate the crime to the next level of punishment. Some prosecutors noted that a hate crime charge was simply not worth their time if it would not be accompanied by increased punishment.[142]

Consider the distinction between four categories of offenses: misdemeanors, non-life-sentence-eligible felonies, life-sentence-eligible felonies, and capital crimes. Within the categories of misdemeanor and felony, one might expect that prosecutors would have an incentive to add hate crime charges when doing so could elevate the offense, for example, from a class B misdemeanor to a class A misdemeanor. One might further expect that extra incentives would attach when a hate crime charge could elevate an offense from one category to the next, such as from a misdemeanor to a felony. Indeed, while statutory schemes are highly variable across states, a critical factor in determining whether to include a penalty enhancement charge may be whether or not it could elevate an offense to the next level.[143]

Where a statute does not allow for such elevation of an offense, one still might expect that prosecutors, in order to encourage a longer sentence from a judge, would include a hate crime charge if it would increase the minimum

140. This factor was the most salient for prosecutors, even across cultural, historical, and regional differences.

141. Interviews 25, 41, 46.

142. Interviews 4, 13, 16, 19, 50.

143. One exception to the intuition that a prosecutor is most likely to include a hate crime charge when it could elevate an offense to a higher category is in the case of death penalty eligible cases. While the possibility of elevating a sentence from life in prison to the death penalty might seem particularly significant, in practice prosecutors rarely rely on hate crime enhancements to do so. Especially in a capital case, "Once you're looking at first- or second-degree murder, the hate crime enhancements are incidental. There are many aggravating factors you could use instead." Interview 25. Thus, in particularly violent archetypal cases, prosecutors may be least likely to include hate crime charges, as they will have an incentive to rely instead on other aggravating factors that do not require proof of motive.

penalty. But many prosecutors referenced the tendency of judges in their jurisdictions to impose such high sentences that the assumption of an extra legal burden was simply not worth it.[144] When asked for further clarification, none of the prosecutors expressed concern that judges in their jurisdiction meted out overly harsh sentences; instead, prosecutors clarified that the sentences seemed ample without a hate crime enhancement and, therefore, that it was not worth expending additional resources to pursue a hate crime conviction.[145]

In jurisdictions where the statute specifies that hate crime charges cannot increase a sentence when a crime is already classified at the highest misdemeanor or felony level, prosecutors have little incentive to use the legislation when prosecuting class A misdemeanors or first-degree felonies. In Texas, for example, prosecutors explained that "if you have a second-degree aggravated assault, then it may make sense as it would raise the charge to a first-degree assault; if it's already a first-degree felony or class A misdemeanor, there's no sense to add a hate crime charge."[146]

Prosecutors from other jurisdictions with similar statutory schemes agreed that to add a hate crime charge under such circumstances would be pointless or ill advised, explaining, "[H]ate crime charges wouldn't give us more, and aren't worth the time in such cases."[147] The alignment of incentives in such cases may point toward underuse of hate crime legislation in cases involving bias motive in which, even if proven, there would be no substantive difference in a defendant's sentence. But hate crime legislation may be used for other purposes, such as a way to introduce motive evidence. According to a prosecutor in Los Angeles County's Hate Crime Unit, "We don't need the hate crime charge to get the death penalty or a conviction, but it's a good way to get motive evidence in to the jury."[148] Prosecutors in Model Penal Code states, however, noted that since all facts and circumstances go into the punishment phase there is little use for hate crime legislation in their jurisdictions.[149]

In states where hate crimes constitute standalone substantive crimes, a prosecutor has no incentive to include hate crime charges if there is a higher

144. *See, e.g.*, Interviews 4, 10, 11, 16, 46.

145. *See, e.g.*, Interviews 10, 11. Prosecutors also expressed concern about jury reaction. *See infra* Part II.B.3.

146. Interviews 4, 16. Notably, Texas's hate crime statute effectively "excludes most serious crimes because the range of punishment already goes up to 99 years in prison." Dexheimer, *supra* note 139. While a hate crime finding could nonetheless raise the defendant's minimum sentence, no prosecutor with whom I spoke considered this effect a sufficient incentive to justify assuming the extra burden of proving motive in such a case.

147. Interviews 4, 8, 16.

148. Interview 24.

149. *See, e.g.*, Interview 16.

charge that does not require proof of motive. In standalone hate crime jurisdictions, conviction on a hate crime charge may yield a few months or even a few years in prison.[150] Prosecutors in states with standalone hate crime statutes, which generally carry a sentence of two years or less, often questioned the utility of hate crime legislation for assault cases, noting that "you're always going to charge the highest offense, and different assault statutes carry lots of time."[151] Many echoed the observation that "often where there's evidence of ethnic intimidation, there's also a violent assault, and therefore a more serious charge. And where there's strong evidence of a serious assault, the hate crime component is less compelling and we're more likely to charge without ethnic intimidation."[152] Whereas conventional accounts of plea bargaining suggest that prosecutors are liable to throw in extra charges in order to gain leverage at the plea-bargaining stage,[153] this was not a common refrain among prosecutors with respect to hate crime charges.[154] Rather, in penalty enhancement and standalone states alike, prosecutors explained that, even without considering hate crime charges, they had many other statutes and enhancements to draw on.

A prosecutor also may be unlikely to include hate crime charges when the statutory language itself is considered vague or confusing. Many prosecutors agreed that, with respect to their state's hate crime legislation, "the way it's worded makes it very hard to prove."[155] A Southern prosecutor elaborated, "[T]he general rule is that you charge the highest offense you can prove at trial, but some statutes are drafted in such a confusing way that it affects your screening

150. For example, in Michigan, the maximum sentence for conviction under the standalone hate crime statute is two years. Prosecutors may not value the addition of a few years to a defendant's sentence. Interviews 7, 9, 14.

151. Interviews 9, 18.

152. Interview 7. One prosecutor agreed that the hate crime charge was less compelling in such cases but stressed that these decisions were not up to individual prosecutors. "We must charge if the evidence is there," the prosecutor insisted, "otherwise it constitutes malpractice by the state." Interview 14.

153. *See, e.g.*, Albert Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 86 (1968); Stephanos Bibas, *Pleas' Progress*, 102 MICH. L. REV. 1024, 1039 (2004) (noting how under pre-Booker guidelines, "[p]rosecutors can overcharge to gain leverage for harsh sentences, and judges have little power to check prosecutorial harshness[, and] [i]f judges try to cut sweet deals unilaterally, say by departing from the Guidelines, they face appellate reversal").

154. Of course, this silence could suggest a lack of candor among the prosecutors with whom I spoke. But it could also be reconciled with a traditional account of plea bargaining: With so many statutes from which to choose, even if prosecutors are prone to overcharge, they still may not charge each and every applicable statute and enhancement in a given case. This seems a plausible explanation given the voluminous criminal code.

155. *See, e.g.*, Interviews 8, 16. Others agreed that "it's so vaguely worded, there's no incentive to use it the way it's written." Interview 15.

decisions. If a statute isn't well written, I won't use it. And if they're close, I'll pick one that's easy and simple."[156]

Even when a statute is clearly worded, proof of motive is exceedingly difficult, and the possibility of multiple motives often complicates a case such that prosecutors may be dissuaded from including hate crime charges. Many prosecutors, when explaining why they do not use hate crime legislation more often, spoke about how difficult the cases are to prove.[157] Specifically, prosecutors discussed the problematics of discerning motivation as a huge disincentive for using hate crime statutes.[158] "It's impossible to know what's in someone's heart" was a common refrain.[159] Moreover, when there is a conflicting motivation, the scenario becomes increasingly complicated.[160]

Prosecutors generally agreed that hate crime cases are "difficult if there is any other motive."[161] Notably, no state statute or court requires but-for causation in hate crime cases, so a demonstration of substantial motivation would be legally sufficient.[162] Nonetheless, a California prosecutor explained, "[W]hen the defendant was motivated by hatred for a rival gang and hatred for blacks, it would have been hard to prove substantial motivation [as is necessary for the state statute] because there was a competing motivation."[163] Similarly, a Texas prosecutor explained that in a case in which African Americans killed an Indian

156. Interview 1. Another prosecutor noted, "I don't want instructions longer than six pages. Simple and short instructions are ideal." Interview 25.

157. Forty-five of fifty-two prosecutors agreed with this statement.

158. Sometimes the circumstances are less than clear. For example, in 1992, David Dinkins, then-Mayor of New York, alleged that a beating by white Jewish men of a black man was a hate crime, outraging the Jewish community, whose leaders claimed that the black man was a burglar and the Jewish men were fighting him off. An accusation of bias itself can be extremely contentious and can inflame intergroup tensions. Jane Fritsch, *Police Dept. Vows a New Caution in Labeling Crimes as Bias Cases*, N.Y. TIMES, Dec. 22, 1992, http://www.nytimes.com/1992/12/22/nyregion/police-dept-vows-a-new-caution-in-labeling-crimes-as-bias-cases.html.

159. Interviews 1, 3, 6, 29.

160. Describing the difficulty in discerning motivation, one Texas prosecutor explained, "It's a very subjective standard . . . . There aren't that many cases you're going to have dead-on proof it's a hate crime." Dexheimer, *supra* note 139.

161. Interviews 8, 16, 22. A Northwest prosecutor mentioned a recent decision in which a court held that cases involving mixed motives could still be charged as hate crimes. He stressed, however, that proof was still enormously difficult and that "normally we look for random selection." Interview 5.

162. *See, e.g.*, N.Y. PENAL LAW § 485.05(a) (McKinney 2008) (defining by statute a hate crime perpetrator as one who "intentionally selects the [victim] . . . in whole *or in substantial part*" on the basis of some perceived trait or characteristic of the victim (emphasis added)); *In re* M.S., 896 P.2d 1365 (Cal. 1995) (adopting the substantial factor standard through judicial decisions).

163. Interview 24.

store clerk, despite evidence of racial bias, "we didn't count it as a hate crime because it was in the course of a robbery."[164]

Difficulty in discerning motivation is especially pronounced when defendant and victim knew each other. Virtually all prosecutors agreed, "[I]f there is a relationship between defendant and victim, there's no bias—it's more personal."[165]

3. Concerns About Jury Reaction

A prosecutor might choose not to include hate crime charges despite evidence of bias motivation because of concerns about appealing to a jury. While criminal cases rarely go to trial,[166] many prosecutors expressed concern about including hate crime charges because it might complicate the issues of the case before a jury.[167] Some emphasized that "where there is strong evidence of a serious assault, the hate crime component is less compelling. We won't charge a hate crime because we don't want to distract the jury."[168]

Such concerns may be based on the perception of hate crime legislation as divisive, especially as pertains to historically fraught social and political issues. Many stressed the political landscape of their jurisdiction as a reason not to in-

164. Interview 16. A Northeast prosecutor agreed, noting that hate crime statutes are rarely used because "proof is so specific and the result is ambiguous, especially since you can get a bump up in other ways, which makes it superfluous." Interview 29.

165. Interviews 6, 26. While some prosecutors maintained that, theoretically, a hate crime charge could be brought even when the victim and the defendant have a preexisting relationship, all agreed that, in practice, such a relationship would preclude them from adding a hate crime charge.

166. Fewer than 10 percent of criminal cases are resolved by a jury. *See* WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 7 (2011); Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1138 (2011) ("95 percent of criminal convictions result from guilty pleas and only 5 percent result from trials."); Michelle Alexander, Op-Ed., *Go to Trial: Crash the Justice System*, N.Y. TIMES, Mar. 10, 2012, http://www.nytimes.com/2012/03/11/opinion/sunday/go-to-trial-crash-the-justice-system.html.

167. Forty-seven of fifty-two prosecutors expressed concern that including hate crime charges might complicate a jury trial. When asked whether this was really a concern given how few cases go to trial, prosecutors responded that, since a jury trial was at least a remote possibility for all cases, they approached each charging decision with the understanding that any individual case might go to trial. Interviews 3, 8, 15. Additionally, prosecutors expressed concern that even judges may not be taking hate crimes seriously. Many spoke about the range of perspectives among judges, stressing that younger judges, and especially judges who themselves are from minority groups, seemed more inclined to take hate crimes seriously. Interviews 27, 30. One particularly uncertain area seemed to be when the crime involved a case of mistaken identity—for example, when a heterosexual victim was perceived to be gay. A Massachusetts prosecutor lamented that, despite the statutory language that clarifies that a bias charge is appropriate when a victim is selected because of a perception that the victim belongs to a particular identity group (even if that perception is incorrect), judges are liable to ask, "[T]his person's not gay, so why are you charging a hate crime?" Interview 30.

168. Interviews 7, 9.

clude hate crime charges.[169] For example, in the murder of a gay man in which there is evidence of bias based on sexual orientation, a prosecutor's decision to add a hate crime charge may be directly correlated to the local climate regarding gay rights. Even in cities known to have strong lesbian, gay, bisexual, and transgender (LGBT) contingents, prosecutors expressed trepidation about including hate crime charges based on sexual orientation or gender identity. A New York prosecutor stressed, "you ask different questions in jury selection if there is a hate crime charge, especially if it involves victims with different lifestyles, such as transgendered individuals."[170] Others expressed concerns about "muddying the waters" and creating "an uphill battle."[171]

Prosecutors representing more conservative jurisdictions were even more concerned about possible negative repercussions that might result from the addition of hate crime charges. Some mentioned a preference not to dwell on the bias element of the crime but instead to highlight other aggravating factors or just to focus on proving, beyond a reasonable doubt, that the defendant assaulted or murdered the victim, a verdict that will invariably result in a stiff sentence.[172] Specifically, they were concerned about distracting the jury from the specific details of an already heinous crime.[173] A Southern prosecutor explained, "Selecting a jury can be a tricky process at best, but when one has to discuss issues of race, gender, and sexual orientation, one enters a potentially charged area. I might fear that a person who is perfectly willing to convict a murderer and would be a great juror might be less inclined to do so if asked to render a verdict under a hate crime statute based on sexual orientation."[174] In the words of another prosecutor, "[W]hy potentially disqualify some of your best jurors if your goal is to punish the wrongdoing?"[175]

When prosecutors refuse to charge hate crimes because they worry that juries might be less willing to convict if they believe the reason for a violent crime was that the victim was gay, it seems hate crime legislation has not had its intended effect on that community. Arguably, the message of hate crime statutes goes

169. Interviews 1, 3, 4, 25.
170. Interview 28.
171. Interviews 1, 8.
172. Interviews 16, 19, 25, 32.
173. One prosecutor suggested, "[I]f we're already asking for a life sentence, better not to muddy the waters and just go with homicide charges." Interview 19.
174. Interview 25.
175. Interview 4. Many prosecutors acknowledged that there may be strong political reasons not to include hate crime charges; specifically, such charges are "divisive" and "make people uncomfortable." Interviews 1, 8, 29. One queried, "Why do we need to speak about these issues? It just makes it messy. It's better to keep the community from feeling bad about itself." Interview 3.

unheard in these jurisdictions.[176] A paradox thus emerges: In those communities least tolerant of diversity (and, as a corollary, those that might benefit most from receiving the expressive messages of equality and tolerance), prosecutors may be least inclined to include hate crime charges for fear of losing the jury to a politically volatile issue.

Notably, a few prosecutors from large cities in heavily liberal districts suggested that they might be disinclined to use hate crime legislation for a very different reason—fear that good jurors could be disqualified for cause if they admitted their prejudice against a defendant who faced hate crime charges. These prosecutors stressed that hate crime charges are "taken very seriously [by the jury]" and that "your best jurors get hostile right away. They want to punish the defendant more harshly."[177] One Northwest prosecutor cited a new phenomenon that some prosecutors have faced in voir dire: "We now have jurors saying that they can't be fair to a defendant accused of hate crimes."[178] Thus, for seemingly dichotomous reasons, both involving the fear of alienating a jury, prosecutors may be disinclined to include hate crime charges in archetypal hate crime cases.

C. A Counterexample: Recent Uses of Hate Crime Legislation in Nonarchetypal Cases

Proponents of hate crime legislation have criticized the underuse and inconsistent use of the laws in archetypal cases.[179] Another critique, which is increasingly salient, addresses the perceived misuse of hate crime charges in nonarchetypal cases. Indeed, an entrepreneurial district attorney's office might widely and systematically include hate crime charges against criminal defendants to increase leverage at the plea-bargaining stage in non-hate-motivated crimes.[180]

This is exactly what has happened recently in Queens, New York. New York does not require a showing of animus for conviction on a hate crime charge,

176. *See, e.g.*, Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 607–08 (2000) (noting that, in contexts such as date rape and drunk driving, while legislators may enact laws with an intent to change social norms, prosecutors may resist enforcing the laws if the norms are widespread, thus reinforcing the norms that legislators hoped to change).

177. Interview 24.

178. Interview 5.

179. *See supra* Part II.B.

180. Arguably, prosecutors could gain leverage by adding hate crime charges more widely in archetypal cases as well. But many prosecutors suggested that for more serious violent crimes, there are many enhancements available such that invoking the hate crime statute seems unnecessary. *See, e.g.*, Interviews 10, 12, 21. Here, by contrast, a hate crime charge would radically change the possible sentencing range and therefore may have special appeal.

and the state's hate crime statute includes age (defined as sixty years or older) as a protected category.[181] As a result, Kristen Kane, head of the Elder Fraud Unit of the Queens District Attorney's Office, has made a practice of including hate crime charges in swindling cases involving elderly victims.[182]

The prosecutorial incentives here are clear. Whereas a conviction for theft of less than $1 million carries no mandatory prison time, a conviction for Grand Larceny as a Hate Crime carries a minimum of one year in prison and could result in a sentence of up to twenty-five years.[183] While Grand Larceny is a C Felony, hate crime charges elevate the charge to a B Felony, which is the next highest level. There are other statutory provisions (known as vulnerable victim statutes) that cover some elderly victims of fraud, but they are narrower and more difficult to prove than New York's hate crime legislation.[184] Thus, whereas New York's hate crime legislation is used in cases in which there is no finding of animus or anything more than a perception by the defendant that an elderly individual is an easy target, the vulnerable victim statute passed specifically to protect elderly victims of fraud is not used for its intended purpose because of the elevated requirements of proof.

Prosecutors are incentivized to use hate crime legislation in these non-bias-motivated cases because the laws provide increased leverage in plea bargaining.[185] In 2005, Shirley Miller, a forty-three-year-old woman who swindled four elderly men out of $500,000, was the first New York defendant to be charged with Grand Larceny as a Hate Crime against the elderly.[186] She pled guilty, paid resti-

181. According to New York's hate crime statute, "A person commits a hate crime when he or she . . . intentionally selects the person against whom the offense is committed . . . because of a belief or perception regarding the race, color, national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation of a person." N.Y. PENAL LAW § 485.05 (McKinney 2008). For a critical discussion of New York's hate crime statute, see Brian S. MacNamara, *New York's Hate Crimes Act of 2000: Problematic and Redundant Legislation Aimed at Subjective Motivation*, 66 ALB. L. REV. 519 (2003); Ginsberg, *supra* note 9.

182. Anne Barnard, *A Novel Twist for Prosecution of Hate Crimes*, N.Y. TIMES, June 22, 2010, http://www.nytimes.com/2010/06/23/nyregion/23hate.html.

183. *Id.*

184. New York's vulnerable victim statute provides an enhancement for schemes to defraud vulnerable elders. The main limitation of this statutory provision, however, is that it requires proof of the victim's impairment. N.Y. PENAL LAW § 190.65(1)(c) (McKinney 2010); Interview 23. This is in contrast to the state's hate crime legislation, N.Y. PENAL LAW § 485.05, which requires only that the victim be over age sixty.

185. Prosecutors lacking "better options" in these cases may turn to the hate crime statute as a way to increase their leverage in plea bargaining. *Cf. supra* note 153 and accompanying text.

186. *See* Press Release, Queens Dist. Att'y, Bayside Woman Halts Trial to Plead Guilty to Defrauding Four Elderly Men in "Sweetheart" Scam (Oct. 14, 2005), *available at* http://queensda.org/Press%20Releases/2005%20Press%20Releases/10-October/10-14-2005.htm.

tution, and served four months.[187] If not for paying the restitution, she would have faced up to three years in prison.[188] Another defendant pled guilty to similar charges and, along with serving four months, received ten years probation.[189]

The Queens County prosecutors make no attempt to define these cases as archetypal hate crimes, or even as distinct from ordinary crimes of opportunity. Kane explained, "Criminals that prey on the elderly, they love the elderly—this is their source of wealth," adding, "[w]e don't have a whole lot of tools . . . . We should utilize what the legislature has given us."[190] Indeed, the Elder Fraud Unit's website describes itself as "creative in using every tool available to prosecute those who victimize the elderly" and credits the Unit with "the first conviction in New York State under the Hate Crimes statute under the protected attribute of age."[191] Queens is considered "a leader in finding new uses for hate crime laws," according to prosecutors in other jurisdictions.[192]

This phenomenon shows signs of becoming more widespread in the near future.[193] While Kathleen Hogan, president of the State District Attorneys Association, had not heard of other offices using hate crime legislation in this way, she "looked into the efforts after hearing about it from a reporter, called it 'an epiphany' and said she would suggest it to the group's committee on best practices."[194]

It is not surprising that the use of hate crime legislation in routine swindling cases involving the elderly has been lauded as a positive step toward punishing those who target vulnerable victims.[195] A close look at the text of New York's bias crime law, however, suggests a disconnect between legislative intent and the statute's use by Queens' prosecutors in the Elder Fraud Unit. The legislation's statu-

187. Barnard, *supra* note 182.
188. *Id.*
189. *Id.*
190. *Id.*
191. RICHARD A. BROWN, QUEENS DIST. ATTORNEY'S OFFICE ELDER FRAUD UNIT, OPENING ARGUMENT: PROTECTING THE ELDERLY FROM FINANCIAL EXPLOITATION (2007).
192. Barnard, *supra* note 182.
193. King's County (Brooklyn) has charged Grand Larceny as a Hate Crime, and other jurisdictions in New York State have considered bringing similar charges. *See* Meredith Hoffman, *Accused Mortgage Scammer Charged With Hate Crime for Stealing $350K*, DNAINFO N.Y. (Mar. 7, 2012, 4:39 PM), http://www.dnainfo.com/new-york/20120307/prospect-heights-bed-stuy-crown-heights/accused-mortgage-scammer-charged-with-hate-crime-for-stealing-350k. Other jurisdictions may follow suit as they learn that this approach has proven successful in Queens. Interview 23.
194. Barnard, *supra* note 182.
195. Indeed, there may be a strong moral intuition that targeting vulnerable victims is morally worse than targeting others without that vulnerability. *See generally* Joshua Kleinfeld, *A Theory of Criminal Victimization*, 65 STAN. L. REV. 1087 (2013).

tory preamble focuses on animus, asserting that "[c]rimes motivated by invidious hatred toward particular groups not only harm individual victims but send a powerful message of intolerance and discrimination to all members of the group to which the victim belongs."[196] While the reason for prosecutors' use of hate crime legislation in swindling cases is perfectly understandable given their goals of efficiency and extracting a favorable plea deal, the crimes involved indisputably are not "motivated by invidious hatred." Rather, the elderly victims are chosen because of a perception that they are more gullible or prone to influence.[197]

This novel use of New York's hate crime statute provides a compelling illustration of how the expressive messages of legislation may change between enactment and enforcement because of differing institutional incentives. Paradoxically, it seems prosecutors may be most incentivized to use hate crime legislation when the original meaning of the legislation is most diluted. But is this new development problematic, or is it rather a positive extension of laws intended to protect people targeted on the basis of their identity? When hate crime laws are invoked in cases entirely devoid of animus, and when the crime appears more like a crime of opportunity than one that targets a victim based on group membership, the connection between that crime and the motivation for hate crime legislation becomes increasingly diffuse. When a hate crime begins to resemble an ordinary crime of opportunity, one wonders what expressive message is really sent and whether there is any limit to the expanding universe of hate crimes.[198]

Prosecutors familiar with the Elder Fraud Unit discussed limiting principles that inform what cases the office might charge as hate crimes.[199] First, they acknowledged that not all people sixty and over are in the same category.[200] While the Queens Elder Fraud Unit views hate crime legislation as a better option than New York's vulnerable victim statute because it does not require proof of infirmity, the office has considered adding hate crime charges only when the

196. N.Y. PENAL LAW § 485.00 (McKinney 2008).

197. Arguably, crimes against elderly victims based on such perceptions may reinforce social stereotypes of the elderly, thus resulting in increased harm not only to the individual victim but also to the identity group more widely. Presumably, however, the very existence of a vulnerable victim statute to cover crimes against children and the elderly could also be said to reinforce such stereotypes.

198. Thus far, the Elder Fraud Unit has focused on fraud such as the typical sweetheart scam, which involves a younger person (usually a woman), who tells false tales of woe (a terrible disease or financial crisis), imploring the victim to help. Interview 23. There are commonalities among the victims; sweetheart scam defendants generally target elderly victims who live alone, have no family, and can be described as more vulnerable. *Id.* All convictions thus far for Grand Larceny as a Hate Crime have been on pleas. *Id.*

199. Interviews 23, 51.

200. *Id.*

victim was infirm in some way (and the youngest victim in a Grand Larceny as a Hate Crime case to date was seventy-eight years old).[201] Nonetheless, the Elder Fraud Unit's use of New York's hate crime statute is entirely detached from the professed legislative aim of combating "invidious hatred."

Prosecutors acknowledged that not all criminal justice actors believe that the Elder Fraud Unit office's approach in charging Grand Larceny as a Hate Crime is justified. One explained, "The defense bar resents the lack of animus involved. Defense attorneys allege that these aren't actually hate crimes."[202] Judges may also regard such cases with skepticism, "refusing to take these financial crimes seriously. Some question, 'is this even a crime?' wondering how a person's request for a loan can constitute a hate crime against the elderly."[203] But some prosecutors maintain that, given the limited tools provided by the legislature, the Elder Fraud Unit would be remiss not to use them if the evidence is there and the facts warrant the addition of a hate crime charge.[204]

D. Expressive Consequences

Prosecutors send messages through their enforcement decisions, whether intentionally or not.[205] Thus, when cases that appear to be crimes of opportunity are prosecuted as hate crimes, the message of combating intergroup hatred that motivated enactment of the legislation may seem diluted. Interest group leaders were skeptical about the use of hate crime legislation in nonarchetypal cases,[206]

201. Furthermore, the office has not charged a hate crime when the defendant and victim previously knew each other. Interview 23. Such cases generally involve well-known family members or close friends and are understood to be crimes of opportunity. *Id.*

202. Interview 51.

203. Acknowledging that the outcome is very judge-specific, one prosecutor lamented, "I can't say that courts are taking these cases more seriously; we're not yet seeing a favorable trend." Interview 23.

204. *Id.* (maintaining that the use of hate crime legislation in cases involving financial fraud against the elderly "does not dilute the importance of hate crime legislation" and that "financial crimes may not be violent but they are still devastating"). Another prosecutor stressed that what elderly victims of financial crimes really want is their money back and possibly a stay-away order so they feel protected from future exploitation. Interview 51 (explaining that "being part of the criminal justice system is hard for the elderly" and that it is considered a positive outcome when defendant returns the victim's money even if it results in reduced (or no) jail time).

205. For comparative discussions of expressive enforcement in the international law context, see Margaret M. deGuzman, *Choosing to Prosecute: Expressive Selection at the International Criminal Court*, 33 MICH J. INT'L L. 265 (2012); Mark A. Drumbl, *The Expressive Value of Prosecuting and Punishing Terrorists:* Hamdan*, The Geneva Conventions, and International Criminal Law*, 75 GEO. WASH. L. REV. 1165 (2007).

206. *See, e.g.*, Interviews A–C, E–I.

invoking legislative history and intent to bolster their claim that hate crime legislation should be limited to archetypal cases.[207]

By contrast, supporters of hate crime legislation expect archetypal hate crimes to be prosecuted as such; when they are not, these are the cases most likely to infuriate those who believe that they are entitled to the full benefit of the legislation.[208] Interest group leaders may feel that refusing to prosecute archetypal cases as hate crimes makes a mockery of their victimization and of hate crime legislation in general.[209]

Some interest group leaders complained that archetypal hate crime cases routinely fall through the cracks and that this sends the message that members of the victim's group are not valued by law enforcement and society.[210] Especially for victim groups who may already be fearful of police,[211] when crimes that appear to be bias motivated are not enforced as hate crimes, this may reinforce a victim's apprehension about law enforcement, leading to a "victimology that bubbles beneath the surface."[212] Some described this phenomenon as a vicious circle of underreporting and underenforcement; when victims do not believe that their interests are taken seriously, they are less likely to report, which leads to even less enforcement, which in turn leads to less reporting.[213]

Even in the absence of an increased penalty for the defendant, the very act of law enforcement's naming a case as bias motivated may help the victim and the victim's community to heal.[214] Especially in a case involving a violent felony with an already-lengthy sentence, while an extra penalty may not matter much, "send-

207. *See, e.g.*, Interviews B, D, E.

208. *See, e.g.*, Michael Barajas, *Anti-gay Crimes Rarely Prosecuted in Texas by Name*, SAN ANTONIO CURRENT (June 27, 2012), http://sacurrent.com/news/anti-gay-crimes-rarely-prosecuted-in-texas-by-name-1.1335230 (documenting the outrage of a murder victim's sister at law enforcement's refusal to charge a hate crime despite alleged evidence of bias based on sexual orientation: "Hate-crimes laws were passed to protect people like my brother Troy, and who are they protecting if nobody's familiar with it and nobody's using it?" (internal quotation marks omitted)). When an archetypal hate crime occurs and there are no arrests or charges, interested parties and victims' groups often hold marches and rallies to signal their outrage. *Id.*

209. *See, e.g.*, Interviews B–D, F, J.

210. *See, e.g.*, Interviews D, F, K. Interest group leaders complained that law enforcement often did not sufficiently investigate claims of bias motivation or were unwilling to include hate crime charges even in the face of indisputable evidence of bias motivation. *Id.*

211. Leading examples include transgendered persons and immigrants. *See* Interviews 33, 40, G–H, L, M.

212. Interviews 13, 21, 36.

213. Interview 36.

214. Interview 13.

ing a message" validating the victim's worth and condemning the defendant's hateful conduct may be hugely significant.[215]

The impact of messages sent by hate crime enforcement practices should not be underestimated. Moreover, the mismatch between legislative expression and prosecutorial incentives, once documented, should be addressed by legislators and others concerned about the consistency and coherence of hate crime messaging.[216]

III. NARROWING THE ENACTMENT-ENFORCEMENT GAP

Legislators insist on the importance of sending a message condemning bias-motivated crimes, positing that these crimes are especially threatening to social cohesion as they are more prone to result in group harm and the possibility of retaliation.[217] Prosecutors, however, may lack incentives to use hate crime charges in archetypal cases, thus jeopardizing the continuity (and even sincerity) of legislative messaging.[218]

Faced with a disconnect between promulgation and enforcement of hate crime laws, legislators could choose to repeal the legislation, simply ignore the tension, or take measures to realign incentives in order to bring enforcement in line with the expressive goals of enactment. This Part assumes that, while legislators might choose to amend existing hate crime laws or to limit further expansion of the laws, political considerations make them unlikely to repeal the laws entirely. If legislators want to keep hate crime laws on the books but also want to narrow the messaging gap between enactment and enforcement of the legislation, what concrete steps could be taken? Having examined the effects of different statutory schemes and political and cultural factors on the practical workings of hate crime enforcement, this Part addresses ways that institutional actors might more effectively align enactment and enforcement of hate crime legislation and explores the underlying complications inherent in each approach. It then suggests ways in which lessons from the hate crime context might be applicable more generally.

215. Chuck Smith, Executive Deputy Director of Equality Texas, a lesbian, gay, bisexual, and transgender (LGBT) lobbying group, explained, "I think that in many cases families would find some level of contentment if there was some sort of a public acknowledgement that, yes, this was a bias-motivated crime." Barajas, *supra* note 208; *see also* Interviews 13, 19.

216. While the mismatch between enactment and enforcement messaging is of obvious concern to those who accept an expressivist justification for hate crime legislation, this mismatch is also crucial to retributivist and utilitarian accounts of hate crime legislation, as it fundamentally affects a defendant's punishment and incapacitation.

217. *See supra* Part I.B.

218. *See supra* Part II.B.

A. Addressing Concerns of Underuse in Archetypal Cases

A proponent of hate crime legislation trying to achieve more prosecutions of archetypal hate crimes might recommend the following: First, at the flagging stage, police and prosecutors could be better equipped to identify possible bias-motivated crimes and more sensitized to the gravity of harm caused by these cases. Second, creating designated units (or appointing point people) focused on hate crime enforcement may cause prosecutors to pay special attention to bias-motivated crimes.[219] Third, legislators concerned that prosecutors may be disinclined to use hate crime statutes in archetypal cases because they would not significantly alter a defendant's sentence might amend the statutes to ensure that a hate crime conviction would meaningfully affect a defendant's sentence. Prosecutors will almost certainly consider whether a hate crime charge, if proven, could make a meaningful difference in the defendant's sentence when deciding whether to include a hate crime charge. Finally, legislators wishing to encourage prosecutors to include hate crime charges in archetypal cases might choose to revise and simplify jury instructions or even to leave the question of determining bias motive to the judge rather than the jury, to alleviate prosecutors' concerns of alienating a jury by adding a hate crime charge.

Each of these suggestions assumes that legislators want to increase hate crime prosecutions in archetypal cases and that defendants who commit bias-motivated crimes should receive a higher sentence than those who commit parallel, non-hate-motivated crimes. But this premise raises serious concerns about whether, in all archetypal hate crime cases, a higher sentence would be either advisable or even feasible.[220] With these concerns in mind, this Subpart will explore statutory and organizational reforms that might increase hate crime prosecution in archetypal cases. While the suggested approaches focus on altering prosecutorial incentives in order to increase hate crime prosecution, they may be used in tandem with other nonlegal recommendations for bridging the enactment-enforcement messaging gap.

1. Training Police and Prosecutors

Legislators might take steps to align enforcement practices with legislative messaging by passing legislation that would fund the creation of special hate

219. *See* BELL, *supra* note 121, at 132.
220. *See infra* notes 236–238 and accompanying text.

crime units and training programs for prosecutors and police.[221] As the first movers in hate crime enforcement, police must have the tools to identify bias motives and to flag them for the prosecutors in their jurisdiction. By funding police training programs, legislators could better ensure that police have the tools to properly identify possible hate crime cases.

Prosecutors in jurisdictions where police are trained to flag hate crime cases noted the success of such efforts. One Northwest prosecutor emphasized the importance of police training, explaining that in his jurisdiction there is now a training video for police and that "since the training, there's been no problem with flagging."[222] Other prosecutors confirmed that screening for hate crimes "starts in the police station."[223] A Massachusetts prosecutor noted that in Boston, there is a police department unit devoted entirely to hate crimes, explaining, "[I]f there's no independent unit and police aren't trained, there's no chance. Education is key. Culture is key. If racial epithets are common in a culture, they won't serve as a signal to police as something to flag."[224]

In addition, police departments whose reporting forms do not include a "possible bias motive" box could consider amending their forms in order to make the identification and reporting of possible hate crimes more systematic. Such changes could begin with prosecutors. If prosecutors make an affirmative decision that hate crime prosecution is a priority, they can both adjust the office infrastructure to support this mandate and provide police with the tools to recognize possible bias motives and to flag cases for further investigation and possible prosecution. Legislative support is crucial, however; prosecutors' commitment will likely not take root unless they are given a statutory incentive to use the legislation,

221. Of course, prosecutors could develop their own hate crime protocols. As a starting point, individual offices could keep records of how many hate crimes were reported, investigated, charged, pled, and convicted in their jurisdiction. *See* Interviews 6, 33.

222. Interview 5 ("It's a very practical video and we went over the elements of a bias crime, focusing on the importance of construing the possibility of bias motive broadly. [Because gender-bias crime is uncommon,] it wouldn't be recognized as such if there wasn't training. We teach them that if he's calling her names, spitting on her, and calling her the c-word, it's not just disorderly conduct, it's a felony.").

223. Interviews 9, 14.

224. Interview 30. While many prosecutors focused on the importance of training police to flag cases, others deemphasized the training, explaining "it isn't rocket science. It's an enhancement and describing it takes two minutes. If you have the facts, you can use it. It's not an in-depth deal. It isn't like search and seizure." Interview 4. Prosecutorial attitudes cannot be explained in a vacuum and, not surprisingly, the prosecutors that emphasized the importance of police training worked in those jurisdictions that featured a bias officer or screener, whereas those prosecutors that deemphasized the significance of police training worked in jurisdictions where no such specialization exists and bias charges are rarely, if ever, used in practice.

are trained to use the legislation, and are working within an infrastructure that supports the legislation's use.

Even in jurisdictions where police recommend charges, prosecutors generally are the ultimate arbiters as to what charges should be brought and can accept, decline, or alter the officer's recommendation.[225] Thus, legislators concerned that archetypal hate crimes are not being prosecuted as such could allocate funding to train prosecutors how to investigate and prosecute hate crime cases.

Of course, prosecutors could also take the lead to train those in their ranks if they were so inclined, with professional associations spearheading these efforts. Despite the existence of state and national district attorney associations, no prosecutor with whom I spoke was aware of any hate crime–related training program administered by a professional association. A Southern prosecutor who lamented the lack of awareness about hate crime legislation in her office noted:

> It really has to be emphasized by professional associations. Every [assistant district attorney] is a member of the [state] association and there are annual conferences. Professional associations should highlight bias crime prosecution in trainings, telling prosecutors, "this is important to protect people, and here's how." The associations must have a strong hand in disseminating materials once they illustrate that this is important. Only this will lead to cooperation.[226]

Other prosecutors believed that the national professional association should be responsible for training. One prosecutor observed, "I've never seen a class offered either by [the state organization] or by the [National District Attorney Association]. There's no level of awareness in our state's offices. It's no surprise given the lack of training."[227]

2. Designating Hate Crime Units

Given time pressures, scarce resources, and the wide array of legislation at a prosecutor's disposal, one might suspect that, beyond stock offenses (the bread and butter of prosecutors' charges), a prosecutor is unlikely to use particular statutes unless someone brings them to the prosecutor's attention. The creation and funding of hate crime units to oversee hate crime prosecution would help to foster enforcement expertise.

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225. The literature on prosecutorial declination is vast. *See generally* Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911 (2006); Roger A. Fairfax, Jr., *Prosecutorial Nullification*, 52 B.C. L. REV. 1243 (2011).

226. Interview 3.

227. Interview 1.

Prosecutors noted that without a designated unit to oversee the office's efforts to prosecute hate crimes, those cases were unlikely to surface in a consistent or reliable manner.[228] A New York City prosecutor stressed, "If there's no specialized unit, hate crime charges won't be discussed."[229] Of course, it is unlikely that many district attorneys' offices other than the largest offices in the most demographically diverse jurisdictions will support the creation of a hate crimes bureau.[230] Still, offices that are not large enough to warrant a devoted hate crimes bureau might designate a hate crimes officer. This prosecutor would soon become an expert on the jurisdiction's applicable hate crime statute and would develop a specialized familiarity about when charges are and are not appropriate.

For example, in New Jersey, every county prosecutor's office has at least one bias officer, and Essex County (the largest in the state) has two specialized bias officers.[231] All bias officers in the state meet monthly to discuss trends in hate crimes and hate crime prosecution.[232] After describing the infrastructure for hate crime prosecution and awareness in New Jersey, a prosecutor emphasized that "as a result of our efforts, we don't have these problems as much."[233] Even in counties with offices that are too small to have someone focused exclusively on hate crime prosecution, one prosecutor could still be given the responsibility of screening bias cases so that the police have a point person who they know will oversee any possible hate crime cases.

3. Addressing Problems of Statutory Interaction

In their charging decisions, prosecutors often choose between different statutes, leaving some seemingly fitting statutes to fall by the wayside because another law proves a superior fit. While this is a common phenomenon in criminal law, arguably the more prominent the expressive aspect of a law, the more significant it is when that law is not used when it seems to fit the facts of a given case. This concern is especially salient in the hate crime context given the predominantly expressive justification for hate crime legislation. This expressive focus increases the possibility that a lack of hate crime enforcement in archetypal cases

228. Interviews 24, 27, 30.
229. Interview 28.
230. Some prosecutors, especially those from Southern and Midwestern cities, were surprised to learn during our conversations that other cities, such as Los Angeles and New York City, have specialized hate crime bureaus or units. *See, e.g.*, Interviews 1, 3, 8.
231. Interview 6.
232. *Id.*
233. *Id.*

may send unintended messages to victims and others that the government does not actually intend to protect all its citizens against bias-motivated crimes.

As demonstrated in Part II, prosecutors may be disinclined to use hate crime legislation when preexisting statutes already have significant penalties for particular crimes.[234] Moreover, when hate crime enhancements do not increase the maximum penalty, as in the case of first-degree felonies and class A misdemeanors in Texas,[235] adding a hate crime charge may only increase the prosecutor's burden without providing any tangible benefit.

In cases in which prosecutors might be disinclined to use hate crime statutes because of structural reasons pertaining to the state criminal code, legislators concerned about the expressive function of nonenforcement might consider revising the statutes in order to mitigate these structural concerns. In addition, when considering future criminal legislation, consideration should be given to how these laws would interact with existing hate crime legislation and in what ways they might affect prosecutorial incentives.

Legislators could affect prosecutorial incentives by ensuring that a hate crime enhancement actually triggers a meaningful sentence increase. For example, a hate crime law might specify that, if proven, the hate crime charge would add a certain number of months to the defendant's sentence or that it would increase the defendant's sentence by a certain percentage. This would be possible for all cases except those few that involve life sentences.[236] While in some cases a prosecutor might still decide that it is not worth it to add a hate crime charge, that prosecutor would not be able to claim that a hate crime charge would not increase a defendant's sentencing range. Legislators could also incentivize prosecutors to use hate crime statutes in states with standalone hate crime statutes, either by setting higher minimum sentences for standalone bias crimes than for their parallel non-bias-motivated crimes or by creating a broader sentencing range for standalone bias crimes, providing the sentencing judge with discretion to sentence appropriately given the magnitude of the crime.

But there may be several reasons why increasing a defendant's sentence in all archetypal hate crime cases is undesirable or impractical. First, in archetypal hate crime cases that are particularly violent and traumatic to the victim's identity group (such as Matthew Shepard's brutal murder) there is simply no possibility for a meaningful sentence increase since, depending on the state, a defendant will likely

234. *See supra* Part II.B.

235. *See supra* Part II.B.2.

236. Of course, even a shorter sentence could be deemed high enough by prosecutors such that they would be disinclined to include a hate crime charge. A system of harsh sentencing may therefore significantly undermine the expressive value of hate crime enforcement.

already be sentenced either to life without parole or to death. Second, a growing concern that criminal sentences in the United States are already overly severe gives rise to the question whether it would even be advisable to significantly increase sentences through a hate crime or other enhancement.[237] Many have lamented the unusually high sentences in the United States and have questioned whether this is a wise use of criminal justice resources.[238] If there is already a concern that sentences are generally too high, this would suggest that increasing sentences further might lead to even more excessive sentences. Finally, further research would be necessary to determine how much sentences would need to be increased to incentivize prosecutors to expend the extra resources and take the added (at least perceived) risk of adding a hate crime charge. Even when increased sentences are plausible, if a prosecutor considers that she can reliably depend on a high sentence from a judge she may be unlikely (without other expressive motivation) to add the hate crime charge since she already considers the sentence sufficient.[239] This calculation would likely be case specific, depending on the historical, political, and social circumstances of the jurisdiction and the identity group dynamics, as well as the prosecutor's priorities and the office norms.

4. Preferring Judge to Jury

While an increasingly small number of cases go to jury trials,[240] prosecutors who take seriously the ethical dictates that they charge only those counts that they credibly could try before a jury will carefully consider the issue of appealing to a jury. Prosecutors therefore may be less likely to add hate crime charges if the jury instructions are confusing or overly lengthy. If made available, model jury instructions that are short, simple, and user friendly might incentivize prosecutors to use hate crime statutes in archetypal cases.

Alternatively, if jury instructions prove so complicated that, even when simplified, prosecutors would be dissuaded from including hate crime charges, the task of determining a bias motive could potentially be given to judges instead of juries. While a judge may not enhance a defendant's criminal sentence beyond

237. Even if one agrees that, in theory, hate crime defendants deserve a more severe sentence than defendants convicted of parallel crimes because the bias-motivated crime is more heinous, one might still believe that sentences in general are too high and therefore that an enhancement for proof of bias motivation is unjustifiable. These competing notions of proportionality may explain why, for some, an intuition that hate crime enhancements make sense in theory may not translate into support for hate crime enhancements in practice.

238. *See, e.g.*, STUNTZ, *supra* note 166, at 5–7.

239. *See supra* notes 144–154 and accompanying text.

240. *See* STUNTZ, *supra* note 166.

the statutory maximum unless based on facts found by a jury to be beyond a reasonable doubt,[241] the judge could consider a bias motive as a factor when determining a defendant's sentence within the sentencing range.[242]

There are a number of possible reasons for preferring judge to jury. First, as institutional actors who are familiar with the complexities of legal doctrine, judges may be better equipped to analyze a hate crime statute. Second, while judges are not impervious to local politics, they may be more objective about fraught cultural and social issues. Moreover, it may not matter whether juries are actually capable of maintaining objectivity in practice; so long as prosecutors continue to believe that hate crime charges will have adverse effects on the jury pool, this belief alone may be enough to make it unlikely that prosecutors will include the charges in archetypal cases.

B. Addressing Concerns of Misuse in Nonarchetypal Cases

In order to sharpen our focus on those cases that appropriately can be deemed archetypal hate crimes, this Subpart concentrates on ways to limit the misuse of hate crime prosecution in nonarchetypal cases. To address concerns that charging nonarchetypal cases as hate crimes may dilute the potency of hate crime legislation,[243] legislators might choose to amend hate crime statutes by adding an animus requirement, thus eliminating the possibility that ordinary crimes of opportunity would be charged as hate crimes. They might also consider limiting the expansion of protected categories to those categories for which group-based animus is of particular concern.

1. Requiring Animus

Legislators might choose to add an animus requirement in order to avoid concerns about dilution and to ensure that only archetypal hate crimes were charged as such. By including a requirement that the victim was selected based on intergroup bias, prejudice, or hostility, legislators could ensure that hate

241. Apprendi v. New Jersey, 530 U.S. 466, 491–97 (2000).

242. In jurisdictions where there is a significant range in sentencing for a particular crime, the result could be quite substantial. In New York, for example, the sentencing range for a class B Violent Felony is between five and twenty-five years. N.Y. PENAL LAW § 70.02(3)(a) (McKinney 2009). For those judges that already tend to sentence at or near the top of the range, making a bias motive another factor that warrants enhancement may not yield any notable change in sentencing. But it is possible that a judge's taking notice of the bias element and labeling the crime accordingly could still serve expressive goals even if the increase in defendant's sentence was negligible.

243. *See supra* Part II.D.

crime laws would be used only in cases of invidious hatred rather than in cases in which the crime, however heinous, was actually a crime of opportunity and not an archetypal hate crime. Arguably this revision, while ensuring that ordinary crimes of opportunity are not prosecuted as hate crimes, would also make even archetypal hate crimes more difficult to prove since the requirement of animus is a more stringent standard than that of intentional selection. This possible amendment is therefore in tension with suggestions geared to encourage prosecutors to charge hate crimes,[244] suggesting a trade-off to be made by individual legislators.

2. Limiting New Protected Categories

The expressive effect of adding new protected categories ought to be considered by legislators both in isolation and with respect to how their inclusion may affect the understanding of preexisting categories. The addition of too many categories (especially of categories that are not understood by many to be aspects of a person's core identity) may dilute the communicative impact of hate crime legislation. Take, for example, the categories of matriculation and personal appearance in D.C.'s hate crime statute.[245] Prosecutors described these recently added categories, along with homelessness and family status, as "not helpful designations."[246] While it may seem costless for legislators to add such categories, if never used and even derided by D.C. prosecutors, they threaten to make a mockery of the broader endeavor of hate crime legislation.[247]

Race, the paradigmatic protected category for hate crime legislation, could help to guide an exploration of potential additional categories.[248] Oriented by a concern with combating harms caused by intergroup prejudice and symbolic victimization, legislators could look to other aspects of core identity that, his-

244. *See supra* Part III.A.3.

245. Matriculation is not defined in the D.C. statute, but prosecutors understand it to refer to targeting based on "two warring schools or educational groups." Interview 31. Official materials do not include any mention of matriculation or personal appearance. *See* BIAS-RELATED CRIME IN THE DISTRICT OF COLUMBIA (2010) (compiled by the Offices of the Mayor and Chief of Police).

246. Interview 31.

247. There is, however, a growing literature on the pervasiveness of discrimination based on personal appearance. *See, e.g.*, DEBORAH L. RHODE, THE BEAUTY BIAS: THE INJUSTICE OF APPEARANCE IN LIFE AND WORK (2010). And various jurisdictions have addressed this issue in their civil codes. *See, e.g.*, Elliot-Larsen Civil Rights Act, MICH. COMP. LAWS ANN. § 37.2202 (West 2001 & Supp. 2013) (banning discrimination in employment based on height and weight, among other factors).

248. *See supra* Part I.C.

torically, have been divisive. Such categories as religion and sexual orientation surely would qualify.

By contrast, when increased protection for a group already exists in the form of vulnerable victim or other such statutes that provide for sentencing enhancements, inclusion of that identity group as a protected category in hate crime laws may be unnecessary. For example, many states include a vulnerable victim statute that protects children and the elderly, arguably making the inclusion of age as a protected category for hate crime legislation unduly repetitive.[249] Of course, just as legislators might want to incentivize prosecutors to charge archetypal hate crimes, if they are particularly concerned about protecting the elderly through the use of vulnerable victim statutes, they might choose to amend vulnerable victim statutes accordingly—for example, in the case of New York, by removing the requirement of infirmity.

C. Managing Enforcement Messaging

This Subpart identifies ways in which prosecutors and other institutional actors, irrespective of the intricacies of individual hate crime laws, might more closely align messaging at the enforcement stage with that of legislative enactment. In some instances, a focus directly on enforcement messaging may circumvent some of the dilemmas created by trying to bridge the enactment-enforcement divide through statutory reform or other systemic changes.

First, prosecutors inclined to see it as their role to send expressive messages might choose to charge a case as a hate crime for symbolic reasons, even if the inclusion of a hate crime charge could not affect the result at sentencing. Second, prosecutors disinclined to take such risks at the charging stage might still take steps to make their charging processes more transparent, thus diffusing interest group tensions.[250] Finally, this Subpart explores the possibility of expanding the role of the state attorney general to propagate messages of tolerance and to combat hate violence.

249. *See supra* Part II.C. This is not to suggest that it would be impossible to have a case involving intergroup animus against the elderly but rather to point out that the relationship between hate crime and vulnerable victim statutes should be carefully considered.

250. A normative discussion of the responsibilities of prosecutors is beyond the scope of this Article. But the literature on prosecutorial transparency sheds light on the ways in which individual prosecutors might address the structural incentives (or disincentives) endemic to hate crime legislation. For a general discussion, see Bibas, *supra* note 225, and Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125 (2008).

1. Symbolic Charging

Prosecutors differ with respect to whether they believe that it is their responsibility to send expressive messages. Some consider it part of their role to send a message to victim groups that they are valued by society and to send a strong message to perpetrators that racist, homophobic, or other bias-motivated behavior will be severely punished.[251] Others vehemently disagree, claiming that their sole goal is individualized justice, which they achieve on a case-by-case basis irrespective of political or interest group pressures.[252]

Prosecutors concerned about the messaging function of enforcement might be inclined to include hate crime charges even when they would have no practical effect. Cynically, this approach could be said to echo what some argue to be a purely symbolic gesture of hate crime law enactment. Some interest group leaders have advocated for symbolic charging, however, based on the belief that law enforcement should be proactive in sending a strong message against hate-motivated violence.[253]

For example, in the explosive aftermath of David Ritcheson's violent assault by alleged white supremacists,[254] the Anti-Defamation League (ADL) urged prosecutors to add hate crime charges despite the uncontested fact that proof of bias motive could not have affected the defendants' sentence because the case was already classified and charged as a first-degree felony. Martin Cominsky, the ADL's Southwest Regional Director, explained, "We want the public to accept and understand that this was a hate crime."[255] Harris County District Attorney Trent remained unconvinced, later noting, "While some groups still pressed us to pursue hate crime allegations for statistical purposes, I was not about to add anything extra to my burden of proof."[256]

251. Fifteen of fifty-two prosecutors mentioned that their role included an expressive component. Not surprisingly, these fifteen included all the prosecutors with whom I spoke who worked in specialized bias units or served as the point person to oversee their office's hate crime enforcement efforts. While those prosecutors who embraced an expressive mission all suggested that for an archetypal hate crime they would expect to include hate crime charges, these same prosecutors acknowledged statutory incentives that cut against adding a hate crime charge and concerns about jury reaction. Thus, while the individual prosecutors might be more inclined to add hate crime charges as part of an expressive mission, the practical realities of hate crime enforcement would likely carry sway.

252. Thirty-three of fifty-two prosecutors agreed that individualized justice was their sole concern.

253. *See supra* Part II.D.

254. *See supra* notes 14–20 and accompanying text.

255. *No Hate Crime Charges Yet for Teens Accused of Beating Texas Boy*, FOX NEWS (Apr. 28, 2006), http://www.foxnews.com/story/2006/04/28/no-hate-crime-charges-yet-for-teens-accused-beating-texas-boy (internal quotation marks omitted).

256. Dexheimer, *supra* note 139 (internal quotation marks omitted).

While the suggestion of symbolic charging proved unpersuasive in the Ritcheson case, prosecutors have used it on occasion—for example, in the 2008 Texas case involving defendant Terry Mark Mangum who admitted to killing Kenneth Cummings because he was gay.[257] Brazoria County prosecutor Jeri Yenne added hate crime charges despite knowing that a bias finding would make no difference in the defendant's prison term, believing that "the finding was important. If you engage in this sort of behavior, there should be some public finding of it."[258] Whatever the theoretical expressive benefits of symbolic charging, it seems unlikely that prosecutors will regularly spend scarce prosecutorial resources without any hope of a sentencing payoff.

2. Prosecutorial Transparency

Increased transparency and improved communication by law enforcement might prevent hate crime victims and victim group members from feeling neglected or even betrayed by the government when crimes they perceive as hate crimes are not enforced as such. Prosecutors, in devising a system of best practices, should strive to combine ex ante and ex post transparency. Ex ante, prosecutors could form partnerships with community organizations to improve public trust in the criminal justice system. They might also partner with other offices in the state to unify their approach toward hate crime prosecution.[259] Furthermore, including hate crime prosecution on a district attorney website would suggest to the community that these crimes are taken seriously.[260]

These approaches would be well complemented by transparency efforts ex post. When interest groups perceive a case to be a hate crime but it is not prosecuted as such, a prosecutor can explain why invoking hate crime legislation in this case would not be efficacious.[261] While it would violate prosecutorial ethics to try

257. *Id.*; *July 21*, TRENDS IN HATE, http://www.trendsinhate.com/hatedates/JulyHateDates/July21.html (last visited Feb. 16, 2014).

258. Dexheimer, *supra* note 139.

259. For example, the Michigan Alliance Against Hate Crimes (MIAAHC) is a statewide effort that brings prosecutors and community groups together and works to prevent and monitor bias-based crimes. *See infra* notes 268–269 and accompanying text.

260. For a discussion of prosecutorial accountability and district attorney websites, see Marc L. Miller & Ronald F. Wright, *Reporting for Duty: The Universal Prosecutorial Accountability Puzzle and an Experimental Transparency Alternative*, *in* THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE 392 (Erik Luna & Marianne L. Wade eds., 2012). For a more general discussion of district attorney's office management issues as they relate to technological advances, see Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 65–66 (2002).

261. While interest group members might be frustrated with a prosecutor who provides an excuse grounded in a shortage of resources or time, if the rationale is grounded in statutory concerns and

a defendant in the media for offenses not charged,[262] a prosecutor could, without making any proclamations about a defendant's culpability or motivation, explain the statutory reasons why a hate crime charge would not increase the possible sentencing range or might be otherwise ill suited in a particular case.

In cases for which a state's hate crime statute simply does not fit the facts, a prosecutor's clear and direct explanation to the victim and interest group leaders at the outset could help to diffuse tension. And in cases for which the evidence of bias does not appear to be sufficient but an investigation is ongoing, taking the time to explain to the victim that his or her concerns are being taken seriously and that the case is being investigated thoroughly may prevent the victim from feeling ignored.

Those prosecutors who already assume such tactics highlighted the importance of transparency in gaining and preserving the community's trust in the criminal justice system. They emphasized the importance of "an ongoing dialogue"; one noted:

> It's crucial that people know what we're doing. If there are racial or homophobic slurs but the evidence is not strong enough to warrant a hate crime charge, it's important to convey to people what the burden of proof is, to explain to them that this is why we're doing what we're doing.[263]

Many agreed that "explaining to families why we're not charging" was crucial, along with "telling the victim what evidence we have, what the time frame is, and following up with them."[264] A Northwest prosecutor insisted, "It usually works. People have fears for themselves and for their community. They want to make sure we understand what bias crimes are."[265] Those prosecutors that stressed the importance of transparency also highlighted the delicacy of relationships between communities and the importance of the criminal justice system in serving as a mediator. One noted, "[T]his job is really important from a social work angle, building bridges with communities. If handled badly, it can destroy relation-

concerns about alienating a jury, the interest group members might be more understanding. *See infra* notes 263–267 and accompanying text.

262. MODEL RULES OF PROF'L CONDUCT R. 3.8(f) (2013) (providing that "except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, [a prosecutor shall] refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused").

263. Interview 22.

264. Interviews 30, 31.

265. Interview 5.

ships."[266] Another cautioned, "No kind of case can spin out of control more quickly."[267]

Concerned about the widespread volatility associated with hate crimes, law enforcement officers and other interested parties might coordinate statewide coalitions to monitor and address bias crimes. For example, Michigan prosecutors referred to the Michigan Alliance Against Hate Crimes (MIAAHC), a coordinated effort among prosecutors and community groups that meets monthly.[268] One prosecutor explained, "MIAAHC assists prosecutors, explaining why these cases are so important, their effect on the victim and the community. A bar fight is very different from an assault based on ethnicity, and it's important to educate people about why these crimes are so different."[269] This coalition between criminal justice actors and community groups could be replicated throughout the country to better synchronize hate crime enforcement efforts with the objectives of hate crime legislation.

Efforts to increase transparency through coalition building would no doubt be criticized or even rejected by some prosecutors. While a few prosecutors expressed satisfaction that interest groups felt comfortable reaching out to them,[270] others mentioned that, while this level of contact is a positive factor in theory, it is also complicated because interest group members have a different agenda. For example, interest group members may pressure prosecutors to investigate crimes that involve their members as hate crimes even if there is no evidence of a bias motive.[271] Specifically, according to a prosecutor from a large Northeastern city, interest group members tend not to distinguish "between crimes involving and targeting a community," referring to the transgender community as a particularly vocal interest group in that jurisdiction.[272] More skeptical prosecutors stressed that they "don't want to appear to be in solidarity with these folks" and would

266. Interview 31.
267. Interview 30.
268. MICH. ALLIANCE AGAINST HATE CRIMES, http://miaahc.com (last visited Feb. 16, 2014).
269. Interview 7.
270. A California prosecutor explained, "[I]t's fantastic to help the black community, to signal that we care about [their] group." Interview 24. A New York prosecutor mentioned that interest groups can be helpful, especially "those that take time and are patient with the criminal justice system." Interview 28.
271. A few of the prosecutors who described themselves as open to interacting with interest group members noted that "it sometimes gets emotional and we feel pressure to conduct the investigation quickly." Interviews 19, 28. A few prosecutors also mentioned that they had been pressured to include hate crime charges in cases involving a white victim and that, upon refusing, allegations of "reverse discrimination" abounded. Interviews 27, 30. In each such case, the prosecutor with whom I spoke insisted that there was not enough evidence to show a hate motive and that, if there were, hate crime charges would certainly have been filed.
272. Interview 31.

therefore take whatever steps are necessary to maintain the impression that "we can't be swayed."[273] Southern prosecutors referenced black preachers as particularly vocal.[274] Northeastern prosecutors who preferred to limit contact with interest groups expressed a similar sentiment but, when asked about which interest groups were most vocal in their jurisdictions, they consistently referred to the gay, lesbian, and transgendered communities.[275] A uniting concern, however, was the expressive message sent to the district's constituents and, specifically, the prosecutors' strong desire to maintain the appearance of neutrality. The dissemination of guidelines for prosecutors' use when interacting with victims and other interested parties might ameliorate some of these concerns and provide guidance to prosecutors for avoiding the extremes of either appearing to ignore victims' needs or appearing to pander to interest groups.

3. Expanding the Role of the State Attorney General

While altering prosecutorial incentives may help to better transmit a message of tolerance and respect for diversity, any large-scale efforts to reduce hate crimes must necessarily look beyond the criminal justice system. Legislators might consider enlisting the help of non–criminal justice actors to transmit messages of tolerance associated with hate crime legislation—for example, by looking to the state attorney general to enforce the legislation through civil litigation.

Eight states have enacted civil hate crime legislation, which empowers the attorney general to file for injunctive relief in tandem with, or instead of, criminal prosecution.[276] Five of these states have integrated these civil hate crime laws into

273. Interviews 3, 5, 7. Many stressed that they "don't want to appear to be pandering" and that the "appearance of undue influence" is to be avoided at all costs. *See, e.g.*, Interviews 9, 22.

274. A number of prosecutors from the South shared some version of the following sentiment:

> If you are in the South and you are a white prosecutor, and you say I'm sending a message, this won't be tolerated. The black community might see it as validating, but the white community sees it as pandering. And even the black community will be skeptical. The proof is in the pudding. They will prefer a long sentence. Maybe in New York, they use hate crime legislation to send a message. Here, we just want to put him away. If black preachers call me, I say "I don't want to talk to you." If I do what they want, they'll think they have sway. And we must appear to be independent. If they scream too much and the DA does what they want, it seems it's only because they're vocal.

Interview 25; *see also* Interviews 1, 4, 8, 15.

275. Interviews 28, 31.

276. For a detailed account of the role of state attorneys general in combating hate crimes, see Amy Dieterich, *The Role of the State Attorney General in Preventing and Punishing Hate Crimes Through Civil Prosecution: Positive Experiences and Possible First Amendment Potholes*, 61 ME. L. REV. 521 (2009).

their wider efforts to combat hate violence.[277] Whereas criminal prosecution focuses on the individual crime and individual victim, when the attorney general seeks injunctive relief the focus is more on the hate crime as a community crime and on the expressive goal of sending a message to citizens that hate crimes are unacceptable in our civil society.[278] This stated focus on sending a message may be, from an expressivist perspective, an advantage of civil injunctions over criminal prosecutions in hate crime cases.

Injunctive relief may take many forms but often includes a stay-away order.[279] Judges are not always receptive to the attorney general as plaintiff, and injunctive relief often is denied "when the judge thinks it's overkill"—for example, when a stay-away order is sought against a defendant who is already under house arrest.[280] Nonetheless, this approach is supported by some interest groups who highlight it as a way to ensure that the victim and those similarly situated are protected, especially since criminal prosecutions do not always yield success.[281]

Furthermore, the attorney general's office is not tasked with the huge caseload of the district attorney and thus may be able to provide more individual attention to victims and their families. Some contend that "victims relate better to the civil side" as opposed to criminal law enforcement actors and that, by comparison, those victims who work with the attorney general report receiving "Cadillac treatment."[282] Moreover, the expeditious nature of injunctive relief may provide a sense of catharsis that is distinct from what many victims describe as the emotional rollercoaster of a criminal investigation and prosecution.[283] Finally, the attorney general's office may wait until injunctive relief is granted before sending out a press release.[284] This control over timing and substance of media exposure allows the attorney general to tailor the media attention according to its specifications, further distinguishing this civil approach from criminal prosecution.[285]

277. *Id.* at 527. These states include Maine, Massachusetts, New Hampshire, Vermont, and West Virginia. *Id.*

278. Interviews 11, 30.

279. *See* Dieterich, *supra* note 276, at 526–27 (highlighting, as an advantage of the civil approach, that "civil injunctions can be permanent, while stay away orders as part of a criminal prosecution normally only last for short periods of time").

280. Interview 11.

281. Interviews 10, 11, 12, 19.

282. Interviews 11, 12.

283. Interview 19.

284. Interview 11.

285. For a discussion of problems associated with media coverage of criminal prosecutions, see, for example, Mark J. Geragos, *The Thirteenth Juror: Media Coverage of Supersized Trials*, 39 LOY. L.A. L. REV. 1167, 1168 (2006), which argues that "[t]he 'supersize' nature of these cases is created by the media rather than reflected by it, as journalists . . . capitalize on the public's apparently insatiable appetite for all things sensational."

D. Beyond the Hate Crime Context

While the hate crime context is unique in its history, development, and social and cultural details, its lessons are relevant for institutional actors concerned about expressive enforcement more broadly. The Article's focus on hate crime laws highlights the significance of the role of the legislature not only in enacting new criminal legislation but also in anticipating how it will be used in practice. For instance, the hate crime example suggests that when legislators add a tool to prosecutors' proverbial toolbox they should consider what incentives, whether statutory, political, or otherwise, might influence prosecutors in their use of the legislation. Legislators should pay heed to when the preamble of a statute does not accord with the text of the statute itself and consider how the statute is likely to be used in practice, quite apart from any stated legislative intent.

As a default presumption, when new criminal laws are enacted, legislators might consider allocating funds for training police and prosecutors and designating special officers to serve as point people in their offices. Of course, prosecutors will always be operating under resource constraints, and legislators have real decisions to make about how to channel state funds. But legislators concerned about continuity in messaging should also concern themselves with how, and whether, their laws are enforced.

The statutory interaction issue confronting prosecutors tasked with enforcing hate crimes also provides a cautionary lesson for legislators in other contexts. Arguably, the more expressive the legislation, meaning the more its enactment is justified on expressive grounds, the more significant the potential for a gap between enactment and enforcement messaging. Especially with laws designed to be norm affecting or to protect vulnerable groups, legislators should carefully consider the interaction between proposed criminal statutes and preexisting legislation; if the new statute is worded such that it functions as a less desirable alternative to an existing statute, law enforcement may deem it worthless and not look to the statute as a resource. Law enforcement's designation of a new statute as useless may be particularly problematic if interest groups understood the legislation's enactment as being of great significance to the wellbeing of their members and society as a whole.

The issue of what determinations will be made by a jury versus a judge may also be a factor in a prosecutor's decision whether to include particular charges. If jury instructions for a particular charge are especially complex, prosecutors may be less inclined to include that charge. Legislators ought to consider the complexity of jury instructions in determining whether an enhancement is more suitable as a

separate charge for jury consideration or instead as an issue for the judge's determination at sentencing.

Lessons from the hate crime context are also relevant to other areas of law enforcement in which relationships with victims, victim groups, and other interested parties may prove especially volatile, such as cases involving domestic violence and child abuse. Ultimately, the level of trust that law enforcement is able to build with victims and victims' groups through efforts to increase transparency and build coalitions may prove of particular significance in sending a unified governmental message that these crimes are taken seriously and will not be tolerated in our civil society.

CONCLUSION

While enactment-enforcement gaps are widespread in criminal law, this discrepancy is uniquely significant in the context of laws that are understood to "send a message." When legislators enact a new law to protect a particular group, that piece of legislation is imbued with expressive force for members of the group and society as a whole. If prosecutors are understood to be sending a different or contrary message through their enforcement decisions, this expressive force is significantly undercut. An exclusive focus on the enactment of such legislation is therefore misguided.

The disconnect between institutional incentives that govern the promulgation and enforcement of hate crime legislation should concern government actors and others who strive to send a consistent message against hate-motivated violence. If prosecutorial incentives are not strategically aligned with legislative expression, community support upon enactment of legislation may be transformed into confusion and disillusionment at the stage of implementation. Moreover, synchronicity between legislative goals and prosecutorial incentives is crucial not only to combating hate-motivated violence but, more broadly, to the propagation of any legislative message through expressive enforcement.

APPENDIX I: QUALITATIVE METHODOLOGY

This study consists of in-depth interviews with fifty-two prosecutors. I limited my sample to prosecutors from states that have enacted hate crime legislation. I further limited the interviews to prosecutors from offices in urban,

metropolitan districts with populations of at least 200,000 people.[286] My interviews with prosecutors included twenty-seven men and twenty-five women. While I did not ask the interviewees to disclose their race, ethnicity, or sexual orientation, five self-identified as African American, three self-identified as Asian American, and one self-identified as gay.

I chose to interview prosecutors in order to gain a nuanced account of the range of incentives faced by prosecutors in hate crime cases. The format of semistructured interviews[287] was ideal because, in order to gain a rich understanding of these incentives, I needed to ask follow-up questions about prosecutorial choices, to inquire about the intricacies of office structure and protocol, and to gain a sense of the cultural and historical factors that distinguish jurisdictions from one another.[288]

I selected prosecutors based on size of office, region of the country, and type of hate crime statute. In offices that included designated individuals who oversaw hate crime cases, whether as part of a hate crime unit or not, I interviewed prosecutors who were in charge of hate crime prosecution efforts. Eight of the individuals with whom I spoke were either heads of their hate crimes unit or the

286. For purposes of triangulation, I also spoke with fourteen interest group leaders from ten organizations, which included advocacy groups for minorities based on the protected characteristics of race, ethnicity, religion, and sexuality.

287. For a detailed treatment of qualitative research methods, see MARGARET C. HARRELL & MELISSA A. BRADLEY, DATA COLLECTION METHODS: SEMI-STRUCTURED INTERVIEWS AND FOCUS GROUPS (2009); GARY KING ET AL., DESIGNING SOCIAL INQUIRY: SCIENTIFIC INFERENCE IN QUALITATIVE RESEARCH (1994); Sandy Q. Qu & John Dumay, *The Qualitative Research Interview*, 3 QUALITATIVE RES. ACCT. & MGMT. 238 (2011).

288. For a broad array of qualitative studies in the social science literature that feature semistructured interviews, see Ann-Kristin Achleitner et al., *New Look: Going Private With Private Equity Support*, 31 J. BUS. STRATEGY 38 (2010); Laura Bernardi, *A Mixed-Methods Social Networks Study Design for Research on Transnational Families*, 73 J. MARRIAGE & FAM. 788, 793 (2011); Ruth Branson et al., *Binge Eating as a Major Phenotype of Melanocortin 4 Receptor Gene Mutations*, 348 NEW ENG. J. MED. 1096, 1098 (2003); Laura Camfield et al., *Wellbeing Research in Developing Countries: Reviewing the Role of Qualitative Methods*, 90 SOC. INDICATORS RES. 5, 10 (2009); RJ Cooper et al., *Ethical Decision-Making, Passivity and Pharmacy*, 34 J. MED. ETHICS 441, 442 (2008); Keith Guzik, *The Agencies of Abuse: Intimate Abusers' Experience of Presumptive Arrest and Prosecution*, 42 LAW & SOC'Y REV. 111, 115 (2008); Carolyn M. Hendriks, *Policy Design Without Democracy? Making Democratic Sense of Transition Management*, 42 POL'Y SCI. 341, 343 & n.4 (2009); Tomas M. Koontz & Elizabeth Moore Johnson, *One Size Does Not Fit All: Matching Breadth of Stakeholder Participation to Watershed Group Accomplishments*, 37 POL'Y SCI. 185, 191 (2004); Helen B. Marrow, *Immigrant Bureaucratic Incorporation: The Dual Roles of Professional Missions and Government Policies*, 74 AM. SOC. REV. 756, 759 (2009); David Orzechowicz, *Privileged Emotion Managers: The Case of Actors*, 71 SOC. PSYCHOL. Q. 143, 145 (2008); Peter Ross & Greg J. Bamber, *Strategic Choices in Pluralist and Unitarist Employment Relations Regimes: A Study of Australian Telecommunications*, 63 INDUS. & LAB. REL. REV. 24, 25 (2009); Clare M. Ryan, *Leadership in Collaborative Policy-Making: An Analysis of Agency Roles in Regulatory Negotiations*, 34 POL'Y SCI. 221 (2001).

office's point person for hate crime cases. In offices that did not have such designated individuals, I spoke to line prosecutors who had been working in the office for at least five years in order to get a sense of how the office dealt with hate crime cases over time. In some cases, a prosecutor from one office provided a name of someone in another office who had dealt with hate crime cases. My interviews thus involved a combination of preselecting offices based on statutory and geographic diversity and using a snowball approach. I interviewed two of the prosecutors in person in their offices and the rest by phone. I transcribed the interviews by taking notes during the conversations.

The interviews began with background questions about the prosecutors' professional experience. I asked the prosecutors how long they had been working in the office, what divisions they had worked in, and what, if any, prior legal positions they had held. I then inquired about how hate crime prosecution worked in their office, whether the office had a specialized hate crime unit or designated personnel to oversee hate crime prosecution, whether the office had any written policy regarding when hate crime charges should be filed, and whether the office kept records regarding hate crime reports or disposition. I asked each prosecutor to walk me through the process from arrest to trial, focusing on how hate crime charges (and, specifically, the decision whether or not to add hate crime charges) factored in at each stage. I also inquired about the prosecutors' interaction with police in hate crime cases and about what kind of training, if any, was given to police and prosecutors about hate crime legislation.

I then asked whether the prosecutors were aware of any hate crime prosecutions in their office and whether they had personal experiences prosecuting or supervising a hate crime case. If so, I asked them to detail the facts of the case, the charging decision, and the ultimate disposition. If not, I asked them whether they or others in their office had ever considered adding a hate crime charge and, if so, why they opted against doing so. I also asked about their interaction with interest groups about hate crime cases or alleged hate crime cases and whether they had ever received feedback about their charging decision in an allegedly bias-motivated case.

The last part of the interviews explored the prosecutors' views on the efficacy of hate crime legislation. I inquired whether a given crime that fit the relevant statutory definition of a hate crime might not be prosecuted as such and, if so, for what reasons. When prosecutors mentioned regional or cultural aspects of their office, I followed up with questions to flesh out these explanations in an attempt to better understand their answers in historical, political, and cultural contexts.

I coded themes that arose throughout the interviews, such as concerns about appealing to a jury and concerns about the underreporting of hate crimes. To complement the open-ended interview questions, I also asked and charted interviewees' answers to specific, directed questions. For example, I asked prosecutors whether, if police did not flag a case as potentially bias-motivated in their report, the motive in such a case would likely go unnoticed. I also inquired whether the prosecutors supported the use of hate crime charges in nonarchetypal cases or were skeptical of such use. Finally, I asked whether the prosecutors believed it to be part of their institutional role to send a message about social norms through their charging decisions or whether their goal was individualized justice on a case-by-case basis.

APPENDIX II: STATE HATE CRIME LAWS

The following chart distills the main features of state hate crime laws.[289] First, it indicates if a state hate crime statute requires animus (as opposed to intentional selection). Second, it indicates what categories are protected by the

289. ALA. CODE § 13A-5-13 (LexisNexis 2009); ALASKA STAT. § 12.55.155(22) (2012); ARIZ. REV. STAT. ANN. § 41-1750; ARIZ. REV. STAT. ANN. § 13-702 (2010); ARK. CODE ANN. § 16-123-106 (2006); CAL. PENAL CODE § 422.55 (West 2010); COLO. REV. STAT. § 18-9-121 (2012); CONN. GEN. STAT. ANN. § 46a-58 (West 2009); CONN. GEN. STAT. ANN. § 53a-181j (West 2012); DEL. CODE ANN. tit. 11, § 1304 (2007); D.C. CODE § 22-3701 (LexisNexis 2012); FLA. STAT. ANN. § 775.085 (West 2010); HAW. REV. STAT. ANN. § 706-662(6)(b) (LexisNexis 2007); IDAHO CODE ANN. § 18-7902 (2004); 720 ILL. COMP. STAT ANN. 5/12-7.1 (West 2002); IND. CODE ANN. § 10-13-3-1 (LexisNexis 2003); IOWA CODE ANN. § 729A.2 (West 2013); IOWA CODE ANN. § 712.9 (West 2003); KAN. STAT. ANN. § 21-6815 (2007); KY. REV. STAT. ANN. § 532.031 (LexisNexis 2008); LA. REV. STAT. ANN. § 14:107.2 (2004); ME. REV. STAT. tit. 17-A, § 1151 (2006); ME. REV. STAT. tit. 25, § 1544 (2007); MD. CODE ANN., CRIM. LAW § 10-304 (LexisNexis 2012); MASS. GEN. LAWS ch. 265, § 39 (LexisNexis 2010); MICH. COMP. LAWS ANN. § 750.147b (West 2004); MINN. STAT. § 626.5531 (2003); MINN. STAT. § 609.749 (2003); MINN. STAT. § 609.2231 (2003); MISS. CODE. ANN. § 99-19-301 (2007); MO. ANN. STAT. § 557.035 (West 2012); MONT. CODE ANN. § 45-5-222 (2012); NEB. REV. STAT. § 28-111 (2008); NEV. REV. STAT. ANN. § 193.1675 (LexisNexis 2012); N.H. REV. STAT. ANN. § 651:6 (2007); N.J. STAT. ANN. § 2C:16-1 (West 2006); N.M. STAT. ANN. § 31-18B-3 (2013); N.Y. PENAL LAW § 485.05 (McKinney 2008); N.C. GEN. STAT. § 14-3 (2011); N.C. GEN. STAT. § 14-401.14 (2011); N.C. GEN. STAT. § 99D-1 (2011); N.C. GEN. STAT. § 15A-1340.16(d)(17) (2011); N.D. CENT. CODE § 12.1-14-04 (2012); OHIO REV. CODE ANN. § 2927.12 (West 2006); OKLA. STAT. tit. 21, § 850 (2002); OR. REV. STAT. § 166.155 (2011); 18 PA. CONS. STAT. ANN. § 2710 (West 2000); R.I. GEN. LAWS § 12-19-38 (2002); S.D. CODIFIED LAWS § 22-19B-1 (2006); TENN. CODE ANN. § 40-35-114 (2010); TEX. CODE CRIM. PROC. ANN. art. 42.014 (West 2006); TEX. PENAL CODE ANN. § 12.47 (West 2011); UTAH CODE ANN. § 76-3-203.3, 203.4 (LexisNexis 2012); VT. STAT. ANN. tit. 13, § 1455 (2002); VA. CODE ANN. § 18.2-57 (2009); WASH. REV. CODE ANN. § 9A.36.080 (West 2009); W. VA. CODE ANN. § 61-6-21 (LexisNexis 2000); WIS. STAT. § 939.645 (2011–12); WYO. STAT. ANN. § 6-9-102 (2003).

hate crime laws. Protected categories are indicated as shaded cells. Since all state hate crime statutes include the categories of race, ethnicity, and religion, the chart does not list these categories. The chart illustrates which of the other federally protected categories—gender, gender identity, sexual orientation, and disability—are protected in each state, and what additional categories each state protects, if any, beyond those in the federal statute. Finally, the chart indicates what remedy is called for by each state hate crime statute.

TABLE 1. STATE HATE CRIME LAWS

State	Animus	Gender	Gender Identity	Sexual Orien.	Disability	Other Categories [1]	Remedy/ Effect [2]
AK							Aggravating
AL	√						Enhancement (Min)
AR	√						Civil
AZ	√						Aggravating
CA						Ass'n w/ someone of protected status	Standalone
CO	√						Standalone
CT					[3]	Alienage; blindness	Standalone (ltd)
							Standalone
DC	√				[3]	Marital status; personal appearance; family responsibility; homelessness; age; matriculation; political affiliation	Enhancement
DE							Standalone

State	Animus	Gender	Gender Identity	Sexual Orien.	Disability	Other Categories [1]	Remedy/ Effect [2]
FL	√					Advanced age; homelessness	Enhancement
GA	NO HATE CRIME LAW						
HI	[6]						Enhancement
IA	√					Political affiliation; age; ass'n w/ someone of protected status	Civil; enhancement (ltd)
ID							Standalone
IL	√						Standalone
IN							Reporting
KS	√						Aggravating
KY							Aggravating [4]
LA						Age; membership, service in, or employment with any organization	Standalone
MA							Standalone
MD	√					Homelessness	Standalone
ME	√						Reporting
						Homelessness	Aggravating
MI							Standalone
MN	√					Age	Reporting; civil
						Age	Standalone (ltd); enhancement (ltd)

State	Animus	Gender	Gender Identity	Sexual Orien.	Disability	Other Categories [1]	Remedy/ Effect [2]
MO	√						Enhancement
MS							Enhancement
MT						Involvement in civil rights or human rights activities	Enhancement
NC							Enhancement; standalone (ltd)
	√						Civil (ltd)
ND							Standalone
NE						Age; ass'n w/ someone of protected status	Enhancement
NH	√						Enhancement
NJ							Standalone
NM						Age	Enhancement
NV							Enhancement
NY						Age	Standalone
OH							Standalone
OK							Standalone
OR							Standalone
PA							Standalone
RI	[5]						Enhancement
SC	NO HATE CRIME LAW						
SD							Standalone
TN							Aggravating

State	Animus	Gender	Gender Identity	Sexual Orien.	Disability	Other Categories [1]	Remedy/ Effect [2]
TX	[6]					Age	Enhancement
UT							Aggravating
VA							Reporting; enhancement (ltd)
VT	√					Age; service in U.S. armed forces	Enhancement
WA					[7]		Standalone
WI							Enhancement
WV	√					Political affiliation	Aggravating; standalone (ltd)
WY							Standalone

[1] This list does not include any categories protected by federal law.

[2] This column shows the maximum criminal effect allowed, if any. Legend:

Reporting: State imposes reporting requirement only.

Civil: State allows only civil penalties or private lawsuit by victim.

Aggravating: Hate crime is an aggravating factor for consideration at sentencing.

Enhancement (min): Hate crime increases mandatory minimum but not maximum sentence.

Enhancement: Hate crime results in sentence enhancement.

Standalone: Hate crime is independent crime carrying its own sentence.

(Ltd) indicates that penalty applies only in limited circumstances—for example, animus creates hate crime only in cases of assault.

[3] States protect physical disability only.

[4] Aggravating factor applies only when offender is under consideration for probation or parole.

[5] State definition of hate crime encompasses both animus alone and intentional selection alone.

[6] State requires both animus and intentional selection together.

[7] State includes sensory disability as protected category.