

Note

Understanding Hate Crime Statutes and Building Towards a Better System in Texas

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I. Introduction

On April 22, 2012, three women were assaulted outside a bar in Williamson County, Texas.¹ Julie Ward, one of the victims, said that she and her companions had been targeted because they were gay.²

Ward claimed that she, her sister, and her sister's partner were first asked to leave the bar because of their sexual orientation.³ She said that next, patrons of the bar followed them outside, restrained them, and assaulted them.⁴ The bar manager's wife, meanwhile, told a different story: that the women were roughhousing; that they were not asked to leave the bar because of their sexual orientation; and that they were not assaulted at all.⁵ When asked whether the incident would be considered a hate crime, a representative from Williamson County Sheriff's Office said only that an investigation was ongoing and that "if 'it is warranted that charges be filed for a hate crime, charges will be filed.'"⁶

Incidents such as this fuel an ongoing nationwide debate about the proper scope and function of hate crime laws. How will law enforcement investigate such offenses? Under Texas's current bias crime statute, will a prosecutor be willing or even able to charge perpetrators with a hate crime? While it is undisputed that bias-motivated crime should not be tolerated, there is little consensus as to whether current laws actually prevent hate crimes from occurring.⁷ Are our current laws effective? One obvious goal of such statutes is to reduce crime, but aside from that objective, are current laws serving the community through public awareness and education?

Nowhere are these questions more appropriate than in Texas. Despite the fact that Texas has had a hate crimes statute on the books since 1993, prosecutors seem extremely reluctant to charge defendants with hate crime offenses. Indeed, data indicates that Texas prosecutors have only used the hate crime law eighteen times since 2001.⁸ If prosecutors are not utilizing hate crime laws, the public will not become educated about this important issue, and perpetrators will not be held accountable for their actions to the fullest extent provided by statute. Of course, while higher rates of

1. Claire Osborn, *Sheriff's Office Investigating Report of Assault on Gay Women Outside Weir Bar*, AUSTIN AMERICAN-STATESMAN, Apr. 24, 2012, <http://www.statesman.com/news/williamson/sheriffs-office-investigating-report-of-assault-on-gay-2323580.html>.

2. *Id.*

3. *WATCH: Lesbian Says She Was Kicked Out of Williamson County Bar, Beaten by Patrons*, DALL. VOICE, April 24, 2012, <http://www.dallasvoice.com/lesbian-beaten-bar-north-austin-10107483.html>.

4. *Id.*

5. *Id.*

6. *Id.*

7. See generally Susan Gellman & Frank Lawrence, *Agreeing to Agree: A Proponent and Opponent of Hate Crime Laws Reach for Common Ground*, 41 HARV. J. ON LEGIS. 421 (2004) (discussing the arguments for and against bias-crime laws and proposing a model bias-crime statute to balance the competing concerns of proponents and opponents of such laws).

8. *Cases in Which a Hate Crime Finding was Requested*, TEX. JUDICIAL COUNCIL (Dec. 11, 2012), http://www.txcourts.gov/oca/hate_crimes.pdf.

prosecution do not necessarily mean that a hate crime statute is effective at stopping crime, prosecution is at least evidence that the statute is being used. What can be done to make Texas's hate crime statute more accessible to prosecutors and, ultimately, more effective at curtailing crime?

This Note will first explore the history, types, and scope of hate crime statutes throughout the United States. It will then analyze hate crime statistics in a number of particular states, in order to determine which are utilizing their hate crime statutes, and whether the construction of those states' statutes has any effect on hate crime rates. Finally, it will outline suggestions about how Texas's hate crimes statute and reporting programs can be improved.

II. History of Hate Crime Statutes

A hate crime, at its most basic level, is an "attack upon the person or property of an individual motivated by hatred of a characteristic of that person, such as race, religion, gender, sexual orientation, or ethnicity."⁹ During the 1980s, legislatures and private organizations began to be troubled by reports of increasing bias-motivated crime throughout the country.¹⁰ A major advocate for hate crimes legislation was the Anti-Defamation League (ADL), which drafted two model hate crime laws in 1981 and 1991.¹¹ These model statutes, while not uniformly ratified by any state, have achieved widespread acceptance.¹²

The federal government has enacted a number of statutes targeting bias offenses. In 1990, the Federal Hate Crimes Statistics Act was passed into law, directing the Attorney General to collect and report data about hate crimes nationwide.¹³ The Attorney General subsequently delegated this responsibility to the FBI, which releases a "Hate Crimes Statistics" report each year.¹⁴ Then, in 1994, Congress directed the US Sentencing Commission to provide a sentence enhancement for federal crimes identified as a hate crime by the trier of fact,¹⁵ which was added to federal sentencing guidelines by the Commission in 1995.¹⁶ Most recently, in 2009, the

9. Theresa Suozzi et al., *Crimes Motivated by Hatred: The Constitutionality and Impact of Hate Crime Legislation in the United States*, 1 SYRACUSE J. LEGIS. & POL'Y 29, 31 (1995).

10. See Craig Peyton Gaumer, *Punishment for Prejudice: A Commentary on the Constitutionality and Utility of State Statutory Responses to the Problem of Hate Crimes*, 39 S.D. L. Rev. 1, 5, 9 (1994) (declaring that "incidents of anti-gay violence reported to the National Gay & Lesbian Task Force increased from 2,042 in 1985 to 7,031 in 1989" and noting that "twenty-nine states passed hate crime statutes between 1981 and 1991").

11. *Id.* at 8–9.

12. *Id.* at 9.

13. Hate Crimes Statistics Act, Pub. L. No. 101-275, §§ 1–2, 104 Stat. 140, 140–41 (1990) (codified as amended at 28 U.S.C. § 534 (2006)).

14. *About Hate Crime Statistics*, FED. BUREAU OF INVESTIGATION (Dec. 2012), http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2011/resources/aboutthatecrime_final.pdf.

15. Violent Crime Control and Law Enforcement Act, Pub. L. No. 103-322, § 28003, 108 Stat. 1796, 2096 (1994) (codified as amended at 28 U.S.C. § 994 (2006)).

16. ANTI-DEFAMATION LEAGUE, HATE CRIME LAWS 14 (2012), available at

Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act was signed into law, making federal hate crimes that result in bodily injury a substantive offense.¹⁷

State legislatures have also passed a myriad of different hate crime statutes, many based on the ADL's 1981 or 1991 model legislation.¹⁸ Today, nearly every state, as well as the District of Columbia, has passed some form of anti-bias offense statute, although some states' statutes are either more vague or less inclusive than others'.¹⁹ Texas passed its first hate crime statute, the Texas Hate Crimes Act, into law in 1993.²⁰

Acceptance of hate crime laws has not been universal. Opponents of anti-bias statutes argue that such laws unlawfully interfere with individuals' rights of free expression.²¹ Nevertheless, in *Wisconsin v. Mitchell*,²² the United States Supreme Court unanimously ruled that a Wisconsin hate crime statute did not violate a defendant's First Amendment right to free speech because it punished conduct which caused special harm to the victim and the community.²³ The hate crime statute, the court reasoned, was aimed at addressing this harm and was not designed to punish the offender because of his beliefs.²⁴ While the Court's decision in *Mitchell* did not rule out the possibility of future constitutional challenges, it did legitimize the government's basis to legislate against bias offenses.²⁵

<http://www.adl.org/assets/pdf/combating-hate/Hate-Crimes-Law.pdf> ("In May 1995, the United States Sentencing Commission announced its implementation of a three-level sentencing guidelines increase for hate crimes, as directed by Congress.").

17. Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, § 4707, 123 Stat. 2835, 2838–41 (2009) (codified as amended at 18 U.S.C. § 249 (Supp. 2012)); see also Sarah Finnane Hanafin, *Legal Shelter: A Case for Homelessness as a Protected Status Under Hate Crime Law and Enhanced Equal Protection Scrutiny*, 40 STETSON L. REV. 435, 453–54 (2011) (describing several provisions of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act).

18. ANTI-DEFAMATION LEAGUE, *supra* note 16, at 2; Gaumer, *supra* note 10, at 9–11.

19. ALISON M. SMITH & CASSANDRA L. FOLEY, CONG. RESEARCH SERV., RL33099, STATE STATUTES GOVERNING HATE CRIMES (2010), available at <http://www.fas.org/sgp/crs/misc/RL33099.pdf>. Wyoming's statute is particularly vague: "No person shall be denied the right to life, liberty, pursuit of happiness or the necessities of life because of race, color, sex, creed or national origin." WYO. STAT. ANN. § 6-9-102 (West 2012).

20. TEX. PENAL CODE ANN. § 12.47 (West 2011); TEX. CODE CRIM. PROC. ANN. art. 42.014 (West 2006); see also David Todd Smith, *Enhanced Punishment Under the Texas Hate Crimes Act: Politics, Panacea, or Pathway to Hell?*, 26 ST. MARY'S L.J. 259, 259–63 (1994) (summarizing the events leading up to the passage of the Texas Hate Crimes Act).

21. FREDERICK M. LAWRENCE, PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW 80–81 (1999).

22. 508 U.S. 476 (1993).

23. *Id.* at 487–88.

24. *Id.* at 488.

25. See generally Suozzi, *supra* note 9, at 45–47 (discussing the Court's reasoning in *Wisconsin v. Mitchell*); *id.* at 40–59 (discussing the Supreme Court's and various state courts' approaches to First Amendment challenges to hate crime statutes).

III. Types of Hate Crime Statutes

The federal government and state legislatures have taken a number of different approaches when drafting statutes that address bias offenses. The Congressional Research Service has identified four main categories of hate crimes statutes:²⁶ (1) *institutional vandalism*, which criminalize the destruction of property belonging to a particular (often religious) organization; (2) *sentence enhancements*, which add extra time in prison or otherwise increase the severity of an offense if it is proven that the commission of the offense was based on bias or prejudice; (3) *substantive offenses*, which re-criminalize already existing low-level offenses into new crimes if they were motivated by bias or prejudice; and (4) *data collection*, which typically mandate an executive agency to collect statistics regarding hate crime offenses and (sometimes) prosecution of hate crimes. A brief analysis and examples of each type of legislation follow.

A. Institutional Vandalism

This type of legislation protects against acts of vandalism committed against buildings used for religious activities, as well as buildings of civic or educational importance.²⁷ Crimes of institutional vandalism are distinct from other hate crimes statutes in that they do not require evidence of bias or prejudice on the part of the offender.²⁸ Such statutes assume that the protected property is sufficiently associated with a particular religious (or ethnic) group that a finding of bias motivation is not a necessary prerequisite to punishing an offender more harshly than a typical vandalism offense.²⁹ This reasoning has been criticized as an attempt to criminalize conduct more severely simply because it is offensive.³⁰ Additionally, these statutes raise issues regarding which expressions deserve special punishment and which

26. See SMITH & FOLEY, *supra* note 19, at 2–31 (classifying state hate crime statutes into four categories: (1) crime/penalty enhancement; (2) institutional vandalism; (3) data collection; (4) law enforcement training); cf. ANTI-DEFAMATION LEAGUE, *supra* note 16, at 2–7 (explaining the ADL’s model hate crime legislation with a focus on “penalty enhancement” and “institutional vandalism”); LAURA L. FINLEY, ENCYCLOPEDIA OF JUVENILE VIOLENCE 125 (2007) (identifying four types of hate crime legislation: “sentence enhancements; substantive crimes; civil rights statutes; and/or reporting statutes”); GLEN KERCHER, CLAIRE NOLASCO & LING WU, CRIME VICTIMS’ INSTITUTE, HATE CRIMES 8 (2008), available at <http://www.crimevictimsinstitute.org/documents/Hate%20Crimes%20Final.pdf> (“Hate crime legislation at the federal or state level takes on four specific forms: (1) statutes defining hate crimes as substantive offenses, (2) sentence enhancement, (3) statistics collection, and (4) civil remedies.”). This Note distinguishes between crime enhancement and penalty enhancement.

27. See ANTI-DEFAMATION LEAGUE, *supra* note 16, at 2, 4 (describing institutional vandalism as “vandalism aimed at houses of worship, cemeteries, schools and community centers”).

28. See, e.g., *id.* at 4 (presenting the text of ADL’s model hate crime legislation dealing with institutional vandalism, which requires only that the offender “knowingly vandaliz[e], defac[e] or otherwise damage[]” a protected structure).

29. JAMES B. JACOBS & KIMBERLY POTTER, HATE CRIMES: CRIMINAL LAW & IDENTITY POLITICS 85 (1998) (“These laws do not require proof of biased motivation, only that the offender committed the act knowing that the object was a church, cemetery, government building, or other designated structure.”).

30. *Id.* at 34–35, 84–86.

buildings deserve special protection.³¹ Such distinctions might implicate First Amendment or Equal Protection issues.

Pennsylvania's Institutional Vandalism statute is typical: "A person commits the offense of institutional vandalism if he knowingly desecrates, . . . vandalizes, defaces or otherwise damages . . . any church, synagogue or other facility or place used for religious worship or other religious purposes" ³²

B. Sentence Enhancements

This type of hate crime legislation increases the punishment for offenses when the finder of fact determines that the defendant's motivation for the underlying offense was based on bias or prejudice.³³ Some sentence enhancement statutes provide a range of additional years in prison by which the sentence for the underlying offense can be increased.³⁴ Other statutes increase the underlying offense to the next level of severity, thereby triggering increased punishment based on the state's sentencing ranges.³⁵ The length of the additional penalty varies widely from state to state, and can range from just a few years³⁶ to up to triple the maximum sentence for the underlying offense.³⁷ One criticism of sentence enhancement statutes is that their practicality is called into question in cases of particularly serious crimes.³⁸ It is useless for a prosecutor to go to the trouble of proving the elements of a hate crime statute when the same sentence is already available based solely on the underlying offense.³⁹

31. *Id.* at 85–86.

32. 18 PA. CONS. STAT. ANN. § 3307 (West Supp. 2012).

33. Alex Ginsberg, *How New York's Bias Crimes Statute Has Exceeded Its Intended Scope*, 76 BROOK. L. REV. 1599, 1608 (2011).

34. *See, e.g.*, CAL. PENAL CODE § 422.75 (West 2010) ("[A] person who commits a felony that is a hate crime or attempts to commit a felony that is a hate crime, shall receive an additional term of one, two, or three years in the state prison, at the court's discretion.").

35. *See, e.g.*, N.Y. PENAL LAW § 485.10 (McKinney Supp. 2013) ("When a person is convicted of a hate crime pursuant to this article and the specified offense is a misdemeanor or a class C, D or E felony, the hate crime shall be deemed to be one category higher than the specified offense the defendant committed, or one category higher than the offense level applicable to the defendant's conviction for an attempt or conspiracy to commit a specified offense, whichever is applicable.").

36. CAL. PENAL CODE § 422.75.

37. *See* FLA. STAT. ANN. § 775.085 (West Supp. 2013) (reclassifying crimes that "evidence[] 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" by one degree of severity, declaring, for instance, that "[a] felony of the third degree is reclassified to a felony of the second degree"); *id.* § 775.082(3)(c)–(d) ("A person who has been convicted of any other designated felony may be punished as follows: For a felony of the second degree, by a term of imprisonment not exceeding 15 years. . . . For a felony of the third degree, by a term of imprisonment not exceeding 5 years."); *see also* VT. STAT. ANN. tit. 13, §§ 1454, 1455 (2009) (providing a sentence enhancement double the maximum for the underlying offense).

38. Beverly McPhail & Valerie Jenness, *To Charge or Not to Charge?—That Is the Question: The Pursuit of Strategic Advantage in Prosecutorial Decision-Making Surrounding Hate Crime*, 4 J. HATE STUD. 89, 97–99 (2006).

39. *Id.*

California's sentence enhancement statute is an example of a statute that provides a range of years that may be added to the sentence of the underlying offense: "[A] person who commits a felony that is a hate crime or attempts to commit a felony that is a hate crime, shall receive an additional term of one, two, or three years in the state prison, at the court's discretion."⁴⁰

Florida's sentence enhancement statute is an example of a statute where the underlying offense is increased in degree of severity:

The penalty for any felony or misdemeanor shall be reclassified as provided in this subsection if the commission of such felony or misdemeanor evidences prejudice based on the race, color, ancestry, [or a number of other enumerated characteristics] of the victim: (1) A misdemeanor of the second degree is reclassified to a misdemeanor of the first degree. (2) A misdemeanor of the first degree is reclassified to a felony of the third degree . . . [etc.]⁴¹

C. Substantive Offenses

This type of hate crime statute identifies criminal conduct motivated by prejudice as a new crime or, more often, as an aggravated form of an existing crime.⁴² In most jurisdictions, this takes the form of an "intimidation" statute, which, as proposed by the ADL's model legislation,⁴³ criminalizes threatening or violent conduct done with the intent to intimidate or harass an individual on the basis of that person's race, religion, or other protected factor.⁴⁴ Notably, substantive offense statutes do not typically reclassify high-level offenses such as murder, rape, or aggravated assault.⁴⁵ Perhaps because of this fact, many states have both a sentence enhancement statute and a substantive offense statute, that deal with higher- and lower-level crimes, respectively.⁴⁶

While sentence enhancement and substantive offense statutes may

40. CAL. PENAL CODE § 422.75(a).

41. FLA. STAT. ANN. § 775.085. Such a sentencing structure results in much more severe penalties for individuals convicted of hate crimes than California's system of increasing the sentence by a maximum of four years. See FLA. STAT. ANN. § 775.082 (providing penalties for crimes by the severity of the offense); CAL. PENAL CODE § 422.75(b) ("[A]ny person who commits a felony that is a hate crime, . . . and who voluntarily acted in concert with another person, . . . shall receive an additional two, three, or four years in the state prison, at the court's discretion.").

42. JACOBS & POTTER, *supra* note 29, at 33.

43. See ANTI-DEFAMATION LEAGUE, *supra* note 16, at 4-6.

44. *Id.* at 5.

45. See McPhail & Jenness, *supra* note 38, at 98 ("Hate crime enhancements are precluded in first-degree felonies since that is the highest level that can be charged and the penalties cannot be further enhanced. . . . The hate crime enhancement may be more helpful at the lower levels of offenses because there is room to enhance the punishment.").

46. For example, California, CAL. PENAL CODE §§ 422.6, 422.75 (West 2010); Kansas, KAN. STAT. ANN. §§ 21-4716, 21-4003 (2007); New York, N.Y. PENAL LAW §§ 240.30, 240.31, 485.10 (McKinney 2008 & Supp. 2013).

seem to be constructed very differently, they are actually very similar in purpose. Despite the fact that one statute enhances the sentence of an existing crime, while the other creates a new category of crime for low-level bias offenses, the result of both statutes is to provide a harsher punishment for already-criminalized conduct when that conduct is motivated by bias or prejudice.⁴⁷

New York has enacted a typical substantive offense hate crime statute:

A person is guilty of aggravated harassment in the second degree when, with intent to harass, annoy, threaten or alarm another person, he or she: . . . [s]trikes, shoves, kicks, or otherwise subjects another person to physical contact, or attempts or threatens to do the same because of a belief or perception regarding such person's race, color, national origin, [or a number of other enumerated special groups], regardless of whether the belief or perception is correct⁴⁸

D. Data Collection

This type of statute mandates jurisdictional authorities to collect, analyze, and report on the prevalence of hate crimes within the jurisdiction.⁴⁹ Data collection statutes typically require local law enforcement agencies, such as police departments or constables, to maintain data on each hate crime offense that is committed.⁵⁰ This data is then reported to a state law enforcement agency. Such a requirement leads to questions about which crimes are considered hate crime offenses in the statute, as well as by local law enforcement officials.⁵¹ While information on the prevalence of offenses is helpful, such data does not speak to how often a hate crime statute is used or how effective it is at obtaining a sentence. Unfortunately, few states have enacted data collection statutes that require prosecutors to report statistics on the disposition of hate crime prosecution.⁵²

Connecticut provides a typical example of a data collection statute:

47. See Ginsberg, *supra* note 33, at 1608 (“The distinction between penalty-enhancing statutes and substantive-crime-creating statutes is primarily a procedural one”).

48. N.Y. PENAL LAW § 240.30 (McKinney 2008).

49. KERCHER, NOLASCO & WU, *supra* note 26, at 9–10.

50. See, e.g., CONN. GEN. STAT. § 29-7m (Supp. 2013).

51. See JACOBS & POTTER, *supra* note 20, at 40. The federal Hate Crimes Statistics Act, for example, only initially listed eight predicate crimes as hate crimes, making “[t]he limitation of hate crime reporting to these eight crimes . . . seem[] arbitrary” *Id.*

52. New York and Hawaii appear to be the only states that mandate prosecutors, as well as law enforcement officials, to submit data on hate crimes. See N.Y. EXEC. LAW § 837 (McKinney Supp. 2013); HAW. REV. STAT. § 846-54 (LexisNexis 2007).

“[T]he Division of State Police . . . shall monitor, record and classify all crimes committed in the state which are motivated by bigotry or bias. The police department, resident state trooper or constable who performs law enforcement duties for each town shall monitor, record and classify all crimes committed within such town which are violations of [various hate crime statutes] and report such information to the Division of State Police”⁵³

IV. Scope of Hate Crimes

Another important aspect of hate crime laws is the scope of the statute. What type of behavior does the hate crime statute punish? Under both sentence enhancement and substantive offense statutes, the motivation of the defendant is a key element. Was the victim targeted on the basis of his or her affiliation with a particular group?

Inherent difficulty exists when a statute targets an offender based primarily on his or her motive. As opposed to “intent,” a defendant’s “motive” has not traditionally been a required element of criminal offenses in American jurisprudence.⁵⁴ There is an important distinction between motive and intent. “[M]otive can perhaps be best described as simply the ‘why’ behind a defendant’s conduct,” while intent can be seen as “‘what’ the defendant meant to accomplish” by his or her conduct.⁵⁵ Making motive an element of a hate crime offense is also seen as constitutionally problematic, as it can be seen as criminalizing a defendant’s thoughts.⁵⁶ The Supreme Court’s ruling in *Mitchell*, however, addressed these issues and seemed to indicate that motive as an element of a hate crime offense was not a violation of the First Amendment.⁵⁷

Motive as an element of the offense is an essential aspect of both sentence enhancement and substantive offense statutes. However, within that broader category, Professor Fred Lawrence has identified two main subsets in terms of scope: the “racial animus model,” where the offender has acted out of hatred for the victim’s affiliation with a particular group; and the “discriminatory selection model,” which requires only that the offender has selected his victim because of the victim’s affiliation with a particular

53. CONN. GEN. STAT. ANN. § 29-7m.

54. Gaumer, *supra* note 10, at 12–13.

55. *Id.* at 13.

56. *Id.* at 13–14; *see also* JACOBS & POTTER, *supra* note 20, at 112–13.

57. *Wisconsin v. Mitchell*, 508 U.S. 476, 483–88 (1993); *see also* Gaumer, *supra* note 10, at 19 (“The Court expressed an assortment of justifications to support its conclusion that the sentence enhancement did not violate the first amendment: 1) motive allegedly plays the same role in the penalty-enhancement statute as it does in antidiscrimination laws; 2) the statute is aimed at the state’s interest in redressing individual and social harm caused by bias-motivated crimes; 3) the defendant’s motive for acting has been used throughout history as a consideration at sentencing; and 4) the statute was aimed at conduct, which is generally unprotected by the First Amendment.”).

group.⁵⁸ Because of the fine distinction between these two categories, a closer look at the effects and implications of each model is warranted.

The racial animus hate crime statute is fairly straightforward: it punishes an offender when the trier of fact determines that the offender committed the crime, at least in part, on the basis of hatred towards a particular subset of the population.⁵⁹ While this model grapples with the First Amendment issue of punishing the offender's motivation, it strikes at the heart of what legislators and, indeed, the public at large, seem to believe hate crime laws should address.⁶⁰ However, establishing the "motivation" element can be difficult, and many prosecutors have indicated their reluctance to pursue that course when the possibility of charging the offender with a different, non-bias-motivated crime is a possibility.⁶¹

Rhode Island's hate crimes statute is a good example of the racial animus model:

If a person has been convicted of a crime . . . in which he or she intentionally selected the [victim or property affected by the offense] because of the actor's hatred or animus towards the actual or perceived [affiliation with a list of enumerated special groups], he or she shall be subject to the penalties provided in this section.⁶²

The other type of statute is the "discriminatory selection model." This type of statute punishes the offender if he or she selected the victim on the basis of the victim's affiliation with a particular subset of the population.⁶³ Under this type of statute, "it is irrelevant *why* an offender selected his victim"; it is sufficient merely that the selection was made on the basis of that affiliation.⁶⁴ Thus, all racial animus statutes fall under the larger umbrella of discriminatory selection statutes because, under the former model, the victim is selected *on the basis of* their affiliation with the protected group.⁶⁵ However, the reverse is not true; not all discriminatory selection statutes can be considered racial animus statutes because an offender may have a different reason for selecting the victim than hatred or animus (e.g.,

58. LAWRENCE, *supra* note 21, at 29–30.

59. *See, e.g.*, Ginsberg, *supra* note 33, at 1600–01 (distinguishing "between 'pure hate' crimes and 'opportunistic bias' crimes" and explaining that "pure hate" crimes "need[] little explanation; these are offenses involving palpable and virulent animus towards a particular group or demographic").

60. *Id.* at 1601–02; *see also* LAWRENCE, *supra* note 21, at 34–35 (declaring that the racial animus model "is consonant with the classical understanding of prejudice as involving more than deferential treatment on the basis of the victim's race").

61. McPhail & Jenness, *supra* note 38, at 97 ("One prosecutor stated it this way: 'When you make a decision to use a hate crime law, you add to the complexity of the case. It's another element you must prove that you wouldn't have to prove otherwise. . . . [M]ost prosecutors would decline to use it if the crime already had a sufficient range of punishment.'").

62. R.I. GEN. LAWS § 12-19-38 (2002).

63. LAWRENCE, *supra* note 21, at 29–30; Ginsberg, *supra* note 33, at 1600–01.

64. LAWRENCE, *supra* note 21, at 30.

65. *Id.*

the offender feels that women, or Hispanics, or homosexuals, are easier to assault than members of another special group).⁶⁶

The Wisconsin hate crimes statute, which the Supreme Court upheld in *Mitchell*, is typical of the “discriminatory selection” model. The statute requires the offender to:

Intentionally select[] the person against whom the crime . . . is committed . . . in whole or in part because of the actor’s belief or perception regarding the race, religion, color, [or affiliation with a number of other enumerated special groups] of that person[,] . . . whether or not the actor’s belief or perception was correct.⁶⁷

Despite the fact that the discriminatory selection model was upheld by the Supreme Court, this type of statute is problematic. Should an offender who targets a member of a special group because of hatred for that group be as equally culpable as an offender who targets a member of a special group for some other reason (for example, the burglar who robs the homes of white families based not on hatred of whites, but on the belief that whites own more valuable possessions)?⁶⁸ Additionally, legislatures are often unaware of the fine distinction between the racial animus and discriminatory selection models, effectively delegating to prosecutors the decision of whether certain individuals who did not act out of hatred towards a protected group can still be punished as if they had so acted.⁶⁹

Of course, the language of some states’ statutes is vague enough that it does not seem to fit under either model.⁷⁰ Many states’ statutes indicate that the offender is guilty of a hate crime if his or her conduct is motivated “because of” bias or prejudice towards a protected group.⁷¹ These statutes do not mention the requisite hatred of the racial animus model; nor do they require that the offender intentionally select the victim on the basis of their affiliation with the protected group.⁷² Rather, the language lies somewhere in between.⁷³ As was indicated above, this provides prosecutors with excessive leeway to charge offenders as they see fit, rather than by what is mandated by statute.⁷⁴

66. *Id.* at 74; see also Ginsberg, *supra* note 33, at 1600–01 (describing “opportunistic bias” crimes as are not motivated by any negative feelings towards the group or demographic, but nonetheless constitute offenses that fit some statutory definitions of hate or bias crimes”).

67. WIS. STAT. ANN. § 939.645 (West 2005).

68. Cf. LAWRENCE, *supra* note 21, at 52–53 (discussing the role of culpability in assessing the seriousness of particular crimes, determining appropriate punishment, and measuring the harm caused to the victim).

69. Ginsberg, *supra* note 33, at 1630–32.

70. LAWRENCE, *supra* note 21, at 35–38.

71. *Id.*

72. *Id.*

73. *Id.*

74. See *supra* note 61 and accompanying text.

V. Which Groups to Protect?

Another fundamental question about hate crime laws is which groups should be protected under the statute. Does expansive inclusion of many different groups lead to less crime, or does it diffuse effectiveness because the categories are too broad? Arguments have been made on both sides, but ultimately it seems that a flexible approach may be the best when determining who to protect.

Race, ethnicity, and religion are traditional categories protected under the vast majority of hate crime statutes.⁷⁵ The ADL, which has been the driving force behind the hate-crime movement for decades, has also made a push for gender to be included as a protected group, despite the presence of state and federal statutes that already deal with crimes against women and domestic violence.⁷⁶ Sexual orientation is another category that has received considerable attention.⁷⁷ Today, gender and sexual orientation are included as protected special groups under federal law as well as under many states' statutes.⁷⁸

Should hate crimes continue to expand in order to protect more and more subsets of the population? In recent years, violence against homeless individuals in urban America has led to a movement seeking for protection of the homeless under hate crime laws.⁷⁹ Proponents of the movement say that the homeless must be protected because they are essentially disenfranchised members of the community.⁸⁰ However, opponents of the

75. Gellman & Lawrence, *supra* note 7, at 423 (“In the United States, every federal and state bias-crime law covers race, ethnicity, and religion in some form.”).

76. ANTI-DEFAMATION LEAGUE, *supra* note 16, at 3; *see also* JACOBS & POTTER, *supra* note 29, at 133–34 (discussing the exclusion of certain groups from hate crime laws and declaring that “[t]he exclusion of gender prejudice from hate crime laws—on the ground that it would water down the special significance of racial, religious, and ethnic prejudice-related crime—is likely to cause a rift among historic civil rights movement allies”). “In 1990, only seven of the 31 states which had hate crime statutes included gender. Today, 19 of the 41 statutes cover victims chosen by reason of their gender.” ANTI-DEFAMATION LEAGUE, *supra* note 16, at 3.

77. *See generally* Teresa Eileen Kibelstis, *Preventing Violence Against Gay Men and Lesbians: Should Enhanced Penalties at Sentencing Extend to Bias Crimes Based on Victims' Sexual Orientation?*, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 309 (1995) (analyzing anti-gay violence and arguing for sentence enhancements for bias-crimes motivated by the sexual orientation of the victim). “There appear to be at least 25 states that protect potential victims of sexual orientation.” SMITH & FOLEY, *supra* note 19, at 1.

78. *See supra* notes 76–77.

79. NAT'L COAL. FOR THE HOMELESS, HATE CRIMES AGAINST THE HOMELESS: VIOLENCE HIDDEN IN PLAIN VIEW (2012), available at <http://www.nationalhomeless.org/publications/hatecrimes/hatecrimes2010.pdf>; Eric Lichtblau, *Attacks on Homeless Bring Push on Hate Crime Laws*, N.Y. TIMES, Aug. 7, 2009, <http://www.nytimes.com/2009/08/08/us/08homeless.html>.

80. *See* Hanafin, *supra* note 17, at 457–58 (“What makes homelessness worthy of hate crime protection is its similarity to currently protected classifications—the homeless are victims of targeted violence based upon virulent discrimination and thus require additional protection from the legal and political process.”); NAT'L COAL. FOR THE HOMELESS, *supra* note 79, at 11 (“These crimes of hate are committed against a community of vulnerable individuals in our country who are at risk because they live outside or in public spaces. . . . Homeless people are treated so poorly by society that their attacks are often forgotten or unreported.”).

movement argue that while race, religion, and sexual orientation are (arguably) “immutable characteristics” (or at least constitutionally protected rights) that are eligible for heightened protection under the law, homelessness is clearly not an immutable characteristic eligible for inclusion under a hate crimes statute.⁸¹ Despite these concerns, Florida became the first state to include homelessness as a protected characteristic under its hate crime statute in 2010.⁸²

Table 1 lists the special groups that are currently protected under state and federal law. The question remains, however, whether inclusion of a greater or fewer number of groups actually has a positive effect on crime or prosecution rates.

81. Scott Steiner, *Habitations of Cruelty: The Pitfalls of Expanding Hate Crime Legislation to Include the Homeless*, 45 CRIM. L. BULLETIN, Sept.–Oct. 2009, at 810.; *see also* Hanafin, *supra* note 17, at 457–58.

82. FLA. STAT. ANN. § 775.085 (West Supp. 2013).

Table 1: Protected Groups by Jurisdiction (2011)⁸³		
	Federal Protection	State Protection
Race, Ethnicity, Color, Nationality	Federal Government, District of Columbia	AL, AK, AZ, CA, CO, CT, DE, FL, HI, ID, IL, IA, KS, KY, LA, ME, MD, MA, MI, MN, MS, MO, MT, NE, NV, NH, NJ, NM, NY, NC, ND, OH, OK, OR, PA, RI, SD, TN, TX, VT, VA, WA, WV, WI (44)
Religion	Federal Government, District of Columbia	AL, AK, AZ, CA, CO, CT, DE, FL, HI, ID, IL, IA, KS, KY, LA, ME, MD, MA, MI, MN, MS, MO, MT, NE, NV, NH, NJ, NM, NY, NC, ND, OH, OK, OR, PA, RI, SD, TN, TX, VT, VA, WA, WV, WI (44)
Sexual Orientation	Federal Government, District of Columbia	AZ, CA, CO, CT, DE, FL, HI, IL, IA, KS, KY, LA, ME, MD, MA, MN, MO, NE, NV, NH, NJ, NM, NY, OR, RI, TN, TX, VT, WA, WI (30)
Physical or Mental Disability	Federal Government	AL, AK, AZ, CA, CO, DE, FL, HI, IL, IA, LA, ME, MA, MN, MO, NE, NV, NJ, NM, NY, OK, OR, RI, TN, TX, VT, WA, WI (28)
Gender	Federal Government, District of Columbia	AK, AZ, CA, CT, HI, LA, ME, MD, MI, MN, MS, MO, NE, NH, NJ, NM, NY, ND, RI, TN, TX, VT, WA, WV (24)
Age	District of Columbia	FL, IA, LA, MN, NE, NM, NY, TX, VT (9)
Political Affiliation	District of Columbia	IA, WV (2)
Homelessness		FL, MD (2)
Physical Disability Only	District of Columbia	CT (1)
Other*	District of Columbia	VT, MT (2)
None**		AR, GA, IN, SC, UT, WY (6)

* Marital Status, Personal Appearance, Matriculation (District of Columbia); Service in the Armed Forces (Vermont); Involvement in Human or Civil Rights (Montana)

** Arkansas and Indiana have only an institutional vandalism statute. Georgia also has an institutional vandalism statute, as well as a sentence enhancement statute based on actions motivated by general "bias or prejudice"; however, this statute has been struck down by the Georgia Supreme Court as being unconstitutionally vague. South Carolina has provisions criminalizing Ku Klux Klan conduct, as well as an institutional vandalism statute. Utah has a provision criminalizing harassment "with intent to terrorize"; it has no specific institutional vandalism statute. Wyoming's statute merely

83. Data derived from the findings of the Congressional Research Service's report compiling state statutes governing hate crimes. See SMITH & FOLEY, *supra* note 19.

criminalizes interference with constitutional privileges on the basis of “race, color, creed, or national origin”; Wyoming also has no institutional vandalism statute.

VI. State Responses to Hate Crimes

As each state’s hate crime statute is subtly different, a state-by-state analysis of how hate crimes are being addressed is worthwhile. Many states have data collection statutes in place, which facilitate an analysis of crime rates—and in some cases, prosecution rates as well.⁸⁴ However, the vast majority of states’ hate crime statistics reports include only law enforcement data.⁸⁵

While law enforcement agency statistics are helpful at measuring how many hate crimes actually occur within a state each year, they reveal little about how much effect a hate crime statute *itself* is having on the attitudes of the general public, because such statistics do not reveal how often hate crime statutes are actually *used*. An analysis of hate crime data in a number of states reveals that the most useful information regarding trends of bias offenses comes from those states that mandate reporting from prosecutors as well as by law enforcement. Although fluctuation in crime rates can be attributed to many factors in addition to prosecution rates, data regarding the prosecution of hate crimes is essential to an analysis of the effectiveness of a hate crimes statute.

A. Wisconsin

Perhaps any discussion of the effectiveness of hate crimes by state should begin with Wisconsin, as the Supreme Court essentially made Wisconsin’s hate crime statute a touchstone for constitutionality when it upheld the statute in *Mitchell*.⁸⁶ Wisconsin’s bias offense takes the form of a sentence enhancement and uses the discriminatory selection model.⁸⁷ It also has an institutional vandalism statute.⁸⁸ Between 2000 and 2009, there were no substantive changes made to Wisconsin’s hate crimes statutes.⁸⁹

While Wisconsin has no data collection statute specifically for hate crimes, it does have a Uniform Crime Reporting program in place that calls

84. See, e.g., CONN. GEN. STAT. § 29-7m (Supp. 2013); see also SMITH & FOLEY, *supra* note 19 (summarizing state statutes governing hate crimes, including statutes mandating data collection).

85. See *supra* notes 50–53 and accompanying text.

86. *Wisconsin v. Mitchell*, 508 U.S. 476 (1993); see also LAWRENCE, *supra* note 21, at 30 (“*Mitchell* was the first case in which the Supreme Court expressly sustained a modern bias crime law. Because *Mitchell* represents the constitutional authority for the enactment of bias crime laws, the Wisconsin statute warrants close examination.”).

87. WIS. STAT. ANN. § 939.645 (West 2005); LAWRENCE, *supra* note 21, at 30; see *supra* note 67 and accompanying text.

88. WIS. STAT. ANN. § 943.012 (West 2005).

89. The Wisconsin legislature made minor language revisions to section 939.645 in 2001. 2001 Wis. Sess. Laws 1533.

for voluntary crime reports on a yearly basis from law enforcement agencies throughout the state.⁹⁰ This crime data includes statistics about hate crimes.⁹¹ According to Wisconsin's Uniform Crime Report (UCR), substantially all of the state's 398 reporting agencies also submitted hate crimes statistics during at least the last ten years.⁹²

In the year 2000, Wisconsin reported that forty-nine incidents of hate crime occurred throughout the year.⁹³ Strangely, this number included only a tiny amount of institutional vandalism offenses (about 10%).⁹⁴ Then, in 2006, reports of institutional vandalism offenses spiked⁹⁵ and, since then, have consistently accounted for 30%–40% of all reported hate crimes in the state.⁹⁶ While these statistics might reflect a sudden surge of institutional vandalism crimes in Wisconsin, it is far more probable that law enforcement officials simply began reporting more vandalism crimes. Thus, there were likely more than forty-nine incidents of hate crime in 2000 (perhaps as many as 30% more, judging by the statistics of later years). A better estimate is that around sixty incidents of hate crime occurred in Wisconsin in 2000.⁹⁷

In 2009, the most recent year for which Wisconsin statistics have been released, sixty-three incidents of hate crime were reported.⁹⁸ Thirty-two percent of those offenses were incidents of institutional vandalism; 21%

90. STATISTICAL ANALYSIS CTR., WIS. OFFICE OF JUSTICE ASSISTANCE, CRIME AND ARRESTS IN WISCONSIN – 2000, at 1–2 (2002) [hereinafter CRIME AND ARRESTS IN WISCONSIN – 2000].

91. *Id.* at 237–38.

92. See STATISTICAL ANALYSIS CTR., WIS. OFFICE OF JUSTICE ASSISTANCE, HATE CRIME IN WISCONSIN: 2009, at 3, (2010) [hereinafter HATE CRIME IN WISCONSIN: 2009], available at <http://oja.wi.gov/sites/default/files/2009%20Hate%20Crime%20in%20Wisconsin.pdf> (“Of the state’s 398 UCR reporting agencies, hate crimes occurred in 26 jurisdictions.”); cf. CRIME AND ARRESTS IN WISCONSIN – 2000, *supra* note 90, at 237 (“It should be noted that about ninety-eight percent of Wisconsin law enforcement agencies submitted Hate Crime forms during 2000.”). But see STATISTICAL ANALYSIS CTR., WIS. OFFICE OF JUSTICE ASSISTANCE, CRIME AND ARRESTS IN WISCONSIN: 2006, at 117 (2007) [hereinafter CRIME AND ARRESTS IN WISCONSIN: 2006], available at <http://oja.state.wi.us/sites/default/files/2006%20Crime%20and%20Arrests%20in%20Wisconsin.pdf> (“It should be noted that only 25 of the 372 agencies reporting UCR submitted hate crime forms in 2006. Because so few agencies report hate crimes, we suspect that they continue to be underreported in the state.”).

93. CRIME AND ARRESTS IN WISCONSIN – 2000, *supra* note 90, at 237–38.

94. See *id.* (identifying five reported vandalism hate crime offenses in 2000).

95. CRIME AND ARRESTS IN WISCONSIN: 2006, *supra* note 92, at 118 (indicating twenty-five reported vandalism hate crimes in 2006, out of a total of seventy-eight reported hate crimes that year).

96. See HATE CRIME IN WISCONSIN: 2009, *supra* note 92, at 5 (declaring that 32% of hate crimes reported in 2009 were for vandalism offenses); STATISTICAL ANALYSIS CTR., WIS. OFFICE OF JUSTICE ASSISTANCE, OFFICE OF JUSTICE ASSISTANCE, HATE CRIME IN WISCONSIN: 2008, at 5, (2009) (declaring that 27% of hate crimes reported in 2008 were for vandalism offenses); CRIME AND ARRESTS IN WISCONSIN: 2006, *supra* note 92, at 118 (indicating that twenty-five out of seventy-eight, or about 32%, of reported hate crimes in 2006 were for vandalism offenses).

97. Indeed, sixty-two hate crimes were reported in 2001, only a year later. STATISTICAL ANALYSIS CTR., WIS. OFFICE OF JUSTICE ASSISTANCE, CRIME AND ARRESTS IN WISCONSIN – 2001, at 249.

98. HATE CRIME IN WISCONSIN: 2009, *supra* note 92, at 3–5. FBI statistics indicate that Wisconsin reported ninety-three incidents of hate crime in 2010. FEDERAL BUREAU OF INVESTIGATION, U.S. DEPT. OF JUSTICE, HATE CRIME STATISTICS, 2010, at tbl.13 (2010), <http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2010/tables/table-13/wisconsin>.

were simple assaults; and 14% were incidents of intimidation.⁹⁹ While sixty-three incidents in 2009 seems at first glance to be considerably higher than the 2000 report of forty-nine incidents, the 2000 statistic would likely closely match the 2009 statistic if additional institutional vandalism incidents are factored into the 2000 report.¹⁰⁰

The statistics indicate that hate crime rates in Wisconsin have remained relatively steady over the last ten years.¹⁰¹ Even factoring in changes in the population rate from 2000 to 2009, the crime rate remained level at around one hate crime incident per 90,000 people per year. One way to look at this data is to say that since these rates have remained so steady, Wisconsin's hate crime statute has not been successful at deterring crime. However, without data on arrest or prosecution rates, it is impossible to know whether the statute is being used at all.

B. Florida

Hate crime statistics from Florida will become particularly relevant during the next few years, as Florida is one of only two states that has recently added "homelessness" to its list of protected characteristics under its hate crimes statute.¹⁰² While the most recent released data does not yet include hate crimes against the homeless, an analysis of Florida statistics before and after the addition will help determine whether hate crime legislation actually has a positive effect upon bias crimes. If 2011 statistics indicate a higher number of crimes against the homeless than subsequent years reveal, such data would indicate that the statute has had a deterring effect upon offenders targeting the homeless. Additionally, such a trend would settle fears that adding additional protected groups to hate crimes statutes dilutes the statutes' effectiveness.¹⁰³

Florida has a sentence enhancement statute that follows the racial animus model, as well as an institutional vandalism statute.¹⁰⁴ Like Wisconsin, Florida only requires law enforcement agencies to report hate crime statistics under its UCR program.¹⁰⁵ No data on arrest or prosecution rates for hate crimes are available. All of Florida's 367 reporting agencies routinely submit hate crime statistics for federal use.¹⁰⁶

99. HATE CRIME IN WISCONSIN: 2009, *supra* note 92, at 3–5.

100. *See supra* notes 93–97 and accompanying text.

101. *See supra* notes 95–99 and accompanying text.

102. *See* FLA. STAT. ANN. § 775.085 (West Supp. 2013); MD. CODE ANN., CRIM. LAW § 10-304 (LexisNexis 2012).

103. *See Room For Debate: Are Hate Crimes Laws Necessary?*, N.Y. TIMES March 7, 2012, <http://www.nytimes.com/roomfordebate/2012/03/07/are-hate-crime-laws-necessary>.

104. FLA. STAT. ANN. §§ 775.0845, 775.085, 806.13, 877.19 (West 2010 & Supp. 2013) (as elaborated in Part VII, *infra*, the inclusion of institutional vandalism offenses is supported as potential substitutes for hate crimes where the latter offense's intent elements may have a weaker evidentiary basis).

105. FLA. STAT. ANN. § 877.19 (West 2000).

106. OFFICE OF FLA. ATTORNEY GEN., HATE CRIMES IN FLORIDA: JANUARY 1-DECEMBER 31, 2010, at 5 (2011) [hereinafter HATE CRIMES IN FLORIDA: 2010], *available at*

In the year 2000, Florida reported that 269 hate crime offenses occurred throughout the year.¹⁰⁷ Since that time, the number of hate crime offenses reported in the state has steadily declined.¹⁰⁸ In 2010, only 149 offenses were reported by law enforcement agencies throughout the year.¹⁰⁹ From the standpoint of the general population, while in 2000 there was about one incident per 60,000 people, by 2010 that amount had decreased to around one incident per 125,000 people.¹¹⁰

Is Florida therefore a hate crimes success story? On its face, Florida's very inclusive statute¹¹¹ seems to be deterring offenders from committing hate crimes.¹¹² However, similar to Wisconsin's statistics, without additional data including information regarding arrests and prosecution of hate crimes, it is impossible to determine whether Florida's hate crime law—or, for that matter, public education or simply falling crime rates—is causing a decrease in the occurrence of hate crimes.

C. Hawaii

Hawaii's hate crime statistics and reporting programs are unique in multiple ways. First, Hawaii does not contribute to the FBI's yearly national hate crime reports.¹¹³ Second, Hawaii is a state that, contrary to UCR practices, in its yearly hate crime reports provides only prosecution statistics unaccompanied by law enforcement data.¹¹⁴ According to its published hate crime report, Hawaii's methodological use of only incidents that clearly meet the State's legal definition of hate crime avoids false positives made by law

[http://myfloridalegal.com/webfiles.nsf/WF/MRAY-8PSRSL/\\$file/2010HateCrimesReport.pdf](http://myfloridalegal.com/webfiles.nsf/WF/MRAY-8PSRSL/$file/2010HateCrimesReport.pdf).

107. OFFICE OF FLA. ATTORNEY GEN., HATE CRIMES IN FLORIDA: JANUARY 1, 2000-DECEMBER 31, 2000, at 5 (2001) [hereinafter HATE CRIMES IN FLORIDA: 2000], available at <http://www.myfloridalegal.com/00hate.pdf>.

108. HATE CRIMES IN FLORIDA: 2010, *supra* note 106, at 8.

109. *Id.* at 5.

110. *Id.*; HATE CRIMES IN FLORIDA: 2000, *supra* note 107, at 5 (2001); UNITED STATES CENSUS BUREAU, *Population Estimates: State Intercensal Estimates (2000-2010)* [hereinafter U.S. CENSUS BUREAU], available at <http://www.census.gov/popest/data/intercensal/state/state2010.html>.

111. Besides homelessness, Florida's protected demographics include race, ethnicity, religion, sexual orientation, disability, national origin, ancestry, color, mental or physical disability, and advanced age. See FLA. STAT. ANN. §§ 775.085 (West Supp. 2013).

112. See NAT'L COAL. FOR THE HOMELESS, HATE CRIMES AGAINST THE HOMELESS: THE BRUTALITY OF VIOLENCE UNVEILED (2012), available at <http://www.nationalhomeless.org/publications/hatecrimes/hatecrimes2011.pdf> (noting that Florida homeless hate crimes "significantly decreased" from twenty-one in 2010 to four in 2011 "due to the emergence of a new state-level legislation" against such crimes).

113. FEDERAL BUREAU OF INVESTIGATION, *Methodology*, FBI.GOV, <http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2010/resources/hate-crime-2010-methodology> (last visited April 27, 2012).

114. CRIME PREVENTION & JUSTICE ASSISTANCE DIV., HAW. DEPT. OF THE ATTORNEY GEN., HATE CRIMES IN HAWAII, 2010, at 2 (2011) [hereinafter HATE CRIMES IN HAWAII 2010], available at <http://ag.hawaii.gov/cpja/files/2013/01/Hate-Crime-Report-2010.pdf>; FEDERAL BUREAU OF INVESTIGATION, *UCR General FAQs*, available at http://www.fbi.gov/about-us/cjis/ucr/frequently-asked-questions/ucr_faqs (noting data collection on "known offenses and persons arrested by law enforcement", but expressly not "the finds of a court . . . or the decision of a prosecutor.").

enforcement officials, thus avoiding the “pitfall” that other jurisdictions make by providing only law enforcement statistics.¹¹⁵

Like Florida, Hawaii’s hate crime statute is a sentence enhancement, which follows the racial animus model.¹¹⁶ It also has an institutional vandalism statute.¹¹⁷ From 2002 to 2011, Hawaii has reported a total of only seventeen hate crime dispositions by prosecutors,¹¹⁸ an average of slightly more than one disposition per year. In 2002, this amounted to one disposition of a hate crime offense per every 620,000 people, a figure that by 2009 had decreased to one disposition per 1.3 million people.¹¹⁹

Is Hawaii’s method of reporting only prosecution data to be preferred over that of states that report only law enforcement data? In enacting this type of reporting method, Hawaii has the opposite problem from states such as Wisconsin and Florida, namely that the state has no record of hate crimes committed—only of crimes prosecuted. Consequently, the implication by Hawaii’s reporting agency that this method leads to more accurate data suffers an equivalent failure to portray the relationship between crimes committed and convictions secured. Thus, there is no way to tell whether Hawaii’s hate crimes statute is actually effective at controlling crime.

D. New York

New York is one of the few states that provides both law enforcement and prosecution statistics for hate crimes. As a result, its data set is one of the few that provides a clear picture of the relationship between hate crime incidents and the effectiveness of the hate crimes statute. Regarding enforcement, New York has both a substantive offense and a sentence enhancement statute,¹²⁰ both of which follow the discriminatory selection model. It also has an institutional vandalism statute.¹²¹

In 2000, before New York had an intrastate hate crimes statistics program in place, it reported 617 occurrences of hate crimes to the FBI.¹²²

115. HATE CRIMES IN HAWAII 2010, *supra* note 114, at 2.

116. HAW. REV. STAT. §§ 706-662, 846-51–846-54 (LexisNexis 2007 & Supp. 2012).

117. HAW. REV. STAT. §§ 846-51–846-54 (LexisNexis 2007); *see also* HAW. REV. STAT. § 711-1107 (LexisNexis 2007).

118. CRIME PREVENTION & JUSTICE ASSISTANCE DIV., HAW. DEPT. OF THE ATTORNEY GEN., HATE CRIMES IN HAWAII, 2011, at 3 (2012) [hereinafter HATE CRIMES IN HAWAII 2011], *available at* <http://ag.hawaii.gov/cpja/files/2013/01/Hate-Crime-Report-2011.pdf>.

119. CRIME PREVENTION & JUSTICE ASSISTANCE DIV., HAW. DEPT. OF THE ATTORNEY GEN., HATE CRIMES IN HAWAII, 2002, at 2 (2003) [hereinafter HATE CRIMES IN HAWAII 2002], *available at* <http://ag.hawaii.gov/cpja/files/2013/01/Hate-Crimes-2002.pdf>; CRIME PREVENTION & JUSTICE ASSISTANCE DIV., HAW. DEPT. OF THE ATTORNEY GEN., HATE CRIMES IN HAWAII, 2009, at 1 (2010) [hereinafter HATE CRIMES IN HAWAII 2009], *available at* <http://ag.hawaii.gov/cpja/files/2013/01/Hate-Crime-Report-2009.pdf>; U.S. CENSUS BUREAU, *supra* note 110.

120. N.Y. PENAL LAW §§ 485.05, 485.10 (McKinney Supp. 2013); N.Y. EXEC. LAW § 837 (McKinney Supp. 2013).

121. N.Y. PENAL LAW §§ 240.30–31 (McKinney 2008).

122. FEDERAL BUREAU OF INVESTIGATION, HATE CRIME STATISTICS: 2000, at 18 (2001), *available at* <http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2000>.

Since 2008, when New York launched its present statistics program, the number of recorded offenses has remained steady at around 600–700 offenses per year.¹²³ Thus, in 2000, New York experienced about one hate crime offense per 31,000 people, with that statistic increasing slightly by 2009 to about one offense per 28,200 people.¹²⁴

While the number of hate crime offenses in New York has remained steady, the number of final dispositions of arrests for hate crime offenses has increased significantly each year. In 2008, the state reported ninety-eight final dispositions for hate crime arrests; in 2009, there were 138 dispositions; in 2010, there were 159 dispositions; and in 2011, there were 194 dispositions.¹²⁵ This increase also reflects an upward trend in convictions for hate crime arrests: sixty-four in 2008; eighty-seven in 2009; ninety-seven in 2010; and 122 in 2011.¹²⁶ Given that offenses have remained steady while convictions have increased, it seems that prosecutors in New York are becoming more comfortable with pursuing convictions for individuals who have been arrested for committing hate crimes.

Still, New York's data is not flawless because it does not indicate how many of those convictions are actually for hate crimes. Indeed, it is possible that the majority of these offenders were convicted for other crimes (such as murder, assault, etc.) and not under New York's hate crime laws at all. Additionally, the lack of change in the rate of hate crimes—despite an increasing number of prosecutions—is troubling. It may suggest that increased prosecution has no impact on reducing the occurrence of hate crime. Or, if increased willingness to prosecute has only been present since 2008, it is possible that it is still too soon to see any change in rates of hate crime in the state.

123. N.Y. DIV. OF CRIM. JUSTICE SERV., OFFICE OF JUSTICE RESEARCH & PERFORMANCE, HATE CRIME IN NEW YORK STATE: 2008 ANNUAL REPORT, at 2 (2009) [hereinafter HATE CRIME IN NEW YORK STATE 2008], available at <http://www.criminaljustice.state.ny.us/pio/annualreport/hatecrimereport2008.pdf>; N.Y. DIV. OF CRIM. JUSTICE SERV., OFFICE OF JUSTICE RESEARCH & PERFORMANCE, HATE CRIME IN NEW YORK STATE: 2009 ANNUAL REPORT, at 2 (2010) [hereinafter HATE CRIME IN NEW YORK STATE 2009], available at <http://www.criminaljustice.state.ny.us/crimnet/ojsa/hate-crime-in-nys-2009-annual-report.pdf>; N.Y. DIV. OF CRIM. JUSTICE SERV., OFFICE OF JUSTICE RESEARCH & PERFORMANCE, HATE CRIME IN NEW YORK STATE: 2010 ANNUAL REPORT, at 2 (2011) [hereinafter HATE CRIME IN NEW YORK STATE 2010], available at <http://www.criminaljustice.state.ny.us/crimnet/ojsa/hate-crime-in-nys-2010-annual-report.pdf>; N.Y. DIV. OF CRIM. JUSTICE SERV., OFFICE OF JUSTICE RESEARCH & PERFORMANCE, HATE CRIME IN NEW YORK STATE: 2011 ANNUAL REPORT, at 2 (2012) [hereinafter HATE CRIME IN NEW YORK STATE 2011], available at <http://www.criminaljustice.ny.gov/crimnet/ojsa/2011-hate-crime.pdf> (showing slight decrease to 554 reported hate crimes).

124. See U.S. CENSUS BUREAU, *supra* note 110.

125. See HATE CRIME IN NEW YORK STATE 2008, *supra* note 123, at 7; HATE CRIME IN NEW YORK STATE 2009, *supra* note 123, at 6; HATE CRIME IN NEW YORK STATE 2010, *supra* note 123, at 6; HATE CRIME IN NEW YORK STATE 2011, *supra* note 123, at 7.

126. See HATE CRIME IN NEW YORK STATE 2008, *supra* note 123, at 7; HATE CRIME IN NEW YORK STATE 2009, *supra* note 123, at 6; HATE CRIME IN NEW YORK STATE 2010, *supra* note 123, at 6; HATE CRIME IN NEW YORK STATE 2011, *supra* note 123, at 8.

E. California

Like New York, California provides both prosecution data and law enforcement data on hate crimes in its annual reports. Interestingly, California's data collection statute grants the state Attorney General broad leeway in determining what data will be collected and how that data will be reported.¹²⁷ As early as 1995, the Attorney General's Hate Crime Reporting program began soliciting data from law enforcement agencies and prosecution offices alike.¹²⁸ Most importantly, California's prosecution data contains not only how many hate crime arrests receive final dispositions, it also indicates how many of those dispositions were for hate crime offenses.¹²⁹ As a result, California's data collection program is the most comprehensive of any state.

Like New York, California has both substantive offense and sentence enhancement statutes that follow the discriminatory selection model,¹³⁰ as well as an institutional vandalism statute.¹³¹ But unlike New York, the number of hate crimes reported in California has declined significantly since 2000. By way of illustration, the State reported 1,957 hate crime offenses in 2000; 1,397 offenses in 2008; and only 1,107 offenses in 2010.¹³² Even taking into account significant population growth during that period (an additional three million people lived in California in 2009 than in 2000),¹³³ the number of offenses declined from about one offense per 17,300 people in 2000 to one offense per 33,600 people in 2009.¹³⁴

An analysis of California's prosecution statistics also seems to reveal positive trends throughout the last decade. While the numbers of case referrals of hate crimes by law enforcement to prosecution agencies fluctuated from year to year, the number was always within the range of 350–550 referrals per year.¹³⁵ Rates of hate crime convictions fluctuated as well,

127. See CAL. PENAL CODE § 13023 (West 2012).

128. CRIMINAL JUSTICE STATISTICS CTR., CAL. DEPT. OF JUSTICE, HATE CRIME IN CALIFORNIA: 2009, at i–ii (2010) [hereinafter HATE CRIME IN CALIFORNIA 2009], available at <http://oag.ca.gov/sites/all/files/pdfs/cjsc/publications/hatecrimes/hc09/preface09.pdf>.

129. *Id.* at 8–9.

130. CAL. PENAL CODE §§ 422.55, 422.6–.76 (West 2010 & Supp. 2013).

131. CAL. PENAL CODE § 594.3 (West Supp. 2013).

132. CRIMINAL JUSTICE STATISTICS CTR., CAL. DEPT. OF JUSTICE, HATE CRIME IN CALIFORNIA: 2000, at 3 (2001) [hereinafter HATE CRIME IN CALIFORNIA 2000], available at <http://ag.ca.gov/cjsc/publications/hatecrimes/hc2000/preface.pdf>; CRIMINAL JUSTICE STATISTICS CTR., CAL. DEPT. OF JUSTICE, HATE CRIME IN CALIFORNIA: 2008, at ii (2009) [hereinafter HATE CRIME IN CALIFORNIA 2008], available at <http://ag.ca.gov/cjsc/publications/hatecrimes/hc08/preface08.pdf>; CRIMINAL JUSTICE STATISTICS CTR., CAL. DEPT. OF JUSTICE, HATE CRIME IN CALIFORNIA: 2010, at 1 (2011) [hereinafter HATE CRIME IN CALIFORNIA 2010], available at <http://oag.ca.gov/sites/all/files/agweb/pdfs/cjsc/publications/hatecrimes/hc10/preface10.pdf>.

133. See U.S. CENSUS BUREAU, *supra* note 110.

134. *Id.*; HATE CRIME IN CALIFORNIA 2000, *supra* note 132, at 3; HATE CRIME IN CALIFORNIA 2009, *supra* note 128, at 1.

135. See, e.g., HATE CRIME IN CALIFORNIA 2000, *supra* note 132, at 24; CRIMINAL JUSTICE STATISTICS CTR., CAL. DEPT. OF JUSTICE, HATE CRIME IN CALIFORNIA: 2007, at 11 (2008) [hereinafter HATE CRIME IN CALIFORNIA 2007], available at <http://oag.ca.gov/sites/all/files/pdfs/cjsc/publications/>

from as many as 213 in 2000 to only seventy in 2010.¹³⁶ Despite these fluctuations, one thing is clear: California prosecutors are actually using the State's hate crimes statutes, and they are securing convictions when they do so. Additionally, prosecutors seem to be growing more comfortable with the tools at their disposal. In 2000, one hate crime case was filed for every 5.4 offenses, and one conviction was secured for every 9.2 offenses.¹³⁷ By 2009, those numbers had increased to one hate crime case being filed for every three offenses and one conviction per 8.4 offenses.¹³⁸

F. Texas

Texas's hate crime law takes the form of a sentence enhancement statute that follows the racial animus model, and it has also enacted an institutional vandalism statute.¹³⁹ The primary Texas data collection provision only requires law enforcement agencies to report hate crimes statistics for the State's annual report.¹⁴⁰ However, legislation passed in 2001 requires court clerks to report the filing and judgment of hate crimes to the Texas Judicial Council.¹⁴¹

As in California, reported hate crime offenses have consistently dropped in Texas during the last decade. In 2000, 305 offenses were reported, a number that by 2007 decreased to 255, then to 171 by 2010.¹⁴² Accounting for population growth, this amounts to approximately one offense per 68,500 people in 2000, and only one offense per 148,500 people in 2009.¹⁴³

Why have hate crime rates dropped in Texas? One possibility is that Texas's hate crime statute is effectively deterring offenders. However, according to data reported to the Texas Judicial Council, only fifteen sentence enhancements pursuant to a finding of a hate crime have been issued to

[hatecrimes/hc07/preface07.pdf](#); HATE CRIME IN CALIFORNIA 2008, *supra* note 132, at 6; HATE CRIME IN CALIFORNIA 2010, *supra* note 132, at 13.

136. See HATE CRIME IN CALIFORNIA 2000, *supra* note 132, at 4; HATE CRIME IN CALIFORNIA 2010, *supra* note 132, at 2; see also HATE CRIME IN CALIFORNIA 2007, *supra* note 135.

137. HATE CRIME IN CALIFORNIA 2000, *supra* note 132, at 2–3.

138. See HATE CRIME IN CALIFORNIA 2009, *supra* note 128, at 8–9; U.S. CENSUS BUREAU, *supra* note 110.

139. TEX. PENAL CODE ANN. § 12.47 (West 2011); TEX. CODE CRIM. PROC. ANN. art. 42.014 (West 2006).

140. TEX. GOV'T CODE ANN. § 411.046 (West 2012).

141. TEX. CODE CRIM. PROC. ANN. art. 2.211 (West 2005).

142. TEX. DEPT. OF PUB. SAFETY, CRIME IN TEXAS: 2000, at 61–63 (2001), available at http://www.txdps.state.tx.us/administration/crime_records/docs/cr2000/Crime%20in%20Texas%206.pdf; TEX. DEPT. OF PUB. SAFETY, CRIME IN TEXAS: 2007, at 61–63 (2008), available at <http://www.txdps.state.tx.us/crimereports/07/citch6.pdf>; TEX. DEPT. OF PUB. SAFETY, CRIME IN TEXAS: 2010, at 47–49 (2011) [hereinafter CRIME IN TEXAS 2010], available at <http://www.txdps.state.tx.us/crimereports/10/citCh6.pdf>. The latest Texas hate crime statistic, for 2011, was even lower at 152. TEX. DEPT. OF PUB. SAFETY, CRIME IN TEXAS: 2011, at 46–48 (2012), available at <http://www.txdps.state.us/crimereports/11/citCh6.pdf>

143. U.S. CENSUS BUREAU, *supra* note 110.

offenders in Texas since 2001.¹⁴⁴ Additionally, according to a recent article in the *Austin-American Statesman*, most of these findings have come in plea arrangements—in fact, during the last ten years, only one hate crime case was taken before a jury in Texas.¹⁴⁵ If prosecutors are not using the statute to convict or even charge offenders, it is likely that the decrease in crime is attributable to other factors.

Table 2: Selected Hate Crime Statistics by State

	No. of Incident s (2000)	No. of Incident s (2007)	No. of Incident s (2009)	No. of Conviction s (2009)	Offense Rate by Population (2000)	Offense Rate by Populatio n (2009)
Wisconsin ¹⁴⁶	49	74	63	N/A	1/109,700 *	1/90,000
Florida ¹⁴⁷	269	193	148	N/A	1/60,000	1/125,000
Hawaii ¹⁴⁸	N/A	N/A	N/A	1	N/A	N/A
New York ¹⁴⁹	617	N/A	683	87**	1/30,800	1/28,600
California ¹⁵⁰	1,957	1,426	1,397	131	1/19,000	1/33,600
Texas ¹⁵¹	305	255	167	1	1/68,500	1/147,500

* Wisconsin hate crime incidents in 2000 should be adjusted upwards to account for additional institutional vandalism offenses. A good estimate is 90 offenses. Likewise, the offense rate should be adjusted upwards to around 1 offense per 90,000 people.

** New York does not report the number of hate crime convictions per year, but it does report hate crimes with “dispositions,” which includes convictions as well as acquittals and dismissals.

VII. Hate Crime Prosecution

Why are prosecutors so reluctant to charge offenders under hate crimes statutes? The primary reason is because prosecuting a hate crime

144. TEX. JUDICIAL COUNCIL, *supra* note 8; *see also* Eric Dexheimer, *Texas Hate Crime Law Has Little Effect*, AUSTIN-AMERICAN STATESMAN, Jan. 21, 2012, <http://www.statesman.com/news/news/special-reports/texas-hate-crime-law-has-little-effect/nRjsf/>.

145. Dexheimer, *supra* note 144.

146. *See supra* Part VI.A.

147. *See supra* Part VI.B.

148. *See supra* Part VI.C.

149. *See supra* Part VI.D.

150. *See supra* Part VI.E.

151. *See supra* Part VI.F.

requires proof of a bias-centered motive on the part of the offender.¹⁵² Proving motive is typically a difficult task for a prosecutor. In a case where the offender did not make any sort of clear-cut, incriminating statement demonstrating a bias towards the victim's protected group, a prosecutor has to rely on circumstantial evidence alone to prove bias, or must draw a bias motive out from the offender's multiple, co-mingled criminal motivations.¹⁵³ This difficulty either causes prosecutors to avoid such cases altogether, or encourages them to charge the offender with a different offense in order to avoid the stringent requirements of the hate crime statute.

Compounding the difficulty of proving a bias motive is the fact that the extra work involved in proving that motive may not even be worth the effort. When a prosecutor first considers a potential case, she will perform a careful cost-benefit analysis, essentially weighing the benefits of charging an offender under a hate crime statute against the risks of such a charge.¹⁵⁴ If the costs ultimately outweigh the benefits, the hate crimes statute will not be used.

The risks of charging an offender under a hate crime statute involve the difficulty of proving the bias motive, the increased complexity of the case, and more work (for example, proving a racial hate element requires more careful questioning of potential jurors during voir dire).¹⁵⁵ The benefit of invoking the hate crime charge is a longer sentence for the offender, whether under a sentence enhancement or a substantive offense statute. Yet for a state like Texas, which has extremely open-ended sentencing ranges,¹⁵⁶ the underlying offense is frequently enough to put a perpetrator in prison for an extended period of time, without having to use the hate crime enhancement at all. In such a case, the costs of using a hate crimes statute would outweigh the benefits, and the hate crimes statute would not be used.

For a variety of reasons, prosecutors file cases they believe they can win.¹⁵⁷ Because of this fact, prosecutors "operationalize" hate crimes statutes in order to make them functional in light of the inherent difficulties in winning such a case. In researching hate crime prosecution in Texas, Beverly McPhail has identified a number of tactics that prosecutors currently employ to make hate crime laws work for them.¹⁵⁸ For example, prosecutors narrow the scope of potential cases that can be charged as hate crimes by only looking for offenses where hate was the sole motivation for the crime, and

152. Catherine Pugh, Comment, *What Do You Get When You Add Megan Williams to Matthew Shepard and Victim-Offender Mediation? A Hate Crime Law That Prosecutors Will Actually Want To Use*, 45 CAL. W. L. REV. 179, 190-91 (2008).

153. *Id.* at 191-94.

154. McPhail & Jenness, *supra* note 38, at 103-04.

155. *Id.*

156. *See* TEX. PENAL CODE ANN. §§ 12.31-.34 (West 2011).

157. Laurie Elizabeth Woods, *Sometimes It's Personal: Hate Crime Prosecution in California* (Dec. 2008) (unpublished Ph.D. dissertation, Vanderbilt University) (on file with Heard Library, Vanderbilt University).

158. McPhail & Jenness, *supra* note 38, at 113.

ruling out more difficult cases where dual or multiple motivations were present.¹⁵⁹ If prosecutors continue to only use hate crime laws in a very narrow set of circumstances, these laws will not ever realize their full potential.

VIII. Effectiveness of Hate Crimes Statutes

The ultimate aim of hate crime legislation seems to be eliminating bias-motivated crime in its entirety in the United States. But are our current types of hate crime laws effective at reducing hate crime rates? And beyond that obvious goal, do (and should) hate crime laws have other purposes? Such purposes might involve victim reparation, increased community education and awareness regarding hate crimes, or heightened punishment for conduct society has deemed undesirable.

Critics of hate crime laws argue that our current forms of legislation do not deter hate crimes. According to FBI statistics, between 7,000–9,000 hate crimes have been committed nationwide during each of the last seven years.¹⁶⁰ This number has held steady despite the fact that nearly every state now has some form of anti-bias statute in place.¹⁶¹ This lack of results has

159. *Id.*

160. See FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES, 2004, at 65–66 (2005), available at http://www2.fbi.gov/ucr/cius_04/documents/CIUS2004.pdf (reporting 7,649 incidents of hate crimes and 9,035 hate crime offenses committed in 2004); FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, HATE CRIME STATISTICS, 2005: INCIDENTS AND OFFENSES 1 (2006), available at <http://www2.fbi.gov/ucr/hc2005/docdownload/incidentsandoffenses.pdf> (reporting 7,163 incidents of hate crimes and 8,380 hate crime offenses committed in 2005); FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, HATE CRIME STATISTICS, 2006: INCIDENTS AND OFFENSES 1 (2007), available at <http://www2.fbi.gov/ucr/hc2006/downloadablepdfs/incidentsandoffenses.pdf> (reporting 7,722 incidents of hate crimes and 9,080 hate crime offenses committed in 2006); FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, HATE CRIME STATISTICS, 2007: INCIDENTS AND OFFENSES 1 (2008), available at <http://www2.fbi.gov/ucr/hc2007/downloadablepdfs/incidentsandoffenses.pdf> (reporting 7,624 incidents of hate crimes and 9,006 hate crime offenses committed in 2007); FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, HATE CRIME STATISTICS, 2008: INCIDENTS AND OFFENSES 1 (2009), available at <http://www2.fbi.gov/ucr/hc2008/documents/incidentsandoffenses.pdf> (reporting 7,783 incidents of hate crimes and 9,168 hate crime offenses committed in 2008); FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, HATE CRIME STATISTICS, 2009: INCIDENTS AND OFFENSES 1 (2010), available at <http://www2.fbi.gov/ucr/hc2009/documents/incidentsandoffenses.pdf> (reporting 6,604 incidents of hate crimes and 7,789 hate crime offenses committed in 2009); FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, HATE CRIME STATISTICS, 2010: INCIDENTS AND OFFENSES 1 (2011), available at <http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2010/narratives/hate-crime-2010-incidents-and-offenses.pdf> (reporting 6,628 incidents of hate crimes and 7,699 hate crime offenses committed in 2010); FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, HATE CRIME STATISTICS, 2011: INCIDENTS AND OFFENSES 1 (2012), available at http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2011/narratives/incidentsandoffenses_final.pdf (reporting 6,222 incidents of hate crimes and 7,254 hate crime offenses committed in 2011).

161. SMITH & FOLEY, *supra* note 19, at 1 (noting “at least” 45 states and the District of Columbia had statutory bias-motivated criminal penalties); see also *Ga. High Court Strikes Down State’s Hate Crimes Law*, WASHINGTON POST, Oct. 26, 2004, <http://www.washingtonpost.com/wp-dyn/articles/A62848-2004Oct25.html> (counting 48 states with hate crime laws in 2004).

led even proponents of hate crime legislation to concede the data does not indicate that bias-crime laws are effective at deterring hate crimes.¹⁶²

Some believe that hate crime rates have remained steady because all three types of hate crime statutes are geared towards increased punishment.¹⁶³ Opponents of hate crime legislation have argued that punishing a hate crime offender with a lengthened sentence fulfills no valid penological purpose and ultimately has little effect on rates of bias-motivated crime.¹⁶⁴ The racially-charged atmosphere of prisons in the United States is not likely to convince a prejudiced offender of the error of his ways; if anything, it may exacerbate his bias.¹⁶⁵

Similarly, current hate crime laws are not effective at providing victim reparation. While prosecuting the offender sometimes provides victims with an opportunity to testify at trial or share their feelings as part of a victim impact statement at sentencing, prosecution is more often institutionally expressed as a contest between the government and the offender, often to the complete exclusion of the victim.¹⁶⁶ Punishment is also inadequate, because it only affects the offender and often offers nothing for the victim, or the community, that was harmed.¹⁶⁷

But if hate crime statutes are ineffective, how does one account for reduced hate crime rates in states such as Texas, California, and Florida? It has been argued that lower hate crime rates are simply reflections of the fact that all violent crime, not just hate crime, has decreased in the United States during the last ten years.¹⁶⁸ While this larger trend may be a factor in a decrease in hate crime, it is also likely that the proliferation of hate crime statutes has sent a message to the public that bias offenses will not be tolerated. Criminal punishment is expressive of societal disapproval, and it seems plausible that, because of hate crime laws, many attitudes have changed over the course of the decade in which most states have had such statutes in place.¹⁶⁹

However, to ensure that the public benefits from full exposure to the existence and power of hate crime laws, those laws must be used. After all, social stigma against hate crimes is hard-pressed to develop if no offenders

162. Gellman & Lawrence, *supra* note 7, at 441.

163. *See id.* at 429–30.

164. Gaumer, *supra* note 10, at 41–42.

165. *See id.* at 46; *see also* JORGE RENAUD, BEHIND THE WALLS: A GUIDE FOR FAMILIES AND FRIENDS OF TEXAS PRISON INMATES 130 (2002) (describing how “insidious racism . . . permeates prison” and how “the system” has failed “to deal with it in any fashion but through forced integration.”).

166. Pugh, *supra* note 152, at 197–200; *see also* Woods, *supra* note 157, at 101 (“Victims appear to be judged for their characteristics and how that will play to juries, rather than protected for their immutable states.”).

167. Pugh, *supra* note 152, at 198.

168. *See* Dexheimer, *supra* note 144.

169. LAWRENCE, *supra* note 21, at 163–65. Even opponents of hate crime legislation admit that hate crime statutes likely have some educational effect. *See* Gaumer, *supra* note 10, at 44 (“If hate crime laws serve any deterrent or education functions at all, they send the message that bigotry and other forms of statutorily defined prejudices are inappropriate values.”).

are ever charged with bias offenses under the statute. California may have already seen some benefits from increased prosecution of offenders under hate crime statutes, in the form of lower crime rates and a higher conviction-to-offense ratio.¹⁷⁰ But if California prosecutors' willingness to utilize hate crime statutes is what lowers crime rates, how does one explain Texas's reduced hate crime rate when it seems clear that Texas prosecutors are not utilizing hate crimes statutes?¹⁷¹

Unfortunately, without clearer data, factors other than prosecution or well-drafted legislation could be influencing lower crime rates, even in states like California. One element that is difficult, if not impossible, to quantify is how law enforcement officials respond to hate crime incidents when they encounter them. A number of states have enacted law enforcement training statutes, in an attempt to educate officers as to the proper response in a situation involving a hate crime.¹⁷² However, there seems to be little oversight in place to ensure that law enforcement officials are actually receiving or utilizing this training.

At present, the effectiveness of a hate crimes statute is in the hands of law enforcement officers and prosecutors. Officers are the first to respond to hate crime incidents, and often make decisions regarding whether an incident is to be classified as a hate crime. Prosecutors, likewise, make the decision whether to charge a defendant with a hate crime, and have a significant effect on the outcome of a case. Increased community awareness stems from prosecutors and officers embracing and utilizing hate crime statutes.

IX. Recommendations for Texas

In light of this reality, the following are suggestions regarding the improvement of Texas's current system.

A. Underutilized Portions of Texas's Current Hate Crimes Statute Should Be Put Into Practice

Before statutory reform can be contemplated, Texas should focus on utilizing laws that it already has in place. Specifically, there are a number of provisions of the 2001 James Byrd, Jr. Hate Crimes Act that have seemingly been ignored during the decade since the law was passed.

A primary concern among prosecutors is that they do not have the time or the resources to prosecute difficult hate crimes, especially where a determination of a bias motive must be made.¹⁷³ However, the Texas Penal

170. *See supra* notes 135–38 and accompanying text.

171. *See Dexheimer, supra* note 144.

172. *See, e.g.*, CONN. GEN. STAT. ANN. § 7-294n (Supp. 2013); CAL. PENAL CODE § 13519.6 (West 2012).

173. *See supra* notes 153–55 and accompanying text.

Code allows the state's Attorney General to assist prosecuting attorneys in the investigation or prosecution of offenses committed because of bias or prejudice.¹⁷⁴ Furthermore, Texas's Code of Criminal Procedure indicates that counties can receive reimbursement from the state for expenses incurred pursuant to the investigation or prosecution of a hate crime offense.¹⁷⁵ These provisions would provide prosecutors with additional, much-needed state resources with which to move forward with hate crimes cases, even in less favorable circumstances than might be typical. However, according to one Equality Texas report, many prosecutors may be unaware that these provisions exist at all.¹⁷⁶

Training and community awareness are also addressed by the Act. Under the state Education Code, the Texas Attorney General must develop a program to provide instruction to students and the community about state laws addressing hate crimes, available upon the request of a school district.¹⁷⁷ While private organizations operate hate crime awareness programs in public schools,¹⁷⁸ there is no indication that the state government has ever made good on this promise to educate the community. Additionally, the state Government Code requires the Texas Court of Criminal Appeals to provide training to prosecuting attorneys regarding the use of Texas's hate crime sentence enhancement provisions.¹⁷⁹ While the Court of Criminal Appeals does furnish grant money to various entities to provide local prosecutorial training, there is no indication that this training includes hate crime laws in the way intended by the 2001 Hate Crimes Act.¹⁸⁰

B. Prosecutors Should Be Required to Submit Data on How Many Offenders are Charged and Convicted for Hate Crimes Each Year

Currently, Texas's data collection statute requires that a central repository for collection and analysis of data be maintained by the Texas Department of Public Safety (DPS).¹⁸¹ A separate provision, enacted by the James Byrd, Jr. Act, requires court clerks to report the filing and judgment of hate crimes to the Texas Judicial Council.¹⁸² Thus data about hate crime offenses is maintained separately from data regarding prosecution of hate crimes.

The annual report issued by the DPS is helpful, in that it provides

174. TEX. PENAL CODE ANN. § 12.47 (West 2011).

175. TEX. CODE OF CRIM. PROC. art. 104.004 (West 2006).

176. Hunter Jackson, *Why has Texas' James Byrd Jr. Hate Crimes Act been so ineffective?*, EQUALITY TEXAS BLOG (October 30, 2009), <http://equalitytexas.typepad.com/blog>.

177. TEX. EDUC. CODE ANN. § 29.905 (West 2012).

178. Anti-Defamation League, *Programs: No Place For Hate*, ADL.ORG (April 30, 2012, 2:50 PM), <http://regions.adl.org/southwest/programs/no-place-for-hate.html>.

179. TEX. GOV'T CODE ANN. § 22.111 (West 2012).

180. Interview with the Office of the Clerk of Court, Texas Court of Criminal Appeals (April 27, 2012).

181. TEX. GOV'T CODE ANN. § 411.046 (West 2012).

182. TEX. CODE CRIM. PROC. ANN. art 2.211 (West 2005).

data regarding the number of hate crime offenses reported by law enforcement throughout the state.¹⁸³ However, it does not contain any information on how frequently prosecutors actually seek a finding of a hate crime pursuant to the sentence enhancement statute. Likewise, the report issued by the Texas Judicial Council does not present a complete picture of how hate crimes in Texas are being investigated and prosecuted. For example, the data from the Texas Judicial Council states that in every single case where a finding of a hate crime was requested by a prosecutor, an affirmative finding of a hate crime was later entered by a court clerk.¹⁸⁴ Does this mean that prosecutors in Texas are extraordinarily gifted at obtaining affirmative findings of hate crimes? Perhaps the data simply indicates that prosecutors are only requesting a hate crime finding when they are absolutely sure that they will obtain one, or that court clerks, in practice, report only affirmative hate crime findings to the Council.

In any case, additional information is needed. On a yearly basis, statistics from both prosecutors and law enforcement officials should be reported. In addition to data that is already submitted, this information should include the number of arrests made by law enforcement, the number of requested findings of a hate crime made by prosecutors, and the number of affirmative findings ultimately entered by courts. Such data would present a clearer picture of the extent that Texas's hate crime laws are being used.

C. Provide Additional Training for Law Enforcement Personnel, as well as Oversight of that Training by State Officials

If officers do not report hate crimes, or do not know how to identify them as they are defined under the statute, then even a well-drafted statute is meaningless. Texas should follow the example of other states in enacting a law enforcement training program that would serve to educate officers about how to better recognize and respond to incidents of hate crime. Improved efforts by officers to effectively respond to hate crime incidents will result in increased community awareness as to the importance and impact of these crimes.

Law enforcement agencies nationwide are beginning to recognize that curtailing hate crime begins with local law enforcement. In 2004, the International Association of Chiefs of Police published an article asserting, "the manner in which officers in the field handle hate crimes depends on the priority and importance that is placed on [hate] crimes by [a] department's leadership."¹⁸⁵ The Association emphasized that policy, procedures,

183. CRIME IN TEXAS 2010, *supra* note 142, at 47.

184. TEX. JUDICIAL COUNCIL, *supra* note 8.

185. Karen L. Bune, *Law Enforcement Must Take Lead on Hate Crimes*, THE POLICE CHIEF, April 2004, available at http://www.policiechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=270&issue_id=42004.

resources, and training must be established to encourage officers to prevent hate crimes and apprehend offenders.¹⁸⁶

The Association also advised local agencies to not be afraid of an increase in reported hate crimes. Such an increase is not a reflection of a spike in criminal activity and does not reflect badly upon the jurisdiction, but rather indicates that officers are better prepared to recognize and respond to crimes, and that victims are developing more confidence in police and are not afraid to report incidents of hate crime.¹⁸⁷

Operating principles such as these need to be taught in Texas. However, oversight over training programs by state officials is also necessary in order to ensure that police forces are receiving the appropriate information, skills, and direction required to facilitate increased awareness and responsiveness to hate crimes.

X. Conclusion

Primarily due to a lack of adequate data, any assessment of whether hate crime statutes nationwide effectively curtail hate crime is problematic at best. This is certainly true in Texas, as a determination of the effectiveness, or even the use, of the state's current hate crimes laws is hampered by insufficient data, inadequate law enforcement training, and underutilization of already-enacted statutes.

In the end, how will a case like the assaults in Williamson County play out? Assuming that local law enforcement even apprehends a perpetrator, there is no guarantee that a prosecutor will take the case as a hate crime. Despite prosecutors' apprehensions, statutory provisions are theoretically at their disposal that would help alleviate their concerns about difficulty, time, and expense. Such provisions also provide prosecutors with needed training. Additionally, if law enforcement training programs were put in place, police would be more likely to apprehend offenders and victims would be more likely to report crimes. If we are to ensure that increasingly few hate crimes will be committed in the future, we must first guarantee that prosecutors and law enforcement officials are properly utilizing the laws that can—and should—be at their disposal.

186. *Id.*

187. *Id.*