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Chapter 1 The Whys and Hows of Hate Crime Laws

On April 28, 2016, Pearl Love was reading a book on a subway in New York City when another passenger, Sarah Eldridge, began yelling homophobic and racial slurs at her. Love is transgender and Taiwanese-American. The verbal attack lasted over 5 minutes. When Love began recording the incident on her phone, Eldridge physically attacked her. Eventually, Love posted the video online to demonstrate what she goes through as a trans person, and the video went viral. Eldridge, who refused to apologize, was charged with two misdemeanors, one of which was a hate crime (Daily Mail, 2016).

In Atlanta, Georgia, in February 2016, two young men asleep in bed together after a long day at work were awaked by a pot full of boiling water poured over them. Marquez Tolbert and Anthony Gooden, Jr., received second and third degree burns on their faces, backs, and limbs; Gooden spent over a month in the hospital, and they both required multiple surgeries. Martin Blackwell, the man who attacked them, was the boyfriend of Gooden's mother and explained to police that he attacked them because they were gay. Georgia does not have a hate crime law, but Blackwell was facing multiple other charges, as well as possible federal hate crime charges (Kaplan, 2016).

In June 2016, David Ragain and Jesse Reed were arrested in St. Louis, Missouri, for throwing eggs at a woman waiting at a bus stop. Ragain and Reed are white, and the victim is black. As they threw the eggs, Ragain and Reed also shouted racial slurs. Police believed they were responsible for a string of similar offenses ("Alleged Egging Spree," 2016).

Also in June 2016, but in Raeford, South Carolina, Russell Langford was arrested on multiple charges, including hate crime. Langford is a major in the U.S. Army Reserves. He allegedly left packages of bacon outside a mosque, made death threats

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against mosque members, and attempted to run some of them over with his SUV. When he was arrested, police found guns and ammunition in his vehicle (“Major in US Army Reserve Arrested,” 2016).

Books and articles about hate crimes often start with the stories of Matthew Shepard, the gay University of Wyoming student who was murdered in 1998, and James Byrd, Jr., the black father of three who was dragged to death behind a pickup truck in Texas that same year. Horrible as those two cases were, they represent only a tiny fraction of the hate crimes that occurred in 1998; the stories of the other victims are rarely heard. Unfortunately, each year at least thousands—and more likely tens of thousands—of Americans have stories to tell like those of the women in New York City and St. Louis, the men in Atlanta, and the people in South Carolina who were merely attending their house of worship.

Hate crimes happen in small towns and large cities. They happen in every state: north, south, east, and west. They involve everything from simple graffiti to brutal murders. They may be called hate crimes, bias crimes, civil rights crimes, or ethnic intimidation. All are crimes committed due to the race, religion, ethnicity, sexual orientation, or other group membership of the victim. The precise groups that are included in the definition of hate crime vary from state to state. Race and religion are always included in the definition, but it may or may not include sexual orientation, gender, national origin, physical or mental disability, age, or political affiliation (Gerstenfeld, 1992).

Although bigotry is probably as old as humanity, the term *hate crime* is a new one, as is the idea of special treatment of these offenses. The first hate crime law was passed in 1980, and three decades later, 45 states, the District of Columbia, and the federal government had all enacted some form of hate crime legislation (Anti-Defamation League [ADL], 2016a). The phrase has entered the popular vernacular, and the media frequently use it. For example, a Google news search for the term *hate crime* during the month of July 2016 produced thousands of hits.

In spite of the rather swift acceptance of the concept of hate crimes (or maybe because of it), the pathway for contending with these offenses has been rough and winding. Relatively little research has been conducted on who commits hate crimes, against whom, and why. Although a variety of legal and other approaches have been implemented for hate crime prevention, virtually no studies have assessed the effectiveness of these approaches. There have also been a number of powerful controversies related to hate crimes—sometimes on constitutional grounds, sometimes on policy grounds, and sometimes on moral grounds. Misconceptions and premature conclusions about hate crimes abound.

This book explores what is known, and what is not known, about hate crimes. It addresses a broad range of issues from a variety of perspectives. As you read, you are asked to assess the existing data and arguments and to develop your own viewpoints. This is not an easy task; even many of those who have studied and thought about hate crimes for years sometimes have difficulty reaching firm conclusions. The one thing that can be said with certainty about hate crimes is that there is very little that can be said with certainty.

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Overview of This Book

What, exactly, are hate crimes, and how are they differentiated from other crimes? How was bigotry treated by criminal laws prior to the recent passage of hate crime laws? What forces led to those laws being enacted? Why, in fact, do so many people believe that special laws are needed for bias-motivated offenses? These are some of the questions addressed in this chapter. This chapter also explores the many forms that hate crime laws take in different jurisdictions and distinguishes hate crime from hate speech.

Hate crime laws are the subject of numerous legal and policy debates. [Chapter 2](#) addresses these debates. Among them are questions about the constitutionality of hate crime legislation, the difficulties in determining an offender's motive, and the issue of which groups to protect with the laws. There are also multiple problems related to the reporting of hate crime and the ways in which law enforcement and prosecutors respond to these offenses.

[Chapters 3](#) and [4](#) look at two aspects of the same question: Who commits hate crimes and why? Contrary to popular belief, most hate crime offenders do not belong to organized extremist groups. [Chapter 3](#) presents the research on who these "ordinary" offenders are and what might lead them to victimize others. Then [Chapter 4](#) delves into the history, beliefs, and activities of white supremacist and other extremist groups.

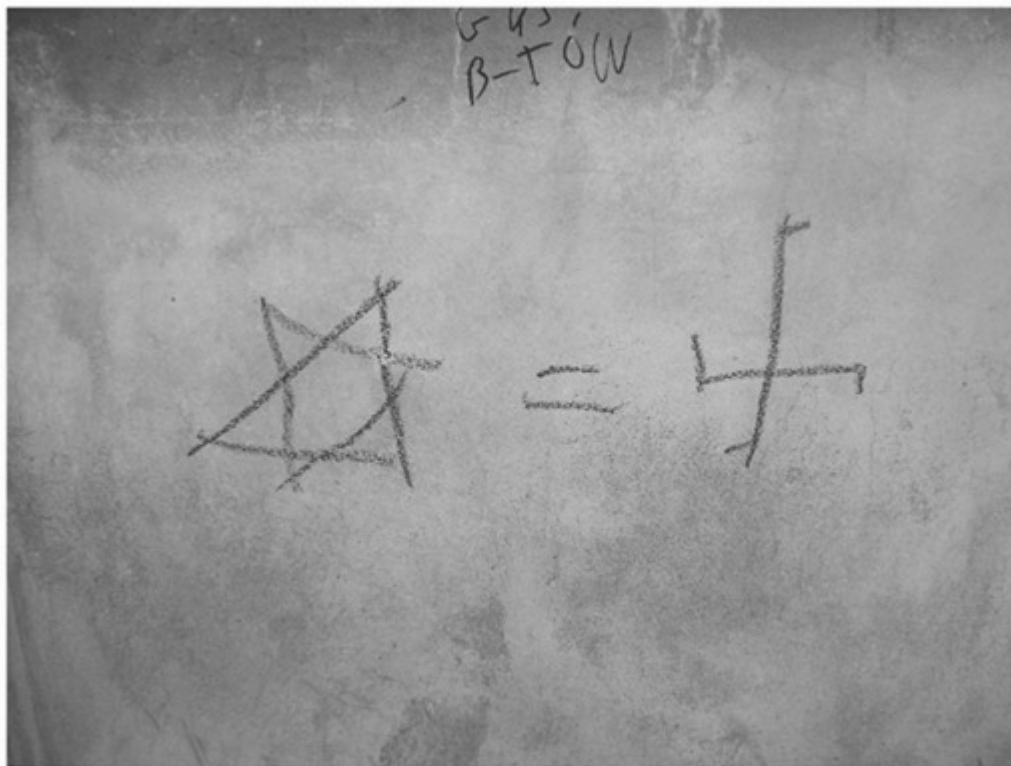
In [Chapter 5](#), the attention shifts from those who commit or encourage hate crimes to those who are victimized by them. I begin by examining the data on hate crime victims. These data have a number of significant limitations that must be kept in mind, so the real picture is incomplete. Among the most commonly targeted groups are blacks, Jews, and LGBT people, and much of the research has focused on these groups. However, this chapter also discusses other frequent victims, such as immigrants and Muslims, as well as the disabled, the homeless, women, and other potential victims.

Aside from hate crime laws, which are discussed in detail in [Chapters 1](#) and [2](#), what other methods are used to prevent hate crimes? [Chapter 6](#) begins with a review of the psychological literature on prejudice reduction. Although this literature is rather extensive and has been developed for several decades, it has, for the most part, not been used to inform or shape hate crime prevention policies. Then the chapter goes on to explore various antihate organizations and initiatives, some of the government-based and some of the privately organized.

Most of this book looks at hate crimes in the United States. However, there is nothing uniquely American about these offenses, as demonstrated by the graffiti in [Photo 1.1](#), which was on a wall in Krakow, Poland, and perhaps something can be learned by examining other countries' problems and solutions. This is the intent of [Chapter 7](#), which investigates the international aspects of hate crimes. I faced two major problems when I wrote [Chapter 7](#). First, how can hate crimes be distinguished from such close cousins as terrorism, genocide, and civil war? I have attempted to deal with this issue; however, of necessity, the discussion occasionally must exceed the (rather arbitrary) boundaries that I set. Second, it turns out that almost all the research on hate crimes abroad has focused on European and English-speaking countries, mostly ignoring the significant problems faced by nations in Asia, Africa, and Latin America. Very recently, a few articles have appeared concerning hate crimes in non-European and non-English-speaking countries, but the picture here remains woefully far from complete.

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Photo 1.1: Anti-Semitic graffiti in Krakow, Poland



Source: Photo courtesy of Phyllis B. Gerstenfeld.

[Chapter 8](#) is the final chapter of this book. Its purpose is to summarize and draw together the themes of the previous chapters. It also takes a bit of a chance and makes predictions and recommendations about the future of hate crimes. Specifically, I highlight a variety of topics that are particularly in need of more research. I also make suggestions for ways to improve data collection, law enforcement approaches, and legislation. The issue of globalized hate is emphasized as well, and ideas for how to better fight hate are discussed.

Goals of This Book

I hope to accomplish several goals with this book. One major goal, of course, is to educate readers about many of the issues and aspects of hate crimes. Not only do I hope to introduce you to new information, but I also want to dispel some of the misinformation that you might have previously gathered.

Second, I want to make you aware of the many controversies surrounding hate crimes. I approach those controversies from a neutral standpoint, and you are encouraged to critically evaluate the relevant research and data. In the end, you may reach your own conclusions or at least identify the subjects about which you need to know more. You may even be encouraged to do research of your own.

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Finally, although prejudice and its effects will never be completely eliminated, they can certainly be reduced. The most fruitful methods of achieving this reduction will likely come not from more punitive approaches but rather through the personal efforts of many individuals. I hope that this book inspires you to look for ways that you can contribute to fighting bigotry and hate crimes.

Punishing Hate Before Hate Crime Laws

When did the first hate crime occur? If we narrowly define the term *hate crime* to include only acts that are formally and legally defined as hate crimes, then the first one likely occurred very soon after the earliest hate crime laws were enacted around 1980. But if we define the term more broadly, to include any violent or invasive act committed because of the victim's group, then the first hate crime probably happened a million years ago, when one *homo erectus* bashed another over the head with his club. As we will see in [Chapter 4](#), bias seems to be an innate human trait.

Throughout recorded history, it is easy to find clear examples of acts that would be labeled hate crimes today. In America, people have frequently been persecuted (and sometimes prosecuted) because they were Native American or African American or Japanese American, or because they were Mormon or Jewish or Muslim, or because they were female or gay or disabled—to name only a few examples (see, e.g., Jacobs & Potter, 1998, pp. 59–63; Newton & Newton, 1991; Petrosino, 1999). In the South between the years 1882 and 1930, at least 2,500 African Americans were lynched. This works out to an average of nearly one lynching per week (Tolnay & Beck, 1995).

What is a hate crime? Although the answer may seem obvious, it is not. To begin with, it is not simply a crime in which the offender hates the victim. In fact, most crimes involving hatred between the parties would not fall under the legal definition of hate crimes. Moreover, for an act to be classified as a hate crime, technically the act does not need to be motivated by hatred at all.

The simplest definition of *hate crime* is this: a criminal act that is motivated, at least in part, by the group affiliation of the victim. As [Chapter 3](#) discusses, only certain types of group affiliations are protected by hate crime laws; typically, these include race, religion, and ethnicity. They may include sexual orientation, gender, disability, and other categories as well.

Although this definition is legally correct, it is important to note that it is not always as precise as we might want. For example, there may often be significant overlap between the definition of hate crimes and those of gang violence, terrorism, political violence, and even war. Was the bombing of the federal building in Oklahoma City a hate crime? The September 11 attacks in America? The Holocaust? What about violence between the Palestinians and the Israelis, between Northern Ireland's Catholics and Protestants, between the Serbs and the Croats, or between the Tutsis and the Hutus? Some of these difficult questions are discussed in more detail in [Chapter 7](#).

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It is also sometimes difficult to distinguish between criminal and noncriminal acts of bias. If a white supremacist prints a magazine urging white people to unite and form a revolution to evict all nonwhites from the country, is this a crime, or the exercise of freedom of speech? This is an important question because, as discussed in this chapter and the next, the First Amendment limits the government's power to restrict freedom of expression.

Finally, it should also be noted that, although most jurisdictions have some sort of law permitting the government to prosecute those who commit hate crimes, some also allow civil suits under these circumstances. In a civil case, it is the aggrieved person rather than the government who brings the wrongdoer to trial, and if the plaintiff wins, the defendant pays damages rather than going to jail. As discussed later in this chapter, civil bias suits have, at times, been a useful tool for compensating certain victims.

Most of the discussion in this book focuses on hate crimes as criminal acts, committed by individuals or small groups (as opposed to governments or large political factions), in which the victim was targeted primarily due to his or her group. These are the kinds of acts that hate crime laws were intended to address.

Prior to the enactment of special hate crime laws, there were several ways in which the legal system dealt with acts motivated by bias. Of course, the perpetrator could always be prosecuted for the underlying crime. After the Civil War, violence against black Southerners became a serious problem (this was the era in which the Ku Klux Klan was born; [Photo 1.2](#) shows a Klan cross lighting ceremony), and many Northerners remained skeptical that local authorities in the South would prosecute whites for attacking blacks. In fact, many feared that the local authorities frequently participated in these attacks themselves. Consequently, Congress passed the Civil Rights Acts in 1871. These laws permit the federal government to prosecute people who have deprived others of their civil rights, either in concert with other perpetrators (18 U.S.C. § 241) or in their capacity as government employees (18 U.S.C. § 242). These two laws, especially Section 242, have been used to punish people in a wide variety of situations, many of which have been unrelated to race or bias (Jacobs & Potter, 1998). A well-known example of the usage of these laws was the prosecution of four Los Angeles police officers for the 1992 attack on Rodney King (Levenson, 1994). A third law (42 U.S.C. § 1983) allows a person to sue a state or local government employee in federal court when that employee interferes with his or her constitutional or civil rights.

Nearly 100 years after passing the Civil Rights Acts, Congress passed additional civil rights legislation. Among the new laws was 18 U.S.C. § 245, which criminalizes interfering with another person's enjoyment of certain activities or benefits when the interference is due to the person's race, color, religion, or national origin. Among the listed protected activities are attending school, being employed, traveling, and eating in restaurants. This statute, which was meant to protect those who were engaged in the civil rights movement, is rarely used (Gilbert & Marchand, 1999; Jacobs & Potter, 1998). See [In Focus 1.1](#) for the language of the current federal Civil Rights Acts that are most relevant to hate crimes.

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Photo 1.2: Ku Klux Klan members at a cross lighting ceremony



Source: Library of Congress Prints & Photographs Division.

18 United States Code § 241

If two or more persons conspire to injure, oppress, threaten, or intimidate any person in any State, Territory, Commonwealth, Possession, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

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If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—

They shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill, they shall be fined under this title or imprisoned for any term of years or for life, or both, or may be sentenced to death.

18 United States Code § 242

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than a year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill, they shall be fined under this title or imprisoned for any term of years or for life, or both, or may be sentenced to death.

18 United States Code § 245

...

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

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

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

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f. enjoying the goods, services, facilities, privileges, advantages, or accommodations of any inn, hotel, motel, or other establishment which provides lodging to transient guests, or of any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility which serves the public and which is principally engaged in selling food or beverages for consumption on the premises, or of any gasoline station, or of any motion picture house, theater, concert hall, sports arena, stadium, or any other place of exhibition or entertainment which serves the public. . . .

42 United States Code § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

By the 1970s, then, a number of legal avenues existed for prosecuting certain people who committed crimes because of their victims' groups. However, the federal statutes suffer from several important limitations. They are *federal* laws, and federal jurisdiction is limited, both legally and practically. From a legal standpoint, according to the Constitution, the federal government may criminalize primarily those acts that affect interstate commerce. In the 1960s, the United States Supreme Court interpreted the phrase "interstate commerce" very broadly. For example, in *Heart of Atlanta v. United States* (1964) and *Katzbach v. McClung* (1964), in which the Supreme Court upheld the Civil Rights Act of 1964, the Court found that the activities of restaurants and hotels could be federally regulated, even if most of the clientele were local residents. In 1985, the Court held that arson of an apartment building affected interstate commerce as well (*United States v. Russell*, 1985).

However, in more recent years, the Court has taken a much narrower view of the Commerce Clause. In 1995, in *United States v. Lopez*, the Court struck down the Gun-Free School Zones Act, which made it a federal crime to possess a gun within a school zone. According to the Court, there was not a sufficient nexus between gun ownership and interstate commerce (Dral & Phillips, 2001).

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Of particular relevance to hate crimes is *United States v. Morrison* (2000). In this case, the Supreme Court declared unconstitutional a portion of the Violence Against Women Act that allowed rape victims to sue rapists in federal court. Among other things, the Court found that the law exceeded Congress's authority under the Commerce Clause. As the law currently stands, then, the federal government's power to prohibit bias-motivated crime is, at the very least, severely in question (Hasenstab, 2001; Peek, 2001).

The future application of the Commerce Clause is even more doubtful after the Supreme Court's 2012 decision on the Affordable Care Act. While a majority of the Court upheld the Act, five Justices agreed that the law exceeded Congress's powers under the Commerce Clause (but Justice Roberts felt the law was permissible under its authority to tax).

Another legal limitation lies within the language of the Civil Rights Acts themselves. These laws were enacted under specific circumstances and with the purpose of addressing specific problems (e.g., the activities of the Klan during Reconstruction). The language of the laws does not encompass many potential bias-related crimes. Section 241 does not cover crimes committed by individual actors; Sections 242 and 1983 apply only to acts committed by government employees or agents; and Section 245 protects only certain acts on the part of the victims. Furthermore, Section 242 protects only a victim who was selected due to "being an alien, or by reason of his color, or race," and 245 mentions only "race, color, religion or national origin." Therefore, neither law would apply if a crime were committed due to the victim's sexual orientation, disability, age, or gender.

Even if the federal government *could* use the laws in the Civil Rights Acts to punish hate crimes, there is a serious question of whether it *would*. Due to issues concerning the role of federalism, as well as limited resources, the federal government generally plays a minor role in the prosecution of crimes; most criminal prosecutions are conducted by the states. For example, in 2012, the federal government made 172,248 arrests (Bureau of Justice Statistics, 2015). In that same time period, there were 1,228,185 arrests in the state of California alone (Department of Justice, 2013). Not only are federal prosecutions a tiny fraction of all prosecutions in the United States, but they also tend to concentrate on only a few types of offenses. Of the federal arrests in 2012, about 15% were for drug-related offenses, 13% were for probation or parole violations, and about 50% were related to immigration matters (Bureau of Justice Statistics, 2015).

If the federal government does not have the power, the resources, or the inclination to address most bias-motivated crime, then it is up to the states. Without specific hate crime laws, there are two potential ways in which these offenders can be prosecuted. The first route, which is by far the more limited, is to prosecute them via laws prohibiting very specific activities. For example, several states have laws against wearing masks in public places (see [In Focus 1.2](#)). Many of these laws were enacted in direct response to a resurgence of Ku Klux Klan violence in the 1920s (Allen, 1991). Other examples include laws against desecrating cemeteries or places of worship. In addition, in some states bias motivation is considered a

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special circumstance in capital cases, which makes the defendant eligible for the death penalty (Gerstenfeld, 1992). Of course, the problem with these laws is that they encompass only a small percentage of bias-motivated crimes. Of the 6,418 hate crimes reported to the Federal Bureau of Investigation (FBI) in 2014, only 195 (3.6%) occurred at houses of worship and only 4 were homicides (Department of Justice, 2015a).

The second, more general way to deal with people who commit bias-motivated crimes is simply to prosecute them for the underlying crime. If they burn a cross in someone's yard, prosecute them for trespassing or arson; if they deface a synagogue, prosecute for vandalism; if they attack someone they think is gay, prosecute for assault and battery. The advantage of this plan is its simplicity: No special laws need to be created, police and prosecutors need no special training, and nobody needs to question the laws' constitutionality. Beginning in the late 1970s, however, some people and advocacy groups began to argue that this was not sufficient and that special hate crime laws should be passed.

In Focus 1.2 Specialized State Laws

Official Georgia Code Annotated § 16–11–38

- a. A person is guilty of a misdemeanor when he wears a mask, hood, or device by which any portion of the face is so hidden, concealed, or covered as to conceal the identity of the wearer and is upon any public way or public property or upon the private property of another without the written permission of the owner or occupier of the property to do so.
- b. This Code shall not apply to:
 - 1. A person wearing a traditional holiday costume on the occasion of the holiday;
 - 2. A person lawfully engaged in trade and employment or in a sporting activity where a mask is worn for the purpose of ensuring the physical safety of the wearer, or because of the nature of the occupation, trade, or profession, or sporting activity;
 - 3. A person using a mask in a theatrical production including use in Mardi Gras celebrations and masquerade balls; or
 - 4. A person wearing a gas mask prescribed in emergency management drills and exercises or emergencies.

Title 13 Vermont Statutes Annotated § 1456

Any person who intentionally and maliciously sets fire to, or burns, causes to be burned, or aids or procures the burning of a cross or a religious symbol, with the intention of terrorizing or

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harassing a particular person or persons, shall be subject to a term of imprisonment of not more than two years or a fine of not more than \$5,000.00, or both.

Wisconsin Statutes § 943.012

Whoever intentionally causes damage to, intentionally marks, draws or writes with ink or another substance on or intentionally etches into any physical property of another, without the person's consent and with knowledge of the character of the property, is guilty of a class I felony if the property consists of one or more of the following:

1. Any church, synagogue or other building, structure or place primarily used for religious worship or another religious purpose.
2. Any cemetery, mortuary or other facility used for burial or memorializing the dead.
3. Any school, educational facility or community center publicly identified as associated with a group of persons of a particular race, religion, color, disability, sexual orientation, national origin or ancestry or by an institution of any such group.
4. Any personal property contained in any property under subs. (1) to (3) if the personal property has particular significance or value to any group of persons of a particular race, religion, color, disability, sexual orientation, national origin or ancestry and the actor knows the personal property has particular significance or value to that group.

California Penal Code § 190.2

(a) The penalty for a defendant who is found guilty of murder in the first degree is death or imprisonment in the state prison for life without the possibility of parole if one or more of the following special circumstances has been found under Section 190.4 to be true:

...

(16) The victim was intentionally killed because of his or her race, color, religion, nationality, or country of origin.

...

Arguments for Having Hate Crime Laws

A variety of arguments have been made about why bias-motivated acts merit their own special laws.^{[1](#)} Broadly speaking, these arguments fall into three (interrelated) categories: retribution, deterrence, and symbolic effects.

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Retribution: Hate Crimes Are Different From Ordinary Crimes

This category of arguments asserts that hate crime laws should be enacted because this type of offender deserves to be punished more than “ordinary” offenders. According to this argument, when it comes to crime, hate is different in several ways.

Victims May Suffer More Psychological Trauma

To begin with, many people have argued that hate crime victims suffer more, psychologically and emotionally, than victims of similar crimes that are not bias motivated (see, e.g., Gellman, 1991; Lawrence, 1999; Levin, 1999; Weisburd & Levin, 1994). In *Wisconsin v. Mitchell* (1993), this claim was a central focus of many of the briefs that were submitted in support of Wisconsin’s hate crimes law (see [In Focus 1.3](#)) and was accepted by Chief Justice Rehnquist in the opinion he wrote for the unanimous Court.

In Focus 1.3 Arguments in *Wisconsin v. Mitchell* (1993)

In 1993, the United States Supreme Court considered whether Wisconsin’s hate crime statute violated the Constitution. Several individuals and organizations submitted amicus curiae (friend of the court) briefs either supporting or opposing the law. Most of the briefs in support of the law contained assertions that hate crimes are more harmful to victims than other crimes. Here are some examples:

The sort of bias attack that took place in this case is more than an assault on the victim’s physical well-being. It is an assault on the victim’s essential human worth. A person who has been singled out for victimization based on some group characteristic—such as race, religion, or national origin—has, by that very act, been deprived of the right to participate in the life of the community on an equal footing for reasons that have nothing to do with what the victim did but everything to do with who the victim is. In short, a bias attack is as much an attack on the victim’s persona as on the victim’s person. Recognition of that fact inevitably produces a sense of vulnerability, isolation and oppression that rarely disappears when the physical injuries heal.

—Brief amicus curiae of the American Civil Liberties Union in support of petitioner

It is by now widely recognized that ordinary crimes become far more harmful and pervasive when they are undertaken as hate crimes by intentionally targeting the victim based on specified characteristics.

—Brief for members of Congress, Charles E. Schumer et al.

Bias related crimes inflict on the victim an injury wholly different in kind from the physical or financial harm caused by ordinary criminal conduct. Such crimes are an attack on the right of the victim to participate equally, if at all, in American society, and can inflict serious and long lasting injury to the dignity of the victim. Such attacks are likely to induce in the victims a sense of separation from and rejection by the larger community “that may affect their hearts and minds in a way unlikely ever to be undone.” *Brown v. Board of Education*, 347 U.S. 483, 494 (1954)

—Brief amicus curiae in support of petitioner of the Crown Heights Coalition, The NAACP Legal Defense and Educational Fund, Inc., and the American Jewish Committee

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How severe is the psychological trauma of being a hate crime victim? Consider these claims by Delgado (1993), who was writing only of verbal (rather than physical) abuse based on race:

The psychological responses to such stigmatization consist of feelings of humiliation, isolation, and self-hatred. . . . Racial tags deny minority individuals the possibility of neutral behavior in cross-cultural contacts, thereby impairing the victims' capacity to form close interracial relationships. Moreover, the psychological responses of self-hatred and self-doubt unquestionably affect even the victims' relationships with members of their own group. The psychological effects of racism may also result in mental illness and psychosomatic disease. The affected person may react by seeking escape through alcohol, drugs, or other kinds of antisocial behavior. (p. 91)

If verbal affronts alone can cause such dire consequences, one can only imagine that the effects of attacks on one's property or body would be even greater. Weisburd and Levin (1994, p. 26) report that aside from low self-esteem and depression, victims of hate crimes suffer from "profound sadness; lack of trust in people; withdrawal; excessive fear of personal and family safety; sleep problems; headaches; physical weakness; increased use of alcohol and drugs; excessive anger; and suicidal feelings."

The problem with these assertions is that they are difficult to support empirically. Do victims of hate crimes experience psychological trauma? It seems extremely likely. But the real question is whether they experience *more* trauma than victims of "ordinary" crimes. As Jacobs and Potter (1998) point out, "[i]t should come as no surprise that hate crime victims report psychological and emotional effects. *All victims do*" (p. 83).

Few studies actually assess the emotional state of hate crime victims. Two studies cited fairly frequently were conducted by the National Institute Against Prejudice

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and Violence (NIAPV, 1986, 1989). The NIAPV concluded in both these studies that hate crime victims suffer more than other victims. However, neither study was methodologically strong, and both included only hate crime victims, so the validity of this claim is questionable. In fact, when Barnes and Ephross (1994) examined the 1989 NIAPV data, they concluded that, for the most part, “the predominant emotional responses of hate crime victims appear similar to those of victims of other types of personal crime” (p. 250).

A report by the League for Human Rights of B’nai B’rith Canada (1993) also concluded that hate crime victims suffer increased trauma. Again, however, the methodology was weak and there were no comparison groups.

Owyoung (1999) interviewed four Asian American victims of hate crimes in the San Francisco area. All reported emotional difficulties as a result of their experiences. With a sample size of four (three of whom had experienced hate crimes only indirectly) and no comparison group, it is impossible to draw any firm conclusions from this study.

Willis (2005) interviewed nine male victims of antigay hate crimes. He found that the men suffered from a number of ill effects as a result of their victimization, including reduced psychological well-being and trust. Again, however, the sample size was very small and there was no comparison group.

Only a very few studies have used more rigorous methodology. In a survey of gay and lesbian youths, Hershberger and D’Augelli (1995) found that victimization was moderately correlated with psychological distress. Similarly, Herek and his colleagues conducted surveys of gay, lesbian, and bisexual adults. Those respondents who had been victims of hate crimes were more likely to have higher levels of depression, anxiety, and anger than were respondents who had been victims of other types of crimes (Herek, Cogan, & Gillis, 2002; Herek, Gillis, & Cogan, 1999; Herek, Gillis, Cogan, & Glunt, 1997). McDevitt, Balboni, Garcia, and Gu (2001) sent a mail survey to victims of hate crimes in Boston, as well as a random sample of victims of nonbias assaults. In comparison with the other victims, hate crime victims reported significantly more psychological impact on some measures, including greater fear and decreased feelings of safety. More recently, Dragowski and colleagues (2011) studied 350 LGB youth and concluded that verbal and physical attacks as a result of sexual orientation were major factors—among others—that contributed to the participants’ posttraumatic stress symptoms.

The question of whether hate crimes are more psychologically harmful is complicated by a number of factors, few of which have been studied. Iganski and Lagou (2015) considered whether some types of victims are more likely to be adversely affected than others. These researchers looked at a large crime victimization survey involving residents of England and Wales and concluded that “as a group, victims of racist crime collectively experience greater emotional and psychological harms compared with victims of parallel crimes” (Iganski & Lagou, 2015, p. 1711). However, individual victim reactions vary a great deal: Some experience more negative emotions than do victims of ordinary crime, but some experience fewer. This question clearly requires more study.

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Another unanswered question is whether some types of hate crimes are more harmful than others. Jacobs and Potter (1998) suggest that perhaps victims of violent crime are equally traumatized, regardless of whether they were bias motivated, whereas victims of minor crimes such as graffiti are more traumatized when the crime was bias motivated. This is certainly a plausible, but untested, hypothesis. Anecdotal evidence comes from cases like one in Omaha, Nebraska, in 2015, where a man burned his neighbors' gay pride flag. The victims later issued this statement:

Had the man who burned our gay pride flag burned our Husker flag, we would have still called the police—but we wouldn't have felt as threatened, they said. We wouldn't have wondered "what's next?" What became so clear to us after Saturday night, is that the intent really does make a difference. Seeing him waving that burning symbol of a controversial, and inherent part of our being(s) as a minority, in front of our house as a clear message, made it scary. It made it an attack as opposed to a prank. (Cooper, 2016)

The most we can conclude, it seems, is that under some circumstances, hate crimes *might* be more traumatic than other crimes. We can also conclude that statements like those in [In Focus 1.3](#), although sincere, have limited empirical support.

Victims May Suffer More Physical Trauma

A second reason why hate crime offenders deserve increased punishments, some assert, is that hate crime results in more *physical* trauma to the victims (see, e.g., Levin & McDevitt, 1993; Weisburd & Levin, 1994). The evidence here, however, is even sketchier than the evidence for increased psychological trauma. Levin and McDevitt (1993) conclude that "hate crimes tend to be *excessively brutal*" (p. 11), but they cite as support only an unpublished study by McDevitt (1990). In this study, McDevitt found that, among crimes that were reported to the Boston police, the proportion of attacks against the person was higher among hate crimes than among crimes in general. More recent data concur: From 1997 to 1999, 60% of the hate crimes reported to the FBI were violent crimes (Strom, 2001), whereas in 1999, only about 26% of all crimes were violent (Rennison, 2000).

The problem in drawing conclusions based on law enforcement data is that, as I discuss at length in [Chapter 2](#), hate crimes are severely underreported (Gerstenfeld, 1998). Logically, nonviolent hate crimes are probably reported even less frequently than violent ones (among other reasons, because they are less likely to come to the attention of law enforcement authorities). Thus, the official data give a highly inaccurate picture. Furthermore, even if the data were accurate, they would not allow us to determine whether hate crimes are more violent than ordinary crimes of a similar type. For example, were the 1,120 bias-motivated aggravated assaults reported in 1999 (FBI, 2001) more heinous, on average, than the 1.5 million aggravated assaults reported overall that same year (Rennison, 2000)? There is no way to tell.

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In addition, victims' perception of the violence of an attack may be affected by factors aside from the attack itself. Meyer (2010) interviewed 44 victims of anti-LGBT violence and found that middle-class white victims evaluated the attacks as more severe than did lower-income people of color. Because people of different ethnic backgrounds and socioeconomic statuses probably report crimes at different rates, official data on crime severity may be additionally skewed.

Pezzella and Fetzer (2015) examined data from the NIBRS (National Incident Based Reporting System) to determine whether hate crimes were more physically injurious than other offenses. The NIBRS data may not accurately represent crime in the United States because it includes information only on offenses reported to police, and also because only about one-third of law enforcement agencies participate. However, the NIBRS does offer rich information about the data it collects. When looking at data from 2010, Pezzella and Fetzer (2015) found that victims of hate crime were no more likely than victims of other crimes to suffer physical injuries.

Most of the other support that is given for the argument that hate crimes are more violent is anecdotal. Weisburd and Levin (1994, p. 23), for example, describe several particularly brutal incidents. Although some hate crimes have been undeniably vicious, so have many ordinary crimes. The murders of Matthew Shepard and James Byrd, Jr., horrified many, but it would be easy to find many killings that were equally awful that were not bias motivated.

Hate Crimes May Have a Wider Impact

Many have also argued that hate crime offenders deserve enhanced punishments because hate crimes have a wider impact than do ordinary crimes. Hate crimes, it is asserted, affect not only the victim, but also all members of the victim's group (see, e.g., Dillof, 1997; Iganski, 2001; Lawrence, 1994, 1999; Levin, 1999; Wang, 1997; Weisburd & Levin, 1994). This is a reasonable claim. I am Jewish, and when I have read about a synagogue having been spray-painted with swastikas, it has had an emotional impact on me that ordinary graffiti would not have. On the other hand, as Jacobs and Potter (1998) point out, "[m]any crimes, whatever their motivation, have repercussions beyond the immediate victim and his or her family and friends" (p. 87). Many people become frightened when they hear about violent crimes in their communities; most of us would become more vigilant if we learned of a burglary in our neighborhood.² The ripple effect of hate crimes is far from unique.

Noelle (2002) attempted to assess the impact of the Matthew Shepard murder on gays, lesbians, and bisexuals nationwide. Twenty-nine people were given a survey, and the nine participants who identified themselves as most affected by the crime were interviewed in detail. Noelle concluded that Shepard's murder had, in fact, traumatized these other members of the victim's group. However, given the very small sample size, as well as the fact that the participants were probably not representative of gays, lesbians, and bisexuals in general, the ramifications of this study are unclear.

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Lynch (2008) compared U.S. census data to reported hate crimes in an attempt to determine whether there is a relationship between segregation and hate crime incidence rates. She found that cities with higher levels of reported hate crimes are, in fact, more severely segregated due to race. One explanation for these findings is that blacks are forced by the threat of hate crime to remain in minority neighborhoods, and that therefore hate crimes contribute to segregation in housing. While these findings are intriguing—and troubling—they are not dispositive because a firm causal relationship between the two variables cannot be assumed.

Bell and Perry (2015) conducted focus group interviews of 15 LGBT people in Canada. The researchers found that the people they interviewed expressed several consequences of hate crimes, even if they themselves had not been victimized. Consequences included internalization of society's victim blaming, decreases in feelings of self-worth, and modifications of behavior, including reduced willingness to come out of the closet. On the other hand, some participants also expressed an increased willingness to fight back against hate.

Similarly, when Perry (2009) interviewed nearly 300 Native Americans, she found that fear of violence kept them segregated from the larger population. Due to their own experiences with hate speech and hate violence, as well as the experiences of others, many of them said they were hesitant to leave the boundaries of reservations. However, in some cases threats and violence actually strengthened Native American communities by unifying them.

In another study, Perry and Alvi (2012) collected qualitative data from members of frequently victimized groups in Canada. Respondents reported a number of negative affects related to hate crime victimization within their communities, including fear, anger, and a sense of inferiority. Respondents also said hate crimes within their communities caused them to change their behaviors, such as by making efforts to be less easily identifiable. While these results are intriguing, they must be considered with care due to the very small sample size (27) and the unknown representativeness of the sample.

Hate Crimes May Spark Retaliation and Conflict

Finally, it is argued, hate crimes deserve greater punishment because they tend to spark retaliation and further intergroup conflict (see, e.g., Lawrence, 1994; Taslitz, 1999; Weisburd & Levin, 1994). Several of the amici curiae in *Wisconsin v. Mitchell* (1993) made this argument, and Justice Rehnquist appeared to agree: "According to the State and its amici, bias-motivated crimes are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest" (p. 488).

Once again, although this proposition seems reasonable, it has extremely little empirical support. Weisburd and Levin (1994, p. 26) report that in the month after an infamous race-related murder of a black man in Howard Beach, New York, in 1986, police recorded twice as many hate crimes as the previous month.

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Of course, it is possible that the number of bias-related incidents themselves did not increase, but rather that, due to the well-publicized incident, people were more likely to report them to the police. Or perhaps the police were more sensitive to the issues involved and were therefore more likely to interpret and record a crime as bias motivated.

There have been documented cases of retaliation following bias-motivated crime. Two weeks after Omar Mateen, who was Muslim, killed 49 people in an Orlando gay nightclub and injured 50 more, a Muslim man was beaten outside the mosque Mateen attended. According to various reports, there was a general increase in anti-Muslim hate crime in 2015 following a terrorist attack in Paris and a mass murder in San Bernardino, California, which were both committed by Muslims (Stack, 2016). But these incidents appear scattered or anecdotal, and it is unclear whether they're indicative of a general trend. Certainly there was no obvious retaliation and unrest after the great majority of the 6,418 hate crimes the FBI recorded in 2014 (Department of Justice, 2015a) or the thousands more that likely occurred but went unreported.

Thus far, only one experiment has studied the potential retaliatory responses to a hate crime in a controlled manner, and it does not support the hypothesis that hate crimes spark additional retaliatory violence. Craig (1999) showed African American and white college students videotapes of assaults that either were or were not hate crimes. She also varied the race of the offenders and victims. After viewing one of the videos, each participant filled out a questionnaire that asked, among other things, about the likelihood that the participant would want revenge were he or she in a similar situation to the victim. Craig found that there was no difference in responses to the two events—that is, participants were no more likely to seek revenge for the hate crime than for the ordinary assault.

On the other hand, the effects of hate crimes on communities may be more insidious than simple retaliatory violence. Perhaps, as Weisburd and Levin (1994) suggest, hate crimes attack community cohesion and the social order in general, leading to distrust, fear, and anxiety. These effects would be much harder to measure and, so far, nobody has tried.

Are hate crimes different? Do the people who commit them warrant harsher sentences than other offenders? The arguments seem plausible. Yet despite the degree to which they appear to be accepted by scholars and courts alike, there turns out to be little data to support them. Probably the most that a cautious person could conclude is that when it comes to this issue, the jury is still out.

Deterrence

The arguments we have discussed so far are primarily retributive in nature: Hate crime laws should exist because these offenses deserve worse penalties. Another broad category of arguments in support of the laws, although related, focuses instead on the laws' supposed deterrent effects. Adherents to this point of view claim that hate crimes legislation is a good idea because it will discourage people

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from committing these harmful offenses (see, e.g., Chang, 1994). Although it seems intuitively accurate, this argument suffers from a number of assumptions that are probably faulty.

The first assumption is that potential offenders will be aware of hate crime laws. People cannot possibly be deterred by a law if they do not know it exists! There have been no empirical studies concerning awareness of hate crime laws. Certainly, hate crimes themselves seem to get a fair amount of media attention, and an English-speaking American would probably have to live in a cave to have never at least heard of hate crimes. But does the average person understand how the laws work? Do they realize that in most states bias-motivated crimes are discrete offenses or lead to enhanced sentences? Do they know what constitutes a hate crime? It seems unlikely.

Even supposing that potential offenders are relatively well versed in the intricacies of hate crimes legislation, the deterrence hypothesis further assumes that these offenders believe that there is a reasonable likelihood of being caught and prosecuted. After all, the average driver is well aware of the penalties for speeding and yet speeds anyway—until he or she spots a patrol car. In the year 2014 in the entire state of California, 148 people were prosecuted for hate crimes and 50 were actually convicted of hate crimes. This was despite the fact that there were 979 reported offenses, involving 799 known offenders (California Department of Justice, 2015). There were undoubtedly many more unreported offenses. Thus, a person who committed a hate crime in California that year had less than a 1 in 10 chance of being convicted. If we assume, therefore, that potential offenders logically weigh the risks and benefits of their behavior, we might also assume that they would rationally conclude that they are pretty unlikely to get caught.

But even supposing that bigots know about hate crime laws and that they believe there is a reasonable chance that they will be punished for their behavior, the deterrence argument makes a third, even more far-fetched assumption. To conclude that hate crime laws will act as effective deterrents, you must believe that a potential offender is not already deterred by the potential of being punished for the underlying crime, but would be by the addition of a punishment for a hate crime. As we discuss in greater detail later in this chapter, hate crime laws come into play only when people commit some other violation of the criminal code (and when the offense is motivated, at least in part, by the victim's group). Therefore, hate crimes involve only acts that are already punishable. For example, in Wisconsin, a person considering causing another severe bodily injury (aggravated battery) is faced with the potential of up to 10 years in prison and a \$50,000 fine (Wisconsin Statutes §§ 940.19, 939.50). If the crime is motivated by the victim's group, the sentence can be increased by as much as 5 years and the fine can be up to \$5,000 more (Wisconsin Statutes § 939.645). Can we reasonably believe that a person would *not* be deterred by 10 years and \$40,000, but *would* be deterred by 15 years and \$45,000? That seems unlikely. The chance of hate crime laws deterring would-be offenders seems even less in murder cases (see [In Focus 1.4](#)).

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In Focus 1.4 Hate Crimes in Capital Cases

Even as Matthew Shepard lay dying in a Colorado hospital, there was much public outcry over the fact that Wyoming remained one of the very few states without a hate crime law. Some people urged Wyoming to pass such legislation, whereas others pushed for more federal hate crime laws or argued for tougher hate crime laws in general (see, e.g., Crowder, 1998; Green, 1998; McCullen, 1998; Miniclier, 1998; "Tough Hate-Crime Laws," 1998). Even had such legislation existed, it is extremely implausible that it would have deterred Aaron McKinney and Russell Henderson; even without a hate crime law, both offenders faced first-degree murder charges and the possibility of a death sentence.

Ultimately, Russell Henderson pled guilty to first-degree felony murder and kidnapping and was given two life sentences (Lane, 1999). Aaron McKinney was convicted of several offenses, including felony murder. After Matthew Shepard's parents interceded to save his life, McKinney agreed to a deal in which he was given two consecutive life terms with no opportunity to appeal (Cart, 1999).

Similarly, after James Byrd, Jr., was murdered, there were calls to stiffen Texas's hate crime law. Then-Governor George W. Bush refused on the basis that all crimes are hate crimes, but the James Byrd, Jr., Hate Crimes Act was eventually signed by Bush's successor, Governor Rick Perry. Among other provisions, the new law specified which groups are protected, mandated hate crime training for police officers, and provided for civil causes of actions for hate crime victims ("Governor of Texas," 2001). Of course, the law itself would have had little effect on Byrd's killers (who, obviously, were not deterred by the already-existing law against murder): Two of them were sentenced to death, and the third was given a life sentence. One of the defendants, Lawrence Brewer, was executed in 2011, while John King's death sentence remained on death row as of July 2016 (Associated Press, September 22, 2011).

A final assumption of deterrence theory is that, in the minds of would-be offenders, the risks of engaging in a hate crime outweigh the potential benefits. And yet the benefits may be substantial. By acting on their biases, people may receive acceptance and admiration from their peers, boost their own self-esteem, and experience excitement and a release of pent-up frustrations. All these are powerful rewards that probably would not be outbalanced by the relatively small risks associated with being arrested.

In any case, it is unlikely that many potential hate crime offenders engage in the rational weighing of risks and benefits that deterrence theory assumes. As Urich (1999) points out (and as we discuss in [Chapter 3](#)), hatred is a strong and well-ingrained part of human psychology. It is also a powerful emotion that is frequently supported by various elements within our society. Deterring people who are bent on committing hate crimes will take much more than a simple law or two.

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Very little research has carefully considered the possible deterrent effects of hate crime laws. Parfaite-Claude (2011) compared the rates of reported hate crimes to the presence or absence of a hate crime law that includes crimes based on sexual orientation (as well as several other variables). She found that states that had such legislation did not have decreased rates of antigay crimes. In fact, these states had significantly *higher* rates of reported antigay crimes. Similarly, Stotzer (2010) found that in states with hate crime laws that included crimes based on sexual orientation, reported rates of antigay crimes on college campuses were higher than in states without such laws. Of course, the limitations of official hate crime data—which we discuss in the [next chapter](#)—limit the strength of conclusions that can be drawn. But there is certainly no evidence in these studies of a deterrent effect of hate crime laws.

Symbolic Effects

Even if hate crime laws are not justified by retribution or deterrence arguments, a strong third claim has been made that the laws serve a symbolic or denunciatory purpose. Many scholars have written about the symbolic value of laws in general. Melton and Saks (1986), for example, state that the law does not simply act as “a carrot or a stick” (p. 235). In addition, it “teaches the moral and social norms of the community and, in a sense, announces, reiterates, and indeed ritualizes the myths and themes of the culture” (p. 251). Similarly, the denunciatory theory holds that punishing a crime “declares, in effect, that in the society in question the offense is not tolerated” (Walker, 1980, p. 28). Furthermore, punishment may repair the tears in the social fabric that were created by the offender.

Many commentators have noted the potential symbolic effects of hate crimes legislation (see, e.g., Beale, 2000; Gerstenfeld, 1992; Jolly-Ryan, 1999; Lawrence, 2000b). Hate crime laws might send a message, as follows:

First, [hate crimes legislation] expresses strong social condemnation of bias crimes. Second, the condemnation of hate crimes implies a general affirmation of the societal value of the groups targeted by hate crimes and a recognition of their rightful place in society. Hate crimes legislation is seen as reinforcing the community’s commitment to equality among all citizens. (Beale, 2000, p. 1254; footnotes omitted)

Of course, the crimes themselves may be symbolic as well. The messages of a swastika or a burning cross are clear: “You’re not wanted here. You’re not valuable human beings. We are powerful, and you should fear us. Do not assert yourself or you will be harmed.” The hate crimes law provides a countermessage to this.

Of all the arguments made in support of hate crimes legislation, the symbolic argument is perhaps the most frequently given. It has been made by legislators, scholars, journalists, advocacy groups, and members of the general public (see [In Focus 1.5](#)).



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In Focus 1.5 Selected Quotes in Support of Hate Crime Laws

Hate crime legislation sends a clear message that racism and bigotry will not be tolerated in our community.

—Friebert (1999)

Denver District Attorney Bill Ritter testified in favor of the [hate crime] measure, urging committee members to support the bill in order to “send a message” that assaults against homosexuals would be punished as severely as attacks motivated by racial hatred.

—Luzadder (1999)

There was a time in this country when the messages, from the halls of Congress to the Supreme Court, were clear. Although the Declaration of Independence proclaimed that “all men are created equal,” blacks were not included in the Declaration. Blacks did not have the same rights as whites. This country has done some growing up since then. But it still sends out messages about gays and lesbians that their rights are somehow not as great as those of the rest of us. That’s why hate-crime laws are necessary. They send a clear message that the rights of everyone are guaranteed in this country, not just those who happen to be in the majority.

—Freeman (1998)

[Hate crime laws] help to create a climate of tolerance and respect for differences which, when combined with education, diminishes the likelihood of violent hate crimes being committed—or accepted.

—Rosenthal (1998)

“This [hate crime bill] allows a judge to say . . . that Parliament and Canadian society do not approve of this kind of a thing.”

—Warran Allmand, chairman of the Canadian Parliament’s justice committee; quoted in Peritz (1994)

“The jury told us afterward they wanted to send a message and they certainly did.”

—Frederick Sperling, attorney for the plaintiff in a federal hate crimes lawsuit in which a black woman was awarded \$1.75 million for an attack by three white supremacists; quoted in Rossi (1992)

“My constituents often feel like the possibility of a hate crime is sort of swept under the rug because we don’t want to talk about it. We have to send a message.”

—Oklahoma State Representative Jabar Shumate, quoted in Juozapavicius & Murphy (2012)

Sources: Selected quotes from “Hate Crime Bill Passes Hurdle,” by Dan Luzadder, published in the *Rocky Mountain News*, Jan. 15, 1999, p. 7A. Reprinted with permission of the *Rocky Mountain News*.; From “Hate Crime Laws Are Necessary to Send Clear Message,” Nov. 3, 1998 by Gregory Freeman. Reprinted with permission of the *St. Louis Post-Dispatch*.

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Do hate crime laws have the impact that these arguments assume? Perhaps, especially if prosecutions are fairly frequent and well publicized. And it is possible that such laws will be instrumental in effecting a long-term reduction in prejudice. However, such results are difficult to quantify empirically. The one study that has attempted to do so concluded that either Great Britain's hate crimes law fails to send a message that bias-motivated violence is reprehensible, or else the message is drowned out by the government's contradictory policies (Dixon & Gadd, 2006). Furthermore, as some commentators have cautioned (Beale, 2000; Gerstenfeld, 1992), there is the danger that hate crime laws will lure the public into complacency, resulting in little demand for other ways of addressing bias that might have more tangible effects.

If hate crime laws do have symbolic effects, there are corollaries that should not be overlooked. If prosecuting hate crimes sends a message that such behavior is unacceptable, then *failing* to prosecute might convey the idea that the society approves of the behavior. As we discuss in [Chapter 2](#), there might also be symbolic effects if the laws protect some groups but not others.

Of the pillars that support hate crimes legislation—retribution, deterrence, and symbolic effect—the latter is probably the strongest. By the 1980s, advocacy groups and some legislators frequently mentioned all three as support for their arguments that existing federal and state laws were not sufficient and that special hate crimes legislation should be enacted.

The Birth of Hate Crimes

In 1977, a neo-Nazi group called the National Socialist Party of America (NSPA) wished to hold a demonstration in front of the village hall in Skokie, Illinois. Skokie had a large Jewish population, many of whom were Holocaust survivors. The village first obtained an injunction against the event and then passed a series of ordinances

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that would have prohibited the NSPA from obtaining the necessary permits. The NSPA sued (with the assistance of the American Civil Liberties Union) and eventually won the right to demonstrate (Downs, 1985). Although the NSPA ultimately never did march in Skokie, the controversy received national attention, even to the extent of being satirized in the movie *The Blues Brothers* (Landis, 1980).³

One organization that paid special attention was the Anti-Defamation League of B'nai B'rith (ADL), a group that combats anti-Semitism and other forms of bigotry. Beginning in 1978, the ADL started tracking anti-Semitic incidents across the United States. Between 1978 and 1981, the number of reported incidents increased from 49 to 974 (Gellman, 1991; Greenberg, 1993). Alarmed by what it interpreted as a disturbing trend and frustrated with existing federal and state laws, the ADL drafted a model ethnic intimidation statute in 1981. Together with allies such as the National Gay and Lesbian Task Force, the National Institute for Prejudice and Violence, and the Southern Poverty Law Center, the ADL began lobbying states to pass the statute (see [In Focus 1.6](#); for more on the hate crimes law movement, see Jenness & Grattet, 1996).

When it was passed, the model statute contained four provisions. The first of these (which is not reproduced in [In Focus 1.6](#)), Institutional Vandalism, was aimed primarily at people who targeted cemeteries, community centers, and places of worship. It was not a new idea, as some states already had similar laws on the books, but the ADL and its allies clearly wanted more states to follow suit.

In Focus 1.6 The Anti-Defamation League's Model Ethnic Intimidation Statute

2. Intimidation

- A. A person commits the crime of intimidation if, by reason of the actual or perceived race, color, religion, national origin, or sexual orientation of another individual or group of individuals, he violates Section _____ of the Penal code (insert code provisions for criminal trespass, criminal mischief, harassment, menacing, intimidation, assault, battery and/or other appropriate statutorily proscribed criminal conduct).
- B. Intimidation under this code provision is a _____ misdemeanor/felony (the degree of criminal liability should be at least one degree more serious than that imposed for commission of the underlying offense).

Note: The ADL model statute also contains provisions concerning institutional vandalism, civil actions, and police reporting and training. This is the original language of the statute, which has since been revised; the current language is available at www.adl.org/99hatecrime/text_legis.html.

Source: Anti-Defamation League.

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The second provision was more revolutionary. Although it was likely inspired by existing civil rights laws, it was quite different in scope. Under this provision, a person would be found guilty of an “intimidation” if he or she violated some existing criminal law and if he or she committed the crime because of the victim’s group (or perceived group). Although only certain types of groups were protected —race, color, religion, national origin, and sexual orientation— this was a significant expansion on civil rights laws. The model statute also specified that it would act as a penalty enhancer, essentially bumping up the seriousness of the underlying crime by one degree. Thus, someone who committed what ordinarily would have been a Class C Felony, for example, could now be sentenced for a Class B Felony.

The ADL later modified this section of the model statute slightly. It renamed it “Bias-Motivated Crimes,” and it also added gender to the list of protected groups (ADL, 1994). The substance, however, remained the same.

The third provision of the model statute creates a civil cause of action so that victims of institutional vandalism and bias crimes may sue their attackers. Antihate groups have found civil actions to be a particularly useful strategy. See [In Focus 1.7](#) for some examples of successful lawsuits against hate groups and their leaders.

Finally, the model statute provides for collection of law enforcement data on bias crimes and for specialized training of police officers.

In Focus 1.7 Suing Hatemongers

- 1981, Mobile, Alabama: Two members of the United Klans of America abducted and killed Michael Donald as he walked to the store. Donald was African American. Donald’s mother sued the United Klans and, in 1987, won a judgment of \$7 million. The group was forced to turn over its headquarters to Donald’s mother.
- 1987, Forsyth County, Georgia: An interracial group attempted to march in honor of Dr. Martin Luther King, Jr. They were prevented by rock- and bottle-throwing members of the Klan. The Southern Poverty Law Center sued two Klan groups and 11 Klan members, receiving a \$1 million verdict.
- 1988, Portland, Oregon: Members of a skinhead gang beat to death Mulugeta Seraw, a student from Ethiopia. The skinheads had been organized and trained by a recruiter from the White Aryan Resistance (WAR). Seraw’s family sued Tom Metzger, the founder and head of WAR; Metzger’s son; and two of the skinheads who killed Seraw. In 1990, the family won a final judgment of \$12.5 million.
- 1995, Clarendon County, South Carolina: Members of the Christian Knights of the Ku Klux Klan burned the Macedonia Baptist Church, which had a mostly African American membership. In 1998, the church sued the Klan group and won \$37.5 million.
- 2000, Hayden Lake, Idaho: A Native American woman and her son were assaulted by security guards on the premises of property belonging to the Aryan Nations. They sued the Aryan Nations and won \$6.3 million in damages. The Aryan Nations was forced to auction the property to pay the judgment. The woman bought the property at the auction and sold it to a man who planned to raze the buildings and build a retreat center.

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- 2003, Cass County, Texas: Mentally disabled African American Billy Ray Johnson was knocked unconscious at a party and then dumped by the side of the road. He received permanent brain injuries. Johnson's family received a \$9 million judgment against several men who participated in the attack.
- 2006, Meade County, Kentucky: Klansmen attended a county fair to hand out recruiting materials. They harassed and then severely beat and kicked a 16-year-old boy of Panamanian descent. The victim obtained judgments totaling approximately \$3 million against his assailants.
- 2011, Jackson, Mississippi: A group of white teenagers accosted an African American man, James Craig Anderson, in a hotel parking lot. They beat him and then ran him over with a pickup truck, killing him. The victim's family filed a wrongful death lawsuit against the teenagers. Ironically, however, the victim's long-term partner could not be a party to the suit because Mississippi didn't recognize the rights of same-sex partners. A judgment of \$840 million was handed down against the offenders.

Hate Crime Laws Today

State

The ADL's efforts to persuade states to pass hate crimes legislation were successful. Very soon after the ADL drafted the model statute in 1981, a few states, such as Oregon and Washington, passed similar laws. Other states quickly followed suit. By 1994, 34 states and the District of Columbia had some kind of penalty-enhancement-type law (ADL, 1994), and by 2016, only 5 states did not have some kind of penalty enhancing law (ADL, 2016a).⁴

Although many of the states used the ADL model as a guide, they frequently made substantial changes when they first passed their laws, as well as in subsequent amendments. Other states created their statutes from scratch rather than using the model. As a result, existing hate crimes legislation today is quite diverse. Some laws act as pure penalty enhancers, increasing the sentence for crimes motivated by bias. The increase can be substantial: In some situations, the maximum sentence may be doubled, tripled, or increased by even more. These laws can also result in misdemeanors being reclassified as felonies, which can have serious legal implications for the offender. Other states created a separate substantive offense, for which the offender may be convicted in addition to receiving a conviction for the underlying crime. In any of these cases, the practical effect is that the defendant faces more severe penalties than he or she would for an ordinary crime.

There are other differences between the states as well. Some permit any underlying crime to qualify as a hate crime, whereas some limit their definition to

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certain specific offenses, such as harassment, assault, and vandalism (see Jacobs & Potter, 1998, p. 31). Some include language that the victim must have been chosen “because of” or “by reason” of his or her group, whereas others simply require that the crime “evidence” or “demonstrate” prejudice or that prejudice be “manifest.” The states also differ substantially about which groups are enumerated in the statute. All statutes include at least race, religion, and ethnicity (or national origin), but only 31 include sexual orientation, 31 include gender, 32 include mental or physical disability, 17 include transgender or gender identity, 16 include age, and 6 include political affiliation. See [In Focus 1.8](#) for a sampling of state statutes.

Finally, in addition to the penalty-enhancement-type laws, some states also have additional, related laws. Most (43 states) have laws prohibiting institutional vandalism. More than half (28 states) have statutes regarding collection of hate crime data. A few (14 states) have laws relating to specialized training for law enforcement personnel. And many (32 states) also authorize civil actions. A handful of states—California, Connecticut, Illinois, Louisiana, Massachusetts, Minnesota, New Jersey, Oregon, Rhode Island, and Washington—have all five types of laws. Only one state—Wyoming—has no hate crime provisions at all.

In Focus 1.8 A Sampling of State Hate Crime Laws

Code of Alabama § 13A-5-13

Hate crimes

...

(c) A person who has been found guilty of a crime, the commission of which was shown beyond a reasonable doubt to have been motivated by the victim's actual or perceived race, color, religion, national origin, ethnicity, or physical or mental disability shall be punished as follows:

1. Felonies:

- a. On conviction of a Class A felony that was found to have been motivated by the victim's actual or perceived race, color, religion, national origin, ethnicity, or physical or mental disability, the sentence shall not be less than 15 years.
- b. On conviction of a Class B felony that was found to have been motivated by the victim's actual or perceived race, color, religion, national origin, ethnicity, or physical or mental disability, the sentence shall not be less than 10 years.

...

2. Misdemeanors:

On conviction of misdemeanor that was found beyond a reasonable doubt to have been motivated by the victim's actual or perceived race, color, religion, national origin, ethnicity, or physical or mental disability, the defendant shall be sentenced for a Class A misdemeanor, except that the defendant shall be sentenced to a minimum of three months.

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California Penal Code § 422.6

- a. No person, whether or not acting under color of law, shall by force or threat of force, willfully injure, intimidate, interfere with, oppress, or threaten any other person in the free exercise or enjoyment of any right or privilege secured to him or her by the Constitution or laws of this state or by the Constitution or laws of the United States in whole or in part because of one or more of the actual or perceived characteristics of the victim listed in subdivision (a) of Section 422.55.
- b. No person, whether or not acting under color of law, shall knowingly deface, damage, or destroy the real or personal property of any other person for the purpose of intimidating or interfering with the free exercise or enjoyment of any right or privilege secured to the other person by the Constitution or laws of this state or by the Constitution or laws of the United States, in whole or in part because of one or more of the actual or perceived characteristics of the victim listed in subdivision (a) of Section 422.55.
- c. Any person convicted of violating subdivision (a) or (b) shall be punished by imprisonment in a county jail not to exceed one year, or by a fine not to exceed five thousand dollars (\$5,000), or by both the above imprisonment and fine, and the court shall order the defendant to perform a minimum of community service, not to exceed 400 hours, to be performed over a period not to exceed 350 days, during a time other than his or her hours of employment or school attendance. However, no person may be convicted of violating subdivision (a) based upon speech alone, except upon a showing that the speech itself threatened violence against a specific person or group of persons and that the defendant had the apparent ability to carry out the threat.

Florida Statutes § 775.085

Evidencing prejudice while committing offense; reclassification

(1)(a) 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, ethnicity, religion, sexual orientation, national origin, homeless status, mental or physical disability, or advanced age of the victim.

...

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Michigan Compiled Laws § 750.147b

Ethnic intimidation

1. A person is guilty of ethnic intimidation if that person maliciously, and with specific intent to intimidate or harass another person because of that person's race, color, religion, gender, or national origin, does any of the following:
 - a. Causes physical contact with another person.
 - b. Damages, destroys, or defaces any real or personal property of another person.
 - c. Threatens, by word or act, to do an act described in subdivision (a) or (b), if there is reasonable cause to believe that an act described in subdivision (a) or (b) will occur.
2. Ethnic intimidation is a felony punishable by imprisonment for not more than 2 years, or by a fine of not more than \$5,000.00, or both.
3. Regardless of the existence or outcome of any criminal prosecution, a person who suffers injury to his or her person or damage to his or her property as a result of ethnic intimidation may bring a civil cause of action against the person who commits the offense to secure an injunction, actual damages, including damages for emotional distress, or other appropriate relief. A plaintiff who prevails in a civil action brought pursuant to this section may recover both of the following:
 - a. Damages in the amount of 3 times the actual damages described in this subsection or \$2,000.00, whichever is greater.
 - b. Reasonable attorney fees and costs.

Texas Code of Criminal Procedure Article 42.014

Finding That Offense Was Committed Because of Bias or Prejudice

- a. In the trial of an offense under Title 5, Penal Code, or Section 28.02, 28.03, or 28.08, Penal Code, the judge shall make an affirmative finding of fact and enter the affirmative finding in the judgment of the case if at the guilt or innocence phase of the trial, the judge or the jury, whichever is the trier of fact, determines beyond a reasonable doubt that the defendant intentionally selected the person against whom the offense was committed or intentionally selected property damaged or affected as a result of the offense because of the defendant's bias or prejudice against a group identified by race, color, disability, religion, national origin or ancestry, age, gender, or sexual preference.
- b. The sentencing judge may, as a condition of punishment, require attendance in an educational program to further tolerance and acceptance of others.
- c. In this article, "sexual preference" has the following meaning only: a preference for heterosexuality, homosexuality, or bisexuality.

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Federal

Having experienced success in their lobbying efforts with the states, the ADL and its allies turned to the federal government. The gains there, although still substantial, were slower and more qualified.

The first federal law relating specifically to hate crimes was enacted in 1990. Called the Hate Crimes Statistics Act (HCSA), it required the United States Department of Justice to collect data on hate crimes from local law enforcement agencies and to publish the results. The law itself was very strongly supported in Congress. Only four senators voted against it, all on the basis that it included sexual orientation within its enumerated categories. Although the HCSA was originally set to expire in 1995, it was later permanently extended. As we see in [Chapter 2](#), there have been problems relating to the collection of hate crime data, as well as the interpretation of the data that are produced.

In 1994, Congress passed the Hate Crimes Sentencing Enhancement Act. This law essentially acted as a federal penalty enhancement statute. It ordered the United States Sentencing Commission to revise sentencing requirements for situations where a person was being tried for a federal crime and where the defendant intentionally selected the victim because of the victim's group. The penalty was to be increased at least three levels. It is important to note that this law is of limited potential scope because, as we have already discussed, federal criminal prosecutions are relatively rare, at least in comparison with state prosecutions. Furthermore, most federal prosecutions are for immigration and drug offenses, which are very unlikely to be motivated by bias. In 1999, this law was used in only 58 cases (Chorba, 2001).

Also in 1994, Congress passed the Violence Against Women Act (VAWA). Among other things, this law provided that victims of gender-based crimes could sue their attackers and receive compensatory and punitive damages. This law could be seen as an extension of existing hate crimes legislation, none of which included gender. However, as already mentioned, the Supreme Court declared a portion of VAWA unconstitutional in 2000 because it exceeded Congress's authority under the Commerce Clause.

Another specialized federal hate crimes law is the Church Arson Prevention Act, passed unanimously in 1997. This law was a reaction to a reported spike in the number of church burnings in the mid-1990s; many of the affected churches had predominantly African American congregations. The law contains a number of provisions, including facilitating federal prosecutions and increasing penalties for damaging places of worship.

Many people argued that a federal hate crimes law was still necessary (see, e.g., Lawrence, 2008). Such legislation bounced around Congress for several years, perpetually mired in politics. It was originally titled the Hate Crimes Prevention Act and proposed in 1998 but was then put aside because Congress became busy with the impeachment hearings of then-President Clinton. In 1999, two competing bills were introduced by Senators Kennedy and Hatch. Both would have extended federal jurisdiction in hate crime cases. The primary difference between them was that Kennedy's bill included crimes based on sexual orientation, whereas Hatch's did not (Peek, 2001).

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Both bills died in committee. Kennedy's bill was revised and reintroduced in 2001 as the Local Law Enforcement Enhancement Act; in early 2002, the bill was once again killed in committee. The bill was reintroduced several times over the next few years, each time failing to make it to law. In 2009, now called the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, the bill was passed by the U.S. House of Representatives. It now included protection not only on the basis of sexual orientation, but also gender and transgender. The Senate passed a version of the bill in July 2009 and amended it to the Defense Authorization Act. However, the Senate version contained death penalty provisions (added by opponents to hate crimes legislation) that many supporters of hate crimes legislation oppose. Because the House and Senate versions did not match, a committee had to determine the final version. The bill was finally signed by President Barack Obama on October 28, 2009. [Photo 1.3](#) depicts President Obama with James Byrd, Jr.'s sisters and Matthew Shepard's mother at a reception following his signing of the law. The law as enacted includes protection for crimes committed due to actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, and disability; it also covers attacks on members of the U.S. armed services. It contains language explicitly protecting freedom of expression, and it does not contain death penalty provisions.

Because the federal hate crime law is new, its limits and constitutionality have not yet been tested. In the 2011 killing of James C. Anderson, discussed in [In Focus 1.7](#), three of the assailants were charged with federal hate crimes and eventually pled guilty. In June 2012, a federal appeals court upheld the conviction of two Pennsylvania men who beat a Mexican immigrant to death. Just 1 day later, two South Carolina men pled guilty to charges stemming from an attack on a 16-year-old African American boy. The attack left him severely injured. And in April 2012, two Kentucky women pled guilty to assisting in the kidnapping and beating of a gay man. Two men stood trial for the same attack and were convicted on multiple counts but found not guilty of a hate crime.

Photo 1.3: President Obama meets with families of hate crime victims James Byrd, Jr. and Matthew Shepard



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However, the very first person convicted under the new federal law, Frankie Maybee, appealed his conviction. Maybee was the driver of a truck that ran a car containing five Latino men off the road. During the appellate arguments in June 2012, prosecutors argued that the 13th Amendment to the U.S. Constitution—the amendment that ended slavery—gives the federal government power to enact a hate crime law. Maybee’s attorney, however, contended that the law goes too far and indicated his willingness to appeal to the U.S. Supreme Court (Bowden, 2012).

While the federal hate crime law has garnered some media attention, its use remains uncommon. In 2014, the FBI made only 43 hate crime arrests across the United States (Department of Justice, 2015b).

Narrative Portrait

This piece was written by Marcy Katz, a professor at Palm Beach State College.

The first time I met him—soft spoken, well-groomed, and polite—I believed we’d be friends. As my roommate Denise introduced us, I smiled at her boyfriend. Nothing about him appeared menacing. He was average in appearance. There was no warning. The air didn’t sizzle between us. His eyes, behind his small, round glasses, blinked innocently at me.

Looks can be deceiving. My friend Edward is an example of this. Edward is a Mexican American and Native American male who was a fellow poet in my graduate school in Arizona. He wrote beautiful, lyrical love poems that could make the class weep and sigh. Because Edward was large in size, strangers reacted to Edward’s bulk with fear. The idea that Edward was dangerous was absurd to me. He was such a gentle soul. Fear, though, is not determined by logic and I often saw this. One time, we entered a hotel elevator for a conference, and the two women already inside clutched their suitcase handles and stared hard at the floor. Another time, we went to the financial aid building to ask for some forms, and the clerk told Edward to “calm down.” The clerk’s eyes flashed with nervousness, even though Edward was being patient and pleasant. When I angrily wanted to report the clerk to the college, Edward merely shrugged his big shoulders.

“I’m used to it. Happens all the time.”

Denise and I weren’t close. I advertised for a roomie, and she answered my ad. We tolerated each other, but were not confidantes or even buddies. We split the bills, but didn’t share our food. We might watch the television together, but we didn’t seek out each other’s company. So her new boyfriend came as a surprise to me. It turned out John lived in the first floor of our building with three other guys. He and Denise had met doing laundry when he needed to borrow some quarters. I actually liked John better than my roommate. He was more inquisitive about my life. John asked me questions or shared places he liked to eat.

So I was shocked the day John and Denise bickered over some money, and John said to Denise. “C’mon, don’t be a Jew.”

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As Denise laughed and gave John some dollars from her purse, I'd like to say my world didn't freeze. But it did. I couldn't recall if I'd told her my religion. If I had told Denise, it was in passing. Did she remember I was Jewish? Did John know? *Did it matter?* Even if I wasn't of that ethnicity, it was still a prejudice saying.

Yes, I'm Jewish, but I was not raised religiously. Many of my family members have married outside of the faith. We often celebrated Christmas and Hanukkah because of that fact. I never gave my religion much thought. While I had studied the Holocaust in history class, I spent most of it passing notes to a giggling friend, as we laughed at the boy snoring in the back row behind us. Although I should have been more sensitive, I only really thought about my religion around my uncle.

My Uncle Saul had to run from the Nazis when he was only a small boy. His entire family died in the Holocaust. To this day, Uncle Saul, who is over eighty, won't discuss the details. It is only now, looking at the young, hopeful faces of my children, that I realize the full magnitude of his survival. The university life was supposed to be enriching and fun. It was the last place I expected to encounter anti-Semitism.

So I said nothing.

I decided John's remark was ignorant but not malicious.

The next time caught me off-guard too. Time had passed. I had all but forgotten the incident.

"Jews smell. They have an odor. It's just different from us."

John was on the phone, standing in my kitchen, the refrigerator open. His back was to me as he munched on some apple slices.

I planted my feet and stood there, even though my heart was leaping like a slippery fish. When he sensed me behind him and turned, I said, "I'm Jewish."

"Sorry." He smiled and then turned his attention to his call.

Unsure what to do with that type of quick, dismissive apology, I stood there a moment before heading to the sanctuary of my room.

I spent the next week rationalizing it all: This was my apartment first. It was at a safe location and close to campus. Nothing happened but some mean-spirited remarks, which John apologized for; did I have a reason to get him removed?

Raised to be a "good girl" all my life, I didn't know how to act otherwise. Confrontation was difficult for me. If you haven't grown up facing prejudice the way Edward had, it is confusing to recognize it or know how to handle it. I tried once to tell Denise that I was uncomfortable with John's living here and his remarks about Jewish people, but when she merely shrugged and handed me her half of the rent.

I did nothing.

That's when things got worse. John left his church cards all over the apartment. I would find them on the counter or the bathroom. They often had sayings about the evil of topics ranging from abortion to homosexuality. Once I found one slipped under my door. I ignored it. I tossed them away. I confided in a few friends that I disliked my housing situation, but I never got into details with them. Mostly I spent time outside of my apartment and could ignore them.

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It never occurred to me the cards were a type of harassment. Harassment meant an ex-boyfriend stalking you. Or it was the angry stranger. John was neither.

Life can be measured in moments. For me, the moment that burst my hesitation like a dam was when I returned from a party. I was feeling good, a little buzzed, and totally unsuspecting. As I entered my apartment, it was fairly dark.

I didn't see John until he thrust his face into mine and softly declared, "The Jews killed Jesus."

John didn't touch me, but his words made me shiver. This wasn't some intellectual debate. Nor was it a made-for television movie where it escalates into a clear case of violence. This was everyday hate.

I moved away from John in a haze, went to my room, and locked my door. Then I got a chair and put it against the lock. Curled up in a ball, my knees clenched together, I stared at that door. I didn't sleep the entire night, afraid.

The shock for me was how impersonal hate can be. It had nothing to do with who I was inside. The fact that I'd been nice to John didn't matter. It was hatred with an expressionless heart.

I moved out by the end of that week, and I gave Denise my key with a stiff, formal goodbye. I received a different type of education that year. In today's political climate, I think about it often.

The contempt in a remark can be disguised as a joke or small talk. Or worse, as "truth." I think of the haughty way John acted. The sneer in his words, even as a smile was on his lips. The way he made me feel unsafe in my own home.

Many years have passed since that day, but the lesson lingers.

Hate Speech

All the laws we have discussed in this chapter assume that the offenders commit some underlying criminal act. But what if they do not? What if, for example, I want to display a swastika on my own property, or call someone else a racially disparaging name? Can I be punished for that?

A general definition of *hate speech* is words or symbols that are derogatory or offensive on the basis of race, religion, sexual orientation, and so on. The critical distinction between hate *crime* and hate *speech* is that the former requires some underlying criminal act; the latter does not. In the case of hate speech, it is the speech itself that is punished.

Many commentators have argued that hate speech is dangerous and harmful. According to these people, not only does hate speech have many of the same effects as hate crimes (psychological trauma, adverse impact on the community, etc.), but it also may foster an atmosphere in which bias-motivated violence is encouraged, subtly or explicitly (see, e.g., Delgado, 1993; Greenawalt, 1995; Lawrence, 1992; Matsuda, 1993; Murray, 2011; Smolla, 1992; Tsesis, 2000). As the Narrative Portrait by Marcy Katz demonstrates, even seemingly casual hate speech can be hurtful.

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We conclude that, even as narrowly construed by the Minnesota Supreme Court, the [St. Paul] ordinance is facially unconstitutional. Although the phrase in the ordinance, “arouses anger, alarm or resentment in others” has been limited by the Minnesota Supreme Court to reach only those symbols or displays that amount to “fighting words,” the remaining, unmodified terms make clear that the ordinance applies only to “fighting words” that insult, or provoke violence, “on the basis of race, color, creed, religion or gender.” Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified topics. Those who use “fighting words” in connection with other ideas—to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality—are not covered. The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects.

In its practical operation, moreover, the ordinance goes even beyond mere content discrimination, to actual viewpoint discrimination. Displays containing some words—odious racial epithets, for example—would be prohibited to proponents of all views. But “fighting words” that do not themselves invoke race, color, creed, religion, or gender—aspersions on a person’s mother, for example—would seemingly be usable ad libitum in the placards of those arguing in favor of racial, color, etc., tolerance and equality, but could not be used by those speakers’ opponents. One could hold up a sign saying, for example, that all “anti-Catholic bigots” are misbegotten; but not that all “papists” are, for that would insult and provoke violence “on the basis of religion.” St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.

Finally, St. Paul and its amici defend the conclusion of the Minnesota Supreme Court that, even if the ordinance regulates expression based on hostility towards its protected ideological content, this discrimination is nonetheless justified because it is narrowly tailored to serve compelling state interests. Specifically, they assert that the ordinance helps to ensure the basic human rights of members of groups that have historically been subjected to discrimination, including the right of such group members to live in peace where they wish. We do not doubt that these interests are compelling, and that the ordinance can be said to promote them. But the “danger of censorship” presented by a facially content-based statute requires that that weapon be employed only where it is “necessary to serve the asserted [compelling] interest.” The existence of adequate content-neutral alternatives thus “undercuts significantly” any defense of such a statute, casting considerable doubt on the government’s protestations that “the asserted justification is in fact an accurate description of the purpose and effect of the law.” The dispositive question in this case, therefore, is whether content discrimination is reasonably necessary to achieve St. Paul’s compelling interests; it plainly is not. An ordinance not limited to the favored topics, for example, would have precisely the same beneficial effect.

Let there be no mistake about our belief that burning a cross in someone’s front yard is reprehensible. But St. Paul has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire.

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Often, the distinction between hate crime and hate speech is as simple as the distinction between conduct and expression. Hate crime and hate speech become especially hard to tell apart in two situations: verbal acts and symbolic expression. A verbal act occurs when words themselves constitute some element of a crime. For example, a person can be convicted of the crimes of harassment or making terroristic threats based solely on the words he or she has spoken or written. This is not a violation of freedom of speech. The problem comes when we try to distinguish general statements of rancor, which may be distasteful but are protected, from actual threats, which are not protected. If I say, “I hate you, and I wish you would die,” that is probably okay; if I say, “I hate you, and I’m going to kill you,” I can go to prison.

The second problematic situation occurs when a person does not say a word and yet still expresses a thought or idea. The Supreme Court calls this symbolic expression or expressive conduct. In a series of cases over the last four decades, the Court has held that actions such as burning a flag or wearing a black armband express ideas and therefore are protected by the First Amendment. In *R. A. V.*, the Court held that cross-burning might fall in this category. On the other hand, the Court has also stated that actions such as burning a draft card and dancing nude were merely conduct and not protected. Clearly, it can sometimes be difficult to classify speech and conduct.

The Supreme Court itself further blurred the distinction in 2003, when it decided *Virginia v. Black*. Virginia law prohibited burning a cross with the intent to intimidate others. Barry Black was leading a Klan rally. With the permission of the property owner and in view of a public road and neighbors’ houses, he set a cross on fire. After he was convicted of violating Virginia’s law and fined \$2,500, he challenged his conviction, claiming that his actions were protected by the First Amendment. In a complex decision, the Supreme Court found that cross-burning is unique in that, due to its history, it tends to carry an especially threatening message. Thus, when a cross is burned with the intent to intimidate others, even when the defendant burns it on his own property, he may still be punished. The relevance of this decision to other forms of hate expression—fliers and web pages, for example—is unclear, because those other forms don’t have the same unique history as does the burning cross.

When Congress passed the federal hate crimes law in 2009, it included language specifying that nothing within the law was to be interpreted in such a way so as to diminish the right to free expression. Nevertheless, some people are concerned that the law may be used to infringe on free speech (Coker, 2011). But the Supreme Court has recently confirmed that even hateful and offensive speech is constitutionally protected. The members of the Westboro (Kansas) Baptist Church have been attracting attention for several years by picketing outside the funerals of gay people and also of soldiers killed in Iraq and Afghanistan. Their signs contained hateful messages such as “Thank God for Dead Soldiers” and “Fag Troops.” The father of a soldier sued the church for emotional pain caused by their presence outside his son’s funeral, but the Supreme Court held that the church members’ actions were protected by the First Amendment (*Snyder v. Phelps*, 2011).

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Entire books could be and have been written on the subject of hate speech alone (see, e.g., Coliver, 1992; Heumann & Church, 1997; Holzer, 1994; Matsuda, Lawrence, Delgado, & Crenshaw, 1993; Walker, 1994). Because the issues involved are significantly different from those involved with hate crimes, we leave a more involved discussion of hate speech for other venues.

Narrative Portrait

The ADL Perspective on Hate Crimes

The following pieces were written by two attorneys for the Anti-Defamation League. Michael Lieberman has been the Washington Counsel for the Anti-Defamation League since January 1989. He has written widely about the impact of hate crimes and has been actively involved in efforts to secure passage of a number of federal and state hate crime statutes. Mr. Lieberman has participated in seminars and workshops on response to violent bigotry and has served on advisory boards for hate crime projects funded by the Department of Justice, the Department of Education, and the Department of Housing and Urban Development. Karen Zatz is the Assistant Western States Counsel for the ADL. She works in the San Francisco ADL office responding to acts of hate and bias and training law enforcement personnel and attorneys on effective responses to hate.

Michael Lieberman:

All Americans have a stake in an effective response to violent bigotry. Hate crimes demand a priority response because of their special emotional and psychological impact on the victim and the victim's community. The damage done by hate crimes cannot be measured solely in terms of physical injury or dollars and cents. Hate crimes may effectively intimidate other members of the victim's community, leaving them feeling isolated, vulnerable, and unprotected by the law. By making members of minority communities fearful, angry, and suspicious of other groups—and of the power structure that is supposed to protect them—these incidents can damage the fabric of our society and fragment communities.

ADL has long been in the forefront of national and state efforts to deter and counteract hate-motivated criminal activity. Hate crime statutes are necessary because the failure to recognize and effectively address this unique type of crime could cause an isolated incident to explode into widespread community tension. Since 1913, the mission of ADL has been to "stop the defamation of the Jewish people and to secure justice and fair treatment to all citizens alike." Dedicated to combating anti-Semitism, prejudice, and bigotry of all kinds, ADL has played a national leadership role in the development of innovative materials, programs, and services that build bridges of communication, understanding, and respect among diverse racial, religious, and ethnic groups. ADL developed the model hate crimes statute as a way to counteract hate. The League's website, www.adl.org, contains excellent background on legal and legislative response to hate violence, as well as educational resources on prevention of bias that

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can lead to violence. The Partners Against Hate website, www.partnersagainsthate.org, serves as a comprehensive clearinghouse of hate crime-related information. In addition, the website includes access to the finest database of hate crime laws that form the basis of criminal enforcement in the states, and counteraction tools.

The urgent national need for both a tough law enforcement response as well as education and programming to confront violent bigotry has only increased. In the aftermath of the September 11 terrorism, the nation has witnessed a disturbing increase in attacks against American citizens and others who appear to be of Muslim, Middle Eastern, and South Asian descent. Perhaps acting out of anger at the terrorists involved in the September 11 attacks, the perpetrators of these crimes are irrationally lashing out at innocent people because of their personal characteristics—their race, religion, or ethnicity. Law enforcement officials are now investigating hundreds of incidents reported from coast to coast—at places of worship, neighborhood centers, grocery stores, gas stations, restaurants, and homes—including vandalism, intimidation, assaults, and several murders. As the nation witnessed a series of disturbing attacks against individuals perceived to be Middle Eastern, Arab, or Muslim, in the aftermath of the September 11 terrorist incidents, we were reminded of the need to directly confront the prejudice and intolerance that can lead to hate crimes—in our communities, in our houses of worship, in our schools, and, especially, in our homes. Our civic leaders set the tone for national discourse and have an essential role in shaping attitudes. On September 26, 2002, at a meeting with Sikh leaders at the White House, President Bush pledged “our government will do everything we can not only to bring those people to justice, but also to treat every human life as dear, and to respect the values that made our country so different and so unique. We’re all Americans, bound together by common ideals and common values.” ADL will continue to advocate for hate crimes laws as an effective means to prevent and combat acts motivated by hate.

Karen Zatz:

Clearly, hate crime numbers do not speak for themselves. Behind each and every one of these statistics is an individual or a community targeted for violence for no other reason than race, religion, sexual orientation, disability, or ethnicity. Every day, ADL staffers respond to victims of hate crimes or incidents. When we talk to them, we hear not just of the pain inflicted by the underlying crime, but also of the devastating effect of being targeted because of something you cannot change about yourself. If you are the victim of an assault while walking to the store, you can blame the route, time of day or what you were wearing. When someone calls you a “dirty spic,” “a damn faggot,” or a “stupid kike” and assaults you on the same route, the impact on you as a victim is quite different. You may be afraid that in the future, wherever you go, and whatever you are doing, you will be targeted for violence based on a fundamental characteristic of yourself that you cannot change (an immutable characteristic). This fear may make you try and hide your identity; it may make you not want to associate with other members of your race or religion. When members of your community hear about this incident, they may also be frightened that they will be attacked. Other minority communities may fear that an attack on

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one group means that their group is in danger. One act of hate in a community may impact hundreds or thousands of individuals.

A few years ago a synagogue in Reno, Nevada, was targeted with a firebombing, damaging the building. Within the following year, it was targeted a second time. When I met with members of the congregation, they were alarmed by these repeat attacks. They wondered if their children were safe at Sunday School and whether they were safe attending services. Some congregants resigned their memberships out of fear, and individuals told me that they would no longer gather publicly with other Jews to pray. Some community members told me how angry these attacks made them; older community members were reminded of their experiences during the Holocaust. Jews who were members of other congregations in Reno also felt that they were in danger. They told me that they were afraid for their businesses and for their families. Even when I spoke with members of other minority groups, including members of Christian and Muslim community groups, they spoke of their concern that they would be the next targets. But what I was heartened to see were that hundreds of people from the community—from church groups, civic organizations, law enforcement, and from the government, gathered together at community rallies to speak out against this act of hate. Over and over again I heard from the Jewish community that it was this support from the community in general that made them feel safe to send their kids to religious school, to keep attending services, and to decorate their houses for Chanukah. It is hard to overstate the importance of outspoken leadership in opposition to all forms of bigotry, whether the leadership comes from elected officials, newspaper editorial boards, school administrators, or your next-door neighbor.

I think that hate crime laws speak for a fundamental value of American society, that we should be able to live our lives free from violence, whether as people of faith, or people from a particular country, or race, or sexual orientation or disability. Philosophical promises of America's Constitution are our freedoms of religion and association, and these can only occur meaningfully when individuals cannot be legally targeted for violence based on who they are. I can comfort victims of hate because I know that my entire community stands against hate, as evidenced by the public statement made when hate crime laws are enacted. I can advocate for hate crime laws because I know that they are fundamental to the kind of society Americans have always envisioned for themselves—one where we are free to live our lives without hate-based violence.

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Conclusion

Although laws addressing some bias-related acts have existed since the Civil War, hate crimes legislation as such is a modern phenomenon. Over the past three decades, it has sprung up rather quickly in most states, as well as within the federal codes. Furthermore, there is good reason to believe that hate crime laws will continue to evolve in the near future.

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The need for special hate crime laws has been asserted by many people and has been supported by a number of cogent and rational arguments. What remains scant is empirical evidence to substantiate those arguments. Of course, some might argue, such empirical evidence is not really necessary; even if the laws are not particularly required, they can do little harm. However, there are a number of serious legal and policy challenges associated with the implementation of hate crime laws. We examine those challenges in the [next chapter](#).

Discussion Questions

1. Where and when have you heard about hate crimes? Do you think what you have heard is accurate and representative?
2. The Federal Civil Rights Acts were aimed at specific behaviors and situations. What kinds of hate crime don't they address?
3. How would you design an experiment to study whether hate crimes have more severe effects than other crimes?
4. Summarize the arguments on why hate crimes are different. Do you find them convincing? Is there sufficient evidence to support them?
5. It has been argued that hate crimes affect communities more adversely than ordinary crimes. Why might this be so?
6. Under what circumstances do you believe a hate crimes law might serve as an effective deterrent?
7. This chapter argues that hate crime laws may serve a symbolic function. Can you think of other examples of laws whose effects are largely symbolic? Is it worth passing legislation for this purpose?
8. Organizations such as the ADL played a major part in the passage of hate crimes legislation. In general, what role should special interest groups play in the creation of laws?
9. Draft a hate crime statute of your own. Which parts of the ADL's model law would you keep, and which parts would you change?
10. Why do so many people argue that the federal government should enact additional hate crimes legislation? Do you agree? What practical effect would such laws likely have?
11. Why do you believe the enactment of a federal hate crimes law has been so contentious and difficult?
12. If you lived in a jurisdiction without hate crime laws, would you support their passage?
13. Would you support a hate speech code on your campus? What do you see as the pros and cons of such a code?

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Internet Exercises

1. Go to the Anti-Defamation League's map of state hate crimes legislation at http://www.adl.org/learn/hate_crimes_laws/map_frameset.html. Now find your state on the map and click on it. What hate crime provisions does your state have? How do they compare with those of neighboring states?
2. Using Google or another search engine, search for the term "hate crime." What are the websites that you find? Do you believe the search results are representative of the true picture of hate crimes? What are the issues that seem to be emphasized on these pages?
3. The Human Rights Campaign is an advocacy organization focusing on the rights of LGBTQ people. Among other things, they publish a guide to state-level advocacy: <http://issuu.com/humanrightscampaign/docs/hrc-hate-crimes-guide-2014/25?e=1357809/9893435>. Look at what the guide says about your state and consider how feasible and advisable the recommendations are. If the recommendations were followed, would they address all the problems in your state, or would you suggest additional actions?

Suggested Readings

ADL. (2001). *Hate crime laws: The ADL approach*. Retrieved July 6, 2016, from <http://www.adl.org/99hatecrime/intro.asp>

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Herz, M., & Molnar, P. (Eds.). (2012). *The content and context of hate speech: Rethinking regulation and responses*. New York, NY: Cambridge University Press.

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Notes

1. There have also been a number of arguments *against* hate crimes legislation. These are discussed in [Chapter 2](#).
2. A few years ago, someone broke into my garage and stole some tools and other small items. After that, not only was my family especially careful about keeping doors and cars locked, but so was our entire neighborhood. The neighbor across the street even installed additional locks around his house.
3. Here are the relevant lines of dialogue: Ellwood Blues (Dan Akroyd) (having come up on a neo-Nazi rally): Illinois Nazis. Jake Blues (Jim Belushi): I hate Illinois Nazis.

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4. Those five states were Arkansas, Georgia, Indiana, South Carolina, and Wyoming.
5. R. A. V. was also prosecuted separately under Minnesota's hate crime statute. He didn't challenge that charge.