

Northwestern

PRITZKER SCHOOL OF LAW

Journal of Criminal Law
and Criminology

The Social Construction of a Hate Crime Epidemic

Author(s): James B. Jacobs and Jessica S. Henry

Source: *The Journal of Criminal Law and Criminology* (1973-), Winter, 1996, Vol. 86, No. 2 (Winter, 1996), pp. 366-391

Published by: Northwestern University Pritzker School of Law

Stable URL: <https://www.jstor.org/stable/1144030>

JSTOR is a not-for-profit service that helps scholars, researchers, and students discover, use, and build upon a wide range of content in a trusted digital archive. We use information technology and tools to increase productivity and facilitate new forms of scholarship. For more information about JSTOR, please contact support@jstor.org.

Your use of the JSTOR archive indicates your acceptance of the Terms & Conditions of Use, available at <https://about.jstor.org/terms>



JSTOR

Northwestern University Pritzker School of Law is collaborating with JSTOR to digitize, preserve and extend access to *The Journal of Criminal Law and Criminology* (1973-)

THE SOCIAL CONSTRUCTION OF A HATE CRIME EPIDEMIC*

JAMES B. JACOBS**
JESSICA S. HENRY***

I. INTRODUCTION

Although definitions vary from state to state, "hate crime" generally means a crime against persons or property motivated in whole or in part by racial, ethnic, religious, gender, sexual orientation and other prejudices.¹ Politicians, journalists, interest groups, and some criminologists insist that the United States is experiencing an across-the-board hate crime "epidemic." The use of the epidemic metaphor is meant to dramatize a sharply accelerating hate crime rate. Assertions that a hate crime epidemic exists are almost always accompanied by recommendations for new "hate crime laws" that increase minimum and/or maximum punishment for offenders.

This Article attempts to deconstruct the claim that the United States is experiencing a hate crime epidemic. Drawing on the "social construction of reality" perspective,² we attempt to show how the "reality" of a hate crime epidemic has come to prevail. First, we examine the hate crime epidemic hypothesis and identify its proponents, including advocacy groups, the media, academics, and politicians. Second, we examine the hate crime data collection efforts of the Anti-Defamation League (ADL), the Southern Poverty Law Center's

* The authors express their appreciation to Kimberly Potter and Elizabeth Graddy for their research assistance.

** Professor of Law and Director, Center For Research in Crime & Justice, New York University. J.D. University of Chicago, 1973; Ph.D. University of Chicago, 1975.

*** Fellow, Center For Research in Crime & Justice, NYU School of Law. B.A. Bucknell, 1990; J.D. NYU School of Law, 1995.

¹ The federal government and most states do not include gender bias in their definition of hate crimes. Some states, like New York, do not include sexual orientation bias. "Other prejudices" which some states include, at least for purposes of collecting data, are physical or mental handicap, age, economic or social status. *See, e.g.,* OR. REV. STAT. § 181.550 (1993). For an excellent review of state hate crime statutes, see LU-IN WANG, *HATE CRIMES LAW* (1995).

² *See* PETER L. BERGER, *THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE* (1990); HANS H. GERTH & C. WRIGHTS MILLS, *THE POWER ELITE* (1957).

Klanwatch Project (Klanwatch) and the FBI; figures from these groups are widely used to confirm the existence of the hate crime epidemic. Third, we demonstrate the political and subjective nature of counting hate crimes. Fourth, we offer some contrarian observations on the status of hate crimes.

II. CONSTRUCTION OF THE HATE CRIME EPIDEMIC HYPOTHESIS

Many commentators assert that the rates of all types of hate crimes taken individually and together have reached epidemic levels. In this section, we consider how the hate crime epidemic has been constructed. We first consider the epidemic metaphor. Then we show how some advocacy groups have used the metaphor to dramatize their groups' plight. Finally, we focus on the roles of the media, politicians, and scholars in fostering the belief that a hate crime epidemic exists.

A. "EPIDEMIC"?

According to Webster's dictionary, an "epidemic" is a phenomenon "affecting or tending to affect many individuals within a population, community or region at the same time; excessive, prevalent; contagious."³ The Atlanta-based Center for Disease Control and Prevention says "an epidemic occurs when the incidence of a condition is higher than normal or higher than what health officials expect."⁴ Proponents of social problems, believing that the more serious their problem, the more persuasive their demand for action, have appropriated the term "epidemic" to mobilize public attention and government resources. Calling a social problem an "epidemic" implies the existence of a crisis, a calamity that *demands* immediate political and social action.⁵

Hate crime is so often referred to as an "epidemic" that one might well believe that there is a solid foundation of facts documenting that this social problem is out of control and getting worse. To take just a few examples: Steven Spielberg, the movie producer, told the U.S. Senate Judiciary Committee that "hate crimes are an epidemic curable only through education";⁶ Leo McCarthy, Lieutenant Governor of California, declared that "[t]here is an epidemic of hate

³ WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (1989).

⁴ See Eric Zorn, *An Outbreak of Epidemics*, ATLANTA CONST., Mar. 28, 1994, at A11.

⁵ *Id.*

⁶ Jake Batsell, *Spielberg Speaks Out Against Hate Crimes; FBI Data Show Report on Rise in Arizona*, ARIZ. REPUBLIC, June 29, 1994, at A11 (quoting Spielberg's testimony to the Senate Judiciary Subcommittee).

crimes and hate violence rising in California";⁷ Mississippi State Senator Bill Minor warned, "this is the type of crime that easily spreads like an epidemic";⁸ a journalist for the *San Francisco Chronicle* declared that "hate-motivated violence is spreading across the United States in 'epidemic' proportions."⁹

B. HATE CRIME EPIDEMIC PROPONENTS

The leading proponents of a hate crime epidemic thesis are advocacy groups representing gays and lesbians, Jews, and blacks; advocates for women, Asian-Americans, and the disabled also have demanded explicit inclusion in hate crime legislation.¹⁰ By calling attention to the criminal victimization of their members, these advocates may hope to mobilize law enforcement resources on behalf of their members, and, more broadly, to make out a moral and political claim in furtherance of their groups' agenda of social and political goals.

The existence of a hate crime "epidemic" may be functional for groups like the ADL and Klanwatch. These organizations are committed to preventing and eradicating all bias against those whom they represent as well as obtaining symbolic and material support for their constituents. Whatever the actual number of hate crimes, these groups' assertion of a hate crime *epidemic* effectively gains them political support. A group uses the term "epidemic" to "focus public attention and resources and create social and behavioral changes."¹¹

Spokespersons for gays and lesbians probably have been the most persistent proponents of the hate crime epidemic hypothesis. Kevin Berrill, Director of the National Gay and Lesbian Task Force (NGLTF), asserts that "[t]he problem [of bias crime] is alarmingly pervasive. The real message is not whether the numbers are up or down, but rather that we have an epidemic on our hands, one that is in dire need of a remedy."¹² Similarly, Michael Petreli, a spokesperson for Gay and Lesbian Americans, stated: "[a]nytime there's a murder of a gay or lesbian person, I am concerned because our group . . .

⁷ *Bills Introduced to Combat Hate Crimes*, UPI, Mar. 22, 1993, available in LEXIS, News Library, UPSTAT File (quoting Lt. Gov. Leo McCarthy of California).

⁸ Gina Holland, *Mississippi Ills Require Hate Crimes Bill, Backers Maintain*, COM. APPEAL, Jan. 7, 1994, at 1B (quoting Sen. Bill Minor).

⁹ Suzanne Espinosa, *Black-on-White Hate Crimes Rising*, S.F. CHRON., Nov. 17, 1993, at A10.

¹⁰ See James B. Jacobs, *The Emergence and Implications of American Hate Crime Jurisprudence*, 22 ISR. Y.B. ON HUM. RTS. 113, 116-18 (1993) [hereinafter ISR. Y.B.].

¹¹ Eric Zorn, *A Trend That's . . . Well, Epidemic*, CHI. TRIB., Mar. 23, 1994, at N1 (citing Ward Cates, Center for Disease Control).

¹² Walt Albrow, *Report: Anti-Gay Violence Shows Dramatic Increase*, UPI, Mar. 19, 1992.

believes there is an epidemic of this kind of anti-gay violence.”¹³ After the NGLTF issued its 1993 survey report, a spokesperson for the NGLTF said that “all the anecdotal evidence tells us this is still an out-of-control epidemic.”¹⁴ Ironically, the NGLTF survey report actually stated that violence against gays and lesbians had *decreased* by 14% in the six cities surveyed.¹⁵ Despite this decline, NGLTF spokesperson Tanya L. Domi told a House of Representatives Committee that “[a]nti-gay violence plainly remains at epidemic proportions.”¹⁶

Some women’s advocacy groups claim that violence against women constitutes the largest category of hate crime. According to Molly Yard, then-President of NOW, “[w]hen one realizes that rape and wife abuse are the most commonly reported violent crimes in America, it becomes clear that the vast majority of violent crime victims in this country are women. There is widespread agreement among feminists that these crimes against women are motivated by hatred [of women].”¹⁷ Similarly, a *Scholastic Update* article titled “War on Women” explains: “[a]ccording to statistics from law enforcement and women’s advocacy groups, crimes of violence against women are rampant, and they’ve been increasing for more than a decade.”¹⁸

Asian-American advocacy groups lobbying for passage of the federal Hate Crime Statistics Act claimed that Asian-Americans were experiencing increased hate violence.¹⁹ In a letter to the Senate, the National Democratic Council of Asian and Pacific Americans stated: “[o]ur members in California, Texas, Massachusetts and New York are aware of an increase in violent crimes against Asian and Pacific-Americans, most frequently new arrivals from Southeast Asia and Korean-

¹³ *Advocacy Group Urges Police to Consider Anti-Gay Motive*, GANNETT NEWS SERVICE, OCT. 11, 1994 (statement of Michael Petreli).

¹⁴ *Survey Finds Decrease in Anti-Gay Violence*, N.Y. TIMES, Mar. 9, 1994, at A13 (statement of David M. Smith).

¹⁵ *Id.*

¹⁶ *House Appropriations/Commerce, Justice, State, the Judiciary, and Related Agencies FY 95 Commerce, Justice and State Appropriations* (May 3, 1994) (testimony of Tanya L. Domi, Legislative Director of the National Gay and Lesbian Task Force on behalf of the American Jewish Committee, Anti-Defamation League and the People for the American Way Action Fund).

¹⁷ *Hate Crime Statistics Act of 1988: Hearing Before the Subcommittee on the Constitution of the Committee on the Judiciary United States Senate*, 100th Cong., 2d Sess. 263-64 (1988) (testimony of Molly Yard, then-President of NOW) [hereinafter *Senate Hearing*].

In addition, Ms. Yard argued that “when crimes such as homicide, assault, robbery, burglary, theft, arson, vandalism, trespass and threats are committed against women, they should be evaluated in terms of ‘hate’ motivation for purposes of categorization.” *Id.* at 264.

¹⁸ Lauren Tarshis, *The War on Women*, 124 SCHOLASTIC UPDATE 14, Apr. 3, 1992.

¹⁹ See Note, *Racial Violence Against Asian Americans*, 106 HARV. L. REV. 1926 (1993).

Americans, often elderly.”²⁰ Likewise, Karen G. Kwong of the Asian American Bar Association of the Greater Bay Area wrote: “. . . [w]e believe that in California, as well as throughout the nation, there has been an increase in crimes committed against Asians and other minorities which are motivated by racial, ethnic, or religious prejudice.”²¹ William Yoshino of the Japanese American Citizens League stated: “[we] believe there has been a dramatic upward trend in violence toward Asians since 1980.”²²

These spokespersons and organizations, among others, have successfully created the widespread belief that hate-motivated crimes based on race, religion, ethnicity, gender, sexual preference, and disability are overwhelming the United States. This “reality” has provided the foundation for political and legislative “findings” and has spawned a growing body of hate crime law and jurisprudence.

C. THE MEDIA’S ROLE

The media have accepted, reinforced, and amplified the image of a nation engulfed by hate crime. A LEXIS search of news articles from 1993 to 1995 revealed fifty-six stories referring to the “epidemic of hate crime.”²³

Headlines like the following are typical: “A Cancer of Hatred Afflicts America”;²⁴ “Rise in Hate Crimes Signals Alarming Resurgence of Bigotry”;²⁵ “Black-on-White Hate Crimes Rising”;²⁶ “[A]cross the nation, hate crimes . . . are on the increase after years of steady decline”²⁷; and “[t]hroughout the country, there are increasing numbers of shootings, assaults, murders and vandalism that are motivated by bias and hatred.”²⁸ The alarming state of inter-group relations is “news” while inter-group cooperation is not. A *Newsday* headline states “Bias Crimes Flare Up in City’s Heat”;²⁹ a full five paragraphs later we find out that “the number of bias-related incidents in the city

²⁰ *Senate Hearing*, *supra* note 17, at 261 (letter to Senator Paul Simon from Susan C. Lee).

²¹ *Senate Hearing*, *supra* note 17, at 246 (letter to Senator Paul Simon from Karen G. Kwong).

²² *Senate Hearing*, *supra* note 17, at 84 (testimony of William Yoshino, Midwestern Regional Director, Japanese American Citizens League).

²³ This search was conducted in the LEXIS “NEWS” library, “CURNEWS” file as of April 1995.

²⁴ Spencer Rumsey, *A Cancer of Hatred Afflicts America*, *Newsday*, May 27, 1993, at 129.

²⁵ Benjamin J. Hubbard, *Commentary on Tolerance*, *L.A. Times*, Apr. 4, 1993, at B9.

²⁶ Espinosa, *supra* note 9, at A10.

²⁷ Claire Safran, *They Burn Churches, Don’t They?*, *Women’s Day*, Nov. 21, 1989, at 68.

²⁸ *Civil Rights Commission to Hold Forum on Hate Crimes in Detroit*, *U.S. Newswire*, July 15, 1991.

²⁹ William Douglas, *Bias Crime Flare Up in City’s Heat*, *Newsday*, July 21, 1991, at 19.

dropped in the first half of this year from the same period last year.”³⁰

Not surprisingly, U.S. hate crime has achieved international notoriety. The Xinhua General Overseas News Service distributed an article stating “[t]he United States is seeing a surge of hate crimes motivated by race, religion and sexual bias according to a *Boston Globe* survey.”³¹ The article further reports increases in nearly every major city in the United States. When FBI Director Louis Freeh released the results of the second Hate Crime Statistics Report during a speech in Germany, he told his hosts that hate crime murders are at least as common in the United States as in Germany, which at the time was said to be experiencing a wave of violence against “foreigners.”³² The media seem almost enthusiastic in presuming the worst about the state of inter-group relationships in American society. For example, a Florida newspaper presented a horrifying attack on an African-American tourist as “a dramatic example of the growing problem of hate crime,”³³ but the writer provided no basis for the assertion that there is a “growing problem of hate.”³⁴

Sometimes the media may even be responsible for triggering hate crimes. When two African-American children in New York City reported that several whites had sprayed them with white shoe polish, the media gave the incident endless publicity. The week after the alleged attack, sixty-one bias incidents were reported.³⁵ When, weeks later, the New York Police Department effectively abandoned the investigation amid speculation that the original accusation was fabricated, the media hardly covered the story.³⁶

³⁰ *Id.* (emphasis added).

³¹ *Survey Finds Rising Hate Crimes in U.S.*, XINHUA GEN. OVERSEAS NEWS SERVICE, July 30, 1990.

³² Karen D’Souza, *Hate Crime Rise: Hostility or Awareness*, PHOENIX GAZETTE, June 29, 1994, at B8.

³³ Tom Scherberger & Sue Carlton, *A Quiet Life Suddenly Shattered by Hatred*, ST. PETERSBURG TIMES, Jan. 16, 1993, at 1A.

³⁴ Admittedly, one can find stories downplaying the prevalence of hate crimes. For example, a headline in *The Atlanta Constitution* boasted of Atlanta (as it gears up to host the 1996 Olympics): “Hate Crimes Becoming More Rare, Police Say.” This article quoted a Gwinnett County police sergeant who proudly proclaimed that “in 1992 we had almost [no hate crimes and cult activity].” Gail Hagans, *King Week ‘93 Hate Crime Becoming More Rare, Police Say*, ATLANTA CONST., Jan. 18, 1993, at J1. Interestingly, Larry Pelligrini, President of the ACLU Georgia’s Lesbian and Gay Rights Chapter, says the ACLU in 1991 received 93 reports of hate crimes in the Atlanta area alone. Kathy Scruggs, *Police Insensitive, Activists Say Handcuff Man Case, Crime Report Cited*, ATLANTA CONST., Mar. 1, 1992, at D5.

³⁵ This is not unusual: “[e]xperts say that the surge in cases is actually a predictable phenomenon that has occurred several times in recent years on the heels of a particularly shocking bias attack that attracted wide publicity.” Lynda Richardson, *61 Acts of Bias: One Fuse Lights Many Different Explosions*, N.Y. TIMES, Jan. 28, 1992, at B1.

³⁶ James B. Jacobs, *Rethinking the War Against Hate Crimes: A New York City Perspective*, 11 CRIM. JUST. ETHICS 55, 58 (Summer/Fall 1992) [hereinafter CRIM. JUST. ETHICS].

D. SCHOLARLY PERSPECTIVES

Perhaps most disturbing, criminal justice scholars have accepted the hate crime epidemic hypothesis with hardly a raised eyebrow. While few books focusing on hate crimes have been published, the overwhelming majority of them lend their support to the social construction of hate crime as an epidemic. In *The Rising Tide of Bigotry and Bloodshed: Hate Crimes*,³⁷ Jack Levin and Jack McDevitt, two of the leading scholars on hate crimes, claim that America is experiencing a "rising tide" of hate crimes that will get worse in the next decade. This prediction is based upon a review of highly publicized incidents and reports of advocacy groups like the ADL, Klanwatch, and the National Institute Against Prejudice and Violence. A large portion of the book is devoted to detailed descriptions of particular horrific hate crimes.

The authors base their bleak prediction of increasing hate crimes on economic decline having led to social-psychological malaise. Levin and McDevitt believe that "resentment" is at the root of most hate crime offenses. They argue that as Americans are forced to cope with dwindling economic opportunities, they will blame others for taking opportunities away from them. This resentment and frustration, coupled with extant biases and stereotypes, expresses itself through hate crimes; in other words, angry competition over a shrinking economic pie.³⁸ This explanation is not based on any empirical studies but on the authors' social speculation. The most significant problem with the authors' speculation is the absence of any data on the hate crime rate. In short, the authors may have created a theory in search of a problem.

In *Bias Crime: American Law Enforcement and Legal Responses*,³⁹ a variety of authors explain how law enforcement agencies have dealt with hate crimes, and advocate improved data collection by the states and federal government. All of the essays assume that hate crimes need to be dealt with and punished as a separate category of crime. Several of the authors express alarm about the prevalence of hate crimes. Joan Weiss, executive director of the Justice Research and Statistics Association, acknowledges that the extent of the problem is unknown, but then claims that "[t]he problem is so pervasive that, even without accurate data, we know that thousands upon thousands of in-

³⁷ JACK LEVIN & JACK McDEVITT, *THE RISING TIDE OF BIGOTRY AND BLOODSHED: HATE CRIMES* (1993).

³⁸ *Id.* at 45-63.

³⁹ *BIAS CRIMES: AMERICAN LAW ENFORCEMENT AND LEGAL RESPONSES* 6-7 (Robert J. Kelly ed., 1993).

cidents occur throughout the country every year.”⁴⁰ In another essay, Allen Sapp, Richard Holden, and Michael Wiggins begin by stating, “[i]n recent years, bias-motivated activities directed at members of minority groups have occurred with increasing frequency. The escalating rate of these crimes is proving to be a major source of concern. . . .”⁴¹

In *Hate Crimes: Confronting Violence Against Lesbians and Gay Men*,⁴² various authors focus on violence against homosexuals, beginning with the premise that such attacks, while not a new problem, have increased dramatically. A large portion of the book presents anecdotal evidence of an increase in anti-gay hate crimes, highlighting individual brutal incidents. The authors state that surveys of victimization among gays and lesbians may not present an accurate picture of the magnitude of the anti-gay hate crimes due to both an unwillingness by some individuals to “come out” and possible under-reporting of incidents.

The most inflammatory of the recent books on hate crimes is Alphonso Pinkney’s *Lest We Forget: White Hate Crimes*.⁴³ Pinkney argues that the conservative political climate during the 1980s permitted an atmosphere of hostility against minorities to thrive. Pinkney states, “[t]he most alarming trend was the resurgence of overt racist behavior. . . . [R]acial behavior was rampant.”⁴⁴ In one chapter, titled “Recent Surge of Racial Violence,” Pinkney points the finger of blame at then-President Ronald Reagan: “the point is that Ronald Reagan set the tone and created the environment in which acts of racial violence thrived. . . . Thus, the widespread physical attacks on blacks and other minorities went unchecked.”⁴⁵ The bulk of the book is devoted to describing highly publicized incidents of violence, some of which were not clearly attributable to racism. For example, Pinkney characterized the Bernhard Goetz case, in which Goetz, a white man, shot four black youths who were trying to rob him, as an example of racial violence. Goetz was acquitted. Similarly, when New York City police shot a mentally unstable black woman as she lunged at another police officer with a knife, Pinkney labeled the incident race-based violence.

⁴⁰ Joan C. Weiss, *Ethnoviolence: Impact Upon and Response of Victims and the Community*, in *BIAS CRIME*, *supra* note 39, at 179 (emphasis added).

⁴¹ Allen D. Sapp, Richard N. Holden & Michael E. Wiggins, *Value and Belief Systems of Right-Wing Extremists: Rationale and Motivation of Bias-Motivated Crimes*, in *BIAS CRIMES*, *supra* note 39, at 105.

⁴² *HATE CRIMES: CONFRONTING VIOLENCE AGAINST LESBIANS AND GAY MEN* (Gregory M. Herek & Kevin T. Berrill eds., 1992).

⁴³ ALPHONSO PINKNEY, *LEST WE FORGET: WHITE HATE CRIMES* 20 (1994).

⁴⁴ *Id.*

⁴⁵ *Id.* at 27.

Pinkney's book is not really about hate crimes, nor does it support the existence of an epidemic of anti-black hate crimes. Indeed, only a few of the incidents covered in the book could uncontroversially be characterized as hate crimes.

A search in WESTLAW's academic journals files found thirty-one articles published between 1992 and 1995 that contained the phrases "hate crime" and "epidemic."⁴⁶ Not one of these articles doubts the existence of an across-the-board hate crime epidemic. To the contrary, a hate crime epidemic is assumed and frequently cited as justification for new substantive laws, enhanced sentences, and increased enforcement.

Like journalists who write about hate crimes, the academic commentators selectively apply data that do not support "the facts" they claim to establish. For example, Professor Abraham Abramovsky, in a 1992 law journal article advocating more laws to combat bias crime, claims an "urgency of the escalating problem [of bias crime]."⁴⁷ He asserts that "categories of bias crime are rapidly growing along with the reported number of instances."⁴⁸ Yet, the proliferation of bias crime categories does not mean more *instances* of bias crimes. Rather, increased categories of crime indicates the willingness of law makers to accommodate more advocacy groups' demands.

Professor Abramovsky expresses alarm that, according to the New York Police Department's statistics for the first four months of 1990, there was a twelve percent increase in the number of bias-related crimes over the same period in 1989.⁴⁹ He explains that "the most alarming statistic is that in 1990 the number of bias-related attacks on Asians almost doubled from the number reported in 1989."⁵⁰ A footnote provides the detail: "there were 11 bias crimes reported against Asians during the first four months of 1990, compared with 22 reports *in all* of 1989."⁵¹ Is a total of eleven bias incidents against Asian-Americans truly "alarming" in a city with a 1990 Asian-American population of 512,719⁵² and with a total of 710,222 FBI index crimes?⁵³ In the

⁴⁶ The search was run on 11/19/94 in WESTLAW's "MAG-ASAP" file.

⁴⁷ Abraham Abramovsky, *Bias Crime: A Call for Alternative Responses*, 19 FORDHAM URB. L.J. 875, 876 (1992).

⁴⁸ *Id.*

⁴⁹ *Id.* at 882.

⁵⁰ *Id.* at 883.

⁵¹ *Id.* at 883 n.56 (emphasis added).

⁵² See BUREAU OF THE CENSUS, U.S. DEP'T OF COM., 1990 CPH-3-245H (1990); CENSUS OF POPULATION AND HOUSING, POPULATION AND HOUSING CHARACTERISTICS FOR CENSUS TRACTS AND BLOCK NUMBERING AREAS, NEW YORK-NORTHERN NEW JERSEY-LONG ISLAND, NY-NJ-CT CMSA, NEW YORK, NY PMSA 505-07 tbl. 5 (1991) (this number represents all counted Asian and Pacific Islander persons in the city of New York, based on a summation of individuals in Bronx County, Kings County, New York County, Queens County, and Richmond

final analysis, the total number of anti-Asian attacks for 1990 was the same as the 1989 figure.⁵⁴

Eleven reported bias crimes in the first four months of 1990 might reflect random crime fluctuations, the prolific criminality of a single offender or of a clique of teenagers, the energies of one police officer or enhanced data collection efficiency. Abramovsky acknowledges the latter possibility, but cites a National Institute Against Prejudice and Violence (NIAPV) study that "reported a steady increase in hate crimes in the last two years from the majority of agencies who collect such data."⁵⁵ This begs the question. As efficiency in bias data collection increases, whether by police or by non-governmental organizations (and often in conjunction with each other), and more public attention focuses on the issue, absolute numbers of recorded bias incidents will necessarily increase. Moreover, can comparisons of data over a two-year period really be considered a trend?⁵⁶

Student law review authors have enthusiastically embraced the existence of a hate crime epidemic. One writer in the *Harvard Law Review* states, "[i]n recent years, violence, threats, and vandalism committed because of the race, religion, sexual orientation, or other such characteristics of the victim have increased at an alarming rate."⁵⁷ The author explains that Congress passed a Hate Crime Bill in 1990 and that the FBI reported 4,558 hate crimes in 1991.⁵⁸ Where the author finds the "increase," let alone the cause for "alarm," is not explained; apparently it is so obvious that it ought simply to be assumed. Another *Harvard Law Review* Note informs us that "[t]he Howard Beach incident highlights an alarming trend of increasing racial violence against minorities in the United States."⁵⁹ The support for the existence of such a "trend" was testimony at a 1981 House Judiciary

County).

⁵³ FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUST., CRIME IN THE U.S.: 1990, UNIFORM CRIME REP., at 101 tbl. 6 (1991) [hereinafter UNIFORM CRIME REP.: 1990]. Crime Index Offenses include the violent crimes of murder, non-negligent manslaughter, forcible rape, robbery, and aggravated assault as well as the property crimes of burglary, larceny-theft, motor vehicle theft, and arson. *Id.*

⁵⁴ NYPD Bias Incident Investigating Unit, Incident Report (Mar. 20, 1991).

⁵⁵ Abramovsky, *supra* note 47, at 884.

⁵⁶ Several books on the subject of hate crime are predicated on the existence of a hate crime epidemic. See, e.g., LEVIN & McDEVITT, *supra* note 37, at ix.

⁵⁷ Note, *Hate is Not Speech: A Constitutional Defense of Penalty Enhancement for Hate Crimes*, 106 HARV. L. REV. 1314 (1993).

⁵⁸ *Id.* at 1314 n.1.

⁵⁹ Note, *Combating Racial Violence: A Legislative Proposal*, 101 HARV. L. REV. 1270 (1988).

Committee Hearing⁶⁰—five years prior to the Howard Beach incident.⁶¹

E. POLITICIANS AND SYMBOLIC POLITICS

Politicians have enthusiastically climbed aboard the hate crime epidemic bandwagon. Denouncing hate crime and passing sentencing enhancement laws provides elected officials with an opportunity to decry bigotry. Politicians can propose anti-hate legislation as a cheap, quick-fix solution that sends powerful symbolic messages to important groups of constituents.⁶² Recognizing the political and symbolic importance of legislation, politicians embrace anti-bias laws, routinely citing advocacy groups' statements and statistics.⁶³ Senator Alan Cranston (D. Cal.), sponsor of the federal Hate Crime Statistics Act, referred extensively to the 1987 NGLTF statistics: "the number of hate crimes increased substantially, . . . representing a 42% increase from 1986."⁶⁴ Co-sponsor John Kerry (D. Mass.) similarly explained:

Hearings which have been held in the House Judiciary Committee indicate that there is a serious problem in America with hate crimes of all types, including violence against Blacks, Hispanics, Asian-Americans, Jews, Arab-Americans and gays. A recent report by the National Gay and Lesbian Task Force [asserts] that hate crimes directed against gays and lesbians are increasing. Legislation is needed to address the serious problem of anti-gay violence.⁶⁵

The claim of "epidemic" levels of violence led to the passage of the 1994 Violence Against Women Act (VAWA).⁶⁶ One section of a NOW Legal Defense and Education Fund statement to Congress on VAWA was titled "The Epidemic of Violent Crime Against Women."⁶⁷ After citing statistics about violence against women, often based on

⁶⁰ *Id.* at 1270 n.2 (citing *Racially Motivated Violence: Hearing Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 77 (1983) (testimony of Mary F. Berry)).

⁶¹ On December 20, 1986, a group of white youths assaulted three black men with baseball bats in Howard Beach, a neighborhood of Queens. Jeffery K. Parker, *Gang of Whites Attacks 3 Blacks in Queens*, WASH. POST, Dec. 21, 1986, at A17. As one of the black men fled the scene, he was accidentally struck and killed by an automobile. *Id.* A total of six youths were convicted of various charges related to the incident. *Three Youths Convicted in Howard Beach Case*, JET, Aug. 8, 1988, at 33.

⁶² James B. Jacobs, *Implementing Hate Crime Legislation Symbolism and Crime Control*, ANN. SURV. AM. L. 541 (1992/1993) [hereinafter ANN. SURV. AM. L.].

⁶³ See JACOBS, ISR. YB., *supra* note 10, at 136-38.

⁶⁴ *Senate Hearing*, *supra* note 17, at 248.

⁶⁵ *Id.* at 253 (statement of Senator John Kerry).

⁶⁶ 28 U.S.C. § 1445 (1994).

⁶⁷ The Violence Against Women Act of 1993: Hearings on H.R. 1133 Before the Subcomm. of Civil and Constitutional Rights, 139 CONG. REC. H10363 (daily ed. Nov. 20, 1993) (NOW Legal Defense and Education Fund on the Violence Against Women Act of 1993: H.R. 1133) [hereinafter NOW Statement].

congressional testimony by other advocacy groups,⁶⁸ the NOW statement concluded that "legislation is needed today to protect citizens from an epidemic of gender-based violence."⁶⁹

Politicians seem more concerned with making symbolic statements against widely disfavored prejudices than in formulating specific remedies to carefully defined problems. In an open letter dated August 16, 1991 to members of the New York State legislature, New York's then-Governor Mario Cuomo stated, "as government, our single most effective weapon is the law. I implore you to support the Bias Related Violence and Intimidation Act I have proposed, and make it clear to the people of this state that behavior based on bias will not be ignored or tolerated."⁷⁰ In the aftermath of the Bensonhurst riots, then-New York State Attorney General Robert Abrams said that the proposed Bias Related Violence and Intimidation Act "would send a message that hate crimes will be severely punished."⁷¹ When former Governor Jim Florio signed New Jersey's ethnic intimidation bill into law, he declared, "[t]his legislation does more than punish It says something about who we are, and about the ideals to which this state is committed."⁷² Similarly, the U.S. Senate Report on the federal Hate Crimes Reporting Statute declared that "the very effort by the legislative branch to require the Justice Department to collect this information would send an additional important signal to victimized groups everywhere that the U.S. government is concerned about this kind of crime."⁷³

III. SOURCES OF DATA

One must examine the sources of hate crime data in order to understand how the hate crime epidemic hypothesis has been constructed. Some advocacy groups, such as the ADL, collect data and generate statistics to support their claims that those whom they represent are experiencing an epidemic of bias-motivated victimization. These statistics are used to confirm the "reality" of hate crime. While it is beyond the scope of this Article to critique every advocacy group's hate crime data collection and reporting procedures, we focus on the

⁶⁸ *Id.*; see also *supra* notes 10-22 and accompanying text.

⁶⁹ NOW Statement, *supra* note 67.

⁷⁰ Letter from Mario M. Cuomo, Governor of the State of New York, to the New York Legislature (Aug. 16, 1991).

⁷¹ Letter from Robert Abrams, Attorney General of the State of New York, to New York Senate Majority Leader Ralph Marino (Oct. 12, 1989).

⁷² Larry Levinson, *Florio Signs Bias Bill*, UPI, Aug. 8, 1990, available in LEXIS, Nexis library, UPSTAT file.

⁷³ S. REP. NO. 21, 101st Cong., 1st Sess. 3 (1989). See also James B. Jacobs & Barry Eisler, *The Hate Crimes Statistics Act of 1990*, 29 CRIM. LAW BULL. 99 (1993).

ADL's data collection methods—by far the most established and sophisticated non-governmental data collection effort. We next examine Klanwatch's hate crime data. Finally, we critique the FBI's recent data collection initiative pursuant to the 1990 Hate Crime Statistics Act.

A. THE ADL'S DATA

Since 1979, the ADL has compiled and published an annual audit of "overt acts or expressions" of anti-Jewish bigotry or hostility.⁷⁴ The anti-semitic overt acts or expressions included in the report are not necessarily crimes. They include non-criminal verbal harassment and the distribution of anti-semitic literature, such as neo-Nazi literature and anti-semitic materials, to Jews and non-Jews, in public places.⁷⁵ Thus, on its face, one cannot rely on the ADL audit as an indicator of hate *crime*.

The ADL data collection method also contains a great deal of subjectivity. The ADL compiles its statistics from data provided by its twenty-eight regional offices. Each regional office relies upon victim and community group reports, newspaper articles, and local law enforcement agencies for its information.

Individuals and community groups who believe they have been the victims of an anti-semitic incident may call the ADL office. A person at the ADL fills out a standard form, which includes the name of the victim and a description of the incident, and the victim may be encouraged to contact the police. The ADL will then look for newspaper coverage of the incident and attempt to determine whether similar incidents, if any, suggest a pattern. If the incident is an isolated, non-criminal event, like an anti-semitic message left on an answering machine, the ADL officer will listen to the message, and confirm it as "harassment" for purposes of the audit. The ADL attempts to confirm all reports.

The ADL also must determine whether an incident brought to its attention constitutes "an act or expression of anti-semitism." For example, the organization has decided that a stone thrown through a synagogue window, even without any markings or other verbal expression of anti-semitism, evidences hostility towards a Jewish institution. The Annual Audit then includes this act, even though (as the ADL itself acknowledges) one child could have thrown the stone at another

⁷⁴ Anti-Defamation League, *1992 Audit of Anti-Semitic Incidents* 24 (on file with the author).

⁷⁵ *Id.* at 27.

and simply missed.⁷⁶

Thus, the ADL Audit will necessarily be dominated by "low-end" incidents such as anti-semitic comments, literature and graffiti. The ADL reviews any crime that occurs at a Jewish institution for anti-semitic overtones, regardless of whether the police classify the incident as bias-related. The 1993 ADL Audit of Anti-Semitic Incidents lists a "representative sampling" of incidents of anti-semitic harassment. For example, in Connecticut, a high school hockey coach yelled an anti-semitic slur, "Get the Jew Boy," at an opposing player. In Georgia, a business owner accused a Jewish woman who questioned the price increase of service of "trying to Jew me down." In Massachusetts, "Jew!" was yelled by a man in a passing truck at a Jewish mourner leaving a cemetery.⁷⁷

Once an act has been reported and classified as an anti-semitic incident, the ADL attempts to verify it. Validating and investigating property damage is easier to confirm than anonymous reports of personal harassment. Without additional follow-up of reports by unidentified complainants, the ADL states that it *may* not be possible to include these incidents in its Annual Audit.⁷⁸ However, "may" is not "must"; some unidentified, unverified reports "may" be included in the ADL's Audit.

The ADL's dependence upon newspaper stories regarding anti-semitic incidents also poses problems. Newspapers vary enormously in their coverage of anti-semitic incidents (especially minor incidents) and in the reliability of their reporting. The propensity to report or not to report bias incidents may have little, if anything, to do with the actual frequency of hate crimes. Perhaps a small town newspaper is more apt to report such incidents because there is less news to report than in a larger urban center. On the other hand, some newspapers in urban centers may have a sizeable readership concerned about anti-semitism. Conversely, a newspaper may not deem such behavior as newsworthy in an area where such conduct or expression is routine. Obviously, we lack any data on the criteria and procedures which journalists employ in confirming claims of hate-crime victimization. We do know, however, that a hate crime is more newsworthy than an "ordinary" crime.⁷⁹

According to its own personnel, the ADL does not purport to be

⁷⁶ *Id.*

⁷⁷ *ADL Audit of Anti-Semitic Incidents for 1993*, U.S. NEWswire, Feb. 16, 1995.

⁷⁸ *Id.* at 28 (emphasis added).

⁷⁹ STEVEN CHERMAK, *VICTIMS IN THE NEWS: CRIME AND THE AMERICAN NEWS MEDIA* 54 (1995) (ranking hate crimes as the fourth most newsworthy crime).

the "end all, be all" provider of anti-semitic statistics.⁸⁰ Yet, organizations such as Klanwatch and the Gay and Lesbian Anti-Violence Project have followed the ADL's data collection model, and numerous states have based their anti-bias laws on ADL guidelines.⁸¹

B. KLANWATCH'S HATE CRIME STATISTICS

An article by Klanwatch, a project of the Southern Poverty Law Center, illustrates how the hate crime epidemic has been constructed on the basis of dubious statistics. In the article "Campus Hate Crime Rages in 1992,"⁸² Klanwatch claims that there is a "raging hate epidemic" on college campuses. Two types of data are offered to support this claim. First, Klanwatch cites a 1990 report by the NIAPV which states that "25% of minority students will become victims of violence based on prejudice. And 25% of those students will be revictimized, according to a survey conducted by the NIAPV at the University of Maryland at Baltimore."⁸³ Second, the article reports that the "New York State Governor's Task Force on Bias-Related Violence survey of 2,823 junior and senior high school students found respondents to be biased against gay and lesbian students."⁸⁴

Klanwatch's conclusion that there is a "raging hate epidemic" on college campuses is questionable. First, Klanwatch does not explain the origin of the NIAPV's twenty-five percent figure. What qualifies as an act of violence? How is a perpetrator identified and his or her prejudice confirmed? Furthermore, the reported NIAPV finding of twenty-five percent conflicts with other data sources. The 1992 National Crime Victimization Survey Report, produced by the Department of Justice, found only 32.1 crimes of violence per 1,000 persons age twelve and over for all Americans.⁸⁵ And, while higher, there were still only 50.4 crimes of violence per 1,000 black persons age twelve and over.⁸⁶ The FBI statistics on campus crimes for 1990 at the University of Maryland in Baltimore County shows that of its 9,868 students, only twelve incidents of violent crime were reported; of

⁸⁰ Telephone interview with Gail Gams, Anti-Defamation League (Sept. 28, 1993).

⁸¹ Over half of all states in the United States have based one or more sections of their hate statutes on the ADL model. For a chart of the states that have followed the ADL hate crime data collection model, see Robert J. Kelly, Jess Maghan & Woodrow Tennat, *Hate Crimes: Victimized the Stigmatized*, in *BIAS CRIME*, *supra* note 39, at 45-46.

⁸² KLANWATCH INTELLIGENCE REPORT, Feb. 1993, at 1.

⁸³ *Id.*

⁸⁴ *Id.* at 2.

⁸⁵ BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., CRIMINAL VICTIMIZATION IN THE U.S.: 1992, at 22 tbl. 3—Victimization Rates For Persons Age 12 and Over, By Type of Crime and Sex of Victims (1992).

⁸⁶ *Id.* at 24 tbl. 6—Victimization Rates For Persons Age 12 and Over, By Type of Crime and Race of Victims.

4,563 students at University of Maryland at Baltimore City, twenty-five incidents of violence were reported.⁸⁷

Klanwatch also fails to explain the link between the New York State Governor's Task Force finding of *biased feelings* among high school students and *acts* of hate on college campuses. The same types of questions remain unanswered: How many students responded to the survey? What qualifies as "bias against gay and lesbian students"? Is personal feeling without action "bias"?

C. THE FBI NUMBERS

The 1990 Hate Crime Statistics Act mandated the collection of hate crime data by the United States Department of Justice.⁸⁸ Passage of the Act itself was predicated on the uncritical acceptance of a hate crime epidemic in the United States. Sponsors favored a data collection effort to confirm what they already claimed to know: hate crime is rampant in every category. The FBI was assigned the task of promulgating guidelines on the collection of hate crime data. Local police departments were requested to follow the guidelines in preparing their regular crime reports for the FBI's Uniform Crime Reports.

In releasing the first data collected under the Act, then-FBI Director William Sessions stated: "[w]hile these initial data are limited, . . . they give us our first assessment of the nature of crime motivated by bias in our society."⁸⁹ However, it is questionable whether this "assessment" provides any useful information. Only thirty-two state police departments submitted *any data*. Only 2,771 agencies,⁹⁰ of the 12,805 law enforcement agencies nationwide reporting to the FBI,⁹¹ participated in the data collection effort; of these, seventy-three percent of the reporting departments reported *no hate crime incidences*.⁹² Even among the participating agencies, data collection methodology varied dramatically from state to state, and municipality to municipality.⁹³ In

⁸⁷ UNIFORM CRIME REP.: 1990, *supra* note 53, at 122 tbl. 7—Number of Offenses Known to the Police, Universities and College Campuses, 1990.

⁸⁸ Hate Crime Statistics Act, Pub. L. 100-275, 104 Stat. 140 (1990). The first FBI report was released in January 1993. *See also* Jacobs & Eisler, *supra* note 73.

⁸⁹ U.S. Dep't of Just., FBI Press Release, Jan. 1, 1993 [hereinafter FBI Press Release] (on file with the author).

⁹⁰ *Id.*

⁹¹ FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUST., CRIME IN THE U.S.: 1991, UNIFORM CRIME REP., at 295 tbl. 74 (1992) [hereinafter UNIFORM CRIME REP.: 1991].

⁹² FBI Press Release, *supra* note 89.

⁹³ The 1990 FBI Resource Book (pre-hate crime bill) compares 11 states' hate data collection methods. In some states, data collection was voluntary, in others it was mandated. Some states provided additional resources for data collection, while others hoped to stretch existing resources to encompass hate crime reporting. In addition, some states applied a much broader definition of what qualifies as a hate crime than others.

fact, for 1991 only 4,558 hate crime incidents involving 4,755 incidents were reported *for the entire country*.⁹⁴ "Intimidation," the most frequently reported offense, accounted for one-third of all hate crime offenses against property and accounted for 27.4% of reported hate crimes.⁹⁵

Despite the spotty nature of the FBI collection effort, and the small number of hate crimes it revealed, the media seized upon these data as confirmation of a hate crime epidemic. A *Houston Chronicle* editorial stated: "[t]he specter of hate is unfortunately alive and well in the United States The national report reveals a grim picture."⁹⁶ The *Philadelphia Inquirer* announced that the FBI and anti-bigotry groups report an alarming rise in hate crimes.⁹⁷ Since this was the first report, it is unclear how the newspaper was able to discern a "rise." *USA Today* simply stated that "no one needs a government report to know such [hate crime] offenses are rising."⁹⁸

The FBI statistics did not square with the much more alarmist reports put forward by advocacy groups for the same time period. For example, the FBI reported that 425 hate crimes nationwide were motivated by sexual-orientation bias. For the same period, the Gay and Lesbian Anti-Violence Project reported 592 bias incidents based on sexual orientation in New York City alone.⁹⁹ Similarly, while the FBI for 1991 reported twelve "hate" murders based upon all federally-recognized prejudices,¹⁰⁰ Klanwatch reported twenty-seven murders motivated by bias.¹⁰¹

Ironically, this statistical divergence led some of the groups which campaigned most vigorously for the passage of the Hate Crime Statistics Act to denounce the whole federal data collection project. Klanwatch, among the most ardent campaigners for the passage of the federal law, dismissed the first FBI statistics as "inadequate and nearly worthless."¹⁰² The second FBI report did not fare much better.¹⁰³

⁹⁴ FBI Press Release, *supra* note 89.

⁹⁵ *Id.* The most frequently reported bias was racial. *Id.*

⁹⁶ *First-Time FBI Report Reveals Prevalence of Malice*, HOUS. CHRON., Jan. 11, 1993, at 12.

⁹⁷ Monica Rhor & Sabrina Walters, "A Meanness Afoot" Gives Push to Update Hate Crime Laws, PHIL. INQ., Jan. 25, 1993, at S1.

⁹⁸ Dan Lovely & Richard Vega, *A Death in Coral Springs: We Came Here For Freedom . . . We Live In Hell*, USA TODAY, Jan. 10, 1993, at 4.

⁹⁹ ANTI-VIOLENCE PROJECT: 1992 REPORT at 3 (on file with the author).

¹⁰⁰ FBI Press Release, *supra* note 89.

¹⁰¹ In 1991, there were approximately 23,000 non-negligent homicides nationwide. Homicide statistics are considered the most reliable crime statistics because murders are almost always reported. However, counting hate crime murders is highly unreliable because of the difficulty of determining the motives (in whole or in part) of the perpetrators, approximately 40% of whom are never even caught.

¹⁰² Klanwatch Director Dan Welch, Klanwatch Intelligence Report, Feb. 1993, at 5.

IV. THE PROBLEM WITH HATE CRIME STATISTICS

The collection of hate crime statistics raises unique problems. The first problem is to define "hate crime." The second problem is to establish a reliable means for determining when a perpetrator's bias should transform an ordinary crime into a hate crime. The third problem is to decide which prejudices are relevant to counting hate crimes.

A. DEFINING THE HATE CRIME'S BIAS ELEMENT

Bias or prejudice is not easily defined. The *International Encyclopedia of the Human Sciences* offers this guidance: "[P]rejudice is not a unitary phenomenon [I]t will take varying forms in different individuals."¹⁰⁴ If what constitutes prejudice seems vague, the scope of prejudice is virtually limitless. Some commentators argue that racism, sexism, homophobia, etc. are structural and pervasive influences in American cultural life.¹⁰⁵ If they are correct, then it may be impossible to point to any interactions between members of different groups unaffected by prejudice, at least to some extent. According to the federal Hate Crime Statistics Act, an ordinary crime becomes a hate crime when "motivated, in whole or in part, by the offender's bias against a race, religion, ethnic/national origin, group, or sexual orientation group."¹⁰⁶ The FBI defines ethnic prejudice as "[a] preformed negative opinion or attitude toward a group of persons of the same race or national origin who share common or similar traits, languages, customs, and traditions (e.g., Arabs, Hispanics, etc.)."¹⁰⁷ Under this definition, practically any crime committed by a member of one group against a member of another could qualify as a hate crime.

¹⁰³ The second FBI report, released by FBI Director Freeh while he was in Berlin on June 29, 1994, did not attract nearly as much media attention as did the first report. In fact, the media seemed much more interested in the Congressional testimony about hate crime that Steven Spielberg gave that same day than in the 7,654 hate crimes reported by the FBI for 1993. CRIM. JUST. INFORMATION SERVICES, UNIFORM CRIME REP., HATE CRIME—1993 (June 1994).

¹⁰⁴ OTTO KLINEBERG, 12 PREJUDICE: THE CONCEPT, INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 444 (David L. Sills ed., 1968).

¹⁰⁵ "To the extent this [common American] cultural belief system has influenced all of us, we are all racists." Charles R. Lawrence III, *The Id, The Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987).

¹⁰⁶ FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REP., HATE CRIME DATA COLLECTION GUIDELINES 4 (1990).

¹⁰⁷ *Id.* at 5.

B. MOTIVATION

There are serious problems in determining when a crime is motivated in whole, or *in part*, by bias. In addition to grave First Amendment issues which are beyond the scope of this paper,¹⁰⁸ determining motivation is a complex, frequently impossible, endeavor. Some, probably the majority, of hate crime offenders are not apprehended; their motivation must be inferred.¹⁰⁹ Even if apprehended, offenders will not provide insight into their motivations. In this situation, and in the situation where offenders are not caught, the coding of hate crimes depends upon information provided by the victim or inferred from the crime scene. Yet, the victim may be mistaken, hold personal biases that affect his or her judgment, be overly sensitive, have misperceived the incident, or simply be unreliable. While there will undoubtedly be some clear cases, many cases will be explicable in terms of a number of different motivations.

Consider a fight that occurs over a parking space, during the course of which a racial epithet is used. While obtaining a parking spot "motivates" the fight, under some statutory constructions the fight could be classified as a bias incident, subjecting the epithet utterer to a harsher criminal sanction.¹¹⁰ A much more complex problem would be presented by attempting to count the number of bias crimes that occurred, for example, during the L.A. riots in the aftermath of the Rodney King trial. Does all the property damage committed by African-Americans against Korean-owned stores count as bias crime?

C. WHICH PREJUDICES COUNT?

Subjectivity also pervades the determination of which prejudices transform an ordinary crime into a hate crime. For example, whether to include sexual orientation in hate crime bills has stirred controversy in Congress and in some states.¹¹¹ Given the sordid history of

¹⁰⁸ For an excellent discussion of these First Amendment Issues, see Susan Gellman, *Sticks and Stones Can Put You In Jail, But Can Words Increase Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws*, 39 UCLA L. REV. 333 (1991).

¹⁰⁹ According to the FBI, 42% of all hate crime offenders are never arrested. HATE CRIME—1993, *supra* note 103, at 1.

¹¹⁰ Alternatively, should an attack that is aimed at a person who is incorrectly perceived to be a member of a certain group be considered a hate crime? For example, in Laguna Beach, CA, a heterosexual man was brutally attacked by two men who incorrectly perceived him to be gay. The two attackers pled guilty to all charges, including the commission of a hate crime. While the motivation for the attack was hatred for gays, the attack was factually perpetrated against a non-gay man.

¹¹¹ Within the Hate Crime Statistics Act of 1990, which collects data for sexual orientation bias, an apparent *non sequitur* included to appease Senator Jesse Helms professes sup-

anti-gay violence, the exclusion of violence against gays and lesbians from any hate crime bill illustrates the point that the definition of hate crime is necessarily a political determination.¹¹²

Labelling and paying special attention to crimes motivated by certain biases arguably belittles crimes motivated by other biases that do not receive the same recognition. Are legislators delegitimizing the victimization of workers who are targets of assaults because of pro- or anti-union biases or of Planned Parenthood employees who are threatened and attacked by violent anti-abortionists?¹¹³

Which *predicate* crimes count as hate crimes (when motivated by bias) is a legislative determination that also shapes the perceived size and scope of the hate crime epidemic.¹¹⁴ For example, the Hate Crime Statistics Act of 1990 originally enumerated for data collection eight predicate crimes when motivated by certain biases: "murder, non-negligent manslaughter, forcible rape, aggravated assault, simple assault, intimidation, arson, and destruction, damage or vandalism of property."¹¹⁵ Exercising Congressionally-authorized discretion, the Attorney General added robbery, burglary, and motor vehicle theft.¹¹⁶ However, certain crimes were not included. One might wonder, for example, why kidnapping, if motivated by bias, does not count as a hate crime?

The political act of classifying whether or not a crime will be counted as hate crime determines the size of the problem. If hate graffiti counts, then the hate crime rate will be formidable indeed. If only violent crimes motivated by bias are counted, then the hate crime rate will be considerably lower.

port for "American family values" and disclaims any intent to promote homosexuality. See Jacobs & Eisler, *supra* note 73, at 102. See also Joseph M. Fernandez, *Recent Developments, Bringing Hate Crime Into Focus*, 26 HARV. C.R.-C.L. L. REV. 261, 276-281 (1991).

In Arizona, sexual orientation was (at least temporarily) dropped from a pending hate crime bill. See *Hate Crime Bill: Justice Dies in a Desk Drawer*, ARIZ. REPUBLIC, Feb. 16, 1995, at B6 ("Sexual orientation was not included in the [Arizona hate crime] bill. [State Senator] Smith made no secret that the bill would go absolutely nowhere with a mention of gays and lesbians."). *Id.*

¹¹² See Jacobs, ANN. SERV. AM. L., *supra* note 62, at 544-45.

¹¹³ On December 31, 1994, a gunman attacked two abortion clinics in Brookline, Massachusetts, killing two receptionists and wounding five other people. These are not the first deaths or assaults against people providing abortion services.

¹¹⁴ See Jacobs & Eisler, *supra* note 73, at 102-105.

¹¹⁵ FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REP., HATE CRIME DATA COLLECTION GUIDELINES 1 (1991).

¹¹⁶ These categories were created to coincide with crimes already listed in the UCR so as to facilitate data collection efforts.

V. TELLING A DIFFERENT STORY WITH THE SAME DATA

It is impossible to prove the null hypothesis: there is no hate crime epidemic. Even if we were to take on this quixotic task, "proof" would require the use of the same statistics criticized in this Article. Nevertheless, these same data can be used to tell a very different story than that which prevails in the media, government, and the legal academy.

We could, for example, point out that the Uniform Crime Report was able to identify only a small number of hate crimes. Similarly, the NYC Police Department, which has had a Bias Crime Unit for almost fifteen years,¹¹⁷ reported 440 bias *incidents* in 1994;¹¹⁸ a relatively small number for a city which records 710,000 felony arrests each year.

There are sharply conflicting views of the same situations. While a 1991 Klanwatch report stated that the number of white supremacist groups had increased significantly, the Georgia Bureau of Investigation reported "membership of white supremacist groups in Georgia had been pretty stable over the past few years" and that there were doubts whether "there had been any increase in the number of groups in such states."¹¹⁹

If it is true that "[t]he more people hear about hate crimes . . . the more likely they are to report such incidents to the ADL or the police,"¹²⁰ then why hasn't the number of reported hate crimes vastly increased? Even if we accept the inevitability of underreporting, an epidemic of hate crime would mean that more people are affected. If more people are affected, there should be a significant increase in the number of people reporting these crimes. Yet there hasn't been, at least according to both the FBI and the NYPD.

Does it make sense to say that 4,588 reported hate crimes constitutes an epidemic when more than 14,872,883 index crimes were reported to the FBI in 1991?¹²¹ Should an epidemic be inferred from less than .039% of all reported crimes? In fact, the total number of hate crimes (most of which fall into the less serious crime categories) represents only a minute fraction of reported crimes. It is impossible to conclude that these numbers represent a *trend* one way or the other.

¹¹⁷ See JACOBS, CRIM. JUST. ETHICS, *supra* note 36, at 55.

¹¹⁸ AUDIT OF ANTI-SEMITIC INCIDENTS, Anti-Defamation League, at 19, app. A (1994).

¹¹⁹ Ronald Smothers, *Hate Groups Seen Growing as Neo-Nazis Draw Young*, N.Y. TIMES, Feb. 19, 1992, at A14.

¹²⁰ Jacob Sullum, *How Perilous are Hate Crimes?*, SACRAMENTO BEE, Dec. 6, 1992, at F1.

¹²¹ UNIFORM CRIME REP.: 1991, *supra* note 91, at 5.

VI. AHISTORICISM

The socially constructed claim that hate crime has reached epidemic proportions flies in the face of history. It requires a certain amount of amnesia to state that “[n]ot since the days when the [Ku Klux] Klan regularly lynched people at the turn of the century . . . have we had anything like we have today,”¹²² or to state that “black students today face a level of hatred, prejudice and ignorance comparable to that of the days of Bull Connor, Lester Maddox and Orval Faubus.”¹²³ It is far beyond the scope of this Article to provide a comprehensive history of racial and ethnic violence, much less anti-religious violence, anti-homosexual violence, and anti-gender violence in the United States; such a history would require nothing less than a multi-volume treatise. Suffice it to say, however, that the claim that the country is now experiencing unprecedented levels of violence in all these categories borders on the preposterous.

A. NATIVE AMERICANS

Almost from the moment European settlers arrived in this country, Native Americans were the target of bigotry and hatred. Viewed as savages, they were routinely removed from their land by force. The nineteenth century was punctuated with atrocities against Native Americans, and unfortunately, by “atrocities” we are not referring to name calling and racist leaflets. Department of War documents from the early 1800s reveal that the United States, in an effort to exterminate Native Americans, distributed blankets infested with the smallpox virus.¹²⁴ During the 1820s, in North Carolina, Georgia, and other southern states, the Cherokees were rounded up by the U.S. military and force-marched to Oklahoma. During this 3,000 mile march, known as the “Trail of Tears,” hundreds of Cherokees died either at the hands of their military escorts, or from starvation and exposure.

In Arizona and New Mexico, settlers and officials of the Catholic church attacked Navajo camps, kidnapping women and children to use as slaves. During the 1850s and 1860s, the U.S. military hunted down and killed Navajos in a carefully orchestrated campaign. They surrendered after their peach orchards and crops were burned. The Navajos also were subjected to a forced march, known as “The Long

¹²² *Racially Motivated Violence, Hearings Before the Subcommittee on Criminal Justice of the House Committee on the Judiciary*, 100th Congr., 2d Sess. 14 (1988) (statement of the Rev. C.T. Vivian, Chariman of the Board, Center for Democratic Renewal).

¹²³ RICHARD BERNSTEIN, *DICTATORSHIP OF VIRTUE: HOW THE BATTLE OVER MULTICULTURALISM IS RESHAPING OUR SCHOOLS, OUR COUNTRY, OUR LIVES* 199 (1995) (quoting statement of John Slaughter, President of Occidental College).

¹²⁴ ANGIE DEBO, *HISTORY OF THE INDIANS OF THE UNITED STATES* (1972).

Walk," to Bosque Redondo, a remote military outpost in southeastern New Mexico. Those unable to keep up were shot. During the four years of imprisonment at Bosque Redondo, nearly half the Navajo population died.

In the late 1800s, several counties in Arizona and New Mexico offered bounties for Indian scalps—\$500 for male scalps and \$250 for women and children. A *New York Times* article, titled "Arizona and New Mexico Settlers Propose to Destroy the Savages," reported that citizens were organizing "in armed bodies for the purpose of going on a real old-fashioned Indian hunt."¹²⁵

B. BLACKS, LYNCHINGS AND THE KLAN

Lynching has a long history in the United States. It was first used after the Revolutionary War by vigilante patriots against loyalists and criminals. In the American West during the 1800s, cattle and horse thieves, murderers, claim jumpers, Hispanics, and Native Americans were common targets of lynch mobs.¹²⁶ Lynching, however, reached its pinnacle with the Klan's terrorism of blacks from the post-Civil War era well into the twentieth century.¹²⁷

From 1882 to 1968, 4,743 people were lynched; the vast majority were black.¹²⁸ During the peak lynching years, 1889-1918, the five most active lynching states were Georgia (360), Mississippi (350), Louisiana (264), Texas (263), and Alabama (244).¹²⁹ In 1982, 200 lynchings occurred in a single year.¹³⁰ These numbers include only the recorded lynchings; one can only speculate on the number of blacks whose deaths at the hand of lynch mobs went unreported. Many hundreds more blacks were injured and killed during race riots in the late nineteenth and early twentieth century. In March of 1871, a riot erupted in Meridian, Mississippi during the trial of three blacks accused of making "incendiary speeches." An argument escalated into a shooting spree in which twenty-five to thirty blacks were killed by rioters.¹³¹ Blacks who escaped the rioters unharmed took to the woods to hide, and the three blacks on trial were taken from the courthouse by

¹²⁵ LEWIS H. CARLSON & GEORGE A. COLBURN, *IN THEIR PLACE: WHITE AMERICA DEFINES HER MINORITIES, 1850-1950*, at 24 (1972).

¹²⁶ WALTER T. HOWARD, *LYNCHINGS: EXTRA-LEGAL VIOLENCE IN FLORIDA DURING THE 1930s*, at 17 (1995).

¹²⁷ CLAUDINE L. FERRELL, *NIGHTMARE & DREAM: ANTI-LYNCHING IN CONGRESS 1917-1922*, at 92 (1986).

¹²⁸ HOWARD, *supra* note 126, at 18.

¹²⁹ *Id.*

¹³⁰ FERRELL, *supra* note 127, at 91.

¹³¹ EVERETTE SWINNEY, *SUPPRESSING THE KU KLUX KLAN: THE ENFORCEMENT OF THE RECONSTRUCTION AMENDMENTS 1870-1877*, at 145 (1987).

Klansmen and hanged.¹³² The early part of the twentieth century saw anti-black riots, often led by the Klan, in Chicago, Tulsa, Memphis, and Washington, D.C.¹³³

The Ku Klux Klan, formed in 1865, terrorized southern blacks during the post-Civil War period to such a degree that many blacks went into semi-permanent hiding. According to David Chalmers, author of *Hooded Americanism: The History of the Ku Klux Klan*,

Unless there were federal troops at hand, the safest thing for Negroes to do was to hide during periods of Klan activity or after outbreaks of violence. It was reported that in some regions of South Carolina, more than a majority of the Negroes slept in the woods during the Klan's active winter of 1870-71.¹³⁴

In the 1920s, Klan membership soared into the millions. At its peak, it is estimated that four to five million people all across the country were members of the Klan.¹³⁵ The Klan targeted not only blacks, but recent immigrants, Catholics, Jews, and communists.¹³⁶ (By contrast, Klan members today are estimated at approximately 5,000 nationwide.)

C. NATIVISM: A POLITICS OF HATRED

Beginning in the 1820s and extending into the twentieth century, a mainstream political movement developed that was based on hatred of Catholics, Jews, and recent immigrants, primarily Irish, Italians, and Germans. Nativist leaders were not simply a fringe element on the American scene. They were elected to political office and published widely-read anti-Catholic and anti-immigrant newspapers. During the 1820-30s, the movement was called "nativism"; it then metamorphosed into the "Know Nothing Party." Later in the century it went by the name of American Protective Association (APA). In the twentieth century, it was again called nativism.

The rhetoric of the nativists encouraged hatred. Catholic churches were burned. Gangs and mobs attacked priests and immigrants in Massachusetts, Maine, Maryland, New Jersey, New York, and Pennsylvania.¹³⁷ In the 1840s, Philadelphia was the scene of sporadic rioting over the course of three months.

¹³² DAVID M. CHALMERS, *HOODED AMERICANISM: THE HISTORY OF THE KU KLUX KLAN* 14 (1987).

¹³³ FERRELL, *supra* note 127, at 92.

¹³⁴ CHALMERS, *supra* note 132, at 14.

¹³⁵ Anti-Defamation League, *Hate Groups in America: A Record of Bigotry and Violence* (1988).

¹³⁶ *Id.* at 110-111.

¹³⁷ DAVID H. BENNETT, *THE PARTY OF FEAR: THE AMERICAN FAR RIGHT FROM NATIVISM TO THE MILITIA MOVEMENT* 37-39 (1995).

Nativists and Irishmen, Protestants and Catholics clashed in fistfights and knifefights. They exchanged gunfire. They menaced each other with cannons, ready to be loaded with stacks of shot, powder, nails, chains, "anything" as one observer put it, that could be used "to kill and maim the foe." . . . [S]ome thirty people were killed, hundreds wounded, dozens of homes burned out.¹³⁸

Anti-immigrant and anti-Catholic violence flourished into the twentieth century. Anti-semitism became a force to be reckoned with and was rampant in all areas of American life. Newspaper classified advertisements for employment, housing, and vacation rentals openly declared that Jews were not acceptable.¹³⁹ Ironically, one of the most virulent American anti-semites of the first half of the twentieth century was a Catholic priest, Charles Coughlin. Father Coughlin's church had been the target of many Klan-orchestrated cross burnings. During the late 1920s, Coughlin began broadcasting his sermons on radio. Once the Great Depression hit, Coughlin began focusing on economic and social issues. An avowed enemy of the New Deal, Coughlin founded the National Union for Social Justice (NUSJ). By 1936, NUSJ recruited over five million members. His radio broadcasts, which boasted an audience of at least ten million listeners, were peppered with anti-semitic attacks; he praised Nazi Germany and the Third Reich. His anti-semitic message appealed to nativism's past victims, Irish and German Catholics. Young followers of Father Coughlin bragged about attacking Jews in Boston and New York.

Anti-semitism even reached the highest levels of the federal government. President Roosevelt's Assistant Secretary of State in the early 1940s, Breckenridge Long, was a nativist and an anti-semite. He wrote, "large numbers of Jews from Russia and Poland are entirely unfit to become citizens of this country [T]hey are lawless, scheming, defiant . . . just the same as the criminal Jews who crowd our police court dockets in New York."¹⁴⁰

D. OTHERS

We believe that the same ahistoricism that characterizes recent pronouncements of unprecedented violence against ethnic and racial groups affects claims about prejudice-motivate violence against women, gays, and lesbians. Until recently, however, gays and lesbians feared to openly affirm or demonstrate their sexual orientation. Now it is routine. Violence against women has always been high, but we know of no reason to believe that it is higher now than earlier in the

¹³⁸ *Id.* at 56.

¹³⁹ CARLSON & COLBURN, *supra* note 125, at 279.

¹⁴⁰ *Id.* at 269.

century, when women all too often had no where to go to report their victimization.

VII. CONCLUSION

Professor Abramovsky asserts that, "no one seriously questions the severity of the problem [of bias crime]."¹⁴¹ We do. The uncritical acceptance of a hate crime epidemic is unfortunate. It distorts discourse about the allocation of scarce resources both within and without the criminal justice system. Further, this pessimistic and alarmist portrayal of a divided conflict-ridden community may create a self-fulfilling prophecy and exacerbate societal divisions.¹⁴²

Minority groups may have good reasons for claiming the U.S. is in the throes of an epidemic. An "epidemic" demands attention, remedial actions, resources, and reparations. The electronic and print media also have reasons to support the existence of a rampant hate crime epidemic. Crime sells—so does racism, sexism, and homophobia. Garden variety crime has become mundane. The law and order drama has to be revitalized if it is to command attention.

History may show that modern society has actually experienced a reduction in violent crime against marginal groups. It is hardly necessary to point out our nation's history of bias: Native Americans were brutally murdered as the West was conquered; the blood and sweat of Chinese and other immigrant workers stain the expanses of railroad tracks across the midwest; lynchings of blacks were once common; violence against various European immigrants and Jews was a fact of life. Clearly, violence motivated by racism, xenophobia, anti-semitism and other biases is not new.

Perhaps what is new is greater intolerance of prejudice. The conclusion that hate crime has reached epidemic proportions today simply evinces the fact that bias crime is now much less acceptable and that victimized groups have a special social and political status. While it is possible to understand how and why the picture of a "hate crime epidemic" has come to dominate the American imagination, it is doubtful that this picture depicts reality.

¹⁴¹ Abramovsky, *supra* note 47, at 913.

¹⁴² See James B. Jacobs, *Should Hate Be a Crime?*, 113 PUB. INTEREST 3 (1993).