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THE STRUGGLE AGAINST HATE CRIME: MOVEMENT AT A CROSSROADS

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INTRODUCTION

Hate crime,¹ far from being an anomaly, has been a means of maintaining dominant power relationships throughout United States history.² Hate crime may be defined as acts of violence motivated by animus against persons and groups because of race, ethnicity, religion, national origin or immigration status, gender, sexual orientation, disability (including, for example, HIV status), and age.³ Thus defined,

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¹ For purposes of this Note, the terms "hate crime," "bias crime," and "bias motivated violence" are used interchangeably.

² For example, the systematic extermination of Native Americans could be characterized as hate crime. See James B. Jacobs & Kimberly Potter, *Hate Crime, Law & Identity Politics* (forthcoming 1998) (manuscript at 115-16, on file with the *New York University Law Review*) (detailing extent of organized campaigns of white violence against Native Americans); James B. Jacobs & Jessica S. Henry, *The Social Construction of a Hate Crime Epidemic*, 86 *J. Crim. L. & Criminology* 366, 387-88 (1996) (same). But see Jacobs & Potter, *supra* (manuscript at 43) (quoting legal director of University of Maryland's Center for the Applied Study of Ethnviolence as claiming that "[m]ass murder is mass murder; it's not a hate crime").

³ This definition includes acts of personal violence, threats, intimidation, harassment, or attacks against property motivated in part by such animus, as well as acts in which the victim is merely perceived to be a member of the target group. This definition is broader than many used in state and federal hate crime laws, see *infra* Part II.B, in that it encompasses "immigration status" as a corollary of "national origin" and includes animus based on gender, age, and sexual orientation. See *infra* note 163 and accompanying text. The National Asian Pacific American Legal Consortium has advocated for inclusion of immigration status in the definition, because persons who attack Asian Pacific Americans frequently invoke perceived immigration status. See National Asian Pacific Am. Legal Consortium, *1995 Audit of Violence Against Asian Pacific Americans: The Consequences of Intolerance in America* 11-12, 26 (1996) [hereinafter *Violence Against Asian Pacific Americans 1995*].

This definition does not include "hate speech," or words expressing animus without any actual or clearly implied threat of violence. Such speech, however, often creates a climate in which violence may flourish, whether committed by the speaker or by others emboldened by such speech. See generally *Group Defamation and Freedom of Speech: The Relationship Between Language and Violence* (Monroe H. Freedman & Eric M. Freedman eds., 1995) (presenting collection of conference reports arguing that language itself can be form of violence and that group defamation creates climate of hatred and oppression); *The Price We Pay: The Case Against Racist Speech, Hate Propaganda, and*

the category encompasses a wide range of historical practices, such as the many individual acts of violence against African Americans used strategically to cement slavery's power base.⁴ Historically, such crimes have been actively encouraged, passively condoned, or simply ignored by systems of governance, especially the criminal justice system.⁵ For example, lynching, practiced disproportionately against blacks, was for years an integral aspect of the administration of criminal justice, one that was often officially sanctioned.⁶

Pornography (Laura Lederer & Richard Delgado eds., 1995) (noting social science data demonstrating that hate speech promotes violence, discrimination, subordination, and degradation); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich. L. Rev. 2320 (1989) (arguing that widespread incidences of violence, vandalism, and harassment associated with hate speech call for legal sanctions). While significant First Amendment concerns have been raised in connection with efforts to control hate speech, see generally *The Price We Pay: The Case Against Racist Speech, Hate Propaganda, and Pornography*, supra (responding to claims that First Amendment protects hate speech), those issues are beyond the scope of this Note.

⁴ See Kenneth M. Stampp, *The Peculiar Institution: Slavery in the Antebellum South* 171-91 (Vintage Books 1989) (1956) (describing range of physical abuses against slaves, including jailing, placing in stocks, chaining and ironing, whipping, branding, mutilation, shooting, and mauling with dogs). It is possible to argue that slavery itself was hate crime on a massive scale. See *Dictionary of Afro-American Slavery* 615-21 (Randall M. Miller & John David Smith eds., 1988) (pointing out that while "slavery as a legal status preceded the use of race as a justification for exploitation," slave trade to Americas both relied upon and solidified racist subordination of blacks). Once slavery was abolished, see U.S. Const. amend. XIII (abolishing slavery), organized hate groups and ad hoc coalitions of whites began campaigns of terror against black communities in an attempt to freeze social and political relations in a pre-Reconstruction tableau. Black communities that achieved political and economic independence from whites were frequent targets for attack. See Paul Finkelman, Introduction, in *Lynching, Racial Violence, and Law* vii, vii (Paul Finkelman ed., 1992) ("In the years after Reconstruction southern whites continued to use violence to destroy black political power and to create and maintain a segregated society."). For example, in 1898 the multiracial political leadership of Wilmington, North Carolina was ousted. Newspapers reported between seven and sixteen black deaths while one witness claimed that at least 100 African Americans were killed. In the ensuing "economic coup" whites took over black jobs and unions. No one was prosecuted. See generally H. Leon Prather, Sr., *We Have Taken A City: Wilmington Racial Massacre and Coup of 1898*, at 119, 133-34, 173 (1984).

⁵ During and after slavery, for example, crimes committed by whites against African Americans were not legally punishable, punishable at lower levels than comparable crimes against whites, or ignored by authorities. See *Dictionary of Afro-American Slavery*, supra note 4, at 396-97 (describing lenient or nonexistent criminal penalties for whites who harmed slaves); Marvin D. Free, Jr., *African Americans and the Criminal Justice System* 28-32 (1996) (discussing slave codes, lynching, post-Civil War "black codes," and frequent violence against blacks); John A. Carpenter, *Atrocities in the Reconstruction Period, in Lynching, Racial Violence, and Law*, supra note 4, at 32, 36-43 (detailing post-Civil War racial violence as recounted in documents from that period, including contemporaneous accounts of local authorities refusing to assist black victims or prosecute their assailants).

⁶ See Charles E. Owens, *Looking Back Black*, in *Blacks and Criminal Justice* 7, 12 (Charles E. Owens & Jimmy Bell eds., 1977) (reporting Tuskegee Institute records revealing that 72% of lynching victims from 1882-1962 were black); see also Finkelman, supra note 4, at viii (describing lynching as form of "race control" and noting that anti-

Examples of hate crime abound as well in recent U.S. history: the murders of Emmett Till,⁷ Medgar Evers,⁸ and Vincent Chin;⁹ church bombings and attacks on peaceful black protesters during the civil rights movement of the 1960s;¹⁰ and the white-supremacist-inspired murders of Alan Berg,¹¹ Hattie Mae Cohens, and Brian Mock.¹² Much as hate crimes have persisted, so too has a clear pattern of differential administration of justice for minority victims. As late as the 1960s and into the 1980s, ill-trained police officers refused to document or investigate bias crime and even abused its victims.¹³ Prosecu-

lynching legislation was blocked by Southern senators in 1930s); Jacobs & Potter, *supra* note 2 (manuscript at 116-17) (discussing historic use of lynching against African Americans).

⁷ Emmett Till, a 14-year-old African American boy from Chicago, was kidnapped and shot in Mississippi in 1955 after he allegedly said "Bye, baby" to a white woman in a grocery store. The two white men accused of the murder were acquitted by an all white, all male jury. See Juan Williams, *Eyes On The Prize* 39-57 (1987).

⁸ Medgar Evers, Mississippi leader of the National Association for the Advancement of Colored People (NAACP), was murdered in his driveway in 1963. Ironically, Evers had been involved heavily with the Emmett Till case, personally finding witnesses and escorting them out of town after their testimony. See *id.* at 46-52, 221-26.

⁹ Vincent Chin was a Chinese American murdered in 1982 in Detroit by white men who mistakenly believed him to be Japanese; they blamed Japan for the decline of the United States auto industry. See National Asian Pacific Am. Legal Consortium, *1994 Audit of Violence Against Asian Pacific Americans* 6 (1995).

¹⁰ See Williams, *supra* note 7, at 179-95 (describing how, in 1963, Theophilus "Bull" Connor, Commissioner of Public Safety, repeatedly ordered police to attack demonstrators—including children—with fire hoses and dogs); *id.* at 202 (recounting 1963 killing of four little girls in bombing of Sixteenth Street Baptist Church in Birmingham; on same day two African American young men were killed in Birmingham, one by police and another by group of whites).

¹¹ Alan Berg, a Jewish radio talk show host in Denver, was murdered in his own driveway in 1984. Several members of Neo-Nazi groups were convicted of federal civil rights charges for the murder. See Jack Levin & Jack McDevitt, *Hate Crimes: The Rising Tide of Bigotry and Bloodshed* 1-5 (1993).

¹² Hattie Mae Cohens, an African-American lesbian, and Brian Mock, a white disabled gay man, were killed when the apartment they shared in Medford, Oregon was firebombed by three white supremacist skinheads in 1992. The firebombing occurred at the height of controversy over Proposition 9, a statewide ballot initiative that would have required widespread antigay discrimination, leading many to conclude that the attack was motivated by homophobia. It later appeared, however, that the Cohens and Mock were not the intended targets and that the firebombing was racially-motivated. See David Van Biema, *When White Makes Right*, *Time*, Aug. 9, 1993, at 40.

¹³ See Attorney General's Comm'n on Racial, Ethnic, Religious and Minority Violence, Calif. Dep't of Justice, *Final Report* 51 (1986) [hereinafter *California Report*] (calling attention to lack of police training that results in "inadequate and inappropriate responses that exacerbate community tensions"); Governor's Task Force on Bias-Related Violence, N.Y. Division of Human Rights, *Final Report* 105-07 (1988) [hereinafter *New York State Report*] (noting "disturbing" suggestion that bias crime "is ignored or not taken seriously by law enforcement personnel, who may view these matters as 'pranks'"); National Coalition of Anti-Violence Programs & N.Y. City Gay and Lesbian Anti-Violence Project, *Anti-Lesbian/Gay Violence in 1995*, at 52-53 (1996) [hereinafter *Anti-Lesbian/Gay Violence in 1995*] (citing national incident data which shows that, in cases where

tors at worst undercharged, refused to charge, or encouraged leniency, and at best failed to give the problem serious attention.¹⁴ Judges and juries sabotaged prosecutions or sentenced hate criminals lightly relative to other criminals.¹⁵

In the 1980s and early 1990s, however, unprecedented public attention was focused on hate crime. State and local governments appointed commissions to study the issue;¹⁶ police departments and prosecutors established specialized bias policies and procedures;¹⁷ state legislatures, and later the federal government, debated and passed hate crime laws in nearly every jurisdiction.¹⁸ Articles and books on the topic were published in ever increasing numbers.¹⁹ The issue even reached the Supreme Court, which heard and decided two hate crime cases in quick succession.²⁰ In seemingly no time at all, a

homophobic violence was reported to police, 37% of victims classified police response as "indifferent" and 8% as "abusive").

¹⁴ See New York State Report, *supra* note 13, at 148-49 (describing most prosecutors as having no focused effort against hate crime and noting low prosecution rates); Tanya Kateri Hernandez, Note, *Bias Crimes: Unconscious Racism in the Prosecution of "Racially Motivated Violence,"* 99 *Yale L.J.* 845, 852-53 (1990) (asserting that prosecutors do not identify with bias victims or take their victimization seriously, are prone to see hate crimes as pranks, and succumb to systemic pressures not to prosecute).

¹⁵ To give one prominent example, white supremacist Byron de la Beckwith was convicted in 1994 of the 1963 murder of Medgar Evers; two white juries in the 1960s had refused to convict. See Anti-Defamation League, *Danger: Extremism, The Major Vehicles and Voices on America's Far-Right Fringe* 5, 60 (1996) (describing eventual conviction of de la Beckwith); Williams, *supra* note 7, at 221-25 (describing Evers murder); see also Todd S. Purdum, *Judge Says He Lied In Story of a Brother Slain In Bias Attack*, *N.Y. Times*, Nov. 7, 1997, at A1 (describing 1963 racist murder of 13-year-old Virgil Ware in Birmingham on same day Sixteenth Street Baptist Church was bombed; one white assailant confessed to murder, was convicted of manslaughter, sentenced to seven months probation, and released early); Panel to Examine Remarks by Judge on Homosexuals, *N.Y. Times*, Dec. 21, 1988, at A16 (quoting Texas judge, who sentenced defendant to 30 years rather than life for murdering two gay men, as saying he would "put prostitutes and gays at about the same level" and that he would be "hard put to give someone life for killing a prostitute").

¹⁶ See *infra* Part II.A (describing such commissions, their activities, and mandates).

¹⁷ See *infra* Part II.C (tracing development and content of such policies and procedures).

¹⁸ See *infra* Part II.B (describing state and federal laws targeting hate crime).

¹⁹ See AnnJanette Rosga, *Policing Bigotry: Socio-Legal Constructions of Hate Crime 8 & n.29* (1996) (unpublished Ph.D. dissertation prospectus, Knox College) (on file with the *New York University Law Review*) (discussing creation in 1990 of "hate crime" as subject matter heading in Library of Congress to accommodate increase in publications on subject).

²⁰ See *Wisconsin v. Mitchell*, 508 U.S. 476, 479 (1993) (upholding state hate crime law allowing sentence enhancement upon proof of bias motivation); *R.A.V. v. St. Paul*, 505 U.S. 377, 381 (1992) (invalidating city ordinance applied against cross burning as unconstitutional viewpoint discrimination).

“hate crimes jurisprudence” had sprung up.²¹ Violence that once was tolerated increasingly was viewed as extraordinary, aberrant, and intolerable.²²

Today, many would argue that the most egregious examples of official tolerance of hate crime have become both more rare and taboo. Consider the following account of an exchange between a prosecutor and judge in 1988, after the murder of a gay Asian-American man: “A Broward County, Florida circuit judge jokingly asked the prosecuting attorney, ‘That’s a crime now, to beat up a homosexual?’ The prosecutor answered, ‘Yes, sir. And it’s also a crime to kill them.’ The judge replied, ‘Times have really changed.’”²³

This Note argues that such an extraordinary amount of police, legislative, judicial, scholarly, and community activity around hate crime in such a short period of time—less than two decades—is the result of an emerging social movement against hate crime. If, indeed, “times have changed,” such change is attributable to the rise and societal impact of a social movement dedicated to hate crime victims. This Note further argues that this anti-hate-crime movement has been rapidly assimilated into the institutions of criminal justice, with the result that anti-hate-crime measures now reflect the culture and priorities of those institutions and therefore inadequately alter those institutions’ treatment of hate crime and its victims.

Part I posits that the emergence and relative success of an anti-hate-crime movement, whose existence has not been described previously in the legal literature, is attributable to the civil rights and victims’ rights movements.²⁴ Those movements created collective beliefs, structural resources, and political opportunities that facilitated the emergence of a social movement organized around hate crime and its victims. Part II demonstrates the external impact of that movement by summarizing the explosion of government sponsored anti-hate-crime activity during the 1980s and 1990s. While most of the legal literature on hate crime has focused on hate crime laws, such laws represent but one aspect of a larger societal response that has included government commissions, police and prosecutorial reform

²¹ See generally James B. Jacobs, *The Emergence and Implications of American Hate Crime Jurisprudence*, 22 *Israel Y.B. on Hum. Rts.* 113 (1993) (discussing movement among American states to criminalize and increase punishments for hate crimes).

²² Whether hate crime is actually increasing or is merely now regarded as less tolerable is subject to debate. See *infra* note 88.

²³ Valerie Jenness & Kendal Broad, *Hate Crimes: New Social Movements and the Politics of Violence* 50 (1997).

²⁴ See *id.* at 21-48 (applying social movement theory to development of gay/lesbian and women’s anti-violence organizations and grounding those organizations in prior “rights” movements).

efforts, and social service provision. Part III argues that governmental adoption of anti-hate measures reflects the fact that such measures fit easily into the values of a criminal justice system that remains weighted against hate crime victims and their communities. This Part uses narrative accounts to illustrate some of the problems regarding how hate crime laws and policies are being implemented.²⁵ By raising doubts about the ability of current anti-hate efforts to achieve justice for victims and their communities, this Part suggests that the anti-hate-crime movement is failing to achieve its central goal of systemic transformation within criminal justice. The Note concludes that, to achieve this goal, the anti-hate-crime movement must engage in critical self-reflection, invest in movement infrastructure, and recommit to challenging the very institutions of criminal justice with which it now cooperates.

I

THE EMERGING ANTI-HATE-CRIME MOVEMENT

Social movements have been, since the 1960s, the subject of considerable academic attention.²⁶ Broadly defined, a social movement is the coming together of a group outside a society's established power structure in an attempt to create or prevent social change.²⁷ Within these broad parameters, theorists have attempted to describe some of the requirements for, and attributes of, social movements. Movements typically arise only at times when political and social factors are conducive to their formation.²⁸ The mere existence of a grievance is not enough; if political arrangements—for example, the existence of both a totalitarian state and a demoralized populace—would necessar-

²⁵ The author of this Note is the former HIV-Related Violence Program Coordinator at the New York City Gay and Lesbian Anti-Violence Project. The narratives are drawn from her personal experiences and observations, as well as from interviews with others in the field. Personal narrative increasingly is being used in legal literature, especially by feminists and critical race theorists. See, e.g., Matsuda, *supra* note 3, at 2320 n.3 (recounting author's personal experience of being victimized by anti-Asian hate speech); *id.* at 2322-24 (defining "outsider jurisprudence" as "jurisprudence derived from considering stories from the bottom" and asserting validity of reliance on "often ignored" sources such as journals, oral histories, and life stories).

²⁶ See, e.g., James L. Wood & Maurice Jackson, *Social Movements: Development, Participation, and Dynamics* 29-39 (1982) (discussing theories on social movements developed in 1960s and 1970s).

²⁷ See, e.g., Sidney Tarrow, *Power in Movement: Social Movements, Collective Action and Politics* 3-4 (1994) (defining movements as "collective challenges by people with common purposes and solidarity in sustained interaction with elites, opponents and authorities").

²⁸ See *id.* at 17-18 (discussing "political opportunity structure" as determinative of movement development); Wood & Jackson, *supra* note 26, at 42-43 (discussing "structural conduciveness" requirement for movement development).

ily frustrate collective challenge, no movement will arise.²⁹ If, however, political opportunities open the door to such challenges, a movement may emerge.³⁰ Its emergence then depends on the extent to which an identifiable grievance exists,³¹ the extent to which a consensus on its existence and problematic nature may be marshaled,³² and the presence of individual and organized group leadership capable of capturing and channeling mass energy and resources.³³

This Part argues that, though hate crime is far from new, a social movement focused on its victims was able to emerge in the 1980s and 1990s. That movement may be traced to the social changes occasioned by two larger movements: civil rights and victims' rights. Each made an undeniable impact on political and social relations in the United States. Together, they created the conditions conducive to an anti-hate-crime movement.³⁴

²⁹ See Wood & Jackson, *supra* note 26, at 43 (discussing argument that democratic societies are inherently more structurally conducive to reform movement development than totalitarian societies).

³⁰ See Tarrow, *supra* note 27, at 17-18 (arguing that political opportunity structure is main factor determining whether social movement will develop). This Note focuses primarily on political opportunity theory, not because other schools of social movement theory are inapplicable to an analysis of the anti-hate-crime movement, but because that theory best explains the historical and political processes leading to that movement. For an exploration of other schools of social movement theory, see generally *Comparative Perspectives in Social Movements* (Doug McAdam et al. eds, 1996) (discussing interaction between political opportunities, mobilizing structures, and framing processes as factors influencing social movements); *New Social Movements: From Ideology to Identity* (Enrique Laraña et al. eds., 1994) (examining social movements from wide range of perspectives, including broad views of social movement theory and specific national movements); John Wilson, *Introduction to Social Movements* (1973) (discussing manner in which social movements arise, social conditions in which they are formed, and structures or behaviors common to social movements).

³¹ One theorist refers to this factor as "structural strain." Wood & Jackson, *supra* note 26, at 43 (citing Neil J. Smelser's definition of structural strain as "existence of ambiguities, deprivations, tensions, conflicts, and discrepancies" from his groundbreaking 1963 work, *Theory of Collective Behavior*).

³² See Tarrow, *supra* note 27, at 22-23 (describing process of "consensus mobilization"); Wood & Jackson, *supra* note 26, at 43 (describing Smelser's requirement of the "growth and spread of generalized beliefs").

³³ See *Comparative Perspectives in Social Movements*, *supra* note 30, at 3-4 (describing resource mobilization theory and mobilizing structures); Tarrow, *supra* note 27, at 21 (arguing that mobilizing structures, such as "movement entrepreneurs" and "social movement organizations or SMOs" are essential to movement formation); Wood & Jackson, *supra* note 26, at 44 (discussing leadership as crucial aspect of "mobilization for action").

³⁴ Cf. Jenness & Broad, *supra* note 23, at 23 ("The discursive themes emanating from the 'rights' movements of the 1960s and 1970s formed the sociopolitical terrain that inspired and continues to fuel the contemporary movement to recognize, respond to, and criminalize violence motivated by bigotry in the United States.").

A. Precursor Movements

The victims' rights movement has profoundly influenced the development of criminal justice since the late 1960s, but has not—until quite recently—focused its attentions on bias crime. Conversely, civil rights movements on behalf of disenfranchised communities have always battled hate crime, but—prior to the 1980s—had not used the language of victims' rights to fight the battle. The confluence of these major social movements helps explain why, by the 1980s, a movement on behalf of bias victims took hold.

1. Civil Rights Movements

Civil rights groups typically have been organized in direct response to hate crimes against their communities and a perceived systemic bias against victims. The Anti-Defamation League of B'nai B'rith (ADL), for example, was founded in response to the 1913 prosecution and conviction of Leo Frank, a Georgia Jewish man accused of murder who was later lynched.³⁵ Similarly, the National Association for the Advancement of Colored People (NAACP) was founded in 1909 in response to racist lynchings and mob violence throughout the country.³⁶ This relationship between hate crime and civil rights organizing remains today.³⁷ Once formed, nearly all civil rights organizations have placed the struggle against hate violence among their central goals.

Bias crimes have also spurred mass mobilization on behalf of civil rights. Hate crimes committed during the African American civil rights movement of the 1950s and 1960s increased that community's willingness to challenge racism in all its forms and mobilized support on the part of non-black allies.³⁸ Indeed, images of hate crime from

³⁵ See Leonard Dinnerstein, *The Leo Frank Case 156-57* (2d ed. 1987) (describing founding of Anti-Defamation League of B'nai B'rith (ADL) after trial, which was widely perceived by Jews to have been motivated by anti-Semitism).

³⁶ See Langston Hughes, *Fight For Freedom: The Story of the NAACP 20-23* (1962) (describing founding of NAACP in response to 1908 Springfield, Illinois riot in which blacks were lynched, injured, and driven from city, and their homes and businesses destroyed). In 1940 the NAACP created a separate organization, the NAACP Legal Defense and Education Fund (NAACP LDF), to help victims of race riots. See Jack Greenberg, *Crusaders In The Courts: How A Dedicated Band of Lawyers Fought for the Civil Rights Revolution 19-23* (1994) (describing founding of NAACP LDF).

³⁷ Consider that over 80 years after the founding of ADL and the NAACP, the 1990 bias-motivated murder of Julio Rivera, a Latino gay man, led to the revitalization of a gay and lesbian liberation movement in Queens County, New York. See Interview with Ed Sedarbaum, Founder, Queens Gays and Lesbians United, in New York, N.Y. (Nov. 17, 1997) (describing growth of movement in wake of Rivera murder).

³⁸ See Jacobs & Potter, *supra* note 2 (manuscript at 118-19) (discussing violence against blacks and Jews during 1950s and 1960s); Tarrow, *supra* note 27, at 130 ("The more violent

that era, such as the burning cross and the burnt out church, remain among the most potent cultural symbols of that age.³⁹ That era's martyrs—including Martin Luther King, Jr., Medgar Evers, and the four young victims of the Birmingham Baptist Church bombing—still command a prominent place in our collective consciousness.⁴⁰

Newer movements, like that on behalf of gay and lesbian rights, have attempted to gain societal recognition and legitimacy by calling attention to similar incidents of violence.⁴¹ Such incidents make vivid the subordinated position of the gay community and mobilize some measure of sympathy from an otherwise hostile society. Similarly, by calling attention to anti-Asian violence, Asian Pacific Islanders are able to challenge their community's frequent mischaracterization as a "model minority" that experiences no racial biases or barriers.⁴²

These movements have borrowed strategy from one another, resulting in the development of a common "repertoire" of tactics, including demonstrations, hate crime incident audits, and lobbying for legal change.⁴³ For example, from the time of its founding, the NAACP's annual report contained a detailed report of the preceding year's lynchings, described and catalogued by state of occurrence, race of victim, alleged offense committed by victim, and method of killing.⁴⁴ Given an eventual decline in lynchings, the NAACP stopped

and unchristian the behavior of white powerholders, the greater the moral superiority of the students' tactics came to seem, and the more reasonable the movement's program.").

³⁹ A wave of burnings of predominantly black churches in 1995 and 1996 refocused national attention on racism and hate violence. See, e.g., Fox Butterfield, *Old Fears and New Hopes: Tale of Burned Black Church Goes Far Beyond Arson*, N.Y. Times, July 21, 1996, at A12 (reporting racial tension in South where approximately 67 black churches had been burned since 1995).

⁴⁰ See *supra* notes 7-10 and accompanying text. The recent release of the Spike Lee movie, *Four Little Girls*, is evidence of the continuing cultural resonance of that incident. See *Four Little Girls* (40 Acres and a Mule Productions 1997) (revisiting Birmingham bombing and interviewing surviving family members).

⁴¹ See Jenness & Broad, *supra* note 23, at 70 (characterizing efforts to document and publicize antigay violence as efforts to achieve "empirical credibility").

⁴² See *Violence Against Asian Pacific Americans 1995*, *supra* note 3, at 5 (declaring documentation of violence crucial to ensuring that policymakers and others recognize magnitude of anti-Asian bigotry).

⁴³ Tarrow has stated that movements create known repertoires of action which are borrowed both intramovement and outside of movement. See Tarrow, *supra* note 27, at 31-47. Similarly, Jenness and Broad discuss the "appropriation of established collective action frames" within and among movements, and propose that such borrowing occurs either via direct social links or through a more generalized process of "cultural drift" in which later actors assume the validity and viability of earlier movement actions. See Jenness & Broad, *supra* note 23, at 177-78.

⁴⁴ See, e.g., National Ass'n for the Advancement of Colored People, N.A.A.C.P. 24th Annual Report for 1933, at 20-26 (1934) (reporting 28 known lynchings, compared to 10 in 1932, all but four against black victims, and including three committed as extralegal punishment for allegedly insulting white women).

publishing its lynching audit, though its annual report continued to feature incidents of racial violence.⁴⁵ Evidencing an appreciation for the power of such reports, ADL in 1979 published its first tally of anti-Semitic crimes, tracking nearly identical categories of information on each incident.⁴⁶ Much as the NAACP had used its reports in the early 1930s to lobby for state and federal anti-lynching bills,⁴⁷ ADL used its audits to lobby for adoption of a model hate crime statute⁴⁸ and passage of the Hate Crime Statistics Act of 1990.⁴⁹ Similar audits were later released by the National Gay and Lesbian Task Force⁵⁰ and the National Asian Pacific American Legal Consortium.⁵¹

By the 1980s, organizing against hate crime had come to be understood as both a catalyst for civil rights activity and a central focus of civil rights movements. The image of the victimized individual and the correspondingly victimized community was well established as a symbol of the consequences of intolerance and bigotry. Much of that symbol's cultural potency, and the reason it assumed such a central role in civil rights activity, stemmed from an increasing societal recognition of crime victims and their rights and needs.

2. *Victims' Rights Movement*

As the African American civil rights movement began to recede in prominence, a potent new movement on behalf of crime victims was coming to the fore.⁵² In 1968 Richard Nixon declared freedom from violent crime to be "the first civil right of every American."⁵³ By 1983, one commentator noted that "the so-called victims' movement

⁴⁵ See, e.g., National Ass'n for the Advancement of Colored People, NAACP Annual Report for 1971, at 25 (1972) (describing, among other incidents, bombing of NAACP chapter president's home).

⁴⁶ See Anti-Defamation League of B'nai B'rith, Press Release of Anti-Semitic Incidents in 1979 (Dec. 8, 1979) (reporting unpublished audit showing 129 reported Anti-Semitic incidents nationwide).

⁴⁷ See, e.g., National Ass'n for the Advancement of Colored People, *supra* note 44, at 21-22 (describing formation of Writer's League Against Lynching and introduction of federal anti-lynching law).

⁴⁸ See *infra* notes 145-48.

⁴⁹ Pub. L. No. 101-275, 104 Stat. 140 (codified in part at 28 U.S.C. § 534 note (1994)); see *infra* note 179 (discussing passage of Act).

⁵⁰ See, e.g., Anti-Lesbian/Gay Violence in 1995, *supra* note 13, at 6-7 (describing 1985 National Gay and Lesbian Task Force report). Similar reports now are released annually by the National Coalition of Anti-Violence Programs, an association of gay and lesbian anti-violence groups. See *id.*

⁵¹ See Violence Against Asian Pacific Americans 1995, *supra* note 3, at 1-2, 26-27 (recommending tougher hate crime statutes at state and local levels).

⁵² For a comprehensive treatment of the history of victims' rights, see generally Frank J. Weed, *Certainty of Justice: Reform in the Crime Victim Movement* (1995).

⁵³ Transcripts of Acceptance Speeches by Nixon and Agnew to the G.O.P. Convention, N.Y. Times, Aug. 9, 1968, at A20.

seems to be making faster progress than any previous civil rights thrust in United States history.”⁵⁴

The “discovery” of crime victims in the late 1960s was largely a reaction to the Warren Court’s expansion of defendants’ rights.⁵⁵ As one self-described conservative scholar would later note in a subtitle, “Anarchy And Lawlessness . . . Set The Tenor And Tone For A Victims’ Rights Movement.”⁵⁶ Social upheaval connected to the civil rights struggle, therefore, led to a counter-movement that defined itself by association with victims of crime.⁵⁷

The victims’ rights movement also was tied to the women’s movement of the early 1970s. By drawing attention to the criminal justice system’s mistreatment of rape and domestic violence victims,⁵⁸ women’s rights advocates highlighted the problem of “secondary victimization”⁵⁹—abuse suffered by victims at the hands of police, prosecutors, social and medical service providers, and judges.⁶⁰

Women’s focus on rape and domestic violence and conservatives’ reaction against the “due process revolution” coincided in one important aspect: outrage against both perpetrators of violence and a sys-

⁵⁴ Curtis J. Sitomer, *New Civil Rights Thrust: Aid for Victims*, *Christian Science Monitor*, Apr. 5, 1983, at 1.

⁵⁵ See Valiant R.W. Poliny, *A Public Policy Analysis of the Emerging Victims’ Rights Movement* 9 (1994) (claiming that “Warren Supreme Court decisions promoting defendants’ rights” provoked “organizational battle-cries” on behalf of victims); Edward J. Van Allen, *Our Handcuffed Police: The Assault upon Law and Order in America and What Can Be Done About It* 13-22 (1968) (describing and criticizing Warren Court’s expansion of defendants’ rights); Shirley S. Abrahamson, *Redefining Roles: The Victims’ Rights Movement*, 3 *Utah L. Rev.* 517, 528 (1985) (“[S]upporters were reacting to the Warren Court’s expansion of defendants’ rights.”).

⁵⁶ Poliny, *supra* note 55, at 17.

⁵⁷ See *id.* at 9 (stating that “protest demonstrations[.]. . . [s]ocial unrest and blatant disrespect for order contributed to disenchantment with rehabilitation” and concern for victims).

⁵⁸ See, e.g., ABA, Section of Criminal Justice, *The Victim Witness Assistance Project, Victim/Witness Legislation: Considerations for Policymakers* 63-71, 85-86 (1981) [hereinafter *ABA Considerations*] (describing legislative efforts to combat domestic violence and advocating increased funding and attention to problem); Richard L. Aynes, *Constitutional Considerations: Government Responsibility and the Right Not to be a Victim*, 11 *Pepp. L. Rev.* 63, 64 (1984) (claiming that concern for victims “originated in modern times as a result of the women’s rights movement and its efforts to protect the welfare of rape victims”); Josephine Gittler, *Expanding the Role of the Victim in a Criminal Action: An Overview of Issues and Problems*, 11 *Pepp. L. Rev.* 117, 118 & nn.4-5 (1984) (citing feminist concern for rape and domestic violence victims).

⁵⁹ For an exhaustive listing of sources on secondary victimization, see Poliny, *supra* note 55, at 34 n.48.

⁶⁰ See, e.g., Jenness & Broad, *supra* note 23, at 26 (citing women’s movement’s central focus on “challenging law enforcement practices that fail to intervene effectively to assist injured women”).

tem that failed adequately to serve and protect victims.⁶¹ This convergence of interests, and its consequent mass appeal, has been credited with the success of the movement.⁶² As Wisconsin Supreme Court Justice Shirley Abrahamson noted:

The call to recognize victims' rights comes from all points on the political spectrum. It crosses party lines. . . .

. . . .

. . . [T]he victims' rights movement can engage the middle and upper classes in the cause. The victim is no longer "only" a rape victim or a minority or a poor person. The victim has become middle class America. We are all potential victims.⁶³

Both radical and reformist demands⁶⁴ developed in response to the widespread perception that the criminal justice system was "out of balance" and insensitive to victims.⁶⁵ Reformist demands have enjoyed relative success; most states and municipalities, for example, now provide money, social services, and special accommodations to soften victims' encounters with police and courts⁶⁶.

⁶¹ See Emilio C. Viano, *Victimology: A New Focus of Research and Practice*, in *The Victimology Handbook: Research Findings, Treatment, and Public Policy* xi, xi (Emilio C. Viano ed., 1990) (crediting women's movement and "efforts undertaken after the urban riots of the late 1960s" for development of victims' rights).

⁶² See Abrahamson, *supra* note 55, at 525-28 (discussing wide appeal of victims' rights movement and possible reasons for its success).

⁶³ *Id.* at 525-26.

⁶⁴ See Emilio C. Viano, *Task Force on Victims' Rights and the Justice System: A Background Document*, in *Victims' Rights and Legal Reforms: International Perspectives* 337, 337 (Emilio C. Viano ed., 1991) (describing radical demands as "victims' rights" and reformist demands as "victims' needs").

⁶⁵ See National Victim Center, *1989 Annual Report* 18 (1989) ("While a person accused of a crime is surrounded by constitutional guarantees of his or her rights, the innocent victim of violence has few protections. The Center is leading a national effort to correct this unfair imbalance in justice for *all* Americans."); Ronald Reagan, *Preface*, in *Crime Prevention Center, California Dep't of Justice, . . . And Justice For All: The Crime Victims Handbook* 3 (1981):

For most of the past thirty years, the administration of justice has been unreasonably tilted in favor of criminals and against their innocent victims. This tragic era can fairly be described as a period when victims were forgotten and crimes were ignored. We hope that things are now beginning to change for the better.

⁶⁶ See Abrahamson, *supra* note 55, at 548-58 (describing growth in victim compensation programs); David L. Roland, *Progress in the Victim Reform Movement: No Longer the "Forgotten Victim,"* 17 *Pepp. L. Rev.* 35, 41-48 (1989) (same). Radical demands have been less successful, though they continue to command popular support. These demands have included a return to private prosecution, formal party status for victims within criminal proceedings, requiring victim input with plea bargaining, informing victims of court dates and giving them the right to be present, and allowing victim impact statements at sentencing and before parole boards. See ABA Considerations, *supra* note 58, at 25-27 (1981); Abrahamson, *supra* note 55, at 535-48; Roland, *supra* note 66, at 37-41, 48-57. Sev-

Many victim programs were implemented during the 1970s as the victims' rights movement gained a toehold in the criminal justice establishment and as private victim advocacy organizations became more prominent.⁶⁷ It was during the 1980s, though, that—as two prominent victim advocates put it—the “entire issue of victims rights was elevated to its proper place in the criminal justice system.”⁶⁸ This “elevation” has been credited to Ronald Reagan’s Presidential Task Force on Victims of Crime, which in 1983 released an influential Final Report.⁶⁹ The report facilitated passage of major victims’ rights legislation, including the Omnibus Victim and Witness Protection Act of 1982⁷⁰ and the Victims of Crime Act of 1984⁷¹ (VOCA).

By the late 1980s, victims’ rights provisions of some sort had been adopted in every state,⁷² and the movement had permanently changed the expectations of many crime victims for fair treatment at the hands of the criminal justice system.

eral states have incorporated “Victims’ Bills of Rights” into their constitutions. See, e.g., Cal. Const. art. I, § 28; Mich. Const. art. 1, § 24; R.I. Const. art. I, § 23.

⁶⁷ In 1976 the American Bar Association established a Victims Committee in its Criminal Justice Section, and in 1979 it founded a Victim-Witness Assistance Project. See ABA Considerations, *supra* note 58, at Foreword. By 1989, there were over 6000 victim assistance groups in the country. See Frank Carrington & George Nicholson, *Victims’ Rights: An Idea Whose Time Has Come—Five Years Later: The Maturing of an Idea*, 17 Pepp. L. Rev. 1, 1, 14 (1989) (describing groups including National Organization for Victim Assistance, Victims’ Assistance Legal Organization, and Parents of Murdered Children).

⁶⁸ Frank Carrington & George Nicholson, *The Victims’ Movement: An Idea Whose Time Has Come*, 11 Pepp. L. Rev. 1, 3 (1984).

⁶⁹ President’s Task Force on the Victims of Crime, *Final Report* (1982). The Final Report made “some sixty specific recommendations for improving the plight of crime victims, addressed to, *inter alia*, the federal and state governments, police, prosecutors, the judiciary, parole boards, hospitals, the Ministry, the Bar, schools, the mental health community, and the private sector.” Carrington & Nicholson, *supra* note 68, at 7-8 (describing Final Report). By 1989, Congress had acted on 75% of those recommendations. See Carrington & Nicholson, *supra* note 67, at 5. Among the Task Force’s unsuccessful recommendations was an amendment to the Sixth Amendment of the United States Constitution, creating parallel rights for victims and defendants. See President’s Task Force on Victims of Crime, *supra*, at 114. The Victims’ Constitutional Amendment Network (Victims’ CAN) continues to advocate such an amendment to state constitutions. See Roland, *supra* note 66, at 40 & n.25.

⁷⁰ Pub. L. No. 97-291, 96 Stat. 1248 (codified as amended at 18 U.S.C. §§ 1512-1515, 3579-3580 (1994) and Fed. R. Crim. P. 32(c)(2)) (allowing victims to seek restitution and make victim impact statements, and protecting victims and witnesses from intimidation).

⁷¹ Pub. L. No. 98-473, 98 Stat. 2170 (codified as amended at 42 U.S.C. §§ 10601-10604 (1994)) (establishing, *inter alia*, Crime Victims Fund for state and local victim compensation and support services).

⁷² See Carrington & Nicholson, *supra* note 67, at 3-4 (discussing victims’ rights provisions that since 1984 had been adopted by “the legislatures of every state”).

3. *An Unlikely Combination Produces Unintended Consequences*

The preceding overview suggests that the victims' rights and civil rights movements would have little common ground from which an anti-hate-crime movement could emerge. The victims' rights movement was in many respects a reaction against civil rights activity.⁷³ Accordingly, hate crime victims and their communities—a core constituency of civil rights movements—never have been a focus of the victims' rights movement.⁷⁴

While victims' rights held out the promise of uniting disparate communities through the common experience of victimization,⁷⁵ that promise has not been realized. Though African Americans, for example, are more likely to be crime victims than whites,⁷⁶ it is the latter group that has dominated the discourse on victims' rights.⁷⁷ Some victims' advocates have taken positions overtly hostile to people of color and other potential victims of bias crime.⁷⁸ Those who are not overtly hostile often have been insensitive to the backgrounds and needs of bias victims.⁷⁹ Civil rights advocates, for their part, have regarded victims' rights as a threat to hard-won social progress, particularly in the area of defendants' rights.⁸⁰ The two movements have taken directly

⁷³ See *supra* notes 55-57 and accompanying text.

⁷⁴ In 1988, some two decades after the birth of victims' rights, the New York State Governor's Task Force on Bias-Motivated Violence declared: "It is time for the renaissance of concern and support for crime victims to specifically include the victims of bias-related violence." New York State Report, *supra* note 13, at 3.

⁷⁵ See *supra* note 63 and accompanying text.

⁷⁶ See, e.g., Free, *supra* note 5, at 16-20 (citing 1991 National Crime Victimization Survey).

⁷⁷ The majority of crime victims' groups either are or are perceived to be predominantly white. See Angela Y. Davis, *Women, Culture, & Politics* 43-45 (1989) (describing "rarity" of African American participation in anti-rape movement); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 *Stan. L. Rev.* 1241, 1242-43 (1991) (claiming that women of color are under-represented in feminist anti-violence discourse); Interview with Bryan A. Stevenson, Director, Equal Justice Initiative, in New York, N.Y. (Feb. 14, 1997).

⁷⁸ See, e.g., Poliny, *supra* note 55, at xvi-xvii (referring to assailants who attempted to steal expensive watch as "Hispanic punks" and "human debris," and expressing desire to hurl beer bottle at head of "lady judge" who sentenced assailants too lightly). This bias, coupled with the reality that crime victims are disproportionately poor and people of color, has led some to complain bitterly that "the 'war on crime' has been one of the few battles in which the black community has not been enlisted." Peter Kovler, *Black on Black Crime: A Taboo Broken*, 223 *Nation* 390, 390 (1976) (quoting Robert Woodson of National Urban League).

⁷⁹ See New York State Report, *supra* note 13, at ES2 & 13 (noting that victim service staff may not be free from biases, recommending training to minimize racial, ethnic, language, culture, and sexual orientation barriers between victims and service providers, and stating that "[f]ew victim programs make any special effort to include bias crime victims").

⁸⁰ Civil rights groups have a long history of commitment to defendants' rights, given biased enforcement of the criminal law and disproportionate arrest and conviction rates

opposing positions on a number of issues, notably the death penalty,⁸¹ the "war on drugs,"⁸² and federal criminal sentencing guidelines.⁸³

That an anti-hate-crime movement did emerge from such seemingly opposing forces is a testament to the unintended consequences that often flow from social movements.⁸⁴ Each movement had impressed its distinct story on the culture, preparing that culture to understand a combined narrative of criminal victimization motivated by bias.

within their communities. See Greenberg, *supra* note 36, at 96-99, 440-60 (describing NAACP LDF efforts on behalf of black defendants in areas of capital punishment, prisoners' rights, bail, jury discrimination, right to counsel, and forced confessions). This commitment stands in direct conflict to the stated goals of victims' rights advocates. See *supra* note 55 and accompanying text.

⁸¹ See *infra* Part III.A.5 (discussing conflict over death sentencing of hate crime offenders).

⁸² The National Victim Center publicly supports the government's "War on Drugs," see National Victim Center, *supra* note 65, at 7, while many have asserted that the "War on Drugs" victimizes poor and minority communities, see Robert Elias, *Wars on Drugs as Wars on Victims*, in *Victims' Rights and Legal Reforms: International Perspectives*, *supra* note 64, at 53; NAACP, *Beyond the Rodney King Story: An Investigation of Police Conduct in Minority Communities 102* (1995) [hereinafter *Beyond Rodney King*] ("The 'war on crime' and the 'war on drugs' have encouraged selective and racist law enforcement. In the name of eradicating drugs, police have been given a free hand to harass, violate the rights of, and brutalize minority groups. In the name of crime control, the police have reduced all African Americans to criminals.").

⁸³ The National Victim Center supported development of the Federal Sentencing Guidelines. See National Victim Center, *supra* note 65, at 19 (citing goals of "swift, sure and equitable justice for criminals"). Those guidelines have come under fire by civil rights groups for imposing harsher sentences for crack cocaine offenses, disproportionately committed by people of color, than for powder cocaine offenses, disproportionately committed by whites. See Reynolds Holding, *Crack Case Penalties Are Upheld, Court Has No Power to Ignore Guidelines*, *S.F. Chron.*, Dec. 14, 1996, at A3 (reporting that "civil rights groups have long attacked the sentencing disparity as racially discriminatory"); Gordon Slovut, *Tough crack laws aren't working, 'U' study finds: lighter penalties advised*, *Minneapolis-St. Paul Star-Trib.*, Nov. 20, 1996, available in 1996 WL 6937415 (stating that disparity in prison penalties between crack and powdered cocaine is 100 to 1); Stephanie Stone, *U.S. Appeals Courts Still Turning Down Challenges to Crack Cocaine Sentencing Laws*, *West's Legal News*, 1996 WL 265206, May 20, 1996, at *1 (reporting that 88% of punished crack offenders are African American). Several victims' rights groups filed amicus curiae briefs in *United States v. Armstrong*, 116 S. Ct. 1480 (1996), supporting the sentencing disparity in spite of its racially disparate impact. See Brief of the Criminal Justice Legal Foundation in Support of Petitioner, available in 1995 WL 758774, at *18-*23 (No. 95-157) (arguing that evidence that group of affected defendants are all of same race with no showing of any comparison group of persons not prosecuted does not suffice to prove discriminatory prosecution); Brief of Washington Legal Foundation, Maryland Coalition Against Crime, Inc., Parents Association to Neutralize Drug and Alcohol Abuse, Inc., and Allied Educational Foundation as Amicus Curiae in Support of Petitioner, available in 1995 WL 790420, at *13-*16 (No. 95-157) ("Statistical Evidence of Racial Disparities is Insufficient as a Matter of Law to Demonstrate Selective Prosecution").

⁸⁴ See Tarrow, *supra* note 27, at 172 (suggesting that movements have "indirect and long-term effects").

B. *An Anti-Hate-Crime Movement Emerges*

The civil and victims' rights movements created the cultural conditions under which hate crime could be named as a specific form of victimization. Similarly, the infrastructure put in place by those movements facilitated development of an anti-hate-crime movement sector.⁸⁵ Those movements also created the political conditions conducive to the emergence of an anti-hate-crime movement. Once hate crime could be seen as a victims' issue, anti-hate efforts became a politically palatable species of civil rights measure.⁸⁶

1. *Naming "Hate Crime" as a Social Problem*

The first task of the anti-hate-crime movement was to create a societal perception that hate crime was a specific evil requiring a specific response.⁸⁷ Civil rights movements had called attention to the personal costs of minority groups' political victimization; the victims' rights movement had called attention to the political context of personal victimization. Hate crime victims represented the site of overlap between these movement stories. "Hate crime" thus became a resonant new diagnosis. An old problem was reformulated, and an old class of victims acquired a new, specific subjectivity. Medgar Evers and Vincent Chin could now be seen, not as political martyrs, but as hate crime victims.

This new conception of hate crime as a distinct social problem resulted in the spread throughout the 1980s of a generalized perception that hate crime was increasing.⁸⁸ While some commentators have

⁸⁵ See *infra* notes 103-05 and accompanying text.

⁸⁶ See Jacobs & Potter, *supra* note 2 (manuscript at 50) (arguing that concept of hate crime "attempts to extend the civil rights paradigm into the world of crime and criminal law").

⁸⁷ As Tarrow describes this process:

Social movements are deeply involved in the work of 'naming' grievances, connecting them to other grievances and constructing larger frames of meaning that will resonate with a population's cultural predispositions and communicate a uniform message to powerholders and others. . . .

. . . [A movement] "has to develop a new diagnosis and remedy for existing forms of suffering, a diagnosis and remedy by which this suffering stands morally condemned."

Tarrow, *supra* note 27, at 122 (quoting Barrington Moore, Jr., *Injustice: The Social Bases of Obedience and Revolt* 88 (1978)). This process is also referred to as both "claims-making" and "framing." See Jenness & Broad, *supra* note 23, at 6-10 (describing processes through which existing social conditions come to be interpreted as social problems).

⁸⁸ Many commentators have asserted that hate crime, as an empirical matter, is increasing. See, e.g., Anti-Defamation League, *Hate Crimes Laws: A Comprehensive Guide 1* (1994) [hereinafter ADL, *Hate Crime Laws*] (arguing that hate crime is "widespread problem which is increasing steadily"); Governor's Task Force on Violence and Extremism, State of Maryland, Executive Dep't, *Final Report 3* (1987) [hereinafter *Maryland Report*]

disputed whether hate crime did actually increase,⁸⁹ the empirical validity of the claim is largely irrelevant; the perception that such crime was both increasing and increasingly intolerable demonstrates the new resonance of the movement's claim.⁹⁰

2. *Development of a "Movement Sector"*

The increasingly widely held view of hate crime as a problem mobilized the development of movement leadership. Much of the leadership for anti-hate efforts emerged from already established civil rights groups. This included the ADL,⁹¹ the NAACP,⁹² the Southern Poverty Law Center's Klanwatch Project,⁹³ the Center for Democratic Renewal,⁹⁴ the National Asian Pacific American Legal Consortium

(citing "rising tide of intimidation and bigotry" not peculiar to Maryland but "happening in every state in the country"); Levin & McDevitt, *supra* note 11, at vii-xi (claiming that "[o]ver the past few years, the number of attacks against people because of their race, religion, sexual orientation or ethnic origin has increased at an alarming rate"); Hernandez, *supra* note 14, at 846 (citing "pervasive recognition that racially motivated violence is on the rise"). Others assert that hate crime ebbs and flows in connection with political and social factors. See *Anti-Lesbian/Gay Violence in 1995*, *supra* note 13, at 62-64 (arguing that antigay ballot initiatives in Colorado, Oregon, and Maine, national debate on "gays in the military," and homophobic political rhetoric are directly correlated to increases in antigay violence); *Violence Against Asian Pacific Americans 1994*, *supra* note 9, at 4 ("anti-Asian sentiment appears to occur in waves, reflecting foreign military action and changes in immigration and economic conditions").

⁸⁹ See, e.g., Jacobs & Henry, *supra* note 2, at 387-91 (calling assertion that hate crime is increasing "ahistoric," given history of racial violence in United States, and claiming that hate crime is merely perceived to be "epidemic" because society has come to regard such violence as intolerable).

⁹⁰ See Jenness & Broad, *supra* note 23, at 5-7 (discussing movements as mechanisms through which people come to perceive and condemn social problems).

⁹¹ In addition to releasing an Annual Audit of Anti-Semitic Incidents, see *supra* note 46 and accompanying text, ADL issued a model hate crime statute, see *infra* note 146 and accompanying text, and throughout the 1980s broadened its focus to encompass various types of bias crime, see Interview with Howie Katz, Associate Director, New York Regional Office, Anti-Defamation League, in New York, N.Y. (Dec. 20, 1996). ADL has also worked with a wide variety of government agencies and law enforcement officials, publishing an impressive array of studies, compilations, and advocacy pieces. See generally *Anti-Defamation League*, *supra* note 15 (profiling rightwing extremist groups and their members); *Anti-Defamation League & United States Conference of Mayors, Combating Hate Crime in America's Cities: 1995 (1996)* (reporting collaborative effort with local governments); ADL, *Hate Crimes Laws*, *supra* note 88 (presenting model statute and tracking development of state hate crimes laws); *Anti-Defamation League of B'nai B'rith, Hate Crimes: Policies and Procedures for Law Enforcement Agencies (1988)* [hereinafter ADL, *Policies & Procedures*] (presenting overview of desired and actual police policies regarding hate crime).

⁹² See *supra* notes 44-45 and accompanying text.

⁹³ See, e.g., *Confronting America's Hate Crime Crisis*, Klanwatch Intelligence Rep. (Southern Poverty Law Center, Montgomery, Ala.), Feb. 1992, at 6 (reporting Klanwatch anti-hate-crime activities).

⁹⁴ See Center for Democratic Renewal, *When Hate Groups Come to Town: A Handbook of Effective Community Responses* (2d ed. 1992) (outlining anti-hate strategies).

(NAPALC),⁹⁵ the National Gay and Lesbian Task Force,⁹⁶ the Puerto Rican Legal Defense and Education Fund,⁹⁷ and the Center for Constitutional Rights.⁹⁸ To a much lesser degree than its civil rights counterpart, the organized victims' rights sector began in the late 1980s to devote attention to bias crime. For example, several victims' groups joined the Hate Crimes Coalition, lobbying for a comprehensive anti-bias law in New York State.⁹⁹

While already established organizations began to target hate crime, new grassroots groups emerged with hate crime as their exclusive focus. Prominent examples of such organizations are the New York City Gay and Lesbian Anti-Violence Project (AVP), founded in 1980 after a rash of antigay attacks in a Manhattan neighborhood,¹⁰⁰ and the Committee Against Anti-Asian Violence (CAA AV), founded in 1986.¹⁰¹ These and other grassroots anti-hate-crime groups¹⁰² are organizational hybrids, providing services traditionally associated with victims' organizations—for example, counseling, support groups, and crime victim compensation filing—as well as the lobbying, political activism, and legal advocacy associated with civil rights groups.¹⁰³

⁹⁵ NAPALC published its first audit of anti-Asian violence in 1993. See *Violence Against Asian Pacific Americans 1995*, supra note 3, at 4, 18-24 (referring to 1993 report). Other groups lobbying for recognition of anti-Asian crime included the National Democratic Council of Asian and Pacific Americans, the Japanese American Citizens League, and the Asian American Bar Association of the Greater Bay Area. See Jacobs & Potter, supra note 2 (manuscript at 98).

⁹⁶ See supra note 50 and accompanying text.

⁹⁷ See Hernandez, supra note 14, at 845 (quoting 1987 testimony on anti-Latino bias crime by Puerto Rican Legal Defense and Education Fund and citing that group's handling of bias reports from Latino community).

⁹⁸ See Hate Crimes Bill Coalition, *List of Member Organizations (May 18, 1995)* (on file with the *New York University Law Review*).

⁹⁹ See *id.* (listing participation of Center for Battered Women's Legal Services, Downstate Coalition for Crime Victims, and Victim Services Agency).

¹⁰⁰ See New York City Gay and Lesbian Anti-Violence Project, *HIV-Related Violence: A Resource Manual for HIV Service Providers in New York City 11* (4th ed. 1995) [hereinafter *HIV Manual*].

¹⁰¹ See Committee Against Anti-Asian Violence, *Police Violence in New York City's Asian American Communities, 1986-1995*, at 1 (1996) [hereinafter *CAA AV, Police Violence*] (describing CAA AV and its work); *CAA AV Takes on Systemic Violence*, *CAA AV Voice* (Committee Against Anti-Asian Violence, New York, N.Y.), Spring 1995, at 1 (reporting anti-Asian incidents, with special focus on violence against South Asian livery cab drivers); Committee Against Anti-Asian Violence, *You Could Be A Victim of Anti-Asian Violence* [hereinafter *CAA AV Pamphlet*] (describing services, including translation, police reporting and court assistance, and referrals) (on file with the *New York University Law Review*).

¹⁰² See, e.g., Jenness & Broad, supra note 23, at 183-90 (listing grassroots anti-violence programs for women, gay men, and lesbians).

¹⁰³ See, e.g., CAA AV Pamphlet, supra note 101 (describing services and advocacy); *HIV Manual*, supra note 100, at 11 (stating that New York City Gay and Lesbian Anti-Violence

The development of specialized organizations for hate crime victims was facilitated by the extensive infrastructure put in place by the victims' rights movement. Many "special victim" programs had been established in the 1970s to serve victim populations seen as particularly vulnerable, including children, the elderly, and victims of domestic violence and sexual assault.¹⁰⁴ As a result of movement advocacy, hate crime victims were added to the special victim list, resulting in the development of targeted programs and services.¹⁰⁵ Anti-hate-crime organizations were also able to draw on the funding sources available to victims' groups.¹⁰⁶ Perhaps most importantly, the anti-hate-crime movement inherited the victims' rights movement's focus on secondary victimization. Anti-hate-crime efforts have mirrored victims' rights measures that directly target the criminal justice system; perpetrators and potential perpetrators are not the primary audience.

3. *Social Tension and Political Opportunity*

The anti-hate-crime movement also drew strength from the continuing occurrence of hate crimes.¹⁰⁷ Communities often were propelled into action by specific crimes whose victims became potent cultural symbols capable of mobilizing and focusing ongoing action.¹⁰⁸ Once such cultural symbols were established, each subsequent hate crime reawakened a deep reservoir of community sentiment and potential for action. These vivid reminders of subordination collided

Project currently provides victim services, activism, and advocacy on behalf of gay, lesbian, and HIV-positive crime victims).

¹⁰⁴ See ABA Considerations, *supra* note 58, at 59-76 (discussing establishment of special programs for elderly and victims of domestic violence and rape); Abrahamson, *supra* note 55, at 525 & n.28 (describing special services for elderly).

¹⁰⁵ See New York State Report, *supra* note 13, at 9 (citing "precedent for establishing organizations, programs and service modules that emphasize type of crime or type of victim," such as domestic violence, sexual assault, children, and the elderly, to justify special programs for bias victims).

¹⁰⁶ See Jenness & Broad, *supra* note 23, at 52 (pointing out that Horizon's Anti-Violence Project in Chicago receives federal Victims of Crime Act funding through Illinois Criminal Justice Information Authority); *id.* at 78-79 (explaining that New York City Gay and Lesbian AVP's hotline was funded by the New York State Crime Victim's Board, and that Gay and Lesbian Community Center of Colorado's Anti-Violence Project received Victims of Crime Act and State Victim Assistance Law Enforcement grants to expand services).

¹⁰⁷ See Tarrow, *supra* note 27, at 38-39 (arguing that death, grief, and martyrdom are powerful mobilizers); Wood & Jackson, *supra* note 26, at 43-44 (noting theory that once generalized belief takes hold, "precipitating factors" challenging belief spur movements into existence).

¹⁰⁸ See, e.g., *infra* notes 127-28 (describing formation of anti-hate-crime commissions in response to specific crimes); see also Tarrow, *supra* note 27, at 1 (noting that movements have at their base cultural symbols through which social relations are understood).

with society's desire to believe such subordination was extinct. Further, the criminal justice system's perceived inability to handle such crimes challenged the new ideal of a victim-centered society.¹⁰⁹ At the same time, however, the country was becoming more politically conservative and less willing to devote significant resources to promoting equality for disenfranchised groups.¹¹⁰

Measures against hate crime emerged as a way for governmental authorities to ease the tension between social desire and political reality.¹¹¹ "Reform is most likely when challenges from outside the polity provide a political incentive for elites within it to advance their own policies and careers,"¹¹² and calls to combat hate crime presented just such an incentive. One commentator has asserted that hate crime laws allow legislators to support a civil rights measure while simultaneously appearing "tough on crime."¹¹³ Because hate crime laws and other anti-hate-crime measures fit easily into an anti-crime, pro-victim agenda, supporting them became an effective way for political actors to communicate a message of "caring" about disenfranchised communities without alienating conservative constituents.¹¹⁴ Constituents have in turn interpreted their governments' willingness to adopt anti-hate measures as a gauge of their commitment to target communities.¹¹⁵ Such measures therefore became a powerful communication

¹⁰⁹ Such clashes are an example of "structural strain." See *supra* note 31 and accompanying text.

¹¹⁰ See U.S. Comm'n on Civil Rights, Pub. No. 77, *Intimidation and Violence: Racial and Religious Bigotry in America* 13 (1983) (citing "widespread perception that the Federal Government is relaxing its enforcement posture in the area of civil rights and cutting back on social programs" and noting "current shift toward a conservative political philosophy").

¹¹¹ See Jacobs & Potter, *supra* note 2 (manuscript at 140-42) (discussing political appeal of hate crime laws).

¹¹² Tarrow, *supra* note 27, at 98.

¹¹³ See David Chang, *Beyond Uncompromising Positions: Hate Crimes Legislation and the Common Ground Between Conservative Republicans and Gay Rights Advocates*, 21 *Fordham Urb. L.J.* 1097, 1098 (1994) (noting that hate crime laws further conservative political agenda by furthering "law and order").

¹¹⁴ See S. Rep. No. 101-21, at 3 (1989), reprinted in 1990 U.S.C.C.A.N. 158, 160 (declaring that passage of Hate Crime Statistics Act, Pub. L. No. 101-275, 104 Stat. 140 (1990) (codified in part at 28 U.S.C. § 534 note (1994)), would "send an . . . important signal to victimized groups everywhere that the U.S. Government is concerned about this type of crime"); ADL, *Policies & Procedures*, *supra* note 91, at 1, 3 (noting risk of increased tension when "targeted group perceives that law enforcement officials are not taking the problem seriously" and suggesting establishment of hate crime reporting system as "important step which clearly demonstrates to the community that law enforcement officials have a genuine interest in the problem of hate crimes").

¹¹⁵ Maryland's efforts are illustrative. In the early 1980s, that state took several measures targeting hate crime. A change in the citizenry's perception of the government's commitment to the issue quickly followed. See Survey Research Center, *Ethnic, Racial and Religious [sic] Attitudes in Maryland, Survey II, Report to the Governor's Task Force on*

device between governments and the communities frequently targeted by hate crime (target communities), one with few political drawbacks.¹¹⁶

Anti-hate-crime measures also had the political virtue of being separable from other civil rights demands on the part of target communities.¹¹⁷ This separation has been most evident in the context of gay and lesbian rights and is reflected in the text of the Hate Crime Statistics Act¹¹⁸ (HCSA). Conservatives upset with the inclusion of sexual orientation, while unable to block HCSA's passage, did force the inclusion of a "seeming non-sequitor [sic]"¹¹⁹ that disavows any generalized support of homosexuality or gay civil rights.¹²⁰ It is possible to support anti-hate-crime measures without supporting the more controversial and resource-heavy demands of disenfranchised groups

Violence and Extremism (1986), reprinted in Maryland Report, *supra* note 88, at 26, 30 [hereinafter Survey Research Center, Survey II] (discussing state's adoption of anti-hate-crime measures in early 1980s). Compare Survey Research Center, Maryland Survey on Violence and Extremism (1982), reprinted in Maryland Report, *supra* note 88, at 19, 21 (reporting results from 1982 Survey on Violence and Extremism, in which 41% of respondents indicated that federal government leaders did not care one way or the other about hate crime and that 22% of state leaders did not care), with Survey Research Center, Survey II, *supra*, at 30 (identifying, by 1986, "notable drop in the perception that national leaders didn't care"). The change in attitude was most significant among black respondents. In 1982, only 28.4% of black respondents felt that national leaders disapproved of bias incidents, and 53.9% felt that state leaders disapproved. See *id.* at 34. In 1986, 51% perceived that national leaders disapproved, and 70.6% felt that state leaders disapproved. See *id.* The variation was less among white voters, a strong majority of whom perceived government disapproval in both survey years. See *id.* at 29.

¹¹⁶ See Jacobs & Potter, *supra* note 2 (manuscript at 138) (claiming that "hate crime laws are symbolic statements requested by advocacy groups for material and symbolic reasons and provided by politicians for political reasons"); see also James B. Jacobs, Implementing Hate Crime Legislation Symbolism and Crime Control, 1992-93 Ann. Surv. Am. L. 541, 543-46 (suggesting that symbolic laws, especially those "denouncing" universal evil such as hatred, carry tremendous political weight at low cost, and claiming that "audience" for legislators passing hate crimes laws is comprised of advocacy groups and their constituents).

¹¹⁷ See Chang, *supra* note 113, at 1100 ("One can be antigay, yet still support the criminalization of those who advocate antigay values through the vigilantism of hate-motivated assault."); Stephen Power, Groups rally for gay rights in Tyler: 150 protesters demand tougher hate-crime laws, Dallas Morning News, Feb. 19, 1995, at 33A (quoting president of Dallas Gay and Lesbian Alliance as saying that though political climate "right now is pretty much on the right . . . it should be pretty easy to get people on board for" hate crime bill, though no such support could be garnered for extending benefits to same-sex partners).

¹¹⁸ Pub. L. No. 101-275, § 2(a)-(b), 104 Stat. 140, 141 (1990) (codified in part at 28 U.S.C. § 534 note (1994)).

¹¹⁹ Jacobs, *supra* note 116, at 545.

¹²⁰ See HCSA § 2(a)-(b), 104 Stat. at 141 (finding that "the American family life is the foundation of American Society" and stating that "[n]othing in this Act shall be construed, nor shall any funds appropriated to carry out the purpose of the Act be used, to promote or encourage homosexuality").

for equality in housing, education, wealth, and sexual freedoms.¹²¹ Doing so allows government authorities to condemn the most extreme manifestations of prejudice without committing to eradication of lesser, more pervasive forms.¹²²

II

TWO DECADES OF ANTI-HATE-CRIME ACTIVITY

Because the anti-hate-crime movement has been supported by both the civil rights and victims' rights movements, and because change is most likely when "a system is challenged by a range of movements, and not when individual movement organizations mount challenges that can be easily repressed or isolated,"¹²³ the movement emerged as a powerful force. That this is so despite deep divisions within the movement¹²⁴ is evidence of the strong cultural resonance of the movement's claims and the political advantages of anti-hate measures. Anti-hate-crime measures flourished in the 1980s, a decade that saw the passage of new hate crime laws in more than half the states,¹²⁵ as well as an eruption of government commissions and reports, changes in police policies, and founding of new organizations. Such activity has continued throughout the 1990s.

A. *Local, State, and Federal Government Responses to Hate Crime*

Throughout the 1980s, numerous states and municipalities established commissions to focus on bias crime, akin to President Reagan's

¹²¹ See Jacobs & Potter, *supra* note 2 (manuscript at 102) ("Passing laws denouncing hate crime provides politicians with an opportunity to decry bigotry. They can propose anti-hate-crime legislation as a quick-fix solution that is cheap and satisfying to important groups of constituents.")

¹²² One legal advocate for hate crime victims has expressed discomfort with hate crime laws on this basis. In her opinion, this phenomenon reflects a "hate the sin, love the sinner" attitude which ultimately erodes claims of right by that group. See Interview with A. Widney Brown, HIV-Related Violence Program Coordinator, New York City Gay and Lesbian AVP, in New York, N.Y. (Oct. 22, 1996).

¹²³ Tarrow, *supra* note 27, at 98.

¹²⁴ See *infra* III.B. (describing divisions and conflicts within the anti-hate-crime movement).

¹²⁵ ADL reported in 1992 that 46 states and the District of Columbia had enacted statutes addressing hate violence. See Anti-Defamation League & United States Conference of Mayors, *Addressing Racial and Ethnic Tensions: Combating Hate Crimes in America's Cities 1* (1992). That figure, however, does not accurately reflect the boom in such legislation during the 1980s, as it included a wide variety of very old statutes, including laws against "masking" and "nightriding." See *infra* note 143 and accompanying text. As of 1994, 35 states had enacted new hate crimes laws addressing interpersonal violence. See ADL, *Hate Crimes Laws*, *supra* note 88, at 4-5, 7.

Task Force on Victims of Crime.¹²⁶ These governmental bodies were often formed in response to particular widely publicized incidents and subsequent community mobilization.¹²⁷ In Maryland, for example, the Governor established a special task force in response to an appeal by the Coalition Opposed to Violence and Extremism (COVE)—whose members included the NAACP, the Urban League, and the National Conference of Christians and Jews—after a spate of hate crimes.¹²⁸

Such commissions generally were charged with gathering testimony from hate crime victims and their communities, evaluating the ability of existing laws to address hate crime, assessing the adequacy of victim services, and identifying needed changes to police procedures.¹²⁹ Government commissions therefore represented a crucial dialogue point between the anti-hate-crime movement sector and its constituent target communities, on the one hand, and systems of governance on the other.

Powerful and disturbing testimony elicited in such hearings led commission members overwhelmingly to conclude that hate crime was a significant problem not adequately addressed by police, prosecutors, and service providers.¹³⁰ Accordingly, these commissions released a series of recommendations that influenced the subsequent develop-

¹²⁶ See *supra* note 69 and accompanying text; see also James Bennet, Clinton Backs Expanding Definition of a Hate Crime, *N.Y. Times*, Nov. 11, 1997, at A20 (reporting on recently convened White House Conference on Hate Crimes).

¹²⁷ See *N.Y. Exec. Order No. 90* (Feb. 6, 1987) (establishing New York State Governor's Task Force on Bias-Related Violence in response to "several events in our state and other regions"); California Report, *supra* note 13, at 3 (stating that Commission was established in 1984 in response to more than five violent incidents); Mayor's Advisory Council on Community Relations, Final Report 1-4 (1989) [hereinafter *New York City Report*] (reporting that New York City Mayor Edward I. Koch founded Council in response to murder of Michael Griffith in Howard Beach incident).

¹²⁸ See Maryland Report, *supra* note 88, at 3 (describing several incidents and noting increase in Klan activity throughout nation).

¹²⁹ See California Report, *supra* note 13, at 3 (stating that mandate of Commission was to obtain accurate information on and develop standard definition of hate crime; to encourage implementation of measures to reduce hate crime; and to act as liaison to affected communities); Maryland Report, *supra* note 88, at 5 (stating that Task Force's mission was to determine extent of racial, religious, and ethnic bias in Maryland; to conduct public education; to facilitate incident reporting; and to develop victim assistance programs); New York City Report, *supra* note 127, at Ex. Sum.—1 (stating Council's mandate to review city government's response to bias crime, to learn from perspectives of community leaders and experts, and to recommend program improvements in field of intergroup relations); New York State Report, *supra* note 13, at ES1 (stating mandate to hold public hearings, receive information on bias crime, analyze existing governmental responses, and recommend appropriate educational programs, police training, and changes in law).

¹³⁰ See, e.g., California Report, *supra* note 13, at 7 (finding that hate crime "poses a threat to the peace and safety of our communities" and that "[e]xisting civil and criminal laws fail to effectively protect the rights of hate violence victims").

ment of law and policy.¹³¹ The commissions thus served not only as sites of dialogue, but as mechanisms through which the anti-hate-crime movement implemented its agenda of systemic reform.¹³²

While commission recommendations varied somewhat, they generally centered on improving bias victims' access to government services,¹³³ achieving greater coordination among those services,¹³⁴ establishing state hate crime laws,¹³⁵ and making existing laws more comprehensive.¹³⁶ Additionally, the Maryland Governor's Task Force

¹³¹ See, e.g., Attorney General's Comm'n on Racial, Ethnic, Religious and Minority Violence, Implementation Task Force Progress Report 3-4 (1987) [hereinafter California Implementation] (noting state adoption of numerous Commission recommendations); U.S. Comm'n on Civil Rights, Intimidation and Violence: Racial and Religious Bigotry in America 19-21 (1983) (listing public commissions formed to combat hate crime and citing claim that Rhode Island Coalition Against Bigotry was "instrumental" in passage of state hate crime law).

¹³² See Tarrow, *supra* note 27, at 6 (arguing that social movements increasingly are marked by states acting not only as targets of social movements but as fulcrums for claims against others).

¹³³ See, e.g., California Implementation, *supra* note 131, at 14 (recommending greater access and describing, as examples of solution, workshop on hate crime organized by California Office of Criminal Justice Planning and pamphlet detailing resources for bias victims). The Commission also recommended passage of a Hate Violence Prevention and Protection Act to establish and fund county Human Relations Centers to assist bias victims. See California Report, *supra* note 13, at 33-34. A year later, however, the committee charged with evaluating implementation concluded that little headway had been made in improving victim services. See California Implementation, *supra* note 131, at 14-15 (finding that "practical assistance and support services are still not being received by most victims of hate crimes"); see also New York State Report, *supra* note 4 (calling for increase in social services for hate crime victims).

¹³⁴ See New York City Report, *supra* note 127, at 12-17 (describing recommendation that City establish coordinated interagency bias response mechanism and reporting Mayor's creation of Bias Response Coordinating Committee in response); see also Exec. Order No. 115, §§ 3-4 (establishing New York City Bias Response Coordinating Committee, comprised of officials from the Mayor's Office, Police Department, Board of Education, Community Assistance Unit, and Commission on Human Rights, as well as "secondary members" such as Youth Bureau and Victims Services Agency), reprinted in New York City Report, *supra* note 127, at App. 1.

¹³⁵ See, e.g., Maryland Report, *supra* note 88, at 44-45 (discussing Task Force's recommendation that legislation defining harassment and providing relief for hate crime victims be adopted); see also Md. Code Ann., art. 88B, §§ 9(b), 10(b) (1995) (requiring state to "collect and analyze information relating to incidents apparently directed against an individual or group because of the individual's or the group's race, religion, ethnicity, or sexual orientation" and to report this information to the State Human Relations Commission).

¹³⁶ The Maryland Governor's Task Force on Violence and Extremism was heavily involved in refinement and implementation of the first law in the country to mandate data collection of hate crime. See Maryland Report, *supra* note 88, at 51-54 (reporting law and Task Forces' involvement in its development). The California Attorney General's Commission on Racial, Ethnic, Religious and Minority Violence, which considered crimes against gay men, lesbians, the disabled, and the elderly under the rubric of "minority," recommended amendments to the state's "Ralph Civil Rights Act." See California Report, *supra* note 13, at 8; see also Cal. Civ. Code § 51.7(a) (West Supp. 1998). That Act provides that:

on Violence and Extremism commissioned two surveys of racial attitudes in Maryland,¹³⁷ convened the first conference on bias crime held in the country,¹³⁸ and helped to found the National Institute Against Prejudice and Violence (NIAPV), still in existence today.¹³⁹

Commission recommendations were acted upon not only in their respective states but also in others following their example. The Maryland police guidelines for hate crime identification, for example, which were developed in response to that state's data collection law, were adopted by other states seeking to track such data.¹⁴⁰ Eventually, the FBI used state and local guidelines in developing compliance

All persons within the jurisdiction of this state have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property because of their race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age, disability, or position in a labor dispute, or because another person perceives them to have one or more of those characteristics.

Id. For example, the Commission recommended increasing compensatory damages, granting trial priority to such suits, and bringing suits against law enforcement agencies that engage in a pattern of violation. See California Report, *supra* note 13, at 7-9. It also recommended amending the existing state penal law dealing with hate crimes to refer to sexual orientation, disability, and age. See *id.* at 30. Many of these amendments were later adopted. See California Implementation, *supra* note 131, at 11-12.

¹³⁷ See Maryland Report, *supra* note 88, at 17-18 (explaining that Task Force commissioned study in 1981 to gather basic data and commissioned second study four years later to observe changes in attitudes and to aid in making recommendations).

¹³⁸ This conference was held in 1981 and was cosponsored by the Governor's Task Force and the Coalition Opposed to Violence and Extremism (COVE), a private group. See Maryland Report, *supra* note 88, at 85 (noting that conference drew 350 attendees from throughout state). Subsequent conferences on hate crime were held for business leaders, educators, and religious leaders. See *id.*

¹³⁹ See Maryland Report, *supra* note 88, at 147-50. Finding that there was no comprehensive national resource to which governments and private organizations could turn when formulating bias responses, Governor Harry Hughes—urged by the Task Force and with approval of the National Governors' Association—asked the Maryland legislature for seed money for a private, nonprofit clearinghouse centered at the University of Maryland. See *id.* at 149-50. The National Institute Against Prejudice and Violence (NIAPV) held its first national conference on bias crime in September, 1986. See *id.* at 150. Additionally, it has published numerous influential booklets. See, e.g., National Institute Against Prejudice and Violence, *Striking Back at Bigotry: Remedies Under Federal and State Law for Violence Motivated by Racial, Religious, and Ethnic Prejudice* (1986) [hereinafter NIAPV, *Striking Back*]; National Institute Against Prejudice and Violence, *Striking Back at Bigotry: Remedies Under Federal and State Law for Violence Motivated by Racial, Religious, and Ethnic Prejudice*, 1988 Supplement (1988).

¹⁴⁰ See ADL, *Policies & Procedures*, *supra* note 91, at 4-5 & n.2 (crediting Baltimore County Police Department for proposed bias reporting guidelines in other states); Law Enforcement/Uniform Crime Report, reprinted in Maryland Report, *supra* note 88, at 53 ("These procedures, applauded throughout the nation, serve as a model throughout law enforcement and are being replicated in other jurisdictions in the State of Maryland.").

standards for HCSA.¹⁴¹ Furthermore, in 1983, the United States Commission on Civil Rights published *Intimidation and Violence: Racial and Religious Bigotry in America*, a call to action that spurred several states to examine their official treatment of hate crime and its victims.¹⁴²

While the mandates and recommendations of government commissions differed among jurisdictions, all urged self-reflection on the part of government, especially with regard to the adequacy of laws, policies, and services provided to victims of hate crime. The legislative, police, and prosecutorial responses to that call are the subjects of the following sections.

B. Hate Crime Laws

1. State Hate Crime Laws

Prior to 1980, numerous states had laws targeting hate crime, many passed during the Reconstruction era to limit Ku Klux Klan activity.¹⁴³ Many states also had statutes prohibiting interference with religious worship and vandalism of religious institutions.¹⁴⁴ No state, however, had pursued a comprehensive approach to bias crime through its penal code, and those statutes in existence were not regarded as part of any overall strategy to combat hate crime.

The concept of a comprehensive legislative response to bias crime came into vogue in 1981 after ADL released a model hate crime statute "intended to assist state and local governments which would like to enact hate crime laws."¹⁴⁵ The model statute represented the first attempt to link disparate legal remedies—a separate substantive crime

¹⁴¹ See James B. Jacobs & Barry Eisler, *The Hate Crime Statistics Act of 1990*, 29 *Crim. L. Bull.* 99, 103-04 (1993) (noting that FBI's Uniform Crime Reports section surveyed 12 states and several cities with bias policies when formulating guidelines).

¹⁴² See generally U.S. Comm'n on Civil Rights, *supra* note 131 (expressing alarm over rise of racially- and religiously-motivated crimes); U.S. Comm'n on Civil Rights, *Intimidation and Violence: Racial and Religious Bigotry in America*, A Restatement (1990) (describing responses of communities and public officials to rise in bias crime).

¹⁴³ Anti-Klan laws are especially prevalent in the South, and they outlaw, for example, the wearing of hoods, masks, or robes in public ("masking laws") and riding a horse at night with the purpose of alarming or causing fear ("night riding laws"). See, e.g., *Ga. Code Ann.* § 16-11-38 (1996); see also NIAPV, *Striking Back*, *supra* note 139, at 72-80 (giving comprehensive description and listing of such laws).

¹⁴⁴ Although those laws cover crimes not motivated by bias, they generally are considered a type of bias crime law because they reach activity frequently motivated by bias. See Anti-Defamation League, *Audit of Anti-Semitic Incidents 1993*, at 1 (1994) (noting that 42% of anti-Semitic incidents reported involved property damage, primarily to synagogues and Jewish cemeteries).

¹⁴⁵ Anti-Defamation League's Model Legislation: A Primer for Action, in *Bias Crime: American Law Enforcement and Legal Responses 207* (Robert J. Kelly ed., 1993) [hereinafter ADL, Model Legislation].

for institutional vandalism, penalty enhancement for crimes motivated by certain biases, and a civil cause of action for bias victims—under a common umbrella.¹⁴⁶ States soon followed ADL's lead, passing new bias crime laws in record numbers,¹⁴⁷ over half of which were based on the ADL model.¹⁴⁸ Additionally, because of increasing public attention to bias crime, states whose existing anti-bias laws previously had been neglected—such as Massachusetts¹⁴⁹—began actively to pursue their exercise.

Notwithstanding the broad influence of the ADL model, hate crime laws vary substantially from jurisdiction to jurisdiction. Some create separate substantive crimes when an enumerated underlying crime is committed “because of” or “by reason of” a victim's characteristics.¹⁵⁰ Others establish penalty enhancements—to be considered only at sentencing—when a defendant convicted of an enumerated crime¹⁵¹ is found to have acted “because of” the victim's characteristic or when the commission of that crime “evidences” or “demonstrates”

¹⁴⁶ The model statute provides, in pertinent part, that a person is guilty of intimidation when he or she violates specified preexisting criminal laws (e.g., laws against assault) by reason of the actual or perceived race, color, religion, national origin, or sexual orientation of the victim. See ADL, *Hate Crimes Laws*, supra note 88, at 2-3 (reproducing model statute in its entirety). The statute recommends a penalty enhancement for intimidation of at least one step up from the penalty under the preexisting laws. See *id.* A person is guilty of institutional vandalism for damaging a cemetery, religious structure or place, educational facility, or community center. See *id.* The statute also creates a civil cause of action for persons suffering damages as a result of institutional vandalism or intimidation and authorizes punitive damages, attorneys' fees, and parental liability for the actions of minors. See *id.* Finally, the statute mandates bias crime reporting by, and training of, law enforcement officials. See *id.*

¹⁴⁷ As of 1994, 35 states had enacted new hate crime laws addressing interpersonal violence. See ADL, *Hate Crimes Laws*, supra note 88, at 7.

¹⁴⁸ See ADL, *Model Legislation*, supra note 145, at 206.

¹⁴⁹ Massachusetts passed a comprehensive civil rights law in 1979. See 1979 Mass. Acts 801 (codified as amended at Mass. Gen. Laws ch. 12, §§ 11H-I; ch. 265, § 37 (1988)). It was not until after the United States Commission on Civil Rights released its 1983 report on bias violence, however, that Massachusetts turned its attention to making full use of the Massachusetts Civil Rights Act. See generally Massachusetts Advisory Comm. to the U.S. Comm'n on Civil Rights, *Stemming Violence and Intimidation through the Massachusetts Civil Rights Act: A Summary Report December 1988* (1988) (providing overview of application and enforcement of Massachusetts Civil Rights Act).

¹⁵⁰ See ADL, *Hate Crimes Laws*, supra note 88, at 8 (listing Iowa, Maryland, and North Carolina statutes).

¹⁵¹ Statutes vary with respect to the enumerated predicate offenses that can trigger penalty enhancement. Compare Ohio Rev. Code Ann. § 2927.12 (1997) (allowing penalty enhancement for bias motivation upon conviction for menacing, aggravated menacing, criminal damage or endangering, criminal mischief, and phone harassment), with D.C. Code Ann. § 22-4001 (1996) (enumerating arson, assault, burglary, injury to property, kidnapping, manslaughter, murder, rape, robbery, theft, and unlawful entry as penalty-enhanced if bias-motivated).

bias.¹⁵² Additionally, some statutes mandate collection of hate crime statistics,¹⁵³ establish training for law enforcement personnel,¹⁵⁴ and create civil causes of action for hate crime victims.¹⁵⁵ Still others, modeled on federal criminal civil rights laws, criminalize interference with the civil rights of another because of bias.¹⁵⁶ Finally, numerous states criminalize interference with religious worship and vandalism of religious institutions.¹⁵⁷ In some cases, institutional vandalism laws extend to nonreligious institutions identified with target groups.¹⁵⁸

Reflecting the conflict within the anti-hate-crime movement regarding the proper scope of anti-hate efforts,¹⁵⁹ hate crime laws vary widely in the types of bias they recognize and the classes of victims they cover, leading to uneven levels of protection between jurisdictions. While all such statutes recognize bias based on the victim's race, religion, or ethnicity, far fewer cover bias based on gender, disability, sexual orientation, or age.¹⁶⁰ Two states and the District of Columbia recognize bias based on political affiliation.¹⁶¹ The inclusion or exclusion of certain groups often has led to fierce legislative debate, in some cases stalling passage of hate crime laws completely.¹⁶²

¹⁵² See ADL, *Hate Crimes Laws*, supra note 88, at 9.

¹⁵³ See *id.* at 30-31.

¹⁵⁴ As of 1994, seven states (Illinois, Indiana, Massachusetts, Minnesota, Oregon, Pennsylvania, and Washington) had training provisions in their hate crime statutes. See *id.* at 30-31, 38.

¹⁵⁵ Hate crime victims, like all crime victims, may bring common law causes of action for physical injury, emotional distress, and monetary losses. See NIAPV, *Striking Back*, supra note 139, at 39-57 (detailing common law causes of action available to victims). The ADL model statute, however, explicitly makes a civil cause of action available and provides for punitive damages and attorneys' fees, and 22 states have incorporated a civil cause of action into their hate crimes laws. See ADL, *Hate Crimes Laws*, supra note 88, at 30-31, 36-37.

¹⁵⁶ See ADL, *Hate Crimes Laws*, supra note 88, at 8 (listing eight such statutes).

¹⁵⁷ See *id.* at 33-35, 37 (listing "institutional vandalism statutes" and "interference with religious worship" statutes).

¹⁵⁸ See, e.g., Wis. Stat. § 939.645 (1996) (enhancing penalties for property damage committed because of "actor's belief or perception regarding the race, religion, color, disability, sexual orientation, national origin or ancestry of . . . the owner or occupant of that property").

¹⁵⁹ See *infra* Part III.B (discussing such conflict and suggesting solutions).

¹⁶⁰ For a chart indicating which states include which types of bias, see ADL, *Hate Crimes Laws*, supra note 88, at 30-31 (noting that 14 states recognized sexual orientation, 15 recognized gender, and 13 recognized disability).

¹⁶¹ See *id.* at 30 (listing Iowa and West Virginia).

¹⁶² The New York State bias bill provides an example. Since 1987, a proposed hate crime law has died every year in the Republican dominated Senate because its Democratic Assembly proponents have refused to eliminate its reference to sexual orientation. See Interview with Howie Katz, supra note 91. Additional controversy broke out in 1992 over the proper level of reference to gender bias. See *id.* The bill's popularity rallied briefly after the 1994 shooting of a group of Jewish youths on the Brooklyn Bridge. See *id.* How-

Those concerned with potential infringement on First Amendment values have raised significant opposition to hate crime laws,¹⁶³ especially since the 1992 decision *R.A.V. v. St. Paul*,¹⁶⁴ in which the Supreme Court struck down a municipal ordinance criminalizing cross burning.¹⁶⁵ While recognizing that cross burning constituted “fighting words” which enjoy no constitutional protection, the Court held that St. Paul could not selectively criminalize such speech based on its motivating bias, such as racism.¹⁶⁶ *R.A.V.* sounded the death knell for hate crime laws directly targeting speech and cast the constitutionality of all hate crime laws into doubt.

The continued viability of penalty-enhancing laws was confirmed one year later, however, in *Wisconsin v. Mitchell*.¹⁶⁷ The *Mitchell* Court unanimously approved the enhanced sentence given to a young African American man convicted of aggravated battery for inciting an attack on a young white man.¹⁶⁸ The Court reasoned that special harms occasioned by hate crime—for example, the creation of fear in the victim’s community—could justify greater punishment.¹⁶⁹ The Court further pointed out that speech is often considered evidence of motive and that many factors, including motive, are validly taken into consideration in sentencing decisions; it therefore found the Wiscon-

ever, because it is still thought of as a “gay bill”—indeed, some legislators repeatedly confuse it with a pending gay civil rights bill—it has not passed. See *id.*

¹⁶³ See, e.g., Susan Gellman, Hate Crime Laws are Thought Crime Laws, *Ann. Surv. Am. L.* 509, 509 (1992-1993) (arguing that hate crime laws are “damaging to constitutional values”); David Goldberger, Hate Crime Laws and Their Impact on the First Amendment, 1992-93 *Ann. Surv. Am. L.* 569, 569 (arguing that advocates for hate crime laws inappropriately treat First Amendment concerns as obstacles).

¹⁶⁴ 505 U.S. 377 (1992).

¹⁶⁵ See *id.* at 391.

¹⁶⁶ See *id.* at 391-92. The Court quoted the invalidated ordinance:

“Whoever places on public property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.”

Id. at 380 (quoting St. Paul Bias-Motivated Crime Ordinance, St. Paul, Minn., Legis. Code § 292.02 (1990)). The Court held that the ordinance constituted both “content discrimination” and “viewpoint discrimination,” pointing out that identical conduct motivated by “hostility, for example, on the basis of political affiliation, union membership, or homosexuality—are not covered.” *Id.* at 391.

¹⁶⁷ 508 U.S. 476 (1993). The statute unanimously upheld in *Mitchell* provides for penalty enhancement when a person commits certain enumerated crimes and selects the victim or the property damaged on the basis of race, religion, color, disability, sexual orientation, national origin, or ancestry. See Wis. Stat. § 939.645(1)(b) (1996).

¹⁶⁸ After watching the movie *Mississippi Burning*, Mitchell asked his friends if they were ready to “move on some white people” and, seeing the victim in the street, said: “There goes a white boy; go get him.” *R.A.V.*, 508 U.S. at 479-80.

¹⁶⁹ See *id.* at 487-88.

sin statute constitutional.¹⁷⁰ Mitchell's stamp of approval led numerous states to follow the penalty enhancement model.¹⁷¹

2. Federal Hate Crime Laws

The proliferation of state hate crime legislation has not been mirrored at the federal level. The primary federal tools for battling hate crime remain criminal civil rights statutes, many of which were passed in the Reconstruction era in an attempt to counter widespread violence against newly freed African Americans.¹⁷² These laws are limited in scope, covering only violence motivated by biases against groups whose civil rights are otherwise protected under federal law, excluding, for example, homophobic violence.¹⁷³ Additionally, as suits under federal civil rights laws must be brought by the Department of Justice on behalf of victims, the statutes' remedies are unavailable in the vast majority of hate crime cases.¹⁷⁴

¹⁷⁰ See *id.* at 487-90. The Court distinguished *R.A.V.* by pointing out that the St. Paul ordinance was aimed at speech, while the Wisconsin statute was aimed at pure conduct and would have no "chilling effect" on speech. See *id.* at 487-88. Some scholars maintain, however, that the case was wrongly decided. See, e.g., Jacobs & Potter, *supra* note 2 (manuscript at 316) (concluding that "the Supreme Court had it right in *R.A.V.* and wrong in *Mitchell*").

¹⁷¹ See, e.g., Memorandum, Governor's Program Bill 1 (1996) (on file with the *New York University Law Review*) (noting that New York State's proposed hate crime bill as introduced in 1996 was "patterned after model legislation drafted by the Anti-Defamation League, the constitutionality of which was upheld by the United States Supreme Court in *Wisconsin v. Mitchell*").

¹⁷² See 18 U.S.C. § 241 (1994) (criminalizing conspiracy to interfere with civil rights); *id.* § 242 (sanctioning deprivation of civil rights under color of law); 42 U.S.C. § 3631 (1994) (outlawing willful interference with sale, purchase, rental, financing, or occupation of any dwelling because of race, color, religion, sex, handicap, familial status, or national origin). These statutes are discussed in detail in NIAPV, *Striking Back*, *supra* note 139, at 11-23. The Civil Rights Act of 1968, 18 U.S.C. § 245 (1994) (covering violence against persons engaged in federally protected activities such as enrolling in school or registering to vote), was passed in response to violence against African Americans asserting their civil rights. See *supra* note 10 and accompanying text.

¹⁷³ See 18 U.S.C. § 245(b)(2) (1994) (prohibiting forcible interference only if motivated by race, color, religion, or national origin); 42 U.S.C. § 3631 (1994) (punishing only acts motivated by race, color, religion, sex, handicap, familial status, or national origin). But see Bennet, *supra* note 126 (reporting proposal to expand statutes to include crimes committed against people because they are gay, lesbian, female, or disabled).

¹⁷⁴ See Jacobs & Potter, *supra* note 2 (manuscript at 73-74) ("These statutes were never intended, and have never served, as all-purpose federal hate crime statutes. Rather, they function as insurance which can be called upon if, for discriminatory or other improper reasons, state and local law enforcement officers fail to prosecute violations of civil rights."). But see Bennet, *supra* note 126 (reporting announcement that President Clinton will assign more federal hate crime investigators and prosecutors and establish working groups on hate crime in U.S. Attorneys' offices); NIAPV, *Striking Back*, *supra* note 139, at 9-10, 161-69 (reporting that Civil Rights Division of the Department of Justice brought only 46 prosecutions for racial violence from 1980 to 1985, over half of which involved Klan members).

The last decade, however, has brought some notable developments in federal law. Foremost among these is the Hate Crimes Statistics Act of 1990 (HCSA),¹⁷⁵ which authorized the Attorney General to collect data from local police departments on enumerated crimes that "manifest evidence of prejudice based on race, religion, sexual orientation, or ethnicity."¹⁷⁶ Unlike the comprehensive hate crimes laws passed by many states, HCSA is strictly limited to data collection and carries few enforcement mechanisms.¹⁷⁷ Compliance with HCSA remains entirely voluntary, and as of 1995 only eighty-five percent of police departments in 172 surveyed cities reported such data.¹⁷⁸ Many jurisdictions in official compliance consistently report zero hate crimes.¹⁷⁹

Another notable development in federal law is a sentence enhancement for federal bias crimes,¹⁸⁰ implemented by the U.S. Sentencing Commission under direction of the Violent Crime Control and Law Enforcement Act of 1994.¹⁸¹ Also, gender-motivated violence

¹⁷⁵ Pub. L. No. 101-275, 104 Stat. 140 (codified in part at 28 U.S.C. § 534 note (1994)).

¹⁷⁶ *Id.* § 2(b)(1), 104 Stat. at 140 (codified at 28 U.S.C. § 534 note (1994)) (applying to crimes of murder; non-negligent manslaughter; forcible rape; aggravated assault; simple assault; intimidation; arson; and destruction, damage or vandalism of property). Those crimes were chosen because federal data collection efforts already track such crimes. See Jacobs & Potter, *supra* note 2 (manuscript at 76). The Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 2131, (1994) (codified at 28 U.S.C. § 534 note), amended HCSA to cover crimes motivated by the victim's disability.

¹⁷⁷ See HCSA §§ 2(b)(2), (b)(4), (c), 104 Stat. at 140 (codified at 28 U.S.C. § 534 note (1994)) (limiting Act's effectiveness to five years). The regulations were released by the FBI, to whom the Attorney General had delegated responsibility. See Federal Bureau of Investigation, U.S. Dep't of Justice, Summary Reporting System, National Incident-Based Reporting System, Hate Crime Data Collection Guidelines (1990) (containing regulations written under authority delegated by Attorney General). HCSA was renewed recently and now remains in effect indefinitely pursuant to the Church Arson Prevention Act of 1996, Pub. L. No. 104-155, § 7, 110 Stat. 1392, 1394 (codified as amended at 28 U.S.C. § 534 note (West Supp. 1997)).

¹⁷⁸ See Anti-Defamation League & United States Conference of Mayors, *Combating Hate Crimes in America's Cities: 1995*, at 1 (1996) (noting that many municipalities justify nonreporting with statements such as "[w]e do not have that kind of problem in our City").

¹⁷⁹ See *id.* at 3 (noting that one-fourth of survey cities responded that there was "no problem at all").

¹⁸⁰ See U.S. Sentencing Comm'n, *Guidelines Manual 227* (1995). Section 3A1.1, "Hate Crime Motivation or Vulnerable Victim," authorizes a three-level sentencing increase if the "finder of fact at trial . . . determines beyond a reasonable doubt that the defendant intentionally selected any victim or any property . . . because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person." *Id.* Because this enhancement is so new, any data on its use may not accurately reflect the incidence of bias crimes. See Telephone Interview with Michael Corlander, Public Information Specialist, U.S. Sentencing Comm'n (Oct. 17, 1996).

¹⁸¹ Pub. L. No. 103-322, § 280003, 108 Stat. 1796, 2096 (codified as amended at 42 U.S.C. § 13701 note (1994)).

may now be prosecuted under the Violence Against Women Act of 1994¹⁸² (VAWA).

Federal legislation, while limited when compared to the bold strides taken by the states, has by no means been insignificant.¹⁸³ HCSA has had a particularly substantial impact. Although reporting compliance is voluntary, the existence of the reporting mechanism and the nationwide distribution of reporting guidelines has created incentives for many police jurisdictions to collect uniform data on hate crime. That and other steps taken by police to respond to bias crimes are the subject of the following section.

C. Police and Prosecutorial Responses to Bias Crime

With increasing frequency after HCSA's passage, police forces around the country began to establish specialized bias crime units and to formalize differentiated intake and data collection procedures for such crimes.¹⁸⁴ Forces not establishing such units sometimes designated already existing departments to coordinate the force's response to bias or to appoint bias crime "liaisons."¹⁸⁵ While mandates varied among jurisdictions, most bias units and liaisons collected data for purposes of HCSA compliance, communicated with bias victims and their community representatives, and officially labeled incidents as bias-motivated.¹⁸⁶

While state and federal hate crime statutes often informed the development of police procedures, in many cases police departments

¹⁸² Pub. L. No. 103-322, 108 Stat. 1796 (codified as amended in scattered sections of 8, 18, 28, 42 U.S.C.). Jenness and Broad theorize that VAWA was passed in an effort to remedy the exclusion of gender from most hate crime laws, and thus to put gender bias crime on the same footing as other hate crimes. See Jenness & Broad, *supra* note 23, at 139-55 (discussing history of VAWA). In this manner, they demonstrate the complicated interplay of movements: the women's movement heavily influenced victims' rights and, consequently, the development of an anti-hate-crime movement; the anti-hate-crime movement was not inclusive of gender; advocates for women then crafted a women's rights law fashioned after hate crime laws. See *id.*

¹⁸³ Other recent federal initiatives include regulations issued by the Department of Housing and Urban Development increasing civil penalties for hate crimes. See Michael Janofsky, *Blacks' Story of Harassment Is the Backdrop for New Fines*, N.Y. Times, Nov. 11, 1997, at A20 (reporting release of regulations).

¹⁸⁴ See ADL, *Policies & Procedures*, *supra* note 91, at 3 (noting that several police bias units were established in 1980s). In 1988, Abt Associates released an influential study recommending the establishment of such specialized units. See Peter Finn & Taylor McNeil, Abt Associates Inc., *Bias Crime and the Criminal Justice Response: A Summary Report Prepared for the National Criminal Justice Association* (1988).

¹⁸⁵ See, e.g., New York State Report, *supra* note 13, at 113 (recommending that small forces in rural areas assign designated bias specialists and make use of preexisting coordinators).

¹⁸⁶ For an excellent collection of internal police documents establishing procedures for handling bias crime, see ADL, *Policies & Procedures*, *supra* note 91, at 103-13.

extended greater protections than mandated by such laws.¹⁸⁷ Additionally, some police jurisdictions had begun responding to bias crime before being given a legislative command to do so and therefore were able to advise the development of law.¹⁸⁸

To a far lesser degree than their police counterparts, prosecutors' offices in several large cities have established Hate Crimes Bureaus or similar Civil Rights Bureaus to handle hate crime, in some cases before receiving a legislative directive.¹⁸⁹ Others have hired bias crime victim-witness coordinators to assist victims and communicate with community groups.¹⁹⁰ While such efforts remain scattered and fledgling, their development was strongly advocated in a 1994 guide developed by Cook County State's Attorney Jack O'Malley.¹⁹¹

Like government commissions, police forces sometimes have formed community advisory councils to help fashion a bias response plan, and advocacy groups have both lobbied police for desired changes and participated in the design and delivery of bias training

¹⁸⁷ For example, the New York City Police Department Bias Incident Investigation Unit, founded in 1980 in response to synagogue vandalism, over time expanded its purview from crimes based on race, religion, or ethnicity—the only categories mentioned in New York State's bias crime law—to encompass the additional categories of sexual orientation and disability. See Jacobs & Potter, *supra* note 2 (manuscript at 204-05); see also Hate Crimes Against the Disabled to be Classified as Bias Crimes, *Stop the Violence* (New York City Gay & Lesbian AVP), Summer 1993, at 1, 11 (reporting that sexual orientation was added in 1984 and disability in 1993, both as result of advocacy by New York City Gay and Lesbian AVP).

¹⁸⁸ In Boston, for example, the Community Disorders Unit—expanded in 1978 to protect African Americans from attacks and harassment as they moved into previously all-white neighborhoods—was instrumental in advocating for and implementing active enforcement of the Massachusetts Civil Rights Act. See Jacobs & Potter, *supra* note 2 (manuscript at 203-04) (describing development of Community Disorders Unit); Massachusetts Advisory Comm. to the U.S. Comm'n on Civil Rights, *supra* note 149, at 6 (crediting Community Disorders Unit with development of successful implementation of Act).

¹⁸⁹ The Kings County District Attorney's Office, for example, has a Civil Rights Bureau even though New York State has only a limited bias crime law. The Civil Rights Bureau regularly handles all types of hate crime, including antigay crime, that is not covered under existing provisions. See Migdalia Maldonado, *Practical Problems with Enforcing Hate Crimes Legislation in New York*, *Ann. Surv. Am. L.* 555, 555 & n.1. (1992-1993); see also N.Y. Pen. Law § 240.30 (McKinney 1989) (defining misdemeanor crime of aggravated harassment as harassment motivated by racial, religious, or nationality bias).

¹⁹⁰ The Cook County State's Attorney's Office employs two such specialists, in addition to liaisons to the gay and lesbian, African American, Asian, and Latino communities. See Telephone Interview with Ellen A. Meyers, Gay and Lesbian Liaison, Cook County State's Attorney's Office (Nov. 7, 1996).

¹⁹¹ See Jack O'Malley, Cook County State's Attorney's Office, *A Prosecutor's Guide to Hate Crime* (1994) (exploring history and context of hate crime laws, discussing relevant case law, and detailing office's case handling procedures, courtroom strategies, and tips on handling media).

programs for police officers.¹⁹² To a lesser degree, prosecutors have engaged in dialogue with community groups and have sometimes evinced a willingness to set up permanent mechanisms for such communication.¹⁹³ Police and prosecutors' bias crime units and reporting mechanisms, like commissions, frequently exempt from their purview crimes motivated by homophobia, gender bias, disability, and immigration status.¹⁹⁴

III A MOVEMENT INSTITUTIONALIZED

Within the space of two decades, the anti-hate-crime movement has achieved significant reform within institutions of governance. The seeming "success" of the anti-hate-crime movement, however, deserves greater scrutiny. The fact that anti-hate measures have been assimilated so easily into the very criminal justice system they seek to challenge indicates that they fit squarely within its dominant ideology.¹⁹⁵ This raises serious questions about those measures' capacity for changing that system. This Part argues that anti-hate-crime measures have come to reflect the internal culture of criminal justice more than the priorities of the target communities such measures are meant to benefit. The movement thereby has failed to bring about significant levels of actual change within the criminal justice system.

Movements are said to be "institutionalized" to the degree their leadership, demands, and infrastructure have been brought within the purview of society's dominant power structures.¹⁹⁶ Institutionalization is a typical stage in the life cycle of a movement.¹⁹⁷ Social move-

¹⁹² See *Police Trainings In Staten Island, Stop the Violence* (New York City Gay and Lesbian AVP), Fall 1996, at 5 (describing trainings).

¹⁹³ See Telephone Interview with Ellen A. Meyers, *supra* note 190 (describing such efforts in Chicago); Telephone Interview with Jennifer Rakowski, *Hate Violence Client Advocate, Community United Against Violence* (Oct. 21, 1996) (describing such efforts in San Francisco).

¹⁹⁴ See, e.g., ADL, *Policies & Procedures*, *supra* note 91, at 63-64 (reprinting International Association of Chiefs of Police model racial, religious, and ethnic violence policy); Maryland Report, *supra* note 88, at 4-5 (limiting Task Force's scope to crimes aimed at racial, ethnic, and religious groups).

¹⁹⁵ See Kimberlé Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 *Harv. L. Rev.* 1331, 1367 (1988) ("People can only demand change in ways that reflect the logic of the institutions they are challenging. Demands for change that do not reflect . . . dominant ideology . . . will probably be ineffective.").

¹⁹⁶ See Wood & Jackson, *supra* note 26, at 4-6 (defining institutionalization as holding formal position of societal power and noting that many group actions fall on continuum between polar types of institutionalized and non-institutionalized).

¹⁹⁷ See Tarrow, *supra* note 27, at 141-45 (describing typical gravitation of movements toward institutionalization and professionalization).

ment theorists state that societies respond to social movements by either repressing them or facilitating them; while repression may seem the ordinary course, the “legitimization and institutionalization of collective action are often the most effective means of social control.”¹⁹⁸ Facilitation is especially attractive if movement goals can be squared with institutional ones. By being responsive, inviting movement leadership into decisionmaking structures, and implementing demands for reform, governments can stave off larger confrontations and even stifle movement activity altogether.¹⁹⁹

Insofar as anti-hate measures have been assimilated into the formal power structures of lawmaking, police procedure, prosecutorial power, and governmental policy, they have been institutionalized. The movement behind those measures, therefore, has also experienced some degree of institutionalization.²⁰⁰ This process is by no means sinister. The anti-hate-crime movement organized, after all, in order to see anti-hate efforts adopted by local, state, and federal authorities. It is undeniably true, however, that once “collective action leads to outcomes in the sphere of politics, . . . the movements that began the cycle can have less and less influence over its outcomes.”²⁰¹ Movements that are not able to sustain collective action outside spheres of political power eventually will cede control to those on the inside. Anti-hate-crime efforts, once adopted, have come firmly within the control of the legislators, government authorities, police, prosecutors, and judges that shape and implement them. That institutional control, coupled with inadequate movement activity outside those institutions, has frustrated larger attempts to alter systemic mistreatment of hate crime. This Part details some of the results of that frustration, for two purposes: first, because these consequences are the best evidence that institutionalization has occurred; and second, because they lead to some suggestions as to how the anti-hate-crime movement might respond.

¹⁹⁸ *Id.* at 96.

¹⁹⁹ See Wood & Jackson, *supra* note 26, at 44 (discussing influential early theorist Neil J. Smelser’s theory of facilitation as social control, often resulting in “co-optation” of leadership).

²⁰⁰ Even those aspects of the anti-hate-crime movement which exist outside of governmental structures—such as grassroots groups—have been partially institutionalized, as they now receive government grants, cooperate with police and prosecutors, and influence the adoption of law and policy. See *supra* Part I.B.2.

²⁰¹ Tarrow, *supra* note 27, at 25.

A. *The Consequences of Institutionalization: Insufficient Change Within Criminal Justice*

The case for attempting to alter the criminal justice system from within is especially compelling in the hate crime context, given that system's long history of disregard for such crime and abuse of its victims. As the many government commissions on hate crime concluded, anti-hate efforts were considered necessary not only because potential perpetrators thereby could be deterred, but because the criminal justice system had proved itself incapable of handling such crimes.²⁰² This section discusses several examples of how, although the movement has succeeded in changing aspects of the criminal justice system, that system nonetheless has retained aspects that motivated the movement's formation.

1. *Inadequate Discretion Control*

The anti-hate-crime movement has attempted to alter systemic bias in part by installing discretion control mechanisms at critical junctures within the criminal justice process.²⁰³ Police may not ignore hate crimes because laws require them to report all possibly bias-motivated crimes within a designated chain of command,²⁰⁴ to collect and report data on bias-motivated crimes,²⁰⁵ and to enter specific charges against perpetrators who act out of bias.²⁰⁶ Statutes may bind prosecutors to pursue bias charges in verified cases and may require judges to impose specific sentences on those convicted of such charges.²⁰⁷ Thus, such laws guide each stage of the criminal process to treat hate crime in accordance with set rules, reducing systemic bias against its victims and in favor of its perpetrators.

Bias mechanisms, however, are easily subverted and ignored, lessening their impact on institutional biases. In no context has an attack

²⁰² See supra note 133 and accompanying text.

²⁰³ This is consistent with a broader push to eliminate the wide discretion historically enjoyed by police, prosecutors, and judges. See generally Samuel E. Walker, *Taming the System: The Control of Discretion in Criminal Justice 1950-1990* (1993) (presenting theoretical overview of "discovery" of and attempts to control discretion within criminal justice system).

²⁰⁴ See, e.g., HIV Manual, supra note 100, at 25-27 (describing New York Police Department requirements that patrol officers notify Precinct Commander or Captain of all cases in which bias is suspected and that Commander or Captain inform Bias Unit of all cases possibly motivated by bias and follow up on report within 10 days).

²⁰⁵ See supra Parts II.B.1 & II.B.2 (discussing data collection requirements).

²⁰⁶ See supra Part II.B.1 (discussing state statutes specifically applicable to hate criminals).

²⁰⁷ See supra Part II.B.1 (discussing separate substantive bias crimes and penalty-enhancement laws).

on discretion led to its complete elimination,²⁰⁸ and anti-hate efforts are no exception.

The processes by which police decide whether to label a given crime as bias-motivated have been criticized for their fluidity and circularity.²⁰⁹ While some commentators express alarm that police may use fluid guidelines to declare any and all crimes bias-motivated,²¹⁰ in fact, whether acting out of personal bias, desire to avoid negative publicity, or not wanting to take on extra paperwork and investigation, police have powerful incentives to undercount bias crimes.²¹¹ The clear perception on the part of target communities is that fluidity allows police unfettered power to avoid naming crimes bias-motivated.²¹²

There is evidence that police do indeed avoid mandates by refusing to classify crimes as bias-motivated.²¹³ Though groups like AVP

²⁰⁸ See Walker, *supra* note 203, at 14-18 (suggesting that discretion cannot be abolished but may be controlled).

²⁰⁹ See James B. Jacobs, *Rethinking the War Against Hate Crimes: A New York City Perspective*, 11 *Crim. Just. Ethics* 55, 55-56 (1992) (describing New York Police Department Bias Unit classification guidelines as subjective and open to political manipulation).

²¹⁰ See *id.* at 57 ("In short, the criteria are so loose and broad that practically any inter-group offense could plausibly be labeled a bias crime.").

²¹¹ See HIV Manual, *supra* note 100, at 25 ("These crimes are often ignored because of the additional paperwork and victim contacts required, [and] the negative image attached to precincts with high numbers of bias cases."); Aurelio Rojas, *Turning A Blind Eye to Hate Crimes*, *S.F. Chron.*, Oct. 22, 1996, at A1 ("The tendency is to pretend everything is under control. . . ." (quoting Fred Persily, director of California Association of Human Relations Organizations, citing police fear of unfavorable publicity as reason why few jurisdictions report hate crime)). The author of this Note once sat on a conference panel with a high-ranking official from the NYPD Bias Incident Investigation Unit, who repeatedly defined his mission on the panel as one of reassuring audience members that bias crime rates in New York City were extremely low and that hate crime was not a serious problem; he cited his Unit's statistics as evidence of that supposedly low rate.

²¹² See HIV Manual, *supra* note 100, at 25-26 ("noting that "there is an institutional slant against recognizing bias crimes," that "[t]hese crimes are often ignored[,] . . . many bias crimes are never classified as such and never come under the more bias-sensitive purview of the Bias Unit" and that even though guidelines mandate "possible bias" classification when bias is suspected, "in practice, police continue to try to rule out any other possible motivation for the crime"); *supra* note 179 and accompanying text (discussing instances of zero reporting under HCSA).

A cartoon prominently displayed in AVP's offices reflects this perception. It shows two police officers standing over the chalk outline of a dead body; behind them on the wall are scrawled a swastika and the words "Die, faggot, die." One officer says to his superior, "Other than robbery, sir, we're at a loss to determine a motive."

²¹³ See *Anti-Lesbian/Gay Violence Rises in New York City and Around Country in 1994*, *Stop the Violence (New York City Gay and Lesbian AVP)*, Winter/Spring 1995, at 1, 13 (reporting that nationwide community groups classified 4.67 crimes bias-motivated for every crime thus classified by police); CAAAV, *Police Violence*, *supra* note 101, at 12 (reporting that because of racism or insensitivity, police refuse to classify anti-Asian crimes as bias-motivated "even when bias motivation is clear"); Telephone Interview with Constance Potter, Coordinator, Anti-Violence Program, Gay & Lesbian Community Action Council

train victims to insist that police follow their own bias guidelines, that power remains firmly vested in the police. An example of the problems this creates is illustrative.²¹⁴ This author once accompanied a victim—an HIV-positive Latino gay man—to his local precinct to file a crime report. When giving his statement to the complaints officer, he stated that his assailant had called him an “AIDS faggot.” The officer would not write the words “AIDS faggot” on the report. When the victim and his advocate insisted that he do so in order to facilitate a Bias Unit referral, the officer expressed discomfort and stated that he could be disciplined for using such language. The officer then consulted with nearby colleagues, each of whom agreed that the epithet could not be included in the report. The resulting report, therefore, gave no indication of the bias-related nature of the crime. The Bias Unit referral was given eventually but only after the officer demanded that the victim first disclose whether he was gay and had AIDS. Such compelled disclosure was unnecessary, as the bias protocol specified that bias classification depends not on the victim’s actual characteristics but rather on the perpetrator’s perception of those characteristics,²¹⁵ and was highly upsetting to the victim. The victim later told his advocate that, had she not been present, he would have walked out of the precinct as soon as conflict arose, or perhaps would not have gone at all, out of fear of such police hostility.²¹⁶ Ill-trained

(Oct. 11, 1996) (reporting that her group documented 418 homophobic crimes in previous year as compared to 39 documented by police and citing police refusal to classify crimes as bias-motivated as one main reason for discrepancy). This author personally has observed numerous New York Police Department officers refuse to record a victim’s allegation of bias on crime reports; commanding officers refuse to call the designated bias unit; and the bias unit refuse to attach the bias label, despite compelling evidence of bias.

²¹⁴ This example, like many others cited in this Part, is based on the personal experiences of the author. See *supra* note 25.

²¹⁵ See City of New York Police Department, Patrol Guide § 103-26 (1997) (defining bias crime as “any offense or unlawful act that is motivated in whole or in part by a person’s, a group’s or a place’s identification with a particular race, religion, ethnicity, sexual orientation or disability”); Karen A. McLaughlin et al., National Bias Crime Training: For Law Enforcement and Victim Assistance Professionals 38-41 (1994) (emphasizing that bias classifications protocols are meant to apply when perpetrator mistakenly believes victim to be member of target group).

²¹⁶ See Anti-Lesbian/Gay Violence in 1995, *supra* note 13, at 49 (citing study showing that many victims of homophobic violence refrain from reporting crimes out of fear of police hostility, leading to low reporting rates relative to national reporting rates for all crime); CAAAV, Police Violence, *supra* note 101, at 11-13 (claiming that police frequently ignore or abuse victims of anti-Asian violence and reporting resulting unwillingness on part of such victims to file police reports); U.S. Comm’n on Civil Rights, Intimidation and Violence: Racial and Religious Bigotry in America 7 (1990) (noting reports that Southeast Asians and Latinos feel mistreated by police after suffering racial violence). Among other consequences of nonreporting, victims who are deterred from filing police reports generally are ineligible for crime victim compensation benefits. See HIV Manual, *supra* note

and insensitive officers remain the gatekeepers to subsequent services, even in jurisdictions with highly developed bias units.²¹⁷

Specialized bias units, both within police departments and prosecutors' offices, are intended to be additional guards against such biases. Within the units, it is presumed, systemic bias will be absent, and hate crime mandates will be obeyed. This is particularly so if persons within such units are given higher levels of hate crime training, and even more so if they self-select out of a particular interest in hate crime and sympathy for its victims.²¹⁸ The concentration of hate crime knowledge in these units, however, may have the undesirable counter-effect of eliminating the need for "ordinary" police and prosecutors to acquire such knowledge and consequent sensitivity.²¹⁹ This is especially problematic given that access to either type of specialized unit depends, in practice, on identification and referral by the responding police officers and their immediate supervisors.

Even if a victim makes it through the hostile gates of police insensitivity, she must still contend with potential prosecutorial bias. If a crime is presented to a prosecutor as bias-motivated, he or she still has control over how it will be charged and tried. Indeed, prosecution statistics suggest that the vast majority of cases in which bias is a factor are not prosecuted at all, and that those which are prosecuted are infrequently charged under existing hate crimes statutes.²²⁰ Prosecutors

100, at 54 (noting that New York State Crime Victim Board requires police report as prerequisite for compensation).

²¹⁷ In an attempt to reduce such insensitivity, community groups have begun offering trainings for police officers. See, e.g., Mayor's Police Council Re-Established, Stop the Violence (New York City Gay and Lesbian AVP), Spring 1996, at 5 (reporting reestablishment of community-police council to coordinate training for police recruits); Police Trainings In Staten Island, *supra* note 192 (discussing precinct-based police training initiative).

²¹⁸ See Telephone Interview with Scot Clark, Assistant District Attorney for the City and County of San Francisco, Hate Crime Unit (Oct. 23, 1996) (describing Unit as staffed by gay men, lesbians, and people of color who take hate crime seriously and personally); Telephone Interview with Jennifer Rakowski, *supra* note 193 (claiming that hate crime units attract sensitive people to police and prosecutorial jobs who would not otherwise want those jobs); Telephone Interview with Woodrow Tennant, Sergeant/Inspector, San Francisco Police Department (Oct. 11, 1996) (suggesting that, like domestic violence units, hate crime units will transform those who work in them by repeatedly exposing them to another group's reality).

²¹⁹ See Telephone Interview with Woodrow Tennant, *supra* note 218 (claiming that there is no contact between Hate Crimes Unit officers and other officers, meaning that "transformed" officer cannot influence "untransformed" ones and that hate crime is removed from experiences of most officers).

²²⁰ See Jacobs & Potter, *supra* note 2 (manuscript at 214-17) (pointing out that little information on prosecution rates is available and suggesting that hate crimes are seldom prosecuted and hate crime laws seldom utilized); Rojas, *supra* note 211 (comparing high rate of reported hate crimes in California with low rate of prosecutions). A disparity between police reports and prosecutions is standard for all crimes. To substantiate an allegation that hate crimes are underprosecuted relative to other crimes, one would have to

continue to enjoy enormous amounts of discretion in charging, plea bargaining, dropping cases, and making sentencing recommendations, and courts consistently have refused to abridge that discretion in a meaningful way.²²¹ Decisions not to prosecute a crime as bias-motivated, potentially shaped by the prosecutor's own conscious or subconscious biases,²²² generally cannot be challenged, except by political protest.

Similarly, judges historically enjoy tremendous power over sentencing.²²³ Although conviction for a substantive hate crime may bump up the recommended sentence, in most state sentencing schemes judges still operate within a range of possible sentences including jail terms, probation, parole, or rehabilitative programs.²²⁴ Hate crime laws that leave the consideration of bias to the sentencing stage do not rein in judicial discretion at all, but merely add bias to the list of factors that may be considered, actually increasing discretion.²²⁵

compare treatment of similar substantive crimes and take into account arrest rates. Given the dearth of such data, this comparison would be extremely difficult at this time. Only California currently collects prosecution statistics and has only collected such data for one year. See Division of Criminal Justice Information Services, California Dep't of Justice, *Hate Crime in California 1995* (1996). Minnesota hoped to begin collecting prosecution data in 1997. See Telephone Interview with H. Camilla Nelson, Civil Rights Policy Director, State of Minnesota Office of the Attorney General (Oct. 31, 1996).

²²¹ See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 225-26 (1976) (White, J., concurring) (rejecting idea that prosecutorial discretion in seeking capital murder charge creates risk of unfairness and stating that prosecutors will be assumed to exercise discretion properly); Kenneth C. Davis, *Discretionary Justice: A Preliminary Inquiry* 224-25 (1969) (describing prosecutorial discretion as "unconfined, unstructured, and unchecked"); Wayne LaFave, *The Prosecutor's Discretion in the United States*, 18 *Am. J. Comp. L.* 532, 532-39 (1970) (describing extent of prosecutorial discretion, propriety of which is "clearly recognized in the case law").

²²² See Hernandez, *supra* note 14, at 851-55 (asserting that as result of subconscious racism, even prosecutors acting in good faith discount minority victims and crimes against them, resulting in chronic underprosecution of bias crimes; criticizing current hate crime statutes for failing to address problem of underprosecution).

²²³ See, e.g., *Wisconsin v. Mitchell*, 508 U.S. 476, 485 (1993) (citing tradition of sentencing judge considering wide variety of factors); *North Carolina v. Pearce*, 395 U.S. 711, 719-23 (1969) (noting that there are few checks on judicial sentencing discretion).

²²⁴ See ADL, *Hate Crimes Laws*, *supra* note 88, at 19-21 (describing rehabilitative sentencing programs in several states). Some members of target groups feel that, in some circumstances, sentencing bias offenders to rehabilitative programs reflects continued judicial leniency toward bias criminals. See Jacobs & Potter, *supra* note 2 (manuscript at 225-27) (noting existence of bias rehabilitation programs and claiming that some advocates question their propriety; citing as example probationary placement of convicted homophobic attacker in New York City Mayor's Office for the Lesbian and Gay Community, without office's consent and provoking community protest).

²²⁵ See *Mitchell*, 508 U.S. at 485 (noting that Wisconsin statute simply added bias motivation to list of properly considered factors).

Even in the face of compelling evidence of bias, judges may refuse to acknowledge bias motivation.²²⁶

In short, a biased police officer, prosecutor, or judge can always find a way to evade the requirements of anti-hate-crime schemes. More typically, insensitive or uneducated officers, prosecutors, and judges may—despite such schemes—unconsciously act in ways that alienate bias victims and undercount their experiences.

2. *Pull to the Paradigm Case and Resulting Suspicion of Victim's Claims*

Underprosecution and police undercounting are perhaps most prevalent when bias was but one of several motivating factors behind an incident. Both police and prosecutors routinely eliminate cases exhibiting mixed motives from the bias purview, even though many hate crime laws and departmental protocols explicitly provide for inclusion of such crimes.²²⁷ Generally, prosecutors will try as bias crimes only those cases in which the evidence of bias is overwhelming and the victim highly sympathetic.²²⁸ Exclusion of nonparadigmatic cases often leads to sharp conflict with target communities, who perceive those cases as hate crimes.²²⁹ Because the ultimate power to label or prosecute a crime as bias-motivated lies within the criminal justice system, it will be police and prosecutors—not target communities or victims—who define those crimes.²³⁰

²²⁶ See, e.g., Jacobs & Potter, *supra* note 2 (manuscript at 217-18) (recounting interview with San Diego prosecutor who failed to obtain hate crime conviction of two white men who “bound and gagged a Mexican farm worker, taped a sign to his head which read ‘No more here,’ and dumped him in a field,” as judge dismissed charges for “insufficient evidence” of bias).

²²⁷ See ADL, *Policies & Procedures*, *supra* note 91, at 39, 45, 61 (reproducing bias protocols that extend protection to crimes motivated in whole or in part by bias); New York City Police Department, *Patrol Guide*, *supra* note 215, § 108-26 (defining bias crime as motivated in whole or in part by bias).

²²⁸ See Telephone Interview with Constance Potter, *supra* note 213 (recounting incident in which prosecutors were initially hesitant to charge as hate crime antigay crime in which overt bias statements were made and swastikas were displayed, and commenting on general refusal to prosecute as hate crime any case where motive is mixed); Telephone Interview with Jennifer Rakowski, *supra* note 193 (describing Community United Against Violence relationship with District Attorney’s Hate Crimes Unit as highly cooperative and productive, pointing out that Unit functions best with “most stereotypical cases” that will “fly in court”). But see Telephone Interview with Scot Clark, *supra* note 218 (asserting that while other cities may underprosecute out of desire to downplay tensions, San Francisco’s hate crime prosecutors take broad view of bias).

²²⁹ See Jacobs & Potter, *supra* note 2 (manuscript at 206-11) (discussing frequent disputes between police and communities over labeling crimes bias-motivated).

²³⁰ See *Anti-Lesbian/Gay Violence in 1995*, *supra* note 13, at 55-58 (reporting that nationwide, only 40% of incidents reported as bias are so classified by police and that in New York City the figure is only 20%, claiming that changes in classification procedure in New

This reductionist tendency is at least partially a function of the fact that bias units are operated on a scarcity model. With limited personnel, they cannot handle every case in which bias is a factor; in order to control their own workloads, they will tend to focus on the few paradigmatic cases. More profoundly, police may focus on extraordinary cases because they find them more exciting and professionally gratifying.²³¹ Rather than focus on the hate crimes most likely to be experienced by the target communities they serve, police may choose to focus on the hate group activities they find more interesting.²³²

Given this systemic bias in favor of the extraordinary case, advocacy groups teach victims to insist that their cases be acknowledged as bias-motivated.²³³ Because such insistence requires placing particular emphasis on bias elements, however, victims are then open to accusations of distortion and false reporting.²³⁴

An example illuminates this point.²³⁵ The head of the Kings County District Attorney's Civil Rights Bureau was placed in charge of a stabbing case because the victim stated that he thought he heard an antigay epithet shouted immediately after he was stabbed by an

York City "sent a strong message that officers should be extremely cautious about labeling an incident as bias-motivated," and asserting that "crimes exhibiting mixed motivation, e.g., hate and economic, are almost never classified as bias").

²³¹ For example, one researcher describes a recent police conference on hate crime which focused almost exclusively on the Oklahoma City bombing, the far-right movement, and organized terrorism, even though the speakers at that conference acknowledged that the vast majority of hate crimes are committed by unaffiliated individuals. See AnnJannette Rosga, *Good Cop/Bad Cop: Refashioning Law Enforcement as the Thin Blue Line Between Bigotry and Tolerance*, in *Homegrown Terrorism* (Lucinda Cole & Richard Schwartz eds., forthcoming 1998) (manuscript at 1-3, 7-31, on file with the *New York University Law Review*) (analyzing fourth annual conference on hate crime for police officers, held in Maryland in May 1995). By focusing on militias and hate groups, the mostly white, male, and heterosexual police officers were able to conceptualize themselves as potential victims, while remaining unable to empathize with ordinary bias victims. See *id.* (manuscript at 11). This empathy made them more invested in the extraordinary case. See *id.* (manuscript at 1-2).

²³² See *id.* (manuscript at 26) (reflecting on law enforcement conference and concluding that "grass-roots activists involved in the struggle for the law enforcement recognition of hate crime . . . have more or less disappeared from this production of the law enforcement anti-hate-crime response. White masculine law enforcement emerged as both the subject and object of this conference's proceedings.").

²³³ See, e.g., *HIV Manual*, supra note 100, at 25-27 (describing police procedures).

²³⁴ See Jacobs & Potter, supra note 2 (manuscript at 98-99) (arguing that significant number of reported hate crimes are false and that media fail to report when alleged hate crimes turn out to be hoaxes); Jacobs & Eisler, supra note 141, at 113-14 (claiming that interest groups seeking "attention, access to funds, and political support" may contribute to fraudulent and false reporting of bias crime); Maldonado, supra note 189, at 557 (positing that victims have strong incentives to fabricate bias motivation).

²³⁵ This account is based on the personal observations of the author, who was present throughout the described events.

unknown perpetrator.²³⁶ Police investigation indicated that a person who looked like the victim had engaged in a drug deal with the suspected perpetrator. Because this prosecutor had come to believe that many supposed hate crime victims either falsify or distort claims of bias in order to gain “special treatment” or to hide their own criminal activity,²³⁷ and because this case appeared to fit that “fraud” paradigm, she concluded that the victim—who, as it later appeared, may have been a victim of mistaken identity—was lying. The victim then was asked to a meeting in which three civil rights prosecutors and two officers from the bias unit confronted him with accusations and strongly urged him to confess to his involvement in a drug deal. The victim, who knew that these unexpected allegations were untrue and who was not allowed to consult in private with his advocate, was highly traumatized. In the aftermath of this interrogation, his relationships with both the prosecutor and the police were irreparably shattered. The prosecutor was eventually reassigned, though the police clung angrily to their “knowledge” of a fraud. The incident seriously damaged the working relationship between the advocacy organization that supported the victim and both the Brooklyn District Attorney and the Bias Unit.

As this incident suggests, a presumption of hoax threatens to open wider rifts between police and prosecutors and target communities, rifts that anti-hate measures are meant to heal.

3. *The Possibility of Selective Enforcement*

Another reason police and prosecutorial discretion, bias, and suspicion of victims are problematic is the possibility that alleged bias criminals disproportionately will be members of target communities. Because hate crime laws and policies are neutral, referring only, for example, to “race” and not to particular races, they can be used to penalize bias-motivated crimes lacking historical pedigree.²³⁸ They

²³⁶ See Brendan Fay Stabbed in Williamsburg, Stop the Violence (New York City Gay and Lesbian AVP), Fall 1993, at 4 (reporting stabbing and planned protest march).

²³⁷ See Maldonado, *supra* note 189, at 557 & n.6:

Given the heightened social awareness of bias crimes and the concomitant special attention that allegations of this sort receive from law enforcement officials and the media, a complainant is keenly aware that if the crime perpetrated against him or her is deemed a bias crime, he or she will be accorded special protections, and the perpetrator will be dealt with more harshly by the courts. A complainant, therefore, has an incentive to tailor his or her presentation of facts so as to obtain a bias crime designation. This motive to embellish the facts of a case not only serves to cast doubt on the credibility of some complainants, it also leads to a relatively high incidence of false reports.

²³⁸ One writer therefore has suggested that such laws be written to apply only to white defendants whose victims are people of color. See Note, Combating Racial Violence: A

can be invoked against an African American person who attacks a white person, or against a gay person who attacks a heterosexual, even though such crimes are neither the most common sort nor the kind that spurred the development of anti-hate measures.²³⁹

Many civil rights advocates have expressed worries that such laws will be used disproportionately against people of color.²⁴⁰ The American Civil Liberties Union, for example, called attention to the possibility of selective prosecution in its position paper approving of hate crime laws, indicating that such approval could be withdrawn if over time prosecutions were brought disproportionately against people of color.²⁴¹

No empirical research has been done to support or refute the premise of selective prosecution. Such research would be extremely difficult, as only one state currently keeps statistics on hate crime prosecutions, and those statistics provide only raw numbers, offering no demographics on perpetrators.²⁴² Interviews with several hate crime prosecutors suggest that such prosecutions currently are not being brought disproportionately against members of target communities.²⁴³ Anti-black hate crime appears to be the most commonly

Legislative Proposal, 101 Harv. L. Rev. 1270, 1272-74 (1988) (proposing special statutes to punish interracial violence directed at minorities on grounds that such crimes represent "most acute manifestation of the racial subjugation that has plagued American society," producing social harms not associated with interracial violence against non-minorities).

²³⁹ See Federal Bureau of Investigation, U.S. Dep't of Justice, Criminal Justice Information Services Division, Hate Crime Statistics 1995, at 7 (1996) [hereinafter *Hate Crime Statistics 1995*] (reporting 1226 "Anti-White" crimes and 17 "Anti-Heterosexual" crimes out of 7947 total incidents).

²⁴⁰ As one example of such concern, this author was called by the New York City Bar Association's Civil Rights Committee for advice. Before recommending that the Association endorse a pending state bias bill, committee members wanted information on the frequency with which hate crime laws were invoked against people of color. See also Jacobs & Potter, *supra* note 2 (manuscript at 31) (citing Jill Trigger, executive director of San Francisco's Intergroup Clearinghouse on Hate Crime, as claiming that "white crime victims are using hate crime laws to enhance penalties against minorities who already experience prejudice within the criminal justice system"); Pedro Ponce, *Some Question Use of Hate Crime Laws by Victimized Whites*, San Diego Union Trib., May 5, 1994, at A36 (describing use of hate crime laws in prosecution of minorities accused of crimes against whites).

²⁴¹ See Interview with Bryan A. Stevenson, *supra* note 77 (explaining process by which selective prosecution caveat was introduced into American Civil Liberties Union position paper).

²⁴² See California Dep't of Justice, *Hate Crime In California 1995*, *supra* note 220 (reporting incidents of hate crimes in California).

²⁴³ See Telephone Interview with Chuck Haines, Assistant District Attorney for City and County of San Francisco (Oct. 15, 1996) (reporting that in 1995 Hate Crime Unit handled 15 antigay crimes and six racist crimes; in 1994, five racist crimes, four homophobic crimes, and one anti-Semitic crime; estimating that in early 1990s Unit handled approximately 30 antigay, 25 racist, and four anti-Semitic crimes); Telephone Interview with Ellen A. Meyers, *supra* note 190 (claiming that most hate crimes prosecuted in

prosecuted, anti-Semitic and homophobic crime trail closely behind, and other types of bias are prosecuted less frequently.²⁴⁴

This cursory examination, however, does not dispose of the concern. Recent FBI statistics, based on local police reports, indicate disproportionate attention to hate crime against whites. According to those statistics, in 1995, twenty-seven percent of known hate crime perpetrators nationwide were African American, while fifty-nine percent were white,²⁴⁵ showing that blacks are significantly over-represented and whites underrepresented as perpetrators in hate crime reports to police.²⁴⁶ While these statistics indicate that crimes perpetrated by whites are the most frequently reported, anti-white crimes are being reported and bias-classified far more frequently than the history of hate crime would suggest. Given both overt and unconscious racism or racial insensitivity on the part of police and prosecutors, it is reasonable to speculate that such persons are quicker to think of anti-white crimes as bias-motivated than so to judge anti-black crimes.²⁴⁷ *Wisconsin v. Mitchell*²⁴⁸ arguably provides additional evidence that hate crimes committed against whites may be regarded as both more serious and more transgressive than crimes against people of color. One could argue that because Mitchell's victim was white,²⁴⁹ the case was considered sufficiently important to become the vehicle for validating hate crimes laws.

Cook County are perpetrated against racial minorities, followed by anti-Semitic and homophobic crimes).

²⁴⁴ See *supra* note 243.

²⁴⁵ See Hate Crime Statistics 1995, *supra* note 239, at 1. A total of 1023 persons of color were labeled perpetrators of "Anti-White" crime, compared to 3167 whites who committed racist crimes. See *id.* at 12. The white perpetrators committed 2208 anti-black, 34 anti-Native American, 241 anti-Asian/Pacific Islander, 111 anti-multiracial, 404 anti-Hispanic, and 169 anti-"Other Ethnicity/National Origin" crimes. See *id.* Similarly, 1990 New York City police statistics cite 530 bias-classified crimes, of which 150 were anti-Semitic, 148 anti-black, 118 anti-white, 47 homophobic, 31 anti-Hispanic, and 22 anti-Asian. See Jacobs, *supra* note 209, at 57 (citing official reports).

²⁴⁶ See Samuel Walker et al., *The Color of Justice: Race, Ethnicity and Crime in America 5* (1996) (citing 1990 census figures showing that African Americans comprised 12.1% of U.S. population while whites comprised 80.3%).

²⁴⁷ As one scholar has asserted, the criminal justice system is more likely to define Reginald Denny as a victim of hate crime than it is to think of Rodney King in those terms. See Interview with Bryan A. Stevenson, *supra* note 77. Others claim that, as a normative matter, anti-white crime is increasing and that such crime should be given equal attention. See *Confronting America's Hate Crime Crisis*, *supra* note 93, at 6 (asserting that black-on-white hate crime is increasing); Jacobs & Potter, *supra* note 2 (manuscript at 286) (claiming that "[w]hites, generally sympathetic to the aspirations of minorities, may bristle at the suggestion that crimes motivated by blacks' racism against whites should be treated as a less virulent strain of hate crime, or not as hate crime at all").

²⁴⁸ 508 U.S. 476 (1993).

²⁴⁹ See *id.*

More research is needed to ascertain the extent of potential disproportionate enforcement against historically oppressed groups. Such a risk may not be dismissed easily.

4. *Police brutality*

Police brutality remains another impediment to meaningful institutional change as a result of anti-hate measures. There exists a long and well documented history of police violence against target communities.²⁵⁰ Indeed, the urban riots of the 1960s were sparked by police violence.²⁵¹ The gay and lesbian liberation movement originated in the 1969 Stonewall Riot, when patrons of a gay bar fought back against a police vice raid; such raids were frequently accompanied by extreme police violence.²⁵² From the perspective of target communities, police remain among the most common perpetrators of bias-motivated violence.²⁵³ There is an inherent contradiction, therefore, in entrusting those same officers with the task of apprehending other bias offenders.²⁵⁴

Police brutality represents perhaps the sharpest point of departure between the priorities of target communities and those of the criminal justice system. Target communities overwhelmingly perceive

²⁵⁰ See Free, *supra* note 5, at 78-80 (describing deep historical roots of police violence against African Americans); Hubert G. Locke, *The Color of Law and the Issue of Color: Race and The Abuse of Police Power*, in *And Justice For All: Understanding and Controlling Police Abuse of Force* 133, 135 (William A. Geller & Hans Toch eds., 1995) (claiming that "in the 1960s the issue of police use of excessive force was one which polarized police officials and large segments of the nation's Black populace and civil rights community").

²⁵¹ See Walker et al., *supra* note 246, at 85 (describing disproportionate use of police force against racial minorities and connecting riots in wake of Rodney King verdict to riots of the 1960s).

²⁵² See generally Martin Duberman, *Stonewall* (1993) (portraying six gay and lesbian individuals' experiences during Stonewall period).

²⁵³ From 1993-95, nearly half of the anti-Asian cases handled by CAAAV involved police officers as primary offenders. See CAAAV, *Police Violence*, *supra* note 101, at 1-10. Similarly, police were identified as perpetrators in 12% of homophobic offenses nationwide in 1995. See *Anti-Lesbian/Gay Violence in 1995*, *supra* note 22, at 32; see also *Beyond Rodney King*, *supra* note 82, at 1-21 (detailing African American perception of police violence); HIV Manual, *supra* note 100, at 65-74 (discussing police abuse of HIV-positive persons); Terry A. Maroney, *HIV and Hatred: Hazardous to Your Health*, *Health/PAC Bulletin*, Winter 1993, at 14, 16-17 (reporting 1992 AVP statistics on violence against persons with HIV, showing that police were perpetrators in 10% of harassment and 24% of bias assault cases). This is not uniformly true for all types of hate crime. For example, ADL's audits of anti-Semitic incidents consistently report no police brutality. See, e.g., *Anti-Defamation League, 1995 Audit of Anti-Semitic Incidents* (1996) (reporting no instances of police abuse); *Anti-Defamation League, 1994 Audit of Anti-Semitic Incidents* (1995) (same); *Anti-Defamation League, 1993 Audit of Anti-Semitic Incidents* (1994) (same).

²⁵⁴ See Interview with Bryan A. Stevenson, *supra* note 77 (noting such contradiction).

brutality to be motivated by racism, homophobia, and other biases,²⁵⁵ while police and prosecutors do not.²⁵⁶ For example, African Americans and their allies took it as self-evident that Rodney King would not have been beaten so brutally had he been white. The white police officers and a white jury regarded the beating as an individual occurrence justified by King's behavior.²⁵⁷ Similarly, after the recent assault on a black Haitian immigrant, Abner Louima, by a white New York City police officer,²⁵⁸ New York's Caribbean community and its allies perceived the assault to be a racist attack exemplifying a general police attitude; the community mobilized outrage and channeled that outrage into enormous marches and rallies.²⁵⁹ Government leadership scrambled to dampen this outrage by insisting that the incident was isolated²⁶⁰ and by assembling a police-community relations board whose effectiveness has been widely questioned.²⁶¹ These prominent examples illustrate a less visible problem.

The existence of police-community boards, bias reporting procedures, and bias units within police departments might encourage greater discipline of officers who themselves display biased behavior,

²⁵⁵ See Felicia R. Lee, *Young and in Fear of the Police: Parents Teach Children How to Deal with Officers' Bias*, N.Y. Times, Oct. 23, 1997, at B1 (describing African American and Latino parents' perception that their children are at high risk of police mistreatment based on race, and citing poll showing 82% of African Americans and 71% of Latinos believe police discriminate while only 45% of whites perceive police racism).

²⁵⁶ See Hernandez, *supra* note 14, at 852 n.34 (quoting scholar describing prosecutorial complicity in covering up police-perpetrated bias incidents as example of how prosecutors' allegiance lies with police with whom they must cooperate).

²⁵⁷ See Locke, *supra* note 250, at 145-48 (discussing, in wake of King verdict, radically different views of police and people of color regarding acceptable use of force, including officers' views that level of force was justified by King's behavior).

²⁵⁸ See David Kocieniewski, *Injured Man Says Brooklyn Officers Tortured Him in Custody*, N.Y. Times, Aug. 13, 1997, at B1 (describing Abner Louima's allegations that police beat and sexually assaulted him).

²⁵⁹ See Jonathan P. Hicks, *Protest Call: 'Something Has to Be Done,'* N.Y. Times, Aug. 14, 1997, at B3 (reporting on overwhelming Haitian community concern and anger over Louima attack); John Kifner, *Thousands Call on City Hall To Confront Police Brutality*, N.Y. Times, Aug. 30, 1997, at A1 (describing march across Brooklyn Bridge to City Hall by thousands of protesters).

²⁶⁰ See Michael Cooper, *Safir, Under Council Fire, Defends Police's Conduct*, N.Y. Times, Sept. 12, 1997, at B3 (reporting that Police Commissioner answered "harsh questioning" from City Council by calling conduct of Louima's attackers "aberrant and abnormal").

²⁶¹ See David Firestone, *Skepticism and Fiery Debate Mark First Session of Panel*, N.Y. Times, Aug. 22, 1997, at B3 (noting that Mayor Rudolph Giuliani formed task force after Louima incident and discussing task force's mandate; reporting that some task force members and at least one City Council member feared task force would be no more than public relations hoax); Jennifer Gonnerman, *Missing In Action: Critics Charge No-Shows and Poor Outreach Undercut the Mayor's Post-Louima Task Force*, Village Voice, Dec. 16, 1997, at 52 (reporting that participation by many task force members and community is low, and citing task force members' frustration with its ineffectiveness).

as that behavior stands in contrast to the expressed policy of the department. Unfortunately, this has not happened. Police brutality against people of color, immigrants, gay men and lesbians, and other target groups does not appear to be lessening; if anything, it appears to be increasing.²⁶² While the few instances in which off-duty police officers commit hate crimes generally are given media attention and treated seriously,²⁶³ hate crimes by police are almost always committed in the course of their duties. Such crimes are funneled through internal disciplinary mechanisms that are notoriously slow, ineffective, and biased against victims.²⁶⁴ The existence of anti-bias policies appears to have little or no effect on brutality rates, making clear that institutionalized anti-hate measures do not necessarily affect the institutions in which they reside.²⁶⁵

5. *Death Penalty*

The inability to counteract police brutality adequately demonstrates how institutionalization frustrates the anti-hate-crime movement's goals. The invocation of anti-hate rationales to justify executions suggests that those measures have in some instances become completely disconnected from, and even antithetical to, the goals and needs of target communities. In several states, a convicted

²⁶² See CAAAV, *Police Violence*, supra note 101, at 4-11 (describing annual increase in reports of police violence against Asians); *Beyond Rodney King*, supra note 82, at 7-8 (claiming that although it is impossible to document whether police violence is increasing, police-community relations are eroding, and most Americans believe that police brutality is both common and disproportionately directed at minorities); *Beating the Cops: Brutality Claims Denude City Coffers of \$98 Million*, *Village Voice*, Dec. 23, 1997, at 35, 38 (reporting that in 1997, 2735 civil misconduct and brutality claims were filed against New York City police, up from 1567 in 1993); *Tough Cops, Thin Skin*, *N.Y. Times*, Nov. 22, 1997, at A14 (criticizing New York police and noting that, while complaints apparently began to drop in 1997, between 1993 and 1996 such complaints rose sharply from 3956 to 5596 annually); Selwyn Raab, *City's Police Brutality Report Card: Complaints Down, Needs Improving*, *N.Y. Times*, Aug. 17, 1997, at 41 (reporting that in 1996, 80% of New York City police misconduct complaints were filed by Blacks, Latinos, and Asians).

²⁶³ See, e.g., Elsa Brenner, *Murder Case Draws Ties to Bias and the Police*, *N.Y. Times*, Sept. 28, 1997, Westchester Section, at 1 (reporting on murder charges against white New York City off-duty officer who shot black man while yelling racial epithets, and on guilty plea by white Yonkers off-duty officer who committed bias-motivated assault against black man).

²⁶⁴ See *Beyond Rodney King*, supra note 82, at 52-70 (reporting that nationwide, citizens seldom prevail in complaints against police, are dissatisfied with complaint procedures, and are actively discouraged from filing complaints); Michael Cooper, *Mayor to Help Police Monitor He Had Fought*, *N.Y. Times*, Sept. 17, 1997, at B1 (reporting that of 20,000 police misconduct complaints filed in New York City between 1993 and 1997, only 4% were deemed substantiated and 1% led to discipline of officers).

²⁶⁵ See *Anti-Lesbian/Gay Violence in 1995*, supra note 13, at 52-53 (citing study showing that nationally, 9% of homophobic violence victims described police response as "verbally or physically abusive").

murderer who otherwise would not be a candidate for execution may now become "death-eligible" by virtue of having committed a hate crime. California,²⁶⁶ Delaware,²⁶⁷ and Nevada²⁶⁸ explicitly include commission of a hate crime in their death aggravation schemes. The inclusion of hate crime in death aggravation schemes and the imposition of death against hate criminals are intended as symbolic gestures to show target communities that they are valued by society and that crimes against them are taken seriously. Indeed, using the death penalty as a method of symbolizing societal commitment to defined groups of people is increasingly common.²⁶⁹ Numerous capital murder schemes, reformulated after *Furman v. Georgia*²⁷⁰ and validated by *Gregg v. Georgia*,²⁷¹ allow the death penalty to be imposed if the victim was a law enforcement official,²⁷² a child,²⁷³ elderly,²⁷⁴ disabled,²⁷⁵ or pregnant.²⁷⁶

The inclusion of hate crime in execution schemes cannot, however, alter the fundamental reality that imposition of the death penalty consistently reinforces a societal valuation of life that is decidedly tipped against target communities. Death is imposed most frequently in cases with white victims and black perpetrators, and least fre-

²⁶⁶ See Cal. Penal Code Ann. § 190.2(a)(16) (West Supp. 1998) (allowing finding of special circumstances warranting death penalty if "victim was intentionally killed because of his or her race, color, religion, nationality, or country of origin"). This provision was added to the death penalty statute by popular vote in 1990. See *id.* Historical and Statutory Notes (West Supp. 1998).

²⁶⁷ See Del. Code Ann. tit. 11, § 4209(e)(1)(v) (1995) (establishing aggravating factor if "murder was committed . . . because of the victim's race, religion, color, disability, national origin or ancestry").

²⁶⁸ See Nev. Rev. Stat. § 200.033(11) (1995) (making defendant death-eligible if murder committed "upon a person because of the actual or perceived race, color, religion, national origin, physical or mental disability or sexual orientation of that person").

²⁶⁹ See generally Jonathan Simon & Christina Spaulding, *Tokens of our Esteem: Aggravating Factors in the Era of Deregulated Death Penalties* (1997) (unpublished manuscript, on file with the *New York University Law Review*).

²⁷⁰ 408 U.S. 238, 403-05 (1972) (Burger, C.J., dissenting) (disagreeing with per curiam majority opinion that held two death sentences unconstitutional; inviting states to reformulate their own capital punishment statutes).

²⁷¹ 428 U.S. 153, 196-99 (1976) (upholding constitutionality of reformulated death penalty statute; citing with approval Georgia's use of statutory aggravating factors as guide on jury discretion and effective means to narrow class subject to capital punishment).

²⁷² See, e.g., Ga. Code Ann. § 17-10-30(5), (8) (1997) (establishing that murder of judicial officer, district attorney, or peace officer is aggravating factor).

²⁷³ See, e.g., Ala. Code § 13A-5-40(a)(15) (1994) (authorizing death penalty if murder victim is under 14 years of age); Nev. Rev. Stat. § 200.033(10) (1995) (same).

²⁷⁴ See, e.g., Del. Code Ann. tit. 11, § 4209(e)(1)(r) (1995) (authorizing death penalty if murder victim is over 62 years of age).

²⁷⁵ See, e.g., Del. Code Ann. tit. 11, § 4209(e)(1)(q) (1995) (authorizing death penalty if murder victim is severely disabled).

²⁷⁶ See, e.g., Del. Code Ann. tit. 11, § 4209(e)(1)(p) (1995) (authorizing death penalty if murder victim is pregnant).

quently in cases with black victims and white perpetrators.²⁷⁷ Other target groups similarly suffer from disproportionate imposition of death. A recent survey of women on death row, for example, suggested that nearly half are lesbians,²⁷⁸ though by any measure lesbians account for far less than fifty percent of the female population.²⁷⁹ Inclusion of favored victim groups in aggravation schemes has served merely to expand the number of death-eligible cases, while maintaining bias-motivated disparities in imposition.²⁸⁰ The occasional execution of a hate criminal will not alter this overwhelming trend. In fact, given the danger of disproportionate hate crime prosecution of target community members,²⁸¹ inclusion of hate crime in aggravation schemes could further the biased imposition of death.²⁸²

A preliminary review of death sentencing in cases of hate-motivated murder suggests its biased and uneven imposition. Several people have already been sentenced to death for hate-motivated crimes even absent statutory designation of hate motivation as an aggravating factor. In Alabama, Henry Hays became in 1997 the third white person in recent history to be executed for murdering an African American.²⁸³ Hays, a member of the Ku Klux Klan, had lynched a young black man in 1981.²⁸⁴ Richard Snell—a right-wing militia member who had killed both a black state trooper and a merchant he mistakenly thought to be Jewish, and who was sentenced to die for the latter

²⁷⁷ See U.S. General Accounting Office, *Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities* 6 (1990) (finding that despite "race-neutral" laws, those convicted of murdering whites are most frequent recipients of death penalty, while those convicted of murdering blacks are least likely to be sentenced to death).

²⁷⁸ See Victoria Brownworth, *Dykes on Death Row*, *Advocate*, June 16, 1992, at 62-64 (finding that at least 17 of 41 women on death row were lesbians).

²⁷⁹ See *The Information Please Women's Sourcebook* 342 (Lisa DiMona & Constance Herndon eds., 1994) (citing 1993 study showing 2.1% of women identified themselves as lesbian and 3.1% as bisexual, while 17% of women reported having had lesbian sex).

²⁸⁰ See Interview with Bryan A. Stevenson, *supra* note 77 (criticizing steady expansion of death-eligible crimes and persistence of racially biased imposition of death).

²⁸¹ See *supra* Part III.A.3 (discussing danger of such disproportionate prosecution).

²⁸² See Jacobs & Potter, *supra* note 2 (manuscript at 316) ("It would certainly be ironic if the consequence of the importation of the civil rights paradigm into criminal law was the execution of prejudiced murderers, some percentage of whom would be blacks and members of other minority groups.").

²⁸³ See Gita M. Smith, Alabama case showed how father's sins were visited on son; White's execution for killing black didn't end inherited racism, *Atlanta J. & Const.*, June 8, 1997, at 4A (reporting Hays execution); Telephone Interview with Richard C. Dieter, Executive Director, Death Penalty Information Center (Jan. 8, 1998) (reporting that Donald Gaskins, executed in 1991 for killing black fellow inmate, was first white to die for killing African American since death penalty had been reinstated in 1976, while Kermit Smith, executed in 1995 for killing black female college student, was second).

²⁸⁴ See Smith, *supra* note 283 (reporting murder of Mobile, Alabama teenager Michael Donald).

crime—was executed on April 19, 1995.²⁸⁵ A Texas murderer who admitted killing his victim because he was gay, thinking that he could thereby avoid prosecution, was sentenced to be executed, as was his accomplice.²⁸⁶ A serial hate crime perpetrator, Joseph Paul Franklin, received a death sentence in 1997 for an anti-Semitic murder committed twenty years earlier.²⁸⁷

Countless other hate-motivated murders, however, have not received death sentences, particularly where the victims were African American. While Joseph Paul Franklin was sentenced to die for an anti-Semitic murder, he had earlier received life sentences for fatally shooting two black Utah men who had been jogging with white women and for murdering an interracial couple in Missouri.²⁸⁸ African American leaders have noted bitterly that while Franklin was sentenced to life for the Utah murders, a black Utah man was given a death sentence in a murder he did not personally commit, in which the victims were white.²⁸⁹ Several U.S. Marines convicted of the premeditated racist murder of a black North Carolina couple were given life

²⁸⁵ See Jo Thomas & Ronald Smothers, *Oklahoma City Building Was Target of Plot as Early as '83, Official Says*, N.Y. Times, May 20, 1995, at 6 (reporting Snell's execution and noting militia members' interest in his case).

²⁸⁶ See *Licensed to Kill* (Arthur Dong & DeepFocus Productions 1997) (portraying interviews with Donald Aldrich, sentenced to death for homophobic murder, who told police of anti-homosexual motivation assuming that such admission would lead to leniency); *Gay Killing Draws 2nd Death Penalty: Second Defendant Faces Death over 1993 Slaying of Homosexual Tyler Records Clerk*, The Austin Am.-Statesman, Sept. 9, 1995, at B11 (reporting that Henry Earl Dunn, Jr., was sentenced to death for homophobic murder and that Donald Aldrich was sentenced to die in 1994 for same crime).

²⁸⁷ See Kim Bell, *Racist Killer Confesses to Three More Slayings*, St. Louis Post-Dispatch, July 10, 1997, at 15A (reporting that Franklin was sentenced to death for 1977 murder and confessed to additional racist murders); *Larry Flynt's Assailant Has Left a Trail of Bigotry and Murder*, N.Y. Times, Feb. 16, 1997, at 41 (detailing Franklin's numerous convictions for hate crimes and reporting that judge was expected to impose death sentence as recommended by jury for 1977 anti-Semitic murder outside St. Louis, Missouri).

²⁸⁸ See *Larry Flynt's Assailant Has Left a Trail of Bigotry and Murder*, supra note 287 (detailing those crimes and sentences imposed). Additionally, Franklin's conviction for bombing a synagogue was overturned, see *id.* (discussing overturned conviction for bombing Chattanooga, Tennessee synagogue in 1977); he was acquitted of shooting a black civil rights leader, see *id.* (reporting Franklin's acquittal for nonfatal shooting of Vernon E. Jordan, Jr., of the National Urban League); and he has confessed to racist murders that were never charged, see Bell, supra note 287 (claiming that Franklin confessed to murders of two black Georgia men and killing of white Tennessee woman who had slept with black man).

²⁸⁹ See Steve Hawkins, *Assistant Counsel, NAACP Legal Defense and Education Fund, Letter to the Editor, Utah Shows Death Penalty's Racism*, N.Y. Times, Aug. 19, 1992, at A20 (contrasting death sentence imposed on black defendant, William Andrews, in connection with murder he did not personally commit, with life sentences given to white murderers such as Franklin, and drawing attention to Utah's racially discriminatory record of death penalty sentencing); Robert Reinhold, *Salt Lake City Journal: 1974 Case Still Strains Race Relations in Utah*, N.Y. Times, Aug. 31, 1989, at A16 (reporting that Utah

sentences.²⁹⁰ Federal prosecutors declined to seek the death penalty for three young white men who, as part of an attempt to “start a race war,” shot three African Americans, killing one.²⁹¹ These cases suggest that the imposition of death in hate crime cases seems to reflect the same arbitrariness plaguing death sentencing generally. One scholar has also pointed out that, by executing selected hate criminals with extremist views, states may attempt to deflect attention from state sanctioned oppression of target communities; for example, while Alabama can point to its execution of Henry Hays for a racist murder, three quarters of those on that state’s death row are African American.²⁹²

More information on the imposition of death against bias-motivated murderers is needed. This first look, however, suggests that the same biases that plague death sentencing generally also plague hate crime sentencing.

The inclusion of hate crime in death penalty schemes and the execution of hate criminals is perhaps the clearest indication that anti-hate-crime measures are no longer under the control of the movement that pushed for them. Civil rights advocates have never lobbied for inclusion in aggravation schemes; indeed, they consistently have opposed the death penalty in all circumstances.²⁹³ While many victims’ rights advocates have supported both the death penalty and recognition of favored victim groups,²⁹⁴ they have never done so on behalf of

black leaders believed racism was behind death sentencing of Andrews and life sentencing of Franklin).

²⁹⁰ See *Second Ex-Paratrooper Gets Life In North Carolina Racial Killings*, N.Y. Times, May 13, 1997, at A17 (reporting that two white supremacist former paratroopers were spared death penalty by jury after convictions for racially-motivated murder of black couple).

²⁹¹ See *3 Accused of Race-War Shootings Face Trial*, N.Y. Times, Nov. 6, 1995, at A18 (reporting that prosecutors originally intended to seek death penalty and later decided against doing so, and detailing how accused planned to incite war with ultimate goal of “killing and eliminating blacks”).

²⁹² See Telephone Interview with Bryan A. Stevenson, Executive Director, Equal Justice Initiative (Jan. 8, 1998).

²⁹³ See, e.g., *Booth v. Maryland*, 482 U.S. 496, 497 (1987) (noting that NAACP filed amicus curiae opposing allowance of victim impact statements at capital sentencing); *Furman v. Georgia*, 408 U.S. 238, 239 (1972) (noting amicus brief filed by NAACP urging reversal of death penalty statute); Greenberg, *supra* note 36, at 440-60 (describing NAACP LDF fight against capital punishment); *id.* at 454 (asserting that in early 1980s “LDF lawyers were counsel, or consulted, in every Supreme Court case” dealing with death penalty).

²⁹⁴ See, e.g., *Payne v. Tennessee*, 501 U.S. 808, 810-11 (1991) (noting amicus briefs filed by Frank Carrington, prominent victim advocate, and National Organization for Victim Assistance, both urging that victim impact information be allowed at capital sentencing); *id.* at 834 (Scalia, J. concurring) (citing rise of “victims’ rights” movement as one justification for allowing such statements, since not allowing them confounds popular opinion); Interview with Bryan A. Stevenson, *supra* note 77 (discussing organized victims’ rights

bias victims. An increasingly death oriented criminal justice system has given target communities a remedy they have not asked for and which most would not want,²⁹⁵ but which fits comfortably into the system's own agenda.

In sum, anti-hate-crime measures leave significant opportunities for the operation of systemic bias. Because such measures have been rapidly institutionalized, they increasingly have come to reflect the institutional culture and priorities of criminal justice. Consequently, they are no longer under the control of the communities behind the anti-hate-crime movement, and are no longer responsive to their priorities.

B. *Toward a Strong Movement*

Anti-hate-crime efforts exist within a general societal context, in which their positive effects are undercut by popular sentiment and government actions that adversely affect target communities.²⁹⁶ These broader societal actions speak louder, and affect more people, than do efforts against hate crime, centered in the few large cities that support bias units in their police departments and prosecutors' offices. At a time when the national mood is turning against civil rights claims made by oppressed groups, anti-hate-crime efforts as they currently exist are a woefully inadequate counterweight.

groups that have lobbied for expansion of legal bases for and increased imposition of death penalty).

²⁹⁵ See Smith, *supra* note 283 (noting that Southern Poverty Law Center, although representing lynching victim's mother in civil suit, was uncomfortable with Hays's execution). AVP recently issued an official statement opposing the death penalty, in response to the recent decision by the Kings County District Attorney to seek the death penalty against a gay man accused of murdering his partner. See New York City Gay and Lesbian Anti-Violence Project, Proposed Policy Statement Opposing the Death Penalty (Oct. 11, 1996) (on file with the *New York University Law Review*). Additionally, although Donald Aldrich and Henry Earl Dunn, Jr. were sentenced to death for the antigay killing of Nicholas Ray West in Tyler, Texas, the incident mobilized the Texas gay and lesbian community to argue for an inclusive state hate crime law rather than to urge the death penalty. See Power, *supra* note 117 (describing "Stop the Hate" rally commemorating 1993 murder).

²⁹⁶ The California Attorney General's Commission on Racial, Ethnic, Religious and Minority Violence recognized this danger, recommending that the state increase its general protections of undocumented immigrants and refugees and take a strong stand against English-only laws. See California Report, *supra* note 13, at 67. Undocumented immigrants, the Commission pointed out, are uniquely vulnerable to hate violence when the public perceives them as a threat to the economy, and exclusionary language laws "point to the existence of the alienation and fear that cause hate violence." *Id.*; see also Jacobs & Potter, *supra* note 2 (manuscript at 119-21) (discussing long history of violence, beginning in 1820s, against new immigrants). California is now leading the nation in an attack on undocumented immigrants. See Proposition 187, approved Nov. 8, 1994, codified at Cal. Educ. Law §§ 48215, 66010.8 (1997) (excluding undocumented immigrants from public elementary, secondary, and postsecondary education).

The task for anti-hate-crime advocates, therefore, is to make the movement an adequate counterbalance to the many societal forces that encourage hate crime and to the institutional forces that prevent an adequate societal response. The anti-hate-crime movement would do well to remember that "a social movement does not sustain momentum for long qua social movement if it slips entirely out of the politics of disorder. If too much emphasis is placed on the use of orthodox channels, the movement becomes mundane, slow moving, and gradualist."²⁹⁷ By becoming too wedded to the institutions of criminal justice, the movement loses both its power and its potential.

To resist this trend, the movement must revisit its initial impulse: to challenge systemic bias against hate crime victims and target communities. Movements may challenge powerful systems consistently only from a position of internal strength, and the anti-hate-crime movement today lacks that strength. The movement therefore must invest in itself. As a preliminary step, the anti-hate-crime movement must conceptualize itself as a permanent force worth investing in. Too frequently, movement organizations spring up in the aftermath of a crisis only to die with the end of that crisis.²⁹⁸ Bearing this cycle in mind, the criminal justice system's near-exclusive focus on paradigmatic cases²⁹⁹ may be attributed to the movement itself. Social movements vary in their level of internal organization, ranging from highly centralized groups to loose coalitions;³⁰⁰ the anti-hate-crime movement falls on the less organized end of this continuum. With the exception of the few existing grassroots groups that regularly advocate for "ordinary" victims, the movement tends to make its presence felt only when an extraordinary case brings people into the streets and commands media attention.³⁰¹ In such cases the criminal justice system feels compelled to show a sympathetic response. In ordinary cases, however, no matter how bitterly the victim and her immediate community may contest a non-bias classification, the criminal justice system feels no external push to reflect their perceptions. Permanent organizations can provide that push.

²⁹⁷ Wilson, *supra* note 30, at 230.

²⁹⁸ See Telephone Interview with Jill R. Trigger, Executive Director, Intergroup Clearinghouse (Jan. 12, 1998).

²⁹⁹ See *supra* Part III.A.2 (discussing disproportionate focus on such cases to detriment of fair consideration of mixed-motive cases).

³⁰⁰ See Tarrow, *supra* note 27, at 15 (positing that many movements have no formal structure or clear membership and are often in formation at time of public appearance); Wood & Jackson, *supra* note 26, at 3-6 (arguing that internal organization of movements ranges from highly formal to loosely knit).

³⁰¹ See Telephone Interview with Jill R. Trigger, *supra* note 298.

Permanent organizations are needed at both the grassroots and national levels. Grassroots organizations are perhaps most capable of reaching victims and their communities, meeting their needs, and channeling their energies. The few such organizations that currently exist, however, primarily serve lesbian and gay communities.³⁰² Many more such groups, which could be modeled after those highly successful projects, are desperately needed to reach the many communities affected by hate crime, especially African Americans. Movement leadership on the regional and national levels is also sorely lacking. Gay and lesbian projects recently have founded their own national network, facilitating the sharing of skills and resources.³⁰³ Similar networks should be put in place to bring together all communities committed to a common strategy against hate crime.

Before such networks could be successful, anti-hate-crime advocates would have to make a serious commitment to bridging the many differences that now divide target communities. Most movement organizations focus on specific target communities and have little contact with groups serving other communities.³⁰⁴ While such groups come together on occasion in coalitions, such coalitions typically are short-lived, being organized in response to a particular crisis or to advocate for passage of a hate crime law.³⁰⁵ Even within such coalitions, advocates have disagreed as to the proper scope of their activities.³⁰⁶ Such conflicts reflect the fact that target communities, far from enjoying a natural solidarity, may in fact harbor biases against one another.³⁰⁷ Indeed, target communities may be implicated in each

³⁰² See *id.*

³⁰³ See *Anti-Gay/Lesbian Violence in 1995*, *supra* note 13, at 6 (discussing formation of National Coalition of Anti-Violence Programs).

³⁰⁴ See Telephone Interview with Jill R. Trigger, *supra* note 298 (noting that Intergroup Clearinghouse is one of nation's only anti-hate-crime groups to serve all target communities).

³⁰⁵ See *id.*

³⁰⁶ For example, while antigay violence is a pervasive and serious problem, see, e.g., *Hate Crimes: Confronting Violence Against Lesbians and Gay Men* (Gregory M. Herek & Kevin T. Berrill eds., 1992) (collecting reports of empirical data, anecdotal essays, and theoretical papers on violence against lesbians and gay men), not all groups include sexual orientation under their purview; the same is true of violence against the disabled, immigrant groups, and women, see, e.g., *Maryland Report*, *supra* note 88, at 4-5 (describing mission of NIAPV as being limited to examining ethnic, racial, and religious violence); *Jeness & Broad*, *supra* note 23, at 141-44 (decrying exclusion of violence against women from agenda of most anti-hate groups); *supra* note 162 and accompanying text (detailing contentious battle over proper level of inclusion of gender and other biases in proposed New York State hate crime bill).

³⁰⁷ See, e.g., Rhonda Chriss Lokeman, *Civil Rights Champion Practices What He Preaches*, *Kan. City Star*, Jan. 12, 1993, at B5 (praising black leader Rev. C.T. Vivian for inclusion of gays and lesbians in anti-hate agenda and criticizing homophobia of local black clergy and residents urging their exclusion).

others' victimization, as when—to give but one example—African Americans are responsible for anti-Asian violence.³⁰⁸ Anti-hate-crime movement organizations, therefore, may come into sharp conflict with one another; the ADL and the NAACP, for example, reportedly have clashed over the issue of anti-Semitism within the Nation of Islam.³⁰⁹ Finally, victims' rights and civil rights groups continue to maintain their distance from one another, lessening their ability to organize around issues of joint concern.³¹⁰

The movement must reject this divisiveness and concentrate on identifying and fortifying common ground. This will entail the often unpleasant and painful process of confronting the ways in which communities are implicated in each other's victimization and working through the many conflicts between victims' rights and civil rights models. While soul searching and confrontation are difficult, they are indispensable if the movement hopes to work toward internal strength. From a place of strength, the movement could begin to focus on currently unanswered crucial questions, such as the movement's theory of punishment, the proper balance between rehabilitation and incarceration, and strategies for reducing police bias violence.

Finally, the anti-hate-crime movement must refuse to allow governmental authorities to regard anti-hate efforts as severable from other civil rights demands. Because hate crime is intimately connected with social and political subordination, advocates must refuse to accept anti-hate measures as a substitute for real systemic change designed to create equal access to jobs, housing, wealth, education, services, and personal freedoms. The movement must remember that, if it hopes to be truly transformative, it must remain true to its roots—the target communities—whose need to be free from hate crime is inseparable from the more general need to be free.

³⁰⁸ See Federal Bureau of Investigation, U.S. Dep't of Justice, Criminal Justice Information Services Division, *Hate Crime Statistics 1995*, at 12 (1996) (cataloguing 57 black-on-Asian hate crimes).

³⁰⁹ See Peter Noel, *Mutual Contempt: The Secret Relationship Between Abraham Foxman and Benjamin Chavis*, *Village Voice*, Nov. 11, 1997, at 48 (reporting such conflict).

³¹⁰ Consider that while the New York State Hate Crimes Coalition counts among its members numerous victims' groups, those groups have been relatively inactive. See Interview with Howie Katz, *supra* note 91. This disparity in the involvement of victim's groups as compared to civil rights groups is reflected in the makeup of the Nebraska Hate Crimes Coalition, which includes ADL, the Urban League of Nebraska, the Chicano Awareness Center, and the National Conference of Christians and Jews, but no victims' groups. See R. George Smith, *Coalition to Target Hate Crimes*, *Omaha World-Herald*, Jan. 15, 1997, at 17 (describing formation and goals of newly formed Nebraska Hate Crimes Coalition).

CONCLUSION

This Note has explained the recent national explosion in anti-hate-crime measures by tracing the emergence of an anti-hate-crime movement. It has grounded that movement's emergence in the political opportunities and cultural understandings created by civil and victims' rights advocates. Given those political opportunities, the movement experienced a rapid rate of institutionalization. That institutionalization, however, impedes significant change within the institutions of criminal justice, the very system that movement hopes to change. By citing specific examples of the continuing maltreatment of bias victims, and by calling attention to the persistence of police brutality and the lack of control movement advocates now have over anti-hate measures and their implementation, this Note has read failure into success.

The proper response to this failure is not to abandon the effort. To the contrary, this Note is a call to further action. By investing in itself and moving toward a position of internal strength, the anti-hate-crime movement may fortify itself to resist the pull toward systemic demands and instead assert the demands of outsider communities. Movements, after all, lay the groundwork for future movements; it is therefore appropriate to consider the legacy this movement wants to create.³¹¹ The anti-hate-crime movement could fade away and leave behind a governmental infrastructure of police reporting mechanisms, bias units, and hate crime laws that could fall into disuse or be used against the persons who advocated for them. By contrast, with enough commitment, it may become both a permanent source of mobilization for those who want to make systems of governance accountable to target communities and a mechanism by which those communities might learn to work productively with one another.

³¹¹ See Tarrow, *supra* note 27, at 172 (pointing out that movements have potential to "transform their initial challenges into permanent access to power and leave lasting networks of activists behind").