THE VICIOUS CYCLE OF HATE: SYSTEMIC FLAWS IN HATE CRIME DOCUMENTATION IN THE UNITED STATES AND THE IMPACT ON MINORITY COMMUNITIES

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"You cannot address the problem of hate in this nation if you refuse to acknowledge its existence."[1]

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1 Press Release, Sikh Coal., Sikhs Demand Federal Hate Crime Prosecution After DuPage Prosecutor Fails (Sept. 11, 2015), http://sikhcoalition.org/advisories/2015/sikhs-demand-federal-hate-crime-prosecution-after-dupage-prosecutor-fails (quoting Sikh Coalition's Legal Director, Harsimran Kaur, responding to an announcement that no hate crime charge would be brought against the offender, who viciously assaulted Inderjit Singh Mukker, a Sikh American resident of Chicago, after pulling up to Mukker's car and yelling racial slurs, including, "Terrorist, go back to your country, Bin Laden!").

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INTRODUCTION

Hate crimes[2] have been prevalent in the United States since its inception; from a history of discrimination targeting new waves of immigrants,[3] to lynching of black Americans in the South,[4] to vandalism of places of worship,[5] to the frightening rise in crimes tied to domestic hate groups,[6] bias-motivated crimes have stained our nation's history. However, the term "hate crime" was not a part of our legal landscape

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2 *See infra* Part I. Though there is scholarship on using the terminology of "hate crime" versus "bias crime," for the purposes of this Note, "hate crime," "bias crime," and "bias-motivated crime" are used interchangeably.

3 *See* 1 ANTI-IMMIGRATION IN THE UNITED STATES: A HISTORICAL ENCYCLOPEDIA xvii–xviii (Kathleen R. Arnold ed., 2011).

4 *Hate Crimes*, FED. BUREAU INVESTIGATION, http://www.fbi.gov/about-us/investigate/civilrights/hate_crimes (last visited Apr. 25, 2016).

5 *See* Uzma Kolsy, *Eight Attacks, 11 Days*, SALON (Aug. 14, 2012, 11:58 AM), http://www.salon.com/2012/08/14/eight_attacks_11_days; *Hate Crimes*, *supra* note 4.

6 *See* Callie Carmichael, *Anti-Government Extremist Groups Reach Record Levels, Say Experts*, CNN (Mar. 6, 2013, 11:17 AM), http://www.cnn.com/2013/03/05/us/splc-extremist-groups-report; Brian Levin, *After Years of Increases, Decline in Hate and Anti-Government Groups May Still Be Bad News*, HUFFINGTON POST (Apr. 27, 2014, 5:59 AM), http://www.huffingtonpost.com/brian-levin-jd/after-years-of-increases_b_4855190.html.

until the 1980s.[7] Since then, there has been a surge in legislation, both state and federal, addressing hate crimes and codifying them into our existing structure of law.[8]

In 1990, Congress mandated federal documentation of hate crimes in the Hate Crimes Statistics Act,[9] and since 1991, the Federal Bureau of Investigation (FBI) has published annual reports on hate crime statistics reported by law enforcement agencies across the country.[10] An analysis of the hate crime documentation by the FBI reveals systemic flaws in the U.S. government's ability to properly document and report hate crimes; this underreporting, in turn, fails to protect minority communities that are vulnerable to hate crimes.[11]

This Note will discuss the legal landscape of hate crime documentation in the United States and the systemic flaws in the U.S. government's documentation and reporting of hate crimes. It will explore possible reasons for these gaps, and consider how improving law enforcement training by implementing a hate crimes task force across jurisdictions may benefit minority communities that are vulnerable to hate crimes.

Part I presents an overview of hate crime documentation. It begins by defining what a hate crime is and what makes it distinct. Next, this Part addresses the importance of the proper application of hate crime laws by law enforcement agencies, beginning with effective identification, documentation, and reporting. This Part then discusses how proper hate crime reporting aids in resource allocation for communities that are vulnerable to hate crimes.

Part II discusses the Hate Crimes Statistics Act and the obligations this statute imposes on the Department of Justice. It then outlines the purpose of the Hate Crimes Statistics Act and the methodology with which the data is collected. Next, it briefly discusses the annual statistics reported by the FBI pursuant to the Hate Crimes Statistics Act, and the reliability of these statistics.

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7 MICHAEL SHIVELY, NAT'L INST. OF JUSTICE, STUDY OF LITERATURE AND LEGISLATION ON HATE CRIME IN AMERICA 2 (2005), http://www.ncjrs.gov/pdffiles1/nij/grants/210300.pdf.

8 Laura Meli, Note, *Hate Crime and Punishment: Why Typical Punishment Does Not Fit the Crime*, 2014 U. ILL. L. REV. 921, 924.

9 28 U.S.C. § 534 (2012).

10 CRIMINAL JUSTICE INFO. SERVS., FED. BUREAU OF INVESTIGATION, HATE CRIME DATA COLLECTION GUIDELINES AND TRAINING MANUAL 1–2 (2015), http://www.fbi.gov/about-us/cjis/ucr/hate-crime-data-collection-guidelines-and-training-manual.pdf.

11 HANSDEEP SINGH ET AL., INT'L CTR. FOR ADVOCATES AGAINST DISCRIMINATION, PERPETUATING DISCRIMINATION: HOW THE U.S. GOVERNMENT'S COMPLIANCE WITH THE UNDERREPORTING OF HATE CRIMES LEADS TO A FAILURE TO PROTECT MINORITY GROUPS AND EFFECTIVELY COMBAT HATE CRIMES 1 (2014), http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/USA/INT_CERD_NGO_USA_17772_E.pdf.

Part III begins by presenting an overview of the Bureau of Justice Statistics' National Crime Victimization Survey.[12] Next, it presents a comparison of the data collection methods by the FBI's Uniform Crime Reporting (UCR) Program[13] and the Bureau of Justice Statistics' National Crime Victimization Survey (NCVS), and outlines the similarities and differences between them. It then discusses the vast discrepancies in hate crime documentation statistics between the FBI's UCR and the Bureau of Justice Statistics' NCVS.

Part IV explores the two main reasons for the documentation gap between the FBI's UCR and the Bureau of Justice Statistics' NCVS: underreporting by victims of hate crimes to law enforcement and underreporting by law enforcement to the FBI's UCR Program. Next, this Part presents factors that contribute to underreporting by law enforcement, including questions about whether hate crimes should be considered a separate class of crimes, varying state legislation regarding hate crimes, varying reporting requirements, and differences in law enforcement training.

Part V focuses on law enforcement training, and presents an overview and analysis of the New York Police Department (NYPD) Hate Crimes Task Force as a model for hate crime identification, investigation, and documentation. It then proposes the implementation of hate crimes task forces in other jurisdictions by using key elements of the New York model and considering areas of improvement. It suggests that by improving law enforcement agencies' responses to hate crimes, task forces will be able to assist in adequate documentation of hate crimes in their jurisdictions, properly allocate resources towards hate crime prevention for vulnerable communities, and decrease the overall number of hate crime incidents.

I. AN OVERVIEW: HATE CRIME DOCUMENTATION

Every hate crime consists of two elements: first, the perpetrator must commit a crime; and second, the perpetrator must have been motivated by an unlawful bias that is protected by hate crimes laws.[14] The bias motive is what makes hate crimes distinct: the victims of hate

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[12] The National Crime Victimization Survey is a survey conducted by the Bureau of Justice Statistics that estimates hate crime victimizations for populations based on information collected on crimes that were reported and not reported to the police. *See infra* Section III.A.

[13] The Uniform Crime Reporting Program is a Federal Bureau of Investigation (FBI) program, through which the FBI publishes an annual report on hate crime statistics. *See infra* Section II.B.

[14] *See* Meli, *supra* note 8, at 926.

crimes are selected as targets due to some actual or perceived protected characteristic such as race, gender, disability, religion, or sexual orientation.[15] Hate crimes are not particularized to one individual but rather to a group or class of people who share a protected characteristic.[16]

Hate crimes should be, as they now are, recognized as distinct from other crimes, and therefore should warrant a distinctive legal approach.[17] First, there is evidence that hate crimes are significantly more likely to involve greater physical harm to the victims.[18] Also, as hate crimes target a person's identity, they have devastating psychological and emotional effects on their victims because they attack a person's fundamental human dignity.[19] Victims of hate crimes are likely to experience psychological effects more strongly than victims of non–hate crimes.[20]

Second, hate crimes also have a community impact.[21] When an individual is targeted based on a protected characteristic, the group that

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15 *See* Megan Sullaway, *Psychological Perspectives on Hate Crime Laws*, 10 PSYCHOL. PUB. POL'Y & L. 250, 250 (2004); *see also* OSCE OFFICE FOR DEMOCRATIC INSTS. & HUMAN RIGHTS, HATE CRIME LAWS: A PRACTICAL GUIDE 16 (2009) [hereinafter HATE CRIME LAWS: A PRACTICAL GUIDE], http://www.osce.org/odihr/36426?download=true.

16 HATE CRIME LAWS: A PRACTICAL GUIDE, *supra* note 15, at 16.

17 *See* SHIVELY, *supra* note 7, at 34.

18 *See* Meli, *supra* note 8, at 952 ("Hate crimes are four times more likely to involve assault than other crimes . . . . [and] far more likely than other assaults to cause serious bodily harm to the victim. Hate-motivated assaults are two times as likely to cause injury and four times as likely to necessitate hospitalization. Nearly two-thirds of hate crimes involve two or more perpetrators, and a greater number of perpetrators is related to increased severity of the crimes." (footnotes omitted)); *see also* Steven Bennett Weisburd & Brian Levin, *"On the Basis of Sex": Recognizing Gender-Based Bias Crimes*, 5 STAN. L. & POL'Y REV. 21, 23 (1994) (defining "heightened violence" as one of the defining characteristics of hate crimes).

19 *See* Carrie Langner, *Hate Crimes: Psychological Research on the Origins and Impact of Bias-Motivated Crime*, SOC'Y FOR PSYCHOL. STUDY OF SOC. ISSUES (Jan. 2008), http://www.spssi.org/index.cfm?fuseaction=Page.ViewPage&PageID=941; Sullaway, *supra* note 15, at 264; *see also* HATE CRIME LAWS: A PRACTICAL GUIDE, *supra* note 15, at 19–20.

20 *See* Meli, *supra* note 8, at 952–53 ("Hate crime victims experience multiple psychological effects from the crime including depression, suicidal thoughts, and sleep problems. . . . [Studies] found that hate crime victims more strongly experience psychological effects from the crime than non-hate crime victims do[,] . . . [and] that victims of hate crimes report significantly higher levels of 'depression, traumatic stress, anxiety, and anger' than victims of non-hate crimes five years after the crime." (quoting Megan Sullaway, *The Psychology of Hate Crime Law, Victims, and Offenders*, *in* CRITICAL RACE REALISM: PSYCHOLOGY, RACE, AND THE LAW 235, 240 (Gregory Parks et al. eds., 2008))).

21 *See* Langner, *supra* note 19; Sullaway, *supra* note 15, at 264; *see also* Wisconsin v. Mitchell, 508 U.S. 476, 488 (1993) (noting, in an opinion by Chief Justice Rehnquist, that bias-motivated crime creates "greater individual and societal harm" than non-bias-motivated crime); Meli, *supra* note 8, at 954 ("When hate crimes occur, those target communities perceive the crime as if they were direct attacks.").

shares this characteristic will often feel vulnerable to future attacks.[22] This is because in a hate crime, the attacker not only asserts power over the victim, but also asserts power over the community.[23] Certain marginalized communities have long histories of being victims of bias-motivated violence and discrimination.[24] When there is little to no understanding of the sheer scope of hate crimes, social acceptance of discrimination persists, and these communities continue to be disproportionately vulnerable to hate crimes.[25]

Third, hate crimes also pose significant security issues due to the large range of people affected by a hate crime as opposed to an ordinary crime.[26] Because hate crimes can produce or exacerbate social unrest and division within the victim group or between the victim group and the greater society, hate crimes can often have "an explosive impact" and trigger further bias-motivated violence.[27]

"Hate crimes do not occur in a vacuum; they are a violent manifestation of prejudice, which can be pervasive in the wider community."[28] There is not only a dire need for hate crime laws, but also proper application of these laws by law enforcement agencies.[29] If not handled properly, hate crime prosecutions are characterized by inadequate law enforcement investigation of biased motives, ineffective prosecution, and improper punishment for the perpetrator.[30] This, in

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22 *See* HATE CRIME LAWS: A PRACTICAL GUIDE, *supra* note 15, at 20; Langner, *supra* note 19; Sullaway, *supra* note 15, at 264; *see also* SHIVELY, *supra* note 7, at 34 ("If a person is beaten for conventional reasons (such as an interpersonal dispute), other members of the community have little reason to fear being targeted. When a person is targeted specifically for their race or religion, all those of that race or religion feel like potential targets and experience a shared sense of persecution.").

23 Meli, *supra* note 8, at 954. There are two statements made by attackers in hate crimes: an expression of power over the individual victim and a second statement to the community. This is what differentiates hate crimes from other crimes: "the pain to both primary victims and their target groups is so egregious." *Id.*

24 *See* HATE CRIME LAWS: A PRACTICAL GUIDE, *supra* note 15, at 20; Julia Dahl, *FBI: Hate Crimes Most Likely Against Blacks, Jews, Gay Men*, CBS NEWS (Nov. 27, 2013, 3:10 PM), http://www.cbsnews.com/news/fbi-hate-crimes-most-likely-against-blacks-jews-gay-men; *see also* Lu-in Wang, *Recognizing Opportunistic Bias Crimes*, 80 B.U. L. REV. 1399, 1413 (2000) (noting that greater individual and community harm is likely when the victim belongs to a group "that the social environment has identified as 'expected' or 'suitable' targets for violence").

25 *See* HATE CRIME LAWS: A PRACTICAL GUIDE, *supra* note 15, at 20; Dahl, *supra* note 24; *see also* Wang, *supra* note 24, at 1413 ("[A] history of bias crimes against a particular group itself contributes to the designation of particular groups as 'suitable victims.'").

26 HATE CRIME LAWS: A PRACTICAL GUIDE, *supra* note 15, at 20.

27 *Id.* at 21; *see* Wisconsin v. Mitchell, 508 U.S. 476, 488 (1993) ("[B]ias-motivated crimes are more likely to provoke retaliatory crimes . . . and incite community unrest."); Sullaway, *supra* note 15, at 266.

28 HATE CRIME LAWS: A PRACTICAL GUIDE, *supra* note 15, at 21.

29 *See* SHIVELY, *supra* note 7, at 34–36.

30 HATE CRIME LAWS: A PRACTICAL GUIDE, *supra* note 15, at 21.

turn, causes marginalized groups, which are disproportionately victims of hate crimes, to feel that law enforcement agencies do not believe them, are unwilling to recognize the discrimination they feel, and have no interest in protecting them.[31] As a result, victims of hate crimes are less willing to report hate crimes.[32] On the other hand, when a hate crime is investigated and prosecuted with acknowledgment of the victim's experience with the perpetrator's bias motive, the victim's community is reassured as to the effectiveness of the criminal justice system.[33]

The enactment of hate crime laws requires training law enforcement agencies in how to effectively assess, document, report, and prosecute hate crimes, improving the criminal justice system's overall response to such crimes.[34] Hate crime laws also inspire and reinforce trust in the criminal justice system, especially by communities that are often distrustful of the system.[35] Furthermore, and perhaps most importantly, hate crime laws that result in proper hate crime reporting and documentation further aid in resource allocation towards hate crime prevention.[36] Without adequate data, federal, state, and local law enforcement agencies' limited funds and resources geared towards hate crime prevention are not allocated to communities that are especially vulnerable to hate crimes, which leaves them trapped in a vicious cycle of hate.[37] These resources are provided to communities that can

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31 *See* NATHAN HALL, HATE CRIME 131 (2d ed. 2013); Sullaway, *supra* note 15, at 266; *see also* S. POVERTY LAW CTR., UNDER SIEGE: LIFE FOR LOW-INCOME LATINOS IN THE SOUTH 25–27 (2009), http://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/UnderSiege.pdf.

32 *See* S. POVERTY LAW CTR., *supra* note 31.

33 HATE CRIME LAWS: A PRACTICAL GUIDE, *supra* note 15, at 21–22.

34 *Id.* at 22.

35 *Id.*; *see also* SINGH ET AL., *supra* note 11, at 5.

36 SINGH ET AL., *supra* note 11, at 2.

37 *See* Hansdeep Singh et al., Recent Development, *A Systems Approach to Identifying Structural Discrimination Through the Lens of Hate Crimes*, 20 ASIAN AM. L.J. 107, 125 (2013) ("The concerns about the inadequacy of police reports may prevent lawmakers and relevant agencies from missing crime patterns, and making sound decisions about how to allocate limited resources to prevent, prosecute, and protect communities from hate crimes."); *see also id.* at 126 ("[T]he failure to document hate crimes by law enforcement causes affected communities to feel further alienated and prevents public officials from properly apportioning resources to address crimes targeting vulnerable communities. The failure to investigate and accurately report hate crimes leads law enforcement officials to treat hate-motivated crimes directed towards particularly vulnerable communities as isolated events, rather as part of a larger trend of hate and violence." (footnote omitted)). The failure of the government in supporting and protecting vulnerable communities reinforces the communities' mistrust in law enforcement and leads them to believe that reporting crimes committed against them to the police is not effective. *Id.* at 127. Therefore, the victims' failure to report, in addition to the failure to properly document these crimes, "can effectively silence and further marginalize communities experiencing repeated hate motivated violence." *Id.* Successful documentation of hate crimes can lead to access to hate crime prevention for targeted communities. For example,

demonstrate, through statistics, that they require protection, and include funds from federal agencies dedicated to enhancing security in community places that are or could be vulnerable to hate crimes, among other related funds.[38]

II. THE HATE CRIMES STATISTICS ACT

In 1990, the Hate Crimes Statistics Act (HCSA) was passed by Congress and signed into law by President George H.W. Bush, requiring the U.S. Attorney General to collect data on hate crimes and publish an annual summary of the data collected.[39]

"the Department of Homeland Security (DHS) and the Jewish community [have coordinated efforts] to protect Jewish synagogues, community centers, and schools, which are subject to a disproportionate number of hate crimes every year." Jack Jenkins & Aaron Shapiro, *Sikhs Argue for 'The Dignity of Being a Statistic' at Senate Hearing*, THINKPROGRESS (Sept. 21, 2012, 6:15 PM), http://www.thinkprogress.org/politics/2012/09/21/892871/sikhs-argue-for-the-dignity-of-being-a-statistic-at-senate. In 2012, approximately ten million dollars were allocated by DHS to Jewish organizations to help protect the community's infrastructure. *Id.* On the other hand, inadequate documentation of hate crimes can prove dangerous to communities. Sikhs, for example, number from 200,000 to 700,000 in the United States and have faced a surge in bias-motivated violence post-9/11. *Id.* Until recently, the FBI did not track hate crime data specifically committed against Sikhs, instead grouping Sikh Americans in other categories, and essentially making crimes committed against this group indistinguishable. *See* Paula Mejia, *FBI to Track Hate Crimes Against Hindus, Sikhs, Arab Americans*, NEWSWEEK (Mar. 28, 2015, 3:33 PM), http://www.newsweek.com/fbi-track-hate-crimes-against-hindus-sikhs-arab-americans-317563. Resources and funds that may otherwise be provided to the Sikh community to aid in hate crime prevention are allocated elsewhere. Singh et al., *supra* at 126–27; *see also* Press Release, Sikh Coal., Fateh! Hundreds Join Rally in Support of Hate Crime Charge (Sept. 15, 2015), http://sikhcoalition.org/advisories/2015/fateh-hundreds-join-mukker-for-rally ("For the Sikh American community, the goal in obtaining a formal hate crime charge is not to seek a harsher penalty, but to instead prosecute the crime for what it was. We can't combat the problem of hatred against minority communities in America unless our elected officials and government agencies acknowledge that the problem exists." (quoting Sikh Coalition Legal Director, Harsimran Kaur)).

[38] SINGH ET AL., *supra* note 11, at 8 n.54; *see also* Singh et al., *supra* note 37, at 126–27 ("A few examples of the kinds of resources that government could provide include the following: increased police patrols of property that is more likely to be targeted (e.g. houses of worship, community centers); training officers to follow set procedures when investigating and questioning victims, witnesses, or perpetrators in potential bias related incidents; funding for the installation of protective boundaries; holding press conferences in solidarity with the community; holding public education events; and conducting training by agencies, like the FBI, on measures the community can take to better protect itself.").

[39] 28 U.S.C. § 534 (2012).

A. *Purpose*

The passage of the Hate Crimes Statistics Act, mandating the collection of data on hate crimes nationwide, was intended to provide many benefits to the public at large.[40] First, it increased public awareness of hate crimes, as this was the first federal legislation that recognized hate crimes as a distinct category of crimes.[41] Second, it aided law enforcement agencies and their officers by increasing their awareness of hate crimes and their sensitivity to hate crime victims.[42] This would further improve the overall criminal justice response to hate crimes.[43] Lastly, by making information on patterns of crime available to law enforcement agencies, legislators, and communities, the HCSA allowed these groups to assess the extent of the problem and formulate their responses to hate crimes.[44]

B. *Methodology*

Pursuant to the federal mandate under the Hate Crimes Statistics Act, the Attorney General delegated the task of collecting hate crime data to the Federal Bureau of Investigation (FBI), as part of the FBI's Uniform Crime Reporting (UCR) system.[45] Consequently, beginning in 1990, the FBI has published an annual report on hate crime statistics.[46]

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40 Joseph M. Fernandez, Recent Development, *Bringing Hate Crime into Focus—The Hate Crime Statistics Act of 1990, Pub. L. No. 101-275*, 26 HARV. C.R.-C.L. L. REV. 261, 263–64 (1991).

41 *Id.* at 263–64; Andrew M. Gilbert & Eric D. Marchand, Note, *Splitting the Atom or Splitting Hairs—the Hate Crimes Prevention Act of 1999*, 30 ST. MARY'S L.J. 931, 955 (1999).

42 The purpose of the HCSA is to "let Congress and law enforcement officials know whether hate crimes are in fact on the rise" and to aid in the innovation of "effective strategies to combat bigotry and racism." 135 CONG. REC. S2378 (daily ed. Mar. 8, 1989) (statement of Sen. Simon); *see also* Fernandez, *supra* note 40, at 289–91.

43 Fernandez, *supra* note 40, at 289–91.

44 *See* S. REP. NO. 101-21, at 2 (1989), *as reprinted in* 1990 U.S.C.C.A.N. 158, 158 ("This information can help law enforcement agencies and local communities combat hate crimes more effectively by identifying their frequency, location, and other patterns over time."); *see also* Fernandez, *supra* note 40, at 263 ("[P]olice involvement in the process of identifying and counting hate crimes may help law enforcement officials to measure trends, fashion effective responses, design prevention strategies, and develop sensitivity to the particular needs of victims of hate crimes.").

45 GLEN KERCHER ET AL., CRIME VICTIMS' INST., HATE CRIMES 5 (2008), http://www.crimevictimsinstitute.org/documents/Hate%20Crimes%20Final.

46 Meli, *supra* note 8, at 930. *See generally Uniform Crime Reports*, FED. BUREAU INVESTIGATION, http://www.fbi.gov/ucr/ucr.htm (last visited May 17, 2016) (publishing annual reports on incidences of hate crimes).

The data that the FBI conveys in these annual reports is collected by law enforcement agencies across the country, and the participation of law enforcement agencies is *entirely voluntary*.[47] The FBI created the *Hate Crime Data Collection Guidelines* and the *Training Guide for Hate Crime Data Collection*, two publications aiding law enforcement in reporting by defining hate crimes, explaining the psychology of prejudice, and providing examples and case studies.[48] In 2012, the FBI merged these two publications and created a new publication entitled *Hate Crime Data Collection Guidelines and Training Manual*.[49] As stated in the new publication, it was created to reflect the UCR Program's expanded bias motivation definitions for hate crimes to include new and revised definitions as provided by the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009.[50]

C. *Statistics*

Even though law enforcement has these publications to reference, there is evidence that officers may need additional training to adequately document, prosecute, and report hate crimes to the FBI.[51] Though it is true that voluntary participation of law enforcement agencies has increased overall since the program's inception,[52]

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47 Remington Gregg, *FBI Director Calls for Better Tracking of Hate Crimes*, HUM. RTS. CAMPAIGN BLOG (Apr. 30, 2014), http://www.hrc.org/blog/entry/fbi-director-calls-for-better-tracking-of-hate-crimes.

48 Meli, *supra* note 8, at 935.

49 CRIMINAL JUSTICE INFO. SERVS., *supra* note 10, at ii. This publication is updated as necessary to reflect changes. *See, e.g.*, *id.*

50 *Id.* at ii. The new publication "establish[es] an updated hate crime training program for their personnel. In addition to providing suggested model reporting procedures and training aids for capturing the new bias motivations, the manual is written to raise law enforcement officers' awareness of the hate crime problem." *Id.* The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009 revised the definitions of federal hate crimes laws to include crimes motivated by a victim's "actual or perceived . . . gender, sexual orientation, gender identity, or disability." 18 U.S.C. § 249(a)(2)(A) (2012); *see also* Meli, *supra* note 8, at 937.

51 Meli, *supra* note 8, at 935–36.

52 *Compare* FED. BUREAU OF INVESTIGATION, HATE CRIME STATISTICS 1996, at 2, http://www.fbi.gov/about-us/cjis/ucr/hate-crime/1996/hatecrime96.pdf (participation by 11,354 agencies from forty-nine states and the District of Columbia), *with* FED. BUREAU OF INVESTIGATION, HATE CRIMES STATISTICS 2000, at 1, http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2000/hatecrime00.pdf (11,690 agencies from forty-eight states and the District of Columbia), *and Hate Crime Statistics 2006*, FED. BUREAU INVESTIGATION (Nov. 2007), http://www2.fbi.gov/ucr/hc2006/jurisdiction.html (12,620 agencies from all fifty states and the District of Columbia), *and Hate Crimes Statistics 2012*, FED. BUREAU INVESTIGATION (Fall 2013), http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2012/topic-pages/jurisdiction/jurisdiction_final (13,022 agencies from all fifty states and the District of Columbia).

numerous law enforcement agencies across the country either choose not to report, or affirmatively report zero hate crimes.[53] This is not a new problem.[54] From 1994 to 1999, approximately eighty-five percent of participating law enforcement agencies affirmatively reported zero hate crimes in their jurisdictions.[55] Based on the most recent Uniform Crime Report on hate crimes in 2014,[56] the FBI documented 5479 bias-motivated incidents, which resulted in 6727 victims, and which occurred in 15,494 jurisdictions across the country.[57] Of these jurisdictions, about eighty-nine percent of agencies *affirmatively reported zero hate crimes*.[58] In other words, jurisdictions that reported zero hate crimes corresponded to approximately thirty-two percent of the total U.S. population, or over 102 million people.[59] As many have noted, it is hard to believe that the existing data is reliable.[60]

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53 Gregg, *supra* note 47.

54 Meli, *supra* note 8, at 936.

55 *Id.*

56 *See generally Hate Crime Statistics, 2014*, FED. BUREAU INVESTIGATION, http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2014 (last visited Nov. 16, 2015).

57 *See Hate Crime Statistics, 2014*: *Hate Crime by Jurisdiction*, FED. BUREAU INVESTIGATION, http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2014/topic-pages/jurisdiction_final (last visited Nov. 16, 2015); *Hate Crime Statistics, 2014*: *Incidents and Offenses*, FED. BUREAU INVESTIGATION, http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2014/topic-pages/incidentsandoffenses_final (last visited Nov. 16, 2015).

58 *See Hate Crime Statistics, 2014*: *Hate Crime by Jurisdiction*, *supra* note 57.

59 This statistic is based on the total population represented by jurisdictions reporting zero hate crimes in 2014 as reported by the FBI, and the total U.S. population on January 1, 2015, as reported by the U.S. Census Bureau. *See Hate Crime Statistics, 2014*: *Table 14*, FED. BUREAU INVESTIGATION, http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2014/tables/table-14/table_14_hate_crime_zero_data_submitted_per_quarter_by_state_and_agency_2014.xls/view (last visited Nov. 16, 2015) (listing the agencies that indicated that no instances of hate crime occurred in their respective jurisdictions during the quarter(s) in 2014 for which they submitted reports); *U.S. and World Population Clock*, U.S. CENSUS BUREAU, http://www.census.gov/popclock (last visited Nov. 16, 2015) (indicating a U.S. population of 320,289,069 for January 1, 2015). Startlingly, 2012 data reported that jurisdictions that reported zero hate crimes corresponded to approximately one-third of the total U.S. population, or over seventy-six million people. *See* SINGH ET AL., *supra* note 11, at 3.

60 In response to the Hate Crimes Statistics 2006 Report, Southern Poverty Law Center's Heidi Beirich stated:

> [W]e have states like Mississippi and Hawaii who are not participating at all or reporting zero hate crimes which is sort of, statistically impossible. You've got my home state here of Alabama that reported one hate crime last year for a population of over four million people. Those numbers just can't be right.

Government Underestimating Hate Crimes?, NAT'L PUB. RADIO: NEWS & NOTES, at 0:38 (Nov. 27, 2007, 9:00 AM); *see also* 1 BARBARA PERRY ET AL., HATE CRIMES 194 (2009) ("[B]ecause the HCSA is voluntary and has never enjoyed adequate fiscal or full state support and cooperation, the resulting data are inherently unreliable. Indeed, given the limitations of the data provided to the FBI, it is virtually impossible to extrapolate *any* conclusions about the state of hate crime in the United States."). *See generally* Nicole Krasavage & Scott Bronstein, *Are Victims Falling*

Aside from the jurisdictions reporting implausible hate crime data, there are still jurisdictions that choose not to report or choose not to participate in the FBI's Uniform Crime Reporting system.[61] Failing to participate in the HCSA program raises serious concerns as to how certain agencies are responding to hate crimes.[62]

III. GAPS IN HATE CRIME DOCUMENTATION: UNIFORM CRIME REPORT VS. NATIONAL CRIME VICTIMIZATION SURVEY

A. *National Crime Victimization Survey (NCVS)*

The Bureau of Justice Statistics (BJS) is a component of the Office of Justice Programs in the U.S. Department of Justice that collects and reports criminal justice statistics.[63] In 1997, the BJS collaborated with a data collection agency, the U.S. Census Bureau, to develop the National Crime Victimization Survey (NCVS).[64] The NCVS intends to assist in identifying victims of hate crimes by annually interviewing a nationally representative sample of households in order to evaluate the probability of victimization for the population as a whole and for divisions of the population.[65] These divisions include women, members of racial and ethnic groups, the elderly, and other groups.[66] The survey collects information on nonfatal personal and household property crimes that were both reported and not reported to the police, and asks survey respondents questions about themselves and whether they suffered

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Through America's Hate Crime Data Gap?, CNN (Mar. 23, 2013, 9:51 AM), http://www.cnn.com/2013/03/15/justice/hate-crime-statistics.

61 *See* Krasavage & Bronstein, *supra* note 60.

62 As the Anti-Defamation League National Chairman Abraham Foxman noted, "When an agency does not participate in the HCSA program, it inevitably raises questions about whether that agency is truly ready and willing to respond to hate violence effectively." Sam Sokol, *ADL: FBI Hate Crimes Statistics 'Seriously Flawed'*, JERUSALEM POST (Nov. 26, 2013, 6:51 PM), http://www.jpost.com/Jewish-World/Jewish-Features/ADL-FBI-hate-crimes-statistics-seriously-flawed-333095.

63 *About the Bureau of Justice Statistics*, BUREAU JUST. STATS., http://www.bjs.gov/index.cfm?ty=abu (last visited Apr. 25, 2016).

64 CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, NCJ 209911, HATE CRIME REPORTED BY VICTIMS AND POLICE 2 (2005), http://www.bjs.gov/content/pub/pdf/hcrvp.pdf.

65 *See id.*; *Data Collection: National Crime Victimization Survey (NCVS)*, BUREAU JUST. STATS., http://www.bjs.gov/index.cfm?ty=dcdetail&iid=245 (last visited Apr. 25, 2016). U.S. Bureau of the Census personnel annually conduct approximately 150,000 interviews of persons age twelve or older. *Crime in the United States 2009: The Nation's Two Crime Measures*, FED. BUREAU INVESTIGATION, https://www2.fbi.gov/ucr/cius2009/about/crime_measures.html (last visited Apr. 25, 2016).

66 *Data Collection: National Crime Victimization Survey (NCVS)*, *supra* note 65.

victimization.[67] Details of each victimization incident are then collected, including information about the offender, time and place, injury, whether and why the crime was not reported to the police, and experiences with the criminal justice system.[68] This information is then used by the Bureau of Justice Statistics to estimate victimizations for populations.[69]

B. *Comparison Between NCVS and UCR Data Collection Methods*

The UCR Program and NCVS share similarities in the data they collect; both measure the same subset of serious crimes, including rape, burglary, robbery, theft, motor vehicle theft, and aggravated assault.[70] However, the two programs are also considerably different.[71] The purposes of both programs differ; while the UCR system's main purpose is to offer a reliable set of criminal justice statistics for the management and operation of law enforcement, the NCVS was created to provide information about crime that was previously unavailable.[72] Therefore, while the sets of crimes measured by the two programs overlap, the UCR includes data on crimes uncovered by the NCVS[73] and the NCVS, unlike the UCR, includes data on crimes that were not reported to law enforcement agencies.[74]

Furthermore, while the UCR and NCVS define rape,[75] robbery, theft, and motor vehicle theft identically, definitions of other crimes

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67 *Id.*

68 *Id.*

69 *Id.* BJS publishes its findings through the NCVS annually in Press Releases and Special Reports. See *id.*, under the heading "Publications & Products," for a list of publications based on data from NCVS.

70 *Crime in the United States 2009: The Nation's Two Crime Measures*, *supra* note 65.

71 *Id.*

72 *Id.* The NCVS therefore includes information about crimes not reported to the police. *Id.*

73 The UCR Program additionally collects data on "homicide, arson, commercial crimes, and crimes against children under age [twelve]." *Id.*

74 NATHAN SANDHOLTZ ET AL., BUREAU OF JUSTICE STATISTICS, NCJ 241291, HATE CRIME VICTIMIZATION, 2003–2011, at 11 (2013), http://www.bjs.gov/content/pub/pdf/hcv0311.pdf; *Crime in the United States 2009: The Nation's Two Crime Measures*, *supra* note 65.

75 Prior to 2013, the definitions of rape in the UCR and NCVS were identical, but "the UCR Program measure[d] the crime against women only, and the NCVS measure[d] it against both sexes." *Crime in the United States 2009: The Nation's Two Crime Measures*, *supra* note 65. However, in 2013, the UCR revised its definition. MICHAEL PLANTY ET AL., BUREAU OF JUSTICE STATISTICS, NCJ 246832, THE NATION'S TWO CRIME MEASURES 2 (2014), http://www.bjs.gov/content/pub/pdf/ntcm_2014.pdf ("Prior to 2013, the UCR Program measured a more limited definition of forcible rape against women only while the NCVS measured a broader definition of rape against both sexes. Now the NCVS and UCR measure rape analogously.").

differ due to the differing methodologies of the UCR and NCVS.[76] Property crimes are also measured differently.[77] Lastly, differences in the data between the two programs may result from nonresponse estimation in the UCR and sampling variation in the NCVS.[78]

C. *Comparison Between NCVS and UCR Statistics*

In the Bureau of Justice Statistics' 2013 Special Report, *Hate Crime Victimization, 2003–2011*,[79] the NCVS data suggest that the data collected by law enforcement agencies and reported by the FBI is seriously flawed.[80] Looking to the most recent data[81] that is reported by both the FBI and the NCVS illuminates this problem. While the FBI's UCR system reported 5796 bias-motivated incidents resulting in 7164 victims in 2012,[82] the NCVS estimates that, in 2012, there were 293,800 nonfatal violent and property hate crime victimizations.[83] This

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76 *Crime in the United States 2009: The Nation's Two Crime Measures*, *supra* note 65 ("For example, the UCR defines burglary as the unlawful entry or attempted entry of a structure to commit a felony or theft. The NCVS, not wanting to ask victims to ascertain offender motives, defines burglary as the entry or attempted entry of a residence by a person who had no right to be there.").

77 *Id.* ("[F]or property crimes (burglary, theft, and motor vehicle theft), the two programs calculate crime rates using different bases. The UCR rates for these crimes are per capita (number of crimes per 100,000 persons), whereas the NCVS rates for these crimes are per household (number of crimes per 1,000 households). Because the number of households may not grow at the same rate each year as the total population, trend data for rates of property crimes measured by the two programs may not be comparable.").

78 *Id.* The NCVS estimates are derived from interviews with a sample of the population and therefore they are subject to a margin of error. However, the "BJS describes trend data in the NCVS reports as genuine only if there is at least a 90 percent certainty that the measured changes are not the result of sampling variation." *Id.* The UCR is based on the "actual counts of offenses reported by law enforcement agencies" and sometimes estimates the data for agencies with incomplete data and agencies that do not participate. *Id.*; *see also* SANDHOLTZ ET AL., *supra* note 74, at 11.

79 SANDHOLTZ ET AL., *supra* note 74, at 11.

80 *See generally id.*

81 This Note reflects the most recent data that was available on November 17, 2015. While the UCR's most recent data report hate crimes in 2014, the NCVS's most recent data report hate crimes in 2012. *See* JENNIFER L. TRUMAN ET AL., BUREAU OF JUSTICE STATISTICS, NCJ 248973, CRIMINAL VICTIMIZATION 2014, at 1, 11 (2015), http://www.bjs.gov/content/pub/pdf/cv14.pdf. Therefore, 2012 data from both the UCR and NCVS were used for purposes of comparison.

82 *Hate Crime Statistics, 2012*: *Incidents and Offenses*, FED. BUREAU INVESTIGATION, http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2012/topic-pages/incidents-and-offenses/incidentsandoffenses_final (last visited Apr. 25, 2016).

83 Press Release, Bureau of Justice Statistics, U.S. Residents Experienced About 293,800 Hate Crime Victimizations in 2012—Unchanged from 2004 (Feb. 20, 2014), http://www.bjs.gov/content/pub/press/hcv0412stpr.cfm.

difference in statistics is not minor; there is a *forty-one-fold gap* between the two reports.[84]

Furthermore, the breakdown of the NCVS statistics is also concerning. The NCVS illustrates that between 2004 and 2012, even though the overall estimates for hate crime victimizations were not statistically different, the bias motivations for hate crimes changed drastically.[85] For example, ethnicity-bias hate crimes more than doubled from twenty-two percent to fifty-one percent between 2004 and 2012, as did gender-bias hate crimes (twelve percent to twenty-six percent).[86] Religious-bias hate crimes almost tripled from ten percent to twenty-eight percent between 2004 and 2012.[87]

The NCVS also indicates that approximately sixty percent of hate crimes were not reported to the police in 2012, which, although is a decline from seventy-four percent unreported crimes in 2011, is still an overwhelming number of unnoticed victims and unpunished crimes.[88] This is especially concerning considering that approximately twenty-seven percent of hate crimes in 2012 were classified as serious violent crimes,[89] and, in twenty percent of violent hate crimes, the victim sustained an injury.[90]

These statistics not only suggest that the FBI data, based on reports by law enforcement, is failing to account for a majority of hate crimes,[91] but also point to a clearly unsolved and escalating problem that the United States faces with bias-motivated violence. The question now is, why do these gaps in hate crime documentation exist, and, more importantly, what can we do to solve them so that we can adequately assess the epidemic of bias-motivated violence in the United States and take meaningful steps towards hate crime prevention?

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84 This statistical gap between the two reports is not a new development either. *See* Mark Potok, *FBI: Reported Hate Crimes Down Nationally, Except Against Muslims*, S. POVERTY L. CTR. (Nov. 16, 2015), http://www.splcenter.org/hatewatch/2015/11/16/fbi-reported-hate-crimes-down-nationally-except-against-muslims ("[T]he BJS studies have found that while the FBI has reported over the last 20 years between about 6,000 and about 11,500 total hate crimes in America each year, the real annual totals in recent years has been nearly 260,000. That suggests that the real numbers are some 25 to 40 higher than the FBI totals . . . .").

85 Press Release, Bureau of Justice Statistics, *supra* note 83.

86 *Id.*

87 *Id.*

88 *Id.*

89 "Serious violent crimes" includes rape or sexual assault, robbery, and aggravated assault. *Id.*

90 *Id.*

91 Singh et al., *supra* note 37, at 124. It is also important to note that individuals who report to the NCVS may perceive bias as a motive in a crime committed against them while police and prosecutors may not, and this is not a statistic taken into account. Regardless, it is unlikely that this factor would result in the drastic difference between the UCR and NCVS statistics. *See infra* Part IV.

IV. ANALYSIS: REASONS FOR DOCUMENTATION GAP

There are two main reasons for the gaps in hate crime documentation: underreporting by victims of hate crimes to law enforcement, and underreporting by law enforcement agencies to the FBI's UCR Program.[92] Research shows that hate crimes are underreported by both victims and the police, leading to underreporting by law enforcement agencies to the FBI, and further resulting in a deficient account of the national hate crime landscape.[93]

A. *Underreporting by Victims of Hate Crimes to Law Enforcement*

A significant problem that the NCVS reveals about the documentation gap is that sixty percent of hate crime victimizations are not reported to law enforcement.[94] There are various reasons why hate crime victims avoid reporting crimes to law enforcement agencies.[95] For example, hate crime victims may not recognize what constitutes a hate crime in their jurisdiction or may not think that there was a bias element in the crime committed against them.[96] Or they may simply not report the hate crime out of fear or embarrassment.[97] Other factors that contribute to underreporting by hate crime victims include language barriers,[98] fear of retaliation by the offender,[99] distrust of law enforcement and belief that law enforcement will not help them,[100] fear

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92 SINGH ET AL., *supra* note 11, at 4–6.

93 Avlana Eisenberg, *Expressive Enforcement*, 61 UCLA L. REV. 858, 884 (2014); Troy A. Scotting, Comment, *Hate Crimes and the Need for Stronger Federal Legislation*, 34 AKRON L. REV. 853, 859 (2001) ("[T]he hate crime problem is much more serious than even the statistics report as a result of drastic underreporting by both law enforcement agencies and victims themselves.").

94 Press Release, Bureau of Justice Statistics, *supra* note 83; *see also* Singh et al., *supra* note 37, at 124.

95 Singh et al., *supra* note 37, at 125.

96 SHIVELY, *supra* note 7, at ii–iii.

97 Edward M. Kennedy, *Hate Crimes: The Unfinished Business of America*, BOS. B.J., Jan.–Feb. 2000, at 6, 21.

98 BILL LOCKYER, REPORTING HATE CRIMES: THE CALIFORNIA ATTORNEY GENERAL'S CIVIL RIGHTS COMMISSION ON HATE CRIMES: FINAL REPORT 11 (2001), http://oag.ca.gov/sites/all/files/pdfs/publications/civilrights/reportingHC.pdf.

99 *See* FREDERICK M. LAWRENCE, PUNISHING HATE 23 (1999).

100 The American Psychological Association reported that the leading causes of underreporting by hate crime victims were fear of retaliation, trauma, and belief that law enforcement will not help them. AM. PSYCHOL. ASS'N, THE PSYCHOLOGY OF HATE CRIMES 2, http://counseling.uoregon.edu/DNN/LinkClick.aspx?fileticket=Y6V365uld4w%3d&tabid=420 (last visited Apr. 16, 2016).

of being exposed as part of the LGBTQ[101] community to one's family, friends, employer, or the general public,[102] fear of deportation due to undocumented status,[103] and fear of secondary trauma from the legal system,[104] among other factors.[105] However, even if a hate-crime victim reports an offense committed against her, law enforcement may not recognize the bias motive in the offense, or may choose not to recognize it.[106]

B. *Underreporting by Law Enforcement to the FBI's UCR Program*

A second significant problem explaining the gaps in hate crime documentation is underreporting by law enforcement to the FBI's UCR Program.[107] Factors contributing to this underreporting include questions about whether hate crimes should be a legitimately separate class of crimes, varying state legislation regarding hate crimes, varying reporting requirements, and differences in law enforcement training.[108]

1. Identifying Hate Crimes

Police officer enforcement and the discretion of law enforcement agencies play a large role in the prosecution and reporting of hate

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101 LGBTQ is an acronym for lesbian, gay, bisexual, transgender, and queer.

102 LOCKYER, *supra* note 98, at 11; *see also* NAT'L COAL. OF ANTI-VIOLENCE PROGRAMS, HATE VIOLENCE AGAINST LESBIAN, GAY, BISEXUAL, TRANSGENDER, QUEER, AND HIV-AFFECTED COMMUNITIES IN THE UNITED STATES IN 2011, at 10 (2012), http://www.avp.org/storage/documents/Reports/2012_NCAVP_2011_HV_Report.pdf ("Only 52% of survivors reported their incidents to the police a slight increase from 2010 (47%). Of those who interacted with the police, 18% reported that the police attitudes were hostile, remaining consistent with 2010 (16%). 55% of survivors who reported to the police received bias crime classification.").

103 Singh et al., *supra* note 37, at 125 (suggesting that hate crime victims who are undocumented persons may not report the crimes to law enforcement out of fear of deportation).

104 Weisburd & Levin, *supra* note 18, at 26 (explaining that victims often fail to report due to fear, distrust, shame, embarrassment, belief that authorities are unsympathetic, and fear of "secondary trauma" from the legal system).

105 *See* LOCKYER, *supra* note 98, at 11.

106 SHIVELY, *supra* note 7, at iii; Singh et al., *supra* note 37, at 125; *see also* Jeannine Bell, Note, *Policing Hatred: Police Bias Units and the Construction of Hate Crime*, 2 MICH. J. RACE & L. 421, 423 (1997) ("Enforcing bias crime legislation would be much easier if identifying bias crime were like identifying homicide.").

107 SINGH ET AL., *supra* note 11, at 6.

108 *Hate Crime Prevalence and Victimization*, NAT'L INST. JUST. (Dec. 22, 2010), http://www.nij.gov/topics/crime/hate-crime/prevalence-victimization.htm.

crimes.[109] Because hate crimes are unique in the sense that they contain two elements—a predicate offense and a bias motivation[110]—law enforcement agencies have the unique task of investigating the predicate offense and later identifying and categorizing it as a bias crime.[111] Furthermore, in order to charge attackers under most state hate crime statutes, police and prosecutors must prove bias motivation by producing evidence.[112] At times, identifying hate crimes can prove a difficult task, particularly when it implicates First Amendment issues,[113] and when the bias motive is not clear.[114]

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109 Meli, *supra* note 8, at 936 ("Hate crime laws do not work without police officer enforcement. . . . Every time the police arrest or fail to arrest someone, it is a political decision. Whether something is reported as a hate crime, or prosecuted as a hate crime, is entirely up to the discretion of law enforcement." (footnote omitted)); *see also* KERCHER ET AL., *supra* note 45, at 20 ("A crucial phase in assisting victims of a hate crime is the officer's identification of the crime as bias motivated."); Bell, *supra* note 106, at 423 ("Because most bias-motivated incidents are placed first in other crime categories, bias crimes do not legally exist until the police say they do.").

110 HATE CRIME LAWS: A PRACTICAL GUIDE, *supra* note 15, at 16.

111 *See* Bell, *supra* note 106, at 423. "Bias crimes are incredibly burdensome to investigate because of the high evidentiary burden to prove a bias motive. These investigative difficulties cause officers to only investigate underlying crimes, such as assault or murder, but not the parallel bias crimes." Jordan Blair Woods, *Ensuring a Right of Access to the Courts for Bias Crime Victims: A Section 5 Defense of the Matthew Shepard Act*, 12 CHAP. L. REV. 389, 421 (2008) (footnotes omitted). However, while hate crime prosecutions are thought to be complex, they are no more or less complex than other criminal cases. *See* Wisconsin v. Mitchell, 508 U.S. 476, 489 (1993) ("Evidence of a defendant's previous declarations or statements is commonly admitted in criminal trials subject to evidentiary rules dealing with relevancy, reliability, and the like."). A simpler way of conceptualizing the bias motive is as a two-tiered mens rea, where the perpetrator of a bias crime possesses "a first-tier *mens rea* of purpose (or knowing or recklessness) with respect to the elements of the parallel crime of assault and a second-tier *mens rea* of purpose with respect to the element of discriminatory victim selection." Frederick M. Lawrence, *Resolving the Hate Crimes/Hate Speech Paradox: Punishing Bias Crimes and Protecting Racist Speech*, 68 NOTRE DAME L. REV. 675, 720 (1993).

112 *See* Wang, *supra* note 24, at 1406 ("[M]ost state statutes incorporate a bias motivation element similar to that found in civil anti-discrimination laws."); Bell, *supra* note 106, at 423 ("[M]any hate crime statutes require that hate crimes be motivated in part by a proscribed hatred.").

113 *See* Bell, *supra* note 106, at 423 ("The First Amendment complicates officers' tasks by requiring them to decide whether words uttered during or prior to the commission of a crime are constitutionally protected speech or evidence of unlawful motivation that can be criminalized under bias crime statutes.").

114 *See id.* at 424 (outlining a case in New York City where the gunman and his victims all died in the incident, leaving people questioning and speculating the motives of the gunman and whether a bias motive was involved). It is interesting to note that a variety of factors cause the scope of bias crimes identified and prosecuted by law enforcement to be quite narrow. *See* Wang, *supra* note 24, at 1409–10 (noting that law enforcement officers often only consider "prototypical" or "paradigmatic" cases that involve severe brutality or dramatic facts to be "true" hate crimes). These factors include the police officers' individual evaluation of what constitutes a "real" hate crime and departmental policies that may limit the definitions of hate crimes. *See id.* at 1410–11. It is also possible that law enforcement officers are more inclined to

Hate crime legislation also raises constitutional and political concerns.[115] Critics of hate crime statutes have raised issues of constitutionality and implications of the First Amendment by objecting to the punishment of biased ideas and protected speech.[116] However, in *Wisconsin v. Mitchell*,[117] the U.S. Supreme Court upheld the view that a defendant's motive for committing a hate crime can be identified and separated from issues of constitutionally protected political expression.[118] The ruling broadly supports the idea that hate violence is not expressive conduct or speech that is protected by the First Amendment.[119] However, while the *Mitchell* decision found no First Amendment violation with a penalty-enhancement provision in a state sentencing statute,[120] the decision did not clearly address whether states can constitutionally create laws outside of the realm of penalty-enhancing statutes that characterize a bigoted motive for committing an already criminalized act as a distinct crime.[121] Furthermore, the Court's decision in *R.A.V. v. City of St. Paul*[122] suggested that hate crimes can prove difficult to identify because they are often so clearly connected to

pursue only cases in which there is a "'clear' evidence of 'hate' and therefore are more likely to result in a bias crime conviction." *Id.*

115 *See* Eisenberg, *supra* note 93, at 874 (noting that one of the three major strands of debate dominating academic conversations about hate crime legislation is the statutes' constitutionality); Bell, *supra* note 106, at 432–33.

116 *See* Jeannine Bell, *Deciding When Hate Is a Crime: The First Amendment, Police Detectives, and the Identification of Hate Crime*, 4 RUTGERS RACE & L. REV. 33, 34 (2002) (noting that one of the most serious problems of controlling hateful behavior is to do so "without offending the First Amendment by silencing speech"); Phyllis B. Gerstenfeld, *Smile When You Call Me That!: The Problems with Punishing Hate Motivated Behavior*, 10 BEHAV. SCI. & L. 259, 278–80 (1992) (reviewing critics' opinion implicating the First Amendment); Bell, *supra* note 106, at 435–36.

117 Wisconsin v. Mitchell, 508 U.S. 476 (1993).

118 *Id.* (unanimously upholding Wisconsin's hate crime statute); *see also* Eisenberg, *supra* note 93, at 874 ("[A]s a practical matter, the U.S. Supreme Court put this argument to rest in 1993 when it upheld Wisconsin's penalty enhancement provision as consistent with First Amendment freedoms.").

119 *Mitchell*, 508 U.S. at 484 ("[A] physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment. Violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact are entitled to no constitutional protection. The First Amendment does not protect violence." (alterations, citations, and parentheses omitted)); *see also* Bell, *supra* note 106, at 441 (noting that protected speech cannot be prosecuted under hate crime laws because there is no predicate offense).

120 *Mitchell*, 508 U.S. at 490.

121 *See* Craig Peyton Gaumer, *Punishment for Prejudice: A Commentary on the Constitutionality and Utility of State Statutory Responses to the Problem of Hate Crimes*, 39 S.D. L. REV. 1, 4 (1994).

122 R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

politically protected speech.[123] Consequently, the constitutionality of hate crime statutes continues to be an issue of debate,[124] and questions about whether hate crimes should be a legitimately separate class of crimes contribute to the limited prosecution of hate crimes.[125]

2. Varying State Statutes

Because the FBI's UCR Program relies on data reported by law enforcement agencies across the country,[126] it is necessary that the data which states are collecting is not only accurate, but in some way consistent.[127] However, this is not the case.[128] One of the major problems with hate crime documentation is that state hate crime statutes vary considerably.[129] Some form of hate crimes legislation

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123 *Id.* at 396. The Court did not overrule *R.A.V.* in *Mitchell*, stating that the ordinance at issue in *R.A.V.* "was explicitly directed at expression (i.e., 'speech' or 'messages')." *Mitchell*, 508 U.S. at 487.

124 *See generally* Bell, *supra* note 106, at 433–38.

125 *See* Wang, *supra* note 24, at 1409–10 (noting that law enforcement officers often only consider "prototypical" or "paradigmatic" cases that involve severe brutality or dramatic facts to be "true" hate crimes); *see also* Eisenberg, *supra* note 93, at 881 ("Preliminary results suggest that, whether intentionally or not, prosecutors send expressive messages through their charging decisions and that hate crime legislation in practice may undermine the messages sent by hate crime law enactment.").

126 *See* FED. BUREAU INVESTIGATION, HATE CRIME STATISTICS 2004, at 1 (2005), http://www2.fbi.gov/ucr/hc2004/tables/HateCrime2004.pdf ("Law enforcement's support and participation have been the most vital factors in moving the hate crime data collection effort from concept to reality. . . . [T]housands of law enforcement agencies nationwide make crucial contributions to the Program's success because the officers within these agencies investigate offenses, determine whether a hate crime was committed, and report the offense as a known hate crime.").

127 *See Hate Crime in America Summit Recommendations*, INT'L ASS'N CHIEFS POLICE, http://www.theiacp.org/ViewResult?SearchID=140 (last visited Apr. 25, 2016) (discussing how justice agencies need to develop a common language and shared definitions for hate crimes so that their responses can be consistent, equitable, and effective; also, disparities between statutory definitions should be eliminated).

128 SHIVELY, *supra* note 7, at iii ("Cross-state variation in hate crime definitions and crime reporting laws and practices make it difficult to combine local and state data into a coherent national picture."). Many states do not have required reporting statutes for hate crimes, and many states' participation in the FBI UCR Program is not meaningful. *See* ANTI-DEFAMATION LEAGUE, ANTI-DEFAMATION LEAGUE STATE HATE CRIME STATUTORY PROVISIONS (last updated Mar. 2013), http://www.adl.org/assets/pdf/combating-hate/state_hate_crime_laws_march_2013.pdf (indicating which states allocate resources for data collection and training for law enforcement personnel). Police reporting methods also vary by jurisdiction. Eisenberg, *supra* note 93, at 885.

129 One of the main reasons for reporting problems is that jurisdictions' hate crime definitions differ from those of the federal government. *See Improving Hate Crime Reporting*, JUST. RES. & STAT. ASS'N (2001), http://www.jrsa.org/pubs/jrp-digest/jrp-digest-articles/jrp-digest-article-0001.htm; *see also* Laura Pfeiffer, Note, *To Enhance or Not to Enhance: Civil Penalty Enhancement for Parents of Juvenile Hate Crime Offenders*, 41 VAL. U. L. REV. 1685,

currently exists in all fifty states and the District of Columbia.[130] These state hate crime statutes can be divided into multiple categories: there are bias crime penalty-enhancement statutes,[131] statutes that define bias crime as a new and separate crime,[132] civil rights statutes that penalize for violating an individual's civil rights,[133] and statutes that allocate resources to the collection and release of bias crime statistics.[134]

1697 (2007) ("The breadth of hate crime statutes vary among states . . . ."); Scotting, *supra* note 93, at 867–68 ("[T]here is substantial variation [of hate crime statutes] from jurisdiction to jurisdiction.").

130 *See* ALISON M. SMITH & CASSANDRA L. FOLEY, CONG. RESEARCH SERV., RL33099, STATE STATUTES GOVERNING HATE CRIMES (2010), http://www.fas.org/sgp/crs/misc/RL33099.pdf (compiling state statutory provisions covering hate crimes, divided into four categories: crime/penalty enhancement, institutional vandalism, data collection, and law enforcement training); ANTI-DEFAMATION LEAGUE, *supra* note 128 (providing a comprehensive chart outlining state hate crimes laws and the categories that are protected by each of these laws). Hate crime laws in some states, such as South Carolina, Wyoming, and Georgia, are more vague or less inclusive than in others. *See* Ben Gillis, Note, *Understanding Hate Crime Statutes and Building Towards a Better System in Texas*, 40 AM. J. CRIM. L. 197, 200, 210 (2013); *see also* ANTI-DEFAMATION LEAGUE, *supra* note 128. Therefore, these states, including a few others with very narrow hate crime laws, are often recognized as states having no hate crime laws. *See* Eisenberg, *supra* note 93, at 921–26; Gillis, *supra*, at 210; *see also* NAT'L GAY & LESBIAN TASK FORCE, HATE CRIME LAWS IN THE U.S. (2013), http://www.thetaskforce.org/static_html/downloads/reports/issue_maps/hate_crimes_06_13_color.pdf.

131 Scotting, *supra* note 93, at 867–68. Most states use bias crime penalty-enhancement statutes, "which increase the penalty for a crime when the offender's motivation is a bias prohibited under the statute." *Id.*; *see also, e.g.*, MD. CODE ANN., CRIM. LAW § 10-306 (West 2016); N.J. STAT. ANN. § 2C:16-1 (West 2015); TEX. PENAL CODE ANN. § 12.47 (West 2015). Many of these statutes are modeled after the Anti-Defamation League's model bias crime penalty-enhancement statute, though with some variations. Scotting, *supra* note 93, at 867. *See generally* ANTI-DEFAMATION LEAGUE, HATE CRIME LAWS (2012), http://www.adl.org/assets/pdf/combating-hate/Hate-Crimes-Law.pdf. Bias crime penalty-enhancement statutes are meant to punish the bias that motivated the offender to establish an intent and act on it, not the act or the offender's intent itself. Pfeiffer, *supra* note 129, at 1701. The prosecution must prove both the elements of the base offense and the bias motivation to implement the enhanced punishment. *Id.*

132 Pfeiffer, *supra* note 129, at 1698–99 ("These statutes are independent and specifically prohibit crime motivated by a person's bias."); *see, e.g.*, CAL. PENAL CODE § 422.55 (West 2016) (hate crime defined); MO. REV. STAT. § 557.035 (2015) (crimes motivated by race, color, religion, national origin, sex, sexual orientation, or disability of the victim); OKLA. STAT. tit. 21, § 850 (2011) (malicious intimidation or harassment because of race, color, religion, ancestry, national origin, or disability).

133 Pfeiffer, *supra* note 129, at 1699–1700 ("Civil rights statutes protect the right to engage in certain activities instead of punishing offenders because the motivation for the crime was based on a particular characteristic."); *see, e.g.*, TENN. CODE ANN. § 39-17-309(a) (2015) ("[I]t is the right of every person regardless of race, color, ancestry, religion or national origin, to be secure and protected from fear, intimidation, harassment and bodily injury caused by the activities of groups and individuals.").

134 Woods, *supra* note 111, at 397. These resources are used to train law enforcement personnel in how to properly respond to hate crimes and collect bias data. *Id.*

The bias crime penalty-enhancement statutes differ significantly,[135] but can further be divided into two general types: statutes that define hate crimes as being motivated by "prejudice" or "animus" against a victim based on the victim's membership in a particular group,[136] and statutes that simply require that the victim be "intentionally selected" on the basis of group membership.[137] The "archetypal hate crime," one that can be prosecuted as a hate crime in any jurisdiction, can therefore be defined as involving prejudice or bias based on a protected characteristic, and the intentional targeting of an individual based on membership in a group.[138] A hate crime missing one of these factors would be a nonarchetypal hate crime,[139] one that is likely to be classified as a "crime of opportunity" in many jurisdictions.[140]

Another important distinction between state hate crime laws is the protected categories included under each statute.[141] At the federal level, protected categories under the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act[142] are race, religion, national origin, color, actual or perceived gender, gender identity, sexual orientation, and

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135 Scotting, *supra* note 93, at 867–68 ("[S]tates differ as to the size of the penalty enhancement, the types of biases that are enumerated under the statute, and the predicate offenses that may qualify as hate crimes." (footnotes omitted)).

136 Eisenberg, *supra* note 93, at 870; *see, e.g.*, FLA. STAT. ANN. § 775.085(1)(a) (2015) ("The penalty for any felony or misdemeanor shall be reclassified . . . if the commission of such felony or misdemeanor evidences prejudice based on the race, color, ancestry, ethnicity, religion, sexual orientation, national origin, homeless status, mental or physical disability, or advanced age of the victim . . . ."). These statutes typically require proof of the prejudice or bias based on the victim's identity as belonging to a particular group. Eisenberg, *supra* note 93, at 871.

137 Eisenberg, *supra* note 93, at 870; *see, e.g.*, DEL. CODE ANN. tit. 11, § 1304(a)(2) (2016) ("Any person who commits, or attempts to commit, any crime as defined by the laws of this State, and who intentionally . . . [s]elects the victim because of the victim's race, religion, color, disability, sexual orientation, gender identity, national origin or ancestry, shall be guilty of a hate crime."). These statutes do not typically require any proof of prejudice or bias, but only proof that the defendant "intentionally selected the victim because of the victim's protected characteristic." Eisenberg, *supra* note 93, at 871.

138 Eisenberg, *supra* note 93, at 871.

139 *Id.* at 871–72. Nonarchetypal cases could include crimes "motivated by animus in which the victim was targeted as a representative of the victim's group but the defendant and victim are part of the same identity group." *Id.* at 873. Another example would be "intergroup crime in which the victim was targeted based on membership in a protected category but there was no evidence of bias or prejudice." *Id.* at 874.

140 *Id.* at 874.

141 *See* George S. Peek, Comment, *Recent Legislation: Where Are We Going with Federal Hate Crimes Legislation? Congress and the Politics of Sexual Orientation*, 85 MARQ. L. REV. 537, 545 (2001) ("[T]hese [hate crime] statutes vary a great deal in terms of the kind of conduct they proscribe, as well as the class of persons they are designed to protect. Thus, all hate crimes statutes are not created equal, and close examination of the differences between the hate crime statutes enacted by the several states shows that such statutes are indeed cast in many forms." (footnote omitted)).

142 Pub. L. No. 111-84, 123 Stat. 2835 (2009) (codified in scattered sections of 18 and 42 U.S.C.).

disability. However, under state hate crime laws, protected categories vary to some extent.[143] For example, of the forty-five states and the District of Columbia that have penalty-enhancement statutes, all but one of them include race, religion, and ethnicity as protected categories.[144] However, only twenty-six states and the District of Columbia include gender as a protected category, and a mere thirteen states and the District of Columbia include gender identity as a protected category.[145] Therefore, while there are some states with protected categories that are broader than those covered under federal law, there are a number of states whose hate crime statutes' protected categories are narrower than federally protected categories.[146] Overall, the differences between state and federal hate crime definitions create inconsistencies in hate crime reporting.[147]

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143 See ANTI-DEFAMATION LEAGUE, *supra* note 128, for a detailed chart outlining the state hate crimes laws across the country, including the type of hate crime law (penalty-enhancement, civil action, data collection, police training, institutional vandalism, cross burning), and which categories are protected under each penalty-enhancement state statute. Some states also include political affiliation, age, and other categories under their hate crime statutes. Eisenberg, *supra* note 93, at 861; *see, e.g.*, D.C. CODE § 22-3701(1) (2016) ("'Bias-related crime' means a designated act that demonstrates an accused's prejudice based on the actual or perceived race, color, religion, national origin, sex, *age*, *marital status*, *personal appearance*, sexual orientation, gender identity or expression, *family responsibility*, *homelessness*, physical disability, *matriculation*, or *political affiliation* of a victim . . . ." (emphases added)); LA. STAT. ANN. § 14:107.2(A) (2004) ("It shall be unlawful for any person to select the victim of the following offenses against person and property because of actual or perceived race, *age*, gender, religion, color, *creed*, disability, sexual orientation, national origin, or ancestry of that person or the owner or occupant of that property or because of *actual or perceived membership or service in*, *or employment with*, *an organization* . . . ." (emphases added)); NEB. REV. STAT. ANN. § 28-111 (LexisNexis 2016) ("Any person who commits one or more of the following criminal offenses against a person or a person's property because of the person's race, color, religion, ancestry, national origin, gender, sexual orientation, age, or disability or because of *the person's association with a person of a certain race*, *color*, *religion*, *ancestry*, *national origin*, *gender*, *sexual orientation*, *age*, *or disability* shall be punished . . . ." (emphasis added)).

144 *See* ANTI-DEFAMATION LEAGUE, *supra* note 128, at 1 n.5 ("The Utah statue [sic] ties penalties for hate crimes to violations of the victim's constitutional or civil rights.").

145 *Id.*; *see also Maps of State Laws & Policies*, HUM. RTS. CAMPAIGN, http://www.hrc.org/state_maps (follow "Select an Issue"; then follow "State Hate Crimes") (last visited Nov. 20, 2015) (showing states that have laws addressing hate or bias crimes based on sexual orientation and gender identity).

146 *See* Gillis, *supra* note 130, at 210 (outlining examples of categories covered by federal and state protection).

147 SHIVELY, *supra* note 7, at iii ("Differences between state and federal hate crime definitions create differences in reported levels of hate crime. For example, Wyoming has no hate crime statutes, yet five hate crimes were reported in the 2002 Uniform Crime Reports. It is likely that the predicate crimes (e.g., vandalism) were locally recorded as conventional crimes, and the hate-motivated nature of the crime was noted elsewhere and reported as such to the UCR. It is also possible that some or all of the five hate crimes were reported to local law enforcement, and then were subsequently referred to federal authorities.").

3. Varying Reporting Requirements

All fifty states were participating in hate crime data collection by the year 2000.[148] However, over eighty percent of law enforcement agencies participating in the UCR continue to report zero hate crimes, and some still choose not to participate in the UCR.[149] For example, of the law enforcement agencies that participated in the UCR Hate Crimes Statistics Report in 2010, 2000 agencies reported a total of 6628 hate-crime incidents, 13,000 agencies reported zero hate crimes occurred in their jurisdictions, and 3000 agencies did not respond to the hate crime survey.[150] Approximately half of the states in the United States have statutes that specifically deal with hate crime data collection and statistical reporting.[151] Within these states, the statutes addressing data collection and reporting differ significantly, and may or may not contain elements such as mandates to create and maintain state databases on hate crimes, mandates for law enforcement agencies to report hate crimes in their jurisdictions to state or legislative agencies, and requirements for law enforcement training in recognizing and reporting hate crimes, among other elements.[152] Many of these state laws are very comprehensive in addressing the major elements of data collection and

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

149 *See* SINGH ET AL., *supra* note 11, at 3; Krasavage & Bronstein, *supra* note 60. "In 2010, for example, cities reporting no hate crimes included Miami, FL, Newark, NJ, and New Orleans, LA. Cities that did not report at all in 2010 included Louisville, KY, Toledo, OH, and Honolulu, HI." Eisenberg, *supra* note 93, at 883.

150 *Hearing Before the Subcomm. on the Constitution, Civil Rights, & Human Rights of the S. Comm. on the Judiciary*, 112th Cong. 4 (2012) (statement of Roy L. Austin, Jr., Deputy Assistant Att'y Gen., Civil Rights Division, U.S. Department of J.), http://www.justice.gov/sites/default/files/testimonies/witnesses/attachments/09/19/12/09-19-12-crt-austin.pdf.

> For example, the Anti-Defamation League's 2010 Hate Crimes Statistical Report establishes that the City of Honolulu, Hawaii did not respond to the Uniform Crime Report Survey between the years 2006 and 2010. However, the State of Hawaii's Annual Hate Crimes Report establishes that during that time period, 9 hate crimes reached final disposition in the City of Honolulu.

Id. at 4 n.1.

151 SHIVELY, *supra* note 7, at 28 ("For example, Connecticut General Statutes § 29-7 mandates collection of data on '*all crimes motivated by bigotry or bias*,' and states that the Division of State Police within the Department of Public Safety shall monitor, record, and classify all crimes committed in the state which are motivated by bigotry or bias."). For specific state statutes addressing data collection, see ANTI-DEFAMATION LEAGUE, *supra* note 128.

152 SHIVELY, *supra* note 7, at 28.

statistical reporting.[153] However, most of these state laws do not actually assist UCR hate crime reporting.[154] Instead, they can often be confusing for law enforcement, who must operate with sometimes conflicting definitions of hate crime—their own state statute definition, and that given by UCR reporting guidelines.[155]

4. Differences in Law Enforcement Training

Because law enforcement officers are the first to respond to hate crimes, they play a crucial role in identifying hate crimes, and it is vital that they have the tools to properly recognize bias motives in crimes in their jurisdictions.[156] However, very few states have mandated training

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153 *Id.* ("For example, Texas Government Code (TGC) § 411.046 provides for the establishment and maintenance of a central repository for the collection and analysis of information relating to hate crimes. The statute also mandates development of procedures to monitor, record, classify, and analyze information relating to bias motivated incidents (TGC § 411.046). It also requires periodic summary reports to be produced and made available to state government agencies, and allows other agencies reasonable access to the data . . . .").

154 *Id.* at 41 ("[S]tate laws generally *do little to support UCR hate crime reporting*. Most state laws with provisions for data collection refer to fulfilling their own statistical reporting requirements, and not the UCR's.") However, there are a few exceptions to this rule; for example, an Oregon statute directs all state law enforcement agencies to report hate crime statistics to the Department of State Police, specifically for UCR Program purposes. *Id.*; *see* OR. REV. STAT. § 181.550 (2015). A Louisiana statute imposes penalties on agencies that fail to comply with UCR data reporting requirements. SHIVELY, *supra* note 7, at 41; *see* LA. STAT. ANN. § 15:1204.5 (2015).

155 SHIVELY, *supra* note 7, at 41 ("In states with definitions of hate crime that are very different from that in the UCR guidelines it can be confusing to law enforcement: A police department's own classification of criminal charges and descriptions in police reports will all categorize offenses according to their state's criminal code, while the UCR will ask for an accounting of offenses defined differently. For example, Maryland's statute specifies only race, religion, and ethnicity as necessary for reporting, while the UCR guidelines include these plus sexual orientation, gender, disability, and other traits. For accurate UCR compliance, Maryland would have to keep a dual data collection system, with each system recording crimes meeting a different set of criteria. In addition, law enforcement personnel would have to use investigative protocols that gathered information about both types of hate crimes, those according to the UCR's and those according to Maryland's definitions. For example, Maryland officers investigating an assault that potentially could be a hate or bias crime must inquire about racial, religious, and ethnic biases, but if these do not apply they need look no further and simply tally the offense as an assault. To fully comply with UCR requirements, however, they would need to fully investigate additional forms of bias (disability, sexual orientation, age) associated with any assault even though those are not covered by the state's hate crime law.").

156 *See* Eisenberg, *supra* note 93, at 903 ("As the first movers in hate crime enforcement, police must have the tools to identify bias motives and to flag them for the prosecutors in their jurisdiction."); Meli, *supra* note 8, at 936 ("Hate crime laws do not work without police officer enforcement. . . . Whether something is reported as a hate crime, or prosecuted as a hate crime, is entirely up to the discretion of law enforcement."); *see also* Bell, *supra* note 106, at 423 ("Because most bias-motivated incidents are placed first in other crime categories, bias crimes do not legally exist until the police say they do.").

for law enforcement officers in investigating, identifying, and reporting hate crimes.[157] Even in states that do offer police training on hate crime identification and reporting, there is not much oversight in place to confirm that officers are actually receiving and using this training effectively.[158] However, hate crime statutes that do provide training provisions improve the effectiveness of law enforcement because they require that officers and prosecutors be informed about statutory changes to hate crime laws and case law that affect their interpretation.[159]

V. PROPOSAL: IMPROVEMENTS IN LAW ENFORCEMENT TRAINING

As evidenced by the documentation gap in the Uniform Crime Reports and the National Crime Victimization Survey, hate crimes are massively unreported.[160] One factor contributing to this gap is that law enforcement officers struggle with how to particularly investigate or

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157 *See* ANTI-DEFAMATION LEAGUE, *supra* note 128. Only thirteen states currently mandate police training on recognizing and reporting hate crimes: Arizona, California, Connecticut, Illinois, Iowa, Kentucky, Louisiana, Massachusetts, New Jersey, New Mexico, Oregon, Rhode Island, and Washington. *See id.* However, some other states have administrative regulations that mandate such training. *Id.*; *see also* SHIVELY, *supra* note 7, at 31 ("[S]ome states have provisions assigning responsibility for providing training and creating standards and materials to existing law enforcement agencies or organizations, while others mandate the creation of new departments or organizations to design and deliver training.").

158 *See* Gillis, *supra* note 130, at 223 ("However, there seems to be little oversight in place to ensure that law enforcement officials are actually receiving or utilizing this training."). Additionally, "oversight over training programs by state officials is also necessary in order to ensure that police forces are receiving the appropriate information, skills, and direction required to facilitate increased awareness and responsiveness to hate crimes." *Id.* at 226. It is also important to note that while all of the state statutes that mandate law enforcement training present the training requirements as mandatory, many of them do not describe sanctions or other consequences for noncompliance. *See* SHIVELY, *supra* note 7, at 32. One state statute that does outline sanctions is section 626.8451 of the Minnesota Statutes, which assigns a designated board to prepare a training course to help law enforcement officers properly distinguish bias crimes from other crimes, help and understand victims of these crimes, and ensure that bias crimes are accurately reported. MINN. STAT. § 626.8451 (2015); *see* SHIVELY, *supra* note 7, at 32. The statute also includes provisions that do not allow individuals to be licensed as sworn law enforcement officers unless they receive the training, and officers must be provided training periodically to maintain their license. *See id.*

159 SHIVELY, *supra* note 7, at 35–36 ("[Training provisions] necessitate the investigation and identification of hate crime and promote more rigorous data collection and reporting practices. These investigative, legal, and data collection skills are generalizable and increase law enforcement's proficiency at addressing all crime, benefiting law enforcement agencies and the communities they serve."); *see also* Singh et al., *supra* note 37, at 121 (stating that an assessment of hate crimes in the United States identifying serious gaps in the hate crimes regime includes a lack of law enforcement education about hate crimes laws leading to poor investigation and reporting of incidents).

160 *See supra* Part III.

prove hate crimes, and hate crimes will not get charged unless there is sufficient evidence.[161] The first step in addressing the documentation gap is not to change the law or how we charge hate crimes because this will raise other issues, such as constitutional issues of punishing speech and thought.[162] Instead, by creating an infrastructure within law enforcement departments to provide officers with the tools necessary to properly respond to, identify, and report hate crimes, we can ensure that officers are actively investigating possible hate crimes.[163] As the legal process does not start with the prosecution of a crime, but rather with the investigation, it is important to first address issues with the identification of potential hate crimes—and this can be accomplished through investment in training law enforcement personnel.[164]

While the FBI has made efforts to improve training for proper data collection for the UCR and some similar state efforts as well,[165] the investment in training of law enforcement personnel is in critical need of expansion.[166] As previously discussed, law enforcement officers are the first to respond to hate crimes within their jurisdictions, and therefore it is crucial that they are trained to properly identify, investigate, and report hate crimes.[167] Prosecutors have observed the

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161 *See supra* Section IV.B.1.

162 *See supra* Section IV.B.1.

163 *See* KERCHER ET AL., *supra* note 45, at 16 (explaining the importance of funding to train and support law enforcement officers for enforcement of hate crime laws, and pointing to the NYPD Hate Crimes Task Force (HCTF) as an instructive example in addressing hate crimes); *see also* Brian Levin & Sara-Ellen Amster, *Making Hate History: Hate Crime and Policing in America's Most Diverse City*, 51 AM. BEHAV. SCIENTIST 319, 336 (2007) (describing how the NYPD HCTF's specialized expertise, advocacy group intervention, and application of greater investigatory resources play a part in its ability to validate a much larger percentage of reported cases as confirmed hate crimes).

164 *See* KERCHER ET AL., *supra* note 45, at 20 ("A crucial phase in assisting victims of a hate crime is the officer's identification of the crime as bias motivated."); *see also* Eisenberg, *supra* note 93, at 903 ("As the first movers in hate crime enforcement, police must have the tools to identify bias motives and to flag them for the prosecutors in their jurisdiction."); Meli, *supra* note 8, at 936 ("Hate crime laws do not work without police officer enforcement. . . . Whether something is reported as a hate crime, or prosecuted as a hate crime, is entirely up to the discretion of law enforcement.").

165 *See* SHIVELY, *supra* note 7, at 83. For example, the California Department of Justice invests in training law enforcement to collect state hate crime data. *See id.*

166 *See* KERCHER ET AL., *supra* note 45, at 16 ("[A]dequate funding is needed to improve law enforcement responses to hate crimes. This funding is needed to adequately train and support officers for enforcement of hate crime laws."); *see also* SHIVELY, *supra* note 7, at 83. Recommended areas of expansion include training on: "how to distinguish hate motivated crimes from other forms; identifying and gathering evidence of hate motivation; and satisfying UCR reporting requirements." *Id.*

167 *See* Eisenberg, *supra* note 93, at 903; *see also* KERCHER ET AL., *supra* note 45, at 16 ("Police need specific training to better understand the plight of victims of hate crimes, the correct definition of hate crimes, and appropriate crime scene investigative skills. This

success of police training in identifying hate crime cases.[168] Furthermore, studies of hate crime policing show that police officers are more likely to report and investigate possible bias motives when a police department incorporates a hate crimes task force or bias unit into its department.[169] There are two major factors that encourage police officers to investigate and report hate crimes. The first is overt departmental influences, which can be addressed through managerial prioritization and the establishment of an infrastructure, such as a hate crimes task force, to deal with hate crimes.[170] The second major influential factor is the individual officer's belief that investigating and reporting is the right thing to do.[171] This second factor can be addressed through enhanced community interaction and training.[172] To address these issues, in some large cities, such as New York City, an entire task force is assigned to hate crimes.[173]

In analyzing the New York Police Department Hate Crimes Task Force as a model, this Note proposes the implementation of hate crimes task forces in other jurisdictions, using key elements of the New York model and considering areas for improvement.

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information may help to prevent secondary victimization by persons of alternative sexual orientation and those victims whose reports are invalidated as hate crimes.").

168 Eisenberg, *supra* note 93, at 903 ("One Northwest prosecutor emphasized the importance of police training, explaining that in his jurisdiction there is now a training video for police and that 'since the training, there's been no problem with flagging.' Other prosecutors confirmed that screening for hate crimes 'starts in the police station.' A Massachusetts prosecutor noted that in Boston, there is a police department unit devoted entirely to hate crimes, explaining, '[I]f there's no independent unit and police aren't trained, there's no chance. Education is key. Culture is key. If racial epithets are common in a culture, they won't serve as a signal to police as something to flag.'" (alteration in original) (quoting interviews with unidentified prosecutors)).

169 *See, e.g.*, *Improving Hate Crime Reporting*, *supra* note 129 (analyzing a survey of 705 police departments' hate crime investigators about hate crime reporting and training); *see also* Bell, *supra* note 106, at 456 ("The creation of specialized units and standard operating procedures like the above are designed to limit police discretion by providing a forum for internal review for the classification decision.").

170 *See Improving Hate Crime Reporting*, *supra* note 129. In the opinion of police departments' hate crime investigators, "the factor that is most likely to encourage officers to properly identify and report a bias crime is departmental managers investing resources and effort into the issue of hate crime as a unique problem." *Id.*

171 *Id.*

172 *Id.*

173 Eisenberg, *supra* note 93, at 886.

A. *The New York Police Department Hate Crimes Task Force as a Model*

In New York, if a police department duty captain finds that the facts of a case before him seem to include a bias motive, the New York Police Department Hate Crimes Task Force (NYPD HCTF) is notified.[174] This, in turn, triggers a Hate Crimes Task Force investigation.[175] The NYPD HCTF has been applauded as a model to overcome some of the factors that lead to underreporting.[176] As mentioned previously, underreporting by victims is a major problem that has contributed to the deficient account of the national hate crime landscape.[177] The efforts of the NYPD HCTF have helped address this problem in the context of understanding the scope of the hate crime problem in New York City.[178] By engaging with vulnerable communities and nongovernmental organizations, implementing proper law enforcement training, and providing oversight in hate crime documentation, the HCTF's efforts have allowed for more resources to be allocated to hate-crime prevention for vulnerable communities.[179] There are various components of the NYPD HCTF that prove effective, and while it may not be a perfect model, implementation of the

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174 *Id.*

175 *Id.* However, even when there are task forces dedicated to investigating possible hate crimes, when "there's a vicious assault, determining motive isn't always a top priority for police; their key objective is to identify the perpetrator. They're not focused on the hate crime aspect." *Id.* (quoting interview with unidentified prosecutor).

176 Singh et al., *supra* note 37, at 125–26 (noting that the Crime Victim's Institute (CVI) has pointed to the New York City Hate Crimes Task Force as a model to overcome some of the failures that lead to underreporting and mistrust between the local community and law enforcement); *see also* KERCHER ET AL., *supra* note 45, at 16 (explaining the importance of funding to train and support law enforcement officers for enforcement of hate crime laws, and pointing to the NYPD HCTF as an instructive example in addressing hate crimes).

177 *See supra* Section IV.A. Factors contributing to underreporting by victims of hate crimes include mistrust between the local community and law enforcement, and fear that police will not help victims. *See supra* Section IV.A.

178 *See* KERCHER ET AL., *supra* note 45, at 16 ("According to the National Crime Victimization Survey (NCVS), only 19.2% of the hate crime incidents reported by victims were determined by local authorities to be bias-related. However, examination of the police response in New York from 1996–2005 shows that the Hate Crime[s] Task Force of the New York Police Department (HCTF) confirmed as hate crimes almost 91% of victim reports." (citation omitted)); Levin & Amster, *supra* note 163, at 336 ("[T]he HCTF validates a far greater percentage of reported cases as confirmed hate crimes. . . . This is probably because of the unit's specialized expertise, advocacy group intervention, and the application of greater investigatory resources."); *see also* Singh et al., *supra* note 37, at 125–26 ("CVI explained that this disparity existed not because victims were any more or less truthful in other jurisdictions, but because unlike many jurisdictions, HCTF engages in proper law enforcement training, engagement with NGOs and the affected communities, and oversight over hate crimes documentation.").

179 Singh et al., *supra* note 37, at 126.

components outlined below can help improve the documentation of hate crimes in jurisdictions across the country.[180]

1. Establishment and Development

Of the nation's specialized task forces dedicated to hate crimes, the NYPD HCTF is the largest and second oldest.[181] It was founded in December 1980 by then NYPD Commissioner Robert McGuire and named the Bias Incident Investigation Unit (BIIU).[182] It was originally founded to investigate unlawful acts committed on the basis of race, religion, and ethnicity, but was later expanded to include a larger number of categories.[183] The NYPD BIIU immediately became a leader in enforcement and data collection, its operation evolving throughout the 1980s to become a national model.[184] In April 1997, with the support of the department, the hate crimes unit was given full authority over investigations of suspected bias incidents.[185] The unit was placed directly under the highest supervisors at police headquarters, and the notification hierarchy put in place ensured that hate crime cases would receive a high level of scrutiny.[186]

In March 2000, then Mayor Rudolph W. Giuliani announced a hate crime initiative to reduce the number of hate crimes and enhance hate crime investigations and prosecutions in New York City.[187] The BIIU became the NYPD Hate Crimes Task Force, and the unit was expanded in order to increase funding and staffing.[188] As part of the

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180 See *infra* Sections V.A.2–3 for an in-depth analysis of the NYPD HCTF's successes and possible improvements.

181 Levin & Amster, *supra* note 163, at 333.

182 *Id.*

183 *Id.* Crimes against gays and lesbians were added in July 1985, and crimes against the disabled were added in April 1993. *Id.* at 336.

184 *Id.* at 336. This was largely due to the fact that "the formation of the NYPD's hate crime unit came about before wide-spread state legislation and national data collection efforts" and consequently, "the unit had to follow its own lead with regard to enforcement and data collection." *Id.*

185 *Id.* at 337.

186 *Id.*

187 Press Release, N.Y.C. Mayor's Office, Mayor Giuliani Announces Hate Crime Initiative to Reduce Hate Crime and Enhance Hate Crime Investigations and Prosecutions (Mar. 30, 2000), http://www.nyc.gov/html/om/html/2000a/pr116-00.html.

188 *See id.* ("As part of the initiative, the Hate Crimes Task Force will receive $3.8 million in funding to quadruple staffing; create a sophisticated hate crimes database to monitor bias incidents and track hate organizations; establish a hate crime prevention training program aimed at elementary and middle school students; and increase the budget for special hate crime investigations, such as the ongoing investigation into the recent acts of vandalism against religious symbols. The additional funding will also enable the Hate Crimes Task Force to

initiative, the city also established a new twenty-four-hour hate crime hotline and a monitoring database, and instituted a concentration on internal departmental training and special investigations.[189] Following an increase in hate crimes in 2000 and 2001, there was a significant decline in 2002.[190]

In January 2009, then Governor David A. Paterson established a hate crimes task force as an interagency committee in response to alarming hate crimes that occurred in New York State.[191] The goal of this task force was to develop strategies to improve hate crime prevention efforts and increase awareness among New Yorkers.[192] The task force was divided into subcommittees, one of which was the Subcommittee on Training, chaired by an individual from the Division of Criminal Justice Services.[193] The Subcommittee on Training was responsible for developing a protocol for law enforcement that outlined their responsibilities when dealing with a possible hate crime.[194] The subcommittee proposed a model policy after examining the International Association of Chiefs of Police Hate Crimes Model Policy and hate crimes policies currently in effect across the state, and surveying police departments from across the state.[195] While New York law mandates that every police officer undergo a course in basic officer training, it does not specify that this training include identifying, investigating, and responding to hate crimes.[196] Therefore in 2009, New York State implemented the proposed hate crimes model policy, which

increase community outreach and improve coordination with federal, state and local agencies and the City's five District Attorneys. The $1.2 million allocated to the District Attorneys will enable them to devote more personnel and resources to hate crime investigations and prosecutions."); *see also* Levin & Amster, *supra* note 163, at 337.

189 Levin & Amster, *supra* note 163, at 337.

190 *Id.* This rise in hate crimes in New York in 2001 was significant, but was a short-term effect of the 9/11 attacks, which led to a rise in anti-ethnic and anti-religious crimes. *Id.* at 331, 339.

191 Memorandum from Galen D. Kirkland, Comm'r, N.Y. State Div. of Human Rights, to Governor David A. Paterson 1 (July 29, 2009), http://www.criminaljustice.ny.gov/pio/annualreport/hate_crimes_task_force_report.pdf (Hate Crime Task Force Recommendations).

192 *Id.* at 1–2.

193 *Id.* at 2. The Division of Criminal Justice Services oversees New York State's Uniform Crime Reporting (UCR) program. *Id.* at 7.

194 *Id.* at 2.

195 *Id.* at 6. "The policy captures best practices and includes applicable laws, response procedures, investigative steps, documentation, accusatory instrument preparation, reporting requirements, and community relations." *Id.*

196 *See* N.Y. GEN. MUN. § 209-q (McKinney 2007); Letter from John Buyce, Audit Dir., Office of the N.Y. State Comptroller, to Michael C. Green, Exec. Deputy Comm'r, Div. of Criminal Justice Servs. 1 (Sept. 25, 2014), http://osc.state.ny.us/audits/allaudits/093014/13s67.pdf (Hate Crime Reporting Report 2013-S-67).

other agencies can adopt as a best practice for responding to and investigating bias-crime incidents.[197]

Furthermore, the New York State Department of Criminal Justice Services (DCJS) cosponsored a training of law enforcement officers with the Anti-Defamation League on domestic extremism in 2008.[198] The training covered topics such as New York State and federal hate crime laws, defining and identifying hate crimes, investigative steps, evidentiary issues, and offender profiles.[199] In 2011, DCJS implemented a hate crimes component on identifying and responding to hate crimes in the required officer training.[200]

2. Practice and Success

The NYPD HCTF's success can be tied to a number of factors, including outreach with diverse communities and advocacy groups, and the enforcement policies of the department's unit.[201] The HCTF also maintains an efficient relationship with borough-level prosecutors who specialize in hate crime prosecution.[202]

The HCTF has worked with victim and advocacy groups for many years and has institutionalized these relationships through outreach and training to diverse communities.[203] As previously mentioned, one of the major factors that leads to deficient hate crime reporting is underreporting by victims of hate crimes to law enforcement.[204]

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197 BRAD HOYLMAN, N.Y. STATE SENATE, NEW YORK'S HATE CRIMES LAW: AN ASSESSMENT 4 (2013), http://www.nysenate.gov/sites/default/files/articles/attachments/Hate%20Crimes%20Law%20Assessment%20Report%20%208.15.13_0.pdf. However, mandatory law enforcement training on identifying, responding to, and reporting hate crimes, though implemented, is not codified to ensure it remains a part of the training curriculum. *See id.*

198 Memorandum from Galen D. Kirkland to David A. Paterson, *supra* note 191, at 6.

199 *Id.*

200 HOYLMAN, *supra* note 197, at 4. This policy was not required by existing law, but DCJS implemented it regardless. *Id.* This was done in an effort to ensure that DCJS is able to accurately collect, analyze, and report hate crimes data in New York. *See id.* ("Having law enforcement officials well trained in identifying and reporting hate crimes is crucial to assisting victims, prosecuting hate crimes, and maintaining accurate data on hate crimes. If a responding or investigating officer does not identify a crime as a hate crime or document a bias motivation in the official incident report, the crime will not be reported to the New York State Department of Criminal Justice Services (DCJS) as a hate crime. This hinders the ability of DCJS to accurately collect, analyze and report hate crimes data in New York.").

201 Levin & Amster, *supra* note 163, at 337–38.

202 *Id.* at 338.

203 *Id.* at 337. "Many of New York's advocacy groups have a high degree of sophistication with regard to victim support and reporting. Their efforts were crucial in getting new hate crime legislation passed in the state, despite sporadic tension with police in earlier years." *Id.*

204 *See supra* Section IV.A.

Nationally, one in ten victims of hate crimes report that they receive help from agencies other than the police.[205] When victims report hate crimes to law enforcement, it is because they believe that the officers will help them.[206] By actively working with victim and advocacy groups, taking advantage of a department that offers reporting services to victims in various languages, taking victim service referrals, employing a diversity of immigrant officers, offering protections for undocumented-immigrant crime victims, and using sophisticated computerized crime analysis, the HCTF has developed mutual trust with communities and demonstrated its ability to solve cases.[207]

The NYPD HCTF also uses a very aggressive enforcement approach.[208] Michael Osgood, the Deputy Chief of the HCTF, has emphasized how hate crimes have the potential to escalate violence, disrupting not only victims, but also whole communities.[209] Comparing his unit's hard-hitting enforcement of hate crimes to broken windows policing, Osgood notes that through consistent enforcement and legislation, hate crimes have declined.[210] The NYPD HCTF's promptness and persistence in responding to hate crimes have made the unit's clearance rates[211] higher than the national average.[212]

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205 HARLOW, *supra* note 64, at 5; Levin & Amster, *supra* note 163, at 337.

206 HARLOW, *supra* note 64, at 5; Levin & Amster, *supra* note 163, at 337.

207 Levin & Amster, *supra* note 163, at 337–38.

208 *Id.* at 338.

209 *Id.* (summarizing a 2005 interview with Deputy Chief Michael Osgood, who was then Deputy Inspector of the HCTF).

210 *Id.* (stating that during a 2005 interview, Deputy Chief Michael Osgood explained "his unit's aggressive enforcement, particularly with violent hate crimes, as part of a multifaceted firewall against a breakdown in civil order"). Osgood "also notes that consistent enforcement through the years and more recent legislation have deterred hate crimes in the city because residents recognize that there is 'a highly motivated unit, statutes, and the government behind it.'" *Id.* (quoting interview with Michael Osgood (Nov. 14, 2005)).

211 A clearance rate is defined as "[t]he number of outgoing cases as a percentage of the number of incoming cases." NAT'L CTR. FOR STATE COURTS, COURTOOLS: CLEARANCE RATES (2005), http://www.courtools.org/~/media/Microsites/Files/CourTools/courtools_Trial_measure2_Clearance_Rates.ashx.

212 Levin & Amster, *supra* note 163, at 338 ("[I]n New York, 51% of physical hate crime attacks and 25% of all hate crimes result in arrests. Nationally, only 22.9% of 'violent' person-directed hate crime, and only 19.3% of hate crime overall, results in an arrest. Compared to crime in general, hate crimes have lower clearance rates because of the fact that many of them involve strangers and lack tangible items like traceable weapons or stolen property.").

3. Areas of Improvement

While the NYPD HCTF has been applauded as a model for addressing hate crimes,[213] there are still areas in which improvements are needed.[214] The New York State DCJS executed a plan to improve hate crimes reporting in August 2009.[215] The plan focused on three specific failures: (1) the failure of New York law enforcement agencies in identifying hate crimes, (2) the failure of victims to report hate crimes, and (3) the failure of law enforcement agencies to submit hate crime information internally.[216] To address the first problem, DCJS shared the model policy with local agencies across the state in an effort to facilitate thorough investigations by providing departments with a framework to adequately document possible hate crime incidents.[217] To address the second problem, the NYPD Community Relations Bureau[218] partners with community leaders and civic organizations to build communities' trust in law enforcement, and train officers in communities vulnerable to hate crimes.[219] Finally, to address the third problem, DCJS conducts a comprehensive validation of the hate crime data submitted by law enforcement agencies, asking agencies to verify hate crime incidents or arrests.[220]

In an audit by the New York State Office of the State Comptroller in 2014, auditors found that while the NYPD had made a good faith

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213 Singh et al., *supra* note 37, at 125.

214 Matt Sledge, *NYPD Bungled Hate Crimes Reporting*, HUFFINGTON POST (Sept. 25, 2014, 12:54 PM), http://www.huffingtonpost.com/2014/09/25/nypd-hate-crimes_n_5882506.html ("While the NYPD has made a good faith effort to accurately report these insidious crimes, there are several areas where improvements are needed." (quoting N.Y. State Comptroller Thomas DiNapoli)).

215 *See* Singh et al., *supra* note 37, at 132; *Improving Hate Crime Data Quality*, N.Y. ST. DIV. CRIM. JUST. SERVICES (Aug. 14, 2009), http://www.criminaljustice.ny.gov/crimnet/ojsa/crimereporting/hatecrimedataquality.htm [https://web.archive.org/web/20130219125410/http://www.criminaljustice.ny.gov/crimnet/ojsa/crimereporting/hatecrimedataquality.htm].

216 Singh et al., *supra* note 37, at 132–33; *Improving Hate Crime Data Quality*, *supra* note 215.

217 Singh et al., *supra* note 37, at 132.

218 *See About the NYPD Community Affairs Bureau*, N.Y. POLICE DEP'T, http://www.nyc.gov/html/nypd/html/community_affairs/history.shtml (last visited Jan. 14, 2016) ("The Community Affairs Bureau was established to foster positive and productive police-community relations. By partnering with community leaders, civic organizations, block associations, and concerned individuals, we work to create solutions for problems that arise within the city's many communities.").

219 Singh et al., *supra* note 37, at 132–33. "Additionally, members of the city council, borough government leaders, and various members of civil society often stand together in solidarity following hate-crime incidents in order to bring attention and resources to the incident and to visibly recognize the painful effects hate crimes have on the community." *Id.* at 133.

220 *Id.* at 133.

effort to accurately report hate crimes, there were many areas where improvements were necessary.[221] First, auditors identified data disparities from 2010 to 2012 between individual incident reports and the summaries of hate crimes that were reported.[222] Second, they discovered that the NYPD did not have a formal central office analysis of the hate crime data that was collected, and therefore could not use this data to formulate a corresponding action plan.[223] Third, they found that system limitations led to data associated only with single-bias incidents, even when multiple biases were reported.[224]

Auditors identified four opportunities to improve the NYPD's training program on hate crime incidents: (1) developing a document-tracking system to address the data disparities between incident reports and summary records of hate crime data; (2) regularly analyzing the summary data to formulate action plans regarding budgeting, staff deployment, and community outreach; (3) creating and maintaining an easily accessible record-keeping system to ensure all officers receive required training in identifying hate crimes; and (4) incorporating periodic bias crime training into the routine NYPD training curriculum.[225] For jurisdictions implementing hate crimes task forces, these are all areas of improvement that should be considered along with the elements for implementation outlined below.

4. Elements of the NYPD HCTF for Implementation

Overall, the success of the NYPD HCTF can be broken down into elements that improve the department's response to hate crimes, which can be implemented in jurisdictions across the country.[226] First, the

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221 *See* Press Release, Office of N.Y. State Comptroller, DiNapoli Finds Opportunities for Improved NYPD Hate Crimes Reporting (Sept. 25, 2014), http://www.osc.state.ny.us/press/releases/sept14/092514a.htm.

222 *Id.* ("In 2010, for example, individual incident reports indicated that there were 371 bias-related crimes in the city. However, because of misreporting by the NYPD, DCJS's annual report stated that there were 350 such crimes.").

223 *Id.*

224 *Id.* ("As a result of this system limitation, stakeholders may not be fully aware of the number of incidents where multiple-bias motivations have been reported and may therefore be relying on skewed data.").

225 NYPD officials agreed with the proposed recommendations and began to take steps in implementing them. *See id. See generally* DIV. OF STATE GOV'T ACCOUNTABILITY, N.Y. STATE OFFICE OF THE STATE COMPTROLLER, REPORTING AND UTILIZATION OF BIAS INCIDENT DATA: NEW YORK CITY POLICE DEPARTMENT (2014), http://osc.state.ny.us/audits/allaudits/093014/14n2.pdf.

226 Levin & Amster, *supra* note 163, at 337–39.

existence of a specialized unit, which is well funded and placed highly within the department, allows for self-sufficiency over investigations.[227]

Second, all officers in the NYPD receive specialized training in how to respond to, investigate, and report hate crimes.[228] This is enhanced by the mandated response and investigative protocols for all officers in the Patrol Guide.[229] Generally, many local law enforcement agencies do not provide training or guidelines on how to adequately investigate or document hate crimes incidents.[230] Bias-motivated incident guidelines in the NYPD Patrol Guide have proven very effective to the NYPD because the guidelines promote proper investigation and documentation of bias crimes.[231] By adopting similar procedural guidelines in patrol guides across the country, law enforcement officers would be in a better position to properly investigate and report hate crimes in their jurisdictions.[232]

Third, regular contact with other agencies, private groups, and communities, and the existence of multilingual victim services strengthens the relationship between vulnerable communities and law enforcement, and makes victims more likely to report hate crimes against them.[233] Fourth, the communication between the department and DCJS and other agencies, which audit and provide recommendations for the task force, combined with the willingness of the task force to implement improvements, allows for a constantly advancing system and enhanced data collection.[234] Other states can avoid underreporting by implementing validation processes similar to that of DCJS.[235]

Of course, there are issues that arise in implementing any specific model across other jurisdictions.[236] Broadly speaking, all states are

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227 *Id.* at 338.

228 *Id.*

229 *Id.*; *see also* Singh et al., *supra* note 37, at 133.

230 SINGH ET AL., *supra* note 11, at 10.

231 *Id.*; *see also* Alison Mitchel, *Police Find Bias Crimes Are Often Wrapped in Ambiguity*, N.Y. TIMES (Jan. 27, 1992), http://www.nytimes.com/1992/01/27/nyregion/police-find-bias-crimes-are-often-wrapped-in-ambiguity.html.

232 Singh et al., *supra* note 37, at 133.

233 *Id.* at 134–35.

234 For an example of a DCJS plan to improve hate crimes reporting and new procedures, see *Improving Hate Crime Data Quality*, *supra* note 215.

235 Singh et al., *supra* note 37, at 133.

236 INT'L ASS'N OF CHIEFS OF POLICE, 1 ENHANCING LAW ENFORCEMENT RESPONSE TO VICTIMS: A 21ST CENTURY STRATEGY 17 (2009), http://www.theiacp.org/Portals/0/pdfs/responsetovictims/pdf/pdf/IACP_Strategy_REV_09_Layout_1.pdf (discussing how fiscal concerns and other factors can impact agencies' capacity to provide adequate training, but by identifying their subject matter needs and working with local stakeholders such as allied law enforcement, prosecutors' offices, victim service providers, and advocacy organizations, agencies can alleviate these challenges to properly accomplish their goals).

different, and one model may not necessarily serve the needs of every state. However, the implementation of the elements of the NYPD model have proved effective in other jurisdictions,[237] and so other local police departments might implement the elements that best fit their needs or that lend themselves to their already-existing structures. There are a number of factors that may make it difficult to adopt a structure like the NYPD HCTF in other jurisdictions, and perhaps the biggest factors are cost, funding, and available resources. For example, a 2007 survey by the Bureau of Justice Statistics demonstrates the differences in employment of full-time sworn personnel in relation to the population served for local police departments across the country.[238] Furthermore, the survey indicates the vast differences in operating budgets for local police departments.[239] It is up to jurisdictions to assess these factors and weigh them alongside the benefits of improving hate crime identification and prosecution in their jurisdictions.[240]

The effectiveness of a hate crimes task force like the NYPD HCTF is evident in other jurisdictions that have similar units, multilingual victim services, and enhanced data collection; these jurisdictions have also experienced declines in hate crimes far in excess of that experienced

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237 Levin & Amster, *supra* note 163, at 339.

238 BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, NCJ 231174, LOCAL POLICE DEPARTMENTS 2007, at 34 (2010), http://www.bjs.gov/content/pub/pdf/lpd07.pdf. For example, according to the survey, the NYPD, which is the largest local police department serving the largest population in the country, employs about forty-three full-time sworn personnel per 10,000 residents. *Id.* In terms of allocating resources to hate crime prevention, it is likely easier for a local police department like the Washington, D.C., Metropolitan Police, which has about sixty-seven full-time sworn personnel per 10,000 residents, to create a specialized hate crimes task force than the San Antonio Police Department, which employs about fourteen full-time sworn personnel per 10,000 residents. *See id.*

239 *See id.* Operating budgets for local police departments averaged about $4.4 million per department for 2007, ranging from about $849 million for departments serving a population of one million or more, to $263,000 for departments serving fewer than 2,500 residents. *Id.* When the NYPD HCTF was founded, it received $3.8 million in funding to quadruple staffing, increase the budget for hate crime investigations, improve coordination with federal, state and local agencies and the city's five District Attorneys, create a sophisticated database to monitor bias incidents and hate organizations, increase community outreach, and create a hate crime prevention training program aimed at elementary and middle school students; an additional $1.2 million was allocated to the District Attorneys to allow them the ability to devote more personnel and resources to hate crime investigations and prosecutions. *See* Press Release, N.Y.C. Mayor's Office, *supra* note 187. Of course, funding for similar programs would differ across states based on numerous factors, including inflation and specific programs and resources implemented. However, for local police departments serving smaller populations, it may be financially more difficult to implement a specialized task force. *See* REAVES, *supra* note 238, at 10.

240 INT'L ASS'N OF CHIEFS OF POLICE, *supra* note 236, at 21 ("Law enforcement leaders deal with the ongoing problem of having to allocate resources among often competing priorities, and the importance of enhancing response to victims is no exception.").

nationally.[241] This indicates that jurisdictions such as New York are more effective at limiting hate crimes than jurisdictions that do not have specialized units.[242] Moreover, the responses of hate crime victims to the NYPD HCTF investigations demonstrate the level of trust that the task force has built with community members,[243] a factor that will improve overall reporting by victims.[244]

CONCLUSION

As distinct crimes that have a community impact and pose significant security issues, hate crimes warrant a distinctive legal approach.[245] It is important for hate crimes to receive proper investigation and documentation by law enforcement agencies, as this inspires and reinforces trust in the criminal justice system, specifically by vulnerable communities that are often distrustful of the system.[246] When hate crime laws result in proper reporting and documentation, resources can be properly allocated towards hate crime prevention.[247] This is incredibly important for communities that are vulnerable to hate crimes, because without these resources, they are trapped in a vicious cycle of hate.[248] These resources are provided to communities that can

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241 Levin & Amster, *supra* note 163, at 339. These jurisdictions include Boston, Los Angeles County, and San Francisco. *Id.*

242 *Id.*

243 *See, e.g.*, Tamer El-Ghobashy, *As Ramadan Nears, NYPD Alert for Signs of Anti-Muslim Harassment*, WALL ST. J.: METROPOLIS (July 27, 2010), http://blogs.wsj.com/metropolis/2010/07/27/as-ramadan-nears-nypd-monitors-anti-muslim-harassment (describing Daisy Khan, a Muslim woman who had received a string of hateful messages and phone calls for wanting to open an Islamic community center, and who said detectives from the NYPD HCTF visited her to assure her they were monitoring the activity). "They taught me how to handle these hate crimes . . . . They taught us how we should take care of ourselves. Thank you. I applaud you . . . I know there's somebody in the Police Department that is concerned." *Id.* (second alteration in original) (quoting Daisy Khan); *see also, e.g.*, Traci G. Lee, *Sikh Professor Survives Hate Attack, 'This Is Not the Harlem I Know'*, MSNBC (Sept. 23, 2013, 3:12 PM), http://www.msnbc.com/martin-bashir/sikh-professor-survives-hate-attack (describing an NYPD HCTF investigation of an attack on Sikh Columbia University professor Dr. Prabhjot Singh as a racially-motivated crime). According to the report, Singh's friend said the "NYPD's response was quick, and that he and others have felt a positive shift over the last year in the way hate crimes against minority communities are treated." *Id.*

244 HATE CRIME LAWS: A PRACTICAL GUIDE, *supra* note 15, at 21–22.

245 *See* SHIVELY, *supra* note 7, at 34.

246 HATE CRIME LAWS: A PRACTICAL GUIDE, *supra* note 15, at 22; *see also* SINGH ET AL., *supra* note 11, at 5.

247 *See* SINGH ET AL., *supra* note 11, at 2.

248 *See* Singh et al., *supra* note 37, at 125 ("The concerns about the inadequacy of police reports may prevent lawmakers and relevant agencies from missing crime patterns, and making sound decisions about how to allocate limited resources to prevent, prosecute, and protect communities from hate crimes."); *see also id.* at 126 ("[T]he failure to document hate crimes by

demonstrate, through statistics, that they require protection.[249] Therefore, it is vital that the compilation of hate crime statistics by the FBI accurately depicts the national hate crime landscape.[250] However, research shows that hate crimes are underreported by both victims and the police, leading to underreporting by law enforcement agencies to the FBI, and resulting in a deficient account of hate crimes nationwide.[251]

An analysis of the documentation gap reveals various factors that lead to underreporting by law enforcement, one of which is the gap in law enforcement training.[252] As such, this Note proposes improvements in law enforcement training, specifically the implementation of a hate crimes task force.[253] Using the New York Police Department Hate Crimes Task Force as a model, jurisdictions across the country can implement the specific elements of the NYPD HCTF that contribute to its success, while improving on its limitations.[254] In improving law enforcement agencies' responses to hate crimes, task forces will be able to not only assist in adequate documentation of hate crimes in their jurisdictions, resulting in the proper allocation of resources towards hate crimes prevention for vulnerable communities, but also decrease the overall number of hate crime incidents.[255] By improving the application of hate crime laws through improvements in investigation,

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law enforcement causes affected communities to feel further alienated and prevents public officials from properly apportioning resources to address crimes targeting vulnerable communities. The failure to investigate and accurately report hate crimes leads law enforcement officials to treat hate-motivated crimes directed towards particularly vulnerable communities as isolated events, rather as part of a larger trend of hate and violence." (footnote omitted)). The failure of the government in supporting and protecting vulnerable communities reinforces the communities' mistrust of law enforcement, leading them to believe that reporting crimes committed against them to the police is not effective. *Id.* at 127. Therefore, the victims' failure to report, in addition to the failure to properly document these crimes, "can effectively silence and further marginalize communities experiencing repeated hate motivated violence." *Id.*

249 SINGH ET AL., *supra* note 11, at 8 n.54.

250 *See* Singh et al., *supra* note 37, at 126–27.

251 Eisenberg, *supra* note 93, at 884–85; Scotting, *supra* note 93, at 859 ("[T]he hate crime problem is much more serious than even the statistics report as a result of drastic underreporting by both law enforcement agencies and victims themselves.").

252 *See* ANTI-DEFAMATION LEAGUE, *supra* note 128; *see also supra* notes 157–58 (describing the states that mandate police training by statute or regulation).

253 *See supra* Part V.

254 *See supra* Section V.A.4.

255 Levin & Amster, *supra* note 163, at 339; *see also* Sally J. Greenberg, *The Massachusetts Hate Crime Reporting Act of 1990: Great Expectations Yet Unfulfilled?,* 31 NEW ENG. L. REV. 103, 112 (1996) ("Captain Donald Bromberg of the New York Police Department, a former commander of the city's bias incident unit, has noted that 'a problem in a particular part of the city can be determined if there are patterns and you can't determine that without reporting. Such reporting helps direct appropriate resources of both kind and amount to the places they are needed.'" (alterations omitted) (quoting Jennifer Nislow, *Bias Crime: Who's Got the Numbers?*, LAW ENFORCEMENT NEWS, Apr. 14, 1987, at 1)).

jurisdictions will be able to collect data based on the categorization and prosecution of hate crimes.[256] As a result, jurisdictions will be able to use this data in evaluating the application of existing hate crime laws, assisting in potentially improving the hate crime laws of their states.[257]

[256] SHIVELY, *supra* note 7, at 36 ("[Training provisions] necessitate the investigation and identification of hate crime and promote more rigorous data collection and reporting practices. These investigative, legal, and data collection skills are generalizable and increase law enforcement's proficiency at addressing all crime, benefiting law enforcement agencies and the communities they serve.").

[257] *Id.*