Deciding When Hate Is a Crime: The First Amendment, Police Detectives, and the Identification of Hate Crime

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DECIDING WHEN HATE IS A CRIME: THE FIRST AMENDMENT, POLICE DETECTIVES, AND THE IDENTIFICATION OF HATE CRIME

Jeannine Bell*

INTRODUCTION

A cartoon that appeared in a major United States newspaper several years ago aptly illustrates many of the fears that have been expressed regarding the enforcement of hate crime laws. The cartoon shows a man in a suit standing in front of a judge.¹ The caption reads, “I had no idea I was violating his civil rights, your honor. I only intended to punch him in the nose.”² The man has been charged with some type of hate crime. A hate crime is a crime motivated by prejudice toward the “victim’s race, color, ethnicity, religion, or national origin.”³ Hate crime laws typically require proof of the individual’s motivation for the crime in order to convict the defendant.⁴ In the cartoon, the judge appears to have been saddled with the responsibility of determining the individual’s true motivation.⁵ The cartoon seems to cast aspersions on the judge’s ability to evaluate whether a hate crime has been committed. This is precisely what worries many who are concerned about enforcement of hate crime laws.⁶

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1. Cartoon on file with author.
2. Id.
5. Cartoon on file with author.
For example, critics see the task of proving and judging motivation in this context complex, if not impossible. They find the task not only difficult, but one fraught with grave First Amendment difficulties.

Critics' concerns contribute to the impassioned decade-long debate concerning hate crime legislation. This debate has only intensified and grown more polarized in the past few years as legislatures around the country have considered passing hate crime legislation, frequently in response to dramatic hate crimes like the dragging death of James Byrd in Texas, the murder of Matthew Shepard in Wyoming, and the murder of a Filipino-American letter carrier, Joseph Ileto, by Burford Furrow in Los Angeles. Critics do not believe that hate crime legislation is an appropriate response to such crimes. They assail hate crime legislation for a variety of reasons, one of the most serious being the problem of controlling hateful behavior without offending the First Amendment by silencing speech. Critics are concerned that people will be convicted for hate crimes in cases in which the crime is not motivated by bias and the only evidence of the defendant's motivation is hate speech.

Unfortunately, the current debate over hate crime is predicated mainly on doctrinal, historical, and emotional arguments as neither supporters nor critics ground their arguments in empirical evidence of how hate crime laws actually work in practice. Scholars have questioned whether hate crime legislation can be enforced by those charged with enforcement, many of
whom are unschooled in the vagaries of First Amendment law. This Article argues that ultimately, whether hate crime laws can be enforced constitutionally is an empirical question that raises important concerns regarding the behavior of those charged with their enforcement. Without some sense of whether hate crime laws can be enforced constitutionally, it is hard to accept the arguments of supporters that the benefits of passing hate crime legislation outweigh the significant harm that critics argue such legislation may cause.

Based on interviews with and observations of those responsible for hate crime law enforcement in a metropolitan city, this Article provides much-needed empirical data to illuminate the contentious debates over the constitutional and practical dimensions of using hate crime law to punish bias crime. This Article adds a story of how hate crime law is enforced to the debate, based on the experiences of the police detectives who are required to enforce hate crime law. Part I of this Article provides a brief description of hate crime laws and argues that the police play an important role in the determination of how hate crime law is enforced and ultimately, whether defendants' First Amendment rights will be respected. Part II describes critics' concerns about defendants' First Amendment rights and the narrow constitutional line that enforcers of hate crime law must walk between enforcing hate crime and policing free speech. In Part III, I describe how enforcers decide that incidents are hate crimes and argue that they are able to avoid the pitfalls identified by critics. The Article concludes in Part IV with a discussion of the disconnect between hate crimes and hate speech and an exploration of new justifications for hate crime law.

PART I: THE POLICE ROLE IN HATE CRIMES LAW

A. Hate Crimes Law

The best way to distinguish hate crimes is to highlight how they are different from non-bias-motivated incidents. Hate or bias crimes are not committed because of animosity towards the victim as an individual, but rather because of hostility toward the group to which the victim belongs. The prejudice which motivates the commission of a hate crime may be based on the victim's actual or perceived race, religion, ethnicity, or sexual orientation. Though usually the vast majority of incidents investigated as hate crimes are assaults and vandalism, if they show evidence of biased motivation the following type of incidents can be hate crimes: murder, non-negligent manslaughter, forcible rape, intimidation, and arson.

The distinction between "hate crime" and "hate speech" is important. Hate speech, sometimes called "assaultive speech" is "[s]peech that carries no meaning other than the expression of hatred for some [particular] group, . . . especially in circumstances where the communication is likely to provoke violence." Examples of hate speech include, for instance, anti-religious and anti-gay slurs and racial epithets. Though universities and public institutions have attempted to regulate this type of offensive speech, courts have agreed the First

17. In this Article, the terms "hate crime" and "bias crime" are used interchangeably.
23. Id. at 1.
Amendment protects hate speech in these contexts and thus, defendants may not be prosecuted just for using it.\textsuperscript{24}

Hate crime, by contrast, can be prosecuted under a variety of federal\textsuperscript{25} and state laws. The vast majority of criminal acts that are prosecuted as hate crimes are prosecuted under state law specifically punishing hate crime, which is not surprising since states have jurisdiction over most criminal matters.\textsuperscript{26} Nearly every state has some type of legislation that criminalizes bias-motivated conduct.\textsuperscript{27} Prosecutors may charge individuals who have committed hate crimes under a variety of types of legislation including ethnic intimidation statutes, statutes that prohibit cross burning,\textsuperscript{28} institutional vandalism statutes that prohibit the vandalism and defacement of a variety of locations, including public monuments and institutions;\textsuperscript{29} and anti-mask statutes that penalize wearing a mask, hood, or disguise while in public.\textsuperscript{30}

When commentators refer to hate crime laws however, they are generally referring to bias-motivated violence or ethnic intimidation statutes. Such statutes are found in many states.\textsuperscript{31}

\begin{footnotesize}
\begin{enumerate}
\item[25.] \textsc{Wang, supra} note 4, § 2.1 (discussing the federal legislation under which hate crimes may be prosecuted).
\item[26.] \textit{Id.} at app. B.
\item[27.] \textit{Id.} (noting that only Wyoming had no legislation specially related to bias crime).
\item[28.] \textit{Id.} (delineating state cross burning statutes; most states also prohibit the burning of any other religious symbol).
\item[29.] \textit{Id.} (delineating state institutional vandalism statutes); \textit{see e.g.}, WASH. REV. CODE ANN. § 9A.36.080(2)(b) (West 1998), § 9.61.160-.180 (West 1998) ("dealing with threats to bomb or injure property."); WIS. STAT. ANN. § 943.012 (West 1996) (criminalizing the destruction of religious or other public institutional structures).
\item[30.] \textsc{Wang, supra} note 4, at App. B (delineating state anti-mask statutes); \textit{id.} at § 11:1 (generally statutes have exemptions for innocent activities such as wearing a mask as part of a holiday costume, "by persons under sixteen years of age," or safety reasons); \textit{see, e.g.}, N.C. GEN. STAT. §§ 14-12.7 to 14-12.10. (1999).
\item[31.] \textsc{Wang, supra} note 4, § 10:2.
\end{enumerate}
\end{footnotesize}
Though state hate crime statutes take slightly different approaches, most statutes do one of the following: (1) make bias-motivated intimidation a separate crime; (2) "automatically enhance the penalty" for crimes motivated by forbidden prejudices; or (3) give a judge discretion to increase penalties when the crime is motivated by a forbidden prejudice. The majority of bias-motivated violence and intimidation statutes bar threats, harassment, assaults, and trespassing on account of a person's "race, color, religion, or national origin." Some state statutes of this type prohibit crimes committed because of an individual's disability status, because of his or her sexual orientation, or because of one's gender. Less commonly proscribed motivations include political affiliation and age.

A frequently misunderstood characteristic of bias-motivated violence and intimidation statutes is that they proscribe particular types of motivation, rather than protecting only individuals who belong to particular groups. Many critics of hate crime legislation assert that such laws constitute special protection for racial and ethnic minorities. This confuses both the structure of most hate crime legislation and the empirical realities of hate crime in most jurisdictions. Hate crime law protects people of every background. Attacks against anyone who is victimized because of his or her race, religion, or sexual

32. Id. at § 10:3; see, e.g., D.C. Code Ann. § 22-4003 (1981) (enhancing fine and imprisonment penalties for bias-related crimes).
33. Wang, supra note 4, at §§ 10:2-10:3.
34. See, e.g., Iowa Code § 729A.1, 716.6A (1993). See generally Wang, supra note 4, at app. B (delineating intimidation statutes which proscribe disability as motivation).
35. See, e.g., Del. Code Ann. Tit. 11, § 1304(a)(2) (Supp. 2000); see generally Wang, supra note 4, at app. B (delineating state intimidation statutes which proscribe anti-gay and lesbian bias as motivation).
38. Id.
orientation—depending on the categories listed under the jurisdiction's statute—can be prosecuted under hate crime laws. Moreover, both national and state statistics show that individuals of a variety of races, religions and other backgrounds are victimized by hate crimes.  

B. The Centrality of the Police Role

The police play a crucial, though largely ignored, role in interpreting hate crime law and ultimately in determining whether the dictates of the First Amendment will be followed. The importance of the police role stems in part from their place as gatekeepers in the criminal justice system. Before most incidents are ever sent to the District Attorney's office, they are reported to the police, who are responsible for investigating the crime and in many jurisdictions, for seeking the initial criminal complaint. As the first organization responsible for deciding whether an individual's actions constitute a hate crime, the police become very important criminal justice gatekeepers and interpreters of motivation. If the police believe that the suspect's actions constitute a hate crime, they investigate. If the investigation confirms their suspicions, they may suggest that the suspect be charged with a hate crime. Once the police finish investigating the crime, there is unlikely to be time to gather further evidence of bias motivation. The small amount of time that most district attorney's offices allocate to the investigation of low-level crimes, the category into which most hate crimes fall, allows few if any cases

44. See id. at 166.
45. See id. at 166-67.
to receive further investigation. If police decide that the case does not warrant hate crime charges, or they do not include some type of evidence of bias motivation in their reports, it is very unlikely the defendant will be charged with a hate crime.

While the police examination of the perpetrator’s motive is crucial in hate crime cases, the requirement to discern motivation is rare for detectives. Though other types of crimes may require a particular *mens rea*, police detectives are not ordinarily required to investigate why a person committed a crime.46 As one detective responsible for investigating hate crime said:

In hate crime cases you have to investigate the crime, who the perpetrator was and what was their motivation. In other crimes, you have the first two, but evidence of motivation is not required. Even though they say it all the time on TV that you’re looking for motivation in an ordinary crime, you aren’t.47

In addition to having to perform tasks to which they are unaccustomed, detectives’ work enforcing bias crimes legislation is made more difficult by the absence of statutory guidelines regarding what constitutes evidence of bias motivation.48 Few statutes describe what may be used as evidence of bias-motivation. The lack of statutorily defined procedures and criteria for selecting permissible evidence of bias motivation would not be as much of a problem were bias motivation not so difficult to identify.49 Bias motivation may assume very different

46. See id. at 171.
47. See Bell, supra note 16 (manuscript at 52-53).
49. See Garofalo & Martin, supra note 41, at 49-51 (describing ambiguity inherent in those cases in which bias is a motivation); Alison Mitchell, Police Find Bias Crimes Are Often Wrapped in Ambiguity, N.Y. TIMES, Jan. 27, 1992, at B2; Revision to hate crimes law is offered; But debate over gays might kill movement to clarify statute, Austin Am-Statesmen, Apr. 2, 1995, at B1 (describing law enforcement officers’ reluctance to use a “loosely defined”
frequently, bias-motivated incidents reported to police do not involve organized hate groups and are not characterized by graphic racist or anti-religious acts such as cross-burnings. Consequently, police are not able to rely on traditional signs of bias motivation.  

C. Murky Constitutional Waters

Police difficulty is compounded by the fact that they must grapple with the fine constitutional line between hate crime and hate speech. The Supreme Court cases in this area are confusing, and as some argue, contradictory. The Court’s decision in a 1992 case, R.A.V. v. City of St. Paul, suggested that hate crimes are difficult to identify because they are so closely linked to politically protected speech. That case examined the conviction of Robert Viktora, who burned a cross on the front lawn of the Jones, a Black family who had recently moved to an all-White neighborhood. Viktora was

Texas hate crime law and fear of having a conviction overturned on constitutional grounds); Rhonda Smith & Larry Murphy, Protection from hate crimes on gay agenda, AUSTIN AM. STATESMAN, Jan. 18, 1995, at B3 (describing a year old hate crime law that does not mention specific racial or minority groups and the difficulty in enforcing such an ambiguous law).

50. See generally LEVIN & McDEVITT, supra note 43 (describing crimes motivated by resentment, mission crimes, thrill-seekers and reactive hate crimes).


54. Id. at 396 .

55. See id. at 379.
convicted under the St. Paul Bias Motivated Crime Ordinance, which prohibited the placement of any object, such as a burning cross or a swastika, that one has reason to know arouses anger or alarm in others on the basis of race, color, creed or gender.\textsuperscript{56} He challenged his conviction on First Amendment grounds, arguing the statute was "substantially overbroad and impermissibly content-based."\textsuperscript{57} On appeal, the Minnesota Supreme Court rejected the defendant’s claim,\textsuperscript{58} but limited the ordinance to expressions of fighting words within the meaning of \textit{Chaplinsky v. New Hampshire}.\textsuperscript{59} In \textit{Chaplinsky}, the Supreme Court declined to extend First Amendment protection to "fighting words" or those "[words] which by their very utterance inflict injury or tend to incite an immediate breach of the peace.\textsuperscript{60}"

The Supreme Court reversed the Minnesota Supreme Court’s decision.\textsuperscript{61} Justice Scalia, who wrote the majority opinion, argued that by not criminalizing all fighting words, the Minnesota statute was clearly attempting to isolate certain words based on their political content.\textsuperscript{62} Calling the singling out of fighting words based on race, color, creed, religion and gender, "viewpoint discrimination,"\textsuperscript{63} Scalia insisted, "St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules."\textsuperscript{64} The Court also held that the city’s desire to communicate to the minority population its condemna-

\textsuperscript{56} \textit{Id.} at 380. The ordinance provided:

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

\textit{Id.}

\textsuperscript{57} \textit{Id.}

\textsuperscript{58} \textit{See In re Welfare of R.A.V., 464 N.W.2d 507, 510–11 (Minn. 1991).}

\textsuperscript{59} 315 U.S. 568 (1942).

\textsuperscript{60} \textit{Id. at 572.}

\textsuperscript{61} \textit{Id. at 391.}

\textsuperscript{62} \textit{See R.A.V. 505 U.S. at 396.}

\textsuperscript{63} \textit{Id.}

\textsuperscript{64} \textit{Id. at 392.}
tion of the message in bias-motivated speech was insufficient to justify a content-based ordinance. Although the Court found St. Paul’s interests compelling, it deemed the ordinance not reasonably necessary, maintaining that “[a]n ordinance not limited to the favored topics . . . would have precisely the same beneficial effect.”

Less than one year later, apparently in light of much confusion among the states’ high courts on the constitutionality of penalty enhancement statutes, the Court elected to rule on another bias crime case, Wisconsin v. Mitchell. In this case, after viewing the movie “Mississippi Burning,” the defendant Todd Mitchell, who was Black, incited a group of Black men and boys to attack a 14-year-old White youth. Mitchell was convicted under Wisconsin’s bias crime statute which provided that the penalty for crimes be increased if the victim was selected because of the actor’s belief or perception regarding the victim’s “race, religion, color, disability, sexual orientation, national origin or ancestry.” Because the jury found that the victim had been selected because of his race, Mitchell’s sentence was increased to the maximum penalty—seven years.

Mitchell challenged his conviction on Fourteenth Amendment grounds, arguing that the Wisconsin statute violated the equal protection clause and was vague. He also argued that providing enhanced penalties whenever a defendant intention-
ally selects a victim on the basis of race violates an individual's First Amendment rights. On appeal, relying on R.A.V., the Wisconsin Supreme Court held that the statute violated the First Amendment by punishing offensive thought and by chilling speech. It also found the statute to be unconstitutionally overbroad.

In Mitchell, the Supreme Court surprised many by reversing the Wisconsin Supreme Court's decision, insisting that both the punishment of Mitchell's discriminatory conduct and use of Mitchell's speech as evidence of discriminatory motive was permissible. The Court held out as examples two other contexts where the motive was considered—the sentencing of aggravated crimes and state and federal anti-discrimination law. The Court held that to assign a harsher penalty when the defendant selected his victims for discriminatory reasons is consistent with these other contexts and does not violate the First Amendment. The Court insisted that Wisconsin's desire to prohibit retaliation by the community that was victimized by the bias-motivated conduct provides sufficient evidence that the penalty enhancement is not based on disagreement with the offender's constitutionally protected beliefs.

D. The First Amendment Standard for Hate Speech

It seems clear that in deciding to uphold the use of speech as evidence of motivation, the Court did not intend to allow jurisdictions to criminalize pure hate speech. In Mitchell, there are two signs that pure hate speech remains protected. First,

74. Id. at 481.
75. Id. at 481-82.
76. Id.
77. See id. at 485-90.
78. Id. at 485-87.
79. See id. at 487-88.
80. Id. at 488.
81. See generally id.; R.A.V. 505 U.S. at 382. (governments disagreeing with ideas expressed are prevented by the First Amendment from prohibiting speech).
82. See generally Mitchell, 508 U.S. at 476 (1993) (holding that penalty enhancement is not prohibited by the First and Fourteenth Amendments).
the Court explicitly declined to overrule two of its earlier cases that provided protection for hate speech,\textsuperscript{83} \textit{R.A.V.} and \textit{Dawson v. Delaware}.\textsuperscript{84} The Court declined to overrule \textit{R.A.V.}, insisting that the ordinance at issue in \textit{R.A.V.} "was explicitly directed at the expression (i.e., "speech" or "messages")."\textsuperscript{85} Here, the Court draws a line between punishing speech and punishing an act when the nature of the act is in part a product of biased motive.\textsuperscript{86} Second, the Court suggests that First Amendment protection exists for hate speech or, at least for the expression of biased ideas. The Court stated that a sentencing judge may not take into consideration a "defendant's abstract beliefs, however obnoxious to most people."\textsuperscript{87} The Court supported this proposition with \textit{Dawson}, a case decided the previous term, in which the Court held that the introduction of evidence that the defendant was a member of a White supremacist gang violated his First Amendment rights.\textsuperscript{88}

\textit{R.A.V.} and \textit{Mitchell} provide an idea of the constitutional limits established by the Supreme Court for the regulation of hate speech and for the regulation of bias-motivated conduct. First, from \textit{R.A.V.}, we learn that states may not single out bias-motivated speech or expressive acts for special regulation, even when such are defined as fighting words. Protected speech and association may not be made a crime, nor may it, as it was in \textit{Dawson}, be used to increase the penalty for a crime for which it is not connected.\textsuperscript{89} In \textit{Mitchell}, the Court emphasized that violent conduct associated with hate crimes is neither speech nor expressive conduct protected by the First Amendment.\textsuperscript{90} Thus, jurisdictions may punish hate crime without violating the First Amendment. Jurisdictions that have penalty enhancement statutes can use speech as evidence of motivation that a hate crime was committed so long as it is

\textsuperscript{83} \textit{Id.} at 585-87.
\textsuperscript{84} 503 U.S. 159 (1992).
\textsuperscript{85} \textit{Mitchell}, 508 U.S. at 487 (internal quotations omitted).
\textsuperscript{86} \textit{See id.}
\textsuperscript{87} \textit{Id.} at 485 (citing \textit{Dawson}, 503 U.S. at 167).
\textsuperscript{88} \textit{Id.} at 486 (citing \textit{Dawson}, 503 U.S. at 167).
\textsuperscript{89} \textit{Dawson}, 503 U.S. at 166-67.
\textsuperscript{90} \textit{See Mitchell}, 508 U.S. at 484.
discriminatory conduct and not just speech that is being punished.

PART II. PRACTICAL CONCERNS IMPACTING ENFORCEMENT

A. Critics' First Amendment Concerns

The narrow standard created by the Supreme Court in *Mitchell* requiring that the police search for motivation heightens the salience of critical arguments regarding enforcement. First Amendment critics of hate crime legislation, both before and after *Mitchell*, have made both doctrinal and practical arguments questioning these statutes' constitutionality. Below I discuss several of the practical arguments addressing whether hate crime legislation can be enforced constitutionally. The critics' disagreements with hate crime legislation revolve around the issue of motivation, and the likelihood that enforcers will interfere with protected speech and association.

While speech can be used as evidence in hate crime cases, *Dawson* and *Mitchell* seem to limit the use of speech to evidence of motivation for the crime. Critics are concerned that those enforcing hate crime laws will be unable to uncover perpetrators' motivation and thus, will use protected speech as evidence of the crime's motivation. Part of this stems from the nature of motivation. Several of these scholars suggest that bias motivation is something hidden, difficult to disentangle, or otherwise impossible to discern. One critic writes, "[A]ssessing motive presents more than the problem of some-how reading the defendant's mind, for the defendant himself may not know his true motive. Social psychology is full of re-search that demonstrates people often are unaware of what is

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91. See supra note 52. Though scholars criticize hate crime legislation on several fronts, this Article only addresses critics' arguments regarding enforcement.


93. See supra note 53.
truly influencing their behavior." In critics' eyes, the slippery nature of bias motivation means that law enforcers will be forced to search for evidence of the crime's motivation by looking to cues from words, thoughts or associations that are protected by the First Amendment.

Critics are also concerned that an offender's hate speech will be used as evidence when hate crime legislation is enforced. Many critics assume that what was said during the crime serves as the starting point in the search for evidence of bias motivation in hate crimes. Critics are fearful that once enforcers have slurs, epithets or other speech evidence, they will never really get beyond this point. Enforcers will use the defendant's biased utterances (or symbols, in the case of property crimes) during the commission of the crime as the only evidence of bias motivation. From a First Amendment perspective there are two worries here. The first is that the defendant would be punished for saying the words, thereby obviating the First Amendment protection for bigoted beliefs.

Critics of hate crime legislation raise an important issue here. For example, *Mitchell* is silent on the question of whether, in situations in which words are the only evidence of motivation, it is acceptable to charge persons with violating hate crime laws. Given the Court's explanation of these issues in *Mitchell*, it is possible that even in instances in which hate speech serves as the only evidence of bias motivation, hate crime charges are constitutional. Allowing an additional


96. See *Jacobs & Potter*, *supra* note 39, at 109-10.

97. *Id.* at 103.

98. See *id*.

99. See *id*.

100. See *id*.; Gellman, *supra* note 95, at 363.

101. See *id*.
punishment under hate crime law in instances when there is hate speech and evidence that the crime was committed for other reasons, however, seems inconsistent with the protection for hate speech the Court granted in R.A.V. and Dawson.

The second concern stemming from enforcers scrutinizing the words uttered during the incident as evidence of bias motivation, is that individuals with constitutionally benign motives will be penalized under hate crime laws because enforcers are unable to disentangle criminal action from protected expression of speech or thought. Critics' articles are replete with "hard cases" that seem clearly unintended by the law but have been allegedly punished as hate crimes. Susan Gellman provides an example that she insists will fall within the ambit of the bias crime statutes, even though the alleged perpetrator had benign motives. Her hard case involves a "racial champion," White woman A, who, hearing another White woman B, calling C, an African American child, a racist name, threatens B in an attempt to protect C. Gellman suggests that under many hate crime statutes, both A and B, two individuals with wholly different motives could be prosecuted. One real case, widely cited by critics, involved an African American man in Florida who was charged with a hate crime after he called a White policeman trying to break-up a domestic disturbance a "cracker." That defendant, one critic writes, "clearly was not motivated to commit his crime because of the policeman's race . . . His name-calling is not being used as evidence that he was hate motivated. Instead, he is being prosecuted for evidencing prejudice by calling the officer a racial epithet." Hate crime charges against the man were later dropped.

102. Gellman, supra note 95, at 364-65.
103. See id. at 356.
104. Id. at 355-56.
105. Id. at 361 n.134; Gerstenfeld, supra note 6, at 279; Barbara Dority, The Criminalization of Hatred, 54 HUMANIST 38 May/June 1994, available at http://ehostvgwl1.epnet.com.
106. Gerstenfeld, supra note 6, at 279.
107. Gellman, supra note 95, at 361 n.134.
As the frequent use of the example of the police officer in Florida suggests, some scholars are particularly worried because it is police officers that are given discretion to enforce hate crime law. Their assumption is that police will transform incidents that are obviously not bias-motivated into hate crimes. One critic who acknowledges that police generally have discretion to deal with crime bemoans police discretion in hate crime cases. He writes:

If some sort of word was said, some sort of slur was used, does not that make what is otherwise a generic crime into a hate crime as well? I think that it is extremely problematic. And though law enforcement officers exercise a fair amount of discretion with every law at the crime scene, certainly these decisions will be even more sensitive and difficult with hate crime laws.

The broad inquiry into words, thought, and association that critics assume will occur as enforcers investigate hate crime leads to yet another First Amendment problem: one of overbreadth leading to the chilling of speech, thought, and association. Although the Mitchell Court rejected this argument as too attenuated, scholars have expressed the concern that enforcers will not just investigate the defendant's words or actions during the crime, but also "all of his or her remarks upon earlier occasions, any books ever read, speakers ever listened to, or associations ever held." In a similar vein, another scholar describes a very intrusive inquiry required in all "competent" hate crime prosecutions. He asserts that evidence would have to be collected regarding, among other things, the past expressions of hatred or tolerance of the individuals, the beliefs and thought patterns of persons with whom the defendant associated. One scholar worries that racist jokes will be used as evidence of guilt. Gerstenfeld writes: "Unless the defendant is an avowed member of the Ku Klux Klan, or

108. See Richard Cordray, Free Speech and the Thought We Hate, 21 Ohio N.U.L. Rev. 871, 880 (1995); Jacobs & Potter, supra note 39, at 92-100 (expressing skepticism regarding police enforcement).
110. See Gellman, supra note 95, at 360.
111. Riggs, supra note 52 at 953.
112. Gerstenfeld, supra note 6, at 270.
another hate group, it might be difficult to determine his motive. One can imagine prosecutors canvassing the defendant's neighbors and coworkers to discover how many times he made racist comments or told an ethnic joke."

The worry about the scope of law enforcers' inquiry is a good one, for the Court did not specify in Mitchell how far back one might go in seeking evidence of motivation, or what might count as evidence of motivation in bias crime cases. Leaving this discretion up to those enforcing the law creates questions about whether defendants' privacy will be protected. While this is not a First Amendment concern, it is important. In addition, depending on how enforcers behave, it creates the possibility, particularly in cases where there is no other evidence of bias motivation, that enforcers will use the defendant's abstract beliefs, wholly unconnected to the crime, as evidence of bias motivation. The use of such evidence is a clear violation of the standard established by the Court in Dawson.

B. Empirical Evidence and Further Concerns

The evidence from the field gives cause for further concern regarding how enforcers are behaving with respect to the First Amendment. One study of detectives classifying hate crime in a large police department revealed that police resist enforcing hate crime law. According to this study, the general perception among the majority of officers was that "only a few crimes [could] . . . 'really' be called hate motivated, such as a cross burning on the lawn of an African American family or the organized activities of the KKK or Aryan Nation." The authors of the study found that police at all levels—patrol officers, detectives and commanding officers—expressed resentment over the departmental policy giving priority to hate crimes. Officers dismissed hate crimes as "'overkill,' 'mostly bull,' 'a pain in the ass,' 'media hype,' 'a giant cluster

113. Id.
114. See Boyd et al., supra note 51, at 827.
115. Id.
116. Id.
Even those who thought that hate crimes were a problem did not feel they deserved priority over what they considered "real" crime—burglary, theft, and rape. The detectives' belief that hate crimes were not a problem in the city translated into different, though equally disturbing types of behavior. Detectives affiliated with one precinct, police "Division A" categorized only cases marked by the clearest signs of bias as "normal hate crimes"—cases with racial epithets, those with symbols of hate, and those involving hate groups. The detectives in Division A rejected all cases that did not have those features. By only viewing as hate crimes the cases with the clearest signs of bias, the detectives in Division A were, strictly from a First Amendment perspective, enforcing the law in the proper cases—those cases that appear unambiguously motivated by bias. Adopting the normal crime/hate crime typification most likely led them to underenforce the law, however. The routines used by the detectives in Division A may have caused them to miss crimes that did not contain extreme manifestations of bias, but were nonetheless bias-motivated.

In the alternative, the behavior of the police detectives in the other police precinct, "Division B," was, from a constitutional perspective, even more troubling. The detectives in Division B ignored the issue of motivation altogether. They behaved as critics expected them to, classifying incidents as hate crimes without inquiry into whether they were actually motivated by bias. Thus, cases that were not bias-motivated could have been identified as hate crimes. The Detectives in Division B left it up to the district attorney (DA) to determine the perpetrator's motivation. If the detective has conducted little or no inquiry in this area, however, the DA may

117. Id.
118. Id. 827-28.
119. Id. at 827.
120. Id. at 839.
121. Id. at 832-40.
122. Id. at 845.
123. Id. at 840.
124. Id.
125. Id. at 845.
have little evidence from which to draw conclusions regarding the perpetrator’s motivation.

Another study, this time of bias units in New York City and Baltimore, raises different questions about the enforcement of hate crime law.\(^{126}\) The authors of the study indicate that in a number of cases “the primacy of the element of bias was ambiguous . . . [and that] . . . [o]ften the police have to deal with cases that seem to contain bias as a secondary motivation . . . [or] an additional motivation.”\(^{127}\) Another issue that effects the classification of an incident “include[s] the weight to be accorded [to] the victim’s perception relative to other factors . . . [and] . . . whom to believe . . . when there are conflicting statements about an incident”\(^ {128}\) These questions are important. Unfortunately, the study does not describe in detail how police address these issues.

News reports from around the country seem to support the idea that officers find the situations in which hate crimes occur ambiguous.\(^ {129}\) One detective from the New York City Police Department is quoted as saying, “I hate these cases because they become real mysteries . . . [E]verybody jumps on the bandwagon but nobody has the facts.”\(^ {130}\) In cases that are ambiguous, officers may question whether the perpetrator was motivated by bias or whether the incident was a prank and not aimed at a particular victim. From these news stories it is unclear whether ambiguous cases are the exceptions or, as many critics of bias crime legislation would have us believe, the rule. The news stories also fail to provide evidence regarding whether police officers are equipped to sort through these interpretive difficulties systematically. The worries that First

\(^{126}\) Garofalo & Martin, supra note 41, at 33-45 (comparing responses of law enforcement officers to bias crimes).

\(^{127}\) Id. at 49-50.

\(^{128}\) Id. at 50.

\(^{129}\) See Leslie Berger, Police Seek Motive in Shop Fire, L.A. TIMES, April 21, 1992, at 3; Meg McSherry Breslin, Vandals Leave Trail of Racist Graffiti Homes, Cars Damaged in Joliet Neighborhood, CHI. TRIB., September 6, 1999, at 1; David Birkland, Lake Forest Park Hit with Racist Graffiti, Police Unsure Whether Vandalism Was Hate Crime or Prank, THE SEATTLE TIMES, May 12, 2001 at B2.

\(^{130}\) Jacobs & Potter, supra note 39, at 91.
Amendment critics of hate crime legislation and others concerned with their enforcement have raised creates three main implications for enforcement. First, many critics argue that enforcers of hate crime laws are unable to discern the defendant's motive and thus will seize on the defendant's speech during the crime as evidence that the crime was bias-motivated. Other critics worry not about the narrowness of the inquiry into motivation, but its breadth, worrying the enforcers of hate crime legislation will reach into areas of protected thought and association as they hunt for bias. Finally, critics' charge that bias motivation is so difficult to discern, and there are so many ambiguous cases that many individuals with wholly benign motives will be charged with violating hate crime laws.

PART III. ARE THE CRITICS RIGHT? —THE POSSIBILITY OF CONSTITUTIONALLY ENFORCING HATE CRIME LAW

Examining the reality of bias crime law enforcement is one method of empirically testing concerns about the First Amendment dangers created by bias crime legislation. Using data collected in "Center City," a metropolitan city, this section will evaluate whether individuals are charged with hate crime violations based on the use of biased language, or words alone; and whether the enforcement of bias crime legislation reaches into areas of protected speech. This section focuses on the behavior of officers in the "Center City" police hate crime unit, appraising police officers' ability to enforce vague statutes, and evaluates their treatment of hate speech, beliefs, and conduct protected by the First Amendment.

A. The Anti-Bias Task Force

Between September of 1997 and May of 1998, I conducted a study that focused on the detectives in a hate crime unit in

131. See supra p. 46.
132. See supra pp. 42-45.
133. See supra pp. 42-47.
“Center City,” a large city in the United States. During this time period, I was granted access to observe the detectives, and was also allowed access to their case files spanning two decades, and to most of their other records. The Center City “Anti-Bias Task Force” (ABTF), the unit I studied, was formed in the late 1970’s, two years before the state’s hate crime statute was passed. The unit was created to address the violence many minorities experienced after they moved into all-White neighborhoods. The unit was supposed to respond to three types of situations: 1) crimes where there was evidence that victim(s) were selected on account of race, or incidents and situations occurred that were precipitated by racial motives; 2) incidents of group activity and demonstrations where there was a potential for inciting group conflict and violence; and 3) incidents where there were concerted efforts by a person or a group of persons to deprive minorities of free access to any neighborhood or community within the city. After the state civil rights law—which served as the jurisdiction’s hate crime statute—was passed, the unit became responsible for investigating and preparing hate crime charges.

As a detective unit, the ABTF received case files after the officers who reported to the scene of a crime determined that an incident was possibly bias-motivated. Police department policy required those on the scene to forward the cases to the ABTF if they believed a case to be bias-motivated.

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134. The city’s actual name and some of its identifying details have been changed to protect the identity of the respondents.

135. The study, its methodology, and its conclusions are described in much greater detail in Bell, supra note 16.

136. Id. (manuscript at 29).

137. Id.

138. Special Order 78-28 from “Center City” to ABTF (unpublished document on file with the author).

139. To preserve the confidentiality of respondents, the statute is not cited.
B. Determining Bias: Detectives’ systematic search for motivation

Bias crime legislation is not, as critics suggest, so vague that police officers have no means of enforcing it systematically. My observation of detectives’ practices revealed the classification of bias crime to be quite systematic. Far from random, the identification of bias crime is a multifaceted process, in which detectives weighed the facts and circumstances of the crime as well as the characteristics of the case against their experience. The decision that officers had to make was twofold: officers first identified the bias-motivation and then made strategic decisions about whether to actually seek charges. Below are the rules of thumb that officers used to identify and select cases appropriate for hate crime charges.

Detectives developed filtering mechanisms and employed rules of thumb to isolate bias motivation in part because many of the cases referred to the unit were not bias-motivated. The unit received a high percentage of non-bias-motivated cases because the ABTF encouraged patrol officers to send any case to the unit that could possibly be bias-motivated. This resulted in large numbers of cases being sent to the unit in which the perpetrator had used slurs and epithets while committing a crime. The unit encouraged patrol officers to be over inclusive rather than under inclusive in their forwarding of incidents because as detectives, they were trained in investigation and wished to take filtering power out of the hands of less well-trained patrol officers. In addition, as a check on patrol, the ABTF also had the Reports Bureau forward any cases with the possibility of bias to the unit. In keeping with the unit’s

140. See generally Jeannine Bell, Policing Hatred: Police Bias Units and the Construction of Hate Crime, 2 Mich. J. Race & L. 421, 443 (1997) (“While there may be no inherent difficulty in identifying bias crimes, as free speech absolutists suggest, separating bias crimes from free speech may at the very least require police officers to make extremely fine legal distinctions, a job that may require a clear understanding of the vagaries of First Amendment jurisprudence. In addition, police officers’ jobs are often complicated by the lack of public understanding about what bias crime laws prohibit.”).

141. The following discussion of the routines that the detectives in Center City use to identify hate crime is drawn from Bell, supra note 16 (manuscript at 141-152).
request, the Reports Bureau forwarded all reports that had slurs or epithets and a difference in race between the victim and the perpetrator. This drastically increased the unit’s caseload, since vulgarity, especially slurs and epithets, were common in acts of violence. For instance, one officer estimated that slurs and epithets were used in 70% of incidents with injuries and 90% of traffic accidents.142

C. Basic Requirements for Hate Crimes

Detectives’ practices reveal that hate crimes had two basic requirements. The perpetrator and victim had to have different identities—race, gender, sexual orientation, etc.—and the context in which the crime occurred needed to be one that suggested that it had been motivated by bias, rather than some other emotion—anger, revenge, jealousy, etc.

1. Different Identities

The first and most important requirement was that the victim and perpetrator have different identities or backgrounds. In the vast majority of cases if detectives accepted that the victim had been attacked because of his or her race, the victim and perpetrator had to have different racial backgrounds. Detectives did not believe that bias-motivated incidents happened within the same identity group; incidents in which the victim and the perpetrator had the same race were routinely dismissed as having other origins.

The heavy presumption against bias-motivation among individuals of the same race applied to cases involving anti-gay bias as well. It was assumed that gays could not commit hate crimes against other gays. In one case involving one Black gay man who was attacked by another and called a “faggot,” two detectives called the man “a victim of no crime,” since the other man was also gay.

There were two important exceptions to the practice of dismissing same-group attacks. The first involved heterosexual men who were attacked by other heterosexuals because their

142. Id. (manuscript at 141).
attackers believed that they were gay. The unit had investigated several cases that fit this scenario. For example, in one case the victims, who were not gay, were in a taxicab and approached by a group of men who said, “Get out of the car, faggots.” After one man exited the car and ran, the perpetrator gave chase. When he caught the victim, he began to kick him, screaming, “Fucking homos.” The unit sought hate crime charges in this case because the victim had been attacked because he was presumed to be gay. In this case, the two defendants pled guilty to both criminal charges and hate crime charges.143

The second important exception to the practice of dismissing same-group attacks concerned attacks against one member of an interracial couple. ABTF detectives accepted that same race attacks against a member of an interracial couple were frequently bias-motivated. The unit had seen particularly dramatic examples of this, especially involving Whites attacked by other Whites for dating minorities.

The practice of dismissing cases when individuals had similar identities meant that detectives were often unable to appreciate the fact that victims and perpetrators had multiple identities and myriad perspectives on these identities. In the case involving the gay victim who the detectives decided was not a victim of a hate crime, the detective did not even explore the possibility that the hate crime could be a race-based crime, or that the perpetrator was a “self-hating gay” and the attack occurred because of the victim’s sexual orientation.144

Automatic dismissal of all cases in which both the perpetrator and the victim are gay means that detectives may miss cases that should be treated as hate crimes. Center City had cases involving so-called self-hating gays who targeted and killed other gay men. Detectives told of several homicides that occurred in a public area where many gay men had sex. The killer selected sex partners and clubbed each to death while the two were engaged in intercourse. The detectives said that when they caught the man, he claimed that he committed the

143. Id. (manuscript at 142).
144. Id. (manuscript at 142-43).

2. Looking to the Crime's Context

Rather than just using speech as evidence of bias motivation, as several critics assume that enforcers of bias crime legislation will do, detectives used mechanisms that helped them look beyond the defendant's speech for clues to his or her motivation. Looking widely for evidence of the motive for the crime did not, as critics argue, mean that detectives scrutinized the defendant's beliefs or association. Detectives looked to the setting and other situational aspects of the crime in order to shed light on why the incident occurred. The setting of the crime included the crime's precise location, whether the crime occurred in or outdoors, and what the perpetrator and the victim were doing immediately before the crime. In exploring these situational aspects of the crime, the detectives were looking for evidence that the crime was not motivated by bias, but rather by anger, jealousy, or revenge. These are a few of the motivations that ABTF detectives wish to rule out when deciding whether a bias crime has occurred. If a crime were motivated by jealousy over a woman, to use an example that detectives sometimes mentioned, it was not a hate crime.

As part of evaluating context, detectives were trained to ask whether the incident could have happened or would have escalated if the perpetrator and the victim were the same race. If the incident would still have occurred and would have unfolded in the same manner even if the perpetrator and victim had the same identity, then the detectives assumed that the incident was not a hate crime.

145. *Id.*
147. Bell, *supra* note 16 (manuscript at 143).
a. "The Typical Non-Hate Crime"

Detectives did not examine the setting of every crime and weigh whether the perpetrator was motivated by anger, jealousy, or revenge. Instead, they used shortcuts to filter out non-bias-motivated cases. These shortcuts were based on incidents that were repeatedly referred to the unit that had been determined to be non-bias-motivated. I call these the "typical non-hate crime." The typical non-hate crime involved five scenarios—cases involving drugs, fights, retaliation for earlier fights, traffic accidents, and neighbor disputes. These cases were among the ones in which detectives were able to identify the perpetrators' motivation. Detectives were frequently not able to determine what motivated an incident (and no hate crime charges were sought). Typical non-hate crimes were the types of cases in which the detectives decided that the incident was not motivated by bias. One detective explained these types of cases as incidents that were "less than 51% bias-motivated." When asked for an example he replied, "[a] traffic accident between someone Asian and someone White. Racial epithets, slurs are exchanged." Typical non-hate crimes were not characterized by a specific set of events. As long as incidents that were really about "traffic" involved cars, and neighbor disputes involved individuals who lived near each other, a non-hate crime could occur in many ways. Any and every case involving a car could really be over traffic. Any situation involving a drug transaction could really be about drugs. One example of such cases involved a young White man who had been shot in the buttocks. He claimed that he had been shot by a group of Black men and that the crime was racially motivated. ABTF detectives investigated and determined that the victim had placed a gun in his back pocket for protection during a drug transaction. During the meeting the gun discharged accidentally.

For the detectives, deciding that something is bias-motivated began with the process of ruling out alternate explanations.

148. Id. (manuscript at 144).
149. Id.
150. Id. (manuscript at 13).
Since every incident involving traffic, or drugs, or neighbors, for example, could be non-bias-motivated, incidents were first evaluated against typical non-hate crime. Real hate crimes then became defined, in part, in opposition to the typical non-hate crime. In this way, ABTF practices were distinct from those other detectives investigating hate crime. Instead of creating archetypal hate crimes with particular characteristics—cases with extreme violence, those involving members of organized hate groups, and other significant outward manifestations of bias—and calling these the “normal hate crimes,” detectives identified classes of crimes frequently referred to the unit that should not be considered hate crimes.

b. Weeding out False Reports

In trying to discern whether an incident was a typical non-hate crime, the detective’s initial task involved the ordinary detective work of trying to “figure out what happened.” Part of figuring out what happened required sorting the conflicting stories that emerged from interviewing suspects and victims and often figuring out who was telling the truth and who was lying. Though a sample of the case files revealed less than one manufactured hate crime a year, the specter of false reports—incidents individuals manufactured to extract some type of benefit—loomed large. Nearly every detective mentioned that sometimes individuals made things up to manipulate the system. When asked for examples, detectives generally gave the same ones: prominent cases in which individuals had deliberately claimed to be a victim when he or she was not, either for attention or in order to receive some tangible benefit.

Detectives were well aware that some individuals might be lying in order to attract attention or sympathy. One such incident involved a Jewish college student who reported that swastikas and anti-Semitic threats had been drawn on her door. After several incidents, the college installed a hidden camera that captured the woman calmly stepping over a page with a swastika on it that had been slid under the door. The note was not reported to the police until the next day when the woman’s roommate discovered it. The victim’s cavalier attitude toward
the note when she believed herself unobserved signaled to the police that she was the person who left the note. The detectives surmised that the victim's reporting of the earlier notes had been a plea for attention.\textsuperscript{151}

Another situation that detectives in the unit encountered on several occasions involved individuals living in public housing who faked hate crimes so that the housing office would move them to another housing development or give them a Section 8 certificate allowing them to move into private housing. One detective explained:

> There is money to be made in false civil rights reports. If someone wants a Section 8 certificate, right now they are not taking applications unless one is a victim of a hate crime. We had an incident when a guy who was gay knew that he could get a Section 8 certificate if he said that his civil rights were violated. He said that he was being harassed, that he had no entrance to certain courtyards, and [that] he could not park his car in certain areas. Sometimes people will say they are being harassed and that they want a transfer to a certain housing development. Then you find out they have a mother or sister in that development.\textsuperscript{152}

One downside to the unusual degree of service that the unit provided to victims was that it attracted the attention of those who wanted the police to investigate crimes that had happened to them. A variation on the false report was the victim who deliberately misrepresented what happened to him or her in order to get the system to pay attention to the crime. Officers were forced to weed out cases in which the victim had added slurs and epithets in order to get the police—any police—to investigate the crime. One detective remarked:

> People realized that they were getting more attention. They were aware of our success rate, also aware of other steps. Other things were done to protect you. People started wising up, if you say it's racial you get personal attention—round-the-clock protection, nail the guy to the wall [when we catch him] high bail or no bail. That's what we started asking for in civil rights cases. They started to think, "I want to really slam this guy who hurt me so I'm

\textsuperscript{151} Id. (manuscript at 145).
\textsuperscript{152} Id. (manuscript at 145-46).
going to say it’s racial and I’m going to get attention.” Like when people want someone to come right away and they report an OT, officer in trouble.153

D. Policing crime, not speech

When asked about the importance of slurs and epithets, or as they called it, “language,” detectives denied that language used by the perpetrator automatically signaled the necessary bias to establish motive. Language alone, detectives insisted, was not enough to prove the crime was motivated by bias.154 One had to look to the suspect’s actions and the crime’s context to evaluate whether the suspect would still have committed the crime if the victim were of another background. If for instance a detective were investigating an assault that was reported as a racially motivated crime and the victim of the crime was Asian American and the perpetrator was White, the detective would evaluate whether the crime would have still happened if the victim were White. If the detective came to the conclusion that the crime would still have occurred if the races of the perpetrator and the victim were the same, then the crime would not be considered bias-motivated. One detective explained:

It's not language alone. You investigate actions. Words are the secondary buttress of actions. They prove the history of the action; prove that they went after someone because of race. You have to put the blinders on. Is this something the perpetrator would have done if the victim were Black or White? You have to consider both sides, walk the line.155

Critics worry that hate crimes statutes are overbroad and will have a chilling effect on protected speech. It is unclear whether individuals in Center City felt “chilled” and were less reluctant to use hate speech, or other speech that may be construed as evidence of motivation after hate crime statutes were enacted.156 Some individuals were clearly not deterred by hate

153. Id. (manuscript at 146).
154. Id. (manuscript at 147).
155. Id.
156. Between 1990 and 1998, the number of possible hate crimes the unit investigated increased. In light of this, some might contend that an increase
crime legislation. The unit had had several cases with repeat offenders, individuals who had committed a number of similar bias-motivated incidents, frequently against members of the same victim group. For these individuals, their behavior in similar cases sometimes served as an important contextual variable. One detective explained:

We look to the totality of the circumstances, criminal action and the words and also at the incident . . . Language alerts us to the possibility of bias, but it's just the possibility.

It's not clear-cut. It's easier for us when you have, as we've . . . had, the same defendant for two crimes. It's hard because of the totality of the circumstances. None of us are in the minds of the perpetrators. They may have acted because they're ticked off because someone is hitting on their girlfriend or because the person is of a different race and is hitting on the girlfriend.157

The comments of the two detectives quoted above are representative of the views of most ABTF detectives. In cases in which slurs or epithets had been used detectives were very receptive to the possibility that bias had not motivated the incident. The typical non-hate crime and their use of context are indicative of their desire to look beyond language for other indications of bias motivation.

E. Relationship and Bias

Further evidence of the importance situational factors to detectives' determination that a crime has been motivated by

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157. Bell, supra note 16 (manuscript at 147).
bias can be seen in the detectives' evaluation of the relationship between the victim and the suspects. ABTF detectives identified the relationship between people as an important part of the context of the crime. Language was discounted as a factor indicating motivation in exchanges between people who knew each other. As other research has found, a pre-existing relationship, good or bad, between the victim and the suspect is a sign to the police that an incident is not bias-motivated. One former detective complained about a case, saying, "it was ... a gay guy complaining about his boyfriend. It was not a legitimate case." In another case, a gay man repeatedly tried to get civil rights (hate crime) charges against someone with whom he had had consensual sex in the past. Like prosecutors who refuse to bring charges in rape cases in which the victim may have had previous consensual sex with the perpetrator, ABTF detectives refused to consider the gay victim's case for civil rights charges. They insisted that because the victim and the perpetrator had consensual sex on a previous occasion, what had happened to the victim was not a hate crime.

Cases involving people who had some other relationship, such as friends or neighbors, were considered problematic by those enforcing the law in Center City. ABTF detectives were not alone in assuming that racial or anti-gay bias was less likely

158. See Martin, supra note 48, at 314. Martin's study of verified and unverified racial, religious, and ethnic incidents by police in Baltimore County, Maryland found that unverified incidents more often than not had a history of conflict between the parties.

159. Cf. FREDERICK M. LAWRENCE, PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW 15 (1999). "Particularly in cases of acquaintance rape and domestic violence, the prior personal relationship between victim and assailant makes it difficult to prove that gender animus, and not some other component of the relationship, is the motivation for the crime." Id.

160. BELL, supra note 16 (manuscript at 148).

161. Lisa Frohmann, Convictability and Discordant Locales: Reproducing Race, Class, and Gender Ideologies inProsecutorial Decisionmaking, 31 Law. & Soc'y Rev. 531, 535-43 (1997) (discussing the impact of race and class on prosecutor's decision to reject rape cases).

162. BELL, supra note 16 (manuscript at 148).

163. Id.
to be the reason for the crime if the individuals involved the incident were acquainted. Lawyers responsible for seeking injunctive relief under the civil rights law also discounted bias as an explanation in cases in which the victim and suspect knew each other.\textsuperscript{164} A previous relationship and sustained contact over time can afford myriad opportunities for one to develop reasons, aside from issues of bias, to attack the victim. Cases between those who knew each other could have multiple motives, any of which could be the reason for the attack. One lawyer explained why cases between friends and neighbors did not make good cases for injunctive relief and why she discounted the use of slurs and epithets in such cases:

> Often you have cases with dual motives. Maybe they used slurs, but they knew each other. They were neighbors and the incident could have been because the dog was barking. Even though a racial slur was used, we may have cut them [the perpetrator] some slack. We all have biases and we have different ways of negotiating the fact that [different] people are in our community.\textsuperscript{165}

In a similar vein, a different Assistant Attorney General replied, in response to a question about the additional evidence she wants when she is not sure about a case:

> I want to find more evidence of bias, more evidence in general. They should ask, is there a history between these two individuals? If they've never encountered each other before that suggests two things, first that it is bias-motivated and second, that it's likely to be repeated.\textsuperscript{166}

Most of the cases the unit investigated involved attacks committed by perpetrators unknown to the victims, something that made finding the person who committed the crime more challenging. It makes intuitive sense that strangers, who are unlikely to know the victim personally, are less likely to have reason other than bias—anger or revenge, for instance—to serve as the motivation for the attack. Perhaps the police and those prosecuting bias crimes favored cases with strangers as perpetrators rather than neighbors or friends because bias

\textsuperscript{164} \textit{Id.} \\
\textsuperscript{165} \textit{Id.} (manuscript at 148-49). \\
\textsuperscript{166} \textit{Id.} (manuscript at 149).
crimes committed by stranger-perpetrators make for simpler and more believable stories.

A related worry is that detectives will uncritically accept the victim’s view of what happened and identify cases as hate crimes that are really only hate speech. This is of particular concern when police are given open-ended criteria and not told exactly what weight to ascribe to a victim’s story.

ABTF detectives were especially careful to weigh the victim’s perception of whether a hate crime had occurred. Distinguishing between hate speech and hate crimes, detectives insisted that although words of hate may hurt or inflame, they were not in and of themselves criminal. Detectives in the unit regularly acknowledged that a line exists between hate speech and hate crime. Their conversations suggest that hate speech was wholly legal, while hate crime, which involves criminal action, was what the law criminalized. This conversation took place in the office, while one detective was looking at an incident report and talking with another.

Detective 1: A White teacher, the victim, has asked a Black student to leave the room. Evidently, the perpetrator, the student, said to the victim teacher, “What are you looking at you fucking honkey?” [Reading directly from the crime report] “The victim thinks his constitutional rights are violated.” [Looking up from the sheet] Names is not a crime.

Detective 2: No.
Detective 1: I’ll screen this one out.167

Another detective described how he weighed victims’ stories with hate speech.

Hate crimes are a challenge. Take an offensive term. The victim hears the term and also the offensive history. You have to remain objective. Take the swastika. That has meaning to people. The “n-word,” too. Sometimes words alone don’t rise to the level of a hate crime.168

The detective continued, giving an example:

167. Id. (manuscript at 150).
168. Id.
A gay man is walking down the street. He hears the words, "Hey, faggot." Those are just words. Or hears, "Hey, White honkey." We have to look to see if he feels intimidated. It's not a crime to just use words. It's words alone in that context in a manner that may make it a hate crime. Did they threaten? Did they have intent? Someone can yell, "Faggot!," but to have intent, you need action.169

F. Questioning the Suspect about Motivation

As mentioned earlier, critics worry that enforcers will inquire into a defendant's beliefs and protected expression—the defendant's thoughts and associations—as they investigate hate crimes.170 The vast majority of the detectives' questioning of suspects occurred during police interrogations. The interrogations of suspects in Center City reveal that detectives were not concerned with the perpetrator's abstract beliefs, but rather, like other criminal investigations, focused on marshaling evidence of who committed the crime. Unlike other crimes, however, even after the perpetrator had confessed, the detectives often spent a large amount of time clarifying the perpetrator's motivation. In this regard, the detectives used the interrogation to gather facts regarding the context of the crime. Suspects were frequently questioned about particular situational aspects of the crime such as what the suspect and the victim had been doing before the crime occurred and the prior relationship between the victim and the suspect. A prior altercation in which the victim had been the aggressor suggested that the second incident may not have been a hate crime, but rather connected to the earlier incident.

In the interrogation below, the detective is trying to find out why a Puerto Rican man was maced on public transportation by two young White men:

169. Id.

170. Lisa M. Stozek, Wisconsin v. Mitchell: The End of Hate Crimes or Just the End of the First Amendment?, 14 N. ILL. U. L. REV. 861, 887 (1994) (concluding that hate crimes statutes impinge on the First Amendment "by punishing motive, thought and speech. Even though bigotry and racism are deplorable to most people, it is a strongly ingrained principle that the government may not regulate expression because of its message, ideas, subject matter or content").
Detective: I think . . . he was sprayed because he was a Puerto Rican, right?
Suspect: Because he bothered my friend.
Detective: You don’t even know for sure whether he was the one who bothered your friend. So there were two reasons, he was Puerto Rican and he bothered your friend?
Suspect: MMM.
Detective: Is that a yes?
Suspect: Yes.
Detective: And he was a Puerto Rican and he was in [names the White neighborhood in which the crime occurred], is that a yes?
Suspect: Yes.
Detective: And neither Puerto Ricans or Blacks should be in [the White neighborhood] at night, is that a golden rule? If he was Black and he was walking down that street and that girl yelled, “Hey nigger,” he would have got the same treatment as the Puerto Rican?
Suspect: So wouldn’t have a White walking through [a Black neighborhood]?
Detective: I’m not saying, but he would have got the same treatment, right?
Suspect: I don’t know.
Detective: And you went over and you sprayed him like you said for two reasons. He was a Puerto Rican in [the neighborhood in which the attack occurred] and he beat up your friend?
Suspect: He was a Puerto Rican and he beat up my friend.171

Before the interrogation, the detective had several reasons to believe that the crime was bias-motivated. The crime occurred in a White neighborhood in which a large percentage of the city’s hate crimes had occurred. Many of the White residents in that particular neighborhood showed open dislike for minorities who were moving to the neighborhood. In other hate crime cases, White perpetrators preceded attacks with language indicating that they were attacking the victim because he or she did not belong in the neighborhood. In this case, the victim said that prior to the attack, the suspect said,

171. Id. (manuscript at 79-80).
“Hey, spic, you shouldn’t be around here.” The detective tried to get the suspect to admit that the defendant was attacked because of his race. Eventually, the defendants pled guilty to hate crime charges.\textsuperscript{172}

1. The First Amendment

ABTF detectives were neither lawyers nor legal scholars. They received little or no training in what the First Amendment demands. Few detectives in the unit had even gone to college. What knowledge they had of the First Amendment came mainly from high school civics or popular culture. Despite a lack of formal training in jurisprudence, many of the detectives’ responses to questions about the First Amendment implications of their job were rather sophisticated. Like critical race theorists who argue for protections against hate speech,\textsuperscript{173} detectives recognized the pain of racial words to hate crime victims. At the same time, detectives seemed to clearly understand that words—taunts, threats, and epithets—were protected.\textsuperscript{174} One detective insisted: “Racial words are very violent. Racial words may be hate incidents, but words aren’t a crime. He called her a nigger? It’s not a crime to say that—the First Amendment right may be violated.”\textsuperscript{175}

Even when pressured, ABTF detectives resisted seeking civil rights charges in cases that reached the outer limits of acceptability under the Supreme Court’s standard in \textit{Mitchell}—cases in which there was only speech and no other evidence that the crime was motivated by bias. In one such case, a group of heterosexual men went to a gay bar and began making anti-gay jokes and remarks. According to one witness, after the group of men was told that it had no right to be in a gay bar, the men hurled a beer at the bar, and a fight ensued. Gay and lesbian organizations were quite vocal in the case, and pressured the unit to seek civil rights charges against two of

\textsuperscript{172} Id.


\textsuperscript{175} \textit{Bell}, supra note 16 (manuscript at 151).
the straight men. The unit refused and sought criminal charges instead. As the detective on the case noted in his report, the case did not merit charges, in part for First Amendment reasons:

[My evaluation of the evidence to this point reveals neither of these defendants was in violation of the civil rights statutes. While both admit that they were telling anti-gay jokes and making inflammatory comments, they state those comments and jokes were directed to each other. This behavior is verified by [two other defendants], as well as other witnesses. While this behavior may be inflammatory in nature, it is within the First Amendment right to speak in this manner.]

Detectives did not view their actions as depriving defendants of their rights to free speech. Consistently, the response to the question about the difference between their actions and behavior that infringed on a defendant’s free speech rights was that a hate crime involved violence and action. When asked whether perpetrators were really being punished just for saying something, one detective responded: “That’s not really the case. We normally had them for something else, not just for saying something. The perp said something, then beat someone up with their fists.”

Another detective evinced an appreciation of the difference between hate crime and hate speech. When asked about the free speech implications of hate crime enforcement, he responded, “People can call you a name, as long as there’s no overt act, you’re on firm constitutional ground. It’s a very fine line.” One detective, who manifested deep dislike for hate speech was clear about the protection that the Constitution gives it:

If you call someone a nigger . . . I don’t think that language should be used. But if it’s used in a context where the words aren’t directed at anybody . . . [Hesitating]. It's not OK to use it at all. You can never call anybody a nigger. You can’t use it when directed at someone or in a park in a crowd. Both are a problem. You say that, you might be

176. Id.
177. Id.
178. Id. (manuscript at 151-52).
looking for trouble. You might intimidate people, a little kid. I don’t think it’s OK but the Constitution allows it.179

Critics’ fears have not been realized in Center City. Their assumption that enforcers cannot accurately identify perpetrators’ motivations, the worry that enforcers will not carefully search for what motivated the crime, and the worry that inquiries into motivation will be too intrusive, have not come to pass in Center City. ABTF detectives were surprisingly conservative in their use of hate crime law. In Center City, detectives adopted a complex series of routines that helped them identify bias motivation. The process involved an initial screening, followed by a series of filtering mechanisms that required detectives to remove whole categories of cases likely motivated by a variety of other emotions—anger, resentment and jealousy—before conducting a detailed examination of the perpetrator’s motivation.180 Rather than focusing on the defendant’s abstract beliefs and association, the detectives’ inquiry was generally restricted to contextual clues regarding the crimes.

Critics also worry that those with benign motives who use slurs or epithets during some type of crime will be punished under hate crime legislation. Both the screening processes and the detectives’ own reluctance to take cases which lacked evidence of bias motivation aside from language helped to safeguard against the punishment of those with benign motives. Not every case in which detectives found the perpetrator to have been motivated by bias resulted in hate crime charges. Detectives preferred cases with injured victims and disliked cases with very young perpetrators.181 While detectives’ decisions not to enforce the law against very young perpetrators raises the specter of under-enforcement of hate crime law, the failure to enforce the law in this context suggests that detectives may have eliminated cases that were problematic from a First Amendment perspective.

179. Id. (manuscript at 152).
180. See generally Bell, supra note 16.
181. See id. (for more on the cases in which detectives chose not to invoke the law).
PART IV. CONCLUSION: THE HATE CRIME HATE SPEECH DISCONNECT

This Article maintains that critics are incorrect when they insist that enforcers are unable to separate instances of pure hate speech from hate crime and that they take language alone as evidence of motivation. In contrast to what critics of hate crime legislation assume, the detectives in Center City did not use language as the sole indication of whether perpetrators committed a hate crime. Because many cases that were clearly not hate crimes were referred to the unit in which the perpetrators used slurs or epithets, ABTF detectives developed procedures focused on the context in which language was used to discern motivation. Their use of the law was judicious and as a result, the detectives did not consider every case with bias-motivation appropriate for charges.

It is not my intention to argue that that the police officers enforcing bias crime legislation in every city behave as they do in Center City. Indeed there is evidence to the contrary. However, the Article suggests that with the proper procedures, enforcers of hate crime laws can provide the protection for hate speech that the First Amendment demands. Protecting perpetrators' First Amendment rights involves a searching examination into the context of the crime, detailed investigation, and as a consequence, an extraordinary commitment of resources by the police department to the investigation of these incidents. It may be possible to explain the difference in outcomes, and as a result, First Amendment protection, by looking to the resources that a department commits to the investigation of a hate crime. Whether such a commitment of resources is appropriate for what is arguably a tiny percentage of crime is a policy question that is beyond the scope of this Article. Nevertheless, the experience of Center City suggests

182. See, e.g., Boyd, supra note 51.
183. For instance, the police department studied by Boyd, discussed in Part II was not a hate crime unit, but rather consisted of individual detectives placed in each police precinct around the city. This arrangement, while more economical, does not allow detectives sufficient frequency in dealing with hate crimes to develop procedures protective of First Amendment rights.
that hate crime legislation can be enforced without violating the First Amendment, and supporters' arguments regarding the value of this legislation should not be ignored on First Amendment grounds.

This research from Center City raises broader issues that may apply in other jurisdictions in which police enforce hate crime law. In preparing cases for hate crime prosecution, detectives may be given an enormous amount of discretion to decide the circumstances in which the law will be invoked. Giving detectives broad discretion to decide when to enforce hate crime law means that judges and lawyers are not the only actors in the criminal justice system with powers of definitive interpretation of the First Amendment.\footnote{184} Police officers' interpretations in this area matter, not only in the critical role they play in screening the disputes that come to court, but also in their ability to decide when hate is a crime.\footnote{185}

Detectives' conservative use of the law and the elaborate system they created for identifying bias indicates that critics' predictions that protected speech will be punished, or that people whose actual motive is not biased will face hate crime charges, have not come to fruition in Center City. Evidence from Center City and research in other jurisdictions suggests that this may be true in part because the types of cases the critics imagine—cases involving pure hate speech, conversations, remarks, racist jokes—are rarely reported to the police; and when they do get reported, are quickly discarded.\footnote{186} The actual hard cases from a First Amendment perspective are cases in which slurs or epithets are used during the commission of a crime. The rigorous system of inquiry into motivation that

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\footnote{184. Cf. R. Alex Morgan, \textit{Jury Nullification Should Be Made a Routine Part of the Criminal Justice System, But It Won't Be}, 29 \textit{Ariz. St. L.J.} 1127, 1140 (1997) (stating that "the other participants in the criminal judicial system are granted a significant amount of discretion. Police use discretion in deciding whether to make an arrest; prosecutors exercise discretion in deciding whether to charge a defendant and with what crime") (footnotes omitted)).}
\footnote{185. See id.}
\end{footnotes}
detectives practice makes it highly unlikely that cases of protected speech will survive until the charging process.

Casting hate crime as an issue connected to hate speech is a mischaracterization that ignores the empirical basis of many of the incidents investigated by the police. The cases that the ABTF investigated suggest that hate crimes arise as White residents try to protect “their” neighborhoods from outsiders. This is clear from the language used in these crimes. “Go back to where you belong,” “Go back to China,” “No niggers in ‘Hillsdale’” are common taunts that accompany the assaults and other harassment in many of the ABTF’s cases. The vast majority of the unit’s cases did not involve mere name-calling, or even garden-variety bigots airing their views. Hate crimes were not ordinary muggings with slurs attached. The hundreds of cases investigated by the ABTF were the stories of perpetrators whose intention was not to express views but, rather, to drive people out of their neighborhood or off the streets because the perpetrator did not like their victim’s race, religion, or sexual orientation. In Center City, the detectives and defendants knew that hate crimes are not about hate speech. Enforcers of the hate crime law rarely saw their jobs as implicating the First Amendment, and defendants almost never asserted their First Amendment right to use slurs or epithets. Thus, enforcers and perpetrators realized that although defendants’ criminal actions were not protected, defendants retained their right to hate.

A. New Justifications for Hate Crime Legislation

At both the national level and in states without bias-motivated violence and intimidation statutes, activists recently have demanded hate crime legislation as the appropriate response to well-publicized hate murders, such as that of James Byrd and Matthew Shepard. In calling for hate crime legislation, supporters see three primary goals served by this legis-

187. BELL, supra note 16 (manuscript at 189).
188. See, e.g., Roxanne Roberts, Voices of Reason: At the HRC Dinner, Coming Out Against Hate, WASH. POST, Oct. 11, 1999, at C1 (describing activism by the parents of James Byrd and Matthew Shepard).
lation. The first is that such legislation will deter perpetrators of hate crimes.\textsuperscript{189} They also believe that hate crime legislation will serve as a tool for law enforcement in fighting this type of violence.\textsuperscript{190} Finally, they insist that it will provide punishment appropriate to the crime.\textsuperscript{191}

As many critics of the legislation are quick to note, such arguments are weak, particularly when supporters hold out hate murders as evidence that hate crime legislation is needed.\textsuperscript{192} As a class of crime, homicides are usually quite aggressively investigated by specialized detective units. Though there are no figures for how aggressively hate murders are prosecuted, \textit{vis à vis} other murders, if the intense public scrutiny focused on the Shepard, Byrd, and Ileto killings occurs in other cases, prosecutors will be unable to push hate murders under the rug. Finally, with respect to adequately punishing hate crimes, perpetrators of graphic bias-motivated murders are likely to be eligible for the death penalty, provided this remedy is available under state law. If a hate crime is punishable by death, a more serious penalty is scarcely needed.

Though hate murders have served as a clarion call for activists, a far better justification for passing hate crime legislation is that it is needed in order to deal with the vast majority of hate crime—low-level criminal assaults, intimidation, and property damage.\textsuperscript{193} Most hate crimes are not homicides. According to the FBI's Hate Crime Report, law enforcement agencies identified only sixteen hate murders out of 8,063 offenses in 2000.\textsuperscript{194} Most of the crimes identified as hate crimes

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\textsuperscript{190} \textit{Id.}
\textsuperscript{191} \textit{Id.} at 467-68.
\textsuperscript{192} \textit{Id.} at 472 ("I don't think an enhancement statute provides a deterrent effect . . . [but] . . . it sends a message about how the people of the state feel.") (quoting Nevada's hate crime statute sponsor).
\textsuperscript{193} \textit{See FBI, U.S. Dep't of Justice, Hate Crime Statistics 2000} 8 (2000), available at http://www.fbi.gov/ucr/cius 00/hate.pdf (discussing that in 2000, the latest year for which figures are available, the FBI Hate Crime Statistics reported 8,063 incidents nationwide, only 16 of which were murders).
\textsuperscript{194} \textit{Id.} at 59
\end{flushright}
were low-level crimes—simple assault, harassment, threats, and vandalism—crimes normally given the lowest priority.\textsuperscript{195} In stark contrast to hate murders, low-level hate crimes are largely invisible. Moreover, if the state makes no particular effort to designate low-level bias crimes as eligible for special treatment, the police may not take them seriously.\textsuperscript{196} That police do not take low-level crime seriously is not new; studies of the police suggest that low-level crimes get little or no investigation.\textsuperscript{197} The decreased priority given to low-level bias-motivated assaults might be acceptable were it not for the fact that studies suggest that victims of bias-motivated crimes suffer more severe psychological effects than victims of similar non-bias-motivated crimes.\textsuperscript{198} In addition, unlike non-bias-motivated violence, as a general matter, bias crime tends to be repetitive, cumulative, and frequently interfere with other hate crime victims' rights, particularly their rights under Fair Housing laws to live in the neighborhood of their choice.\textsuperscript{199} The importance of such rights and the damage caused by bias-motivated violence provides a compelling justification for hate crime legislation.

\textsuperscript{195} Id. at 60.

\textsuperscript{196} See Boyd, \textit{supra} note 51, at 821

Issues of 'linguistic ambiguity' are anything but theoretical for police personnel; on the contrary, these issues are of immediate, practical concern. Decisions, interpretations, and categorization must be—and are—made as a matter of course in the routine work of police officers. Theoretical problems aside then, the question remains: How do police personnel recognize, identify, and categorize certain crimes as hate motivated?) (footnotes omitted).

\textit{Id.}


\textsuperscript{199} See Green, \textit{supra} note 186, at 397.