

tough on crime” policies think about, orient to, and implement hate crime law. We asked prosecutors how they think about hate crimes and which factors do and do not influence their decision-making processes when deciding whether to charge a hate crime (add a hate crime enhancement). Our empirical findings along these lines provide the first glimpse of the dynamics that underlie the prosecution of hate crime.

In order to set the stage for this research, the next section reviews the conceptual terrain surrounding the term “hate crime.” Thereafter, we describe the research on the multitude of factors that shape prosecutors’ commitment to invoking hate crime law and preparedness to do so when prosecuting a crime that is arguably motivated by bias. Finally, we conclude with a discussion of the relevance of our findings for understanding both the factors that shape the implementation and enforcement of hate crime law in particular and the disjuncture between “law-on-the-books” and “law-on-the-ground” more generally.

## I. CONCEPTUALIZING HATE CRIME

Definitions of hate crime abound. Indeed, there are as many definitions of hate crime as there are municipalities and interest groups defining the parameters of the term (see, for example, Jenness and Broad 1997; Grattet, Jenness, and Curry 1998; and more recently, Grattet and Jenness 2005). However, in an article aptly titled “The Hate Crime Canon and Beyond: A Critical Assessment,” Jenness (2001) argues that the hate crime canon can first and foremost be described as a body of law that contains core elements that imbue the term with meaning and set the limits to meaning that—legally speaking—can be attached to the term. Specifically, hate crime law 1) provides a new state policy action, by creating a new criminal category, altering an existing law, or enhancing penalties for select extant crimes when they are committed for bias reasons; 2) contains an intent standard, which refers to the subjective intention of the perpetrator rather than relying solely on the basis of objective behavior; and 3) specifies a list of protected social statuses, such as race, religion, ethnicity, sexual orientation, gender, disabilities, and so forth. These elements of the definition of hate crime law capture the spirit and essence of hate crime politics and law in the U.S. (Jenness 2001).

Central to this conceptualization of a hate crime canon is an emphasis on prosecuting criminal activity that contains a “bias” element as a hate crime, which legitimates pursuing penalty enhancements for those being prosecuted for hate crime, as opposed to pursuing prosecution under the conventional rubric of (“just”) assault, trespass, vandalism, homicide, and the like (cf., Grattet and Jenness 2005). In *Punishing Hate: Bias Crimes*

*Under American Law*, Frederick M. Lawrence forcefully argues that this pursuit is warranted:

When bias crimes are compared with parallel crimes, something more must be said: bias crimes are worse. They are worse in a manner that is relevant to setting levels of criminal punishment. The unique harm caused by bias crimes not only justifies their enhanced penalty, but compels it. (Lawrence 1999, 175)

To convince the reader of this position, Lawrence first distinguishes bias crimes from other crimes (i.e., parallel crimes), arguing that the former are far worse than the latter because “a bias crime occurs not because the victim is *who* he is, but rather because the victim is *what* he is” (Lawrence 1999, 9). To further demarcate how bias crimes are different from parallel crimes, Lawrence (1999, 29-30) makes a distinction between “two analytically distinct, but somewhat overlapping models of bias crimes”: the discriminatory selection model and the racial animus model. The discriminatory selection model defines the crime solely on the basis of the perpetrator’s discriminatory selection of a victim, regardless of why such a selection was made. In contrast, the racial animus model focuses on the reasons for discriminatory selection (i.e., animus).

Once a distinction has been made between bias crimes and other crimes, Lawrence argues that “bias crimes ought to receive punishment that is more severe than that imposed on parallel crimes” (Lawrence 1999, 45) because “they cause greater harm than parallel crimes to the immediate victim of the crime, the target community of the crime, and the general society” (Lawrence 1999, 44). Lawrence details how guilt of a bias crime turns on the culpability of the actor, not on the results of his/her conduct; how cases can fall within the discriminatory selection model, but outside the racial animus model; and how, nonetheless, “if discriminatory selection of the group can be shown, animus can often be inferred” (Lawrence 1999 79).

This short review of Lawrence’s work, as well as work that contests his support for hate crime law (Gellman 1991; Hurd and Moore 2004; Jacobs and Potter 1998), makes one thing undeniably clear: hate crime, as a legal category, does not exist until law enforcement officials say so by addressing the question all prosecutors address: whom is it appropriate to punish? The enforcement of hate crime law requires prosecutors to engage in classification processes and procedures above and beyond those entailed in the pursuit of other types of crime (e.g., trespass, vandalism, assault, homicide, etc.) as they try to determine the motivation of a perpetrator, the context in which the crime occurred, and the best way to classify the incident. As Bell (2002, 13) explains in *Policing Hatred: Law Enforcement*,

*Civil Rights, and Hate Crime*, “bias crimes require police officers to examine not only what happened, but *why* it happened.” For her, then, the question becomes, how do officers make these difficult determinations?

Following Bell’s lead, we ask: How do prosecutors think about hate crime and, in particular, what informs how prosecutors make decisions about the prosecution of bias-motivated conduct? Related, how do prosecutors wield discretionary power as they decide whether to pursue hate crime charges for cases that, arguably, have an element of bias? To address these interrelated questions, we recognize that the role of the prosecutor is complex (Vinegrad 2000) and that prosecutors have considerable power and discretion within the criminal justice system (Carter 1974; Gelman 1982; Jacoby 1997; Uviller 2000). Moreover, prosecutorial decision-making is influenced by, among other things, professional standards and workplace policies, ideas about the pursuit of justice, the pursuit of self-interest, risk reduction, and orientations to “social harm” and the “likeability” and “believability” of key players in a case (Albonetti 1987; Baumgartner 1992; Blumberg 1967; Frazier and Haney 1996; Frohmann 1991, 1996, 1997; Jacoby 1977; James 1995; Spohn, Beichner, and Davis-Frenzel 2001; Ohlin 1993; Wilson 1973). However, we know very little about how these factors, as well as others, influence prosecutorial action related to hate crime.

Two unpublished studies on the prosecution of hate crime provide the first glimpses into prosecutorial decision making in hate crime cases. First, King’s (2001) examination of extra-legal factors that impact whether a state has prosecuted a hate crime identified only two factors as significant predictors of hate crime prosecution: the large size of a prosecutor’s office and the presence of a state Anti-Defamation League office. Second, the American Prosecutors Research Institute (APRI 1998) national survey of prosecutors’ offices identified three factors that influenced whether a particular case was classified as a hate crime: offenders’ use of words; symbols or acts that may be offensive to an identifiable group; and statements of witnesses and offenders.

## II. RESEARCH SITE, DATA, AND METHOD OF ANALYSIS

### A. *Research Site*

To investigate the contours of prosecutorial decision-making surrounding hate crime, we focus on prosecutors throughout the state of Texas. We chose Texas as our research site for multiple reasons. First, it is one of the largest, most heterogeneous states in the country. Second, it is home to one of the most brutal and visible hate crimes in the nation—the murder of James Byrd, Jr. in 1998.<sup>2</sup> Third, and most importantly, consistent with its

larger “get tough on crime” stance, Texas has one of the most demanding sets of hate crime laws in the U.S.

Hate crime lawmaking in Texas spans over a decade. In 1991, the year after the U.S. Congress passed the Hate Crimes Statistics Act, the Texas Legislature amended the Texas Government Code to require the Texas Department of Public Safety to “establish and maintain a central repository for the collection and analysis of information relating to crimes that are motivated by prejudice, hatred, or advocacy of violence” (Texas Department of Public Safety 2001). Thereafter, in 1993, the Texas legislature passed a second hate crime law by adopting Senate Bill Number 456, the Hate Crime Act. This Act provides that, if a person commits an offense under the Texas Penal Code and the defendant “intentionally selected the victim primarily because of the defendant’s bias or prejudice against a person or group,” the defendant’s punishment will increase by one offense (Hate Crime Act, 73d Leg., R.S., ch. 987, 1993 Texas General Laws 4273). Although this type of penalty enhancement has been embraced by many other states, this law is unusual insofar as it does not include specific status provisions that define the types of bias that will be prosecuted under Texas law.

In legislative sessions during the years 1995, 1997, and 1999, hate crime bills were proposed, but not passed, with much of the opponents’ energy focused on the proposed inclusion of the “sexual orientation” category. However, in 2001, almost three years after the murder of James Byrd, Jr. in Jasper, Texas, two similar bills (SB 87 and HB 587)—both titled the James Byrd, Jr. Act—passed in the Texas Senate and House and were signed by the governor.<sup>3</sup> The James Byrd, Jr. Hate Crime Act became law in Texas on September 1, 2001. It articulates the following:

In the trial of an offense under Title 5, Penal Code, or Section 28.02, 28.03, or 28.08, Penal Code, the judge shall make an affirmative finding of fact and enter the affirmative finding in the judgment of the case if at the guilt or innocence phase of the trial, the judge or the jury, whichever is the trier of fact, determines beyond a reasonable doubt that the defendant intentionally selected the person against whom the offense was committed or intentionally selected property damaged or affected as a result of the offense because of the defendant’s bias or prejudice against a group identified by race, color, disability, religion, national origin or ancestry, age, gender, or sexual preference. (Tex. Code Crim. Proc art. 42.014)

### B. *Data*

Because very little is known about the mechanisms that shape the prosecution of hate crime, this work is exploratory in nature. In order to gain an in-depth understanding of how prosecutors think about, orient to, and implement hate crime law, qualitative interview data were collected. Indeed, one of the primary reasons for conducting qualitative research is “*to explore a topic about which little is known*” (Padgett 1998, 7; italics in original).

A non-probability, purposive sampling strategy was utilized and yielded the seventeen interviewees described in Table 1. Interviewees were primarily district and county attorneys and their assistants who are currently practicing in Texas. A key informant guided the selection of participants during early stages of the sampling, and snowball sampling occurred in the later stages. Although the small sample size and sampling method preclude a claim of representativeness and generalizability, a cross-section of prosecutors was sought based on the following characteristics: race/ethnicity, gender, rural or urban status, and elected or assistant position.

TABLE 1. DEMOGRAPHIC CHARACTERISTICS OF PROSECUTORS (N = 16)

<b>Age of Prosecutors</b>	
Mean	46.4 years
SD	8.6 years
Range	32-63 years
<b>Years of Prosecutorial Experience</b>	
Mean	14.6 years
SD	7.3 years
Range	1.5-27 years
<b>Ethnicity</b>	
African American	3 (19%)
Latino/a	3 (19%)
White	13 (62%)
<b>Gender</b>	
Female	8 (50%)
Male	8 (50%)
<b>Position</b>	
Elected District Attorney	6 (38%)
Assistant District Attorney	8 (50%)
Elected County Attorney	1 (6%)
Prosecutor Advocate	1 (6%)

The first author conducted all the interviews in accordance with what Padgett (1998, 59) describes as a “goal-directed” approach to interviewing. Using a semi-structured interview schedule, she asked interviewees how they understand the parameters of hate crime law, how they evaluate the law, how they think about the feasibility of implementing the law, how they determine whether to file a hate crime charge and pursue a penalty enhancement, and how much experience they have had with hate crime prosecutions. She also asked them about their political beliefs, legal philosophies, perceptions of justice and the criminal justice system, and motivations for serving the state as a prosecutor. Interviews lasted approximately one hour, with a range of 45 minutes to two hours. Permission was sought to audiotape each interview and when interviews were audiotaped they were subsequently transcribed. Five of the interviewees did not agree to be audiotaped; thus their interviews were documented via handwritten field notes during the interview. Data gathering ended after sixteen interviews as saturation was achieved, that is, no new information was emerging from interviews.

### *C. Methodology and Data Analysis*

Specifically, a comparative case study approach to the analysis was undertaken (Lijphart 1975; Yin 1984). In a comparative or collective case study (Stake 1998, 89), researchers “may study a number of cases jointly in order to inquire into the phenomenon, population, or general condition.” Each interviewee was treated as a case, one that ultimately could be combined with and compared with other individual cases. The logic of this approach is that “each individual case study consists of a whole study, in which convergent evidence is sought regarding the facts and conclusions for the case; each case’s conclusions are then considered to be information needing replication by other individual cases” (Yin 1984, 52). This method of analysis allows for pattern-matching (Stake 1994; Yin 1984) through controlled comparisons (Lijphart 1975) as a primary method of increasing internal validity. By comparing individual cases along relevant dimensions, empirical patterns and trends could be identified.

The data analysis consisted of asking questions of the data and making comparisons between the cases. First, the data were analyzed line-by-line using an open coding process that allowed concepts to emerge through discovering their properties and dimensions in the data. Factors that impinged upon the prosecutorial decision-making process were highlighted. Most of the factors were derived from the prosecutors’ own experience, as voiced during interviews, while a few factors, such as conviction rates, political affiliations, or personal attitudes did not arise from the interviews, but were brought into the research from the literature review for comment by the

prosecutors. Patterns were matched across interviews and common features began to emerge.

### III. FINDINGS

When considering whether to attach a charge of “hate crime” to a case, prosecutors engage in a decision-making process that can be stated in a single sentence: Prosecutors are seeking justice and enforcing the law by employing a standard decision-making process while pursuing a strategic advantage when deciding whether to charge a hate crime enhancement and, at the same time, denying or minimizing the influence of extralegal factors. This study found that a range of factors influence this process. These factors can be divided into two categories: those factors prosecutors readily identify as influential in their decision-making process and factors that the prosecutors denied were influential.

#### A. *Influential Factors*

##### 1. The Institutional Triad: Facts/Law/Evidence

Prosecutors first examine each case in relation to state law to determine whether any laws were violated and to determine which charges can be filed. The most common phrases used by prosecutors to describe this part of a larger process are “the facts of the case” or the “fact situation.” As one prosecutor said, “I am driven by the facts, the facts of the offense and the background of the defendant. If the facts are there, we’ll charge.”

To arrive at “the facts,” prosecutors assess the defendant’s criminal history, the “believability” of the witnesses(es), the strength of evidence, and the relationship between the victim(s) and perpetrator(s); moreover, they anticipate how the facts will play out in front of a jury and what the defense might be. The evidence is assessed to determine whether it is strong and able to withstand the burden of proof. Prosecutors spoke of mentally checking off the evidence to determine whether they could prove each element in a court of law. Prosecutors present this portion of the process as being straightforward and objective. For example, one prosecutor explained:

When you ask a prosecutor what he is looking for in terms of whether he is going to use a hate crime law or not, it always boils down to evidence. Can you prove that this is, in fact, the motive; and, if so, then he will use the hate crime statute because it enhances the punishment. If it is a mixed thing, he may or may not use it depending on the particular facts and circumstances.

Once the basic facts of the case have been ascertained, the prosecutor moves to a process of assessing the viability of a case in terms of assumed strategic advantage.

## 2. Assessment for Strategic Advantage

Prosecutors were very focused on obtaining acceptable plea bargains or winning a case if it goes to trial. Although at times prosecutors would mention that securing justice is different from winning a case, once they were convinced of the defendant's guilt, the two goals became a singular aim. Prosecutors identified multiple strategies that had an effect on the decision to add or not to add a hate crime enhancement. For instance, *decreasing the complexity* of the case and *minimizing risk* were often mentioned. One prosecutor stated it this way: "When you make a decision to use a hate crime law, you add to the complexity of the case. It's another element you must prove that you wouldn't have to prove otherwise. And you always run the risk of dividing a jury over that type of issue, so most prosecutors would decline to use it if the crime already had a sufficient range of punishment."

Minimizing risk and playing it safe were mentioned by many of the prosecutors, including one who stated:

If I believed personally that the case was racially motivated, but I thought that doing that [charging a hate crime] would detract from the actual commission of the crime and might jeopardize the guilty plea, then I would just try the case as the regular offense. The law allows us, in the code of criminal procedure, to offer anything in the punishment that the judge deems relevant for punishment. So I would probably just save that for punishment, and call witnesses to prove that and then argue to the jury that that needs to move up the range of punishment. That is the safer course.

Adding a hate crime enhancement was often viewed as acting against these preferences for keeping things simple and not "cluttering" the case. If a prior relationship existed between the victim and offender, this relationship was viewed as making the case muddier and more ambiguous; therefore a hate crime enhancement was less likely to be utilized. Often the prosecutor plans to include the bias motivation in the case without filing a hate crime enhancement to secure more punishment informally via juror outrage, rather than via a formal hate crime finding. This strategy was viewed as allowing for an inclusion of the bias without complicating the case.

In pursuing strategic advantage, the principle of obtaining the *lowest burden for the highest level of punishment* is reported to be a key factor.

Several examples offered by prosecutors illustrate this strategy. For instance, when someone is killed, prosecutors may charge serious bodily injury rather than murder because the charge of murder requires the burden of proving an intention to kill, whereas serious bodily injury requires only the proof of an intention to do serious bodily injury. Both carry the same penalty. Therefore, the charge of serious bodily injury lowers the burden of proof in relation to the punishment. Another prosecutor describes a different case using the same strategy:

You have facts where the police officer could be shot at during the course of trying to stop a robbery suspect. And the bad guy takes a shot. Under those facts you can charge the bad guy with attempted capital murder if you think you can prove beyond a reasonable doubt that he was trying to kill the policeman, knowing he was a policeman. Or you could just file aggravated assault of a peace officer, threatening with a deadly weapon. Both are first-degree felonies. If I am the prosecutor on the case, I am going with aggravated assault; my burden is easier. I want to make sure the bad guy gets his just rewards. That is the easiest thing for me to prove and the range of punishment is the same. So why make it more difficult for myself? Why get the jury thinking, "Oh yeah, no doubt he threatened the officer with a deadly weapon, he pointed it at him, but I don't know if he meant to kill him. And I don't know if he was shooting it up in the air." Why make it more difficult than it needs to be, when the punishment is the same?

The burden of proving the motive adds a burden that prosecutors often find daunting and unnecessary. As one prosecutor stated: "There are so many crimes that from my standpoint I don't understand why they happened, but I know that it [*sic*] does. And then to have to take that crime one step further and show, 'What were you thinking, why did you do this?' That can be an unbelievable burden."

To minimize the burden of proving motive, prosecutors want the lowest burden of proof for the highest punishment range. Hate crime enhancements are precluded in first-degree felonies since that is the highest level that can be charged and the penalties cannot be further enhanced. So in the case of a first-degree felony, adding a hate crime enhancement that would increase the burden of proof without a commensurate increase in punishment generally is not viewed as being helpful. The hate crime enhancement may be more helpful at the lower levels of offenses because there is room to enhance the punishment.

Another influential factor for prosecutors is *maintaining credibility* with the jury. As one prosecutor noted:

When you go into a courtroom, you put your credibility on the line with

the jury. You are going to prove this fact. If you add to your charges against them, like the element that this was a hate crime, racial motive, if you can't prove that, you lose some credibility with the jury. "The prosecutor said he was going to prove this was racially motivated, and he didn't do that." And you have a weaker punishment if you ever lose your credibility with the jury. So it's a practical decision on what you charge somebody with. Can I meet my proof, or will that jury sit back and say, "He told us this and he couldn't prove it, and so I am not sure if the other stuff he is telling us is right"?

When strategizing to win, prosecutors seemed to *value the product over the process*. That is, strategies were focused on achieving the desired outcome, either a plea bargain or conviction; less important was which charge got them there. Again, this strategy often acted against a hate crime enhancement. While the victim's community might want the hate crime charge to make a symbolic statement, that was less important to the prosecutor than winning the case. As one prosecutor noted, "We want this guy in prison for as long as this crime deserves, and how within the law we get him there may not be as big of a concern for us as it is for the family." Another prosecutor noted the following: "If you have any sense at all, you are concentrating on what will win the case and not what might be politically correct in some other places." This assessment of the facts of the case is accomplished on a very individual, case-by-case basis.

### 3. Case-by-Case Lens

Prosecutors report viewing each case on an individual basis and emphasizing each case's uniqueness in the process. This approach seems to be an institutional prosecutorial lens for viewing cases. As one prosecutor noted, "You go on a case-by-case basis, and you do what is right for that case." As another prosecutor stated, "I don't speak categorically. Give me the facts, that is what I think. Each individual case, in my opinion, should be evaluated on the evidence that you have. I don't think you can say across the board, 'This is what we do in all situations,' because all situations are unique."

The individualizing of cases tends to act against the addition of a hate crime enhancement. The spirit of hate crime law encourages looking at victims as members of a larger, often historically marginalized and oppressed, group. Prosecutors tend to see both victims and offenders as individuals rather than as members of a collective group.

## 5. Proving Hate Motivation

What distinguishes a hate crime from other, more conventional crimes is the underlying motive for the crime. The underlying facts of the case must support a criminal charge, and then a bias motive must also be present in order for a hate crime charge to be forthcoming. Assessing the motive is different for prosecutors, for motives do not have to be proved beyond a reasonable doubt in other cases. As one prosecutor said,

We are not used to having to prove motive. Yes, it is nice to be able to tell the jury what the motive is, but that is not something we have to prove. And we are used to saying to juries, "We don't have to tell you what the motive was; we don't know; but we can show you beyond a reasonable doubt that that person did that to that victim."

However, prosecutors noted that in almost all cases the motive is of interest insofar as both juries and prosecutors are curious about why the crime happened. According to a prosecutor,

In every criminal case we try there is always culpable mental state, intentional knowing, or reckless or criminally negligent that we have to prove. What we always tell juries is that we can't open up their heads and show you what they were thinking; the law says we can infer from their conduct and the facts and circumstances surrounding the commission of the offense. You can infer from that what somebody was thinking.

Although motive plays a role in most criminal cases, it becomes the defining issue in a hate crime case. Far from the more tangible or factual evidence that prosecutors assess, motive seems more subjective and creates an increased evidentiary burden for the prosecutor.

In assessing motive, prosecutors first look for evidence that demonstrates a hate motive. They look at the status of the defendant(s) and any statements, especially epithets, that he or she may have uttered before, during, or after the crime. However, prosecutors note that epithets are suggestive, but not conclusive in and of themselves. They also look at the defendant's history of bias-motivated behavior, typically asking a series of questions that include: Is the person a member of an organized hate group, does the person have tattoos that might indicate bias, has he or she made previous remarks of a biased nature, does the individual possess literature that might document a hate motive? The prosecutors look to see if the victim and perpetrator are from two different groups based on religion, race, or other status category. That they are from two different groups seems neces-

sary, but again, not sufficient for a hate crime charge. As one prosecutor explained:

A lot of times people say racial terms or anti-religious terms when they are mad. But that might not be what motivated them to commit the offense. There has to be a causal connection between why the offense was committed before an affirmative finding of a hate crime can be made. And it has to be beyond a reasonable doubt.

An area of special interest to prosecutors is determining whether the hate motive is the only motive or whether there are multiple motives. Multiple motives muddy the water and make a hate crime enhancement less likely. If there seem to be dual motives, as for example when epithets are uttered during the course of a robbery, the prosecutors are likely to see the robbery as the primary crime and the epithets as incidental. For example, one prosecutor stated:

For all those 17 years plus that I tried cases, there is certainly name-calling and racial slurs, but often it was from the same ethnic group or they had a history, a neighbor-type thing. And where did that hatred begin? Was it because someone was of a different color or persuasion, or was it just because you are my neighbor and you really piss me off, or because of the way you do things?

In the legal literature, these multiple motive crimes are frequently discussed and debated. There is debate about whether the hate motive must be the whole reason the crime occurred (“but for”) or part of the reason the crime occurred (“in whole or in part”). Most prosecutors in this study wanted the hate motive to be the *primary* or *sole* cause of the underlying crime in order to add an enhancement. Consider how one prosecutor discussed the primacy of motivation:

I can certainly see whether a slur had been used against an individual it could suggest that a person is biased or prejudiced, but it doesn't necessarily suggest that is why they committed the crime. You can have folks, I guess I can see the situation, where maybe you have a traffic altercation and people get upset about being treated unfairly, not with proper respect or courtesy, when they are driving. And they don't have a clue as to if you got a man or woman, a white person, a black person, a Catholic, a Jew, whatever it is driving the car, they are just mad. And both of them get out and they have every intention at that point that they are just going to follow through. They are going to do something because they feel they have been wronged for whatever reason. So they get upset, they might commit an aggravated assault, and when they realize who it is they could also be so mad that they call him, maybe it's a rabbi, and they call him

some negative name, based on seeing that he is a rabbi, but that is not *why* the crime is committed.

Determining whether the crime was committed solely and primarily out of hate is a sticking point for prosecutors. Clear-cut motives or single motives are preferred by prosecutors, and are more likely to result in a hate crime enhancement. However, in the majority of cases the motives are not clear, but ambiguous, and are not the result of a single-motive, but rather of dual or multiple motives. One prosecutor summed up many of the factors involved:

Talking about hate crimes, there are going to be degrees. There are going to be some that are crystal clear—"this is a hate crime"—and there are going to be others with gray areas. Prosecutors are going to utilize it if they think they can prove it, because it's the right thing to do. They are going to want to make that defendant accountable for what he or she did, I think. My perception is that prosecutors are more concerned about the proof problems than anything.

Proof becomes primary and proof is deemed easier when there is a single motive without other confounding factors. As one prosecutor noted, "What I think doesn't mean a hill of beans to a jury. It is what I can convince the jury that matters." Meeting the standard of proof is a chief concern for prosecutors, as is a new standard they have perhaps inadvertently created, that is, the standard of a normal crime.

##### 5. "Normal" Hate Crimes

One prosecutor mentioned the type of cases that are especially helpful in determining motive: "I see the hate crime situation really coming into play more in those egregious, clear-cut cases, for example, what happened to James Byrd." This quote is indicative of the tendency to compare the facts and motives of a given case to landmark hate crimes. Although they don't acknowledge it directly, prosecutors measure the facts of the particular case against a "typical" hate crime. The two cases most consistently mentioned were the James Byrd, Jr. racially motivated "dragging death" in Jasper, Texas and the "gay-bashing" death of Matthew Shepard in Laramie, Wyoming. In making more general comparisons, typical cases frequently cited were cross burnings at the home of African Americans and swastikas painted on synagogues. The less similar a case is to one of these "classic" or "typical" hate crime cases, the less likely prosecutors are to be able to deem it a hate crime and prosecute it as such.

The normal hate crime standard was seen most clearly operating via

the category of gender. Prosecutors did not view gender-bias hate crimes as typical hate crimes and for the most part did not think violence against women fit a hate crime paradigm, although gender is a protected category under the James Byrd, Jr. Hate Crime Act. They attributed violence against women to motives of power and control rather than of hate (McPhail and DiNitto 2005). Additionally, prosecutors' knowledge of the statute can greatly influence what is charged or not charged. For instance, only a handful of prosecutors knew that the category of gender was in the new list of protected statuses. Indeed, when questioned, most were surprised to hear it was in the statute and quickly went to their reference guide to double-check. Prosecutors asked, "Is gender in there?" Many were embarrassed by their lack of knowledge. One prosecutor thought the interviewer meant sexual orientation, and a lively discussion ensued about the difference between gender and sexual orientation.

#### 6. Egregiousness of the Crime

Another factor that seems to influence the charging decision is the egregiousness of a crime. Similar to the public at large, prosecutors report being affected by the brutality of the crime. An especially brutal crime is likely to get more attention and enhancements. For instance, the James Byrd, Jr. case was often referred to, not only because of its lack of motive other than racial hatred, but because of the horror of how the crime was perpetrated. Prosecutors were likely to mention the dragging and subsequent dismemberment of his body. However, the more egregious a crime, the more likely it is to be a first-degree felony, and adding an enhancement would not increase the penalty. Therefore, egregiousness seems to be a factor in prosecutorial outrage, but not necessarily in adding enhancements.

#### 7. Cost-Benefit Analysis

If a hate motive can be established, prosecutors quickly move to weigh the utility of a hate crime enhancement. Generally, they are performing a cost-benefit analysis. That is, they are weighing the benefits of adding an enhancement against the costs of adding an enhancement. In other words, they are weighing the strategic advantage of either including or excluding a hate crime charge.

Calculated costs include increasing the prosecutor's burden by having to prove beyond a reasonable doubt that the crime was indeed hate-motivated and increasing the complexity of the case, which leads to fears that the enhancement could "clutter" the case and might confuse the jury. From the point of view of prosecutors, pursuing a hate crime charge adds more

work, including more careful questioning of the jury during *voire dire*, to the task of securing a prosecution. For example, a prosecutor noted the strong passions hate crime engenders:

The decision process from a logical point of view doesn't change much, but the passions are so much stronger when you are talking the black, white, or sexual preference thing.

When you go into that area, you know, that there is [*sic*] going to be segments on one end that have strong feelings and segments on the other end that have different feelings and you know you are just walking into hot water.

On the other hand, there are benefits to using a hate crime charge. The main benefit is the sentence enhancement. That is, according to state law the punishment of the offense is increased to the punishment prescribed for the next highest category of offense, except for first-degree felonies or Class A misdemeanors; in the latter case, the sentence is not enhanced to the next level, but the minimum term of confinement for the offense is increased to 180 days (Beckham 2001). As one prosecutor described it, "If you can prove it, you get this bonus." The other benefits as described by prosecutors are "sending a message" to potential perpetrators that hate crimes will be handled seriously, and providing a plea bargain incentive, that is, when negotiating a plea bargain the hate crime charge adds another element to push for a guilty plea in exchange for dropping the hate crime enhancement.

In order to add a hate crime enhancement, the prosecutor must believe the benefits of the charge outweigh the costs or risks. For example, an urban prosecutor described a case in which two white men set up a small drug-selling operation in a predominately African American community. Several rival drug dealers, who were African American, crashed through the door of the white men's apartment, started shooting, and stole the drugs and money. During the assault, epithets referring to the white race of the victims were shouted. The assault resulted in one of the white drug dealer's losing an arm to a shotgun blast. The victim's family wanted a hate crime enhancement brought against the perpetrators. The prosecutor decided against the hate crime enhancement for several reasons, as he described:

This guy [perpetrator] is going to prison for life; this is a case where I don't need it [hate crime charge]. In fact, this is a serious injury. They shot this kid with a shotgun and took his arm off. So he [the victim] lost an arm, so he [the perpetrator] has life, and in the trial I don't even need this stuff [hate crime enhancement]. I don't need to cast it in a racial light. This guy's a robber, and he picked a victim and he robbed him.

In this case the potential benefits of the hate crime enhancement did not outweigh the potential costs for this prosecutor. Since the underlying crime was serious enough to put the perpetrator in prison for life, a hate crime charge was not viewed as useful, and this was in spite of the victim's family's wish to have the case prosecuted as a hate crime. This case illustrated the multiple factors involved in deciding whether to add a hate crime enhancement.

#### 8. Downstream Thinking

Frohmann (1991) described the "downstream thinking" of prosecutors in their decision-making processes. That is, prosecutors are in dialogue with the anticipated defense arguments and the potential responses of the judge and jury. This factor was readily apparent in prosecutorial interviews, although the prosecutors were less likely to mention defense arguments and judges' decisions and more likely to focus on the jury's response. For example, in response to a hypothetical case that could warrant a hate crime enhancement, the prosecutor first said, "What would the jury think? How would the jury view that?" As a prosecutor explained:

What scares the prosecutors is to divide the jurors. You can approach a jury with an assault, but you have questions whether it was committed just because of hate crime, that's what caused the assault. Then you may divide your jurors and you may not get your assault because, you know, jurors are just people. And they get angry with each other and you can hear them in there. Sometimes we hear them laughing in there and sometimes, whatever, they get loud sometimes, and if you divide your jury and leave them a question, well, you could lose the whole case.

In most cases, the downstream thinking tended to act against adding a hate enhancement.

#### 9. Sending a Message

Prosecutors' decisions were also impacted by the desire to send a message to the community. There were two communities that their actions were directed toward: potential hate crime offenders and the victim's community. For instance, one prosecutor stated:

I am a strong believer that there are cases that come along that need to be tried. For instance, this intoxication manslaughter coming up. I am getting sick and tired of having to handle cases in which people are killed because people are drinking and driving. I have a terribly tragic case coming up. It is not a question of guilt or innocence; the guy is a first

offender and I want to send him to prison. And I want it to be in the front of the paper and somewhere out there somebody says, "You mean they will send you to prison for doing this?" Some cases are born to be tried and some cases are better opportunities than other cases to make a difference in the community. And I think a hate crime case would be that opportunity. . . . And if we have an opportunity to take a case like that to trial and get a real good sentence, then the message is pretty clear and the consequences are pretty serious.

Another prosecutor mentioned that by adding a hate crime enhancement a message is sent to the victim's community as well. A white prosecutor recognized that adding hate crime enhancement in a case where an African American man was shot and killed sends a message to the targeted African American communities that they will be heard and protected, and that all dominant group members do not harbor bias toward their group.

#### 10. Prosecutorial Discretion

Another factor prosecutors consider is the deployment of *prosecutorial discretion*. Interestingly, prosecutors talk less about "power" and "discretion" and more about "doing the right thing" or "doing justice." This broad category allows them a lot of leeway in decision-making, becoming the "wild card" in the deck. Although the prosecutors generally follow their decision-making processes while pursuing strategic advantage, prosecutorial discretion allows them to break with the routine procedures and standardized decision-making processes, permitting them latitude in any particular case.

Similar to Frohmann's (1996) discussion of "hard cases," prosecutors' power allows them to disregard some factors or weight factors differently depending on the particular case, the environment, and the prosecutor himself/herself. A prosecutor described prosecutorial discretion this way:

It would be a very easy thing as prosecutor to just take a hard line on everything, and a lot of prosecutors do that. The safest approach is that everybody's guilty, and go after everybody, or the other approach would be don't take any chances. Everyone gets a great deal and you don't have to go to trial. The real difficulty in prosecution is knowing who deserves the breaks and who doesn't.

Or as another prosecutor noted, "We don't smash everyone as people are not always evil, sometimes just foolish." Prosecutorial discretion is complex and a bit mysterious. It is not possible to ferret out the multiple factors, both known and unknown, that guide prosecutors' decisions. In some cases, the primary factor is their own moral compass.

## 11. Internal Moral Compass

All of the prosecutors interviewed for this study spoke of their jobs with a single voice, despite their gender, racial, and regional diversity. Time after time prosecutors spoke of “seeking justice,” “enforcing the law,” “doing the right thing,” and having a prosecutorial “mindset.” Prosecutors saw themselves as prosecuting the guilty in service to the victim, the victim’s family, and the community at large. Prosecutors often saw this as part of a bigger battle of good against evil. Although they usually prefaced their remarks with self-deprecating statements, such as “This sounds hokey,” many saw their work as casting them into “a hero” role, wearing “the white hat” or being “a knight in shining armor.” Several spoke of their work as “a calling” and a commitment to doing justice.

Another prosecutor expressed it this way:

I certainly would relish the opportunity to go after somebody who committed a crime and victimized somebody just because of their sexual orientation, or just because of race. I would love that and I would do it with glee. I would use every tool at my disposal to do it because I genuinely think that it is a worse person, a more dangerous person, who hurts someone because of who they are rather than because of drugs, alcohol, or greed.

However, “doing justice” is a complex interplay of many factors, both known and unknown. One part of the complex interplay is the prosecutors’ use of a colorblind lens.

## 12. Colorblind Lens

Over the course of the interviews, prosecutors expressed reluctance to focus on identities, that is, the racial, sexual orientation, religious, gender, or other categories specified in hate crime law. Their aversion to a focus on identity included victims, offenders, and even the prosecutors themselves. Several prosecutors struggled with the notion that hate crime and hate crime enhancements focus on the racial, sexual, and gender identities of both perpetrators and victims. One noted, “It is certainly drilled into our heads, and I certainly appreciate it intellectually and emotionally, the idea that equal justice for all, that justice is blind. I think there is a school of thought that says you shouldn’t look at the person, you should look at the crime.” Another prosecutor noted, “A victim is a victim to me.”

## B. *Non-Influential Factors*

Prosecutors denied or minimized the influence of certain factors on their decision-making processes when deciding whether to charge a hate crime in addition to the underlying crime. Described below, these factors often represented sensitive areas for discussion and caused either exasperated or defensive reactions from some prosecutors.

### 1. Conviction Rates

Prosecutors denied that conviction rates were a major part of their decision-making process. Rather than conviction rate demonstrating a “notch in their belt,” one prosecutor said:

So conviction rates tell us we are probably tending to prosecute the right people, because we send them through this filter and then with the jury we get a conviction. So we probably are more likely to have a charge in the first place if our conviction rate is 90 percent as opposed to if our conviction rate was 20 percent.

### 2. Electoral Politics

To a person, prosecutors denied that politics had anything to do with their decision-making processes in looking at hate crime or any other crimes. Ironically, prosecutors would frequently say that they had heard that other offices were “political,” but never their own. Although prosecutors saw legislators as very political, they reported that their own decisions were entirely apolitical. An elected prosecutor noted that adding a hate crime enhancement to a case in his community would win him some votes at one end of the political spectrum and lose him some votes at the other end. Another prosecutor put it this way: “The most basic way for me to do my job is to do right. Political winds change. You get out there and you are going to be in trouble. The law and the evidence don’t change—politics do.” Finally, another prosecutor explained the apolitical nature of prosecutorial decision making as follows:

If you just do what the facts demand and not be concerned about whether you are going to be re-elected or how it’s going to look to anybody, you just do what you know is the right thing to do. And you are going to be okay and the ultimate result is if you get deselected, then you have done what you can. To do anything else would really violate the conscience of the office of a good prosecutor.

### 3. Community Attitudes

Although community attitudes toward hate crimes in general and the groups of people that the statute specifically protects are taken into consideration in charging a hate crime, they are not persuasive. In the hate crime arena, most prosecutors believe juries would be tough on hate crime, just as they are tough on all crime. Prosecutors often anticipate the biases and beliefs of their community. One prosecutor explained:

The general feeling in this county, and I am sure around the state and other places, is one of tolerance. And while a jury might not feel that this victim's [a gay man] lifestyle was appropriate and might have really strong feelings against it, that same juror would in all probability say, "Okay, it is not right for this guy to hit him or hurt him or various other stuff." So it complicates the issue, but it's not unusual in criminal law. Some husband finds out his wife is cheating and whips hell out of her. You have many people say that she shouldn't have been cheating and she needed a good whooping. And you have others who say, "I don't agree with her cheating, but he had no right to," so it's the same thing. We deal with lots of other issues, except that in the issue of race and sexual preference the passions are stronger.

Dealing with attitudes in the community also involves dealing with pressure from community groups.

### 4. Pressure from Targeted Groups

All prosecutors stated that they would be open to hearing what the community representatives had to say, but that a community's pressure would not get them to add an enhancement if they felt an enhancement either was not necessary or could not be proved. One prosecutor reported that the jury does not make a decision based on public outcry, but upon the evidence presented. Speaking of the outcry she said, "It's not persuasive. Certainly, we know it is out there. We are not ignorant; we hear it. We are not blind, deaf, and dumb—well, it depends on who you ask. It should not play a part."

### 5. Media Pressure

Prosecutors state that media pressure does not have an effect on their charging decisions. They reported reading the local papers and keeping abreast of what was written about their cases, but pressure to add a hate crime enhancement did not come from the media. There was some distrust

and even resentment of the media for a perception of sensationalizing cases or using sound bites that often led to misinforming the public of the complex nature of cases and issues. For example, one prosecutor noted, “The media can be very helpful and unbelievably misguided. And I think oftentimes in their zeal, conflict is what sells papers and gets ratings and that sort of thing, and sometimes they pander to that, and sometimes it causes a lot of damage.” One exception to this line of thinking came from a prosecutor who was not involved in a case in a neighboring community. As he explained, “Well, that community decided, that DA and that sheriff decided if we designate this as a hate crime, we are going to get all kinds of outside media coming in here, we are going to really stir things up. If we don’t designate this as a hate crime, maybe they will leave us alone a little bit, and we can go about our jobs.”

Again, this case proved to be the exception, not the rule. In general, issue salience or media pressure did not seem to affect charging decisions. And ironically, in the one case in which it appeared to affect the decision, it resulted in *not* charging, rather than charging a hate crime.

## 6. Victim and Family Pressures

In several cases the victim’s family wanted a certain case tried as a hate crime. For the most part, family pressures were not enough to get a hate crime enhancement added. One prosecutor noted that most families leave the criminal justice system disappointed, feeling as though they did not get a full measure of justice. Every prosecutor noted how important it is to listen to the family and attempt to “satisfy their concerns” or “look at it from their point of view.” However, much of the interaction with the family is an attempt to explain the limitations of the justice system and the larger picture to the family. A prosecutor addressed the issue this way:

The family is concerned. They want, the family wants, most of the time, people to vindicate—I am looking for the words—to *understand* the suffering they are going through. They want somebody to know that this was wrong, they want the paper to report it, they want us to recognize it, they want us to tell the jury. And we may be saying that we are going to do that, or we want this guy in prison for as long as the crime deserves, but how within the law that we get him there may not be as big of a concern for us as it is for the family.

## 7. Hate Crime Attitudes

Like the general public, prosecutors hold diverse views toward the hate

crime law they are to enforce. A small group of prosecutors felt as though hate crime law righted past wrongs, while another group derided the law as a “political correctness law.” The majority of prosecutors felt more neutrally about the law, believing it could be a useful tool if the facts support an enhancement. Another prosecutor was conflicted about the law, stating:

I really do believe that when we continue to craft laws that highlight distinctions between us that we are headed in the wrong direction. I am uncomfortable with having justice meted out based on the color of someone’s skin or religion. And I think in a perfect world, of course we don’t live in a perfect world, that would not be necessary, in fact that would be unethical. But on the other hand, nothing angers me more, nothing viscerally affects me more, other than something like a rape, than the idea that someone targets somebody else violently out of hatred, hatred for their religion, because somebody is a different race. I can’t even watch movies like *Mississippi Burning*; they anger me so much. And from that perspective, I am willing to take whatever tools the legislature wants to give me, and use them against people who commit hate crimes.

Prosecutors denied that their personal attitudes affected their decisions by repeatedly stating that “the law is the law” and acknowledging that they did not have the right to enforce some laws they liked and ignore those they didn’t. However, one prosecutor noted that although there are limits on how “hard” one can prosecute, there are no limits on how “light” one can prosecute. Yet this same prosecutor who labeled the hate crime law as a “politically correct law,” when asked if that would prevent him from adding a hate crime enhancement, said: “If I can be politically correct and gain an advantage in a jury case, I will do it. But if I have to lose an advantage and/or weaken my chances at a jury case to be politically correct, I am going to reject political correctness.”

## 8. Religious Views

Prosecutors, for the most part, denied that their religious views impacted their charging decisions. A frequently cited example of the separation of religious views and charging decisions was death penalty cases. Several prosecutors reported that they were Catholic and noted their church’s opposition to the death penalty; however, they still occasionally prosecuted death penalty cases. A prosecutor stated that although prosecutors have their own personal and moral views, “You have your duty as an assistant district attorney to set those aside if they are causing you not to be objective in your evaluation of the case.”

## 9. Prosecutorial Identity and Experiences

Prosecutors' own identities and experiences as members of status categories protected by the hate crime law seemed to have limited, or an undeterminable, influence on charging decisions. This became apparent, for example, when comparing male and female prosecutors. The most enthusiastic proponent of using the gender category in the hate crime act was a female prosecutor, but other female prosecutors remained as skeptical about the category as most male prosecutors. When a female prosecutor was asked whether female prosecutors were different from their male counterparts she said, "No, we are more like the boys. For the most part, a prosecutor is a prosecutor." Though this view was widely shared, two female prosecutors did note gender differences, with one saying she thought women were better prosecutors than men because they were more methodical and analytical in building cases. The other noted that the influx of women into the field in the 1970s-80s had brought increased caring and concern for victims into the system.

The prosecutor who was the most enthusiastic about the hate crime law and had actually added a hate crime enhancement to a case was a white man. Almost all of the prosecutors of color denied that their racial identity was a factor in how they saw their jobs or made their decisions. For instance, a Latina prosecutor answered a question about how her ethnic identity influenced her decisions with these words: "That doesn't factor in. I don't think as a Latina woman; I think as a prosecutor." Alternatively, a Latino prosecutor noted, "We understand that we are minorities. If you are a minority then you can never forget it."

One African American prosecutor explained his charging decisions by noting his focus on the facts of the case and achieving his goal of a successful prosecution by weighing the utility of the addition of the enhancement. However, when asked late in the interview whether his race in any way affected his charging decision, he told this story:

When I was in the fifth or sixth grade there used to be patrol boys. We were basically school crossing guards. In my little town before the onset of concern for children's livelihoods we were the school's crossing guards, unsupervised at twelve, eleven years old at a very busy intersection. And I remember, we distinctively had a white band and stuff, thought it was cool (laughing). Yes, a symbol of authority at ten or eleven years old, or eleven and twelve, and we were out there helping with the school crossing. But I was almost run over once on purpose. Growing up where I did and the place where we did it, I knew it was because I was black that they were doing it. I had to walk home and people would try to run me off the road. There were other kids that had to walk by the white

fraternity houses in the college town and most of them had to run home every other day just to get to their house. So yeah, I have more sensitivity to this type of thing (laugh) than some other people. So to pass the law to me, somewhere in the back of my mind I am going, "Serves you right, Delta Tau Delta" or whoever that guy was that tried to kill me when I was ten. You know, yeah, I want them to go get you, and another prosecutor might say, "What's the deal?" But yeah, maybe I am a little more sensitive to that, but the law is the law, like I said.

#### IV. DISCUSSION AND CONCLUSION

Hate crime policy illustrates the discrepancies and tensions between law-on-the-books and the enforcement of the law-on-the-ground. Although Texas legislators placed the hate crime penalty enhancement in the prosecutorial toolbox, the prosecutors' use of the tool cannot be mandated. Prosecutors have wide powers of discretion when it comes to deciding "to charge or not to charge" alleged perpetrators with a hate crime enhancement. Prosecutors consider the use of the hate crime tool based on many factors. The previous section of this article has detailed and described these factors, both acknowledged and unacknowledged, often utilizing the prosecutors' own words. The discussion will now elucidate how these factors impinge on charging hate crimes by prosecutors across the state of Texas.

Two major issues arise for prosecutors. First, since the hate crime statute is relatively new, broadly adopted in 1993 and further specified with a list of protected statuses in the James Byrd Hate Crime Act in 2001, prosecutors must determine how they will conceptualize the hate crime statute. Second, prosecutors must consider how a hate crime charge/enhancement impacts their overall pursuit of strategic advantage in trying a particular case.

This research reveals how prosecutors think about the contours of hate crime. The James Byrd, Jr. Hate Crime Act broadly defines hate crime. In light of this, prosecutors must further operationalize the definition in order to make it functional. Prosecutors in this study adopted four specific tactics in order to do so: 1) comparing cases against a typical or normal hate crime; 2) adopting Lawrence's animus model rather than the discriminatory selection model; 3) adopting the "but for" motivation standard rather than "in whole and in part;" and 4) looking for hate as the sole motivation for the crime and largely ruling out cases in which dual motives are present. By making these choices, prosecutors thus considerably narrowed the scope of potential cases that can be charged as hate crimes.

For example, gender-bias hate crimes are not usually considered for hate crime designation by Texas prosecutors, as they do not fit the "typical"

hate crime as constructed by prosecutors. Jenness (2001) termed the gender category a “second-class citizen” that has found a home in legal discourse on hate crime legislation, but remains in the guest house of that home. The study supports this observation insofar as a significant number of prosecutors in Texas were not even aware that a gender status had been included in the new law. In noting the frequency of status provisions included in hate crime, Jenness (2003) reports the “core” categories usually cited are race, religion, color, and national origin. Occurring less frequently and occupying a “second-tier” position are sexual orientation, disability, and gender. However, findings of the present study indicate that prosecutors elevate sexual orientation to the core category in their frequent, and unprompted, use of the category as an illustration of hate crime.

In addition, prosecutors have embraced Lawrence’s (1999) animus model rather than the discriminatory selection model. By their own report, prosecutors are looking for evidence of the subjective state of hate rather than the behavioral indication of differential selection based on group membership. Also, unlike Franklin’s (1998) notion of multiple determinism—that is, mixed and multiple causes of bias and prejudice that can cause someone to transgress against another based on that individual’s group membership—prosecutors have a narrow understanding of what constitutes hate crime. This again impacts the charging of gender-bias hate crimes, as prosecutors attribute violence against women to desires for power and control rather than to hate.

Although one standard of charging hate crimes offered by the FBI (1999) is when a crime is committed “in whole or in part” by a hate motivation, prosecutors in this study have informally (and perhaps unknowingly) adopted the standard of “but for,” meaning that but for the hate, the crime would not have been committed. This higher standard is applied in most charging decisions. That is, if there is another motive in the crime, such as a robbery, prosecutors seem to be less likely to include a hate crime enhancement.

The adoption of these four standards results in a process of narrowing the range of activities that—from a prosecutorial point of view—can be properly categorized as hate crime and charged accordingly. Although the use of these categorization standards is well-established in this research project, what is less known is how the prosecutors came to this understanding. What sources of information influenced their understanding? How is their understanding vulnerable to future sources of influence? Regardless, the routine use of categorization processes that narrow the range of what constitutes hate crime clearly has consequences for what gets charged as a hate crime.

The other notion this research makes clear is that prosecutors are pur-

suings strategic advantage when deciding whether to make a charge in any case. Prosecutors want to win cases and punish perpetrators. Although as one prosecutor stated, “We love to hammer defendants,” many factors weigh in their decisions, both consciously and unconsciously. Winning the case or obtaining an acceptable plea bargain is paramount; and this goal is pursued in a context defined by a cost-benefit analysis designed to determine the optimal way of achieving that goal. The ideal is a charge that is most likely to lead to conviction and less likely to be risky, to confuse or divide the jury, at the same time that it presents the lowest burden of proof for the highest punishment.

Unfortunately for hate crime law advocates, the prosecutorial pursuit of strategic advantage in hate crime cases often is antithetical to the pursuit of a hate crime penalty enhancement. That is, prosecutorial norms and routine practices often preclude a hate crime charge, which is frequently viewed as an impediment to strategic advantage. Prosecutors are not accustomed to proving motive, and hate crime enhancements rest exclusively on the motive of the perpetrator. Prosecutors desire the lowest charge for the highest payoff, and many times hate crime enhancements add to their burden without increasing their reward, especially in first-degree felony cases. The ability to address a bias motivation in the punishment phase rather than the guilt/innocence phase, which removes risk while potentially gaining increased punishment via jury outrage rather than penalty enhancement, also acts against the charging of hate crimes.

Additionally, the worldviews of prosecutors often stand in opposition to the worldview of hate crime policy advocates. For instance, prosecutors focus on individualized notions of justice, while hate crime acknowledges victims and perpetrators as members of a group. Hate crime focuses on the context of the group, primarily based on their history of oppression and discrimination, while prosecutors focus on “just the facts” of the case, without regard for the historical and societal context. Prosecutors are most likely to view the world and their cases through a colorblind lens, while hate crime policy supporters emphasize the social identities of the victim and perpetrator. Prosecutors see people of a particular category as both victims and perpetrators, while hate crime policy supporters view people with dominant statuses as perpetrators and people in targeted statuses as victims. Prosecutors focus on how much a crime is “worth” to the entire community, while hate crime policy supporters focus on how much the crime is “worth” to the targeted community. For prosecutors, the stated goal is justice for all, while the goal of hate crime policy supporters is justice for those who historically have been oppressed.

In sum, the stringent standards the prosecutors in this study have knowingly or unknowingly adopted in viewing hate crimes result in the

narrowest of readings of hate crime law and limited additions of penalty enhancements. Few cases meet this stringent standard and, ironically, the few that do are—and perhaps will continue to be—subject to a Catch-22. That is, if a case reaches the level the prosecutor demands, it is likely to be an egregious, first-degree felony, where an enhancement does not provide more punishment, and thus is unlikely to provide a strategic advantage. However, prosecutors report being willing to use the law if the facts and proof of those facts support a hate crime enhancement while also providing a strategic advantage. In fact, some prosecutors expressed a willingness and eagerness to make such a charge. However, the high standards of hate crime categorization prosecutors have adopted, in addition to the ambiguity that often accompanies such cases and the need to prove the motive as well as the underlying crime, make charges less likely.

#### NOTES

1. For publication in the *Journal of Hate Studies*.
2. Covered extensively in the national media, the murder of James Byrd, Jr.—a 49-year-old black man who was beaten and then dragged to his death behind a truck by three white men known to be affiliated with a white supremacist group—was talked about as a hate crime, but not prosecuted as such.
3. The language in this bill was changed from “sexual orientation” to “sexual preference” in an effort to appease some legislators.

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