

# ENFORCING BIAS-CRIME LAWS WITHOUT BIAS: EVALUATING THE DISPROPORTIONATE- ENFORCEMENT CRITIQUE

FREDERICK M. LAWRENCE\*

## I

### INTRODUCTION

Beware the critique based in a desire to protect the audience from itself. One of the standard arguments asserted by those who have challenged the efficacy, propriety, and legality of bias-crime laws is that these laws will harm the very people they are designed to protect. This disproportionate-enforcement critique argues that bias-crime laws, as implemented, will disproportionately be used against minority defendants and will otherwise cause disproportionate harm to minority groups.<sup>1</sup>

This essay addresses the disproportionate-enforcement critique on a number of levels and concludes that there is insufficient basis to accept the critique, that the critique is largely based on a misunderstanding of the goal of bias-crime laws, and that, although the critique should make us mindful of the potential for disproportionate enforcement of the criminal laws generally, it ought not to call into serious question the overall project of enforcing laws against bias-motivated violence.

After introducing the overall context of bias-crime laws, this essay first reviews the disproportionate-enforcement critique and offers a typology of the criticisms it encompasses. On examination, some of these criticisms are shown

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\* Law Alumni Scholar and Professor of Law, Boston University School of Law.

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1. Bias crimes are motivated by group-based animus. Different bias-crime laws cover different groups. In the United States, every bias-crime law covers race and ethnicity in some form. Many also include religion, while some cover sexual orientation, gender, or other characteristics. The particular concern of the disproportionate-enforcement critique is bias crimes of racially or ethnically motivated violence. In this essay, the general term “bias crime” will be used, intended to refer only to these race- and ethnicity-based crimes.

to be based not on a concern with disproportionate enforcement, but, ironically, on a concern with proportionate enforcement. The difficulty facing most of the critics, however, is the absence of empirical support for their assertions and concerns. Nor is this absence surprising. The serious and systemic difficulties in obtaining support for any sustained empirical argument where bias crimes are concerned are the subject of the next part of this essay. After reviewing these difficulties, this essay analyzes the data available from the federal government and from three major cities to evaluate the strength of the disproportionate-enforcement critique. It suggests there is reason to reject the critique and that the one significant effort to support the critique empirically is ultimately unconvincing. In addition, it suggests that there is reason, albeit softer, to affirmatively support the converse of the disproportionate-enforcement critique: Subject to the general concerns of disproportionate representation of minorities in our criminal justice system discussed elsewhere in this Symposium, bias crimes can be prosecuted and punished without discrimination. Simply put, if we are to root out the effects of racism, both conscious and unconscious, in the criminal justice system, the enforcement of bias crimes is the wrong place to start, and perhaps even the wrong place to look altogether.

## II

### THE NATURE OF BIAS CRIMES

Bias crimes are the criminal manifestation of prejudice.<sup>2</sup> They may be distinguished from parallel crimes—crimes that are similar in all manners but for the absence of bias-motivation—by the mental state of the actor as well as the nature of the harm caused. A parallel crime may be motivated by a variety of factors whereas bias crimes are motivated by a specific, personal and group-based reason: the victim's real or perceived membership in a particular group. Different bias-crime laws cover different groups. In the United States, every bias-crime law covers race and ethnicity in some form. Many also include religion, while some cover sexual orientation, gender, or other characteristics.<sup>3</sup>

Bias crimes affect victims not only physically, but also at the very core of their identity, creating a sense of vulnerability heightened beyond that normally found in crime victims. Perhaps most dramatically, victims of bias crimes experience their attack as a form of violence that manifests racial stigmatization and its resulting harms.<sup>4</sup> The stigmatized individual may experience both

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2. For a more detailed discussion of the nature of bias crimes, their cause, and their resulting harms, see FREDERICK M. LAWRENCE, *PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW* 29–44 (1999) [hereinafter LAWRENCE, *PUNISHING HATE*].

3. I have discussed elsewhere the legal and social implications of a legislative determination of the scope of bias crimes. *See id.* at 11–20. This essay uses “group” as the generic term for the categories encompassed by any particular bias-crime statute.

4. *See, e.g.*, GORDON ALLPORT, *THE NATURE OF PREJUDICE* 148–49 (1954); ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* 7–17, 130–35 (1963); ROBERT M. PAGE, *STIGMA* 1 (1984); Harold W. Stevenson & Edward C. Stewart, *A Developmental Study of Racial Awareness in Young Children*, 9 *CHILD DEV.* 399 (1958).

clinical<sup>5</sup> and social symptoms.<sup>6</sup> Bias-motivated violence carries with it the clear message that the targets and their groups are of marginal value.<sup>7</sup> Group-motivated crimes thus inflict psychological harm to victims over and above that caused by parallel crimes.<sup>8</sup>

The impact of bias crimes reaches beyond the harm done to the immediate victim or victims of the criminal behavior. There is a more widespread impact on the “target community” and an even broader harm to the general society. Members of the target community do more than sympathize or even empathize with the immediate bias-crime victim.<sup>9</sup> They may perceive the crime as a direct, personal attack. A cross-burning or a swastika-scrawling directed at one victim will not simply call up feelings of sympathy on the part of other blacks or Jews. Rather, members of these target communities may experience reactions of actual threat and attack from this event.<sup>10</sup>

Finally, the impact of bias crimes may be felt in the general society. Such crimes violate not only society’s general concern for the security of its members and their property, but also the shared values of equality and racial and religious harmony in a multicultural society.<sup>11</sup>

This societal harm is, of course, highly contextual. One could imagine a society in which racial motivation for a crime would endanger no greater value in society than a criminal act motivated solely by the perpetrator’s dislike of the victim’s eye color. This notion of contextuality in turn helps us understand which categories of victims should be protected by a bias-crime law. The characteristics that ought to be included are those that implicate societal fissure lines—divisions that run deep in the social history of a culture. In the United States, the strongest case for inclusion is for race. Racial discrimination, the greatest U.S. dilemma, has its roots in slavery, the greatest U.S. tragedy.<sup>12</sup> Strong cases can also be made for the other classic bias-crime categories of color, ethnicity, religion, and national origin. The very act of determining which

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5. See, e.g., KENNETH CLARK, *DARK GHETTO: DILEMMAS OF SOCIAL POWER* 82–90 (1965); Earnest Harburg et al., *Socio-Ecological Stress, Suppressed Hostility, Skin Color, and Black-White Male Blood Pressure: Detroit*, 35 *PSYCHOSOMATIC MED.* 276, 292–94 (1973).

6. See, e.g., HARRY H. L. KITANO, *RACE RELATIONS* 125–26 (1974); IRWIN KATZ, *STIGMA: A SOCIAL PSYCHOLOGICAL ANALYSIS*, (1981); Ari Kiev, *Psychiatric Disorders in Minority Groups*, in *PSYCHOLOGY AND RACE* 416, 420–24 (Peter Watson ed., 1973).

7. ALLPORT *supra* note 4, at 57–59 (discussing the degrees of prejudicial action: from “antilocution,” to discrimination, to violence).

8. LAWRENCE, *PUNISHING HATE*, *supra* note 2, at 39–41.

9. See, e.g., MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* 221 (1990) (stating the importance of empathy in combating discrimination in the United States).

10. See, e.g., ROBERT ELIAS, *THE POLITICS OF VICTIMIZATION* 116 (1986); ANDREW KARMEN, *CRIME VICTIMS: AN INTRODUCTION TO VICTIMOLOGY* 262–63 (2d ed. 1990); JACK LEVIN & JACK MCDEVITT, *HATE CRIMES: THE RISING TIDE OF BIGOTRY AND BLOODSHED* 205, 220–21, 234 (1993).

11. See LAWRENCE, *PUNISHING HATE*, *supra* note 2, at 43–44.

12. E.g., ANDREW HACKER, *TWO NATIONS, BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* 4–6 (1992); JENNIFER L. HOCHSCHILD, *FACING UP TO THE AMERICAN DREAM: RACE, CLASS AND THE SOUL OF THE NATION* (1996).

groups will be included in a bias-crime law is a legislative, and thus social, determination of a society's fissure lines.

### III

#### THE CRITICS AND THE CRITIQUE

The disproportionate-enforcement critique of bias-crime laws takes a variety of forms, but its essence is the argument that members of minority groups are more likely to be arrested, convicted, and punished as bias-criminals than are whites. This argument can be understood either in a "false positive" or "false negative" context. Were there no disproportionate enforcement, all bias-criminals—whites and members of ethnic minorities—would be convicted of bias crimes (no false negatives) and *only* bias-criminals would be convicted of bias crimes (no false positives). The disproportionate-enforcement critique argues either (or both) that white bias-criminals are less likely to be punished under bias-crime laws than are minority bias-criminals, or that members of ethnic minority groups who are innocent of bias crimes (whether or not guilty of the parallel offense) are more likely to be punished for having committed bias crimes than are whites.<sup>13</sup>

A concern about racially disproportionate use of bias-crime law has been advanced by those who are highly critical of this legislation generally as well as by those who tend to be sympathetic to the bias-crime project. What most have in common, however, is a tendency to argue by assertion and not demonstration, and by conclusion and not by proof.<sup>14</sup>

Professor James Jacobs, a noted critic of bias-crime laws,<sup>15</sup> espoused the disproportionate-enforcement critique in an early treatment of the subject. He raised the concern that "new bias laws will be used more against minority groups than against the white majority," and, without any empirical support, added that "[t]his has apparently been the case in Britain."<sup>16</sup> Similarly, Profes-

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13. The reverse argument, that bias-crime laws will be disproportionately enforced against *white* offenders, has generally not been asserted by academic critics of bias-crime laws, although it has received some attention in the popular press. See, e.g., John Leo, *When Rules Don't Count Double Standards Are Accident; They Arise From a Theory*, U.S. NEWS & WORLD REP., Aug. 7, 2000, at 2 (arguing that bias-crime enforcement is based on a "double standard" and will be disproportionate against whites); Clarence Page, *Hate-Crime Laws Not for 'Whites Only,'* CHI. TRIB., July 16, 2000, at 17 (expressing doubt that bias-crime laws are disproportionately enforced against whites but giving credence to the concern). This essay deals directly with the disproportionate-enforcement critique concerned with over-enforcement *against* minority group members. Many of the observations disputing the critique, however, apply equally to this "reverse" argument.

14. For a noted exception to this trend, see Christopher Chorba, Note, *The Danger of Federalizing Hate Crimes: Congressional Misconceptions and the Unintended Consequences of the Hate Crimes Prevention Act*, 87 VA. L. REV. 319, 360-71 (2001), arguing that a federal bias-crime law would inevitably result in disproportionate impact on blacks. As discussed below, the questionable reliability of meaningful data concerning the incidence levels of bias crimes at least calls into question some of the Note's conclusions. See *infra* text accompanying notes 33-55.

15. See, e.g., JAMES B. JACOBS & KIMBERLY POTTER, *HATE CRIMES: CRIMINAL LAW AND IDENTITY POLITICS* (1998).

16. James B. Jacobs, *Rethinking the War Against Hate Crimes: A New York City Perspective*, CRIM. JUST. ETHICS, Summer/Fall 1992, at 55, 60.

sor James Weinstein has written that “hate crime laws promise to be difficult to administer, may well be counterproductive in that they might be used disproportionately against the very minority groups they were primarily designed to protect, and to some limited extent may even deter protected speech.”<sup>17</sup>

Wisconsin Supreme Court Justice Shirley Abrahamson, citing Professor Jacobs for support, expressed the concern that “many persons also fear that hate crime laws will ultimately be used against the very groups they are designed to protect, and this case illustrates that phenomenon.”<sup>18</sup> Justice Abrahamson’s views are of particular interest because the case she refers to is *Wisconsin v. Mitchell*, in which she authored the dissenting opinion.<sup>19</sup> *Mitchell* concerned the constitutionality of the Wisconsin penalty enhancement bias-crime law. While the majority of the Wisconsin Supreme Court struck the statute down as an unconstitutional infringement on free speech,<sup>20</sup> the United States Supreme Court reversed,<sup>21</sup> making Wisconsin’s bias-crime law the first to be endorsed by the Supreme Court. In her dissent, Justice Abrahamson took the unusual step of expressing her own view that “[h]ad I been in the legislature, I do not believe I would have supported [the penalty enhancement] statute because I do not think this statute will accomplish its goal.”<sup>22</sup> She nonetheless found the statute to be a constitutional exercise of the legislature’s power,<sup>23</sup> a finding ultimately shared by the United States Supreme Court. In her subsequent writing on the subject, Justice Abrahamson raised the disproportionate-enforcement critique: “It appears that hate crime statutes may be disproportionately enforced against minority group members such as Todd Mitchell.”<sup>24</sup>

In referring to the case of Todd Mitchell, Justice Abrahamson may have been searching for support for an intuitive concern with disproportionality that lacked empirical grounding. The respective races of the victims and perpetrators in the two bias-crime cases that the U.S. Supreme Court decided in the past decade are worthy of note, if ultimately inconclusive. In *R.A.V. v. City of St. Paul*,<sup>25</sup> the Court struck down a municipal ordinance prohibiting cross burning, and in so doing raised serious doubts concerning the legality and continued vitality of bias-crime laws generally.<sup>26</sup> These doubts were largely resolved when the Court upheld the Wisconsin bias-crime law the following year in *Mitchell*. In *R.A.V.*, Robert Viktora burned a cross on the lawn of Russell and Laura Jones and their family; the defendant was white and the victims were black. In

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17. James Weinstein, *First Amendment Challenges to Hate Crime Legislation: Where’s the Speech?* CRIM. JUST. ETHICS, Summer/Fall 1992, at 6, 17.

18. Shirley Abrahamson et al., *Words and Sentences, Penalty Enhancement For Hate Crimes*, 16 U. ARK. LITTLE ROCK L. REV. 515, 525 n.38 (1994).

19. 485 N.W.2d 807, 818, (Wis. 1992) (Abrahamson, J., dissenting), *rev’d*, 508 U.S. 476 (1993).

20. *Mitchell*, 458 N.W.2d at 817.

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

22. *Mitchell*, 485 N.W.2d at 818.

23. *Id.* at 819.

24. Abrahamson et al., *supra* note 18, at 525–26.

25. 505 U.S. 377 (1992).

26. LAWRENCE, PUNISHING HATE, *supra* note 2, at 31–32.

the Wisconsin case, Todd Mitchell encouraged a group of young men and boys to attack Gregory Riddick; the defendant and his accomplices were black and the victim was white. Much can be made of the consistency or inconsistency of these two celebrated Supreme Court bias-crime holdings, but it is hard to argue that the race of the parties alone explains the two outcomes. The Court itself distinguished the cases on a “speech vs. conduct” theory, holding that the cross-burning ordinance in *R.A.V.* had punished speech or thought, while the penalty enhancement statute in *Mitchell* punished conduct.<sup>27</sup> Others have questioned the usefulness of the speech–conduct distinction in this context and distinguished the cases on other grounds.<sup>28</sup> The racial differences in the two cases offer a tempting surrogate for a firmer empirical grounding for those making the disproportionate-enforcement critique.

The disproportionate-enforcement critique has also been proposed by those who have otherwise expressed support, however muted, for identifying crimes of bias-motivation or enhancing the punishment of such crimes. Professor Martha Minow, for example, in an essay weighing the arguments for and against criminal prohibitions on bias crimes and hate speech, asserted that:

Agents entrusted to enforce laws restricting hateful and subordinating speech rely upon their own perceptions about what precisely is hateful and subordinating—and those perceptions inevitably will be partial, and potentially even discriminatory against the least powerful or most vulnerable members of the society. . . . Thus, the case against hate speech and hate crime regulations rightly points out the dangers of selective enforcement, with a likely disparate impact on the weakest and the most minority members of society.<sup>29</sup>

The critique here relies not upon specific empirical findings but rather on the general concern that providing additional tools to the criminal justice system will tend to further disadvantage those groups already politically marginalized.

Understandably, where data are hard to come by, broad legal or sociological generalizations will fill the gap. Before discussing why data are so incomplete in this area, and analyzing some of the data that are available, one additional observation about the disproportionate-enforcement critique should be made. Further support for the critique comes not from any evidence of disproportionality, but rather from a concern about the possible impact of proportional enforcement of laws against bias crimes. Professor Jacobs, for example, has expressed fear that even proportional enforcement of bias-crime laws, against minority as well as majority defendants, would have a negative impact on minority group members and on inter-group relations in society more generally:

It is a little discussed fact of today’s multiracial society that among interracial crimes (which are greatly outnumbered by intraracial crimes) those perpetrated by blacks and latinos against whites outnumber those perpetrated by whites against blacks and latinos. Given the intense societal fears of minority street crimes, it would not be surprising to see new hate crime laws used against minority offenders thereby reinforcing

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27. *Mitchell*, 508 U.S. at 487–88.

28. See, e.g., LAWRENCE, PUNISHING HATE, *supra* note 2, at 89–92, 94–102.

29. Martha Minow, *Regulating Hatred: Whose Speech, Whose Crimes, Whose Power?* in *BREAKING THE CYCLES OF HATRED: MEMORY, LAW, AND REPAIR* 31, 41 (Nancy L. Rosenblum ed., 2002).

negative stereotypes and again triggering a downward rather than upward spiral in inter-group relations. That would be a travesty and a tragedy.<sup>30</sup>

Professor Minow has suggested that because “[t]here may even be reasons to suspect that members of maltreated minority groups may be more likely to engage in escalating violent reactions against those they hate” and because “this hate itself (though not the violence) may be understandable, even justifiable, in a world offering them insufficient social and legal protections[,] [t]he targeting of hate-motivated crimes thus may have a disparate impact on members of mistreated minority groups.”<sup>31</sup>

The disproportionate-enforcement critique is generally sympathetic to the goals articulated by advocates of bias-crime enforcement, and that is critical because of the concern that bias-crime laws will hurt those whom they are meant to help. This is true both in its direct concern with disproportionate enforcement—arguing that bias-crime laws will be over-enforced *against* minorities, and thus under-enforced in cases with minority victims—and in its ironic concern with the *disproportionate* impact of *proportionate* enforcement.<sup>32</sup> The critique, however, has lacked an empirical basis. To some extent, this is understandable because of the difficulty in obtaining data from which to establish a baseline against which to measure claims of disproportionality.

#### IV

##### CHALLENGES IN ESTABLISHING A BASELINE

Any claim about proportionality of enforcement requires a baseline. Only if we know what proportion of bias crimes are committed by members of various racial or ethnic groups can we determine whether the enforcement of bias-crime laws is proportionate. Before turning to an analysis of the statistics we do have on this question, it is worthwhile to consider the systemic problems with respect to data on bias crimes.<sup>33</sup>

##### A. Particular Problems in Compiling Bias-Crime Data

Statistics gathered by both independent and governmental data-gathering organizations remain inconsistent and incomplete. For example, in 1990, Klan-watch, the data-gathering arm of the Southern Poverty Law Center (“SPLC”), reported that homicides linked to white supremacists or bias motivation had

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30. Jacobs, *supra* note 16, at 60; *see also* Chorba, *supra* note 14, at 364–69, 371–76 (noting that parallel crimes that are associated with bias crimes are disproportionately committed by minority group members).

31. Minow, *supra* note 29, at 41.

32. The distinction between the true disproportionate-enforcement critique, which is based on a concern with disproportionate enforcement, and a disproportionate *effect* critique, which is concerned with proportionate enforcement leading to a disproportionate effect, is analyzed below in great detail. *See infra* text accompanying notes 59–61.

33. This discussion of the systemic difficulties with respect to obtaining reliable data on bias-crime level is drawn from LAWRENCE, PUNISHING HATE, *supra* note 2, at 20–28.

more than tripled since 1989, reaching a total of twenty.<sup>34</sup> By 1993, Klanwatch noted a “shocking reversal” in the racial profile of the perpetrators and victims of these deadly crimes.<sup>35</sup> Though whites were charged with all of the racially-motivated slayings in 1989 and all but one in 1990, of the fifty-eight such slayings reported nationwide from 1991 to 1993, law enforcement officials charged African Americans with twenty-seven—a full forty-six percent.<sup>36</sup> This shift in the African-American role in bias-crime, from victim-only to victim and perpetrator, marked a significant departure from traditional perceptions of the bias crimes. Minorities were no longer only victims and whites no longer only victimizers.

This surprising shift in bias-crime demographics, however, elicited charges of inaccurate reporting from numerous bias-crime experts and commentators. For instance, Reverend Joseph A. Lowery, President of the Southern Christian Leadership Conference, questioned the Klanwatch figures and cited the inclusion of a resistant robbery victim as an example of erroneous recording.<sup>37</sup> In this case, Lowery explained, the African-American robbers probably killed their victim not because he was white but because he had attempted to intercede during the commission of the robbery. Hence, Klanwatch incorrectly labeled this homicide as bias-motivated.<sup>38</sup>

In an effort to provide trustworthy statistics for bias-crime observers and simultaneously to address flourishing concern over the bias-crime problem, Congress, in 1990, passed the Hate Crime Statistics Act (“HCSA”).<sup>39</sup> Under this Act, the Department of Justice must collect statistics on the incidence of bias crimes in the United States as a part of its regular information-gathering system.<sup>40</sup> The Attorney General delegated the development and implementation of the HCSA to the Federal Bureau of Investigation’s (“FBI”) Uniform Crime Reporting Program for incorporation among its 16,000 voluntary law enforcement agency participants.<sup>41</sup> Accordingly, the FBI initiated intensive education and training of state and local law enforcement personnel in the investigation, identification, reporting, and appropriate handling of bias crimes.<sup>42</sup>

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34. Charles Lewis Nier III, *Racial Hatred: A Comparative Analysis of the Hate Crime Laws of the United States and Germany*, 13 DICK. J. INT’L L. 241, 263 (1995); *The Face of Hatred in America*, CHRISTIAN SCI. MONITOR, Nov. 27, 1991, at 8.

35. *Around the South Hate Crimes by Blacks Soar, Anti-Klan Group Says*, ATLANTA CONST., Dec. 14, 1993, at A3.

36. *Id.*

37. *Id.*

38. *Id.*

39. Hate Crime Statistics Act, 28 U.S.C. § 534 (2000).

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

41. *The Implementation and Progress of the Hate Crimes Statistics Act: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 103 Cong., S. Hrg. 103-1078 at 17 (1994) (statement of Steven L. Pomerantz, Asst. Director, Criminal Justice Information Division, Federal Bureau of Investigations).

42. *Id.*



Since the HCSA's implementation in 1991, the FBI documented a general rise and then plateau in the incidence of bias crimes, with a dramatic increase in 2001. The data collected under the HCSA reveal the following number of bias-crime incidents:

TABLE 1:  
HCSA BIAS-CRIME INCIDENTS<sup>43</sup>

Year	Incidents
1991	4,558
1992	7,442
1993	7,684
1994	7,498
1995	7,947
1996	8,759
1997	8,049
1998	7,755
1999	7,876
2000	8,063
2001	9,730

These figures, like those reported by other data-gathering organizations, remain vulnerable to charges of inaccuracy. Because the FBI's numbers simply mirror those reported by state and local law enforcement agencies, and because agency participation under the HCSA is voluntary, the completed data more closely reflect popular perception of the bias-crime problem than the actual magnitude of the problem itself. For example, the near seventy-percent increase in bias-crime incidents reported between 1991 and 1993 evidences a simultaneous increase in the reporting of such crimes. Specifically, only 2,771 police departments in thirty-two states participated in data collection and reporting in 1991, while in 1993, 6,840 police departments in forty-six states and the District of Columbia did so.<sup>44</sup> In 1994, the first year of a decline in FBI bias-crime statistics, Massachusetts, Alabama, and Kansas—states that had previously reported bias crimes to the FBI—did not participate in the annual survey. If Massachusetts alone had participated in the 1994 survey, 808 bias-crime inci-

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43. FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS, HATE CRIME STATISTICS (1991–2001), *available at* <http://www.fbi.gov/ucr/ucr.htm> [hereinafter HATE CRIME STATISTICS]. The statistics in the text refer to bias-crime “incidents,” each of which may be composed of multiple bias-crime offenses. The variation in incidents reported and measured, discussed in the text, is the relevant factor in assessing the overall accuracy of the statistics.

44. HATE CRIME STATISTICS (1991, 1993).

dents would have been added to that year's total, yielding an overall number of 8,306—a 7.5% increase over 1993.<sup>45</sup>

In addition to such inconsistent reporting, the FBI's data also suffer from consistent under-reporting: Although nearly 7,000 agencies participated under the HCSA in 1993 and 1994, over 9,000 agencies throughout the country failed to report altogether, many of them located in major urban centers.<sup>46</sup> In 1999 and 2000, the number of agencies reporting reached its highest level, with 11,690 in 2000, and 12,122 in 1999.<sup>47</sup> This still leaves a remarkable number of non-reporting agencies. Levels of reporting have improved significantly over time. The roughly seventy-five percent of agencies that reported in 1999, for example, represented approximately eighty-five percent of the nation's population. This eighty-five percent figure, however, is deceptive. In 1999, Alabama—a state that might well be expected to have at least an average number of bias crimes—did not report. Other, similar states arguably underreported. (Mississippi reported two bias offenses, Louisiana reported seven, and Arkansas reported nine; by comparison, Rhode Island reported forty offenses and Washington State reported three hundred.)<sup>48</sup> As a result, even with improvement in data gathering over time, it remains difficult to draw reliable nationwide conclusions on the basis of HCSA data because law enforcement participation has not yet reached an optimum, or even representative, level.

There is a mutual-feedback relationship between the bias-crime problem and both the popular perception and official response to the problem. A perceived increase in bias crime as fostered by independent data-gathering and reporting leads to increased public concern regarding such crimes. Such concern leads, in turn, to legislative and administrative response, to increased official reporting and, in effect, to an even greater perceived increase in bias crime. Thus, problem and perception conflate, and the apparent growth in bias crime becomes not simply a reflection of increased hatred and apathy (as the statistics alone would suggest), but also an indication of increased understanding and action (as the increased response to the problem suggests).<sup>49</sup>

On the other hand, some organizations, including the National Institute Against Prejudice and Violence, report that, despite increased bias-crime reporting by police agencies, the majority of bias-crime victims do not report

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45. See Sally J. Greenberg, *The Massachusetts Hate Crime Reporting Act of 1990: Great Expectations Yet Unfulfilled?*, 31 NEW ENG. L. REV. 103, 125 n.107 (1996).

46. *The Implementation and Progress of the Hate Crimes Statistics Act: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 103 Cong., S. Hrg. 103-1078 at 49 (1994) (statement of Robert Machleder, Chariman of the ADL New York Regional Board).

47. HATE CRIME STATISTICS (1999, 2000), *supra* note 43.

48. HATE CRIME STATISTICS (1999), *supra* note 43.

49. See, e.g., JAMES B. JACOBS & KIMBERLY POTTER, HATE CRIMES: CRIMINAL LAW AND IDENTITY POLITICS 45-64 (arguing that the "epidemic" of bias crimes is in fact a social construction created through a mutual feedback relationship among advocacy groups, media, scholars and politicians); *Statement of the Anti-Defamation League on Bias-Motivated Crime and H.R. 1082—The Hate Crimes Prevention Act August 4, 1999*, 21 CHICANO-LATINO L. REV. 53, 54, 63-64 (2000) ("[S]tudies demonstrate that victims are more likely to report a hate crime if they know a special reporting system is in place.").

incidents at all.<sup>50</sup> In fact, “[d]ue to factors such as [the victim’s entrenched] distrust of the police, language barriers, the fear of retaliation by the offender, and the fear of courting exposure,” even organized attempts to collect bias-crime data, such as the HCSA, probably fail to provide an accurate count and adequate description of bias-motivated crimes in the United States.<sup>51</sup> Some bias-crime victims may view the incidents as simply too minor to report, thus skewing the statistics even further. Given that intimidation constitutes the most frequently perpetrated bias behavior, and given that intimidation sometimes appears “minor,” the problem of under-reporting takes on even greater urgency.<sup>52</sup> Under-reporting by law enforcement agencies, coupled with under-reporting by victims, combine to produce drastic under-reporting of bias crimes in general.

In light of these incomplete data, we must also look to social trends to determine bias-crime incidence levels. The SPLC attributes an increase in the number of hate groups to communication among racist groups through the Internet, and to the broader dissemination of hate-oriented music with lyrics advocating violence against minorities.<sup>53</sup> Perhaps indicative of the authenticity of this rise are the criminological observations that white teenage males are, both historically and currently, the “most common [perpetrators] of hate crime,”<sup>54</sup> in tandem with the propensity among some groups of teen-agers

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50. Abraham Abramovsky, *Bias Crime: A Call for Alternative Responses*, 19 FORDHAM URB. L. J. 875, 885 (1992); Jonathan S. Landay, *Rise in Hate Crimes Looms Behind Church Burnings*, CHRISTIAN SCI. MONITOR, June 28, 1996, at 4.

51. Fernandez, *supra* note 40, at 291; Steven Bennett Weisburd & Carl Levin, “*On the Basis of Sex*” *Recognizing Gender-Based Bias Crimes*, 5 STAN. L. & POL’Y REV. 21, 26 (1994) (“Victims often fail to report bias crimes because of fear, embarrassment, shame, distrust, a sense of futility and a belief that authorities are unconcerned.”); American Psychological Association, *Hate Crimes Today: An Age-Old Foe In Modern Dress*, at <http://www.apa.org/pubinfo/hate/homepage.html> (last visited April 28, 2003) (“In fact, [bias-crime victims] are much less likely than other victims to report crimes to the police, despite—or perhaps because of—the fact that they can frequently identify the perpetrators. This reluctance often derives from the trauma the victim experiences, as well as a fear of retaliation.”).

52. Peter Finn, *Difficult to Define, Difficult to Prosecute: New Laws and Techniques that are Putting Violent Bigots Behind Bars*, 3 CRIM. JUST. 19, 19 (1988) (finding that attempts to gather data on hate crimes are seriously deficient because victims fail to report incidents due to distrust of police, belief that crimes are minor, existence of language barriers, fear of retaliation by the perpetrator, or “wish to avoid public exposure of their minority status”); *see also ADL’s HCSA Oversight Hearings*, *supra* note 44.

53. *The Year in Hate*, KLANWATCH INTELLIGENCE REP., Winter 1998, available at <http://www.splcenter.org/intelligenceproject/ip-index.html>.

54. Jack McDevitt, et al., *Hate Crime Offenders: An Expanded Typology*, 58 J. OF SOC. ISSUES 303, 311 (2002) (finding also that teens and young adults are most associated with committing defensive, retaliatory and thrill-based bias crimes); *see also* Scott Hirschfeld, *Moving Beyond The Safety Zone: A Staff Development Approach to Anti-Heterosexist Education*, 29 FORDHAM URB. L.J. 611, 614 (2001) (“Statistics show that the majority of hate crimes are committed by white teenage males. In a nationwide study of lesbian and gay hate crimes, ninety-seven percent of hate crime offenders were male.”); Laurent Bennett, *The Face of Hatred in America*, CHRISTIAN SCI. MONITOR, Nov. 27, 1991, at 8 (stating that, of twenty racially-motivated murders committed in 1990, over half the suspects were under twenty-one years of age); Indira A.R. Lakshmanan, *Hate-Crime Reports Rise in Boston*, BOSTON GLOBE, June 20, 1994, at 1A (quoting Professor Jack McDevitt saying, “[This is] the most racist and sexist generation of high school kids I’ve ever seen . . .”). *See generally* LEVIN & MCDEVITT, *supra* note 10.

toward racial hostility and the acceptance of violence as a means of dispute resolution.<sup>55</sup> Though these observations create something of a tautology (white teenage males commit more bias crimes because they are racist and violent; because they commit more bias crimes, white teenage males appear racist and violent), they nonetheless point to a disturbing trend: Individuals more apt to commit bias crimes now occupy the age cohort most likely to commit such crimes.

This trend, however, reveals an internal irony. Although white teenage males commit most bias crimes generally, and most violent bias crimes specifically, they often cite reasons other than actual bias as their true motivation. The invocation of racial or religious slurs often reflects the perpetrator's "larger insecurities, frustrations, petty rivalries, hostilities and other emotions that are a part of coming of age."<sup>56</sup> Thus, rather than accurately depicting bigoted beliefs, bias behavior actually masks deeper and largely dissimilar feelings of personal inadequacy.<sup>57</sup> In effect, the increase in teenage-perpetrated crimes that appear to be bias-motivated may stem from overestimating cases of actual bias motivation and may, therefore, fail to indicate a true worsening of the bias-crime problem.

It is thus not possible to know with confidence the extent to which bias crimes are increasing and, if so, among which racial or ethnic groups. Although we may make general observations concerning trends, the effort to establish a firm baseline from which to assess the proportionality of bias-crime law enforcement is necessarily one of approximation, not one of precision. With these cautionary notes in mind, we proceed to a consideration of the data from several police departments that allow us to evaluate, to some degree, the disproportionate-enforcement critique.

#### B. Are We Enforcing Bias-Crime Laws Without Bias?

Most disproportionate-enforcement critics do not advance empirical support for their arguments and, for the reasons discussed above, this omission is not surprising. Any claim of racially disproportionate enforcement of bias-crime laws requires a baseline of bias-crime perpetrators by race or ethnicity. No such baseline is available. Here it is worthwhile to return to the distinction between the two versions of the disproportionate-enforcement critique outlined above<sup>58</sup> and to articulate this distinction rigorously. Only one of these versions states that bias-crime laws will be enforced more vigorously, that is *disproportionately*, against ethnic minorities. This is a true critique of disproportionate enforcement because it argues that bias-crime laws are enforced against members of

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55. LEVIN & MCDEVITT, *supra* note 10, at 118–21 (asserting that contemporary youths are more violent than their predecessors and therefore resolve ethnic and racial differences with violence).

56. *Students Say Racial Slurs Go Beyond Hatred*, N.Y. TIMES, June 26, 1995, at B2 (discussing incidents manifesting bias among students at Norman Thomas High School in New York City and Greenwich High School in Greenwich, Connecticut that occurred in the spring of 1995).

57. *Id.*

58. *See supra* text accompanying notes 30–32.

ethnic minority groups more than they *should* be. Perfect enforcement would involve a regime under which all bias crimes, and only bias crimes, would be prosecuted as bias crimes, and lead to convictions for bias crimes. A deviation from perfect enforcement that was random with respect to race would still yield a proportionate—albeit imperfect—bias-crime enforcement system.

Consider the following simple model, for example, involving only whites and blacks, in which we know that one hundred bias crimes have been committed and that whites have committed three-fourths of these crimes. In a perfect enforcement model, all one hundred crimes will be prosecuted as bias crimes and will lead to convictions. In an imperfect but still proportional model, roughly three-fourths of those investigated, prosecuted, and convicted of bias crimes will be white, and one-fourth black, even though not all one hundred bias-criminals will be apprehended, and perhaps some non-bias-criminals will be wrongfully charged with having committed a bias crime. In a racially disproportionate enforcement model, enforcement levels will deviate in a statistically significant way from the expected levels of seventy-five percent white convictions, and twenty-five percent black convictions. If, for example, equal numbers of whites and blacks were investigated, prosecuted, and convicted of bias crimes, this would suggest that bias-crime laws are being relatively over-enforced against black suspects and under-enforced to protect black victims.

The true disproportionate-enforcement critique, therefore, must take as its baseline the actual levels of bias-crime occurrence by race and contrast that with the level of bias-crime enforcement by race. For the reasons discussed above, this is very difficult to do. For the reasons discussed below, it is possible to make some tentative observations in this direction. What is clear, however, is that no empirical evidence has been advanced to support this version of the disproportionate-enforcement critique.

The one disproportionate-enforcement critic who has attempted to support the argument empirically has proceeded along the lines of the other version of the disproportionate-enforcement critique.<sup>59</sup> This version does not argue that bias-crime laws are enforced against members of ethnic minorities in a way that is disproportionate to their rate of committing bias crimes, but rather that bias-crime enforcement will disproportionately affect ethnic minorities precisely because they are likely to commit more bias crimes. This argument thus does not seek the elusive baseline of actual levels of bias-crime occurrence, but rather relies on the readily ascertainable, but immaterial, baseline of total population statistics.<sup>60</sup> This is not truly a concern with disproportionate enforcement, but rather a concern with *proportional* enforcement, and it relies upon the assumption that the level of bias crimes committed by members of minority groups will be proportionally higher than the level of bias crimes committed by whites. Even if this assumption is true, the argument misses the

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59. Chorba, *supra* note 14, at 364–70.

60. *Id.* at 362–63 (arguing that “a disproportionate number of blacks commit hate crime offenses” because of the number of black offenders “relative to their percentage in the total population”).

mark. It is not in fact an argument about disproportionate *enforcement* of bias-crime law, but rather disproportionate *effect* of bias-crime law. It argues not that bias-crime law is overly enforced against minority groups but that, if properly and fairly enforced, bias-crime laws will have a proportionately larger impact on minority groups because of their greater proclivity to commit bias crimes. This cannot serve as a critique of bias-crime enforcement, since accepting this as a critique would lead to one of the following two equally problematic conclusions:

1. We should enforce all criminal laws in a manner that yields a level of prosecution among racial groups roughly proportional to the size of each group in the general population, regardless of the actual numbers in each group who commit crimes. If members of a particular ethnic group (the Purples) commit theft proportionally more than do members of another ethnic group (the Golds), we should precisely *under-enforce* the crime of theft against Purples so that the number in each group convicted of this crime mirrors their proportion in the general population. Such attention to general population levels and not criminal commission levels would itself give rise to charges of disproportionate enforcement of the laws of theft, and properly so. Proportional enforcement of the laws of theft would result in a greater proportion of Purples being convicted of theft than Golds.
2. We should not enforce a criminal law once it is determined that the crime is disproportionately committed by members of one racial or ethnic group. If, for example, murder rates were higher among blacks than whites, we should abandon the crime of murder. Although this sounds like *reductio ad absurdum*, it is in fact precisely the argument made by the one disproportionate-enforcement critic who has attempted to level an empirical attack on bias-crime enforcement. If the fact of “a large number of black offenders relative to their percentage of the total population”<sup>61</sup> is an argument against the enactment of bias-crime laws, then differing murder rates among racial groups is an argument against murder laws. The critique is misconceived.

Without a clearly established baseline of actual levels of bias-crime occurrence, the ultimate strength of a true disproportionate-enforcement critique must be left largely conjecture. In evaluating the disproportionate-enforcement critique, it is tempting to leave it at that. But more can be said, albeit tentatively. In the absence of a baseline rate of bias crimes by racial or ethnic groups, we might consider whether the trends in enforcement of bias-crime laws depart in any significant manner from the overall trends in law enforcement. Here the data—even allowing for the inconclusiveness of bias-crime data discussed above—are striking. Whatever else may be said of the enforcement of bias-crime laws, it appears to be highly consistent with overall law enforcement.

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61. *Id.* at 363.

The consistency of bias-crime enforcement with law enforcement generally is well illustrated by federal statistics. The Uniform Crime Reports for 2000, for example, reveals roughly similar racial proportions of offenders generally and bias-crime offenders, as shown in Table 2.

TABLE 2:  
ARRESTEES AND BIAS-CRIME OFFENDERS BY RACE

	Total Arrestees by Race <sup>62</sup>	Bias-Crime Offenders by Race <sup>63</sup>
White	69.7%	64.4%
Black	27.9%	18.7%

To be sure, the absence of a baseline of levels of bias-crime commission makes it impossible to draw firm conclusions from these data. If, however, there were a particular problem of over-enforcement of bias-crime laws against African Americans, one might expect a ratio of whites to blacks arrested for bias crimes significantly different than the ratio of arrests overall. This is not the case.

These national data are corroborated by the data from various localities. Consider Jeannine Bell's "Center City," the pseudonymous U.S. municipality of "between 500,000 and 900,000 residents" whose enforcement of bias-crime laws she studied in the late 1990's.<sup>64</sup> Over a period of nine months, Professor Bell observed bias-crime enforcement in "Center City" and interviewed victim advocates, bias-crime prosecutors, and police officers involved in bias-crime enforcement.<sup>65</sup> The racial breakdown of bias-crime offenders investigated by the police, shown in Table 3, mirrors the national figures.

TABLE 3:  
BIAS-CRIME INVESTIGATIONS IN "CENTER CITY" BY OFFENDERS' RACE<sup>66</sup>

White	66%
Black	24%

62. FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T JUST., UNIFORM CRIME REPORTS, CRIME IN THE UNITED STATES § IV, at 2 (2000), available at [http://www.fbi.gov/ucr/cius\\_00/00crime4.pdf](http://www.fbi.gov/ucr/cius_00/00crime4.pdf).

63. HATE CRIME STATISTICS (2000), *supra* note 43, at 6. Percentages are based on total number of offenders (7530) who were identified by race.

64. JEANNINE BELL, POLICING HATRED: LAW ENFORCEMENT, CIVIL RIGHTS, AND HATE CRIME 7-8 (2002).

65. *Id.*

66. *Id.* at 50-52 tbl.4.3 (statistics cited in text refer to racially-motivated bias crimes).

While we do not have general law enforcement figures for “Center City,” we do have a descriptive baseline provided by Professor Bell that is directly relevant to the disproportionate-enforcement critique. Over her nine-month study of the “Central City Anti-Bias Task Force,” Professor Bell “observed no pattern of differential enforcement targeting minorities for hate crime charges.”<sup>67</sup> Indeed, if anything, she observed a slight over-representation of African Americans and Latinos as victims, and a slight under-representation of those groups as perpetrators.<sup>68</sup>

Data from Los Angeles and Chicago similarly fail to confirm the disproportionate-enforcement critique and, if anything, suggest the contrary. The Los Angeles data for 2000, shown in Table 4, are quite similar to the national trend.

TABLE 4:  
LOS ANGELES COUNTY

	Total Arrestees by Race <sup>69</sup>	Bias-Crime Suspects by Race <sup>70</sup>
White	22.2%	34%
Latino	48.6%	39%
Black	24.1%	26%

The Los Angeles data show the greatest disparity between arrest rates of white offenders generally, and for bias crimes in particular. There is, however, little positive disparity where African-American suspects are concerned.

The experience with bias-crime enforcement in Chicago not only refutes the argument that bias crimes are disproportionately enforced against minority groups, it suggests that the prime targets of bias-crime investigations and prosecutions are white. The Chicago data for 2000 follow:

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67. *Id.* at 152.

68. *Id.* at 152–53.

69. CRIMINAL JUSTICE STATISTICS CTR., STATE OF CAL. DEP’T OF JUSTICE, ADULT AND JUVENILE ARRESTS REPORTED, RACE/ETHNIC GROUP BY SPECIFIC OFFENSE, LOS ANGELES COUNTY (2000), available at [http://justice.hdcdojnet.state.ca.us/cjsc\\_stats/prof00/19/22.htm](http://justice.hdcdojnet.state.ca.us/cjsc_stats/prof00/19/22.htm) (data calculated by dividing total arrestees for each racial category by the total arrestees).

70. L.A. COUNTY COMM’N ON HUMAN RELATIONS, HATE CRIME REPORT 18 (2000), available at [http://lahumanrelations.org/Hate\\_crimes/index.htm](http://lahumanrelations.org/Hate_crimes/index.htm). Data was calculated by multiplying percentage of suspects in each racial category by 100 and dividing by percentage of suspects whose races are known.



TABLE 5:  
CHICAGO

	Total Arrestees by Race <sup>71</sup>	Bias-Crime Offenders by Race <sup>72</sup>
White	11.7%	62%
Black	70.1%	34%

The large disparity between the racial breakdown of bias-criminals and arrestees generally tends to refute the suggestion that these laws are being disproportionately enforced against minority groups. The more likely explanations for these data are that bias crimes in Chicago are nearly twice as likely to be committed by a white person than a black person, that bias-crime enforcement in Chicago is particularly focused on white offenders (the very opposite of the disproportionate-enforcement critique), or that both of these propositions are true. For present purposes it is not necessary to resolve this question. It is enough to consider the impact of the experience in Chicago on the case for disproportionate enforcement, which has always lacked empirical validation.

The national and local data permit us to make a series of assertions concerning the viability of the disproportionate-enforcement critique. Some of these assertions are necessarily soft because of the inherent unreliability of bias-crime data, but other assertions may be made with somewhat greater strength.

First and foremost, one hard assertion is that these data do not support the disproportionate-enforcement critique. The difficulty in obtaining bias-crime data and drawing conclusions from these data is understandable. But if those who have advanced the theory of disproportionate enforcement wish to argue against the regime of bias-crime laws on the basis of the critique, they must bear some of the burden of weak and inconclusive data. Moreover, their burden is to use a proper baseline for a true disproportionate-enforcement critique—namely a baseline of the actual occurrences of bias crimes.

A second, and still reasonably firm, assertion challenges the disproportionate-enforcement critique on a relative level. Assuming that U.S. criminal law suffers to some degree from racially disproportionate enforcement generally, the data suggest that there is no particular concern as to disproportionality with respect to bias crimes. This is not merely a debater's point. As will be

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71. CHI. POLICE DEP'T, 1999/2000 BIENNIAL REPORT, at Fig. 17b, *available at* [http://egov.cityofchicago.org/webportal/COCWebPortal/COC\\_EDITORIAL/9900AnnualReport.pdf](http://egov.cityofchicago.org/webportal/COCWebPortal/COC_EDITORIAL/9900AnnualReport.pdf). Data was calculated by dividing total arrestees for each racial category by total arrestees whose race is known.

72. CHI. POLICE DEP'T, HATE CRIMES IN CHICAGO: 2000, at 14 *available at* [http://egov.cityofchicago.org/webportal/COCWebPortal/COC\\_EDITORIAL/HateCrimes00.pdf](http://egov.cityofchicago.org/webportal/COCWebPortal/COC_EDITORIAL/HateCrimes00.pdf). Data was calculated by dividing arrestees for bias crimes for each racial category by total arrestees for bias crimes whose race is known.

addressed below, unless there is a specific, focused concern about disproportionate enforcement of bias-crime laws, these laws are an ironic place to begin to apply the critique to law enforcement. Indeed, they are among the worst places to begin.

The third, and necessarily weakest, assertion that the data permit is that bias-crime laws are enforced in a non-discriminatory manner. Enforcement statistics suggest that minority bias-criminals are not singled out for special attention from law enforcement and that the majority of bias-criminals who are investigated and prosecuted are white. This assertion must be most tentative in the absence of an accurate baseline of actual commission of bias crimes by members of various racial and ethnic groups. To refute the disproportionate-enforcement critique definitively, each of the above tables would need a column for actual bias-crime commission rates. No such data exist. We are left then with a soft refutation, but it is a refutation supported by the qualitative aspects of Professor Bell's study of "Central City."<sup>73</sup>

## V

### CONCLUSION

Even if the disproportionate-enforcement critique cannot be absolutely refuted—and the current state of bias-crime data suggests that we are relegated to living with some residual doubt on this question—there are reasons to continue to enforce the current regime of bias-crime laws in the United States. I do not intend to restate here the sustained argument I have made elsewhere for the importance of vigorous and effective enforcement of laws prohibiting bias-motivated violence and providing enhanced punishment for bias crimes.<sup>74</sup> Instead, I conclude with two observations that are of particular relevance to the disproportionate-enforcement critique. The first concerns a misunderstanding of bias-crime law often found in the disproportionate-enforcement critique. The second concerns the particular harms associated with affording the disproportionate-enforcement critics the benefit of the doubt and repealing bias-crime laws on this basis.

The rhetoric of the disproportionate-enforcement critics flags the particular irony that bias crimes, of all crimes, would be enforced discriminatively. Thus, Justice Abrahamson cited the concern that "hate crime laws will ultimately be used *against the very groups they are designed to protect*,"<sup>75</sup> and Professor Weinstein the fear that "hate crime laws . . . may well be counterproductive in that they might be used *disproportionately against the very minority groups they were primarily designed to protect*."<sup>76</sup>

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73. See *supra* text accompanying notes 67, 68.

74. See, e.g., LAWRENCE, PUNISHING HATE, *supra* note 2.

75. Abrahamson et al., *supra* note 18, at 525 (emphasis added).

76. Weinstein, *supra* note 17, at 17 (emphasis added).

It is a mistake, however, to think of bias-crime laws as being primarily designed to protect minority groups. To be sure, the results of a proper enforcement of bias-crime laws will prominently include the protection of would-be victims who are members of minority groups. But to see this as the exclusive, or even major, purpose of bias-crime laws is misconceived, both descriptively and normatively.

The descriptive misconception is the simpler to articulate. Not a single bias-crime law in the United States distinguishes between minority and majority victims for purposes of establishing the elements of the crime.<sup>77</sup> Although we would expect that certain bias crimes apply primarily to minority victims—for example, crimes motivated by the victim’s real or perceived sexual orientation—this expectation does not hold for racially-motivated crimes, the largest category of bias crimes.<sup>78</sup> Racially motivated bias crimes apply to racial motivation regardless of the respective race of perpetrator and victim. Roughly twenty percent of victims of racially motivated bias crimes are white, and these white victims constitute more than ten percent of all bias-crime victims.<sup>79</sup>

That bias crime laws do not distinguish between minority and majority victims, and thus between majority and minority perpetrators, is not simply a matter of surviving equal protection challenge. The identification of bias crimes as a separate category of criminal behavior—and in most jurisdictions, the enhanced levels of punishment for these crimes—is based on the greater harm caused by crimes that are grounded in group-based animus. As discussed above, in a perfect system of bias-crime enforcement, with one hundred percent prosecution of the guilty and no punishment of the innocent, investigation, prosecution, and punishment of bias-criminals would precisely reflect the levels of bias crimes. If, as some have argued, ethnic minorities exhibit higher rates of bias-motivated violence,<sup>80</sup> a perfect system of bias-crime enforcement would similarly reflect higher rates of punishment. If there were anything disproportionate about such a law enforcement regime, it would be disproportionate in effect, not in the means of enforcement.

The normative misconception is perhaps the more profound. Bias-crime laws are better understood not merely as protecting individual victims—though that is clearly a part of these criminal laws—but also as recognizing the role of groups in a multi-cultural society and, thus, the particular harms these crimes cause the society. As discussed earlier in this essay, bias-crime laws locate the existence of “social fissure” lines in society, and recognize the greater harm that is represented by crimes that implicate these fissure lines.<sup>81</sup> It is no overstate-

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77. See LAWRENCE, PUNISHING HATE, *supra* note 2, at 178–89, app.A.

78. For example, according to federal statistics, in 2000, “victims of racial bias accounted for 54.5% of all single-bias hate crime victims.” HATE CRIME STATISTICS (2000), *supra* note 43, at 5.

79. *Id.* at 7 (Table of Incidents, Offenses, Victims and Known Offenders by Bias Motivation, 2000).

80. See, e.g., Jacobs, *supra* note 16, at 60; Minow, *supra* note 29, at 41; Chorba, *supra* note 14, at 364–69.

81. LAWRENCE, PUNISHING HATE, *supra* note 2, at 12–14, 39–44, 58–63.

ment to say that bias-crime laws, like all criminal laws, are aimed only in part at protecting individual victims; their primary purpose is to protect society.

This in turn brings us to a consideration of particular harms associated with opposing and repealing bias-crime laws on the basis of an unproven, and indeed doubted, concern with their disproportionate enforcement. Enactment of bias-crime legislation constitutes a societal condemnation of racism, religious intolerance, and other forms of bigotry and, of perhaps greater significance here, a formal awareness of the role of these protected groups in our society. If bias crimes are not expressly punished in a criminal justice system, or, if expressly punished, not punished more harshly than parallel crimes, there is also a message expressed by the legislation. The message here is that society, through its criminal law, is not cognizant of the additional harm caused by the bias-motivated crime. This message suggests a lack of formal awareness of the status and role of ethnic, racial, or other groups in the society. Simply put, it is impossible for the punishment choices made by society *not* to express societal values.<sup>82</sup>

Bias-crime legislation in the United States expresses precisely the values that many of the disproportionate-enforcement critics espouse: The law ought to protect all citizens, including, and perhaps particularly, minority citizens, and the criminal justice system should not be used in a manner that harms members of minority groups. On close consideration, the disproportionate-enforcement critique is based primarily on the general argument that the criminal justice system is enforced in a discriminatory manner such that members of ethnic minority groups are unequally and unfairly treated, both as perpetrators and as victims. Many aspects of this general argument have been explored elsewhere, including in this Symposium, and to great effect. The general argument as to disproportionality in the criminal justice system, however, would not seem to support the undoing of the criminal justice system generally. Yet this is essentially the argument that disproportionate-enforcement critics have advanced: that a generalized concern with disproportionate enforcement of the criminal justice system warrants a rejection of laws punishing bias-motivated crimes. It would be painfully ironic if the one place in which the general argument were to be applied was one of the prime areas of criminal law concerned with protecting the “right to be the same or different”<sup>83</sup> and recognizing the role of groups and sub-groups in a multi-cultural society. Absent particular reason to believe that bias-crime laws, more than other areas of the criminal law, are enforced in a racially discriminatory manner, an area of criminal law enforcement particularly

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82. *See id.* at 161–69. For a discussion of expressive punishment theory and of the role of social denunciation in punishment, see EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 44–52, 60–64 (W. D. Halls trans., 1984); JOEL FEINBERG, *The Expressive Function of Punishment*, in *DOING AND DESERVING* 95–118 (1970); Ronald J. Rychlak, *Society’s Moral Right to Punish: A Further Exploration of the Denunciation Theory of Punishment*, 65 *TUL. L. REV.* 299, 332–35 (1990). *See also* DURKHEIM AND THE LAW 61–63 (Steven Lukes & Andrew Scull eds., 1983); STEVEN LUKES, EMILE DURKHEIM: HIS LIFE AND WORK, 160–63 (2d ed. 1985); Robert Reiner, *Crime, Law and Deviance: The Durkheim Legacy*, in *DURKHEIM AND MODERN SOCIOLOGY*, 176–182 (Steve Fenton ed., 1984). *See generally* DAVID GARLAND, *PUNISHMENT AND MODERN SOCIETY* (1990).

83. ALLPORT, *supra* note 4, at 518.

concerned with the impact of bigotry and discrimination on its victims ought not be impeded.

The burden of the argument is on the disproportionate-enforcement critics, and it is a burden they cannot carry. Efforts would be better focused on the need to improve bias-crime data than on a generalized non-empirical assault on the attempt to understand, recognize, investigate, and prosecute bias-motivated crimes.