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Pick the Lowest Hanging Fruit: Hate Crime Law and the Acknowledgment of Racial Violence

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PICK THE LOWEST HANGING FRUIT: HATE CRIME LAW AND THE ACKNOWLEDGMENT OF RACIAL VIOLENCE

JEANNINE BELL*

The U.S. has had remedies aimed at racial violence since the Ku Klux Klan Act was passed in the 1870s. Hate crime law, which is more than thirty years old, is the most recent incarnation. The passage of hate crime law, first at the federal level and later by the states, has done very little to slow the rising tide of bigotry. After a brief discussion of state and federal hate crime law, this Article will critically examine the country’s approach to hate crime. The article will then discuss one of the most prevalent forms of hate crime—bias-motivated violence that targets individuals in their homes. The article will conclude with a discussion of the approach taken by the Justice Department in the Ahmad Arbery case as a potentially positive solution for the handling of hate crime cases.

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INTRODUCTION

As a society, we roundly criticize racism.¹ Hate crime laws—criminalizing certain actions motivated by bias on the basis of race, religion, sexual orientation, and ethnicity—are a clear recognition of this fact. One popular (mis)understanding of hate crime laws is that they are the criminalization of hatred expressed by those who have particular biases.

For instance, some academics have suggested that hate crime laws were created to punish bigots for their biases.² Those in favor of the “punishing bigots for their bias” characterization of hate crime legislation have fundamentally misunderstood the way hate crime law works: hate crime laws

¹ See Jeannine Bell, *There Are No Racists Here: The Rise of Racial Extremism When No One Is Racist*, 20 MICH. J. RACE & L. 349 (2015).

² See Heidi Hurd, *Why Liberals Should Hate Hate Crime Legislation*, 20 LAW & PHIL. 215, 216 (2001).

punish acts of intentional selection, not bias generally.³ In addition to being factually inaccurate, the “punishing-bigots-for-their-biases” characterization greatly overstates the reach of hate crime legislation. Rather than being broad enough to respond to all attacks stemming from bigotry, hate crime law actually has a tiny footprint. Despite the widespread promulgation of hate crime law in most states,⁴ the criminal legal system is largely failing most victims of bias-motivated violence.⁵

Perhaps deliberately, the very existence of hate crime law holds out a false promise. In actuality, for the vast majority of those targeted by hate crimes, there will be no remedy for the crimes they experience.⁶ No one understands this sad truth better than a victim who has been targeted but does not have a remedy which recognizes the violence they experienced.⁷

In some cases, the gap between the promise of a remedy created by the abundance of hate crime law and its ability to address what victims experience is a failure of the way in which the law is structured. For instance, in March 2021, a Nigerian family living in Woodbridge, Virginia awakened to find their garage door defaced with a racial slur.⁸ They dutifully reported the crime to the police.⁹ Unfortunately, reporting the crime provided no legal relief, as Virginia does not recognize vandalism under the state’s hate crime penalty enhancement law.¹⁰ Thus, even though the incident would be noted as a hate crime by police and reported in the official statistics for Virginia, it could not be prosecuted as a hate crime.¹¹ Though this case is notable for

³ Frederick Lawrence, *PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW* 31–33 (2009).

⁴ Jeannine Bell, *Lack of Punishment Doesn’t Fit the Crime: America’s Tepid Response to Bias-Motivated Crime*, 85 *STUD. L., POL. & SOC’Y* 29, 31 (2021).

⁵ *Id.*

⁶ Travis Bubenick, *Reported Hate Crimes on the Rise, but Federal Prosecutions Drop*, *COURTHOUSE NEWS SERV.* (Aug. 13, 2019), <https://www.courthousenews.com/reported-hate-crimes-on-the-rise-but-federal-prosecutions-drop> [<https://perma.cc/VPF6-YDEK>] (describing a few prosecutions despite a rise in reported hate crimes).

⁷ See, e.g., LAURA J. LEDERER & RICHARD DELGADO, *The Case of the Cross-Burning: An Interview with Russ and Laura Jones in THE PRICE WE PAY: THE CASE AGAINST RACIST SPEECH, HATE PROPAGANDA, AND PORNOGRAPHY* 30 (1995) (detailing the Jones’ disappointment with the lack of viable legal remedies after a cross was burned on their lawn).

⁸ Evan Lambert, *Police Investigating Racist Vandalism in Woodbridge*, *FOX 5* (March 31, 2021), <https://www.fox5dc.com/news/police-investigating-racist-vandalism-in-wood-bridge> [<https://perma.cc/UZV7-J6CX>] (detailing defacement of a Nigerian family’s garage door).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

Virginia law's failure to address bias-motivated violence, the inability of legal remedies to offer redress to victims of hate crimes is not unusual.¹² This article addresses the many ways in which the law, police and prosecutors often fail to provide any tangible remedy to victims of bias-motivated crime.

These issues will be addressed in the following manner: Part I explores the current state of hate crime and hate crime law. Part II introduces one common (but largely overlooked) form of hate crime—racially based anti-integrationist violence—violence directed specifically at racial and ethnic minority newcomers to predominantly white neighborhoods. Part III applies the frame of hate crimes as anti-integrationist violence to the murder of Ahmaud Arbery in Brunswick, Georgia, in 2020.¹³ Part IV concludes with a discussion of the Department of Justice's (DOJ) exemplary handling of the hate crime charges brought against Arbery's murderers, which serves as a potential model for addressing hate crimes going forward.

I. CAPTURING THE PROBLEM OF HATE CRIME

A. HATE CRIMES AND THE LEGAL ATTACK ON BIAS

The United States has long had identity-focused criminal acts.¹⁴ In response to these acts and activist demands to address those targeted by bias-motivated violence, the government responded by creating new remedies.¹⁵ In the case of hate crimes, these new remedies arose out of the fact that for a variety of reasons, the general criminal law often fails in hate crime cases.¹⁶ Though hate crime laws sometimes have difficulties addressing bias-motivated violence, as the incident described above in Woodbridge, Virginia

¹² See Shirin Sinnar & Beth Colgan, *Revisiting Hate Crime Enhancements in the Shadow of Mass Incarceration*, 95 N.Y.U. L. REV. ONLINE 149, 158–60 (2022) (describing the failure of hate crime laws to offer redress for victims).

¹³ Travis and Gregory McMichael were eventually prosecuted for Arbery's murder by the state of Georgia. *Ahmaud Arbery Shooting: A Timeline of the Case* N.Y. TIMES Aug. 8, 2022. <https://www.nytimes.com/article/ahmaud-arbery-timeline.html>.

¹⁴ See generally MICHAEL NEWTON & JUDY NEWTON, RACIAL AND RELIGIOUS VIOLENCE IN AMERICA: A CHRONOLOGY (1991) (describing “a time of atrocity acts of mayhem, murder, and intimidation perpetrated on the grounds of racial or religious prejudice, from the discovery of North America to modern times”).

¹⁵ See generally VALERIE JENNESS & RYKEN GRATTET, MAKING HATE A CRIME: FROM SOCIAL MOVEMENT TO LAW ENFORCEMENT (2004) (describing the long road from civil rights to hate crime law).

¹⁶ Some hate crimes cannot even be prosecuted under the criminal law. Such was the cases with the cross burned on Russ and Laura Jones' lawn. See LAURA J. LEDERER & RICHARD DELGADO, *The Prosecutor's Dilemma: An Interview with Tom Foley in THE PRICE WE PAY: THE CASE AGAINST RACIST SPEECH, HATE PROPAGANDA AND PORNOGRAPHY* 195 (1995).

demonstrates, hate crime law has at least one advantage over the ordinary criminal law—it signals that the incident is bias-motivated.¹⁷

In some circumstances, the failure of hate crime law to respond effectively to hate crime victims is complicated by the interaction between the reality of most hate crimes and the structure of the criminal law. The typical hate crime involves being called a racial slur while being beaten. The criminal law classifies crimes by offense level with the most serious crimes having the most serious penalties and so-called low-level crimes not having serious penalties. Many hate crimes have tremendous psychological impact on their victims, but they often fall into the category of simple assaults.¹⁸ Having a low offense level impacts more than just the punishment. Crimes with low offense levels do not provide sufficient incentive to either police or prosecutors to investigate and prosecute.

There are also normative issues with using the criminal law. The idea of prosecuting hate crimes using the general criminal law is sometimes rejected by victims and victims' advocacy organizations, who may see hate crime prosecutions as the only way of acknowledging the additional harm done to the victim during the bias-motivated attack.¹⁹ Hate crimes are especially damaging to victims, and a separate category of crimes outside of the normal criminal law is a nod to this notion,²⁰ recognizing “[i]t is not enough simply to punish an offender, or even to punish him in some general sense for what he has done. Rather, we must punish him in a way that rejects the intolerable messages sent by his conduct.”²¹ What Professor Taslitz noted is one of the most significant justifications for hate crime law—that in addition to

¹⁷ Lambert, *supra* note 8.

¹⁸ 2019 *Hate Crime Statistics*, FBI, <https://ucr.fbi.gov/hate-crime/2019/topic-pages/tables/table-2.xls> [<https://perma.cc/8FSG-9HJW>] (showing 18 murders compared to more than 1,700 simple assaults).

¹⁹ See, e.g., *Hate Crime Laws: The ADL Approach*, ANTI-DEFAMATION LEAGUE (Nov. 2, 2019), <https://www.adl.org/resources/tools-and-strategies/hate-crime-laws-adl-approach> [<https://perma.cc/BD4U-93WW>] (discussing the Anti-Defamation League's support for hate crime law as a remedy for addressing hate crime).

²⁰ Victims of hate crimes experience a host of deleterious effects that do not affect victims of similar crimes which include but are not limited to post-traumatic stress, anxiety, and depression. See, e.g., Gregory Herek, J. Roy Gillis & Jeanine C. Cogan, *Psychological Sequelae of Hate-Crime-Victimization Among Lesbian, Gay, and Bisexual Adults*, 67 J. CONSULTING & CLINICAL PSYCH. 945, 945–51 (1999); Jack McDevitt, Jennifer Balboni, Luis Garcia & Joann Gu, *Consequences for Victims: A Comparison of Bias- and Non-Bias-Motivated Assaults*, 45 AM. BEHAV. SCIENTIST 697, 697–713 (2001); PHYLLIS GERSTENFELD, *HATE CRIMES: CAUSES, CONTROLS, AND CONTROVERSIES* (2011).

²¹ Andrew E. Taslitz, *Condemning the Racist Personality: Why Critics of Hate Crimes Legislation Are Wrong*, 40 B.C. L. REV. 739, 750–51 (1999).

violating the criminal law the hate crime offender has engaged in behavior that violates American ideals of equality, and this is something that must be communicated to the offender.²² The hate crime charge does that.

The creation of hate crime as a separate category solves all the problems that I have described above. The attention-grabbing term “hate crime” has the capacity to capture the attention of prosecutors and police officers by pulling them into the victim’s experience, even for otherwise minor offenses.

1. *From Federal Civil Rights Remedies to the Hate Crime Statistics Act*

This previous section focused on the advantages of hate crime law over the ordinary criminal law in response to the frequently used argument that we already have laws to deal with this conduct. Though it is rarely raised by critics of hate crime, existing civil rights law has long been used to prosecute incidents that are now labeled as hate crimes.²³ That being said, for a series of complicated reasons that I will explain below, if the incident is a hate crime, hate crime law may be easier to use than civil rights law. Before the 2009 Matthew Shepard and James Byrd Hate Crimes Prevention Act (HCPA), on the federal level hate crimes needed to be prosecuted under federal civil rights law, which required a deprivation of federal civil rights.²⁴ The complex difficulty of connecting the use of federal rights with the situation in which hate crimes occur was obviated by the creation of hate crime law like the HCPA, which targets actions motivated by bias irrespective of the behavior in which the individual victimized is engaged.²⁵ By contrast, when hate crime law is used to address acts of bias-motivated violence, rather than focusing on the victim’s actions at the time that they were targeted, the focus of attention moves to the perpetrator.²⁶ Previously,

²² This notion of the norms inherent in hate crime law was expressed even at the beginning. For instance, Arthur Green, director of the Connecticut Commission on Human Rights and Opportunities in his testimony before Congress said:

This bill . . . represents more than merely collecting data about incidents of racial, religious, and ethnically motivated violence. It will also constitute a statement to the general public of her country that this Congress and this administration and, indeed, the state and local governments will not tolerate further acts of violence.

JENNESS & GRATZET, *supra* note 15, at 53.

²³ ZACHARY J. WOLFE, *HATE CRIMES LAW 27* (2021) (indicating that prior to the 1994 Act, hate crimes were prosecuted as violations of civil rights statutes).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

in order to fit into a civil rights standard for identity-based attacks under the federal law, individuals had to be enjoying federal rights at the time of an attack.²⁷

Eliminating the requirement that the victim be enjoying a particular federal right when they are attacked was not easy to remedy.²⁸ In fact, the very first piece of legislation aimed at violent bigotry and using the term “hate crime” was not a criminal law at all.²⁹ It did not punish bigotry. The Hate Crime Statistics Act of 1990 (HCSA) required the U.S. Attorney General to collect statistical data on “hate crimes,” which it described as “crimes that manifest evidence of prejudice based on race, religion, sexual orientation or ethnicity, including where appropriate the crimes of murder, non-negligent manslaughter; forcible rape; aggravated assault; simple assault; intimidation; arson; and destruction, damage or vandalism of property.”³⁰

The HCSA required the U.S. Attorney General to collect statistical data on hate crime. The FBI quickly became the agency to which police departments around the country were asked to submit hate crime reports.³¹ Though many agencies, as discussed in the next section, collect data on hate crime, the HCSA placed the responsibility for identifying and counting hate crime on local police departments. Supporters of the statute, both the legislators who had been pushing for it for years and advocates of those targeted by hate crimes, believed that collection of data from police departments might help law enforcement “measure trends, fashion effective responses, design prevention strategies, and develop sensitivity to the particular needs of victims of hate crimes.”³²

Data collection for the newly passed HCSA started well. In 1991, the first year that data was collected under the HCSA, 4,755 hate crimes were identified by 2,771 agencies participating from thirty-two states and the District of Columbia.³³ Seven years later, the number of hate crimes included

²⁷ *Id.*

²⁸ See JENNESS & GRATTET, *supra* note 15, at 42–72 (describing the decades long road from federal civil rights laws to hate crime law).

²⁹ *Id.* at 44.

³⁰ Pub. L. No.101-275, 104 Stat. 140 (Apr. 23, 1990) (codified as amended at 34 U.S.C. § 41305).

³¹ Submission of hate crime data under the HCSA has been voluntary, an approach that has long been criticized. Ronald L. Davis & Patrice O’Neil, *The Hate Crimes Reporting Gap: Low Numbers Keep Tensions High*, *The Police Chief Magazine*, <https://www.policchiefmagazine.org/the-hate-crimes/> (criticizing voluntary nature of HCSA).

³² JENNESS & GRATTET, *supra* note 15, at 44.

³³ *Id.* at 47.

in the FBI report had grown significantly—to 9,325—reflecting the substantial increase in the number of agencies participating.³⁴ By 1998, more than 10,000 agencies from forty-six states, representing 79% of the population of the United States, submitted reports to the FBI.³⁵ These increases suggested that a continued upward trajectory of hate crime identification and classification had been established.

There are advantages and disadvantages to the HCSA being the first, and still the only, official national governmental collection of potential incidents motivated by bias in the United States.³⁶ That being said, its accuracy and comprehensiveness has been widely criticized.³⁷

Thirty years after the passage of the HCSA, there was an abundance of laws criminalizing hate crimes at both the state and federal level.³⁸ Another federal law, the Hate Crime Sentencing Enhancement Act of 1993,³⁹ adds to the earlier approach of dealing with hate crime by providing penalty enhancements for hate crimes committed on federal lands or federal properties.⁴⁰

At the state level, where most hate crimes are prosecuted, laws punish crimes motivated by bias on the basis of race, ethnicity, gender, religion, and sexual orientation.⁴¹ Though the reach of statutes and their form greatly varies, nearly every U.S. state has passed some form of hate crime legislation.⁴²

2. *The National Criminalization Survey (NCVS)*

The FBI reports are not the only source of government data on hate crime. While the FBI report is essentially a collection of police data, the National Crime Victimization Survey (NCVS), a national survey of

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 24.

³⁷ *Id.* at 27.

³⁸ See Peter G. Berris, *Overview of Federal Hate Crime Law*, CONGRESSIONAL RESEARCH SERVICE, April 1, 2022 <https://crsreports.congress.gov/product/pdf/R/R47060> (detailing a long list of hate crimes laws passed after the HCSA)

³⁹ Pub. L. No. 103-322, 108 Stat. 2096, title II § 280003 (Sept. 13, 1994). For the purpose of the Act, hate crimes occur when “the defendant intentionally selected any victim or property is the object of the offense because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation.” title II § 280003(a). This law applies for crimes in which committed on federal lands or federal properties. SOURCE.

⁴⁰ *Id.*

⁴¹ WOLFE, *supra* note 23, at 126.

⁴² *Id.*

individuals who have been asked if they have been victimized, is far more inclusive in that it includes crimes reported and not reported to police.⁴³ The NCVS report collects accounts from individuals who indicate they were victimized due to their race, ethnicity, national origin, gender, disability, sexual orientation, or religion.⁴⁴

A closer look at the NCVS reveals important differences between the NCVS and the FBI hate crime report. The FBI report, which does not require law enforcement to report hate crimes, did not lead to large numbers of hate crimes being reported. In fact, the number of hate crimes reported by police departments to the FBI from 2008 to 2017 remained nearly flat, despite an increase in the overall number of agencies reporting the crimes.⁴⁵ The lack of an increase in the actual number of hate crimes over this time period has been attributed to the wide variety of police agency approaches to hate crime and their relative effectiveness.⁴⁶

In 2017, there was a significant departure in hate crime trends from both the earliest time period (1993–2006) after the passage of the HCSA, when states were becoming accustomed to collecting data on hate crime, and the no growth period (2008–2016).⁴⁷ Both the Uniform Crime Report (UCR) (2017–2020) and the NCVS (2017–2019) report that the number of hate crimes increased across the board between 2017 and 2020.⁴⁸ The NCVS data showed an increase of 41.94% (215,150 to 305,390) of hate crime offenses between 2017 and 2019.⁴⁹ On the other hand, the UCR showed an increase of 31.87% (8,437 to 11,126) between 2017 and 2020.⁵⁰ There is a noticeable difference between the UCR and the NCVS numbers. That difference is explored above in the discussion about the source methodology, but the NCVS notes that 42% of respondents explained they did not report the hate crime to the police.⁵¹

⁴³ *National Crime Victimization Survey*, BUREAU OF JUSTICE STATISTICS, <https://bjs.ojp.gov/data-collection/ncvs> [<https://perma.cc/2CJY-CXGZ>].

⁴⁴ GRACE KENA & ALEXANDRA THOMPSON, HATE CRIME VICTIMIZATION, 2005–2019, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUST. 1, 5 (Sept. 2021), <https://bjs.ojp.gov/library/publications/hate-crime-victimization-2005-2019> [<https://perma.cc/TY4Z-7N6L>].

⁴⁵ Bell, *supra* note 4, at 45.

⁴⁶ *See id.* at 35–40 (describing differences in police departments' identification, investigation, and classification of hate crime).

⁴⁷ Kena & Thompson, *supra* note 44.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 6.

There is also a qualitative difference in the perspective added by the NCVS. Hate crimes are personal, people-centered crimes—the majority of hate crime perpetrators targeted individuals as opposed to property.⁵² According to the UCR, from 2017 to 2019 between 60% and 65% of hate crimes targeted individuals; however, that number jumped to 71.7% in 2020.⁵³ The NCVS suggests a more dramatic increase in the percentage of times people, as opposed to property, were targeted. According to the NCVS, between 2017 and 2019, hate crime perpetrators targeted individuals between 88% (2019) and 92% (2018) of the time.⁵⁴

A closer look at this data reveals that the increase in individual targeting may have significant implications for the racial climate in the United States. This can be seen in the data from the UCR, which breaks down hate crime into further categories, such as motivations.⁵⁵ Overall, most hate crime reported to the FBI was racially-motivated, making up between 57.2% and 63.2% of all reported hate crime between 2017 and 2020.⁵⁶ The highest percentage of reported racially-motivated hate crime occurred in 2020 at 63.2% and the lowest percentage occurred in 2019 at 55.9%.⁵⁷ Religious bias made up the second largest share, accounting for 15.5% to 19.9% of all hate crime offenses between 2017 and 2020.⁵⁸ The third largest motivation was sexual-orientation, taking up 13.4% to 16.5% of all hate crime offenses between 2017 and 2020.⁵⁹

The two largest sources of hate crime data that present a full picture of hate crime in the United States are the FBI's Uniform Crime Reporting (UCR) Program and the Bureau of Justice Statistics' (BJS) National Crime Victimization Survey (NCVS).⁶⁰ These are two organizations that collect and then aggregate data on hate crimes committed with different motivations.⁶¹ The FBI report includes police reports of hate crimes alleged to have been

⁵² See, e.g., *2020 Hate Crime Statistics*, U.S. DEP'T OF JUST., <https://www.justice.gov/hatecrimes/hate-crime-statistics> [<https://perma.cc/NG5W-L566>] (detailing 69.6% of crimes against persons and 28.2% of crimes against property).

⁵³ Kena & Thompson, *supra* note 44.

⁵⁴ *Id.*

⁵⁵ See, e.g., *2020 Hate Crime Statistics*, *supra* note 52 (describing different motivations).

⁵⁶ Kena & Thompson, *supra* note 44.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ See, e.g., *Hate Crime Statistics* <https://www.fbi.gov/how-we-can-help-you/more-fbi-services-and-information/ucr/hate-crime> (describing the FBI's UCR) and *National Crime Victimization Survey*, <https://bjs.ojp.gov/data-collection/ncvs> (describing the NCVS).

committed on the basis of race, ethnicity, ancestry, religion, sexual orientation, gender identity, gender, and disability.⁶²

a. The Failures of Both Governmental Databases

Though both the NCVS and the annual FBI hate crime statistics are national collections of data, there are a number of reasons to suggest that they do not portray all of what is happening with hate crime in the United States. The failures of these two databases begin with methodological issues raised by the FBI's Uniform Crime Reporting program and the Bureau of Justice Statistics' National Crime Victimization Survey. Because the UCR and the NCVS collect data in entirely different ways, they have different weaknesses, which will be discussed in turn.

Though the FBI's annual Hate Crime Report includes data from thousands of law enforcement agencies around the country, the idea that it presents some sort of national picture of hate crimes that occur is inaccurate because the vast majority of jurisdictions that report to the FBI do not report a single hate crime having occurred in their jurisdiction in the previous year. As the table below shows though, while the number of agencies reporting to the FBI has grown on average approximately 87% of agencies report that no hate crimes occurred in their jurisdiction in the previous year. Thus, the hate crime numbers we have had for the last several years come from slightly more than 10% of law enforcement agencies in the United States.

Year	Number of Agencies reporting 1 or more hate crimes	Number of Agencies reporting zero hate crimes	% of the Agencies with zero reports
2015	1742	13255	88%
2016	1776	13478	87%
2017	2046	14109	87%
2018	2026	14013	87%
2019	2172	13416	86%

Source: Hate Crime Recorded by Law Enforcement, 2010–2019⁶³

⁶² *Hate Crime Statistics*, FBI, <https://www.fbi.gov/services/cjis/ucr/hate-crime> [<https://perma.cc/AX5Z-XPXS>]

⁶³ ERICA SMITH, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, HATE CRIME RECORDED BY LAW ENFORCEMENT, 2010–2019 (Sept. 2021), <https://bjs.ojp.gov/sites/g/files/xykuh236/files/media/document/hcrle1019.pdf> [<https://perma.cc/FU8P-WUVA>].

There is another problem with zero reporting. Large numbers of law enforcement agencies reporting that no hate crimes occurred in their jurisdiction sharply contradict advocacy group reports indicating that hate crimes are rising.⁶⁴ If the FBI reports are wrong (and advocacy groups are correct about the significant increases in hate crime), as hate crimes rise, the FBI annual hate crime reports will capture a far less accurate picture of hate crime in the United States. It remains to be seen where precisely the problem lies with the FBI figures. They may represent an undercount—a failure of the FBI to include incidents that are widely recognized as hate crime.⁶⁵ It may also be attributable to the fact that individual police departments report incidents as harassment not rising to the level of a crime.⁶⁶

Though it has been criticized for its failure to provide a detailed picture of where and how hate crime is occurring, FBI data tells us much about how hate crime law really operates throughout the United States. The lack of reporting indicates that there may be many jurisdictions where, though they have hate crime laws, hate crime may not be a category that local police understand or appreciate.⁶⁷ Because of the FBI data on hate crimes, we know where these jurisdictions are, and that hate crime law is functionally meaningless in these cities and towns.

The NCVS has the opposite problem of the FBI report; where the FBI report captures too few hate crimes, the NCVS may actually be reporting too many. The NCVS accuracy comes under fire because of its approach.⁶⁸ The figures reported by the BJS are estimates—statistical extrapolation from the data collected. Critics also say the NCVS survey contains methodological

⁶⁴ Joe Hernandez, *Hate Crimes Reach The Highest Level In More Than A Decade*, NPR (Sept. 1, 2021), <https://www.npr.org/2021/08/31/1032932257/hate-crimes-reach-the-highest-level-in-more-than-a-decade> [<https://perma.cc/AQ4H-RHYP>] (describing gap between advocacy group reports and FBI reports of hate crime).

⁶⁵ Ken Schwencke, *There Have Been Huge Gaps in FBI Hate Crime Data for Years. A New Law Aims to Fix That*, PROPUBLICA (June 4, 2021), <https://www.propublica.org/article/there-have-been-huge-gaps-in-fbi-hate-crime-data-for-years-a-new-law-aims-to-fix-that> [<https://perma.cc/93XG-22T8>].

⁶⁶ David Nakamura, *New Jersey officials said hate was spiking. The FBI said numbers had fallen. It depends on what you count*, PHIL. INQUIRER (Jan. 29, 2022), <https://www.inquirer.com/news/new-jersey/hate-crimes-data-us-new-jersey-white-supremacy-racial-justice-20220129.html> [<https://perma.cc/95BH-EHPH>].

⁶⁷ See, e.g., James J. Nolan, Stephen M. Haas, Erica Turley, Jake Stump & Christina R. LaValle, *Assessing the “Statistical Accuracy” of the National Incident-Based Reporting System Hate Crime Data*, 59 AM. BEHAV. SCIENTIST 1562, 1579–80 (2015) (describing officer difficulty classifying hate crime).

⁶⁸ *Id.*

errors, processing errors, nonresponse errors, specification errors, measurement errors, and issues relating to the lack of privacy for the respondent.⁶⁹

B. NON-GOVERNMENTAL ORGANIZATIONS (NGO) HATE CRIME DATA

The FBI and the NCVS are not the only sources of data on hate crimes. Private, non-governmental organizations also collect and publish data on hate crimes. NGO reports, however, are different from FBI reports. Organizations often only report crimes consistent with their mission, such as the Anti-Defamation League's focus on anti-Semitic crime and extremism. In some cases, this involves a geographic focus, such as the Los Angeles County Commission on Human Relations.⁷⁰ The organizations collecting hate crime data include hate crime victims' advocacy groups, public interest groups, and research organizations that provide compilations regarding the number of hate crimes that have occurred in the United States. Such organizations exist at national, state, regional, and local levels.

1. *Victim's Advocacy Groups*

The largest category of compilers of data on hate crimes outside of the federal government are advocacy organizations that are part of the anti-hate crime movement in the United States. As part of the anti-hate crime movement, these organizations have a huge footprint in the movement on behalf of individuals victimized by hate crime. In addition to serving victims, they also initially performed some of the most powerful lobbying for hate crime legislation.⁷¹ Ranging from large national organizations to small grassroots groups, these organizations played an important role in identifying and broadcasting incidents of violence directed at nonwhites: “[P]ublicizing the harm associated with bias-motivated violence, submitting proposals for reform, calling on the law to intervene on behalf of selected injured constituencies, and providing social services to victims of bias motivated violence.”⁷²

⁶⁹ See generally NAT'L RSCH. COUNCIL, ESTIMATING THE INCIDENCE OF RAPE AND SEXUAL ASSAULT 109–52 (Candace Kruttschnitt, William D. Kalsbeek & Carol C. House eds., 2013).

⁷⁰ LOS ANGELES CNTY. COMM'N ON HUMAN RELATIONS, 2018 HATE CRIME REPORT 16, <https://hrc.lacounty.gov/wp-content/uploads/2019/09/2018-Hate-Crime-Report.pdf>].

⁷¹ JENNESS & GRATTEY, *supra* note 15, at 32.

⁷² *Id.*

a. The Anti-Defamation League

The largest, most established antiviolence organization in the United States is the Anti-Defamation League (ADL).⁷³ Started in the 1913 with the goal of ending defamation against Jewish people and obtaining justice and fair treatment for all, the ADL began tracking anti-Semitic violence in 1979.⁷⁴ The organization soon embarked on a campaign to publicize the incidents reported to the organization.⁷⁵ In the early 1980s, the ADL created model hate crime legislation for states, which was ultimately adopted by 43 state legislatures.⁷⁶

The ADL's drive for hate crime legislation was prompted by its recognition of the rising number of hate crimes in its annual audits of anti-Semitic violence.⁷⁷ It has compiled an annual audit of anti-Semitic incidents—vandalism, harassment, assault, and murders—reported to or detected by local ADL offices since 1979.⁷⁸ Though initially incidents were collected by the organization annually, the organization's web presence now has a tracker of anti-Semitic incidents that shows incidents by date and by source.⁷⁹

The number of incidents included in the ADL's annual audit of anti-Semitic violence is likely to be greater than the FBI figures for a variety of reasons. First, victims may be more comfortable reaching out to the ADL than to police departments. Second, as a leader in fighting anti-Semitism, those working on behalf of the ADL are very likely to be more skilled at recognizing anti-Semitism in its many different manifestations. Related to this and consistent with its mission to expose anti-Semitism in its various forms, the audit includes both criminal and noncriminal incidents of harassment, vandalism, and assault reported to the ADL.⁸⁰ As the ADL states, "Although some incidents are hate crimes, many incidents included in the

⁷³ *Id.* at 33.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Hate Crime Laws: The ADL Approach*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/sites/default/files/pdfs/2022-05/hate-crime-laws-the-adl-approach.pdf> [<https://perma.cc/EQD8-5HL4>].

⁷⁷ *ADL's Mission & History*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/about/mission-and-history> [<https://perma.cc/DF6L-MVXX>].

⁷⁸ *Anti-Semitism in the U.S.*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/what-we-do/anti-semitism/antisemitism-in-the-us> (describing ADL's tracking of anti-Semitism beginning in 1979).

⁷⁹ *Id.*

⁸⁰ *Audit of Anti-Semitic Incidents: Year in Review 2018*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/audit2018#methodology> [<https://perma.cc/9MHL-7K86>].

Audit include non-criminal acts that rise to the level of anti-Semitic incidents.”⁸¹

To give an example that likely would not be reported to the FBI by a police department, the ADL tracker reported that in Columbia, South Carolina, on December 18, 2020, “A synagogue’s virtual Shabbat services on Zoom were disrupted by an unknown person who made inappropriate comments to the other participants.”⁸² While the behavior is likely bias-motivated, hate crimes require a criminal element as well. As it is written, this report does not include evidence of criminal behavior. Including incidents like the comments at the synagogue in South Carolina are consistent with the ADL’s mission, allowing the audit to offer a picture of discrimination that is broader than just hate crimes.⁸³

b. Stop AAPI Hate

Stop AAPI Hate is a smaller organization focused on racist incidents directed at Asian Americans, which was founded in March 2020.⁸⁴ The organization is a coalition of several different organizations—Chinese for Affirmative Action (CAA), the Asian Pacific Policy and Planning Council (A3PCON), and the Asian American Studies Department at San Francisco State University—which came together in response to the rise in hate crimes directed at Asian Americans in the wake of the pandemic.⁸⁵ As a central tracker of hate crimes, Stop AAPI Hate has in just a short time become the leading tracker of Asian American violence.

Though it is the premier source for incidents targeting Asian Americans, like other identity-focused anti-hate crime victim advocacy organizations, the goal of Stop AAPI Hate is not just to collect data on hate crimes but rather to create an umbrella of victim service and support.⁸⁶ Other services the organization offers to victims include:

1. Offering multilingual resources for impacted community members;

⁸¹ *Id.*

⁸² *Tracker of Anti-Semitic Incidents*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/resources/tools-to-track-hate/antisemitic-incidents> (in “Filter by State” field, select “South Carolina” and in “Date” field, select “Nov. 2020” to “Jan. 2021”).

⁸³ *Id.*

⁸⁴ *About*, STOP AAPI HATE, <https://stopaapihate.org/about> [<https://perma.cc/8LLK-PSJL>].

⁸⁵ *Stop AAPI Hate: Documenting the Rise of Anti-Asian Hate*, CHINESE FOR AFFIRMATIVE ACTION, <https://caasf.org/stop-aapi-hate> [<https://perma.cc/N4QB-C8V4>].

⁸⁶ *Act Now*, STOP AAPI HATE, <https://stopaapihate.org/actnow> [<https://perma.cc/GL5J-URB4>].

2. Providing technical assistance, from rapid response to preventative measures;
3. Supporting community-based safety measures and restorative justice efforts; and
4. Advocating for local, state, and national policies that reinforce human rights and civil rights protections.⁸⁷

As an organization whose goals are broader than just responding to hate crime, the Stop AAPI Hate collection of bias-motivated incidents includes many more incidents than FBI reports.⁸⁸ Stop AAPI Hate’s report covering its first year in existence—from March 19, 2020, to March 31, 2021—revealed 6,603 “hate incidents” reported to the organization.⁸⁹ This vastly exceeds FBI figures for Asian American violence for 2020, to say nothing of 2021.⁹⁰ Even with numbers that are so large, the organization is quite clear that their figures are an undercount—they have not been able to capture all of the discrimination leveled at members of the Asian American community. As the organization’s report emphasized, “The number of hate incidents reported to our center represent only a fraction of the number of hate incidents that actually occur, but it does show how vulnerable Asian Americans are to discrimination, and the types of discrimination they face.”⁹¹

Even though the report does not identify hate crimes per se, if it is correctly understood, there is tremendous value in the report created by Stop AAPI Hate from a criminal justice perspective. For instance, the 2020 – 2021 Stop AAPI Hate report analyzed the types of discrimination experienced by those who contacted the reporting center—harassment (66.8%) and shunning (16.3%); physical assault (16.1%); and online misconduct (8.6%).⁹² Even

⁸⁷ *Id.*

⁸⁸ See *National Report (Through March 2021)*, STOP AAPI HATE, <https://stopaapihate.org/national-report-through-march-2021> [<https://perma.cc/9KJCJ-GQ9M>] (describing types of discrimination like “shunning” and hate crimes); cf. *2020 Hate Crime Statistics*, U.S. DEP’T OF JUST., *supra* note 52 (describing only hate crimes).

⁸⁹ *Id.*

⁹⁰ *2020 Hate Crime Statistics*, U.S. DEP’T OF JUST., *supra* note 52.

⁹¹ See *National Report (Through March 2021)*, *supra* note 88.

⁹² AGGIE J. YELLOW HORSE, RUSSELL JEUNG & RONAE MATRIANO, STOP AAPI HATE, NATIONAL REPORT: 3/19/20–9/30/21, 5 <https://stopaapihate.org/wp-content/uploads/2021/11/21-SAH-NationalReport2-v2.pdf> [<https://perma.cc/N8T7-JM28>] (defining this as “the deliberate avoidance of Asian Americans.”). The organization uses the term “hate incidents” rather than hate crime. The use of the term “hate incidents” most likely conveys the organization’s understanding that the incidents it includes are not all hate crimes. For instance, shunning would not be categorized as a hate crime.

accepting that there are incidents that would not fall into the category of hate crimes, there are some incidents, such as physical assault, that very clearly fall into this category. It is significant that physical assaults are the third largest category of incidents reported to the organization. Physical assaults because of race are clearly hate crimes.⁹³ At 16.1% of its total, the physical assaults included in Stop AAPI Hate's report were 1,669—a number far greater than the FBI has ever recorded directed at Asian Americans.⁹⁴

The criminal justice value of tracking anti-Asian violence was heightened with the next report issued just a few months later in the wake of a series of high-profile attacks and murders of several Asian women.⁹⁵ The report, issued June 2021, revealed 4,533 hate incidents occurred in the first six months of 2021.⁹⁶ Breaking down the incidents, physical assaults constituted 13.7% of the data.⁹⁷ The organization also added the category “being coughed and spat on.”⁹⁸ In addition, the organization provided granular detail about the precise bias-motivated speech—most of the incidents occurred in public, 48% included at least anti-Chinese or anti-immigrant rhetoric, and a majority of victims reporting were Chinese (43.5%).⁹⁹

2. *Non-Identity Based Research and Advocacy Organizations*

a. Center for the Study of Hate and Extremism

In addition to identity-based advocacy groups like the Anti-Defamation League, there are other organizations active in the hate crimes space that are conducting research, compiling statistics, and documenting hate crimes. One of most prominent and long-standing of these organizations is the California-based Center for the Study of Hate and Extremism (“Center”).¹⁰⁰ A part of the University of California, San Bernardino, the Center is a nonpartisan

⁹³ *Id.*

⁹⁴ *Id.* at 6.

⁹⁵ *The Rising Tide of Violence and Discrimination Against Asian American and Pacific Islander Women and Girls*, STOP AAPI HATE, <https://stopaapihate.org/aapi-women-and-girls-report> [<https://perma.cc/9UXG-HAHC>].

⁹⁶ Aggie Yellow Horse, et. al, *Stop AAPI Hate National Report (Through June 2021)*, 1 <https://stopaapihate.org/wp-content/uploads/2021/08/Stop-AAPI-Hate-Report-National-v2-210830.pdf> (noting that 4.533 incidents occurred in 2021).

⁹⁷ *Id.* at 2.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *About Us*, CENTER FOR HATE AND EXTREMISM, <https://www.csusb.edu/hate-and-extremism-center/about-us> [<https://perma.cc/8EA5-K6GH>].

research and policy center focusing on bigotry, “advocacy of extreme methods,” and terrorism both in the United States and abroad.¹⁰¹ The organization is concerned with incidents that deny the civil rights of individuals because of their race, ethnicity, religion, gender, sexual orientation, disability, “or other relevant status characteristics.”¹⁰² The goal of the organization is to assist a variety of stakeholders, including scholars, community members, law enforcement, and government scholars in developing research-based approaches to hate crime.¹⁰³ The Center also serves as a resource for media.¹⁰⁴ While not a traditional advocacy group on behalf of victims of a particular identity, the Center director, Brian Levin, does testify before legislative bodies.¹⁰⁵ The Center also issues reports conveying its general support for hate crime remedies.¹⁰⁶

b. ProPublica

For research organizations like the Center and advocacy groups, the most important goal clearly seems to be influencing the media and the national conversation about hate crime.¹⁰⁷ Recognition of the importance of the media’s role in hate crime spurred one nonprofit news organization, ProPublica, to take an active role.¹⁰⁸ Motivated in part by the rash of hate crimes that followed in the wake of the 2016 presidential election¹⁰⁹ and the gap between FBI statistics, ProPublica partnered with other new organizations to create the “Documenting Hate” project.¹¹⁰ From 2016 to 2019 the project worked with news organizations to collect and verify accounts of hate crimes, eventually creating a database of hate crimes.¹¹¹

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *See, e.g., id.* (“The center seeks to aid scholars, community activists, government officials, law enforcement, the media and others with objective information to aid them in their examination and implementation of law, education and policy. We are unique in that we are fiercely Non-Partisan and seek to promote clear and accurate discourse and debate on the important issues of by countering censorship, violence, bigotry, and tactical falsehoods.”).

¹⁰⁸ Rachel Glickhouse, *What We Found in Three Years of Documenting Hate: A Letter to Our Partners*, PROPUBLICA (Jan. 2, 2020), <https://www.propublica.org/article/what-we-found-in-three-years-of-documenting-hate-an-open-letter-to-our-partners> [<https://perma.cc/EUL3-TT87>].

¹⁰⁹ *See* Discussion, Part I.

¹¹⁰ *See* Glickhouse, *supra* note 108.

¹¹¹ *Id.*

ProPublica's activities went beyond simply creating a database. The organization collected more than 6,000 tips regarding hate crimes, collected police records, and eventually published more than 230 stories on hate crime.¹¹² Though it was not an advocacy organization working on behalf of any particular group of victims, ProPublica's Documenting Hate project had an unparalleled effect on highlighting the prominence of hate crime as an important force in social relations in America for the few short years that the project existed. It was not just how hate crime was viewed by the members of the public—ProPublica also seemed concerned with improving law enforcement's identification and classification of hate crimes. In many cases, this involved reaching out to the primary organizations responsible for identifying hate crime: police departments. Several of ProPublica's stories involved police misclassification of hate crime—crimes marked as anti-heterosexual when they were really anti-gay,¹¹³ crimes missed by the police,¹¹⁴ and other law enforcement failures.¹¹⁵ Perhaps because the organization stayed in close contact with the government agencies from whom they gathered data, their reports documenting the failure of law enforcement to respond appropriately to hate crime led to changes in policy designed to improve hate crime data collection, and hate crime identification.¹¹⁶

Despite all the value and increase in information provided by the efforts of non-governmental research organizations collecting data on hate crime, even advocacy groups and non-profits like ProPublica cannot supply a complete picture. There remains a number of challenges involved in using

¹¹² *Id.*

¹¹³ Rachel Glickhouse & Rahima Nasa, *Police Are Mislabeled Anti-LGBTQ and Other Crimes as Anti-Heterosexual*, PROPUBLICA (May 15, 2018), <https://www.propublica.org/article/police-are-mislabeled-crimes-as-anti-heterosexual-hate-crimes> [<https://perma.cc/4TR3-FUJP>] (describing results of public records request sent to more than 50 police departments that reported anti-heterosexual hate crimes to the FBI revealing no evidence of hate crimes against straight people).

¹¹⁴ Ken Schwencke, *Why America Fails at Gathering Hate Crime Statistics*, PROPUBLICA (Dec. 4, 2017), <https://www.propublica.org/article/why-america-fails-at-gathering-hate-crime-statistics> [<https://perma.cc/3QQ9-R4RF>] (describing the failure of local law enforcement to identify and classify hate crime).

¹¹⁵ Ryan Katz, *Hate Crime Law Results in Few Convictions and Lots of Disappointment*, PROPUBLICA (Apr. 10, 2017), <https://www.propublica.org/article/hate-crime-law-results-in-few-convictions-and-lots-of-disappointment> [<https://perma.cc/L5VW-S4KM>] (describing a paucity of successful prosecutions for hate crimes in Texas).

¹¹⁶ See Glickhouse, *supra* note 108 (describing changes in police policy and a number of police agencies, increases in the number of hate crimes identified, and other changes as a result of reports by ProPublica).

their data as a marker of the number of hate crimes that occur in the United States. First, as advocacy groups typically focus on a particular identity—for instance, Stop AAPI Hate only collects data regarding Asian Americans who were victimized by crime—data from any one group does not present a full picture of all the race-based crimes. Though aggregating race-based crime would be possible by adding Asian American, Black, and LatinX advocacy groups together, this too, presents problems. In some cases, multiple agencies with different measures of classifying incidents exist.¹¹⁷ In addition, for people of at least two different racial identities—i.e., white and Black people—there are few, if any, victim-advocacy organizations collecting data on hate crime. To add to this problem, with the exception of the Anti-Defamation League, which only collects data on anti-Semitic violence, there are very few longstanding organizations collecting data from the early days of the creation of this new category of crime. For instance, though the data collected by ProPublica is national, it is limited because the organization collected data for just two years.¹¹⁸

In addition to questions regarding the accuracy and comprehensiveness of advocacy group data, there is also the issue of the reliability of data collected by advocacy groups and other organizations. Organizations may or may not investigate or verify the factual circumstances of incidents reported to the organization.¹¹⁹ It is not clear why some organizations choose to investigate and others do not. It may be because the organization's approach is deliberately broad to encourage as many victims as possible to report hate crimes. This may mean that incidents included in their audit may not actually fit the legal definition of "hate crime."¹²⁰

¹¹⁷ Compare Yellow Horse, *supra* note 96, at 2 (including shunning in its report of crimes directed at Asian American) with Anti-Defamation League, *ADL Tracker of Antisemitic Incidents*, <https://www.adl.org/resources/tools-to-track-hate/antisemitic-incidents> (compiling alleged anti-Semitic incidents of "vandalism, harassment or assault reported to or detected by the ADL." While neither organization claim that what it compiling is all hate crimes, point is that the two organization collect different types of incidents.

¹¹⁸ See, e.g., *Documenting Hate*, PROPUBLICA, <https://projects.propublica.org/graphics/hatecrimes> [<https://perma.cc/FZ8C-KHB9>] (describing the project beginning in 2016 and ending two years later).

¹¹⁹ Compare Yellow Horse, *supra* note 96, at 1, (indicating incidents in the report are those "reported to our center") with Anti-Defamation League, "ADL Tracker of Antisemitic Incidents," <https://www.adl.org/resources/tools-to-track-hate/antisemitic-incidents> (noting incidents in the Tracker may be removed if they are determined not credible upon further investigation by ADL.)

¹²⁰ Law focused organizations like the Anti-Defamation League—which has been involved in crafting model hate crime legislation since the early 1990s—recognized this fact and specifically note this both in the definition of accounts in its annual audit. See, "Explainer:

3. *Making Sense of Data Failure in Official Statistics*

Advocacy group data like that compiled by the ADL and Stop AAPI Hate are not the only sources suggesting that hate crimes are rising; FBI data from 2020 showed a 20% increase in hate crimes since the previous year.¹²¹ Though there were significant increases over the previous year, few experts consider FBI data to be an appropriate account of what is happening.¹²² One criticism of FBI data is the failure of so many jurisdictions to report hate crimes.¹²³ Though the FBI is required by the HCSA to publish the data it receives, law enforcement agencies are not required to report hate crimes to the FBI.¹²⁴ In other words, every law enforcement agency's report to the FBI is entirely voluntary.

In addition to the data and anecdotes from news organizations and advocacy groups which call into question the accuracy of hate crime reporting, there are victim surveys, like the NCVS, which suggest that the numbers reported by the FBI are significantly undercounted.¹²⁵ One potential explanation for the lack of hate crime reports in particular jurisdictions is the different processes for dealing with hate crimes.

Police departments have a variety of approaches to dealing with hate crimes.¹²⁶ After hate crimes are reported to the police, like other crimes, they need to be investigated. Some departments have specialized police hate crime units.¹²⁷ In other departments, hate crimes may be dealt with by police who

"ADL's Methodology for Gathering and Reporting Antisemitic Incident Data," June 04 2021, <https://www.adl.org/resources/news/explainer-adls-methodology-gathering-and-reporting-antisemitic-incident-data>.

¹²¹ Christina Carrega & Priya Krishnakumar, *Hate Crime Reports Surge to Highest Level in 12 Years, FBI Says*, CNN (Oct. 26, 2021), <https://www.cnn.com/2021/08/30/us/fbi-report-hate-crimes-rose-2020/index.html> [<https://perma.cc/KLV7-XVL2>].

¹²² Swenke, *supra* note 114.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ See, e.g., *Antisemitic Incidents in Connecticut Increase 42% in 2021 According to New ADL Report*, ADL CONNECTICUT (April 26, 2022), <https://connecticut.adl.org/news/antisemitic-incidents-in-connecticut-increase-42-in-2021-according-to-new-adl-report> [<https://perma.cc/8YCC-BAH4>].

¹²⁶ JENNESS & GRATSET, *supra* note 15, at 134–38 (describing different police departmental organizational practice in the area of hate crime).

¹²⁷ JEANNINE BELL, *POLICING HATRED: LAW ENFORCEMENT, CIVIL RIGHTS AND HATE CRIME* 49 (1992) (describing bias crimes unit in "Center City"); JAMES GARAFALO & SUSAN MARTIN, *CTR. FOR THE STUDY OF CRIME, DELINQ. & CORR., BIAS MOTIVATED CRIMES: CHARACTERISTICS AND LAW ENFORCEMENT RESPONSE* 5-7(1993) (describing bias crime units in Maryland and New York City) <https://www.ojp.gov/pdffiles1/Digitization/145315NCJRS.pdf>.

do not specialize in hate crimes.¹²⁸ Some police departments may have specific policies in place, while other police departments lack departmental policies for dealing with hate crimes.¹²⁹ Officers' approaches to and belief in the hate crime project varies as well. Some officers are supportive of hate crime victims and investigation, while others mock the process, referring to hate crimes as "a pain in the ass."¹³⁰ The failure of police to identify hate crimes also affects prosecutors downstream. If police do not collect evidence of bias motivation, prosecutors may be unable to prosecute hate crimes.

In some cases, prosecutors are reluctant to bring hate crime charges.¹³¹ Take the case of New York City, which has a police bias crime unit charged with forwarding hate crime cases to the District Attorney's Office. In 2022, when there was a push to respond to attacks on Asian Americans fueled by the pandemic, journalists discovered that just 15% of hate crimes initially charged as hate crimes ended up being prosecuted as hate crimes.¹³² In the vast majority of cases, prosecutors accepted pleas or had the hate crime charges dropped.¹³³ In this way, prosecutorial reluctance hampered an approach to hate crimes where such incidents resulted in the full identification of crimes as hate crimes.

Whether the numbers are generated by the FBI or by advocacy groups, reports from both governmental and non-governmental agencies show an increase in the overall number of hate crimes, especially after 2019.¹³⁴ This

¹²⁸ Shea Cronin, Jack McDevitt, Amy Farrell & James J. Nolan, III, *Bias-Crime Reporting: Organizational Responses to Ambiguity, Uncertainty, and Infrequency in Eight Police Departments*, 51 AM. BEHAV. SCIENTIST 213, 221 (2007).

¹²⁹ William Johnson, *The Importance and Structure of a Written Hate Crime Policy*, 86 POLICE CHIEF, Mar. 2019, at 30–34.

¹³⁰ Elizabeth Boyd, Richard Berk & Karl Hamner, "Motivated by Hatred or Prejudice": *Categorization of Hate-Motivated Crimes in Two Police Divisions*, 30 L. & SOC'Y REV. 819, 827 (1996).

¹³¹ Beverly McPhail & Valerie Jenness, *To Charge or Not to Charge?—That Is the Question: The Pursuit of Strategic Advantage in Prosecutorial Decision-Making Surrounding Hate Crime*, 4 J. HATE STUD. 89, 97 (2005).

¹³² Yoav Gonen, Claudia Irizarry Aponte & Suhail Bhat, *Most Hate Crime Charges in NYC Get Dropped Before Conviction, Stats Show*, CITY (Mar. 6, 2022), <https://www.thecity.nyc/2022/3/6/22964719/hate-crime-nyc-dropped-before-conviction> [<https://perma.cc/CD9D-3ERD>].

¹³³ *Id.*

¹³⁴ See e.g., Nicole Hong & Jonah E. Bromwich, *Asian-Americans Are Being Attacked. Why Are Hate Crime Charges So Rare?*, N.Y. TIMES (March 18, 2021), <https://www.nytimes.com/2021/03/18/nyregion/asian-hate-crimes.html> [<https://perma.cc/DTZ6-SMH4>] (detailing rising hate crimes against Asian Americans); Tim Arango, *Hate Crimes in U.S. Rose to Highest Level in More Than a Decade in 2019*, N.Y. TIMES (Nov. 16, 2020), <https://www.nytimes.com/2020/11/16/us/hate-crime-rate.html>

is alarming information, but it does not help fashion appropriate remedies, since rising numbers tell us little about where violence happens or anything at all about the overall root causes of bias-motivated violence.

II. HATE CRIMES AS ANTIDEMOCRATIC VIOLATIONS OF THE FAIR HOUSING ACT

Police departments, the FBI, and prosecutors' offices often struggle with hate crime identification, classification, and prosecution.¹³⁵ Thus, the number of actual hate crimes committed may be quite different than records suggest. That being said, it may not be vital to count every single hate crime. In fact, a comparative analysis of the overall numbers cannot tell us much about the roots of societal problems investigating and prosecuting a crime. This is important in part because in 2016, with the rise of pro-Trump rhetoric, hate crimes began to be constructed as openly political crimes.¹³⁶ As this section suggests, a focus on numbers misses the deeper issue concerning the true context of many hate crimes—as acts of anti-integrationist violence which violates the Fair Housing Act.¹³⁷

A. THE COMPLEX ROOTS OF ONE TYPE OF HATE CRIME

Boxes covered with the words, “Trump,” and “Take Back America,” were left in the driveway of a home in Michigan where one family member was Hispanic.¹³⁸

The words, “Hail Trump” were written on the outside of a Black family's home, and “Nigger's Keep Out” on the opposite side.¹³⁹

[<https://perma.cc/CHJ4-8YVT>] (describing increase in hate murders in 2019); Joe Hernandez, *Hate Crimes Reach the Highest Level In More Than A Decade*, NPR (Sept. 1, 2021), <https://www.npr.org/2021/08/31/1032932257/hate-crimes-reach-the-highest-level-in-more-than-a-decade> [<https://perma.cc/8G6R-885G>].

¹³⁵ See *supra* Part I.

¹³⁶ See, e.g., Griffin Edwards & Stephen Rushin, *The Effect of President Trump's Election on Hate Crimes*, (Jan. 31, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3102652 [<https://perma.cc/S9HR-6YXK>].

¹³⁷ See 42 U.S.C. § 3604 (1968).

¹³⁸ *Boxes Scrawled with “Trump” Left on Michigan Family's Driveway*, CLICKONDETROIT (Nov. 14, 2016) <https://www.clickondetroit.com/news/2016/11/14/boxes-scrawled-with-trump-left-on-michigan-familys-driveway> [<https://perma.cc/G2NP-L2AU>].

¹³⁹ Micaela Marshall, *Arrest made in racially charged vandalism on Ogden Ave.*, ABC NEWS (Jul. 14, 2018), <https://www.13abc.com/content/news/Arrest-made-in-racially-charged-vandalism-on-Ogden-Avenue> [<https://perma.cc/7RSH-33LZ>].

Though these types of incidents are alarming, attacks on individuals because of their race or ethnicity did not start with the candidacy and later election of Donald Trump. In fact, hate crimes which target individuals where they live have a far deeper connection to long-standing resistance to housing integration.¹⁴⁰

In America, there is well-established resistance to non-white integration of white neighborhoods.¹⁴¹ Though Black people and whites lived close by each other without conflict before and after the Civil War,¹⁴² by the 1890s, racial tension increased and violence began to be directed at non-whites living in white neighborhoods.¹⁴³ Among the first targets of this violence were the Chinese, who were attacked across Washington, Oregon, Idaho, and California beginning in the 1890s.¹⁴⁴ Attacks directed at Black people in the West, Northeast, and South also began in the 1890s and continued throughout the United States, increasing when Black people, seeking jobs and opportunity after the First and Second World War, left the overcrowded ghettos to which they had been confined.¹⁴⁵ Often, Black people moving in to white neighborhoods were subjected to mob violence, as angry neighbors often gathered in groups—breaking windows in their new dwellings to get them to leave.¹⁴⁶

Though the fervor with which whites protected their neighborhoods cooled somewhat by the late 1960s when the Fair Housing Act was passed,¹⁴⁷ protecting the rights of individuals to live in the neighborhood of their choice, white resistance did not disappear completely.¹⁴⁸ Rather than completely vanishing, violence directed at Black people—and to a lesser extent Asians and Latinos—who moved to white neighborhoods retreated into the

¹⁴⁰ See, e.g., Bell, *supra* note 127.

¹⁴¹ *Id.*

¹⁴² IRA BERLIN, *MANY THOUSANDS GONE: THE FIRST TWO CENTURIES OF SLAVERY IN NORTH AMERICA* 29 (2000).

¹⁴³ JAMES W. LOEWEN, *SUNDOWN TOWNS: A HIDDEN DIMENSION OF AMERICAN RACISM* 50–54 (2005).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*; see also THOMAS J. SUGRUE, *THE ORIGINS OF URBAN CRISIS, RACE AND INEQUALITY IN POSTWAR DETROIT* 24 (1996).

¹⁴⁶ STEPHEN GRANT MEYER, *AS LONG AS THEY DON'T MOVE NEXT DOOR: SEGREGATION AND RACIAL CONFLICT IN AMERICAN NEIGHBORHOODS* 6 (2000); AMANDA SELIGMAN, *BLOCK BY BLOCK: NEIGHBORHOODS AND PUBLIC POLICY ON CHICAGO'S WEST SIDE* 167 (2005).

¹⁴⁷ 18 U.S.C.A. § 242.

¹⁴⁸ JEANNINE BELL, *HATE THY NEIGHBOR: MOVE-IN VIOLENCE AND THE PERSISTENCE OF RACIAL SEGREGATION IN AMERICAN HOUSING* 57–61 (2013).

shadows.¹⁴⁹ From the 1920s until the 1950s, white resistance to minorities moving to white neighborhoods consisted of grand displays of violence carried out by large, angry mobs.¹⁵⁰ By contrast, violence in the 1970s to the 1990s involved fewer perpetrators and often occurred under cover of night, when newcomers to white neighborhoods often found their property vandalized.¹⁵¹

In 1990, the Hate Crime Statistics Act was passed, and race-based violence became a “hate crime.”¹⁵² The new remedy for hate crime did little to abate violence directed specifically at racial and ethnic minority newcomers to predominantly white neighborhoods.¹⁵³ Anti-integrationist violence often occurs because perpetrators want to keep non-whites out of the neighborhood for irrational, stereotyped reasons, ranging from worries about the newcomers bringing crime to the neighborhood to concerns about a potential decline in property values.¹⁵⁴ Court cases and news reports published between 1990 and 2010 revealed more than 400 incidents of violence directed at Black people, Asians, Latinos, and other racial and ethnic minorities who moved to white neighborhoods.¹⁵⁵ The incidents include (but are not limited to) homicide, physical attacks, threats, harassment, arson, firebombing, and shotgun blasts.¹⁵⁶ Vandalism also constituted a significant portion of incidents.¹⁵⁷

One important issue to note about these incidents is how incredibly traumatizing the targets found the violence, irrespective of the criminal offense level involved.¹⁵⁸ Because the crime targets the victim because of who they are, they are always potentially vulnerable. Victims are also affected when the target is the home, a place where they are supposed to feel safe. For instance, Sang Huynh’s and Phong Tran’s home in Happy Valley,

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 85.

¹⁵² Pub. L. 101-275 § 1 (Apr. 23, 1990).

¹⁵³ Bell, *supra* note 4, at 35 (showing the numbers of hate crime increasing across several years).

¹⁵⁴ Bell, *supra* note 127, at 61–71.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 70.

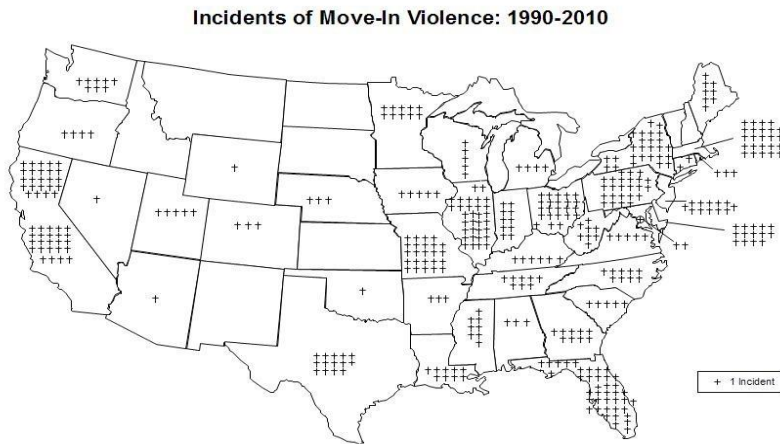
¹⁵⁷ See, e.g., Rick Bella, *Vandals Target Happy Valley Family with Racist Graffiti, Threaten to Burn Down Their House*, OREGONIAN (Sep. 3, 2010), https://www.oregonlive.com/happyvalley/2010/09/happy_valley_family_victims_of_racial_harassment.html [<https://perma.cc/GK53-G5YP>].

¹⁵⁸ See JACK LEVIN & JACK McDEVITT, HATE CRIMES: THE RISING TIDE OF BIGOTRY AND BLOODSHED 13 (1993) (detailing the unique sense of victimization hate crime victims face).

Oregon, was painted with racial slurs.¹⁵⁹ The perpetrator also left a note threatening, “Last warning. We will burn your house down if we have to.”¹⁶⁰ Next to the note were matches and colorless liquid that the police assumed was gasoline.¹⁶¹ Family members were devastated.¹⁶² Phong Tran remarked, “It’s just terrible because we just moved here, and it’s my dream area.”¹⁶³

An important fact to acknowledge is that the type of violence directed at Tran and other people of color who moved to white neighborhoods was not restricted to a particular area of the country.¹⁶⁴ As the graphic below demonstrates, though incidents were not identified in every single state, no specific area of the country was immune from anti-integrationist violence.

Figure 1. Incidents of Anti-Integrationist Violence 1990-2010¹⁶⁵



¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ Bell, *supra* note 148, at 67.

¹⁶⁵ *Id.*

B. ANTI-INTEGRATIONIST VIOLENCE IN THE TRUMP AND POST-TRUMP ERA

The tone of anti-integrationist violence changed with the election of Donald Trump.¹⁶⁶ As a presidential candidate, Trump used racist dog whistles to call out to racists and racial extremists.¹⁶⁷ Trump's use of coded language resonated with extremists who celebrated his victory with hate crimes after the election.¹⁶⁸ As President, Trump's comments in the wake of the Unite the Right rally expressed support for the racial extremists whom he described, along with counter-protesters, as "very fine people."¹⁶⁹ Irrespective of whether Trump's statements before he was elected president or after were intended as open support of violence directed at racial and ethnic minorities, racial extremists began invoking Trump's name when targeting individuals at their homes.¹⁷⁰

III. THE AHMAUD ARBERY MURDER AS AN ACT OF ANTI-INTEGRATIONIST VIOLENCE

As this brief description of the context of anti-integrationist violence suggests, in 2020 and beyond, Black people, Asians, Latinos, and other racial and ethnic minorities abiding in and passing through white neighborhoods were vulnerable to attacks by whites who were resistant to their presence. Whites continue to target minorities for anti-integrationist violence, and, in 2020, the FBI Hate Crime Reports found the most frequent place people were attacked was at home.¹⁷¹

¹⁶⁶ See Jeannine Bell, *The Resistance & the Stubborn but Unsurprising Persistence of Hate and Extremism in the United States*, 26 IND. J. GLOB. LEGAL STUD. 305 (2019).

¹⁶⁷ Adam R. Shapiro, *The racist roots of the dog whistle*, WASH. POST (Aug. 21, 2020), <https://www.washingtonpost.com/outlook/2020/08/21/racist-roots-dog-whistle> [<https://perma.cc/M3VN-C9VN>].

¹⁶⁸ *Ten Days After: Harassment and Intimidation in the Aftermath of the Election*, SPLC (Nov. 29, 2016), <https://www.splcenter.org/20161129/ten-days-after-harassment-and-intimidation-aftermath-election> [<https://perma.cc/S6BR-A53U>].

¹⁶⁹ Rosie Gray, *Trump Defends White-Nationalist Protesters: 'Some Very Fine People on Both Sides'*, ATLANTIC (Aug. 15, 2017), <https://www.theatlantic.com/politics/archive/2017/08/trump-defends-white-nationalist-protesters-some-very-fine-people-on-both-sides/537012> [<https://perma.cc/U47W-S2YX>].

¹⁷⁰ See, e.g., Andrew Wyrich, *Racist graffiti at Giants player's home investigated as hate crime*, NORTH JERSEY (Dec. 8, 2016), <https://www.northjersey.com/story/news/2016/12/08/exclusive-giants-player-describes-racially-charged-scrawls-his-home-after-break-/95136494> [<https://perma.cc/E6HQ-XVVX>]; Marshall, *supra* note 139.

¹⁷¹ Press Release, FBI Nat'l Press Office, FBI Releases Updated 2020 Hate Crime Statistics, (Oct. 21, 2021) <https://www.fbi.gov/news/pressrel/press-releases/fbi-releases-updated-2020-hate-crime-statistics> [<https://perma.cc/R2YP-84JH>].

The killing of Ahmaud Arbery clearly fits the pattern of anti-integrationist violence. Arbery, a 25-year-old Black man, was shot dead after he was confronted by two white men, Gregory McMichael and Travis McMichael. Arbery, who friends said was an avid jogger, was accosted while jogging through Satilla Shores, a predominantly white suburban neighborhood, on February 23, 2020 shortly after 1 PM.¹⁷² Arbery was not a stranger to the area. In addition to having jogged through the neighborhood on other occasions, he lived with his mother just two miles away.¹⁷³

According to police reports, the attack on Arbery began when George McMichael was standing in the front yard and saw Arbery pass in front of his house. McMichael said he looked like a man suspected for burglaries in the neighborhood.¹⁷⁴ The alleged resemblance to another Black man prompted McMichael and his son, Travis, to grab rifles and a shotgun and begin pursuing Arbery in their pickup truck.¹⁷⁵ When later questioned by the police, the McMichaels claimed that Arbery, who was not armed, had tried to grab their shotgun and Travis had shot and killed Arbery.¹⁷⁶ Though Arbery had been unarmed when he was shot to death, initially, prosecutors declined to prosecute either of the McMichaels or William Bryan, who was present at the time of the murder.¹⁷⁷ Favoritism may have played a role in prosecutor's decision not to charge, as Gregory McMichael was a former police officer and investigator with the local district attorney's office.¹⁷⁸

The prosecutor's decision was not the end of the road for Arbery's killers. Several weeks after Arbery's murder, a cell phone video of the crime was published online.¹⁷⁹ It had been shot by William Bryan, and was leaked to a local radio station by a lawyer who had consulted with the suspects.¹⁸⁰ The video quickly began to create controversy online, and the Georgia

¹⁷² Richard Fausset, *What We Know about the Shooting Death of Ahmad Arbery*, N.Y. TIMES (Aug. 8, 2022), <https://www.nytimes.com/article/ahmaud-arbery-shooting-georgia.html> [https://perma.cc/WT55-9VHZ].

¹⁷³ Richard Fausset & Rick Rojas, *Where Ahmaud Arbery Ran, Neighbors Cast Wary Eyes*, N.Y. TIMES (May 22, 2020), <https://www.nytimes.com/article/satilla-shores-ahmaud-arbery-killing.html> [https://perma.cc/8GPR-59LA].

¹⁷⁴ *Id.*

¹⁷⁵ Fausset, *supra* note 172.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ Sarah Mervosh, *Ahmaud Arbery Video Was Leaked by a Lawyer Who Consulted with Suspects*, N.Y. TIMES (May 8, 2020), <https://www.nytimes.com/2020/05/08/us/ahmaud-arbery-video-lawyer.html> [perma].

¹⁸⁰ *Id.*

Bureau of Investigations took over the case and charged the McMichaels with murder and aggravated assault.¹⁸¹ Bryan was later charged with felony murder under Georgia law.¹⁸² In the state murder trial, all three men were convicted and sentenced to life in prison, only Bryan was given the opportunity to be paroled.¹⁸³

Arbery's murder fits clearly into the category of anti-integrationist crime. A Black man who lived near the neighborhood where he was jogging was perceived as a criminal and pursued by armed residents of the neighborhood. Though Arbery lived just two miles from Santilla Shores, Georgia, where he was confronted and then killed, he lived in a traditionally Black neighborhood.¹⁸⁴ That being said, Santilla Shores was not all white. One Black resident interviewed by *The New York Times* had moved to the neighborhood 35 years before.¹⁸⁵ Another Black resident of the neighborhood described his white neighbors as "chilly."¹⁸⁶ One Black neighbor indicated that it was not surprising that Arbery had been quickly spotted by the McMichaels as he ran through the neighborhood.¹⁸⁷ The mixed-income neighborhood, which had experienced a number of burglaries in the months before the McMichaels confronted Arbery, was described as "on edge."¹⁸⁸

The McMichaels' confrontation of Arbery was very similar to George Zimmerman's confrontation of Trayvon Martin in Florida.¹⁸⁹ Both situations involved defendants with law enforcement backgrounds who considered themselves self-appointed armed protectors of their neighborhoods.¹⁹⁰ In both cases, Black people—in the case of Martin, a baby-faced preteen—were killed by armed white men who maintained they were protecting the neighborhood.¹⁹¹ In neither case was the individual killed behaving in a

¹⁸¹ *Id.*

¹⁸² *Why the man who took video of Ahmaud Arbery's death has been charged with murder*, SAN JOSE MERCURY NEWS (May 22, 2020), <https://www.mercurynews.com/2020/05/22/why-the-man-who-took-video-of-ahmaud-arberys-death-has-been-charged-with-murder> [<https://perma.cc/S3W3-A3Q3?type=image>].

¹⁸³ *Id.*

¹⁸⁴ Fausset & Rojas, *supra* note 173.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ For a discussion of the Zimmerman case, see Jeannine Bell & Mona Lynch, *Cross-Sectional Challenges: Gender, Race, and Six-Person Juries*, 46 SETON HALL L. REV. 419 (2016). Details of the Aubrey murder are discussed in Fausset, *supra* note 172

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

manner that was objectively suspicious or threatening.¹⁹² In Zimmerman's case, the jury believed the defendant's claims of self-defense, despite the victim's age and smaller stature.¹⁹³ By contrast, the McMichaels were found guilty; the jury rejected their argument that Arbery resembled a burglary suspect and they were making a citizen's arrest.¹⁹⁴

The whiteness of both the McMichaels' and Zimmerman's neighborhoods was threatened by the presence of the few Black people who lived there and by their close proximity to traditionally Black neighborhoods. Some white residents of the McMichaels' neighborhood tried to support Santilla Shores separateness by flying Confederate flags and aggressively policing potential violations of the neighborhood space.¹⁹⁵ In both cases, armed men assumed that the Black men they encountered were criminals, despite both engaging in the most innocent of activities, and shot and killed them.¹⁹⁶ The individual characteristics of the Black man in the circumstances of their confrontation were actually irrelevant. For Zimmerman and the McMichaels, Black men were the symbolic assailant¹⁹⁷—always criminal and unquestionably responsible for whatever crime which they imagined him to be guilty.

Despite the context of the crime and evidence that the defendants were racists, little of the race-based details came out during the criminal trial.¹⁹⁸ The lead prosecutor in the case, Linda Dunikoski, elected not to discuss the defendants' racism and targeting of Arbery.¹⁹⁹ Racial slurs used during the

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ Fabiola Cineas, *The Significance of the guilty Verdicts in Ahmaud Arbery's Murder*, VOX (Nov. 24, 2021), <https://www.vox.com/2021/11/24/22798878/ahmaud-arbery-guilty-verdict-trial-mcmichaels-bryan> [<https://perma.cc/GL8J-YR7Z>].

¹⁹⁵ Fausset & Rojas, *supra* note 173.

¹⁹⁶ Arbery was out for a jog and Martin had returned from a snack run. *See*, Fausset, *supra* note 172 (describing Arbery as an avid runner and running when he was accosted.); Julia Dahl *Trayvon Martin shooting: A timeline of events* - CBS News (July 12, 2013), (describing Martin's trip to the 7-11 before Zimmerman attacked him) <https://www.cbsnews.com/news/trayvon-martin-shooting-a-timeline-of-events/>.

¹⁹⁷ For a discussion of Black men as symbolic assailants, see Jeannine Bell, *Dead Canaries in the Coal Mine: The Symbolic Assailant Revisited*, 34 GA. ST. L. REV. 513 (2018).

¹⁹⁸ Tariro Mzezewa, Giuli Hayward & Richard Fausset, *Discussions of Race Are Notably Absent in Trial of Arbery Murder Suspects*, N.Y. TIMES (Nov. 19, 2021), <https://www.nytimes.com/2021/11/19/us/ahmaud-arbery-shooting-race.html> [perma].

¹⁹⁹ *Id.*

crime, racist text messages on the defendants' cell phones, and the defendants' Confederate license plates were all kept from the jury.²⁰⁰

The state conviction of the three men responsible for Ahmaud Arbery's death was, of course, a victory, but not one that sets the stage for an overall better approach to dealing with acts of anti-integrationist violence. This is true for several reasons. First, the trial almost did not happen. Initially, the police did not arrest the three men. Even Waycross County prosecutor George Barnhill maintained that there was not even probable cause to arrest the men.²⁰¹ Two months passed, and they were not arrested.²⁰² It was the leaking of the cell phone video, particularly in the context of the murder of George Floyd, that led to public outcry and an outside prosecuting agency—the Georgia Department of Criminal Investigation—stepping in to issue charges against the McMichaels and Bryan.²⁰³

In the end, the legacy of the Georgia state case against the McMichaels and Bryan is an outcome stemming from two powerful but connected strokes of luck—a video of the events taken by a perpetrator that was then leaked by a lawyer. In other words, the case may be more noteworthy for the guilty verdict, especially in light of the context that those in the local prosecutor's office accepted the death of an unarmed man jogging in a white neighborhood as a simple act of self-defense.²⁰⁴ In this way, it is a reminder of the difficulty of seeing anti-integrationist violence even when it is right in front of our noses.

Luckily for the future of hate crime law prosecutions, the state case was not the end of the line for the defendants, who had also been charged with federal hate crime violations before the end of the state case.²⁰⁵ The victory

²⁰⁰ *Id.* There are a variety of reasons that the evidence of racial slurs may have been kept from the jury. First, though Georgia did have a hate crime law, it was a brand new one, passed in the wake of the George Floyd killing. Even in situations with more tested hate crime law prosecutors are often reluctant to bring hate crime charges. Christine Carrega, *Prosecutors Rarely Pursue Hate Crime Charges. Here's Why Ahmaud Arbery's Murder Was Different*, CAPITAL B NEWS (Feb. 24, 2022), <https://capitalbnews.org/ahmaud-arbery-hate-crimes> [<https://perma.cc/8ATV-2FGX>]. There may have been at the outset, less evidence of bias, because of police inability. *Id.* Finally, because the crimes with which the McMichaels and Bryan were charged did not require evidence of bias motivation, introducing evidence of bias could only aggravate those on the jury who might have also harbored such biases.

²⁰¹ Fausset, *supra* note 172 (prosecutor Barnhill arguing that there was not even probable cause to arrest the McMichaels).

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ See Press Release, Department of Justice, Office of Public Affairs, *Three Georgia Men Charged with Federal Hate Crimes and Attempted Kidnapping in Connection with the Death*

in the case says much about the best options for hate crime law going forward.

IV. THE AHMAUD ARBERY FEDERAL HATE CRIMES TRIAL AS THE NEW WAY FORWARD

On April 28, 2021, after the state of Georgia had announced its charges against the McMichaels and William Bryan, the Justice Department charged Travis McMichael, Gregory McMichael, and William Bryan with hate crime charges.²⁰⁶ The press release announcing the indictment captured the full nature of the violence of the crime from the perspective of one who is concerned about ensuring equal access to justice for individuals irrespective of their race.

Counts One and Two of the indictment allege that the defendants used force and threats of force to intimidate and interfere with Arbery's right to use a public street because of his race. Specifically, Count One of the indictment alleges that as Arbery was running on a public street in the Satilla Shores neighborhood of Brunswick, Georgia, Travis and Gregory McMichael armed themselves with firearms, got into a truck, and chased Arbery through the public streets of the neighborhood while yelling at him, using their truck to cut off his route, and threatening him with firearms. Count One also alleges that the offense resulted in Arbery's death. Count Two alleges that William "Roddie" Bryan joined the chase and used his truck to cut off our Arbery's route.²⁰⁷

This discussion of the crime vividly highlights the nature of the assault and the deprivation of Arbery's rights.

It is frequently the case that the Justice Department steps in with hate crime charges only when states fail.²⁰⁸ Though it is possible to initiate dual state and federal prosecutions, the federal government frequently declines prosecution of crimes or incidents that the state has decided to prosecute.²⁰⁹ There are a variety of reasons supporting this approach. These include protecting individuals from dual prosecution, efficient use of resources, and allowing for cooperation between states and the federal government.²¹⁰

The Justice Department may elect to seek hate crime charges in cases where the state proceeding did not result in severe enough penalties or there are other failures of justice.²¹¹ That doesn't seem to be the case here,

of *Ahmaud Arbery* (Apr. 28, 2021), <https://www.justice.gov/opa/pr/three-georgia-men-charged-federal-hate-crimes-and-attempted-kidnapping-connection-death> [<https://perma.cc/NB2W-RAGH>].

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ WOLFE, *supra* note 23, at 43.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

however. The federal case began after the state case ended. All defendants had been convicted of murder. The McMichaels had been sentenced to life in prison with no opportunity for parole. In this case, a different motivation for the federal hate crimes trial may have been prompted by the actions of Ahmad Arbery's mother, Wanda Cooper-Jones.

A. A MOTHER STEPS IN AND THE HATE CRIME TRIALS BEGIN

Though some have argued that criminal legal processes do not vindicate the rights of victims,²¹² Ahmaud Arbery's mother, Wanda Cooper-Jones, would probably beg to differ.

After the McMichaels and Bryan were convicted in the state murder trials, the federal process began, and it was disclosed that the McMichaels and Bryan had reached an agreement with federal prosecutors.²¹³ This is a problem with hate crimes writ large. In many jurisdictions, a large number of hate crime charges are dropped.²¹⁴ It may be as a result of plea-bargaining—when cases are plea-bargained, defense attorneys argue that the hate crime charges should be dismissed.²¹⁵ They may also argue for other sorts of benefits for their clients, as they did in the McMichaels case—serving their time in federal, as opposed to state, prison.²¹⁶ Prosecutors may see plea-bargaining as a win-win, particularly when they are risk-averse and often believe that hate crime cases are hard to win.²¹⁷

In the case of the McMichaels and Bryan, Ahmaud Arbery's mother, Wanda Cooper-Jones, argued that the deal allowing the McMichaels to go to federal prison was not appropriate.²¹⁸ She told the judge, in open court, "I'm asking on the behalf of his family, on behalf of his memory and on behalf of

²¹² See, e.g., Michael German & Emmanuel Mauleón, *Fighting Far-Right Violence and Hate Crimes*, BRENNAN CTR. FOR JUST., 14–15 (2019) (arguing that hate crime sentence enhancements do not serve the interests of justice, nor do they “remedy the injury inflicted on the victimized communities”); see also Shirin Sinnar & Beth Colgan, *Revisiting Hate Crimes Enhancements in the Shadow of Mass Incarceration*, 95 N.Y.U. LAW REV. ONLINE 150, 151–153 (2020) (describing progressive civil rights organizations which do not support hate crime laws).

²¹³ Richard Fausset & Shaila Dewan, *How a Plea Deal in the Arbery Hate Crime Case Unraveled*, N.Y. TIMES (Feb. 2, 2022), <https://www.nytimes.com/2022/02/02/us/ahmaud-arbery-murder-plea-deal.html> [<https://perma.cc/53DM-BS98>].

²¹⁴ Gonen, Aponte & Bhat, *supra* note 132.

²¹⁵ Bell, *supra* note 127, at 163 (describing a district attorney discussing defense attorneys' practices).

²¹⁶ Fausset & Dewan, *supra* note 213.

²¹⁷ *Id.*

²¹⁸ *Id.*

fairness that you do not grant this plea in order to allow these men to transfer out of Georgia state custody into the federal prisons, where they prefer to be.”²¹⁹

Upon hearing from Mr. Arbery’s mother, the judge rejected the plea deal²²⁰ and the defendants withdrew their guilty pleas, making space for the trial.²²¹

B. THE QUEST TO PROVE INTENTIONAL SELECTION ON THE BASIS OF RACE

Because it was a hate crime case, the federal case was markedly different from the state case.²²² In order to prevail, the prosecutor was required to show that the defendants were motivated by bias on the basis of race and their actions.²²³ Because of this, in sharp contrast to the state criminal trial, in the federal hate crime trial, the prosecution put on twenty witnesses, a number of whom testified to the defendants’ racist beliefs.²²⁴ For instance, Amy Vaughan, an analyst with the FBI, read racist text messages sent by two of the defendants.²²⁵ The prosecutors also introduced evidence that Travis McMichael wanted Black people to die and that he stated he wanted to kill a Black person who had played a practical joke.²²⁶ Other evidence presented made use of social media posts made by one of the defendants and text messages containing slurs and epithets.²²⁷ Though none of these remarks referred to Arbery, the prosecutor’s strategy was to use an abundance of evidence to indicate that the defendants were racist—as opposed to making occasional racist remarks.²²⁸ Overwhelming the jury with evidence of the defendants’ racism worked. The jury took just four hours to find the defendants guilty of civil rights violations.²²⁹

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ Tariro Mzezewa, *After Calling One Witness, Defense Rests in Arbery Hate Crimes Trial* N.Y. TIMES (Feb. 18, 2022).

²²⁵ Tariro Mzezewa & Richard Fausset, *Prosecutors Show Voluminous Evidence of Racism by Arbery Murderers*, N.Y. TIMES (Feb. 16, 2022), <https://www.nytimes.com/2022/02/16/us/ahmaud-arbery-mcmichael-racism.html> [<https://perma.cc/BG8V-99BE>].

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Jury Convicts Arbery Killers of Hate Crimes*, N.Y. TIMES (Feb. 23, 2022), <https://www.nytimes.com/live/2022/02/22/us/ahmaud-arbery-verdict> [].

CONCLUSION

The approach to hate crime taken by the Justice Department after Ahmad Aubery's mother forced its hand is unusual. In general, America is failing victims of bias-motivated violence.²³⁰ The vast majority of police departments, more than 80%, report that not a single hate crime occurred in their jurisdiction.²³¹ When hate crimes are recognized by the police, prosecutors are reluctant to prosecute.²³² Despite the presence of hate crime laws in the vast majority of states, American law enforcement, with its refusal to acknowledge the presence of hate crimes by investigating and prosecuting, acts by and large as if hate crimes were not happening.

If others in America think that a relaxed approach to hate crime is the right approach, the shooting at the Tops Friendly Market on May 14, 2022, in Buffalo, New York, certainly suggests otherwise. In the middle of the afternoon, eighteen-year-old Payton Gendron, who is white, walked into the Tops grocery store, a gathering place in one of Buffalo's African-American neighborhoods.²³³ Gendron was heavily armed and began shooting.²³⁴ He shot and killed ten people, most of whom were African-American.²³⁵ Authorities later learned from a manifesto he had written and social media posts that Gendron had spent months planning the shooting.²³⁶ According to the social media posts, Gendron had a specific desire to target African-Americans and chose Buffalo because it had a greater African-American population.²³⁷

Scholars and others who contest the intentionality of hate crime perpetrators, or who otherwise minimize their blameworthiness, are denying

²³⁰ See generally, BELL, *supra* note 4, 41-47 (describing the patchwork law enforcement of hate crime law where only some victims of hate crime get any measure of justice).

²³¹ See, e.g., *2019 Hate Crime Statistics*, U.S. DEP'T OF JUST., <https://ucr.fbi.gov/hate-crime/2019/topic-pages/jurisdiction> [<https://perma.cc/VBG5-ZEFG>] (reporting that 86.1 % of police departments reporting to the FBI indicated that no hate crimes had been reported in their jurisdiction).

²³² See, e.g., Brian Byers, Kiesha Warren-Gordon & James A. Jones, *Predictors of Hate Crime Prosecutions: An Analysis of Data from the National Prosecutors Survey and State-Level Bias Crime Laws*, 2 RACE & JUST. 203 (2012).

²³³ Shimon Prokupecz, Christina Maxouris, Dakin Andone, Samantha Beech, & Amir Vera, *What We Know About Buffalo Supermarket Shooting Suspect Payton Gendron*, CNN (May 18, 2022), <https://www.cnn.com/2022/05/15/us/payton-gendron-buffalo-shooting-suspect-what-we-know/index.html> [<https://perma.cc/B4AT-EGAB>].

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

the lived experiences of victims who may grapple with racism on a daily basis.²³⁸ The shooting at the Tops Friendly Market left African-Americans, not just in Buffalo, but around the country, reeling.²³⁹ In a Washington Post-Ipsos poll of Black Americans taken soon after the shooting, 70% of respondents believed that “at least half of white Americans hold white supremacist beliefs, 75% of black Americans say white supremacists are a major threat to black Americans, and 66% say white supremacy is a bigger problem today than it was five years before.”²⁴⁰ Black Americans believe that white supremacists are coming for them, even if some groups insist that they are not.²⁴¹

Payton Gendron has been charged with murder as a hate crime.²⁴² In his New York State case, he was charged with murder and state domestic charges motivated by bias.²⁴³ He pled guilty to all state charges.²⁴⁴ He was also charged with hate crime charges by the federal government.²⁴⁵ At this point, it is hard to say whether the federal prosecutor will try to accept a plea bargain to avoid the hate crime trial, as the federal prosecutor did in the McMichaels’ case. But for Ahmaud Arbery’s mother, the case would not have been tried as a hate crime. There are important consequences stemming from prosecutors’ avoidance of hate crime law. When we do not use hate crime law, we are implicitly saying that it is okay to be racist and attack people because you don’t believe that they are valued members of our community.

Though perpetrators can sometimes be punished under the criminal law, hate crime law, with its focus on bias, openly recognizes perpetrators’ disdain

²³⁸ See generally JAMES JACOBS & KIM POTTER, *HATE CRIMES: CRIMINAL LAW AND IDENTITY POLITICS* (1998) (arguing that hate crimes should not be punished separately).

²³⁹ Sylvia Foster-Frau, Arelis R. Hernández, Scott Clement & Emily Guskin, *Poll: Black Americans Fear More Racist Attacks After Buffalo Shooting*, WASH. POST (Jun. 2, 2022), <https://www.washingtonpost.com/nation/2022/05/21/post-poll-black-americans> [<https://perma.cc/SB6E-U57G>].

²⁴⁰ *Id.*

²⁴¹ Mark Hay, *A peek behind the curtain of a sinister new effort from white nationalists to co-opt the language of social justice*, May 11, 2021 <https://www.thedailybeast.com/anti-white-watch-is-the-racist-answer-to-hate-crimes> (describing white supremacist campaign to insist that whites are the real victims of the recent increases in hate crime).

²⁴² Mark Berman & Meryl Kornfield, *Buffalo Shooting Suspect Charged with Murder as a Hate Crime, Domestic Terrorism*, WASHINGTON POST (Jun. 1, 2022, 4:38 PM, updated Jun. 1, 2022), <https://www.washingtonpost.com/nation/2022/06/01/buffalo-shooting-indictment> [<https://perma.cc/XP97-SUXF>].

²⁴³ Chloe Mayer, *Buffalo Shooter Payton Gendron Pleads Guilty in Massacre*, NEWSWEEK, Nov. 28, 2022, <https://www.newsweek.com/buffalo-supermarket-shooter-pleads-guilty-payton-gendron-1762775>.

²⁴⁴ *Id.*

²⁴⁵ *Id.*

for victims' identities. For instance, Gendron's hatred for Black Americans that spurred on his deadly rampage was motivated in part by the "great replacement theory"—the idea that Black Americans serve as the "replacers" of whites. The idea that whites should fear that they are being replaced by nonwhites is a core white supremacist idea that has recently received significant following amongst conservative news outlets and members of the Republican Party.²⁴⁶

Gendron will most certainly be convicted of murder and may even be sentenced to death. Even though he will clearly be punished, a criminal case will not satisfy all the social needs. Hate crimes have a wider impact than on the people targeted by the perpetrator. This particular crime created fear among Black Americans all over the United States.²⁴⁷ If the murders at the Tops Friendly Market are not prosecuted as hate crimes, there will be no discussion of the perpetrator's motivation. If it is prosecuted as a hate crime, the Justice Department must discuss the perpetrator's motivation. The great replacement theory—a racist idea gaining popularity—will be forced out into the open. We will have to discuss its racist implications.

Although those who argue that hate crime law does not serve victims appear to suggest that the racist killer's racism was incidental, nothing could be further from the truth. The McMichaels' and Payton Gendron's racism was so entrenched that it constituted the reason for the murders they committed. To suggest that the racism inherent in race-based hate crimes is not relevant is a powerful denial of the fact that racism has a continuing presence in American society. It also is a denial of the experiences of people of color in a fundamental way.

One of the values of hate crime trials is that they are widely publicized acknowledgements of racism. If American society is going to conquer racial bias, we must engage in deeper examination and confrontation of racist ideas. In other words, as a society we must engage with America's racist underbelly, rather than assume that our racist past is behind us.

In a hate crime trial, unlike an ordinary criminal trial, the defendant's bias—in the form of their intentional selection of a victim—is displayed in open court for the public, any victims, and everyone else to see. Though plea bargains or guilty verdicts on criminal charges may punish the defendant, the

²⁴⁶ Shane Goldmacher & Luke Broadwater, *Republicans Play on Fears of 'Great Replacement' in Bid for Base Voters*, N.Y. TIMES (May 16, 2022), <https://www.nytimes.com/2022/05/16/us/politics/republicans-great-replacement.html> [<https://perma.cc/8TGL-2CDA>].

²⁴⁷ Audra Burch & Luke Vander Ploeg, *Buffalo Shooting Highlights Rise of Hate Crimes Against Black Americans*, N.Y. TIMES (May 16, 2022), <https://www.nytimes.com/2022/05/16/us/hate-crimes-black-african-americans.html> [<https://perma.cc/M4BA-SVV7>].

victim may need more than mere punishment. It may also matter for society to receive legal confirmation that what the defendant did was not just criminal, it was also racist.