SYMPOSIUM ESSAY

THE INHERENT UNFAIRNESS OF HATE CRIME STATUTES

DAVID GOLDBERGER*

Hate crime sentencing enhancement statutes create new offenses by making biased motivation an additional element of established underlying offenses. Once biased motivation is proven as an element of the offense, such statutes explicitly obligate or implicitly pressure judges to enhance the penalty for a crime, without regard to mitigating circumstances. Advocates favor such penalty enhancements because they send a message that hate crimes are worthy of special punishment, simultaneously deterring offenders and reassuring victims. In this Essay, Professor Goldberger criticizes hate crime sentencing enhancement statutes for granting prosecutors inordinate power over plea bargaining and sentencing. Because hate crime charges increase the applicable sentencing range or maximum, prosecutors can dictate the penalty defendants face simply by choosing whether to charge them with the hate crime or the underlying crime. This discretion over charge selection gives prosecutors a powerful chip in the plea bargaining process. At the same time, defendants feel pressure to avoid trial on a hate crime charge for fear of the likely presentation to the jury of inflammatory evidence of bias. Professor Goldberger concludes that legislatures should abandon hate crime sentencing enhancement statutes that include biased motivation as an element of the statutorily defined offense. He urges a return to a judge-based sentencing regime in which judges consider biased motive as an aggravating circumstance, but simultaneously are free to give mitigating circumstances appropriate weight. The result would restore the fairness guarantees provided by the criminal justice system's intended division of power between prosecutors and judges, leaving prosecutors to prosecute and judges to judge and to sentence.

America's embrace of hate crime statutes as weapons against crimes motivated by bias is proving to be a well-intentioned mistake. These statutes are applauded because they often require judges to impose enhanced penalties when biased motive is proven as an element of the offense, as opposed to permitting judges to treat biased motive as one factor among many to be considered at sentencing. Hate crime statutes are claimed to be an appropriate legislative response to the problem of bias-motivated crimes because these crimes are inherently worse than parallel crimes not

---

* Isador and Ida Topper Professor of Law, Director of Clinical Programs, Moritz College of Law, The Ohio State University. J.D., University of Chicago Law School, 1967; B.A., University of Chicago, 1963. The author thanks Professor Douglas Berman, whose wise advice and sentencing expertise were very helpful. He also thanks Professors Neil Komesar and Stephen Huefner and Jennifer Petrowski, Esq., for their suggestions and insights in the preparation of this Essay. Finally, he thanks Michael Kindred, whose comments about sentencing in hate crime cases, years ago, provided the idea for this Essay. He hastens to add that the Essay reflects his views and analyses, not those of the people who read his manuscript prior to publication. Finally, he thanks research assistants Joice Chang, Kristen Siefert, and Stephanie Vermeer.

motivated by bias.[1] Unfortunately, such statutes are not the valuable law enforcement tools their advocates claim them to be. They are not merely a strong social statement disapproving of bias-based crimes. On the contrary, because hate crime statutes limit judicial sentencing discretion, they serve as powerful prosecutorial weapons that transfer control over criminal proceedings from judges to prosecutors in a way that undermines the integrity of the criminal justice system.

The transfer of control over criminal proceedings from judges to prosecutors caused by hate crime statutes originated with the sentencing reform movement of the 1970s and 1980s. During that period, Congress and many state legislatures enacted sentencing laws that sharply limited judicial sentencing discretion.[2] One of the original purposes of enacting laws to limit this discretion was to achieve sentencing uniformity.[3] Using these initial reforms as their model, jurisdictions across the United States have adopted hate crime statutes requiring, or at least pressuring, judges to impose increased penalties for established crimes whenever the prosecution proves, as an additional element of the offense, that the defendant's crime was motivated by bias or prejudice against the victim.[4] Thus, a determination that biased motive is an element of the offense has the effect of either obligating or pressuring a conscientious sentencing judge to enhance the penalty for the crime whether or not there are mitigating circumstances.

The advocates of hate crime statutes justify them by pointing to crimes like the 1998 bias-based murders of James Byrd, Jr. in Jasper, Texas, because of his race, and of Matthew Sheppard in Laramie, Wyoming, because of his sexual preference.[5] These advocates argue that such statutes are desirable because, by imposing heavy penalties, they send a message that society regards hate crimes as unacceptable and worthy of special punishment.[6] Advocates assert that hate crime statutes are especially important because they simultaneously send a deterrent message to potential offenders and reassure actual and potential victims that they are not society's outsiders.[7]

---

[1] *See generally* FREDERICK M. LAWRENCE, PUNISHING HATE: BIAS CRIMES UNDER AMERICAN LAW 175 (1999).

[2] *See* Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 CAL. L. REV. 61, 69 (1993).

[3] U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, introductory cmt. n.3 (2003); *see also* Mistretta v. United States, 488 U.S. 361, 365–67 (1989).

[4] *See infra* notes 32–34 and accompanying text.

[5] *Statement of Anti-Defamation League on Bias Motivated Crimes and H.R. 1082—The Hate Crime Prevention Act*, 21 CHICANO-LATINO L. REV. 53, 54 (2000); *see also* Christopher Chorba, Note, *The Danger of Federalizing Hate Crimes: Congressional Misconceptions and the Unintended Consequences of the Hate Crimes Prevention Act*, 87 VA. L. REV. 319, 328–32 (2001).

[6] LAWRENCE, *supra* note 1, at 45–63.

[7] *Id.* at 169.

In their enthusiasm, advocates of hate crime statutes have routinely ignored at least two basic failings that severely undercut their argument. First, such statutes obligate or strongly encourage sentencing judges to impose remarkably harsh penalties without particularized consideration of the specific circumstances of each individual case.[8] Some current hate crime penalty enhancements even double or triple the penalty that would be imposed for the same criminal conduct without proof of the defendant's biased motivation.[9] Second, hate crime statutes have the practical consequence of expanding the already dominant control that prosecutors exercise over sentencing and plea bargaining.[10] As this Essay will demonstrate, the ability of prosecutors to dominate sentencing and plea bargaining with the threat of extremely heavy sentences creates a strong incentive for defendants to plead guilty, even if they are innocent. The incentive is generated when a risk-averse defendant prefers the certainty of a lighter sentence, resulting from a plea bargain, to the possibility of a much heavier sentence triggered by a hate crime statute's sentencing enhancement.

The adverse impact that hate crime statutes have had on the operation of the criminal justice system has been evident from the moment that the Anti-Defamation League (ADL) first proposed its model hate crime legislation in 1981.[11] This model statute created a new criminal offense by adding the element of biased motive to an existing offense. According to its provisions, when biased motive is proven, "the degree of criminal liability should be at least one degree more serious than that imposed for commission of the underlying offense."[12] Thus, the model statute could, depending on the overall sentencing scheme, automatically enhance the penalty so that it will be significantly more severe than the penalty for identical conduct not motivated by bias. When initially proposed, the model statute contained a simple innovation. It shifted consideration of biased motive from the sentencing phase, where it was a discretionary factor, to the adjudicatory phase where, when proven, it could automatically trigger a heavier sentence or higher sentencing range.[13]

At first look, the model statute seemed quite sensible. Bigotry is a major societal problem, and crimes motivated by bigotry can be fairly characterized as worse than similar crimes devoid of such a reprehensible moti-

---

[8] *See* Anti-Defamation League, *Hate Crimes Laws*, I & II (2001), *available at* http://www.adl.org/99hatecrime/penalty.asp (last visited Apr. 19, 2004).

[9] *See infra* notes 35–41 and accompanying text.

[10] The sentencing reforms of the late 1970s and 1980s also led to harsher sentences for other offenses. *See* Lowenthal, *supra* note 2, at 119–20. For the most part, however, such sentences were the result of multiple aggravating and mitigating factors taken into account at sentencing. *See id.* The mandatory enhancements that characterize hate crimes and the like are designed to override all mitigating circumstances. *See id.*

[11] Anti-Defamation League, *supra* note 8, at I.

[12] *Id.* at II(b).

[13] Apprendi v. New Jersey, 530 U.S. 466, 477–90 (2000).

vation. As observed by Chief Justice Rehnquist, "Deeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished."[14] As a consequence, in a political democracy, it is permissible for legislatures to single out for special punishment "bias-inspired conduct because this conduct is thought to inflict greater individual and societal harm."[15] Closer examination reveals, however, that the sentencing enhancements employed by current hate crime statutes do not take into account the harmful structural impact that automatic sentencing enhancements have on the authority of judges. Nor do hate crime laws take into account the fact that by tying the hands of judges at sentencing, they undermine sentencing fairness and the reliability of determinations of guilt or innocence in hate crime cases.

In theory, decision-making in criminal cases is based on the "adversarial system of justice."[16] Decisions of guilt, innocence, and punishment are delegated to "a neutral decision maker who is to render a decision in light of the materials presented by the adversary parties."[17] The prosecution and defense have the responsibility to gather the facts and determine how best to present their cases. "Each party is expected to present the facts and interpret the law in a light most favorable to its side, and through searching counter-argument and cross-examination, to challenge the soundness of the presentations made by the other side."[18] The judge has the duty to act as a neutral decision-maker who carefully supervises the proceedings and assures fairness by making rulings that check any excesses by the prosecution or defense. Because the defendant is presumed innocent until proven guilty, the prosecutor has an ethical obligation to temper his adversarial zeal by acting to "seek justice and not merely to convict."[19] Finally, it is assumed that in the event of a guilty verdict, the impartial judge will impose an individualized sentence that fits the circumstances of the crime and the defendant.[20]

Unfortunately, this abstract theory is subverted by the reality of such modern sentencing reforms as hate crime statutes, which, by establishing defined sentencing consequences, aggrandize the already powerful role of prosecutors. Prior to the 1970s, criminal sentencing was largely based on judicial discretion.[21] Under that regime, judges had discretion to consider the individual circumstances of each offense and each offender; they could

---

[14] Wisconsin v. Mitchell, 508 U.S. 476, 485 (1993) (quoting Tison v. Arizona, 481 U.S. 137, 156 (1987)).

[15] *Id.* at 487–88.

[16] WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE 31 (3d ed. 2000).

[17] *Id.*

[18] *Id.*

[19] STANDARDS FOR CRIMINAL JUSTICE: CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION STANDARDS, Standard 3-1.2(c) (1993).

[20] LAFAVE ET AL., *supra* note 16, at 23–24.

[21] KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING 14–29 (1998).

tailor the penalty to fit the crime. Thus, they were free to choose among probation, an appropriate jail term, or an indeterminate sentence ending when parole authorities determined that the inmate was sufficiently rehabilitated to justify release.[22] Starting in the late 1970s and early 1980s, however, shortly before the development of the ADL's model hate crime statute, many jurisdictions began to reconfigure the sentencing process legislatively by restricting judicial discretion with determinate and mandatory sentencing laws.[23]

Reconfiguration occurred because liberals thought that discretionary sentencing led to unequal sentences for the same crimes and conservatives believed that judges were too lenient.[24] Both liberals and conservatives joined forces to enact sentencing reforms, the result of which reduced radically the role of the judiciary in sentencing.[25] These reforms generated a sentencing regime in most jurisdictions characterized by the requirement that judges impose determinate sentences or sentences within narrow ranges.[26] The sentences are augmented by mandatory sentencing enhancements that are triggered whenever prosecutors prove that the crime charged includes an aggravating element.[27] Jurisdictions not imposing determinate sentences or mandatory sentencing ranges often add mandatory enhancements requiring that a statutorily specified number of years be added to the sentence if the offense contains an element the legislature has designated as especially blameworthy.[28] As a practical matter, these reforms have resulted in longer sentences for most crimes than were imposed before the reforms.[29] Currently, the United States has an incarceration rate seven times greater than England, Italy, France, or Germany.[30]

Using the ADL's model statute as a point of departure, hate crime statutes follow the trend set by other sentencing reform laws. Generally, they require the imposition of sentencing enhancements that operate in one of three ways.[31] First, in some jurisdictions, proof of biased motive as

---

[22] *Id.* at 18–22, 38–39.

[23] Lowenthal, *supra* note 2, at 61–62.

[24] STITH & CABRANES, *supra* note 21, at 29–35.

[25] At the federal level, this reform effort led to the establishment of a determinate sentencing system in which the Federal Sentencing Commission established narrow sentencing ranges with guidelines confining judicial sentencing discretion. Lowenthal, *supra* note 2, at 63. During the 1970s, many state legislatures adopted their own variants of determinant sentencing. For a discussion of determinate sentencing at the state level, see generally LAFAVE ET AL., *supra* note 16, at 1210–14.

[26] LAFAVE ET AL., *supra* note 16, at 1210–14.

[27] Lowenthal, *supra* note 2, at 70–71.

[28] *See, e.g.*, OHIO REV. CODE ANN. § 2941.145 (Anderson 2003) (imposing a three-year mandatory prison sentence for possession or use of a gun during a crime).

[29] Lowenthal, *supra* note 2, at 72.

[30] Justice Anthony M. Kennedy, Address at the 2003 Annual Meeting of the American Bar Association (Aug. 9, 2003), *available at* http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html (last visited Apr. 19, 2004).

[31] Some states combine the three approaches in their penalty enhancement statutes. *See infra* notes 32–34 and accompanying text.

an element of a criminal offense automatically adds a specific number of years to the length of the sentence for the underlying felony.[32] Second, in other jurisdictions, a hate crime conviction automatically and substantially changes the sentencing range by simultaneously increasing both the minimum and the maximum sentence for an offense.[33] Third, in yet other jurisdictions, a conviction under a hate crime statute automatically increases the maximum sentence the defendant can receive.[34]

For example, Alabama's hate crime statute provides for a mandatory enhancement of an additional fifteen years when the felony is proven to be motivated by "the victim's actual or perceived race, color, religion, national origin, ethnicity, or physical or mental disability."[35] California's hate crime laws use an alternative approach. There, both the minimum and maximum sentences are increased. Thus, a defendant charged with first-degree murder faces a penalty of anywhere from twenty-five years to life, life imprisonment without parole, or the death penalty.[36] If, however, the same defendant is charged with hate crime murder, the only possible penalties become death or mandatory life without parole.[37] Finally, Ohio's hate crime statute employs the third approach. It increases the length of the maximum sentence that can be imposed without modifying the minimum sentence.[38] Thus, if an Ohio defendant commits aggravated menacing (i.e., knowingly causes another to believe that the offender will cause serious physical harm to the person or property of another) by verbally threatening another, the maximum penalty that can be charged is a first-degree misdemeanor punishable by up to six months in jail.[39] If, however, the defendant engages in the same conduct but was motivated by racial, religious, or ethnic bias, the maximum sentence that he can be charged becomes ethnic intimidation, a fifth-degree felony punishable by up to one year in jail, which is double the maximum sentence for the underlying offense.[40] Similarly, Florida's hate crime statute triples the maximum pen-

---

[32] *See, e.g.*, ALA. CODE § 13A-5-13 (1994); GA. CODE ANN. § 16-11-37 (2002); R.I. GEN. LAWS § 12-19-38 (2002); TEX. PENAL CODE ANN. § 12.47 (Vernon 2003); VA. CODE ANN. § 18.2-57 (Michie 2002).

[33] *See, e.g.*, CAL. PENAL CODE § 190.2(a) (West 1999); HAWAII REV. STAT. §§ 706-661 & 706-662 (2002); IOWA CODE § 712.9 (2003); NEB. REV. STAT. § 28-111 (2002); N.Y. PENAL LAW § 485.10 (McKinney 2003); R.I. GEN. LAWS § 12-19-38 (2002).

[34] *See, e.g.*, ALASKA STAT. § 12.55.155(a)(22) (Michie 2003); ARIZ. REV. STAT. ANN. § 13-702 (West Supp. 2003); CONN. GEN. STAT. § 53a-40a (2003); DEL. CODE ANN. tit. 11, § 1304 (2003); FLA. STAT. ANN. § 775.085 (West 2002); 730 ILL. COMP. STAT. 5/5-5-3.2 (2003); MD. CODE ANN., CRIM. § 10-305 (2002); MINN. STAT. § 609.749 (2002); MONT. CODE ANN. § 45-5-221 (2002); N.M. STAT. ANN. § 31-1813-3 (2003); OHIO REV. CODE ANN. § 2927.12 (Anderson 2003); 18 PA. CONS. STAT. § 2710 (2003); TEX. PENAL CODE ANN. § 12.47 (Vernon 2003); WIS. STAT. § 939.645 (2003).

[35] ALA. CODE § 13A-5-13 (1994).

[36] CAL. PENAL CODE § 190(a) (West 1999).

[37] *Id.* § 190.2(a)(16).

[38] OHIO REV. CODE ANN. § 2927.12 (Anderson 2003).

[39] *Id.* § 2903.21.

[40] *Id.* § 2929.14(A)(5).

alty that could be imposed for the parallel offense in the absence of a finding of biased motive.[41] In short, a defendant convicted of a hate crime can usually count on a greater sentence than would have been imposed if he had been convicted only of the underlying offense.

It might be argued that hate crime statutes imposing increased *maximum* sentences but not increased *minimum* sentences are not as objectionable because they merely increase the maximum sentence a judge can impose. According to this argument, such statutes actually expand rather than limit judicial discretion. This argument is mistaken because it underestimates the actual power of hate crime and other similar sentencing enhancement laws to govern judicial behavior. If judges ignore the authorized enhancement, then they disregard the legislative decision to define hate crimes as aggravated offenses. This, in turn, means that the judges ignore their duty to apply the laws as they are written. According to Wisconsin Supreme Court Justice Shirley Abrahamson, judges feel duty-bound to apply such laws whether they like them or not. She explains that judges take the obligation imposed by hate crime statutes quite seriously even when they believe such laws to be unwise. "After all, judges cannot declare void those laws with which we disagree or to which we are opposed. Our personal views of the soundness of legislation are, in fact, irrelevant."[42]

The duty of judges to enforce hate crime laws faithfully results in a distortion of the adversarial system of justice. The distortion occurs because hate crime laws establish separate offenses with enhanced penalties that can be charged in addition to the charges based on established, underlying crimes. As a consequence, the prosecutor has discretion to charge a defendant with a single offense or, in the alternative, with two offenses: the hate crime offense plus the underlying offense. These options give the prosecutor power to control potential sentencing outcomes.[43]

The prosecutor accumulates power from the presence of the sentencing enhancement laws because, through charge selection, the prosecutor, rather than the judge, determines the applicable sentencing range or maximum penalty.[44] When the law of the jurisdiction requires judges to select the

---

[41] FLA. STAT. ANN. §§ 775.085, 775.082 (West 2002).

[42] Shirley S. Abrahamson et al., *Words and Sentences: Penalty Enhancement for Hate Crimes*, 16 U. ARK. LITTLE ROCK L. REV. 515, 526 (1994).

[43] Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 23 (1998) (arguing that the charging decision practically predetermines the outcome and sentence where judicial sentencing discretion is restricted by law); Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CAL. L. REV. 1471, 1475 (1993) (arguing that charging decisions give prosecutors control over sentencing outcomes).

[44] This power is particularly problematic in hate crime cases because, unlike sentencing enhancements for offenses with objective elements like armed robbery, the added element that creates the hate crime—the defendant's biased motive—is subjective in nature. As a consequence, the evidence introduced against the defendant at trial is likely to include his bigoted statements or offensive associations with activist groups widely viewed as

sentence from a narrow sentencing range, they must do so. If a defendant is found guilty of only the underlying crime, the judge must sentence based on the sentencing provision applicable to that offense. If, however, the defendant is found guilty of the enhanced hate crime, the judge can sentence based only on the sentencing enhancement provision applicable to the hate crime. The judge is obliged by law to increase the length of the sentence if the sentencing enhancement statute requires additional time to be added to the defendant's sentence or increases the severity of the sentencing range.

Even if the law of the jurisdiction sets a higher maximum sentence without raising the minimum sentence, a conscientious judge is under an obligation to impose an enhanced sentence reflecting the legislature's judgment that hate crimes deserve more severe punishment. This duty is made clear by Justice Abrahamson of the Supreme Court of Wisconsin, a state with a hate crime statute that increases the maximum sentence without increasing the minimum sentence.[45]

In the course of discussing why the hate crime penalty imposed in *State v. Mitchell*[46] was legally proper, even if not to her personal liking, Justice Abrahamson explains that judges in jurisdictions with hate crime sentencing enhancement statutes believe they have a duty to impose the enhanced sentences created by such statutes, whether or not they believe them to be just, because it is the will of the legislature.[47] In Justice Abrahamson's view, a judge in a jurisdiction with hate crime statutes that increase maximum penalties without increasing minimums is obliged to impose the enhancement even though, theoretically, she could ignore it.[48] She believes that if a judge in such a jurisdiction ignores the enhancement, she fails in her duty to enforce the laws of the jurisdiction.[49] To the extent that other conscientious judges share Justice Abrahamson's view, their sentencing decisions in hate crime cases are structured or, at the very least, are constrained by the judicial obligation to apply the law as the legislature intended. As a consequence, a judge's sentencing discretion is limited by the prosecutor's decision whether to bring a hate crime charge in the first place.

---

holding biases based on race, religion, gender, sexual preference, or national origin. Juries hearing such evidence may be tempted to convict based on the perception that the defendant is a bad person rather than based on his actual conduct. *See infra* notes 77–82 and accompanying text.

[45] WIS. STAT. § 939.645 (2003).

[46] 485 N.W.2d 807 (Wis. 1992), *rev'd*, 508 U.S. 476 (1993).

[47] *See* Abrahamson et al., *supra* note 42, at 526. Notwithstanding her apparent questions about the wisdom of hate crime laws, *see id.* at 526–27, Justice Abrahamson dissented from the decision of the Wisconsin Supreme Court to reverse the hate crime conviction of the defendant in *Mitchell*, 485 N.W.2d at 818–19 (Abrahamson, J., dissenting).

[48] *See* Abrahamson et al., *supra* note 42, at 526.

[49] *See id.*

Prosecutors' control over charging and sentencing also puts them in command of the entire adjudicatory phase of a criminal case, because control over charging means control over plea bargaining, the process by which more than ninety percent of all criminal cases are disposed.[50] Sometimes a plea bargain is struck so the prosecution is guaranteed a victory and the defendant is assured of a conviction for a lesser offense carrying a shorter penalty. In other cases, a deal is struck simply because the charges are serious and the defendant pleads guilty so the prosecutor will support a sentence shorter than the maximum allowed by law, even though the charge remains the same. Whatever the reason, plea bargaining completely bypasses trial and moves a case to the sentencing phase, where the judge's sole authority is to select among statutorily limited sentencing options.

Prosecutors' ability to dominate plea bargaining in jurisdictions that limit judicial sentencing discretion is based on their control over charge selection, which gives them an extraordinarily powerful bargaining chip in the plea-bargaining process.[51] Confronted with two charges, one of which carries a heavy mandatory penalty, or at least significant risk of a heavy penalty, the defendant faces enormous pressure to plead guilty to the lesser charge rather than go to trial and risk a much heavier sentence. Indeed, according to Gary Lowenthal, the bargaining chip is so powerful that the risk of a heavy sentence mandated by the particular offense charged "pressure[s] defendants, who might otherwise test the state's evidence, into accepting guilty pleas."[52] In light of this phenomenon, a prosecutor who is uncertain about the strength of his case has a strong incentive to maximize his bargaining leverage by charging every plausible offense that carries a heavy penalty in order to pressure a risk-averse defendant into pleading guilty to a lesser crime.

The same problem exists, if to a lesser degree, in a determinate sentencing regime that bases the penalty on an assessment of the defendant's actual conduct at the time of the offense rather than on the charge to which the defendant pleads guilty.[53] In such a system, known as conduct-based or real-offense-based sentencing, the sentence is determined based on a

---

[50] Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1150 (2001) (citing STATISTICS DIV., ADMIN. OFFICE OF THE U.S. COURTS, STATISTICAL TABLES FOR THE FEDERAL JUDICIARY: SEPTEMBER 30, 2000, tbl.D-4 (2001)).

[51] STITH & CABRANES, *supra* note 21, at 130; *see also* Bibas, *supra* note 50, at 1151–67.

[52] Lowenthal, *supra* note 2, at 78. As evidence of this type of pressure on defendants, Lowenthal cites the decreases in the percentage of cases proceeding to trial during the years following each of three mandatory sentence enhancement enactments in Arizona. *Id.* at 78–85.

[53] The Federal Sentencing Guidelines use a modified "real offense" approach to sentencing. For a discussion of this approach, see U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, introductory cmt. n.4(a) (2003).

post-trial or post-plea presentencing report prepared by a probation officer.[54] Included in the report is a description of the defendant's actual conduct at the time of the offense, which must be taken into account when determining the sentence. "Actual conduct" sentencing supposedly limits the prosecutor's ability to control sentencing by charge selection.[55] This purported limit arises from the judge's power to sentence based on "actual" offense facts rather than relying wholly on the facts set out in the plea agreement.

In actuality, however, prosecutors engaged in plea bargaining in conduct-based sentencing jurisdictions are often able to bypass the theoretical constraints on their power. After reaching a plea agreement, they can retain substantial control over sentencing by actively withholding from probation officers information that would lead to a sentence greater or lesser than the one agreed upon as part of the plea bargain. Studies indicate that federal prosecutors, at least, are often willing to exercise such control. According to a study of plea bargaining under the Federal Sentencing Guidelines reported by Stith and Cabranes, only twenty percent of the federal probation officers surveyed believed that the stipulations and calculations in plea agreements were accurate and complete in at least eighty percent of the cases.[56] Another twenty percent of the probation officers surveyed believed that such stipulations were inaccurate three-fourths of the time.[57]

In sum, the prosecutor's ability to control sentencing and plea bargaining carries with it the power to circumvent the trial's procedural safeguards, which are designed to assure the integrity of the outcome. As observed by Professor John Langbein, "Plea bargaining merges [these] accusatory, determinative, and sanctional phases of the procedure in the

---

[54] STITH & CABRANES, *supra* note 21, at 128–30.

[55] *Id.* at 132–33.

[56] *Id.* at 138. The nationwide survey was conducted by the chief federal probation officer in the District of Massachusetts, in 1996. *Id.*

[57] *Id.* Stith and Cabranes continue:

> The survey also suggested that prosecutors play a larger role in determining the scope and content of presentence reports than the Sentencing Commission had anticipated. The description of the offense in most presentence reports in most districts is prepared largely or exclusively on the basis of information provided by the prosecutor. Fewer than half of the chief probation officers responding to the survey reported that prosecutors provide all of the available information.

Id. at 138–39 (footnotes omitted).

Lowenthal cites a study by the U.S. Sentencing Commission to suggest the degree to which prosecutors have been able to use plea bargaining to bypass purported limits on their control over sentencing in conduct-based systems, but in order to *shorten* rather than lengthen sentences. According to the study, "nearly forty percent of the actual sentences imposed [in a sample of federal guidelines cases] were less than the prescribed statutory minimum." Lowenthal, *supra* note 2, at 109 (citing U.S. SENTENCING COMM'N, MANDATORY MINIMUM PENALTIES OF THE FEDERAL CRIMINAL JUSTICE SYSTEM 59 (1991)).

hands of the prosecutor."[58] When this occurs, little is left of the adversarial system of justice.

Admittedly, the problem of excessive prosecutorial control over criminal proceedings is not unique to hate crime prosecutions. Such distortions of the criminal justice system can occur in any criminal case where the judge's control over sentencing and plea bargaining is severely limited by law. The distortions that result from excessive prosecutorial control, however, are even greater in hate crime cases than in run-of-the-mill criminal cases. Hate crime cases are distinctive in that their sentencing enhancements are based on allegations that the defendant was subjectively motivated by bias. They do not turn on objective facts such as the amount of money stolen[59] or whether a gun was used during the crime.[60]

Because hate crimes are based on the defendant's motivation of bigotry, they are more likely to be emotionally charged, attracting press attention and provoking strong feelings.[61] As a result, prosecutors anxious for public approval have a powerful incentive to treat a hate crime defendant more harshly than a defendant charged with a less emotionally charged but similarly serious crime. This incentive exists because most prosecutors are elected officials whose publicly visible conduct in office has an enormous impact on whether they will be reelected.[62] Indeed, the publicity value and voter appeal of taking a hard line in high visibility cases is so well known that prosecutors typically run on a "get tough on crime" platform.[63] Thus, tough action in hate crime cases is likely to be rewarded with press attention and public support.[64] Moreover, prosecuting under hate crime statutes is likely to gain particular approval from the groups whose members are frequently victims of hate crimes.[65]

Prosecutors interested in attracting publicity can hardly be blamed for taking advantage of the notoriety that results from charging a defen-

---

[58] John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 18 (1978).

[59] *E.g.*, U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(1) (2003).

[60] *E.g.*, *id.* § 2B3.1(b)(2).

[61] *See* STEVEN M. CHERMAK, VICTIMS IN THE NEWS: CRIME IN THE AMERICAN NEWS MEDIA 54–57 (1995). Indeed, press coverage of the Byrd and Shepard murders in 1998 was so extensive that commentators on hate crime laws were able to call them to the minds of readers years later simply by naming the victims, without recounting the actual events. *See, e.g.*, Lu-in Wang, *Unwarranted Assumptions in the Prosecution and Defense of Hate Crimes*, CRIM. JUST., Fall 2002, at 4, 6.

[62] Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 728–36 (1996) (describing the history of prosecutors as elected officials and the local nature of their constituencies).

[63] Davis, *supra* note 43, at 58–59.

[64] *Cf.* Wainwright v. Witt, 469 U.S. 412, 459 (1985) (Brennan, J., dissenting) (noting the dangers of political pressure in the context of capital cases).

[65] *See* JAMES B. JACOBS & KIMBERLY POTTER, HATE CRIMES: CRIMINAL LAW & IDENTITY POLITICS, 65–68 (1998) [hereinafter JACOBS & POTTER, LAW & IDENTITY] (arguing that victimized groups are sensitive to the threat of victimization, which motivates them to political action); James B. Jacobs & Kimberly A. Potter, *Hate Crimes: A Critical Perspective*, 22 CRIME & JUST. 1, 35 (1997) [hereinafter Jacobs & Potter, *A Critical Perspective*].

dant with a hate crime felony, even when the underlying crime, without the element of biased motive, is a misdemeanor.[66] Consider, for example, *State v. Wyant*,[67] Ohio's leading hate crime case:

> In 1989, David Wyant and his wife, both white, were playing loud music at their campsite in Ohio's Alum Creek State Park. Two black campers in the adjoining campsite, Jerry White and Patricia McGowan, complained to park officials. When asked by park officials to turn off the music, Wyant complied, but fifteen minutes later turned on the radio again. White and McGowan then overheard Wyant shouting that "[w]e didn't have this problem until those niggers moved in next to us. I ought to shoot that black motherfucker. I ought to kick his black ass."[68]

Notwithstanding the racist threats made by the defendant, no blows were delivered, and no physical harm was caused.[69] In the absence of a hate crime statute, Wyant would have been guilty of the misdemeanor of aggravated menacing,[70] an offense carrying a maximum penalty of 180 days in jail.[71] Because his statements included racist references, he was charged with ethnic intimidation, a hate crime felony punishable by up to one and one-half years in jail.[72] Additionally, the prosecution gained national attention because the basis for Wyant's conviction was violation of a hate crime law. As the *Wyant* case moved through the court system, it spurred media coverage throughout the State of Ohio[73] and appeared in the national press as well.[74]

Somewhat surprisingly, the *Wyant* case is a typical hate crime case in that it did not involve a serious felony inherently deserving special treatment. According to Jacobs and Potter, studies indicate that "[t]he typical

---

[66] As observed by Jacobs and Potter, "The media seem enthusiastically to embrace the most negative interpretation of intergroup relations." JACOBS & POTTER, LAW & IDENTITY, *supra* note 65, at 51.

[67] 624 N.E.2d 722 (Ohio 1994).

[68] JACOBS & POTTER, LAW & IDENTITY, *supra* note 65, at 34.

[69] *See* State v. Wyant, 597 N.E.2d 450, 451 (Ohio 1992), *vacated by* 508 U.S. 969 (1993), *remanded to* 624 N.E.2d 722 (Ohio 1994).

[70] OHIO REV. CODE ANN. § 2903.21 (Anderson 2003).

[71] *Id.* § 2929.24.

[72] *Id.* § 2927.12.

[73] *See, e.g.*, Rodd Aubrey, *Ohio High Court Reviews State's "Hate Crimes" Law*, CLEVELAND PLAIN DEALER, Apr. 16, 1992, at 2G; James Bradshaw, *Ethnic Intimidation Law Gets a Second Look in Court*, COLUMBUS DISPATCH, Oct. 13, 1993, at 3B; James Bradshaw, *Justices Uphold Ethnic Intimidation Law*, COLUMBUS DISPATCH, Jan. 13, 1994, at 1C; Jill Reipenhoff, *Court's Reversal Pleases 2 Victims of Racial Hatred*, COLUMBUS DISPATCH, Jan. 17, 1994, at 3E.

[74] *See, e.g.*, Jesse Birnbaum, *When Hate Makes a Fist*, TIME, Apr. 26, 1993, at 30; Joan Biskupic, *Hate Crime Laws Face Free-Speech Challenge: High Court Considers Taking Up State Statutes that Stiffen Penalty When Bias is Shown*, WASH. POST, Dec. 13, 1992, at A10; *Ohio Ethnic Intimidation Law Passes Muster*, NAT'L L.J., Mar. 28, 1994, at B15.

hate crime offender is an individual, usually a juvenile, who . . . holds vague underlying prejudices which on occasion spill over into criminal conduct."[75] At least one federal study reports that the typical hate crime consists of "low-level criminal conduct."[76]

In brief, almost every case in which a hate crime charge can be brought against the defendant gives the prosecutor several advantageous options. First, if a hate crime actually is charged and the public is not too interested in the case, the prosecutor can use the threat of the enhanced penalty as leverage to force a bargain. Second, if the defendant has been charged with an ordinary crime and could also be charged with a hate crime, the prosecutor can threaten to amend the complaint or indictment as part of the plea bargaining process. By threatening to add a hate crime charge, but not starting the case with it, the prosecutor is in a position to minimize public attention to the case while using the threat as a bargaining chip during plea negotiations. Yet, if the prosecutor later prefers the visibility likely to be triggered by the filing of hate crime charges, he can cease negotiations and draw attention to the case simply by amending the indictment or information to include the hate crime charge. Finally, in a truly high-profile hate crime case, the prosecutor can bring hate crime charges at the outset and force the defendant to chose between a high-visibility plea bargain with a heavy sentence mitigated, somewhat, by a favorable sentencing recommendation, or he can force the defendant to undergo a high-profile trial with the risk of a maximum sentence based on inflammatory evidence and no favorable sentencing recommendation.[77]

Aggressive application of hate crime laws is particularly problematic because the presence of hate crime charges in an indictment increases the risk of an unfair conviction if the case goes to trial. In order to prove a hate crime violation, the prosecution must prove that the defendant was motivated by bias. This proof often consists of evidence about the defendant's prejudiced statements, bigoted ideas, and association with biased groups or individuals. It is this kind of evidence that jurors find offensive and inflammatory. According to Professor Lu-in Wang:

---

[75] Jacobs & Potter, *A Critical Perspective*, *supra* note 65, at 21.

[76] *Id.* at 19 (citing FED. BUREAU OF INVESTIGATION, HATE CRIME STATISTICS: 1992 (1994) and FED. BUREAU OF INVESTIGATION, HATE CRIME STATISTICS: 1993 (1995)); *see also* John S. Baker, Jr., United States v. Morrison *and Other Arguments Against Federal "Hate Crime" Legislation*, 80 B.U. L. REV. 1191, 1203 (2000) (citing similar FBI studies of data from 1994 to 1998). *But see* LAWRENCE, *supra* note 1, at 39 (citing a study showing that about half of all bias crimes in Boston involved assaults, compared to the national average of seven percent of crimes generally involving assaults, and that nearly three-quarters of victims of bias-motivated assaults in Boston suffered serious physical injury, compared to the national average of thirty percent for assaults generally).

[77] For an example of the evidence that might be introduced at trial, see *People v. Slavin*, No. 19, 2004 WL 305600 (N.Y. Feb. 17, 2004), which upheld, against a Fifth Amendment challenge, the introduction of photographs of the hate crime defendant's tattoos depicting, among other things, a swastika and a caricature of a Jew, with a big nose and wearing a skullcap, being kicked in the hindquarters.

> The most common evidence of bias motive is the defendant's own words, for in many cases perpetrators utter racial or other derogatory, group-based slurs before, during, or after the crime. The Supreme Court has stated that the First Amendment is not violated when a defendant's speech is used to prove the elements of a crime or to establish motive or intent. However, prosecutors have not stopped at evidence of the defendant's statements made in direct connection with the crime charged. It has become increasingly common for the prosecution to introduce evidence of defendants' general racist philosophies or interest in racist organizations and even of defendants' possession of racist tattoos, clothing, and literature.[78]

Prosecutors know that such evidence draws favorable attention to the prosecution's case for heavy punishment, not the defendant's innocence.[79] As already noted, in hate crime cases such evidence is not introduced to establish an objective fact such as the number of grams of an illegal drug the defendant sold or the value of stolen goods. Instead, it is introduced to establish the contents of the defendant's thoughts at the time of the crime in order to demonstrate a subjective element—the defendant's bigotry—and its causal role in his or her criminal actions.

The fairness problem posed by prosecutions involving introduction of evidence about controversial and offensive beliefs, statements, and associations is well understood. In *Virginia v. Black*,[80] the Supreme Court explicitly acknowledged this problem when it invalidated a portion of a criminal statute creating a presumption that cross burning was *prima facie* evidence of a defendant's intent to intimidate others. Justice O'Connor wrote for a plurality of the Court that the presumption was impermissible because it "makes it more likely that the jury will find an intent to intimidate regardless of the particular facts of the case."[81] She noted that such a presumption "permits the Commonwealth to arrest, prosecute, and convict a person based solely on the fact of cross burning itself. It is apparent that the provision as so interpreted 'would create an unacceptable risk of the suppression of ideas.'"[82]

---

[78] Lu-in Wang, *supra* note 61, at 7–8 (citation omitted); *see also supra* note 77 and accompanying text.

[79] *See* Dawson v. Delaware, 503 U.S. 159 (1992). In *Dawson*, the Supreme Court overturned the imposition of the death penalty where evidence of a white defendant's association with a racist group was introduced during the penalty phase of his case. *Id.* at 169. The Court explained, "[O]n the present record one is left with the feeling that the Aryan Brotherhood evidence was employed simply because the jury would find these beliefs morally reprehensible." *Id.* at 167.

[80] Virginia v. Black, 538 U.S. 343, 367 (2003) (plurality opinion).

[81] *Id.* at 365 (plurality opinion).

[82] *Id.* (plurality opinion) (quoting Secretary of State v. Joseph H. Munson Co., 467 U.S. 947, 965 n.13 (1984)).

Indeed, the Supreme Court has traditionally been very suspicious of the ability of factfinders to treat evidence of controversial communications and offensive viewpoints objectively. Evidence of this wariness is the Court's application of a higher standard of appellate review to the facts in First Amendment cases than in most other contexts. Instead of applying the "clearly erroneous" standard typically used by appellate courts to assess the accuracy of fact-finding at trial,[83] it has applied the far more demanding "de novo review" of facts where accurate findings of fact are inseparable from determining whether First Amendment rights have been violated.[84] The heightened standard of appellate review of facts ensures that case outcomes are not the product of fact-finding tainted by jury bias against a party for his or her offensive beliefs or statements.[85]

In addition to the distorting impact such evidence has on the trial process, it also gives the prosecutor unfair leverage during plea bargaining. Even under ordinary circumstances, plea bargaining is not bargaining between equals.[86] Where hate crimes are charged, however, defendants are even more vulnerable to the prosecutors' leverage. Defendants know that if they go to trial, the evidence against them likely will consist of their bigoted statements, beliefs, or associations. No rational defendant wants a judge or jury to hear such evidence. Thus, to the extent that defendants fear such evidence will be introduced, their incentive to plead guilty to a crime with a lighter sentence is increased—whether or not they are guilty of any wrongdoing. Similarly, defendants may choose to plead guilty, even if prosecutors do not offer to drop the hate crime charge, but, instead, promise to recommend a lenient sentence as an alternative to a trial accompanied by the introduction of evidence likely to offend a judge or inflame a jury.

It is indisputable that hate crime statutes expand the prosecutor's control over every stage of criminal proceedings up to and including sentencing. Such legislation replaces judicial discretion with prosecutorial discretion in a fashion that is inconsistent with basic considerations of fairness. In a recent address to the American Bar Association, Justice Kennedy argued that, as a general matter, the interests of justice would best be served by

---

[83] FED. R. CIV. P. 52(a).

[84] Bose Corp. v. Consumers Union, 466 U.S. 485, 514 (1984) (holding that de novo review of facts by the Supreme Court is necessary to assess constitutional malice in a libel case); *see also* Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 276 (1985) (arguing that de novo review of facts in First Amendment cases should be mandatory in judicial review of administrative decisions but discretionary in appellate review of lower court decisions). De novo review is also employed in other constitutional contexts where the Court is concerned that inaccurate fact-finding at trial will impede proper application of constitutional principles. *See, e.g.*, Blackburn v. Alabama, 361 U.S. 199, 205 n.5 (1960) (reiterating the Supreme Court's authority to conduct a de novo review of facts to determine the voluntariness of a confession).

[85] Monaghan, *supra* note 84, at 239.

[86] *See supra* notes 50–57 and accompanying text.

reducing prosecutorial control over the entire sentencing process in the federal system. He observed,

> Under the federal mandatory minimum statutes a sentence can be mitigated by a prosecutorial decision not to charge certain counts. There is debate about this, but in my view a transfer of sentencing discretion from a judge to an Assistant U.S. Attorney, often not much older than the defendant, is misguided. The policy, nonetheless, gives the [sentencing] decision to an assistant prosecutor not trained in the exercise of discretion and takes discretion from the trial judge. The trial judge is the one actor in the system most experienced with exercising discretion in a transparent, open, and reasoned way. Most of the sentencing discretion should be with the judge not the prosecutors.[87]

A similar critique is applicable to the United States's heavy reliance on hate crime statutes, because they also diminish judicial control over the criminal justice system. Like other statutes limiting judicial sentencing discretion, hate crime statutes give far too much control over sentencing and plea bargaining to prosecutors, while crippling the authority of judges to ensure that trials and sentences of hate crime defendants are fair and impartial.

In order to remedy this problem, hate crime sentencing enhancement statutes should be abandoned. Rather than treating biased motive as an element of a criminal offense, legislatures should return to a judge-based sentencing regime that confines consideration of biased motive to the sentencing phase of the case. This change would permit judges to consider biased motive as an aggravating circumstance to be put into the balance with all other aggravating and mitigating circumstances, rather than as an automatic override of all mitigating factors. The result would preserve the intended power distribution of the legal system by leaving the job of prosecuting to prosecutors and the role of judging and sentencing to judges. The harsh sentences meted out to hate crime defendants under current hate crime statutes may make victims of bigotry and their defenders feel better. Such severe punishment, however, comes at the expense of basic fairness, making it inconsistent with a criminal justice system designed to generate trustworthy determinations of guilt and sentences genuinely tailored to fit each crime.

---

[87] Kennedy, *supra* note 30, at 5.