Received: 17 August 2022 | Revised: 26 June 2023 | Accepted: 4 August 2023

DOI: 10.1111/lasr.12685

ARTICLE

Law & Society REVIEW

A higher bar: Institutional impediments to hate crime prosecution

Ryan D. King[1] | Besiki L. Kutateladze[2]

[1]The Ohio State University, Columbus, Ohio, USA

[2]Florida International University, Miami, Florida, USA

Correspondence
Ryan D. King, The Ohio State University, Columbus, OH, USA.
Email: king.2065@osu.edu

Funding information
National Institute of Justice, Grant/Award Number: 2017-IJ-CX-0031

Abstract

Why are hate crime cases so rarely prosecuted? Most states and the federal government have hate crime laws on their books, yet available data indicate few prosecutions in most jurisdictions. Drawing on case files and interviews with police and prosecutors in one jurisdiction, three institutional impediments to hate crime prosecution are identified: evidentiary inflation, by which law enforcement uses a higher burden of proof than what is required by statute; loose coupling between police departments and prosecutors' offices; and cultural distance between law enforcement and victims. Findings also reveal that advocacy groups and media can successfully increase the visibility of cases and draw the attention of prosecutors. The findings align with aspects of legal endogeneity theory and enhance our understanding of the role of organizations in constructing the meaning of law. The results also help explain why some laws are rarely enforced, even when they have support from key personnel in an organization.

INTRODUCTION

Hate crime laws, which specify punishments for offenses motivated by prejudice based of ethnicity, religion, sexual orientation, disability, or other characteristics (Walters, 2022), are firmly institutionalized in the United States. This was not always the case; only in the 1980s did a handful of states draft hate crimes legislation (Grattet & Jenness, 2001). Since that time, these laws diffused across the country and survived constitutional challenges in the appellate courts (Jenness & Grattet, 2001; King, 2019).

Yet the enforcement of these laws is contested and varies considerably across jurisdictions. Hate crimes are prone to underreporting (King, 2007; Lantz et al., 2019) and official crime statistics underestimate their incidence (Ruback et al., 2018). Prosecutions and convictions are also rare. For example, data from Miami, Florida, show that only 15% of 400 LGBTQ victims reported the incident to the police, and only a handful of them were prosecuted (Kutateladze, 2022). Even districts with heavy caseloads and dozens of police reports of hate crimes can go several years without a prosecution (King, 2008, pp. 1379–1380). According to the 2001 National Survey of Prosecutors—one of the

few surveys ever to inquire about hate crime prosecution nationally—only 20% of districts in the United States prosecuted one or more hate crimes that year. The only categories with smaller percentages were telemarketing fraud and police use of excessive force (DeFrances, 2002). As Reis Thebault (2021) of the *Washington Post* summarized, "Researchers, advocates and law enforcement officials have described a breakdown at nearly every step of the justice system leading to a disturbing conclusion: Hate crimes go unpunished."

Why are hate crime prosecutions uncommon, despite their established presence in criminal statutes? More generally, how do organizations, and the professionals that inhabit them, respond to innovations in their legal environment? Legal change is a fixture of modern society. New federal and state laws are enacted each year that require implementation in various settings, including the workplace (e.g., minimum wage laws), the criminal courts (e.g., sentencing reform), or law enforcement agencies (e.g., hate crime reporting mandates). Appellate court cases sometimes upend decades of established practice, as evidenced by the recent Supreme Court decision ending affirmative action in college admissions (Students for Fair Admissions v. Harvard, 2023). When legal terms are introduced by the courts or legislatures, implementation falls on the organizations responsible for compliance and enforcement, which have their own cultures and standard operating procedures.

What happens, then, when a legal innovation, even one as established as hate crime law, presents challenges to organizational practices? This question has been particularly important for laws that are ostensibly intended to protect minority groups from discriminatory treatment. For instance, equal employment laws, such as Title VII of the Civil Rights Act, have had limited impact on workplace equity (Edelman, 2016). In the realm of criminal law, many law enforcement agencies were slow to comply with the Hate Crime Statistics Act and hate crime statutes often remain dormant in prosecutors' offices (King, 2007, 2008).

This article examines police and prosecutors' approaches to hate crime prosecution to understand how organizations determine the practical meaning of laws, in this case a law that requires additional resources such as investigatory time. We see this case in criminal law as comparable to cases in civil rights and employment law, such as anti-discrimination and EEO laws that likewise have ambiguous statutory language, require the deployment of office resources, and necessitate an organizational response. To this end, we take theoretical guidance from the literature on law and organizations, which developed around the related question of why civil rights and anti-discrimination laws often fall short of achieving their objectives. Prosecutors' offices, akin to corporate workplaces, are organizations that must respond to a legal environment and to oversight from external groups (e.g., government oversight, advocacy groups). Likewise, public and private organizations must determine how to implement laws that are ambiguous and that create opportunities in organizations for personnel to construct the practical meaning. The meaning of legal terms such as "hatred" and "prejudice," like "harassment" and "discrimination," is often determined at the organizational level.

This investigation thus makes two contributions to law and society scholarship. First, we examine the meaning-making process in criminal law by focusing on an infrequently studied case: hate crime prosecution. National statistics indicate that hate crime indictments are rarely pursued, and early research on the topic suggests that prosecutors have a narrow vision of what constitutes a hate crime, thus limiting the cases seen as fit for prosecution (McPhail & Jenness, 2005). Prior work also suggests that prosecutors adopt symbolic responses to hate crime, such as identifying hate crime prosecutors or community liaisons, without actually prosecuting many hate crimes (King, 2008).

We approach the issue from a slightly different angle, looking explicitly at the construction of the meaning of hate crime law in the office for purposes of criminal prosecution. As Edelman (2016: 12) wrote, "the meaning of law evolves… not in the halls of Congress but rather in the halls of work organizations." This premise also applies to criminal law enforcement, where concepts such as hate, bias, and proof of motivation are vaguely defined in statutory law, allowing practitioners to construct its meaning at the local level (Grattet & Jenness, 2005). We also examine ways in which prosecutors' constructions of what constitutes a hate crime—that is, their assumptions about the characteristics of offenses and the burden of proof legally required—influences the investigation process, and what implications these assumptions have for charging.

https://doi.org/10.1111/lasr.12685 Published online by Cambridge University Press

Second, we contribute to research on law and stratification. Hate crime law is an example of the social control of intergroup conflict, a type of law that is thought to be under-enforced (Bell, 2002; King, 2008, p. 1352). The criminal justice process, including the gathering of evidence and the decision to prosecute (Frohmann, 1997), often works against those with less power and against minority groups. In the context of hate crime prosecution, we examine law enforcement's assumptions about victims and whether the social distance between police and hate crime victims inhibits investigation. This is an important issue for prosecution because the dominant perspective on charging—that prosecutors take cases with a high probability of conviction—does not always consider the process that generates the evidence. The legal stratification perspective suggests that evidence available in a case is itself a function of law enforcement's willingness to investigate (Cooney, 1994), which has implications for the notion of convictability. We probe about evidence collection and victim characteristics in our interviews with law enforcement.

We put these ideas in theoretical context in the following section. We then turn to two types of data—a review of case files and interviews with prosecutors and other law enforcement officials in one jurisdiction—to investigate hate crime charging. The data suggest that hate crime prosecutions are not merely a function of the availability of evidence. To understand the types of cases that are prosecuted also requires attention to the embedded knowledge of hate crimes in district attorneys' offices and specific organizational practices. We identify other possible applications of these findings in the discussion.

LAW AND ORGANIZATIONS: IMPLICATIONS FOR HATE CRIME PROSECUTION

Prosecutors generally move forward with a prosecution when they are confident about the chances of conviction (Albonetti, 1987; Frederick & Stemen, 2012). Factors that can increase the "convictability" of a case include the availability of physical evidence, the presence of eyewitnesses, and the promptness of reporting. For example, the likelihood of filing charges in intimate partner violence cases increases when an arrest is made promptly and physical injury is documented (Messing, 2014; Worrall et al., 2006). Likewise, prosecutors invoke hate crime charges in cases entailing injury and clear evidence that racial, religious, or other slurs were written or uttered during the offense (McPhail & Jenness, 2005).

The notion that prosecutors charge when the evidence supports conviction is uncontroversial and aligns with social science research and legal norms. The less settled question is how a case is defined as "convictable." Neither the presence of evidence nor its interpretation is exogenous to the system. To this end, theory and research in the law and organizations tradition emphasizes the endogeneity of legal regulation (Edelman, 2016; Edelman et al., 1999). Law is not simply created outside of an organization and then applied evenhandedly within it. Rather, actors in an organization—managers and legal counsel in the private sector or prosecutors and victim advocates in a criminal justice setting—reframe the practical meaning of laws in subtle but consequential ways (Edelman, 2016).

Two processes described in legal endogeneity theory are relevant to hate crime law enforcement. The first is the redefinition of ambiguous law in the organization. Many laws, hate crime among them, leave room for substantial discretion and variable interpretations of statutes. For example, California's hate crime law, like many others across the nation, refers to crimes committed "in whole or in part" based on the actual or perceived characteristics of a victim (Cal. Penal Code § 422.55). This law leaves room for discretion and interpretation. For instance, how much prejudice must be evidenced to constitute "in part"? And what type of evidence could be used to prove motive? Grattet and Jenness (2005) describe how law enforcement agencies interpret the same law differently. In a study of hundreds of department-level policy documents in California ("general orders"), the authors identify a range of hate crime definitions at the organizational level. Ambiguous state law

https://doi.org/10.1111/lasr.12685 Published online by Cambridge University Press

was to some extent redefined at the agency level, which is consequential for determining procedures for training and investigating hate crimes.

Within an organization, this meaning-making process can reflect a process of reframing the law in ways that that help negotiate the tension between the requirements of the law and the efficient practices of the organization. Edelman (2016, pp. 25–26, 124) refers to this process as the managerialization of law: the reframing of law or policy to align with the organization's values and prerogatives, potentially at the expense of enforcement. For example, complaints of sexual harassment in the workplace are reframed by complaint handlers as "workgroup issues," or characterized benignly as the result of differences in management style (Edelman et al., 1993, p. 516). Informal dispute resolution, seen as a legitimate organizational response in the eyes of the courts, becomes an efficient and expedient means of handling complaints. As such, the meaning of harassment is reframed in such a way as to reduce the risk of litigation and minimally disrupt standard management practices.

An analogous process plays out in criminal law. For instance, prosecutors in large counties manage heavy caseloads that require a balancing their formal mandate of "seeking justice" (ABA, 2017) with the brute necessity of efficiently disposing of a high volume of cases. Some prosecutors expressed reluctance to prosecute hate crimes, even in the presence of evidence that the victims were targeted because of their race, electing to prosecute using the predicate crime instead (e.g., assault but not *hate crime* assault; King (2008, e.g., pp. 1375–1376)). Prosecutors downplayed the evidence of victim selection based on race, acknowledging the difficulty of proving this motivation. This practice effectively raises the evidentiary threshold for hate crime charging. As such, law enforcement agencies can subtly reframe the law for practical purposes of efficiency. We investigate the possibility of this kind of interpretive drift in our analysis.

A second relevant process is organizational decoupling, a term that is used in two ways in prior research on law and organizations. Decoupling most commonly refers to a disconnect between an organization's policies and its practices. Decoupling is deployed to effectively separate symbolic compliance with a regulation from the organization's actual operations (Meyer & Rowan, 1977). For example, diversity training programs can signal attention to diversifying the workplace, yet the programs are often disconnected from actual change in the diversity of managers (Kalev et al., 2006).

King (2008, p. 1380) illustrates how decoupling can unfold in law enforcement settings. He interviewed prosecutors in jurisdictions with heavy caseloads, some of which were located in areas with significant advocacy group activity around hate crimes. Some district attorneys faced a quandary; they wanted to respond to the external pressure from the community to take hate crimes seriously, but they also sought to maintain the efficient disposition of cases in the office, which can be interrupted by the additional investigatory work needed for some hate crime cases. The district assigned a member of the office to work out of a police substation and liaise with the community on issues of race and hate crime. However, the "community prosecutor" had no authority to charge cases; the position was largely symbolic.

Decoupling can also refer to the absence of coordination across agencies that work on a given task. The U.S. criminal justice system is a loosely coupled system in that various agencies have autonomy and discretion over initiatives and priorities. A consequence of autonomy in a loosely coupled system is the lack of coordination and information sharing across parts of the system. To be sure, police and prosecutors collaborate; but autonomy creates a condition that is ripe for miscommunication when agencies in a loosely coupled system become "self-contained" (Hagan, 1989, p. 128).

Both types of decoupling have implications for hate crime charging. Building on King's (2008) work, we expect the presence of hate crime law and even designated hate crime prosecutors to result in few actual hate crime prosecutions. The volume of cases in a typical urban office creates a necessity to focus on the predicate crime (e.g., assault) with minimal additional investigation into prejudicial motive (Boyd et al., 1996, p. 841). We also explore the implications of coordination across subunits, police and prosecutors in this case. Following Hagan (1989), we inquire about the degree of coordination between police and prosecutors, and whether the degree of decoupling is consequential for hate crime prosecution.

https://doi.org/10.1111/lasr.12685 Published online by Cambridge University Press

LAW, STRATIFICATION, AND HATE CRIME PROSECUTION

Classic law and society theory states that law works to the advantage of the powerful and often to the detriment of the poor and minority groups (Black, 1976; Galanter, 1974; Pager et al., 2022; Songer, 1999). Even seemingly neutral laws work against less powerful groups in society, as evidenced by voting restrictions (Bentele & O'Brien, 2013; Manza & Uggen, 2006), fines and court fees (Menendez et al., 2021), or drug law enforcement (Alexander, 2010). Hate crime law, as legislation intended to protect minority groups from bigotry-motivated crime, would appear to challenge the very premise of the law and inequality thesis. The purpose of such laws, based on the early testimony and advocacy, was to protect minority groups from hate-inspired crime (Jenness & Grattet, 2001). Yet laws designed to protect minority groups can be blunted at the level of enforcement and implementation (Edelman, 2016).

The process through which protective laws are rendered impotent can be subtle and reflect apathy more than malice. Frohmann (1997), for instance, shows that prosecutors make assumptions about victims and witnesses based on the locations of crime incidents and the victim's race and gender. Prosecutors tend to think "downstream" (p. 535) by anticipating how jurors or judges will view the credibility of defendants, victims, and witnesses. The organizational imperative of charging only convictable cases and the social distance between victims and anticipated jurors increases the odds case rejection.

We anticipate a similar process for hate crime cases, although our interest is in the decision to invoke a charge enhancement rather than rejecting a case outright. Police culture tends to emphasize masculinity, conservatism, and distrust of outsiders (Crank, 2014; see Martin, 1999 on masculinity). In the past, some police officers and units resisted enforcing hate crime laws (Balboni & McDevitt, 2001; Boyd et al., 1996). Recent studies show that police officers approach potential hate crimes with some skepticism or preconceived notions of what a "real" or "normal" hate crime looks like (Lantz et al., 2019). For law enforcement, the stock image of a hate crime involves a violent offense in which the victim and offender are of different races, and the racial motivation is signaled through the use of specific words (e.g., slurs) or symbols during the offense (Boyd et al., 1996).

We anticipate that prosecutors will gravitate toward such archetypical cases when invoking hate crime charges. In addition, and in keeping with the law and stratification tradition, we probe about the role of social distance between law enforcement and hate crime victims. For instance, does a profession that emphasizes masculinity and conservatism, such as policing, face impediments when interacting with victims of potential hate crimes, such as those motivated by animus based on gender and sexual orientation?

LEGAL MOBILIZATION AND HATE CRIME LAW ENFORCEMENT

If the literature on law and organizations identifies headwinds for hate crime prosecution, then prior research on legal mobilization points to some tailwinds. Pioneering research on the creation of hate crime law demonstrates that organized advocacy groups, for instance civil rights and victim's rights organizations, successfully lobbied state congresses to create hate crime laws (Jenness, 1999; Jenness & Grattet, 2001). Other organizations, such as the Anti-Defamation League, collected data on alleged hate crimes and crafted statutory language that could serve as a template for legislation, which was significant in the development of federal law (Jacobs & Potter, 1998).

The role of advocacy organizations continued after legislation. For example, hate crime reporting by law enforcement varies across jurisdictions, such that some police departments report no hate crimes for consecutive years while comparable departments report dozens. Among the factors that distinguish law enforcement agencies that report hate crimes from those that do not is the presence of civil rights advocacy organizations (McVeigh et al., 2003; Scheuerman et al., 2020).

https://doi.org/10.1111/lasr.12685 Published online by Cambridge University Press

Prosecutors also acknowledge ways in which advocacy groups can exert some influence through subtle means. For instance, organizations share information or literature (e.g., from the Southern Poverty Law Center) and invite prosecutors to community meetings in an effort to put hate crimes on the prosecutor's radar (Bell, 2002; King, 2008). McPhail and Jenness (2005) similarly report that prosecutors are willing to listen to local advocacy organizations. However, they did not view external pressures from advocacy groups and the media as affecting prosecutorial decision-making (McPhail & Jenness, 2005, p. 109).

In the current study, we inquire about prosecutorial responses to advocacy group and media attention to hate crimes. Based on prior research, we anticipate that prosecutors are receptive to communication with advocacy organizations, although extant work suggests minimal influence on prosecutorial decision-making.

The current study

This study investigates how police and prosecutors operationalize hate crime and how prosecutors make charging decisions. We focus on to how these practitioners perceive the role of media and advocacy groups, and we give attention to their norms and cross-agency relationships. The research site is Miami-Dade County (hereafter, Miami). Miami, while having a different demographic composition than most large U.S. cities (72.3% identify as Hispanic/Latino), is similar to other large local prosecutorial offices with respect to the organization of the State Attorney's Office. It has an executive team making key decisions, multiple divisions handling various felonies and misdemeanors, hate crimes prosecutors processing hate crimes as well as other offenses, and victim liaisons specializing in victim engagement and support throughout case processing. As such, we expect that challenges documented in this jurisdiction would be applicable to prosecution of hate crimes in other metropolitan areas. We should also note, however, that many Florida jurisdictions do not report any hate crimes. Based on the most recent report by the Florida Attorney General (2022), Miami had the greatest number of hate crimes reported by local police departments, suggesting that other counties in Florida may have less capacity for responding to these cases.

DATA

The Miami-Dade State Attorney's Office provided access to case files for criminal cases processed as hate crimes in Miami for the period 2005–2019. There were 23 hate crime cases during this time, which included those motivated by victims' race, religion, sexual orientation, mental disability, or homelessness (a comparable number of cases was reviewed by Phillips, 2009 when studying hate crimes in New Jersey). Cases involving juveniles are sealed and not available for review. Four additional cases flagged as hate crimes were still pending at the time of data collection and, therefore, unavailable for review. Furthermore, cases filed prior to 2005 were housed outside of the office and became logistically difficult to obtain; as such, they were also excluded.

The information from case files was obtained and recorded following a standardized data collection tool used with prosecutorial case files in other jurisdictions (see Kutateladze et al., 2015; Kutateladze & Andiloro, 2014). The tool was modified to more effectively capture the information on hate crime enhancement and to allow recording of additional qualitative information. It was then piloted with select case files and discussed with prosecutors, a process resulting in adding new fields, revising others, and dropping some. The resulting instrument contains 41 quantitative and qualitative data fields, capturing the characteristics of a *case* (e.g., top charge at arrest, evidence type and nature, and disposition type), *defendant* (e.g., prior record, substance use and mental health note, and defense counsel type), and *victim* (race/ethnicity, injury, and relationship type with an offender). Generally, more information was available about defendants if the forensic evaluation was

https://doi.org/10.1111/lasr.12685 Published online by Cambridge University Press

conducted, because some of these cases included extensive notes from psychiatrists describing possible traumas, mental health diagnoses, and childhood experiences.

To conduct the review, paper files of criminal cases were brought to a private conference room and stored in locked cabinets between review sessions. Only one person, the principal investigator, conducted all reviews to ensure the consistency in recording information. Case files ranged from a 50-page folder to multi-box case documents. While an examination of most cases took approximately an hour, a few cases required between 3 and 5 hours to review. Given that files within the folders and boxes were not organized, prosecutors were called upon to assist with finding relevant documents, decipher difficult-to-read handwriting, and clarify various notes.

Data from case file reviews were combined with semi-structured interviews with 10 practitioners, all of whom were identified through a combination of key informants' referrals and snowball sampling. Although the small sample size and sampling method preclude a claim of representativeness, this design is consistent with previous qualitative research on prosecutorial perspectives about hate crimes (McPhail & Jenness, 2005, interviewed 16 prosecutors; King, 2008, interviewed 11 prosecutors).

The interviews were carried out in person by the principal investigator with support from a research assistant who took verbatim notes. Interviews lasted between 40 and 95 min. The resulting transcript contains 84 single-spaced pages of notes. While a semi-structured questionnaire was used to guide the interview, these interviews took the form of a discussion during which it was not uncommon for the respondent to ask questions, both clarifying and substantive, to the interviewer.

The interview instrument used open-ended questions organized around two broad sections. The first section—case processing—includes questions on collaboration with police, factors considered in determining hate motivation, and the role of the enhancer in plea negotiations, among others. The second section—challenges and opportunities for reform—covers questions about the barriers to hate crime reporting and prosecution, legislative and training opportunities for improving crime reporting and prosecution, and the role of social media and technology in identifying hate-motivated offending and gathering evidence to establish offenders' bias.

Because practitioner interviews and case file reviewers were closely related, it was difficult to determine the sequence of data collection. At times, insights from the case file review provided information for engaging in a productive discussion with respondents. On the flip side, practitioner interviews were also an important source of information about how to best capture data from criminal case files. Given this interdependency, case file reviews and practitioner interviews were carried out concurrently between July 2018 and December 2019.

ANALYTIC STRATEGY

Data from case file reviews and practitioner interviews were analyzed qualitatively. Given the lack of published research on prosecutorial decision-making in hate crime cases (save McPhail & DiNitto, 2005), this work is exploratory, making qualitative research especially appropriate. Data from case file reviews was examined descriptively and through qualitative content analysis (Mayring, 2004) with an emphasis on the analysis of documents and records (Wolff, 2004). Practitioner interviews were analyzed through the Directed Qualitative Content Analysis (QCA) method (Assarroudi et al., 2018). Unlike conventional content analysis, where coding categories are derived from the text data, Directed QCA analysis starts with a theory or prior research findings as guidance for initial codes (Hsieh & Shannon, 2005). For example, earlier studies showed that prosecutors rely on verbal slurs as the most common types of evidence, followed by the presence of an eyewitness, location evidence, and confessions (Levin et al., 2007). Accordingly, the analysis looked into whether such evidentiary factors are still dominant, or if social media, for example, has begun to play a larger role in gathering evidence of prejudice.

A priori thematic codes were created based on research questions informed by prior research and research team members' experience of working with prosecutors (Kutateladze et al., 2015). For example, the codes for case file reviews were created to assess what type of evidence is being used to

https://doi.org/10.1111/lasr.12685 Published online by Cambridge University Press

demonstrate hate motivation, to what extent offender and victim attributes were different, at what point of case processing the hate crime enhancement is being added or dropped, and how often hate crime enhancers are used as a plea-bargaining chip. For practitioner interviews, the codes aimed at assessing challenges with hate crime identification and case processing.

Findings

Several findings from previous research are supported by our analysis of case files and interviews with police and prosecutors. This was particularly true for the concept of convictability and the general approach that police and prosecutors take toward hate crimes. Yet the data also reveal insights into factors that constrain hate crime prosecution. We identify three subtle practices that serve as impediments: (a) evidentiary inflation, which occurs when law enforcement assumes a higher burden of proof than what the law requires; (b) loose coupling of police and prosecutors; and (c) cultural distance between law enforcement and victims. The data also reveal two factors that increase attention to hate crime cases: media presence and citizen advocacy.

CONVICTABILITY

Prosecutors are risk-averse when making charging decisions, particularly in hate crime or civil rights cases (Bell, 2002). Cases that move forward in the system are typically strong cases that stand a good chance of a guilty verdict if the case proceeded to trial. This "convictability" standard was referenced several times during the interviews. As one prosecutor states, "The facts of the case matter—what I can prove. Whether I can make a good faith effort to continue." Consistent with this approach, a colleague adds,

> What I think makes a hate crime more difficult is…getting the jury to understand. What do I mean by that? Let's talk about an LGB hate crime. I don't know if this is going to be the first time that a juror has ever interacted with someone who's gay. That's legitimately a concern that I have. I try to vet all that out in jury selection, but you only get so much.

As evidenced by this downstream thinking, and consistent with Frohmann's (1997) insights, prosecutors' anticipation involves an appraisal of potential jury bias, in this example based on sexual orientation. A consequence is that prosecutable hate crime cases are reduced to those in which suspects make overt and unmistakable statements of bigotry during the commission of the crime, such that a jury can understand them unambiguously.

In line with this claim, research finds that arrests and prosecutions are most likely when cases fit the stereotypical depiction of a hate crime, such as swastikas painted on synagogues (Lantz et al., 2019; McPhail & Jenness, 2005). This notion is also reflected in our interview data. Prosecutors took interest when "statements are made specifically [and] in cases where certain signals or symbols are indicative of hate; i.e., Nooses, swastikas." When asked what he looks for in a case, one prosecutor responded,

> sometimes they're pretty on-the-face and I kind of take the belief of if a defendant is yelling, "fuck you, you faggot," while they're beating them, I'm going to file the [hate crime] enhancement. I think it's pretty clear on its face. Now if someone's made a Facebook post or something more subtle, it's going to be harder.

https://doi.org/10.1111/lasr.12685 Published online by Cambridge University Press

The image of a prosecutable hate crime invoked by law enforcement is the egregious but uncommon act that constitutes only the tip of the iceberg of possible hate crime cases. Cases below the surface that require a closer look are given far less consideration.

A review of case files in this office leads to the same conclusion. In several cases, victim testimonies formed the basis for the hate crime charge. One case involved homophobic insults that preceded a physical attack. The defendant was quoted as saying, "You're a faggot. Gay people don't pay for nothing. What are you, trans? What do you want to be, male or female? This is why I hate gay people." In another case, the victim was attacked in a parking lot and later testified to police that the defendant had said to him: "You're a fuck'n Indian. You are a fuck'n terrorist."

In addition to overt statements during the crime, prosecutors were attentive to location and the use of symbols. For example, in a criminal mischief case, the defendant sprayed swastikas and wrote "hail Hitler" [sic] using red paint on a driveway, the house, and the mailbox of a Jewish family. In two Islamophobic hate crime cases, the defendant spray-painted over the name of the mosque and left a threatening message on the mosque's voice mailbox: "Hate the Muslims. I hate all of you. I am going to go to your center and shoot all of you. I hate the Koran."

These types of cases fit the law enforcement archetype of a hate crime and align with other observations (McPhail & Jenness, 2005). However, police and prosecutors we interviewed were quick to mention that such cases are rare, which may explain why only 23 cases had been brought forward during a 15-year period according to our review of case files. As our interviews with police and prosecutors turned from prosecutable cases to the more frequent cases that are less likely to be charged as hate crimes, some commonalities emerged that help us understand why hate crime prosecutions are rare events (more on this below).

Furthermore, while "convictability" is an important factor for pursuing hate crime prosecutions, it appears that this consideration comes into play mainly at case screening. If a prosecutor decides to file hate crime charges, they are likely to pursue them. For example, we were told that the enhancement is not used as a plea-bargaining chip. As one senior prosecutor noted: "I can't think of an instance since I've been doing this that we've dropped the enhancement in exchange for a plea." "We don't use enhancements as leverage," added another prosecutor. Case file reviews were consistent with this observation. Respondents note that some defendants would not plead guilty because of the stigma associated with the "hate offender" label. Still, most cases with the enhancer are disposed of through guilty pleas. The charge enhancement makes defense counsel worry about the trial outcome, which may encourage them to take the plea offer. We should also note that these were difficult discussions for prosecutors, often reflected in taking a pause before responding or rearticulating their previous points, suggesting that the organizational culture on hate crime case processing is still in a forming stage.

IMPEDIMENTS TO HATE CRIME PROSECUTION

Interview data revealed three tendencies of police and prosecutors that reduce the likelihood of hate crime charges in cases that do not involve overt statements during the commission of the crime: *evidentiary inflation*; *loose coupling* of investigations; and *cultural distance*.

Evidentiary inflation

Police and prosecutors play a role in constructing the practical meaning of hate crime law, akin to compliance professionals' construction of civil rights law (Edelman et al., 1993). Our data suggest that law enforcement's normative understandings of Florida hate crime law assume a higher burden of proof than what is required by statute. We refer to this tendency—when there is a higher evidentiary threshold for the "law in action" than what is required by the "law in the books" – as evidentiary inflation.

https://doi.org/10.1111/lasr.12685 Published online by Cambridge University Press

According to Florida's hate crime statute (775.085(1)(a)), "The penalty for any felony or misdemeanor shall be reclassified as provided in this subsection if the commission of such felony or misdemeanor *evidences prejudice* based on the race, color, ancestry, ethnicity, religion, sexual orientation, national origin, homeless status, or advanced age of the victim" (emphasis added). The statute does not require that prejudice be the sole motivation. However, police frequently discuss hate crimes as if hatred must be the one and only motivation for the offense. Given the importance of the police report in the decision to pursue a case as a hate crime, this is a critical assumption.

Most of our interviewees, almost reflexively, discussed hatred as being the sole or exclusive motivation for the offense for a hate crime.[1] For instance, a detective mentions, "If [hate crime victims] were targeted *solely* (our emphasis) on the basis of their sexual orientation, then that would make that a hate crime against that particular community." When giving an example of a hate crime, this detective again remarks that, in the case he is describing, it is "100% given" that it was a hate crime. He adds, "however, if the tell-tale signs aren't there…it's not being reported as much."

Victim liaisons also elevated the burden of proof. In response to a question about how often these crimes occur, one victim liaison replied, "Very rarely. We might think it is, but until it's definitely identified…you know it has to be 100% identified." Another detective concurs:

> When you bring a case to the state attorney's office, you want [to] make sure you have proof beyond a reasonable doubt that that crime occurred. So for a hate crime we also have to prove that it occurred and the motivation behind that was because they were part of that community… It's been difficult with that because, like I said,… It's more for other purposes why they were targeted. It wasn't for that specific reason."

Prosecutors were more attentive to the nuance in the law, although they ultimately default to the "sole motivation" standard as well, albeit for a different reason. Prosecutors foresee juries as making the assumption that prejudice is the sole motivation. One prosecutor, after accurately describing the Florida hate crime law, explains that "the law says if it is partially or fully motivated by hate, it can be a hate crime." This prosecutor adds, "But juries don't hear that; they hear "if it *is* motivated [by hatred]."

In sum, criminal offenses evidencing hatred as a motive, even if not the sole motive, can legally be charged as hate crimes. However, many are not charged as hate crimes because of assumptions (by police) or strategy (by prosecutors) to elevate the evidentiary threshold. Such evidentiary inflation is a way of reducing risk of acquittal later in the process, not unlike the risk mitigation tendency observed in organizational responses to employment law (Edelman, 2016). Yet is also reduces the likelihood of cases with a partial motive being prosecuted as hate crimes.

Loose coupling

Criminal complaints frequently originate with a victim reporting an incident to police, which then leads to a police investigation and a referral to the prosecutor's office. The prosecutor's office has its own division of labor, in which a group of prosecutors makes charging decisions, and another set of line prosecutors handles cases after charging. Cases are potentially handed off several times throughout the process, resembling what Hagan (1989) referred to as a loosely coupled system. Drawing on the seminal work of Meyer and Rowan (1977), a loosely coupled organization allows for autonomy among connected units, and it is marked by little coordination or direction from organizational leadership. There is common understanding of responsibilities, but without frequent coordination.

[1]We did not ask specifically about sole motivation or partial motivation. The responses and descriptions of respondents' interpretations of the law grew out of more general discussions of how cases are labeled hate crimes.

https://doi.org/10.1111/lasr.12685 Published online by Cambridge University Press

A consequence of loose coupling is that some actors in the system, such as police, may make assumptions about what other actors in the system are doing (e.g., prosecutors). In hate crime cases, charging attorneys rely heavily on the responding police officer's assessment of the case. This was apparent in the case file reviews, where nearly all evidence was collected at the time of arrest, or soon afterwards, but always before case filing. In no case that we reviewed was the hate crime enhancement added at a later stage of the process because of newly discovered evidence stemming from additional investigative work. As a prosecutor familiar with these types of cases attests, "By and large it's happening at the case filing stage. It's a rarer circumstance where a case gets past filing and then someone recognizes it as a potential hate crime." A victim liaison agreed, stating, "…unless it's said from the victim or if something is expressed from the victim saying that it could have been a hate crime, a [hate crime charge] is probably never going to happen."

Such assembly line justice can be effective and efficient when roles are clearly defined, but this was not always the case. The police accept that it is largely their responsibility to make the initial investigation, but some interviewees assumed that the prosecutor's office would follow up on ambiguous cases. One respondent acknowledges that officers should flag hate crimes early, but also sees it as the prosecutor's responsibility to follow up, remarking that "they are the ones that investigate and go more in deep. They take a statement from the victim." A detective adds, "I like to take recorded statements so the prosecutors can hear exactly what the person said. If anything rings a bell to the prosecutor, they listen to the statement, and they bring the victim in. They would know if it's a hate crime or if they were specifically targeted."

Prosecutors do not make the same assumptions. Intake and line prosecutors are relying more heavily on the police to flag hate crimes, which has also been reported in other jurisdictions (Bell, 2002,p. 161). Whereas the detective in the previous quote sends the recording up the line so that prosecutors can make the determination about the hate crime, a line prosecutor notes the importance of the officer mentioning the hate element:

> If there's a red flag within the reports they receive, or if the police officer mentions the word hate crime to someone, it might get brought up and sent to the supervisor. But it really depends on how diligent the intake attorney or the case filer is.

Another line prosecutor adds that the system is based on "assembly line filing." That is, prosecutors are "looking for the element, you know on a grand theft (did someone take the property? What's the value? You know? Etc. etc.)… They're not really digging into the background, the behind-the-scenes. So those [hate crime] cases, they probably don't get seen as much."

In sum, loosely coupled systems have some advantages. They allow for autonomy and agency-specific goal setting. However, a consequence of a loosely coupled system is that distinct actors in the process of criminal case referral can make assumptions about the work of the other actors. To put it more bluntly, the components of the system can be out of sync. In this case, we find evidence that seemingly benign assumptions about whether the prosecutor will further investigate a case (as some detectives assume they will) or that the police would explicitly flag the hate element (as some prosecutors assume they will) can reduce the likelihood that a potential hate crime will receive additional investigation. As such, these nonobvious cases tend to fall through the cracks.

Importantly, the evidence of decoupling described above differs from the observations in prior work. For instance, King's (2008) description suggests strategic decoupling by which ceremonial and visible outreach to the community is detached from actual enforcement. Our observations suggest another kind, which is less strategic and might better be described as the absence of tight coupling. That is, without intentional coordination between police and prosecutors, such as that observed in some prior work in places with more frequent prosecutions (Bell, 2002), the default practices of police and prosecutors leave each group making assumptions about the investigatory practices of the other.

https://doi.org/10.1111/lasr.12685 Published online by Cambridge University Press

Cultural distance

Prior research detects hostility toward hate crime investigations among some officers (Boyd et al., 1996). We detected no disdain for the laws or their investigation in our interviews, and several of our interviewees believed that hate crimes happened more frequently than what official statistics indicate. Yet they could not pinpoint why cases rarely landed on their desks. The most common speculation for the suspected dark figure was the lack of reporting by victims, especially by LGBTQ and Muslim victims, whom practitioners perceive as especially disconnected from the law enforcement community. Victims may indeed fail to call the police or choose not to reveal relevant information about themselves during a police interview, such as their sexual orientation or immigration status. It also appears that law enforcement is reluctant to ask probative questions during investigations. This is particularly evident in hate crimes motivated by sexual orientation.

Law enforcement culture leans conservative and masculine (Crank, 2014). This orientation, and the cultural distance between the police and some victims, can work against the development of soft skills to uncover bias as a motive, especially for crimes perpetrated against LGBTQ victims. For example, police officers are reluctant to ask about the victim's sexual orientation. Several interviewees expressed discomfort about mentioning sexual orientation for fear of insulting the victim. As one officer states,

> Everybody is very sensitive nowadays. It might be hard for an officer, especially a young officer [who is] maybe not very experienced, to ask someone that question. They might be very reluctant to ask, "I'm sorry. Are you a homosexual?" If that person takes offense to it, that person can call in a complaint on them and say, you know, "I was treated unfairly…I was afraid of the officer," whatever, they can say X, Y, and Z. So I think that maybe some young road officers might be afraid to ask that question.

This quote demonstrates a reluctance to ask victims questions about sexual orientation during the investigation. Equally importantly, it also illustrates how cultural distance is maintained through word choice. Using the term "homosexual" indicates inattention to basic normative communication with members of the gay community and could make victims less willing to engage with officers during investigations.

A victim liaison agreed. When asked by the interviewer if it was appropriate to inquire about the victim's sexual orientation, the liaison responded, "I don't think they think that it's an appropriate question… I think it's an irrelevant question. It's irrelevant to the case. If the crime occurred, the crime occurred." When asked how an officer would know it was a hate crime if they do not know the sexual orientation of the victim, the respondent answered,

> Well, I mean, if someone says, you know, they're saying *gay*, you know, I mean how would…I'm seeing it through the law enforcement lens… I think that the hate crime component is something that should be identified from the beginning, but unless it's said from the victim or if something is expressed from the victim saying that it could have been a hate crime, that's probably never going to happen, you know what I mean?

Prosecutors acknowledge the cultural distance as a potential impediment to prosecuting hate crimes. When asked about the challenges to investigating hate crime cases, a prosecutor responded:

> IDing of LGBTQ hate crimes. Identifying things within LGBT victims' experience so that cops know what to pay attention to when doing investigations. You've got to learn from that how these folks will be more willing to be interviewed. Show cops how to

https://doi.org/10.1111/lasr.12685 Published online by Cambridge University Press

> interview them, how to talk to them and relate to them without being judgmental. Whatever it is in the victim's experience that would turn them away from reporting, help the cop understand what that is and not do it. *For a lot of cops it's two different worlds- cops have their world, and LGBT have theirs* (emphasis added).

Advocacy and media

Despite these headwinds to hate crime charging, some cases are brought forward and charged under the state's hate crime statute. As stated previously, cases involving physical harm in which the defendant made clear statements about the victim's race, religion, or sexual orientation are most common in the case files. But absent the presence of symbols or slurs during the offense, are there factors that increase the likelihood of a hate crime charge when the evidence is less clear-cut?

Prosecutors spoke candidly about their interactions with external audiences and acknowledged the relevance of media and advocacy organizations. With regards to media coverage, one prosecutor states that "it shouldn't be affected, but the reality is that the political pressure could play into [the charging decision]. … In my time, I've seen too many instances of people trying to apply political pressure. And sometimes it could easily affect decisions." This sentiment aligns with early observations that media and advocacy organizations can increase the visibility of hate crime in a community (Bell, 2002, p. 111). A prosecutor in our study concurs, adding,

> The biggest way I get a lot of my cases is through media attention. You know these cases have been hitting the media a lot so what happens is a lot of these cases that might go downstairs [screening unit], I already see they are in the media and I will have already flagged them, so as soon as the A-form [arrest form] comes in I already know that case is coming and I'll tell them, 'You're not taking that case. Send it up to me.'

When the interviewer probed as to whether the prosecutor referred to social media or news media, the prosecutor answered directly: "Facebook…you know, not necessarily. I'm not necessarily looking at social media. I mean like *Miami Herald*, WSVN, NBC6, even *Miami New Times*."

A victim specialist expresses the same opinion with equal candor:

> To what extent does the office work with PD to identify hate crimes? It's only when the media is involved. We don't have officers walking in to discuss hate crimes. So it is really underreported. Miami is still very backward, not an accepting society of people who are different. So victims don't report. They go to different agencies to get the help they need, but they won't go to the PD, and they won't come here.

Advocacy from constituents or organized groups also matters. Advocacy groups not only encourage victims to come forward to report crime, but they can also work on behalf of victims to advocate for hate crime charges. The visibility and perceptions of these groups by practitioners is a consideration when handling potential hate crime cases. Practitioners see this as one reason why crimes with an anti-Jewish motive are a sizeable fraction of reported hate crimes.[2] As a prosecutor states,

[2]According to data reported by the Miami-Dade Police Department, sixteen hate crimes were reported between January 1, 2018 and August 31, 2021. Seven of these (44%) had an anti-Jewish motive (Miami-Dade Police Department, 2022).

https://doi.org/10.1111/lasr.12685 Published online by Cambridge University Press

> Jewish [sic] are more willing to speak out. Muslim, probably less, given the national climate these days. So, Muslims, because they're a more disliked minority, they're less likely to speak out…. If you get the community supporting you, or supporting your claim, you're more likely to be listened to and worked with, than if you're an individual Muslim who comes forward on your own with something. That's not going to get as much attention.

Another prosecutor adds,

> When it's a crime against your religion, it's personal but it's also community. When it's a racial crime, the community wants to speak as well as the individual. Immediately we get the ACLU, the NAACP, immediately we get the Counsel of Rabbis, or whomever, you know, involved. It's not just the individual, it's also the community, so I think it's not as, it's personal, but it's not as "personal personal."

In sum, and in line with prior work on lawmaking (Jenness, 2007), reporting (McVeigh et al., 2003), and prosecution (King, 2008), advocacy on behalf of hate crime victims is by no means inconsequential. Advocacy can propel law enforcement to give cases the second look that many do not receive in a busy, loosely coupled system.

DISCUSSION

Hate crime law is an instructive case for advancing our understanding how practitioners respond to the legal environment. These laws provide another tool for law enforcement, but also an additional element to prove to a jury and new legal concepts to operationalize (e.g., "hate-motivation"). Our interviews with police and prosecutors revealed that working definitions of hate crime differed slightly but consequentially from statutory law, and that cultural distance can impede investigation in subtle ways, such as preventing probatory questions. The findings also reveal how the degree of coupling between organizations influences enforcement. Specific to hate crime laws, our data help us understand why they are infrequently prosecuted, even where the law has been in place for years and the district attorney's office has identified personnel to oversee potential cases.

Before discussing the broader implications of our findings, we draw attention to a couple of dogs that did not bark. For instance, the police and prosecutors we interviewed expressed neither hostility nor derision toward hate crime laws, which past research as shown to be a relevant factor at some times and places (Balboni & McDevitt, 2001; Boyd et al., 1996). Antipathy toward hate crime laws almost certainly exists in pockets of the United States legal system, but our data show that prosecutions are rare even in the absence or overt resistance. Likewise, we did not observe ceremonial policies or structures that were systematically decoupled from actual enforcement, as some prior work has reported (King, 2008).

Factors that impeded prosecution were subtle and resembled what Edelman et al. (2001) called the managerialization of law. In this case, law enforcers interpreted the requirements for a hate crime in a way that mapped on to workplace norms and prerogatives. This was most visible through the process of evidentiary inflation, in which police casually referred to a higher threshold for hate crime cases than what is required by statute. Although none of our questions directly asked respondents about their view of the evidentiary threshold for hate crimes, when interviewees discussed cases, either real or hypothetical, they typically assumed that hatred or prejudice must be the sole motivation for the crime. The prosecutor's logic of minimizing risk of acquittal—an organizational objective—also results in some disjuncture between statutory requirements and the practical definition of hate crime. This observation in the realm of criminal law generally aligns with studies of

https://doi.org/10.1111/lasr.12685 Published online by Cambridge University Press

regulatory law that document how organizations reframe policies to maintain organizational efficiency (Edelman et al., 1999; Talesh, 2009).

We also identified consequences of loose coupling between sub-agencies in a system. We do not imply any strategic decoupling of police and prosecutorial practices concerning hate crimes. Rather, police and prosecutors can sometimes make assumptions about each other's investigative responsibility in the absence of strategic coordination. Our observations are an interesting contrast with Bell's (2002) careful analysis of an anti-bias crime task force in pseudonymed "Center City." As Bell describes, this unit worked closely with the DA's office and often felt that it had a stake in the outcome of the case (p. 174). Indeed, the police unit was accustomed to having its charging recommendations endorsed by the DA's office. This is an example of tight coupling between police and prosecutors, which coincides with more frequent prosecution. Whereas we illustrate the ways in which loose coupling can limit investigation, Bell's example is a useful analogue to show how tight coupling can result in more prosecutions.

It also appears that social distance between police and crime victims can impede the identification of hate crimes in the initial stage of an investigation, which is crucial for eventual prosecution because charging attorneys rely heavily on police reports. Some police were reluctant to ask probing questions about sexual orientation, ostensibly out of fear of offending the victim. This concern, at least in the officers' eyes, seems to trump the harm of not identifying a possible hate crime. Sometimes the anachronistic terms used by police ("homosexual") constitute an unforced error that could work against cooperation from gay victims. As such, cultural distance between the police and community, especially in the absence of training on this issue, reduces the chances of identifying hate crimes in the early stages of investigation.

The latter finding puts an interesting twist on Black's (1976) proposition concerning law and cultural distance. For Black, cultural distance between law enforcement and an alleged *perpetrator* results in *harsher* legal sanctions than in cases involving less distance (e.g., same race or same sexual orientation). Our findings suggest a corollary; cultural distance between officials and *victims* appears to *lessen* the law enforcement response. This claim aligns with prior research showing that theories of crime and punishment apply differently to hate crimes, in which victims are often from minority or disadvantaged groups (see Lyons, 2007 on hate crime behavior; King, 2008 on enforcement).

The findings also revealed circumstances that can increase attention to hate crimes. In certain cases, the media and advocacy groups impelled action. Some attorneys were surprisingly candid in their assessment of the media and organized interests, noting that although the media attention should not matter, in practice it is relevant. The same was true for advocacy groups. Knowing that an alleged victim was associated with a group that was capable of pressing the issue in the public eye was not lost on prosecutors. We detected no overt coercion, but the subtle influence was acknowledged. This finding aligns with other interview-based work (Bell, 2002; King, 2008; McPhail & Jenness, 2005) and with quantitative findings showing the advocacy group activity is associated with hate crime reporting (McVeigh et al., 2003).

Finally, the results inform socio-legal research on prosecution and the decision to charge. Prior research emphasizes the importance of case convictability—that is, prosecutors move forward with a case when they feel that a conviction is likely (Frederick & Stemen, 2012; Richardson & Kutateladze, 2021). Weaker cases are dropped or result in a plea bargain (Bushway et al., 2014). We see evidence of this perspective in our data. However, convictability is not exogenous to the investigatory and charging process. The degree of coupling, the vagueness of the law, and the external scrutiny of media and advocacy groups can inform the perceived convictablity of a case and thereby propel or hinder prosecution.

Our conclusions might be applied in other contexts, particularly for laws or legal innovations that can be perceived as protective of vulnerable groups and entail significant ambiguity. For instance, our results partly align with Frohmann's (1997) influential work on sexual assault, although we saw less evidence of place-based bias against victims' testimonies for the case of hate crime. The concepts of evidentiary inflation and loose coupling may be pertinent in sexual assault cases as well,

https://doi.org/10.1111/lasr.12685 Published online by Cambridge University Press

as prosecutors construct meanings of terms that often appear in these statutes, such as "impaired," "capacity," or "coercive."

Another application is the recent spate of state laws relating to the expungement or concealment of criminal records, which would disproportionately help people of color given their overrepresentation among those convicted of crimes. In some states, for instance Ohio (Revised Code 2953.32), certain convicted persons *may* be eligible for expungement or sealing of the record, but judges must decide based on "circumstances related to offender's rehabilitation." Other agencies are also involved, including prosecutors, victim liaisons, and probation officers. As a legal innovation with vague definitions, we anticipate that the meaning of "rehabilitation" and other criteria will be constructed in the courts, including the evidentiary threshold. We also anticipate that loose versus tight coupling between investigators (probation officers in this case) and deciders (judges) will influence the frequency of expungement.

While this research offers insights into hate crime charging in a large and diverse jurisdiction, we are mindful that the results are not necessarily characteristic of all legal environments. For example, Oregon's statute includes all federal bias categories, including gender identity and disability, while the Pennsylvania Ethnic Intimidation Law (§2710)—comparable to a hate crimes statute—only captures "race, color, religion or national origin." In some states, hate crime is a sentencing enhancer (e.g., Florida and Louisiana), while in others hate crimes represent dedicated charges (e.g., Oregon and Illinois). Some offices have a long history of processing hate crimes and even publishing data (e.g., Multnomah County District Attorney's Office) while most prosecutorial offices have limited experience of processing hate crimes. Perhaps most consequentially, some offices have dedicated hate crimes units while others do not. Our interviewees were chosen, in part, because they had experience working with hate crime cases. We would expect similar results in jurisdictions without hate crime task forces and in states with similar laws.

Policy implications

Considering the prevalence of hate crime according to victimization surveys and the low number of prosecutions, no single strategy will meaningfully improve the detection, investigation, and prosecution of these crimes. Based on our findings and those of related studies, here we offer a few recommendations, assuming the goal is to enhance investigation and build viable cases for hate crime prosecutions.

We would expect higher rates of hate crime charging in situations in which task forces or similar initiatives bring together multiple agencies (see Palmer and Kutateladze (2021) on building LGBTQ task forces to improve hate crime reporting and cross-agency collaboration). Such tight coupling leaves less room for agencies to make assumptions about the investigatory work of others. As described above, Bell's (2002) study of an anti-bias crime task force suggests deeper investigation and more prosecutions than what we observed in our study.

Building the cultural competence and investigator capacity necessary for hate crime detection and successful prosecution would also require improvements in training, which is typically limited to learning applicable laws. The training could utilize real case scenarios and emphasize practical skills development. For example, the training should aim to enhance case screeners' ability to flag cases where the evidence of prejudice is not readily apparent. Developing competencies for interviewing crime victims is also advisable. Police and prosecutors in our study discussed the absence of reporting by victims, which may stem from cultural distance and distrust between some communities and the police. Developing soft skills to ask about sexual orientation, religion or ethnicity in ways that use respectful language could be part of training. Furthermore, all prosecutors should receive some form of this training, even if only selected hate crime prosecutors handle cases after charging. The process of when and how a case should be transferred to the hate prosecution unit should be clearly explained.

Finally, recruitment of minority groups as patrol officers, detectives, prosecutors, and victim liaisons—and ensuring their visibility, inclusion, comfort and safety in the workplace—may also

https://doi.org/10.1111/lasr.12685 Published online by Cambridge University Press

increase the likelihood of hate crime detection and evidence gathering because victims might be more likely to relate to practitioners who share their identities. Closing cultural distance with victims would presumably aid in investigation, although we acknowledge that this and the above recommendations require careful study and evaluation.

CONCLUSION

Legislation determines which behaviors can be sanctioned by the state, but practitioners are instrumental in shaping the everyday meaning and the enforcement of laws. When a criminal statute requires additional resources or imposes new standards at the organizational level, for instance investigatory time on cases or an additional element to prove beyond a reasonable doubt (e.g., hate-motivated), underenforcement can result. This situation resembles observations of civil rights and employment law, in which organizations must implement vague laws aimed at reducing unequal treatment. The net effect in each situation can be inaction or inefficacy. Drawing on concepts from legal endogeneity theory (Edelman, 2016), our study illustrates how and why criminal laws are sometimes under-enforced.

We found that hate crime laws were reframed and rarely enforced even when law enforcement showed no evidence of defiance or antipathy. Rather, subtle but consequential drift from the legislation occurs when the law eventually confronts the norms and practical constraints of the organizations responsible for enforcement. When law and organizational culture are misaligned, managerialization works against enforcement, a situation that appears exacerbated when cultural distance between parties is present and tight coupling is absent. Consideration of these organizational factors helps us understand why some laws are regularly enforced, while others require a higher bar for prosecution.

ACKNOWLEDGMENTS

This project was supported by the National Institute of Justice, Office of Justice Programs, U.S. Department of Justice (Award No. 2017-IJ-CX-0031). The views and opinions expressed in this work are those of the authors and do not necessarily reflect the views of the National Institute of Justice. We are grateful to numerous contributors and partners on this research project, including all respondents who took the time to participate in interviews. We thank Marquianna Griffin for assistance on an earlier draft and Vinnie Roscigno for his feedback on parts of the paper. We are also grateful to the editors and anonymous reviewers of the *Law and Society Review* for their thoughtful comments on earlier versions of this article.

REFERENCES

Albonetti, Celesta A. 1987. "Prosecutorial Discretion: The Effects of Uncertainty." *Law and Society Review* 21(2): 291–313.

Alexander, Michelle. 2010. *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*. New York: The New Press.

American Bar Association. 2017. Criminal Justice Standards for the Prosecution Function https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/. Accessed April 15, 2023

Assarroudi, Abdolghader, Fatemeh Heshmati Nabavi, Mohammad Reza Armat, Abbas Ebadi, and Mojtaba Vaismoradi. 2018. "Directed Qualitative Content Analysis: The Description and Elaboration of its Underpinning Methods and Data Analysis Process." *Journal of Research in Nursing* 23: 42–55.

Balboni, Jennifer M., and Jack McDevitt. 2001. "Hate Crime Reporting: Understanding Police Officer Perceptions, Departmental Protocol, and the Role of the Victim Is there Such a Thing as a "Love" Crime?" *Justice Research and Policy* 3(1): 1–27.

Bell, Jeannine. 2002. *Policing Hatred: Law Enforcement, Civil Rights, and Hate Crime*. New York: New York University Press.

Bentele, Keith G., and Erin E. O'Brien. 2013. "Jim Crow 2.0? Why States Consider and Adopt Restrictive Voter Access Policies." *Perspectives on Politics* 11(4): 1088–1116.

Black, Donald. 1976. *The Behavior of Law*. San Diego, CA: Academic Press.

Boyd, Elizabeth A., Richard A. Berk, and Karl M. Hamner. 1996. "Motivated by Hatred or Prejudice: Categorization of Hate-Motivated Crimes in Two Police Divisions." *Law and Society Review* 30(4): 819–850.

Bushway, Shawn D., Allison D. Redlich, and Robert J. Norris. 2014. "An Explicit Test of Plea Bargaining in the Shadow of the Trial." *Criminology* 52: 723–754.

https://doi.org/10.1111/lasr.12685 Published online by Cambridge University Press

Cooney, Mark. 1994. "Evidence as Partisanship." *Law and Society Review* 28(4): 833–858.
Crank, J. P. 2014. *Understanding Police Culture*. London and New York: Routledge.
DeFrances, Carol J.. 2002. Prosecutors in State Courts, 2001 Bureau of Justice Statistics. https://bjs.ojp.gov/content/pub/pdf/psc01.pdf. Accessed August 15, 2022
Edelman, Lauren B. 2016. *Working Law: Courts, Corporations, and Symbolic Civil Rights*. Chicago: The University of Chicago Press.
Edelman, Lauren B., Howard S. Erlanger, and John Lande. 1993. "Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace." *Law and Society Review* 27(3): 497–534.
Edelman, Lauren B., Christopher Uggen, and Howard S. Erlanger. 1999. "The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth." *American Journal of Sociology* 105: 406–454.
Edelman, Lauren B., Sally Riggs Fuller, and Iona Mara-Drita. 2001. "Diversity Rhetoric and the Managerialization of Law." *American Journal of Sociology* 106(6): 1589–1641.
Florida Attorney General. 2022. Hate Crimes in Florida, January 1, 2021–December 31, 2021 http://myfloridalegal.com/webfiles.nsf/WF/CPAL-CMKPX8/$file/Web+Link.pdf
Frederick, Bruce, and Don Stemen. 2012. *Anatomy of Discretion: An Analysis of Prosecutorial Decision Making—Summary Report*. NY: Vera Institute of Justice.
Frohmann, Lisa. 1997. "Convictability and Discordant Locales: Reproducing Race, Class, and Gender Ideologies in Prosecutorial Decision Making." *Law and Society Review* 31(3): 531–556.
Galanter, Marc. 1974. "Why Haves Come Out Ahead: Speculations on the Limits of Legal Change." *Law & Society Review* 9 (1): 95–160.
Grattet, Ryken, and Valerie Jenness. 2005. "The Reconstitution of Law in Local Settings: Agency Discretion, Ambiguity, and a Surplus of Law in the Policing of Hate Crime." *Law & Society Review* 39: 893–942.
Hagan, John. 1989. "Why Is there So Little Criminal Justice Theory? Neglected Macro-and Micro-Level Links between Organization and Power." *Journal of Research in Crime and Delinquency* 26: 116–135.
Hsieh, Hsiu-Fang, and Sarah E. Shannon. 2005. "Three Approaches to Qualitative Content Analysis." *Qualitative Health Research* 15: 1277–88.
Jacobs, James B., and Kimberly Potter. 1998. *Hate Crimes: Criminal Law and Identity Politics*. New York: Oxford University Press.
Jenness, Valerie. 1999. "Managing Differences and Making Legislation: Social Movements and the Racialization, Sexualization, and Gendering of Federal Hate Crime law in the US, 1985-1998." *Social Problems* 46: 548–571.
Jenness, Valerie. 2007. "The Emergence, Content, and Institutionalization of Hate Crime Law: How a Diverse Policy Community Produced a Modern Legal Fact." *Annual Review of Law and Social Sciences* 3: 141–160.
Jenness, Valerie, and Ryken Grattet. 2001. *Making Hate a Crime: From Social Movement to Law Enforcement*. New York: Russell Sage Foundation.
Kalev, Alexandra, Frank Dobbin, and Erin Kelly. 2006. ""Best Practices" or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies." *American Sociological Review* 71(4): 589–617.
King, Ryan D. 2007. "The Context of Minority Group Threat: Race, Institutions, and Complying with Hate Crime Law." *Law & Society Review* 41: 189–224.
King, Ryan D. 2008. "Conservatism, Institutionalism, and the Social Control of Intergroup Conflict." *American Journal of Sociology* 113: 1351–93.
King, Ryan D. 2019. "Hate Crimes: Perspectives on Offending and the Law." In *Handbook on Crime and Deviance*, 2nd ed., edited by Marvin D. Krohn, Nicole Hendrix, Gina Penly Hall, and Alan J. Lizotte. Cham, Switzerland: Springer.
Kutateladze, Besiki Luka. 2022. "Hate Crime Victimization and Reporting within Miami's Queer Latine Immigrant Population." *Law and Human Behavior* 46(6): 429–439.
Kutateladze, Besiki Luka, and Nancy R. Andiloro. 2014. *Prosecution and Racial Justice in New York County—Technical Report*. New York: Vera Institute of Justice.
Kutateladze, Besiki Luka, Victoria Z. Lawson, and Nancy R. Andiloro. 2015. "Does Evidence Really Matter? An Exploratory Analysis of the Role of Evidence in Plea Bargaining in Felony Drug Cases." *Law and Human Behavior* 39(5): 431–442.
Lantz, Brendan, Andrew S. Gladfelter, and R. Barry Ruback. 2019. "Stereotypical Hate Crimes and Criminal Justice Processing: A Multi-Dataset Comparison of Bias Crime Arrest Patterns by Offender and Victim Race." *Justice Quarterly* 36(2): 193–224.
Levin, J., G. Rabrenovic, V. Ferraro, T. Doran, and D. Methe. 2007. "When a Crime Committed by a Teenager Becomes a Hate Crime: Results from Two Studies." *American Behavioral Scientist* 51(2): 246–257.
Lyons, C. J. 2007. "Community (Dis) Organization and Racially Motivated Crime." *American Journal of Sociology* 113(3): 815–863.
Manza, Jeff, and Christopher Uggen. 2006. *Locked Out: Felon Disenfranchisement and American Democracy*. New York: Oxford University Press.
Martin, Susan Ehrlich. 1999. "Police Force or Police Service? Gender and Emotional Labor." *The Annals of the American Academy of Political and Social Science* 561(1): 111–126.
Mayring, Phillip. 2004. "Qualitative Content Analysis." *A Companion to Qualitative Research* 1(2): 159–176.
McPhail, Beverly A., and Diana M. DiNitto. 2005. "Prosecutorial Perspectives on Gender-Bias Hate Crimes." *Violence Against Women* 11: 1162–85.
McPhail, Beverly A., and Valerie Jenness. 2005. "To Charge or Not to Charge? That Is the Question: The Pursuit of Strategic Advantage in Prosecutorial Decision-Making Surrounding Hate Crime." *Journal of Hate Studies* 4: 89–120.

McVeigh, Rory, Michael R. Welch, and Thoroddur Bjarnason. 2003. "Hate Crime Reporting As a Successful Social Movement Outcome." *American Sociological Review* 68: 843–867.
Menendez, Matthew, Michael F. Crowley, Lauren-Brooke Eisen, and Noah Atchison. 2019. "The Steep Costs of Criminal Justice Fees and Fines." *New York: Brennan Center for Justice. Accessed August* 12(2021): 200–2007.
Messing, Jill Theresa. 2014. "Evidence-Based Prosecution of Intimate Partner Violence in the Post-Crawford Era: A Single-City Study of the Factors Leading to Prosecution." *Crime & Delinquency* 60: 238–260.
Meyer, John W., and Brian Rowan. 1977. "Institutionalized Organizations: Formal Structure as Myth and Ceremony." *American Journal of Sociology* 83: 340–363.
Pager, Devah, Rebecca Goldstein, Helen Ho, and Bruce Western. 2022. "Criminalizing Poverty: The Consequences of Court Fees in a Randomized Experiment." *American Sociological Review* 87(3): 529–553.
Palmer, Neal A., and Besiki Luka Kutateladze. 2021. "What Prosecutors and the Police Should Do about Underreporting of Anti-LGBTQ Hate Crime." *Sexuality Research and Social Policy* 19(3): 1190–1204.
Phillips, Nickie D. 2009. "The Prosecution of Hate Crimes: The Limitations of the Hate Crime Typology." *Journal of Interpersonal Violence* 24: 883–905.
Richardson, Rebecca, and Besiki Luka Kutateladze. 2021. "Tempering Expectations: A Qualitative Study of Prosecutorial Reform." *Journal of Research in Crime and Delinquency* 58(1): 41–73.
Ruback, R. Barry, Andrew S. Gladfelter, and Brendan Lantz. 2018. "Hate Crime Victimization Data in Pennsylvania: A Useful Complement to the Uniform Crime Reports." *Violence and Victims* 33: 330–350.
Scheuerman, Heather L., Christie L. Parris, Alison H. Faupel, and Regina Werum. 2020. "State-Level Determinants of Hate Crime Reporting: Examining the Impact of Structural and Social Movement Influences." *Law & Policy* 42: 31–55.
Songer, Donald R., Reginald S. Sheehan, and Susan Brodie Haire. 1999. "Do the Haves Come out ahead over Time-Applying Galanter's Framework to Decisions of the US Courts of Appeals, 1925-1988." *Law & Society Review* 33(4): 811–832.
Students for Fair Admissions, Inc. v. 2023. President and Fellows of Harvard College, 600 U.S.
Talesh, Shauhin A. 2009. "The Privatization of Public Legal Rights: How Manufacturers Construct the Meaning of Consumer Law." *Law & Society Review* 43: 527–562.
Thebault, Reis. 2021. "Nearly every State Has a Hate-Crime Law. Why Don't More People Use Them?" *Washington Post* https://www.washingtonpost.com/nation/2021/04/26/hate-crime-laws-explained/. Accessed April 27, 2021.
Walters, Mark Austin. 2022. *Criminalising Hate: Law as Social Justice Liberalism*. Cham, Switzerland: Palgrave Macmillan.
Wolff, Stephan. 2004. "Analysis of Documents and Records." In *A Companion to Qualitative Research*, edited by Uwe Flick, Ernst von Kardorff, and Ines Steinke, London: Sage Publications Ltd. 284–89.
Worrall, John L., Jay W. Ross, and Eric S. McCord. 2006. "Modeling Prosecutors' Charging Decisions in Domestic Violence Cases." *Crime & Delinquency* 52: 472–503.

AUTHOR BIOGRAPHIES

Dr. Ryan D. King is professor of sociology and Dean of Social and Behavioral Sciences at The Ohio State University. His research focuses on hate crime law and criminal punishment.

Dr. Besiki Luka Kutateladze is an associate professor in the Department of Criminology and Criminal Justice of Florida International University. He is also a founder and co-manager of Prosecutorial Performance Indicators (PPIs), a national research and technical assistance project focusing on prosecutorial reform. Prof. Kutateladze specializes in performance indicators, prosecutorial discretion, racial disparities, and hate crime reporting and prosecution. He served as a PI on this NIJ-funded research project.

SUPPORTING INFORMATION

Additional supporting information can be found online in the Supporting Information section at the end of this article.

How to cite this article: King, Ryan D., and Besiki L. Kutateladze. 2023. "A Higher Bar: Institutional Impediments to Hate Crime Prosecution." *Law & Society Review* 57(4): 489–507. https://doi.org/10.1111/lasr.12685