

SOMETIMES IT'S PERSONAL:
HATE CRIME PROSECUTION
IN CALIFORNIA

By

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To my daughter Indira Kaye Woods,
my reason
for nearly everything

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CHAPTER I

INTRODUCTION

When many Americans think of hate crime, they immediately consider the brutal killings of James Byrd in Texas and Matthew Shepard in Wyoming. Targeted because one was African American and the other a homosexual, both men suffered abuse at the hands of those who allegedly selected them because of the color of one's skin and sexual orientation of the other. Media coverage and resulting public outcry to punish the offenders for hate crimes brought the issue to the fore, while at the same time creating confusion in the minds of citizens who did not understand the complexities of prosecuting such a crime,¹ because unlike any other crime in the American judicial system, a hate crime prosecutor is required to prove what was in the minds of an attacker (Deputy DA Jim Hackleman, personal interview, July 21, 2003).

The term "hate crime" is relatively new in American jurisprudence. According to James Jacobs (1997), the first mention of a hate crime in the American media occurred in 1985, when a review of the nation's newspapers revealed 11 such stories. Ten years later he found more than a thousand stories on the topic of hate or bias crime. Jacobs and Henry (1996) contend that politicians, the media, some criminologists and interest groups insist that a "hate crime epidemic" is sweeping across America, requiring new and more stringent bias crime laws, and giving an unbalanced view of hate crime. For example, a LEXIS search of news articles from 1993 to 1995 revealed a total of 56 stories that referred to the "epidemic of hate crime" (Jacobs & Henry, p.370).

¹ The men convicted of both James Byrd's and Matthew Shepard's murders were not charged with hate crimes because neither Texas nor Wyoming had hate crime statutes at the time.

Despite the contention by some that all crime is motivated by hate or that certain groups have perpetually been targets of hate and bias-related vengeance, hate as a codified crime has only existed since the 1980s in some states, and for much less time in others. For the federal government, hate crime became something to count, rather than something to prosecute, which will be explained later.

Much public and media attention has been paid to murders committed under the guise of hatred, but murders make up less than one percent of hate crimes in the United States. The great majority of criminal offenses that are prosecuted as hate crimes are intimidation, assault, or property crimes such as vandalism. Despite the much higher incidence of these less notorious offenses, limited data exist, and few studies have been done that consider the types of crimes that prosecutors face every day, and the subjective decisions that are made regarding them. Some research has focused on the various hate groups (Blee, 1991, 2002; Hamm, 1993), the evolution of hate crime laws (Jenness & Grattet, 1996, 2001; Soule & Earl, 2001) and the necessity of hate crime laws (Jacobs & Potter, 1997, 1998; Weinstein, 1992; Murphy, 1992; Gellman, 1992, Lawrence, 1999).

Jenness and Grattet (2001) studied hate crime policy and enforcement, along with many others (Bell, 2000; Jacobs & Potter, 1998; McPhail, 2000; Walker & Katz, 1995; Morsch, 1991). Other researchers (Boyd, Berk and Hammer, 1996; Bell 2000) have used qualitative methods to review how police investigate crimes in metropolitan areas, and though they provide useful insight into the workings of law enforcement's role in hate crime investigation, both fall short of the actual discretionary decision-making process and the characteristics of the prosecutors themselves. To date, there appears to be no research that provides an in-depth look at the people who prosecute hate crime cases, and

what influences them to make the decisions that they make. Instead, the existing research focuses on the role of police, with some emphasis placed on the problems associated with law enforcement's reporting of the applicable data.

Hate crime statistics are unreliable and fraught with discrepancies. Although perhaps helpful in terms of evaluating trends, the method of data collection, reporting practices, and changing interpretations of hate crime lead to unreliable statistics. There is no nationwide database that captures data on hate crime prosecution and disposition, and while California is the only state that requires prosecutors to report the number of hate crime cases filed, along with the outcomes of bias crime cases, the number of cases is too few in any given year to allow for reliable quantitative examination. Changing policies within police agencies and prosecutors' offices can also impact the number of cases filed, therefore, using the numbers for comparison is flawed. Consequently, qualitative research may offer the best hope of understanding which crimes are filed, how decisions are made, and who the people are who make those determinations.

This study used qualitative methods to explore how decisions concerning hate crime cases in California are made by those who daily determine, without oversight, which crimes will be prosecuted and which will not. I looked at how prosecutors make their decisions, what factors they consider in making their determinations, and how their personal feelings may impact their decisions. My study includes interviews of eighteen hate crime prosecutors in California, all of whom have considerable prosecutorial experience. It also includes data from a set of hate crime scenarios that were evaluated by those same prosecutors, who rated the scenarios according to how likely he or she would be to charge the case as a hate crime. Using grounded theory (Glaser & Strauss,

1967), I have identified two types of prosecutors that I have labeled *procedural prosecutors* and *personal prosecutors*. What emerged was a sharp contrast between the two types of prosecutors, and the latter were the real mavericks who deviated from the accepted standards, procedures, and limitations by which most prosecutors abide. The former, however, are equally important in that they represent the majority of my sample.

CHAPTER II

CURRENT LAW AND HATE CRIME DATA

Introduction

As of September 2003, the Federal Government, and forty-five states had some type of statute regarding hate crime. However, the definition of and the reporting of hate crime in the US varies widely. This chapter looks at the definitions of hate crime at the federal and California level, as well as how the crime of hate is counted by governments. I pay attention to the problem of voluntary data submission and how it skews the overall picture of the problem of hate crime in the United States. Since California has mandatory hate crime reporting as well as prosecution reporting, I focus on the state's hate crime statistics, including the tracking of cases prosecuted. I also look at the differences between the prosecution of federal and state hate crimes and briefly, the current state of police training in hate crime investigations.

Federal Law

The current federal law (18 USC 245) enacted in 1968, permits prosecution of crimes deemed to be motivated by a bias of race, color, religion, national origin or ethnicity. However, the statute is limited to the categories of bias listed above, and even then only in instances of crimes committed on federal property, or when a victim is engaged in activities protected under federal law (such as voting or attending school). Specifically, the United State Attorney's Office has clear jurisdiction over those crimes committed on federal property, or when the victim is engaging in a protected activity *if*

the crime was motivated by a bias detailed in 18 USC 245. However, under a separate federal statute (28 USC 994), if a person is otherwise convicted of a federal offense, and it has been proven that the crime was bias motivated, “based on the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation” the sentencing judge is allowed the option of “sentence enhancement” and may increase the sentence of a criminal so convicted by three “levels.”

Under 28 USC 994 (the same statute that governs sentence enhancement), the Federal Department of Justice further expands its definition of a hate crime as follows:

Hate crime is the violence of intolerance and bigotry, intended to hurt and intimidate someone because of their race, ethnicity, national origin, religious, sexual orientation, or disability. The purveyors of hate use explosives, arson, weapons, vandalism, physical violence, and very threats of violence to instill fear in their victims, leaving them vulnerable to more attacks and feeling alienated, helpless, suspicious and fearful. Others may become frustrated and angry if they believe the local government and other groups in the community will not protect them. When perpetrators of hate are not prosecuted as criminals and their acts not publicly condemned, their crimes can weaken even those communities with the healthiest race relations (www.parishioners.org).

Federal Reporting and Data Collection

In response to a growing concern about hate crimes in America, President George H. W. Bush signed Public Law 101-275, the “Hate Crime Statistics Act of 1990,” (28 USC 534) on April 23, 1990. Prior to that time, the only data available were those provided by organizations like the Anti-Defamation League and the Southern Poverty Law Center, which advocated for the hate crime bill (Jacobs & Potter, 1997). This act ultimately required the Federal Bureau of Investigation to collect data, as part of the Uniform Crime Reporting (UCR), “about crimes that manifest evidence of prejudice based on race, religion, sexual orientation, or ethnicity, including where appropriate, the

crimes of murder, non-negligent manslaughter; forcible rape; aggravated assault, simple assault, intimidation; arson; and destruction, damage or vandalism of property”

(www.fbi.gov/ucr/traing99). Four years later, in 1994, the Violent Crime Control and Law Enforcement Act amended the Hate Crime Statistics Act to add disabilities, both physical and mental, as factors that could be considered a basis for hate crimes. These two laws were not about prosecuting crimes, but were simply about counting them.

In deciding how to collect hate crime data, the UCR Program considered two approaches. The first approach was to conduct an in-depth analysis of suspected bias-motivated incidents based on a national sample. This approach would have required approximately 800 select law enforcement agencies to identify and track cases suspected of being hate crimes through the investigatory and prosecution processes, and then report findings regarding the offenses that they determined to have been motivated by hatred (www.fbi.gov/ucr/traing99). Much like the National Crime Victimization Survey (NCVS), which uses a nationwide random sample to estimate crime rates, this type of data collection promised to be more comprehensive. However, analysts felt that the sampling approach would not provide statistically significant breakdowns of local, state, or regional data. There were also concerns about the fiscal burdens brought on by this method, and ultimately the sampling method was dropped. In contrast, because of the important national picture it might provide regarding hate crime, the UCR Program staff believed that using their existing method would achieve the most valid assessment of the national problem of hate crime activity (www.fbi.gov/ucr/traing99).

The approach that was adopted, then, incorporates hate crime data into the already established nationwide UCR Program. This method of data collection was attractive

because it did not require major resource commitments from individual police agencies, and it could provide statistical data broken down into geographical locations. It was assumed that law enforcement agencies would voluntarily provide the data, using the required data collection form. Unfortunately, only about two-thirds of police agencies submit information regarding their hate crime incidents, and the result is an incomplete, if not unreliable, report on hate crime in the United States.

The first Federal data on hate crimes were collected for the year 1990. The report examined hate crime statistics from eleven participating states. By 2002, still only 64 percent of agencies nationwide were reporting, and of those, only 15.5 percent submitted hate crime reports. Levin and McDevitt (2002) explained that a survey conducted by the Bureau of Justice Statistics in 2000 found that only 45 percent of the police departments across the country had a formal hate crime investigation policy in place.

As a case in point, the racially and ethnically diverse city of Nashville, Tennessee, -- the nation's 22nd largest city -- had no hate crimes in the year 2001, according to FBI statistics. Memphis, Tennessee, a nearby city, which is approximately the same size, and equally diverse, reported 47 hate crimes during that same year. When questioned by a local newspaper about the disparity, the Nashville Metropolitan Police Department admitted investigating 109 cases of hate crime in the year 2000, and 78 cases in 2001. When asked why the FBI data had no data on these crimes, a police spokesperson said "We have not done a very good job of bean counting" (qtd. in Bottorf, 2000).

If the twenty-second largest city in the United States does not report its hate crime numbers, how many others fail to do so? Why do so many agencies fail to report? Part of the problem comes from a lack of expertise or training: A reporting body cannot report

what it does not fully understand. A hate crime is one of the most difficult and complicated to investigate, since motive is the key factor, and the minds and motives of those who commit crimes of hatred are inscrutable to even the most experienced police investigators.

The dilemma brought about by the inconsistencies in hate crimes reported to the FBI is evident in a comparison of the 2002 crime statistics of two states: California is the most populous state in the U.S., with an overall crime rate that ranked 25th in the year 2002. The state reported the second highest number of hate crimes per capita that year, exceeded only by Arizona. At the same time the state of Arkansas, which is the 33rd largest state in the country, reported an overall crime rate that ranked them 23rd among the 50 states. Arkansas reported no hate crimes in 2002.

Almost certainly, with a total crime rate higher than half of U.S. states, including California, Arkansas must have experienced some hate crime during 2002. Indeed, the following year, Arkansas reported 177 hate crimes. (Interestingly, Arkansas does not have a state hate crime law, but for the year 2003 submitted reports on 177 hate “incidents.”) There are other states with similarly high crime rates, yet they report few hate crimes. Other states with relatively low crime rates, such as Minnesota, may report a disproportionately high number of hate incidents. Clearly, better documentation and reporting is essential to a better understanding of this issue.

Because the reporting of hate crime data across states seems to be so unreliable, it is difficult to know whether there is actually more hate crime committed in California and Arizona, or whether law enforcement agencies in those two states simply are more diligent in reporting.. However, these problems should not preclude an exploratory

examination of the patterns found in rates of hate crime among the states. In a preliminary analysis of UCR hate crime rates, using the average for 2002-2003, Jensen and Woods (2005) found that in the United States, the Northeast and West report the highest rates of hate crime, while the South reports the lowest rate of bias motivated incidents.

Hate Crime in California – History and Background

California's hate crime reporting system was implemented by the California Department of Justice (DOJ) in September 1994. DOJ required that law enforcement agencies incorporate a two-tier decision-making process when it comes to hate crimes, the same type of system recommended by the FBI (Levin & McDevitt, 2002). The first level is done by the initial officer who responds to the suspected hate crime incident. At the second level, at least one other officer reviews the report to confirm that the offense constitutes a hate crime. DOJ acknowledges that its hate crime data are influenced by a number of factors, such as cultural practices of potential victim groups and likeliness of reporting crimes to law enforcement, the level of commitment by law enforcement agencies, and the amount of training and resources devoted to hate crimes (Lockyer, 2001, p. 48).

The California Penal Code defines a hate crime as follows:

422.6. (a) No person, whether or not acting under color of law, shall by force or threat of force, willfully injure, intimidate, interfere with, oppress, or threaten any other person in the free exercise or enjoyment of any right or privilege secured to him or her by the Constitution or laws of this state or by the Constitution or laws of the United States because of the other person's race, color, religion, ancestry, national origin, disability, gender, or sexual orientation, or because he or she perceives that the other person has one or more of those characteristics.

(b) No person, whether or not acting under color of law, shall knowingly deface, damage, or destroy the real or personal property of any other person for the purpose of intimidating or interfering with the free exercise or enjoyment of any right or privilege secured to the other person by the Constitution or laws of this state or by the Constitution or laws of the United States, because of the other person's race, color, religion, ancestry, national origin, disability, gender, or sexual orientation, or because he or she perceives that the other person has one or more of those characteristics.

The punishment upon conviction under this statute is as follows:

(c) Any person convicted of violating subdivision (a) or (b) shall be punished by imprisonment in a county jail not to exceed one year, or by a fine not to exceed five thousand dollars (\$5,000), or by both that imprisonment and fine, and the court shall order the defendant to perform a minimum of community service, not to exceed 400 hours, to be performed over a period not to exceed 350 days, during a time other than his or her hours of employment or school attendance. However, no person shall be convicted of violating subdivision (a) based upon speech alone, except upon a showing that the speech itself threatened violence against a specific person or group of persons and that the defendant had the apparent ability to carry out the threat.

Under California Penal Code section 594 (the typical vandalism statute), damage resulting from vandalism must be in excess of \$400 in order to warrant significant jail time or fine, and most often, community service is the sentence, if there is a sanction at all. Under the hate crime statute, the potential sentence is only slightly different – up to a year in county jail or fine, or both. In addition, however, the law states that the court *shall* order the defendant to perform community service, in addition to any other fine. With the crime of intimidation, however, the difference becomes much more evident. Under California law, intimidation had not been codified as criminal, except for intimidation of a witness, until the adoption of the hate crime section. A person convicted of intimidation under the hate crime statute can receive both imprisonment and a fine.

California's Hate Crime Data Collection

Unlike the federal system, the Attorney General of California *requires* that all law enforcement agencies within the state report “events” of hate crime. California was the first state to pass its own state hate crimes statute in 1978, and in accordance with California Penal Code section 13023, began gathering data in 1994, with a full year of reporting for 1995. The Attorney General, through the California Department of Justice, publishes an annual report. The California report differs from FBI report data in a number of ways. First, as previously mentioned, all law enforcement agencies in California are required to report; the federal system is voluntary. Second, California requires district attorneys and elected city attorneys to submit annual summaries of the number of hate crime cases referred to them, as well as initial filings, prosecutions and eventual dispositions. This information is important because it can help assess the relative value of using hate crime laws for prosecution. Third, the California program counts hate crime robbery as a violent crime, whereas the federal system categorizes hate crime robbery as a property crime.²

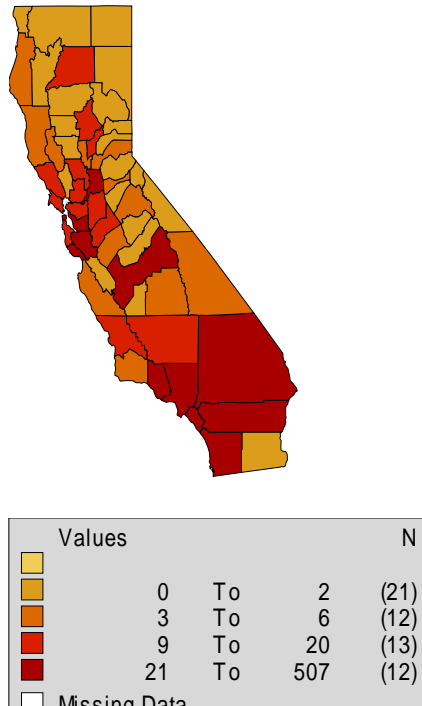
In the year 2005, California law enforcement agencies reported a total of 1,397 hate crime events involving 1,691 offenses, compared to 1,409 events with 1,170 offenses in 2004.³ Figure 1 shows California hate crime reports by county for the year 2005:

² For crimes other than hate crimes, the FBI counts robbery as a violent crime or a “persons crime.”

³ An “event” may have more than one victim or may include one or more offenses.

Figure 1: Hate Crime Reports by County 2005

Rptd 05 -- Rptd 05



(Source: *Hate Crime in California 2005*. CA Dept of Justice.)

Violent crime comprised 65 percent of the events reported in 2005, and property crimes accounted for the remaining 35 percent. Nearly half of all events categorized as violent crime involved intimidation, and more than a third involved simple assault. Intimidation and both types of assaults, simple and aggravated, comprised nearly 95 percent of all hate crimes. Murder was only 0.1 percent.

Of the 595 property crimes reported in 2005, nearly 93 percent involved destruction or vandalism. Destruction or vandalism has been the number one property crime since data collection began in California; from 1998 to 2005, it has accounted for more than 90 percent of property crimes in bias-motivated cases (Lockyer, 2005, p. 3). It

is important to note that, when examining the crime of vandalism, it can often be linked to intimidation, where racial or ethnic epithets or graffiti on walls could produce as much fear in the victim as an actual physical confrontation. There is no way to assess or compare the impact of the two types of hate crimes, violent and property, but according to the American Psychological Association, the symptoms of depression, anxiety, and posttraumatic stress disorder are often present in the victims of all types of hate crimes (www.apa.org).

Table 1 shows a breakdown of hate crime offenses reported to the California Department of Justice for the year 2005:

Table 1

Hate Crime Offenses in California 2005

<u>Crimes against Persons</u>	<u>Number</u>
Murder and non-negligent manslaughter	1
Forcible rape	1
Aggravated assault	317
Simple assault	298
Intimidation	443
Robbery	36
Total	1,096
<u>Crimes against Property</u>	<u>Number</u>
Burglary	27
Larceny-theft	5
Motor vehicle theft	3
Arson	7
Destruction/damage/vandalism	553
Total	595
Grand total of all offenses	1,691

(Source: *Hate Crime in California, 2005*. CA Dept of Justice.)

The collection of hate crime data in California was previously done in a similar manner to the one used by the FBI: reports were mailed to DOJ headquarters. Analysts reviewed each hate crime event report (which usually consists of the face sheet of the actual crime report) to ensure that it met the criteria required for inclusion in the hate crime statistics a follow-up was sometimes necessary. In 2002 analysts at DOJ rejected 16 percent of the hate crime reports because they did not meet the criteria for inclusion.⁴ Beginning in late 2003, DOJ required agencies to submit their hate crime reports via a system that DOJ calls HATE (Hate Crime Analysis, Tracking and Evaluation), a web-enabled database that collects the data. Additionally, the system can be used by investigators for intelligence purposes. Information such as details about incidents, persons, groups, businesses, vehicles, weapons, property, locations, financial accounts and investigating personnel can be accessed by authorized investigators using a “relational database management system.” This relationship “wizard” shows connections among specified variables within the system.

In 2005 California prosecutors filed a total of 330 hate crimes out of the 448 that were referred by law enforcement to county district attorneys and city attorneys, or 74 percent.⁵ A total of 274 cases resulted in a disposition during 2005, while the others were pending disposition. Slightly more than 13 percent of those hate crime cases resulted in no conviction, while nearly 37 percent resulted in convictions for offenses other than a hate crime. Still, one half of those cases resulted in a conviction for a hate crime. A total of 25 hate crime cases in California in 2005 resulted in a conviction by verdict.

Dispositions, number of cases filed and the number of incidents or offenses reported

⁴ Typically, the reason for rejection was the police report’s lack of clearly documented bias motivation.

⁵ The percentage of referred hate crimes prosecuted (as hate crimes) in 2003 was 66%, and in 2004 was 68%.

cannot be compared, and DOJ does not attempt to do so, since offenses, arrests, filings and dispositions rarely fit neatly into a calendar year.

Federal Prosecution of Hate Crime

The United States Attorney's Office has the ability to choose among the local law enforcement cases for cases that it wants to prosecute, provided those cases meet the minimum requirements under the federal statute. Strapped by limited resources, as well as state prosecutors who may lack training, local law enforcement agencies will often look to the federal authorities for assistance. When a hate or bias crime case comes along, some FBI and US Attorneys' offices are eager to become involved. Typically, federal prosecutors have higher conviction rates than their state counterparts in all criminal cases, partly because they have luxury of choosing them from local law enforcement agencies. Perhaps more importantly, federal offices are not burdened by the overwhelming numbers of criminal complaints that typically flood district attorney and city attorney offices.

I spoke with a prominent federal prosecutor who told me that often a prosecutor's office learns about a hate crime through newspaper or television. Cases that attract the attention of these prosecutors must meet the criteria mentioned earlier: the crime must be motivated by race, color, religion, national origin or ethnicity. As mentioned earlier, the crime must occur on federal property or during certain protected activities. Interestingly, one of those protected activities is putting fuel in your vehicle at a gas station.

A federal prosecutor recalled a case in which an African-American man was assaulted while pumping gas at a gas station. The suspects, two white males, uttered

racial epithets as they approached the man, and then slashed his throat. The suspects were later arrested. The victim, despite being badly wounded, survived, and an account of the attack appeared in the local paper. Because the crime occurred where it did, and against whom it did, it qualified for prosecution as a hate crime under federal law. The US Attorney's Office, perhaps intrigued by the challenges of the unusual circumstances, chose to take the case. The suspects admitted stabbing the victim, and confessed that they had uttered racial slurs before doing so. Their defense seemed odd: They claimed that the victim's presence at the gas station was incidental to the crime. The counsel for the defense argued that the stabbing could just have easily happened on the open street. A more common defense, of course, would have been to claim that the crime was not bias motivated, or that the suspects did not have any reason to hate the group represented by the victim, or even to claim mistaken identity. But, these suspects had already confessed; they were convicted and sentenced to federal prison.

Federal sentencing in hate crime cases is complicated by systems of "points" and "levels." The Sentencing Reform Act of 1984 established a commission that empowered the establishment of guidelines and practices for federal judges, prosecutors, and probation and parole agents. The federal guidelines establish base offense levels, applicable in every district court, for every federal offense. That base level determines the number of "points" each crime rates – in the same way that different traffic offenses can cause different numbers of points to be charged against someone's driver's license. Points are added (or subtracted) according to the gravity of the crime, the behavior of the accused, his or her background, character and criminal history, even whether or not the defendant admits involvement. The ultimate total of points assigned to the accused is

reported to the sentencing judge, and in most cases a judge imposes a sentence determined by the point total. According to one federal probation officer, a point total of forty three or higher means life imprisonment. (Laurie McAnulty, personal interview, Sept. 6, 2002).⁶

Under federal law, if it has been proved that any crime was bias-motivated, an enhancement can be added to a defendant's sentence. As mentioned previously, under 28 USC 994, if the prosecution can prove beyond a reasonable doubt that the crime was committed "based on the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation," the sentence is increased based on moving the convicted suspect's potential sentence up three "levels," another somewhat complicated system outlined in the *Federal Sentencing Guidelines*. Let us take one example:

Someone convicted of assault inside a federal park might receive a sentence of 36 months. But if it is proved during trial that the assault was the result of the victim's sexual orientation, the defendant might receive a sentence of 48 months or 60 months. Federal prosecution of hate crime is not common, but when the U.S. government does decide to take a case, it has greater access to resources than local District or City Attorney offices (former federal prosecutor Jon Conklin, personal interview, October 4, 2003).

⁶ This complicated and rigid system is also one of the reasons that more drug traffickers, particularly minorities, are sent to federal prison for longer periods of time, and why sentencing guidelines have been the subject of recent judicial review.

Hate Crime Prosecution in California

Prosecution in California state court presents the same problems as in the federal court, without the jurisdictional issues. If a crime occurs in the state, it has the potential for prosecution in state court. Under California law, once the prosecutor has proved that the crime was, in fact, a hate or bias crime, the sentencing guidelines are much less cumbersome than the federal system, and a convicted defendant's sentence will typically be three to five years longer than for a parallel felony crime. Some crimes such as vandalism have their own harsher sentences because of the threat that they represent to entire communities or groups of people.

Police Training in Hate Crime Investigation

Although most police officers may believe that their job is to protect all people, and therefore adequately report and investigate all incidents of hate crime, Jenness and Grattet (2001) contend that there is a great diversity in training and knowledge across police departments in California. Their data (1999) indicate that many police departments in California are without strict guidelines as to how to recognize report and investigate hate crimes, but sources in the California Department of Justice tell me that today all California law enforcement officers receive hate crime guidelines as part of their mandatory training. The state has some of the strictest standards for its law enforcement officers, and hate crime training is required by the California's Commission on Peace Officers Standards and Training (POST). State requirements mandate yearly training for all law enforcement officers in California, which now includes hate crime reporting and investigation. The training and accompanying guidelines give working

definitions of key terms, such as “race,” “ethnic group,” “bias,” and “sexual orientation,” as well as how to weigh the relevance of evidence, how to process and follow-up on cases, and how to prepare the cases for presentation to prosecutors. (John Balbach, DOJ, personal communication, Nov. 20, 2004).

The increased emphasis on training may be the result of the California Attorney General’s Civil Rights Commission on Hate Crimes Final Report (Lockyer 2001). In order to compile this report, members of the 46-person Commission held public forums and interviewed citizens in 22 diverse communities in both small and large cities throughout California. The Commission found that hate crime victims are reluctant to report to law enforcement or other authorities for a variety of reasons; but some common themes included a lack of awareness about hate crime laws, fear of being re-victimized or of not being taken seriously by law enforcement personnel. The Commission also found credibility issues for law enforcement, which included law enforcement officers’ reluctance to respond to hate incidents or to take hate crime reports: this absence of reports has had an impact on law enforcement efforts to prevent future hate crimes. A number of law enforcement personnel reported to the Commission that city officials, chambers of commerce, developers and others sometimes attempt to discourage police from actively pursuing hate crime cases for fear of tarnishing their community’s image.

People of color and members of the gay, lesbian, bisexual and trans-gendered communities expressed particular concern that hate crimes perpetrated against them were not being properly investigated and ultimately, prosecuted. Those who believed they were the victims of hate crimes at the hands of police officers felt particularly vulnerable and fearful. And, though gender-based hate crimes can be prosecuted under California

law, they are rarely reported. Hate crimes based on disability faced an even tougher challenge, particularly when the crime is perpetrated by a caregiver (Lockyer 2001)...

As a result of the implementation of the Attorney General's Commission's recommendations, it appears that the uniformity that Jenness and Grattet (2001) argue is absent in law enforcement agencies across California may be evolving and is becoming more reliable all the time – at least as reliable as any system can be that involves human beings. Enthusiasm, however, does not appear to be absent. While there is no doubt that some biases may exist in certain police officers, hate crimes are high profile and can offer personal rewards to investigators in terms of public recognition and personal satisfaction. As one investigator told me, “Sure cops have prejudices, but cops hate ‘hate’ more than anything else.”

Many California police departments provide training for citizens in addition to their own investigative personnel. The Riverside Police Department, for example, gives presentations to civil groups, educators, businesses – anyone who will listen to them explain what constitutes a hate crime. They address such topics as how they investigate hate crime, how to identify bias indicators, and whom to call if you are victim of or witness a hate crime. The department, along with various other law enforcement, prosecutorial and human rights agencies in the area, are members of the Western Inland Empire Coalition Against Hate. Other agencies, such as the Los Angeles County Sheriff's Department, the Sacramento Police Department, and the District Attorney offices in Los Angeles and Santa Clara counties, have developed hate crime brochures that cover things such as how to recognize a hate crime, how to report it, how to prevent it, and the eventual penalties for violation of hate crime laws. The Orange County District

Attorney's Office has held community meetings with topics such as "A Hate Crime Victim's Journey: The story of a successful collaboration," during which prosecutors, police, victims rights advocates and a hate crime victim all discussed how such crimes should be handled (DA Scott Steiner, personal interview, March 9, 2007).

Communities where hate crimes have not been handled appropriately and immediately have suffered. For example, in Southern California's Antelope Valley in 1996, young racist skinheads, some armed with machetes, attacked minority students on a local high school campus. When school officials and local law enforcement did little to investigate the bias nature of the attacks, other minority students, who were not victims, felt so alienated and angry by the perceived lack of concern that they began to attack white students at random. The fear of continued racial violence finally spurred the community to action and the Antelope Valley communities, schools and law enforcement formed a network to deal specifically with hate crimes (Lockyer 2001).

Summary

The understanding of hate crime is clouded by a complicated system of data collection which oftentimes, such as with the federal government, has little to do with actual hate crime prosecution. The FBI collects data on hate crime incidents from police agencies that voluntarily submit such statistics, and has no requirement that prosecutors report their successes in the courtroom. California requires all law enforcement agencies in its 58 counties to report monthly, through a data tracking program, the number of hate crimes it investigates, along with the number of arrests. In addition, they must report other important details, such as type of offense, bias motivation, and type of location

where the crime occurred. More importantly for my purposes California DOJ requires prosecutors to report the number of cases that are presented to them for review, the number they file and the number of dispositions.

Because there appears to be such an emphasis on accurate reporting of hate crime data, law enforcement officers receive training in hate crime investigations. Officials I interviewed indicated that they take the investigation of hate crimes quite seriously, and welcome community involvement.

CHAPTER III

LITERATURE REVIEW

The Roles of Prosecutors

Jenness and Grattet (2001) looked at the roles of prosecutors and point out that hate crime prosecutors recognize their roles in the local community, and they “make choices regarding the importance of the instrumental good that law enforcement provides within the community” (p. 148). They acknowledge that inclusive categories such as “social harm” determine the likelihood of prosecution, and media coverage can impact decisions made by prosecutors. They also address this issue of self-interest and efficiency in prosecutorial choices, arguing that pressure to obtain convictions will lead prosecutors to try only the cases they are most likely to win. Career advancement can be tied to conviction rate. The authors state:

Hate crimes are not attractive cases to prosecute because they create additional burdens for prosecutors, consequently lowering the likelihood of successful prosecution. A prosecutor choosing to prosecute a case as a hate crime rather than an assault, for example, might need to extend greater effort to gather evidence to show that the victim was selected because of his or her race, religion or sexual orientation. . . . In addition, prosecutors may view hate crime as a concept that is highly controversial and ambiguous and thus more difficult to prove to a judge or jury and perhaps even more easily defended. These two characteristics make it much more difficult to predict the success of a prosecution strategy. In such circumstances the prosecutor would be likely to take a more conservative approach, pursuing the simpler prosecution of the parallel crime (p. 149).

It is the controversial nature of hate crime cases that intrigues many prosecutors, as well as serving the community and advancing their own careers by being willing to take chances. Media coverage of a successful case can only benefit a prosecutor who has

promotional or political aspirations. As Jenness and Grattet (2001) point out, in California prosecutors have increased the frequency with which they file hate crimes now that the constitutionality of California's hate crime laws has been confirmed.

“Conviction rates and guilty pleas are also increasing, which suggests that prosecutors are becoming more comfortable invoking and enforcing hate crime laws and criminal defense attorneys are less likely to effectively interfere with their doing so” (p. 151).

Prosecutorial Discretion

In 1704 the first public prosecution statute in this country was enacted in the colony Connecticut. It read, “Henceforth there shall be in every countie a sober, discreet and religious person appointed by countie courts, to be attorney for the Queen to prosecute and implead in all the lawe all criminals and to do all other things necessary or convenient as an attorney to suppress vice and immorallitie . . .” (qtd in Grosman, 1969: 13). By the end of the following century, prosecutions in the newly independent United States were conducted by public prosecutors, patterned after the English and French systems. At the end of the Civil War, the United States Attorney General was awarded supervisory power over all federal prosecutions, while district attorneys operated in their own counties, without interference from the state or federal governments. As Grosman (1969) further points out, “. . . at the local level in each state the independence of the prosecutor and his freedom from supervisory control is a unique development born of the hardy independence of a young country disenchanted with past attempts at forced centralizations” (p. 14).

Supreme Court Justice Kenneth Jackson noted in 1940, “The prosecutor has more control over life, liberty and reputation than any other person in America” (Davis 1969:190). And, while police officers and judges wield certain power in the decision-making process, the person in the criminal justice system with largely unchecked power is the prosecutor. Prosecutors determine who is charged, what charge is filed, who will be offered a plea bargain and who will go to trial. Discretion is “an essential component of the American system of criminal justice. It is the element which makes the system uniquely American (Skolnick 1967). As Kerstetter (1990) observes, there is no decision that is more critical than the prosecutor’s decision to file or “charge” a case, a decision that has been characterized as the “gateway to justice” (p. 182). According to a commentary in the *Southern California Law Review* (1969), “the prosecutor traditionally has virtually unlimited discretion of two distinct types: (1) the power to abstain from prosecution and (2) the power to selectively prosecute” (Prosecutorial discretion in the initiation of criminal complaints, p. 521). Once a prosecutor has refused to file a case, it almost always stops there. If the prosecutor decides to file or charge the case, that is when the adverse consequences of prosecution begin.

Prosecutorial discretion exists because of the limitation of all criminal statutes. They are, by their nature, broad mandates that human beings must apply to specific situations. Case law does not provide guidelines, but develops the specific applications slowly and inconsistently, involving legal criteria only. It rarely addresses the “extra-legal” factors involved in prosecution. And, because case law rarely discusses the charging or complaint process, the decisions made at that stage of a criminal prosecution are largely made without the oversight of the courts. Courts generally refuse to order a

prosecutor to initiate a prosecution on the grounds that it is the prosecutor's discretion to decide who is charged -- that decision cannot be made by the court. More typically, a prosecutor's discretion is said to be controlled by the forces of public opinion (Prosecutor's discretion, 1955). Skolnick (1967) agreed, stating that the prosecutor is "interested in making a favorable impression on a diffuse public -- including courts, political authorities, and the man in the street" (p. 55).

Krug (2002) observed that critics of prosecutorial discretion have for a long time pushed for some predictability in the charging system. He found that there are some written criteria for case filing and at least one state, Minnesota, requires all county prosecutors to establish written guidelines for charging cases. Professional organizations, such as the National District Attorneys Association, also have adopted and publish model standards for local prosecutors to accept. The American Bar Association and other professional organizations also address ethical rules in terms of prosecutor responsibilities. Still, as Krug (2002) and others point out; there is still a wide range of decision-making possibilities available to prosecutors without interference or governance from external, or even internal, sources.

Carter (1974) conducted what he referred to in his book *Limits of Order*, as a "social science analysis of the daily activities of a prosecutor's office" (p. xi). Using interviews and observation Carter examined the daily activities of prosecutors in a mid-sized California city and looked at particular at their interactions among each other, as well as their relationships with the police and courts. He organized his findings regarding prosecutors' styles into four categories; 1) Analysts -- those who review the facts of a case without particular concern for the victims involved or outside influences, 2) Crime

fighters – conservative, hard charging, sometimes rigid prosecutors who identify strongly with police officers and who saw the police and the community as his “clients,” 3) Teachers – those who sought to transmit knowledge of legal requirements to police as well as the consequences of legal behavior to suspects, and 4) Competitors – prosecutors who were concerned primarily with winning, exacting tough sentences for suspects, and bargaining for results. Carter’s study was groundbreaking in that he used personal observations, questionnaires and in-depth interviews to identify the personal styles of prosecutors within an office, as well as some of their individual peculiarities. Clearly, however, the attorneys represented in Carter’s study reflect a time when public prosecutors were a largely homogeneous group with similar racial, ethnic, gender, and socioeconomic backgrounds.

Mellon et al., (1981) interviewed charging attorneys in ten large prosecutors’ offices across the country and looked at policies that determined how and when cases were initially charged, or filed. They divided the management styles and policies into four categories; legal sufficiency, system efficiency, defendant rehabilitation and trial sufficiency.

The organizational perspective that the researchers labeled as legal sufficiency means that cases are examined primarily to determine if they meet the basic legal elements for prosecution, irrespective of constitutional or evidentiary elements that could exist and could ultimately change the course of the prosecution. System sufficiency refers to a typically overloaded and overbooked criminal justice system where the disposition of cases is the primary concern. The prosecutor’s office must have an efficient, well-established and streamlined system in order to be successful.

Defendant rehabilitation policy agencies use diversion for most defendants, rather than incarceration. Non-criminal justice resources in the community are utilized to attempt to redirect offenders to options other than paths that include incarceration.⁷ In offices where trial sufficiency is the primary policy, prosecutors accept cases only when they believe the cases will be successful at trial. The result is a high conviction rate but fewer cases filed.

Frohmann (1997) reports findings in sexual assault cases that indicate that prosecutors organize their work around a number of issues: stereotypes of the location of the crime, evaluations of the standing and characteristics of the victim, and assessments about the victim's moral worth. Jones and Aronson (1974) also tested the degree to which the defendant or victim were blamed in rape cases, depending upon the "respectability" of the victim. As Jenness and Grattet (2001) point out, evaluating a victim's moral worth may not be good for prosecution, particularly "when the victim is a member of a targeted group toward whom prosecutors hold negative views" (p. 149). They also acknowledge, however, that minority victims might be perceived to be in greater need of legal protection. According to Williams (1976) victims who are perceived as weak and vulnerable are more likely to be viewed as helpless and therefore, undeserving of victimization. In her review of nearly 600 violent crime cases, she found that victim characteristics do affect the decision-making process in the case of violent crimes relevant to charging and later in the case, but stop short of the guilt or innocence determination.

⁷ Many hate crime prosecutors utilize a system of this type for juvenile offenders, referring them to places such as the Simon Wiesenthal Museum for training classes, rather than juvenile detention.

The findings that the worth of the victim may determine whether or not someone is arrested, prosecuted and sentenced have long been debated in sociology and are often a determining factor in any prosecution. Prosecutors may deny that they consider the victim's social worth before deciding to file a case, and argue that it is just those victims whose voices have been long neglected for whom hate crime statutes are most appropriate (Jenness & Grattet, 2001). Punishment for hate crimes may lead to what one prosecutor referred to as an "organized system of revenge."

Bell (2002) found that prosecutors took into consideration their own win-loss records when considering whether or not to take a hate crime case. According to Bell, "not only did such records matter for promotion during campaigns for district attorney, the incumbent DA often held out his or her win-loss record" (p. 165). Looking at which cases had the greatest likelihood of winning appeared to be a primary consideration in her study of an anti-bias task force. Another view she encountered was a prosecutor's unwillingness to take on too many cases for fear of "watering down" the law. Cases that seemed to have the greatest likelihood of prosecution were cases where both action and strong language were used, but without both the cases were usually rejected.

Frohmann (1997) found that the concern with "convictability" is shaped by "organizational policies and procedure of the prosecutor's office and the courts. The decisions are made within the organizational context of the prosecutor's office, the institutional structure of the court system, and the political context of the community" (p. 537). Cases may be believable but appear "unconvictable," and therefore, are likely to be rejected, as implications for promotions, transfers, conviction rate and reputation are considered. Frohmann's (1997) study examined convictability in sexual assault cases and

found that prosecutors construct “discordant locales” through the way they characterize victims, defendants, jurors and the location of the sexual assaults. She argues that prosecutors “inadvertently reproduce race, class and gender ideologies in legal decision making” (p. 531). These discordant locales influence whether or not a prosecutor will file a case. As Frohmann points out, “if cases are unconvictable, prosecutors have to bear the consequences” (p. 532).

Spohn et al. (2001) looked at victim characteristics and the decision whether or not to charge a case. They likened the charging process to that of judges’ sentencing decisions, which may be guided by “focal concerns” (Steffensmeier, et al. 1998). According to this perspective, culpability of the defendant, desire to protect the community and social costs of imprisonment are considerations that guide sentencing. In a similar vein, according to Spohn, prosecutors are not concerned with the costs of imprisonment, but with the likelihood of conviction, and how the victim, suspect and the crime will be viewed by judges and juries. These factors will determine which crimes are charged and which crimes are refused for filing.

In a similar study, Williams (1976) looked at victim characteristics in the charging and ultimate prosecution of violent crimes. She found that a victim’s characteristics, such as sex, age, drug or alcohol use, relationship to suspect, and appearance in terms of being seen as weak and helpless, do affect the decisions made by prosecutors. However, the decision of guilt or innocence by a jury did not appear to be similarly affected by a victim’s characteristics.

Albonetti (1987) used two organizational dimensions outlined by Thompson (1967); 1) beliefs about cause and effect relations and 2) preferences regarding possible

outcomes: both are characterized by uncertainty. Albonetti applied the dimensions to the process a prosecutor uses when determining whether or not to charge a case and found that, in particular, “a decision maker’s inability to control others’ behavior unilaterally impedes predictability” (p. 294). Therefore, determinations by some prosecutors about charging cases are more likely to be based on routine decision-making rationality such as standard operating procedures, a hierarchy of authority, formal channels of communication, professional training, and indoctrination. March and Simon (1958) found that the decision-making strategy that emerges is based on routine choices made by organizations, predicated on the assumption that if certain previous decisions produced positive results future decisions made using the same criteria will produce similar outcomes. Further, Albonetti (1987) states in her findings that “the exercise of prosecutorial discretion at the initial stage of felony screening is significantly influenced by the uncertainty of the assessment of the prosecutorial merit of a case, which is the probability of conviction” (p. 311).

Thompson (1965) describes two distinct aspects of discretion in organizations which may also be applied to prosecutors’ offices: the motivation to *occupy* discretionary jobs and the motivation to *exercise* discretion in those jobs. He points out that some individuals are more tolerant of risk and ambiguity than others, but that “individuals exercise discretion whenever they believe it is to their advantage to do so.” (p. 118). In what Thompson refers to as “highly discretionary jobs,” he makes three assumptions: (1) individuals in highly discretionary jobs have high aspirations and are therefore interested in favorable spheres of action; (2) individuals in highly discretionary jobs are not

reluctant to exercise discretion and (3) individuals in highly discretionary jobs have developed political skills (p. 125).

Landes (1971) tested a mathematical theory, later known as the “Landes formulation,” and found that “the prosecutor’s decision to go to trial or settle a case prior to trial depends on the probability of conviction, the severity of the crime, the availability and productivity of his resources and those of the defendant, the costs of prosecuting the case and attitudes toward risk” (cited in Forst & Brosi, 1977, p. 178). While he did not test the charging decision of prosecutors, Landes examined the same types of concerns that prosecutors face in both the charging phase and the trial/plea phase. Forst and Brosi (1977) used the Landes formulation to determine what type of cases prosecutors spend more time and resources on. Using the model, they expected that a district attorney would allocate more resources to cases where “the probability of conviction is relatively responsive to prosecutive effort, and for which the severity of punishment associated with the offense and the extensive of the defendant’s criminal history are greater” (p. 183). They point out, however, that a prosecutor may see himself as a public agent who convicts offenders for the benefit of society, or he may derive personal or political benefit from publicizing his convictions, even if those motives are not regarded as appropriate purposes for allocation of resources. They also determined that a prosecutor’s decision to “carry a case forward” had more to do with the strength of the case than the seriousness of the offense or the criminal background of the defendant.

In the early 1970s, in an effort to regulate some of the discretion-making power of federal prosecutors, several of the larger offices of the United States Attorney began using a system for case management and tracking called Prosecutor’s Management

Information System (PROMIS). Once this new system was evaluated in the larger offices, the plan was for it to then be used all across the country. The way the PROMIS system worked was as follows: Information about a defendant was fed into a computer, along with previous arrests and other background information. The type of crime, amount of loss or degree of injury was also documented, as time, place and location of arrest. The system also tracked the status of the case, how charges were filed, modified or dropped by a prosecutor, including the reasons why decisions were made. Witness information and a prosecutor's assessment of witnesses' value to the case were included as well.

According to Hamilton and Work (1973) the "centerpiece" of PROMIS was an automated designation of priorities for pending criminal cases. The computer evaluated cases on the basis of gravity of the crime and criminal history of the defendant and then set priorities for the prosecutors to follow. A "priority" case, as identified by PROMIS was handled by a special team of prosecutors. In addition, explanatory data revealing all of a prosecutor's decisions pertaining to a case tracked by this system detailed the reasons for refusing to file a case, continuing or dismissing a case and other decisions. This "reason data" was designed to study the effectiveness of various prosecution policies and procedures and ultimately took some of the discretion away from prosecutors.

While the PROMIS system provided a number of useful tools for prosecutors, administrators found that recording reasons for all prosecutorial actions was cumbersome and attorneys were not meeting the requirement for full documentation. Some of the offices hired paralegals to assist in documenting the decisions, but prosecutors were still reluctant to give up their autonomy or to rely on a computer system to make decisions for

them. The PROMIS program in its original state had a short life in the U.S. Attorney's Office, and it eventually mutated into a system that tracked defendants and court dockets, without the prosecutorial discretion element. The federal government no longer uses PROMIS, although some states now use a system with the same name that essentially provides on-line tracking of cases for the courts and the public.

The Complaint Process

The mechanics of complaint issuance vary from county to county and even within some jurisdictions. Typically, a law enforcement officer brings to the filing deputy the crime report, the arrest report, a criminal history of the defendant/s, evidence reports, lists of potential witnesses and any other relevant documents. The deputy's job is to apply the law and determine whether to (1) file the case for felony prosecution, (2) reject the case entirely or (3) file the case as a misdemeanor.⁸ In the case of a hate crime, the prosecutor must also decide if the case warrants charging the hate crime or if a lesser, included, non-hate crime offense will be charged. At this stage in the process, the victim is not present, the defendant is not present, nor is his/her attorney. All decisions must be made by the prosecutor based solely on the documents presented. While the prosecutor can require that the law enforcement agency conducts further investigation before making a decision, ultimately a determination will be made by the prosecutor.

In many larger district attorney offices there are teams of prosecutors who, on a rotating basis, are responsible for all of the case filing for that office. In certain crime categories, such as gangs, major narcotics and hate crimes, most offices practice what is

⁸ In some counties, such as Los Angeles, misdemeanor cases are referred to the city attorney for prosecution.

known as vertical prosecution. In most California hate crime prosecutions, the same deputy district attorney files the case, issues warrants, presents the case at a preliminary hearing, makes all decisions about the case, and ultimately, brings the case before a jury. Although as many as 95% of hate crime cases are adjudicated somewhere in the system prior to a jury trial, hate crime prosecutors must proceed with the knowledge that all cases have the potential to be heard by jurors.

In a survey conducted by the *Southern California Law Review* (Prosecutorial discretion, 1969) of the Los Angeles District Attorney's Office, deputy district attorneys were asked a number of questions about their decision-making policies when determining whether or not to file a case. The following questions and responses were part of that survey:

1. Should a deputy file a criminal complaint:

a. Even if a case will probably not get past the preliminary hearing stage? (20%)

b. If a case will get past a preliminary hearing but will probably be lost at trial?
(30%)

c. Only if the case will probably win at trial? (50%)

2. Should a deputy always file the most serious charge that the facts might merit?

Yes – 62.5%

No – 37.5%

3. Should a deputy always file all possible charges which might be found in the facts of a case?

Yes – 42.8%

No – 57.2%

4. When there is a possible violation of a suspect's constitutional rights which might cause the exclusion of evidence necessary for conviction, should a deputy
 - a. Only file when he believes there has not been a violation (28.6%)
 - b. File, even if it is possible that a court will find a violation (50%)
 - c. Always file (21.4%)

The results of this questionnaire indicate that the standard of proof varies widely among prosecutors and that the seriousness and number of charges depends upon who is doing the charging. Finally, the issue of the violation of constitutional rights is treated differently by different deputies. Since most prosecutorial agencies lack written guidelines when it comes to questions such as those above, prosecutors continue to have the freedom to make decisions using their own discretion.

The issue of race is always a concern when it comes to human discretion, and the decisions made by prosecutors are not exempt from scrutiny. In the same questionnaire as mentioned previously (Prosecutorial discretion, 1969), Los Angeles prosecutors were asked what weight a number of personal characteristics of the suspects would have in their determination of whether or not to file a case. Table 2 reflects the results of their responses:

Table 2

Weight Given to Suspect Personal Characteristics

Characteristic	Response Options			
	Great Weight	Some Weight	Little Weight	No Weight
1. Occupation	6.6%	40.0%	26.6%	26.6%
2. Prior record	26.6%	46.6%	18.6%	6.6%
3. Race	0 %	0 %	0 %	100.0 %
4. Dependents	0 %	13.3%	20.0%	66.6%
5. Age	0 %	33.3%	33.3%	33.3%
6. Intelligence	0 %	26.6%	33.3%	40.0 %
7. Sex	0 %	6.6%	26.6%	66.6%
8. Residence	0 %	6.6%	13.3%	80.0 %

As the authors of this study pointed out:

According to the above statistics, many of the personal characteristics are not given much weight by the deputies. However, this data may not accurately reflect the true impact of a suspect's personal characteristics. Deputies may be reluctant to admit the full impact of the suspect's characteristics, *especially race (emphasis added)*. Further, much of the impact on the deputy is likely to be of an unconscious nature. It is the writer's belief, based upon observation of the complaint process, that personal characteristics of the suspect weigh more heavily than the results of the questionnaire indicate (p. 529).

The questionnaire distributed to Los Angeles prosecutors also addressed the perceived status⁹ of crime victims. Two-thirds of those responding believed that the victim's status has no effect on the decision to file a case, while one-third admitted that it has some effect. Two-thirds of the prosecutors surveyed believed that public opinion had some effect on their decision-making process and more than half of them believed that in fact, it should.

⁹ Status was defined in the study as "community status or prestige" (Prosecutorial discretion in the initiation of criminal complaints, p. 530).

Jacoby (1979) looked at the charging policies of prosecutors and identified three “distinct and important roles” (p. 75) played by prosecutors; legal, bureaucratic, and political. The prosecutor is the chief law enforcement officer in any jurisdiction, and the job by its very nature is discretionary. The prosecutors sets policy for the entire agency, and as Jacoby points out, “Policy choice is clearly shaped by personal considerations such as the prosecutor’s own philosophy of law and his perception of the prosecutor’s purpose and duties in law enforcement” (p. 77). In addition, the elected district or city attorney is still responsible for the efficient running of an agency, while considering the financial constraints under which all government offices must operate. Jacoby also found that “policy determinations should be and probably are influenced by the socioeconomic characteristics of the community and its value system” (p. 78).

Jacoby (1979) evaluated policies and procedures in nineteen prosecutors’ offices throughout the United States, and ultimately divided the types of policies into four separate approaches; legal sufficiency, system efficiency, defendant rehabilitation, and trial sufficiency. Legal sufficiency refers to a policy where if the prosecutor believes a case has all the elements of the crime for which the defendant is charged, the case should be filed and should proceed through the system. The System Efficiency approach strives to make best use of resources by disposing of cases in the most efficient manner; cases with potential legal issues, such as search and seizure, are rejected at filing. Emphasis is placed on plea bargains, diversion programs, probation, and any other type of disposition that will keep the case out of the already overloaded courts. Defendant rehabilitation policies focus on systems outside the formal criminal justice system, usually using community resources, with a goal of keeping the defendant from re-offending. Finally, a

trial sufficiency policy looks at every case with the ultimate consideration of winning the case before a jury. This late approach requires the most experienced trial attorneys to make the initial decisions about initial filing. Hate crime prosecutors may fall into any one of the four aforementioned categories, but most operate under the trial sufficiency model.

Most previous research on prosecutorial discretion in hate crime cases has focused on the various implied reasons that prosecutors refuse to charge cases. Jenness and Grattet (2001) reviewed hate crime statutes throughout the United States and contend that hate crime statutes are designed to protect those who have previously been ignored as victims, but they do not address how the prosecutors actually accomplish this. Previous studies may indicate that some prosecutors file or refuse to file cases for reasons that are almost universal. Hernandez (1990) suggests that there is unconscious racism in the decision of whether or not to prosecute bias crimes, favoring white victims over nonwhites. Statistics clearly indicate that hate crime victims are more likely to be black than a member of any of the other protected groups, but those same statistics do not reveal the victim characteristics in the cases that actually go forward.

My work looks at not only the prosecutors who file the obvious cases, but those who are willing to charge and ultimately try the difficult cases that don't fit neatly into any previously defined category or bureaucratic framework. In the following chapters, I looked at the individuals; who they are, why they have chosen hate crime prosecution as a specialty, their backgrounds and personal characteristics, and what determines for them a chargeable case.

Summary

It is clear that there is no concrete and identifiable determinant of prosecutability that can be applied across the board to all prosecutors and cases, and as mentioned before, a prosecutor's personal and professional discretion carries with it the ability to make decisions that go unchecked. Some of the determinants of prosecutability identified by previous scholars as well as during my own research, however, are listed below. The first four determinants are the most salient, while the remaining nine, in no particular order, weigh less heavily:

Most salient:

- Likelihood of conviction at trial
- Suspect's affiliation with racist groups (memberships/tattoos)
- Hate speech in combination with crime
- Previous record of suspect

Weigh less heavily:

- Helplessness of victim
- Public outcry/Media involvement
- "Worth" of the victim
- Occupation of victim
- Victim's age
- Victim's race, especially compared to race of potential jurors/community
- Victim's sexuality in relation to conservative/liberal community makeup
- Status and believability of witnesses
- Relationship of suspect to victim

CHAPTER IV

RESEARCH DESIGN

Introduction

My purpose and goal of this research is to identify variables that impact the decision-making processes of hate crime prosecutors in California. Although limited previous research has been conducted on outside influences that affect prosecutors, structural conditions among prosecutors' offices, and other concerns, I seek to, as well, uncover more personal variables that may enter into their day-to-day considerations when they review bias crime cases. Based on interviews that I conducted between June 2006 and March 2008, I examine their political and career motives, as well as their personal feelings about their work and the victims they represent. In the first section I describe grounded theory and how I use it in this study. Next, I describe the method used to identify prosecutors for interview, the manner in which they were interviewed and the types of questions asked. Finally, I describe the hate crime scenarios that each prosecutor was asked to review for determination of suitability for prosecution.

Grounded Theory

Grounded theory begins with a research situation without a particular theory to explore or hypothesis to test. Although I first examined a number of theoretical approaches, I could not find an applicable theory that adequately applied to the issues that I had chosen to address in my study. The resulting grounded theory approach led me to

discover patterns and themes that were implicit in my data, and to identify emerging theories as I discovered and substantiated them through my research. As Strauss and Corbin (1990) point out:

A grounded theory is one that is inductively derived from the study of the phenomenon it represents. That is, it is discovered, developed, and provisionally verified through systematic data collection and analysis of data pertaining to that phenomenon. Therefore, data collection, analysis, and theory all stand in reciprocal relation to each other. One does not begin with a theory, then prove it. Rather, one begins with an area of study and what is relevant to that area that is allowed to emerge. (p. 23).

Bogdan and Taylor (1998) describe the work of qualitative methodology as interpreting and explaining “the meanings people attach to their lives” (p. 7). Since the large portion of my work deals with prosecutor motivations and personal feelings about their work, this type of research was particularly applicable. According to Taylor and Bogdan (1998), “interviewing is well-suited for studies in which researchers have a relatively clear sense of their interests and the kinds of questions they wish to pursue” (p. 91). Qualitative interviews with semi-structured questions allowed the participants freedom to express their views about their work in ways that questionnaires or participant observation would not and produced unanticipated patterns in prosecutors’ approaches to their work.

Selection of Participants

DOJ has published a document titled *Hate Crimes in California* annually since the state began collecting data in 1995. In order to identify prosecutors who were experienced with hate crime cases, I used DOJ’s *Hate Crimes in California* for the years 2004, 2005 and 2006 (Lockyer, 2005, 2006; Brown, 2007) to determine where the most cases were referred to prosecutorial offices, and to identify the cities and counties where

most hate crime prosecution occurred. California has 58 counties, each with an elected district attorney. Eight California cities also have city attorneys who prosecute misdemeanor crimes, while all felony cases are handled by the corresponding district attorney offices. In those areas with city attorneys, unless the crime is clearly a misdemeanor, hate crime cases are usually first reviewed by the district attorney in the given county, then routed to the city attorney if the case does not meet the prosecutor's criteria for felony prosecution.

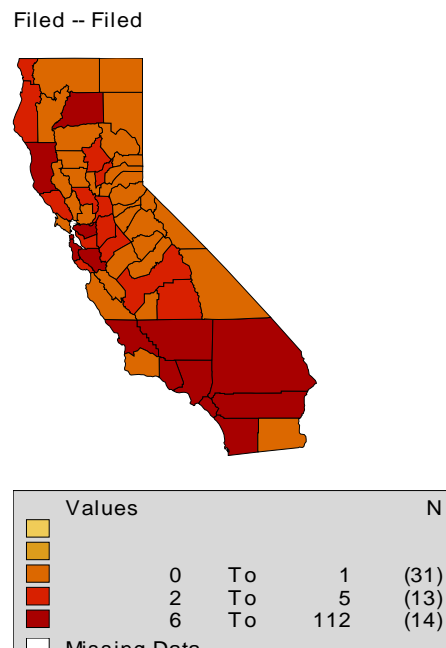
Because California has relatively few hate crimes (when compared to all felony cases), only a handful of prosecutorial agencies have much experience in dealing with them on a regular basis. In 2005, of the 58 county district attorneys and eight elected city attorneys, 31 filed no hate crimes at all (most of those also had no cases referred to them). A total of 12 offices filed one or two cases and of the remaining 24 District Attorney and City Attorney offices, the mean number of cases filed was 14. The mean number of hate crime cases that reached disposition in the year 2005 was even smaller.¹⁰ Of the 66 counties and cities that submitted data to DOJ in 2005, 31 reported hate crime dispositions, and less than two-thirds of those offices, 19, adjudicated more than two cases during the year. The mean number of cases that reached disposition in the remaining offices, where prosecutors file three or more cases per year, was 13 - a miniscule number compared to the numbers of other cases they see daily.¹¹ Los Angeles County and City Attorney offices, accounted for more than one-third of all hate crime cases filed in California in the years 2000-2006.

¹⁰ Filings and dispositions in a given year cannot be compared, as they rarely represent the same cases. A case filed in a given year may or may not reach disposition that same year – in most cases it will not.

¹¹ Statistics are similar for 2004-2006, with the same counties prosecuting the most hate crimes.

To give perspective to the relatively small number of hate crimes that are filed in California, between the years 2000-2006, California district and city attorneys prosecuted a total of 3,137 hate crime cases statewide (Brown, 2007). By contrast, however, in the year 2005 alone, California prosecutors filed more than 270,000 felony cases against adults¹². This number still does not take into account juvenile felonies or any misdemeanor cases. Figure 2 shows 2005 California hate crime filings mapped by county.

Figure 2 – Hate Crime Filings by County 2005¹³



(Source: *Hate Crime in California, 2006*. CA Dept of Justice.)

Part one of my research consisted of in-depth interviews of hate crime prosecutors in some of the county district attorney and city attorney offices where the number of hate crimes cases filed in each county for each of the years 2005 was six or more. While the

¹² 2005 is the most recent year for which complete arrest and prosecution data are available.

¹³ Cases filed by city attorneys are included in the appropriate county's data.

mean number of cases (14) was higher and I at first considered only interviews in counties with numbers higher than the mean, Los Angeles County's numbers act as an outlier which skews the mean. Therefore, removing the counties where fewer than three were filed, I used the resulting median of six as a benchmark from which I chose the counties for potential interviews. Fourteen counties prosecuted more than six hate crimes cases in each of the years 2004-2006 and represent prosecutorial offices throughout the state of California with the most experience in dealing with hate crime cases. These are the same offices that have traditionally prosecuted the most hate crime cases since data collection began in 1995.

Once I had identified the offices that were to be included in my sample, I began with jurisdictions where I had some prior professional relationship through my employment as a Special Agent with the California Department of Justice, Bureau of Narcotic Enforcement during the years 1979-1995. This relationship permitted me an entrée to the offices and established previous credibility with the prosecutors. Once those interviews were completed, I asked for referrals to other hate crime prosecutors in the other counties that I had previously identified. Because hate crime prosecution is so specialized, many agencies have formed working groups that meet regularly, and prosecutors talk by telephone to discuss cases and share information and expertise. Therefore, most hate crime prosecutors throughout the state know each other, particularly in the counties that see a lot of bias crime.

In areas where I did not have an introduction from another hate crime prosecutor, I obtained the name of the appropriate prosecutor from websites. I then contacted the prosecutors by telephone or letter and requested an interview. If, after a conversation

with a prosecutor, I learned that he or she did not have much experience prosecuting hate crimes, even though DOJ statistics made it appear otherwise I removed that person from the sample. For instance, one particular county prosecuted several hate crimes during a certain year and none the next year. For that reason, since my interviews took place over several date reporting periods, I continuously reviewed hate crime reporting statistics in order to reach the most experienced prosecutors.

Sample

My sample of 18 prosecutors was composed of both male and females; persons who are white, African American, Hispanic and Asian. There were both heterosexual and homosexual individuals, while two prosecutors declined to state sexual orientation. Some of the participants were married, while others were not, and some were single with children or married with no children. Table 3-A through 3-E show the demographic makeup of my sample:

Table 3-A: Gender

Gender	Number	% Total
Male	14	78%
Female	4	22%
Total	18	100%

Table 3-B: Race/Ethnicity

Race/Ethnicity	Number	% Total
White	14	78%
African American	1	6%
Hispanic	2	11%
Asian	1	6%
Total	18	**

** May not equal 100% due to rounding

Table 3-C: Sexual Orientation

Sexual Orientation	Number	% Total
Heterosexual	15	83%
Homosexual	1	6%
Declined to state	2	11%
Total	18	**

Table 3-D: Marital Status

Marital Status	Number	% Total
Married	14	78%
Unmarried	4	22%
Total	18	100%

Table 3-E: Parental Status

Parental Status	Number	% Total
Children	15	83%
No Children	3	17%
Total	18	100%

I chose to collect the above-listed demographic information to attempt to determine if a person's gender, race/ethnicity or sexual orientation had an impact on how they viewed their work or if they saw one type of hate crime case as more suitable for prosecution than another. Their marital status and whether or not they have children was of interest to me in order to get an overall view of them as people, since I was interested in how their personal feelings might impact their decision making. I collected data on where they attended college and law school primarily to get a sense their backgrounds and to get to know them better. Other data, such as political affiliation and religiosity were also collected and are addressed in Chapter Four.

Interviews

When I met with the hate crime prosecutors, I assured them that their personal identifying information would be kept confidential, and that no direct quotes or statements would be attributed to them without first asking their permission. I also told them that they would remain anonymous for the purposes of my study, with the understanding that counties that prosecute more than the median number of hate crimes are easily identifiable through DOJ statistics and annual hate crime reports. Those reports list county and city attorneys' offices but do not identify specific prosecutors, however. Based on that understanding, all the prosecutors that I contacted agreed to speak with me.

A discussion with several prosecutors who were not participants in my study led me to decide not to tape record any of the interviews. They explained that the prosecutors would be more comfortable and more likely to review their true motives,

feelings and backgrounds if they were not being recorded. Glaser (1992) also recommends avoiding the use of tape recorders. Therefore, I took key-word notes along with occasional copious notes, and then entered the data into AQUAD for Windows Five (2001), a qualitative software program (see later in this chapter for an in-depth description of the use of AQUAD). I then identified patterns and themes that emerged from the interviews.

Most of the interviews took place in the prosecutors' offices, with follow-up for clarification by telephone as needed. Two prosecutors who were not available to interview in person were contacted by telephone. During the interviews I utilized Gordon's (1976) seven types of topic control in order to gather as much information as possible. The seven types are: silent probe, encouragement, immediate elaboration, immediate clarification, retrospective clarification, retrospective elaboration and mutation. I used probe notes and key phrases that came up during the interviews, for clarification or elaboration of ideas. The probes were used to explore inadequate answers in order to get relevant, complete and clear information that satisfied the needs of my study.

I began each interview by asking the prosecutor how long he/she had been employed in the prosecutor's office, where he/she had attended college and law school, and what assignments he/she held in the prosecutor's office prior to this appointment hate crime prosecution. I also inquired about previous employment in any type of criminal justice field prior to the prosecutor's office. I then asked whether or not the assignment to hate crimes prosecution was voluntary and if so, why did the prosecutor choose hate crimes? Was it for career advancement, political purposes, personal beliefs or some other

reason? Did any of the prosecutors see this role as hate crime prosecutor as a stepping stone to a judicial appointment or successful judicial election, for example? Were there any religious or spiritual beliefs that influenced the prosecutor's involvement in choosing hate crime prosecution as an assignment?

The Process

I asked each prosecutor to walk me through a typical hate crime case from arrest to case filing to prosecution and finally, to ultimate disposition of the case. Since most of the cases do not go to trial,¹⁴ I asked the prosecutors to provide a description of the negotiation of pleas as well as an overview of trial proceedings.

Each prosecutor then gave me a description of a typical case, beginning when the suspect is either identified or arrested by police. In some cases, especially high profile or those where the media show an interest, the prosecutor may become involved early on, overseeing the investigation and orchestrating the time of the arrest with an eye toward the most effective prosecution. In most cases, however, the police make an arrest and then present the facts of the investigation to the deputy district attorney or city attorney. In all hate crime cases in California, the matters are "vertically prosecuted." This means that one prosecutor charges the suspect with the complaint, takes the case to a preliminary hearing if warranted, and handles the ultimate disposition of the case, whether it is a negotiated plea¹⁵ or the case goes to a bench trial¹⁶ or jury trial. In most other types of cases, one deputy district attorney may file the initial charges, while

¹⁴ The same is true for all criminal cases, not just hate crimes.

¹⁵ This is more commonly known as a "plea bargain," but in California, the term "negotiated plea" is the most-often used term.

¹⁶ A bench trial is conducted by the judge alone, with no jury.

another handles the preliminary hearing and a third, the trial phase of the prosecution.

Hate crime cases are appropriate for vertical prosecution because of the unique nature of the offenses, which also necessitates specialized training and experience. In that vein, I wanted to know how a decision to prosecute a hate crime was different from a decision to prosecute any other type of crime.

The following is a timeline or sequence of events as presented to me by participants who file typical hate crime cases, all steps of which are handled by the same person, who specializes in the field:

1. Crime is investigated by police.
2. Suspects are arrested or identified for future arrest.
3. Facts of case are presented to hate crime prosecutor for review.
4. Prosecutor may: A) file as hate crime, B) agree to file lesser non-hate crime offense, C) send case back to police for further investigation, D) reject filing of case in its entirety. If a suspect has been identified but not arrested, a warrant may also issue at this stage.
5. Arraignment for both felony and misdemeanors cases (once arrest has been made).
6. Preliminary hearing for felonies only.
7. Second arraignment for felonies in higher court if defendant is “held to answer” for the charges, based on evidence presented at the preliminary hearing.
8. Various pre-trial motions and settlement conferences.
9. Trial
10. Sentencing

(At any points from Step 6 through Step 9, plea negotiations are common in all criminal cases, including hate crimes, and are most prevalent at Step 7 of the process.)

After a discussion of a typical hate crime case, I asked each prosecutor to describe for me what type of case is more likely to see charges filed and ultimate prosecution in criminal court. Specifically, I wanted to know how the sex, age, race, and sexual orientation of victim and suspect weighed into the decision of whether or not to prosecute, and I was interested to know if the prosecutors would be forthcoming about their personal feelings. I also inquired about the religious affiliation, if any, of the prosecutor and whether or not his/her religious faith played a part in either the decision-making or the process. I was aware that many prosecutors would be reluctant to discuss personal feelings, biases, and backgrounds, but I found that most of them were eventually willing to discuss more personal matters with me.

In the late 1990s the California Department of Justice provided local district and city attorneys in California with a book of hate crime prosecution guidelines, written by members of the state attorney general's office, which most prosecutors continue to use for reference. In addition to the document, I wanted to know from prosecutors whether they follow any written guidelines established by their departments, and whether they consult with attorneys within their own departments or hate crime prosecutors from other jurisdictions before reaching decisions. Finally, in a segment of the criminal justice system that has arguably the least amount of oversight from outside sources, I wanted to know if the prosecutor has the authority to decide which

cases will go forward for prosecution or if he or she must seek approval from someone else within the prosecutor's office.

The final part of my open-ended interviews dealt with how the prosecutors viewed the importance of their work in terms of the good their actions might do for society. I was also particularly interested in how prosecutors see their responsibility toward the victims they serve, since as Jenness and Grattet (2001) point out, it is the weak, disenfranchised, and otherwise powerless in our society who need the most legal protection.

Hate Crime Scenarios - Description

Part two of the research consisted of a group of five hate crime scenarios. At the close of my in-depth interviews, I provided the prosecutors with the set of scenarios and asked them to review them. The scenarios are based on actual hate crimes that took place in California and are taken from publicly-available police reports, but they did not occur in jurisdictions that are part of this study. Names of suspects and victims, cities in which the crimes occurred, dates and other identifying information had been removed from the reports prior to my gaining access to them. Using a Likert scale, prosecutors were asked to rate how likely they would be to prosecute the offense outlined as a hate crime, based only on the available information. The choices for each scenario, asking for the prosecutors' initial reaction to prosecution, were Very Likely, Somewhat Likely, Unsure, Somewhat Unlikely and Very Unlikely. The scenarios represent the typical cases reviewed by hate crime prosecutors in terms of

race, ethnicity, sexual orientation of victim, as well as type of crime and amount of available evidence. (See Appendices 1-5).

Participants either reviewed the scenarios at the conclusion of our interviews or mailed them to me later. One prosecutor did not return the scenarios, reducing my sample size from the 18 whom I interviewed to an eventual 17. Comments or notes prosecutors wrote on the forms were compiled into one group for each scenario and used later for comparison.

Measurement and Operationalization -AQUAD

AQUAD for Windows Five (Huber 2001) is a software program developed for the purpose of analyzing qualitative data. Information can be typed directly into the program and formatted as .rtf files. The program then numbers the lines of the text for easy retrieval of specific information. In this case, information for each interview was loaded into the program with number identifiers, such as “inter_001, inter_002 . . . inter_018,” and so on. Numerical identifiers were used rather than names in order to protect and maintain the anonymity of the participants.

In the first phase of the data analysis, I established an initial list of codes to represent personal and professional information I received from the participants. I coded for sex, race, age, marital status, children, sexuality, undergraduate education, law school attended, political affiliation, years working hate crimes and total years with the district or city attorney offices.

I then organized some of the first codes into more general categories in order to group responses, such as those who attended college or law school in California or out of

state. It was not necessary to identify exactly which schools they attended, and I compared my results with those of Carter (1974) as described later in this chapter.

I also manually reviewed the documents for themes, such as a prosecutor indicating that he had a positive or negative working relationship with the media and recoded such statements into “likes media” or “dislikes media.” I did the same review and eventual recoding for themes such as how a prosecutor related to victims and how he spoke about cases, particularly in terms of victims or suspects. This step was difficult due to the fact that I did not recognize the pattern of responses until I was about halfway through my interviews.

I entered key words, phrases and demographic information on each prosecutor into AQUAD at the conclusion of each interview, after I had left the interview site. The following are typical examples of descriptions of two prosecutors and their responses/comments during the interview, as entered into AQUAD:

Male, white, 45 years, undergraduate University of Arizona, law school Hastings, heterosexual, married, two children, 4 years HC (hate crime), 8 years DA, Democrat, somewhat religious, talks about victims when asked about cases, likes challenge, likes to visit crime scenes to get feel for situation, likes to work with press, job is exciting, plans career as prosecutor, might consider judgeship later, innovative sentences, likes trials, likes juries, described differences in trying victims as racial minorities vs. gays as victims. Enthusiastic. Plea bargains a large part of work. Considers evidence of victim’s status, takes into consideration statements of suspects to prove motive.

Male, white, 50 years, undergraduate Cal State Sacramento, law school Univ of San Francisco, heterosexual, married, four children, 5 years HC, 25 years DA, Republican, somewhat religious, talks about suspects, talks about procedure, complains about press, follows guidelines strictly, same political as DA, wants to be judge, prefers to plea bargain, complains about juries wanting too much, discusses procedure when asked about cases. Not enthusiastic about work. Feels overworked. Cases with clear evidence of victim’s status more likely to be prosecuted.

I also entered anecdotes that prosecutors related, as well as statements that I could later use for the purpose of quotation. Most prosecutors gave general (and sometimes detailed) descriptions of cases that they had prosecuted and I summarized the information provided for purposes of entry into the Memo category of the software program. Once I completed some of the interviews and entered the associated information and narratives, I ran linkages in AQUAD between key words. I also ran linkages at two subsequent stages during the process and then again after all the interviews were completed. I continuously analyzed my data using the constant comparison method of grounded theory in order to discover any other theory implicit in the data (Glaser & Strauss 1967; Charmaz 1983). Using the software program, I looked for the following themes and patterns:

- The background and experience of the prosecutors
- Patterns of decision making (including, but not limited to: victim/suspect race, sex, socio-economic status, sexual orientation)
- Patterns of outside influence, such as media, victim rights groups
- Patterns of personal or political aspirations of the prosecutors
- Types of cases that are more likely to be prosecuted as hate crimes.
- Patterns in how the prosecutors view the work that they do, and how they view victims.
- Methods used by prosecutors that are similar or different than their counterpart in other areas of the state.

Hate Crime Scenarios- Measurement

I used a Likert scale to determine the amount of agreement or disagreement (on a five point scale) with the likelihood of prosecution for the hate crime scenarios in Part two of my study. Prosecutors' responses were compared with one another using cross tabs and frequencies. The size of the sample was N=17. Their responses were based solely on the information presented to them in the scenarios, which is often the most initial information a prosecutor has before deciding to file a case. The responses are limited to the information presented to the participants.

I examined the various ways that prosecutors viewed the scenarios and the extent, if any, of their agreement about the suitability for prosecution of each of the cases. I was also interested in the comments the prosecutors made about each case.

Summary

In this chapter I explained how I selected the participants for my interviews, how I approached the interviews and how they were conducted. I describe the questions that I asked the prosecutors as I attempted to ascertain why they do the jobs that they do, how they do those jobs and how their personal characteristics and beliefs may impact their work. I explored the timeline of prosecution from arrest to conviction or acquittal and the various stages at which a disposition can be agreed upon by the prosecution and defense.

Code words, narratives and other pertinent data were entered in AQUAD, a qualitative software program, and I used that information to look for themes and patterns among the responses given by the prosecutors. About halfway through all

the interviews, when I rank linkages and compared observations that I made of the prosecutors, I began to observe two distinct types of participants. I examined statements made by the prosecutors that might indicate any difference among them that had not previously been identified by other researchers. Finally, I looked for patterns among the responses to the hate crime scenarios.

CHAPTER V

RESULTS

Introduction

An observer might ask why any prosecutor make the effort to charge a somewhat simple case as a more complicated hate crime? The burden of proof is greater, and there is a greater likelihood of losing a case. According to the prosecutors I interviewed, the answer is simple. The cases are challenging, “sexy” as one told me, and they represent crimes against entire communities, in addition to the victim. Both the federal and state prosecutors I interviewed saw prosecuting hate crime cases as attacking a greater evil and promoting a greater good. They also make great press (although television cameras are not permitted in federal courtrooms), and the message may be spread to others who might perpetrate similar crimes. If the sanctions are great enough, people will be deterred from committing crime. This is what prosecutors of hate crimes hope to accomplish, and as one told me, “it guards against the type of hatred that has gotten out of control.”

During this study I interviewed 18 county and city prosecutors, all with at least four years of experience prosecuting hate crimes, as well as five years of other types of prosecuting duties. The respondents included both men and women, both heterosexual and homosexual, ranging in age from 35-56. They were mostly white, which is representative of the elected officials for whom they work.¹⁷ Respondents were both married and single, with and without children, and considered themselves to be both

¹⁷ Of the largest 15 District and City Attorney offices in California, all except one (an African American), are white, and all but one are apparently heterosexual. One-third are women, one is Hispanic, and one is openly gay.

religious and non-religious. They represented both major political parties; Democratic and Republican, as well as Independent. They also described themselves as non-political or apolitical. The primary difference I observed was the two types of approaches to the work, which I have labeled *procedural* and *personal*.

The Prosecutor

The typical hate crime prosecutor is a white male with more than 10 years of prosecuting experience. Although I interviewed four women prosecutors, for the purposes of this study, I will use the pronoun “he” to signify both male and female participants, in order to maintain the anonymity of all those concerned. He earned his undergraduate degree at a variety of colleges, both in-state and out-of-state, but most prosecutors attended California public law schools. This finding replicates the observations of Carter (1974) in his study of prosecutors in a California district attorney’s office, where he found that the majority of his participants also earned their law degrees from in-state law schools. Most prosecutors were either raised in California or moved to the state to attend law school and then stayed to begin their law careers. The majority of them started at the prosecutor’s office right out of law school, or had brief jobs elsewhere, such as police officer or clerking for judges, before joining the organization.

The subject of political affiliation was sometimes a touchy one. Several prosecutors admitted to being strong law-and-order Republicans, while others said that though Republicans, they leaned to a more middle of the road political philosophy. Since California voter registration no longer requires that a voter declare a political party, several of the participants indicated that they checked the “Decline to State” box when

registering to vote. A nearly equal number of prosecutors indicated that they were either registered Democrats or were more likely to vote for a Democratic candidate in major elections. And, while some of the prosecutors told me that they were member of the same political party as the elected district attorney or city attorney for whom they worked, many were members of a different political party. The most common observation made by the prosecutors was that the highest level of prosecutor, such as an assistant district attorney, was more likely to be affiliated with the same political party as the elected D.A. Table 4 shows the breakdown of reported political affiliation of the participants:

Table 4

Political Affiliation

Affiliation	Number	% Total
Democrat	6	33%
Republican	5	28%
Independent	4	22%
Other/Nonpolitical	3	17%
Total	18	100%

Although none of the participants expressed any aspirations to run for future public office, and none had any immediate plans to run for judge, several indicated that they would not rule out a judgeship in the future. In fact, one hate crime prosecutor, with whom I had spoken on the telephone in 2004, was appointed as a Superior Court judge a few months later. Three others expressed a desire to become judges in the future because they felt that they had accomplished all that they could within their current positions and saw no further upward mobility within their organizations. They admitted that the high

visibility of the hate crime position might help get their work as prosecutors noticed while work in other assignments might be overlooked.

The notion that prosecuting hate crimes is high profile was also what compelled several of the prosecutors to volunteer for the assignment. Because of the vertical prosecution aspect of it, which includes little or no oversight by supervisors, many prosecutors felt that an assignment such as hate crimes was an indication that they were more experienced and more capable. Others, however, saw the job as a challenge because of the relatively new and untested legal aspect of the type of prosecution. One prosecutor in particular told me that he was excited to take on the types of cases that had not been handled before and was not afraid of challenges to the law that might ensue: in fact, he welcomed them. This prosecutor was one of two among my participants who did not volunteer for the assignment, but was asked by the district or city attorney if he would take the job. Table 5 is a breakdown of primary reasons given by the prosecutors for why they took their hate crime assignments:

Table 5

Primary Reason for Hate Crime Assignment

Reason	Number	% Total
Liked high profile	4	22%
Upward mobility	3	17%
Needed change	6	33%
Asked by DA	2	11%
Personal feelings	3	17%
Total	18	100%

Most of the prosecutors I interviewed were married with children of various ages. When asked about sexual orientation, several prosecutors were quick to tell me that while they, themselves, were heterosexual, the district/city attorney's office in which they worked had at least one prosecutor who would be considered a sexual orientation minority. Since this topic was usually addressed during the discussion of the sexual orientation of victims of hate crimes, it appeared that the prosecutors wanted me to know that the office exhibited sensitivity toward gay and lesbian victims, even if the prosecutor himself was heterosexual. Interestingly, the prosecutors whom I have labeled later in this study as *procedural* were more likely to make a point of telling me that their offices employed gay or lesbian prosecutors. Two prosecutors declined to discuss sexual orientation.

More than two-thirds of the prosecutors I interviewed indicated that they considered themselves to be very religious, somewhat religious, or spiritual. While those whom I later identify as *personal* prosecutors were slightly more open about how their moral/spiritual backgrounds or beliefs affected their views of their jobs, there did not seem to be any difference among the various participants in how they said they approach the work. As one pointed out, "If I am a devout Christian and our teachings say that homosexuality is wrong, I still must protect the rights of gays and lesbians who are victims of hate crimes. I have to leave my personal beliefs at home. No one deserves to be targeted because of who they are or how they seem to others." Table 6 is a breakdown of their responses:

Table 6

Religiosity

Religious Beliefs	Number	% Total
Very religious	1	6%
Somewhat religious	5	28%
Spiritual	6	33%
Not at all religious	4	22%
Declined to answer	2	11%
Total	18	100%

I spent a considerable amount of time discussing the judicial process and specifically, negotiated pleas with the prosecutors. Prosecutors consider any plea agreement as a conviction, and since they are aware of the backlog of cases in any courtroom, they make an effort to negotiate pleas in hate crime cases just as they would any other case. However, unlike a typical criminal case settlement, where a defendant may perform community service, pay a fine, serve time in jail or prison, prosecutors have become more creative when dealing with hate crime defendants. Several of the prosecutors mentioned having defendants sentenced to attend sensitivity training as a condition of the plea agreement and those who are located in the Southern California area sometimes require defendants to attend workshops at the Simon Wiesenthal Center's Museum of Tolerance in Los Angeles. For teenagers who have committed hate crimes, particularly because of religious bias, the museum's *Tools for Tolerance for Teens* is used to help rehabilitate them rather than punish, in the hopes that they will not become repeat offenders.

As mentioned previously, negotiated pleas occur during any of the later steps in the criminal justice process. Several prosecutors (especially those I later identify as

personal) indicated to me that while negotiating pleas is a significant part of their jobs, they do not shy away from taking cases to trial. The reasons they gave for this is that the more the public becomes aware of the nature of hate crimes and the more that juries are familiar with how the cases are adjudicated, the less difficult it will be to try cases in the future. The hope is, as well, that hate crime trials and their resulting media coverage will deter future offenders.

Media Coverage and the “CSI Effect”

Media coverage of hate crime was discussed with all the participants, but in greater depth with those who had stronger opinions on either side of the media debate. Some prosecutors saw the media as interfering in their work by publicizing cases and leading the public to expect unrealistic outcomes at trials. This is commonly known as the “CSI Effect,” where television and other portray ideal situations and evidence that lead the average person to expect more from police, prosecutors and at trial (Shelton 2008). Some prosecutors saw this as particularly troublesome in hate crime cases, but all agreed that it is now a consideration in nearly every case that is tried in court.

Hate crime prosecution is not immune to unrealistic expectations from the public. In a particular case, a gay man was beaten during a fight and later died from his injuries and other complications. There was indication that a verbal altercation ensued between the man and a group of other men prior to the fight. The local police chief told the media that the victim had been targeted as a hate crime, without consulting the district attorney’s office. Terms such as “Hate Crime Murder” and the like, headlined the local paper, television and radio for several days. The prosecutor’s office, whose job it was to

file the case, however, realized that the elements for charging a hate crime simply did not exist in this case and the correct crime for filing against the suspects in custody was manslaughter. Under mounting pressure from the media, victim rights groups and others, the office filed the case as a hate crime, knowing that a judge would dismiss the hate crime aspect at preliminary hearing, which he did. The prosecutor told me it was better politically for the office to charge the bias crime, rather than try to convince those who had already made up their minds, and ultimately to let the judge make the decision. This prosecutor expressed frustration with the police department, the media and the victim rights groups and seemed annoyed that he filed a case that he knew would not stand.

Issues With Juries

According to the prosecutors I interviewed, there was no particular type of victim whose case was more likely to see prosecution in court, and while California does collect race, sex, age, sexual orientation of victims, the data do not indicate which cases are later charged as hate crimes. As indicated in the data on victims, however, blacks are most often the target of bias-related crimes. One prosecutor told me that crimes committed against someone because of race, particularly if the person is black, are sometimes less complicated to prosecute because it is usually apparent that the person is a minority and therefore, protected under the law. Juries are able to see that a person is black, but much less so if a victim is homosexual. While the same prosecutor was quick to point out that a hate crime can be charged even if the victim only *appears* to be a member of the protected class or if the suspect perceives mistakenly that the victim is a member of a protected class, convincing a jury is the ultimate goal. Juries are more likely to convict

when the evidence is very clear that the victim was targeted for, as one prosecutor put it, an “immutable state.”

Another prosecutor spoke of the problems with juries in particularly conservative communities. According to him, jurors tend to be older, middle class Americans who are typically more conservative toward sexual orientation. For that reason, it can become much more difficult to convince a jury that a person who is a victim of a hate crime because of sexual orientation deserves special protection in the first place, in spite of the law. For those jurors, the immutability of a victim’s sexual orientation may be in question. Even in communities where more persons who are sexual orientation minorities live, juries can still be composed of people who are not sensitive to their plight. One prosecutor pointed out that many prospective jurors are less than truthful; some lie to be removed from jury duty, but others may not reveal their personal prejudices in the hopes of being selected for jury duty on a high profile case, such as a hate crime. This type of concern can make a prosecutor’s job even more difficult. As one mentioned, people get the idea from movies and television that attorneys can hire jury consultants to help with the selection and hopefully, avoid the problems that arise when jurors are selected who don’t reveal their personal biases. Prosecutors do not have resources for jury consultants and, therefore, along with all the other work they must do to prepare a case for trial, they must rely on the system and their own instincts when it comes to choosing a jury. They are limited by the jury pool. As one prosecutor revealed, this was especially problematic after the September 11, 2001 attacks on the World Trade Towers, when anti-Muslim sentiment was high and hate crimes against Middle Eastern-looking Americans increased dramatically for a period of time. He said it was difficult to find jurors who did not have

some anger or ill feelings toward people who appeared to be of Middle Eastern descent, whether it was for a hate crime trial or any type of criminal prosecution.

Written Guidelines

Every prosecutor I interviewed acknowledged the use of written guidelines when determining the suitability of prosecution of a hate crime case, at least when the prosecutor was newly assigned or after modifications to California's law were made. The California Attorney General's Office publishes periodic updates to its original guidelines and all prosecutors I interviewed had access to the most recent version. The California District Attorneys Association (2006) also publishes a book that covers current legal topics in hate crime prosecution as well as information on alternative civil remedies. These guidelines mentioned in both documents, however, are simply suggestions and not written rules. Prosecutors still use their discretion when determining whether or not to file a case.

Cooperation Among Hate Crime Prosecutors

Most prosecutors I interviewed mentioned that they keep in constant contact with other prosecutors who do the same type of work. Because some offices have only one or two prosecutors assigned to hate crimes, they often consult with their counterparts in other cities and counties. Some prosecutors, such as several in Southern California, have formed a group that meets regularly for lunch to discuss cases. As one told me, "I rarely file a case without discussing it with someone in another jurisdiction. There are so few of us [in California] and I like to run my ideas by another guy just to make sure we are all

doing the same thing.” This type of cooperation becomes particularly important when a prosecutor is negotiating a plea and is looking for an alternative method of sentencing, such as the Simon Wiesenthal Center. “_____ told me about using the Wiesenthal Center and he is having good luck with it. He gave me his contact person there so that I didn’t have to start from the beginning,” a prosecutor told me.

Charging Approval

No prosecutor in my study needed to seek approval from a supervisor in order to charge a case. In the instance of high profile cases, the prosecutors often discuss the case with supervisors, other attorneys or the elected district or city attorney, but the final decision rests with the hate crime prosecutor. According to one prosecutor, “Sure, in the beginning I sometimes ran the cases by someone more senior, but I soon found that no one in my office really knew much more about hate crime than I did. I ended up talking with DAs in other counties and getting help from them. Ultimately, I am the one who has to try the case, so the responsibility is mine.”

Types of Prosecutors

During my interviews of California hate crime prosecutors, I found two different and distinct types of people. While the prosecutors I interviewed tended to be white males with considerable experience within any district or city attorney’s office, I found that I can divide them into two categories which I call *procedural* and *personal*. Procedural prosecutors typically see their roles in the administration of the criminal justice process as upholding the law, interpreting the chances of a case’s success in the

court system and focusing more on the crime and the suspect than on the victim. The circumstances surrounding the crime, along with the personal characteristics of victim and suspect are elements in the prosecutor’s decision, but those circumstances and elements are most important in determining whether or not a prosecutor can be successful in court. Personal prosecutors, however, are more likely to file a case that they find interesting or where they have a personal interest in the characteristics of the person who was victimized or feel personally outraged at the victimization. They are less likely to shy away from a case because of its complexity or challenge of prosecution. Consideration of the victim plays a larger role in the decision-making process than does the convictability of the case. Table 7 shows the number and percentages of the two types of prosecutors I interviewed during my study:

Table 7

Prosecutor Types

Prosecutor Type	Number	% Total
Personal	5	28%
Procedural	13	73%
Total	18	100%

Procedural prosecutors

Procedural prosecutors were usually, but not always, white males with considerably more experience than most others in district attorneys’ offices. Hate crime was a voluntary assignment that the prosecutor thought might be good for his career or because it was something that he had not done before and he was ready for a change.

Procedural prosecutors were more likely to comment that media were a problem for them; newspapers and television put undue pressure on a prosecutor's office and sometimes try to force them to file cases as hate crimes even when the law does not warrant it, at least according to those I interviewed.

The procedural prosecutor was more likely to give the impression that he was overworked and to complain about the increased workload that hate crime legislation produced. One prosecutor asked, "Aren't all crimes hate crimes? People commit a lot of crimes because they hate something or someone." They were more likely to discuss the notion of win-loss record as a factor in determining how to charge a case. Because of that, structural prosecutors were less likely to take a chance on a case that while perhaps more interesting and compelling, was less likely to result in certain conviction. They were also more likely to prosecute the cases when they were more certain that a suspect would plead guilty to the hate crime charge or to a lesser charge, thereby avoiding a lengthy trial that could possibly result in acquittal. Most of prosecutors I interviewed agree that they try to prosecute those cases where they have the greatest likelihood of success, but that is true of all cases, not just hate crimes. What we often forget, as several prosecutors pointed out in our interviews, and previous researchers failed to acknowledge, is that a prosecutor's job is *about* winning. Justice is served when the "people" win.

Another consideration pointed out to me by a procedural prosecutor is that charging risky cases that ultimately result in acquittal are detrimental to both the system and to how the public views future hate crime prosecution. Every time the district attorney's office loses a hate crime case, because such cases are typically high profile, it

not only embarrasses the office, but it makes it more difficult to prosecute the next one. Judges have long memories, as one prosecutor told me, and so do citizens. Taking a risk on a hate crime case because of personal feelings is just not good law practice, and considerations of anything but the actual case must be set aside. Once a prosecutor develops a reputation for trying unwinnable cases, it is very difficult to reverse that perception.

The procedural prosecutors I interviewed explained how they carefully consider each case before deciding whether or not to charge it, always with an eye toward conviction. Although they (and personal prosecutors as well) welcome negotiated pleas, their work must always be geared toward a defendant deciding to take his case to trial. To do otherwise can backfire and leave a prosecutor unprepared for the courtroom. Prosecutors consider how the witnesses will appear on the witness stand, how the victim will be perceived by the jury, how the defendant will present himself to the jury, as well as any physical evidence. There is little room for a personal understanding of the victim or assuming that the jury will be convinced of the victim's helplessness. This is not to say, of course, that procedural prosecutors don't get to know their victims: to try a case successfully the prosecutor must be able to, in many cases, defend the victim's status *as* a victim, but it may more about that status than about the actual person.

Personal prosecutors

The majority of prosecutors I encountered fell into the category of procedural prosecutor, as previously discussed. About one-fourth of them I can categorize as personal prosecutors, based on their responses to my questions, but more importantly, on

the approaches they took to their work, and in some cases, to their lives overall. Because they deviate from the typical prosecutor, these prosecutors are of special interest to me, although it is important to note that both types of prosecutors reported similar win-loss records. From the personal prosecutors, however, I attempted to learn from them why they saw their jobs differently and what inspired them to do more than was required of them by their job descriptions.

Two of the five personal prosecutors were women. The other three were white males. Four of the five had volunteered for the assignment, while one was asked by the elected DA. Perhaps the highly charged emotional nature of hate crimes attracts prosecutors who feel a personal dedication to the victims of bias, which might account for the fact that women are overrepresented in my personal prosecutor group. My sample is too small for any statistical comparison, but it is interesting that the women were attracted to crimes where the helpless are victimized.

Four of the personal prosecutors were married and four of them had children, although one married participant had no children and one unmarried participant had children. None of the married prosecutors of either group made much, if any comment about his spouse, although all of the personal prosecutors who had children made some mention of their children, whether it was in terms of how they view their work or how they balance home life and the demands of the job. I found that the procedural prosecutors were less likely to mention their children during our interviews.

Of the five personal prosecutors, two were Democrats, one was a Republican and two were apolitical. They all described themselves as somewhat religious or spiritual, but

did not talk about religious values during our interviews. Several of them did indicate a *moral* responsibility to prosecute hate crimes, however.

When asked to talk about their roles as hate crime prosecutors, most personal prosecutors talked about the satisfaction they received from the job. They were much less likely than procedural prosecutors to complain about the system, juries, media and concern about win-loss record. Interestingly, while procedural prosecutors spoke at some length about *cases* and the problems involved, personal prosecutors talked about the *victims*. This was one of the most striking differences that I noticed between the two groups. The other difference I noticed among the personal prosecutors was a certain enthusiasm for the job, a willingness to look for innovative sentencing, and a willingness to connect with the victims and their families. There was a clear difference in the two types of prosecutors in terms of their feelings of responsibility to their victims, to go outside the courtroom to visit the scene of the hate crimes¹⁸ and to enlist the help of the citizens and media in understanding the nature of both hate crime and its prosecution.

One of the personal prosecutors I interviewed explained to me why he volunteered to work hate crimes. He had worked narcotics for many years, including complicated illicit drug laboratory prosecutions. Immediately prior to his assignment as a hate crime prosecutor, he spent a considerable number of years on a prosecution team that dealt exclusively with gang violence. He explained his need for a change as his wanting to deal with actual victims. He said, “Gang members usually kill each other. Who is the victim there? I got tired of dealing with gang prosecutions where nobody really cared about the victims or the suspects. And drugs? All of my victims were

¹⁸ Another misconception perpetuated by television dramas is that prosecutors always respond to crime scenes.

imaginary – if I put some meth cooker away, maybe it took some drugs off the street, maybe not, but who did I really help?” This prosecutor said he wanted to see the victims, to help them get justice, to help their families and the communities who lived in fear. He objected to the term “hate” crime, preferring “bias” crime, because as he said, “These people don’t beat someone up or kill someone out of hate – hate has nothing to do with it. It’s bias, pure and simple. They target someone because of the person’s race, ethnicity, sexuality, without much feeling at all. That’s why the crimes are so insidious.” He also pointed out that “we are all members of a protected class,” and that becoming the victim of a bias crime can happen to any of us.

A prosecutor also told me that he considered his children when he volunteered to work hate crimes. He said that, as a father, he wanted to set an example for them by helping people who were targeted because of things they could not help. What his children thought of the job he did played a significant role in his decision to prosecute hate crimes, since they could understand how some people were treated differently because of their personal characteristics much more so than they could understand gang violence or illegal narcotics. He told me that he preached repeatedly to his children about seeing people for who they are and treating others with respect and thought it was time that he demonstrated to them a commitment to his own words.¹⁹

One prosecutor discussed a number of cases with me; cases he had successfully prosecuted and some where he was not successful. He spoke about an African American girl of about 12 who was killed by some Hispanic gang members when she walked on the “wrong” street with several of her friends. The prosecutor drove around the area one

¹⁹ Although I am using the pronoun “he” to represent all respondents, this prosecutor agreed to his identification as male.

afternoon with the victim's mother because he wanted to see first-hand where the crime occurred and to try to understand the geography of the gang territory. He told me that as he turned down a particular street, the victim's mother said, "We can't go down there, you have to turn around." The prosecutor couldn't understand what she meant until she explained that there were just some streets she could not use because to do so could mean she would be killed in the same way that her daughter was murdered. He told me, "I saw the fear on her face when I turned the corner and I was shocked - I take so much for granted that I can go anywhere I want and these people can't even walk one street over from their own homes without fearing for their lives. There are people who are not able to move around freely. It made me angry and for a moment I felt helpless."

Another hate crime prosecutor whom I identified as a "personal prosecutor" did not volunteer to work hate crimes, but was asked by the district attorney, as previously indicated, if he would take the assignment, due largely, it appears, because of the prosecutor's ability. He was quick to point out that it is not only a victim's characteristics that can lead to a hate crime, but the association with a targeted group or the perception that someone is a member of a protected group. In particular, the prosecutor showed me photos of a woman who had been badly beaten by some suspects because of her perceived sexual orientation. When he examines motive, the prosecutor asks himself, "would this have happened if the victim weren't _____?" If he can fill in the blank, he wants to take it as a case. However, the prosecutor did state that juries are difficult to predict and the more helpless and innocent a victim appears, the easier it is to secure a conviction. He described the hate crime victims he had dealt with in the past four years as "really nice people," and told me that he bonds with the victims, partly

because they typically have no one else who will stand up for them. He also feels a certain responsibility to the families of victims and immediately following our interview, the prosecutor rushed into a conference room to meet with the family of a hate crime victim who had been murdered a few years earlier. He said, “I have an appointment with the family of a victim who was murdered several years ago. They drop by every once in awhile and we just talk. Sorry, but I don’t want to keep them waiting.”

All of the personal prosecutors I interviewed discuss their relationships with the media, but unlike the procedural prosecutors, they were more likely to welcome the media’s interest in the cases, or at least help the media frame their coverage of hate crime, rather than resent media’s perceived interference. One prosecutor actively enlists the help of local media because he found that the more publicity he can get for hate crimes, the better the general public will understand them and the better jurors he can expect in the long run. He described the media as “a useful tool when it comes to shaping public opinion.” He makes public presentations about hate crimes and when the argument is made to him by opponents that hate crimes punish the same criminal act differently and “a battery is a battery,” irrespective of the victim, his response is: “Hate crimes are not the same. They are more serious. They are designed to terrorize not just a victim, but a whole group. A hate crime is a ‘message crime.’ A person who targets another solely because of his race or religion or any other characteristic is more dangerous and deserving of harsher punishment.” He referred to perpetrators of hate crimes as “despicable,” and keeps photos of various hate crime victims in his office to remind him of the egregious nature of some of their injuries. He described hate crime victims as those who were targeted because of “immutable states,” and explained that the

public has learned in the past 10-12 years to accept the law as it is and to feel sympathy for victims. He saw it as part of his job to increase the public's understanding.

A former federal prosecutor I interviewed in order to obtain background on federal law, although not part of the sample in this study, told me he elected to file a hate crime that occurred at a gas station because he read about it in the local paper and felt compelled to prosecute the crime. Under no obligation to prosecute a case that the local district attorney had the ability to charge, the assistant U.S. Attorney felt so outraged at the senselessness of the violence that he found a way to bring the case under the jurisdiction of his office, with the knowledge that a conviction would bring a stiffer sentence than in state court. His actions, and those of other personal prosecutors, could be an example of what has been called Organizational Citizen Behavior.

Organizational Citizenship Behavior

In the early 1980s, studies of the contributions of individuals in their workplaces focused on organizational citizenship behaviors (OCB) or “contributions not contractually rewarded nor practicably enforceable by supervisors or a job description” (Konovsky & Organ 1996, p. 253). Researchers attempted to determine why certain employees far exceeded what was expected of them without formal incentives or literal job requirements. Organ et al., (1994) found that personality was not necessarily a factor in determining OCB, but that a combination of conscientiousness, personality, agreeableness, extraversion and other traits were predictors of OCB. Work performed by such employees is “not directly or explicitly recognized by the formal reward system” of the organization (Organ et al., p. 8). This is true of prosecutors' offices as well. While

win-loss records are taken into consideration for all attorneys, they have so much discretion in how they do their duties that how they get to the “win” is a matter of personal style rather than procedural guidelines. This type of organizational behavior is discretionary, another important function of the personal prosecutor, as there is absolutely no job requirement that states that a prosecutor must care about his victims.

Another element of OCB requires that “in the aggregate [the behavior] promotes the efficient and effective functioning of the organization” (Organ et al., 1994, p. 8).

There is no way to determine if personal prosecutors’ behavior resulted in more convictions for hate crimes than procedural prosecutors, as most of them didn’t talk about it, at least in terms of how they view their jobs. Instead, personal prosecutors focused on the *people* involved in the cases, especially the rights of the victims and how they deserve to be protected. They clearly went outside what was required of them when it comes to “effective” functioning of the organization, however. An effective prosecutor’s office needs the support of the community in many areas, from victims’ rights groups to media to educated potential jurors.

Furthering my efforts to determine whether or not OCB describes the personal prosecutors that I discovered while conducting my interviews, I found that as many as 40 different forms of OCB have been identified and measured in the past 20 years, Organ et al. (2006) organized them into seven common themes or dimensions. They are as follows:

1. Helping – this usually involves voluntarily helping others with work-related problems.

2. Sportsmanship – Organ (1990) defines sportsmanship as “a willingness to tolerate the inevitable inconveniences and impositions of work without complaining (p. 96).
3. Organizational Loyalty – this construct refers to promoting the organizations to outsiders protecting it against threats from the outside and remaining committed to the organization even during adverse times.
4. Organizational Compliance – an employee adheres to all the rules and regulations, even when no one is watching is often considered an especially “good citizen.”
5. Individual Initiative – some examples of this type of behavior include voluntary acts of creativity and innovation, volunteering to take on extra responsibilities, persisting with extra enthusiasm and effort and encouraging others in the organization to do the same. The acts described are so above and beyond the job requirements that they appear to be strictly voluntary.
6. Civic Virtue – this theme relates to an employee’s responsibilities as a “citizen” of an organization, in the same way that a person is a citizen of a community, reflecting the employee’s membership in the organization and the responsibilities included in that membership.
7. Self-Development – this discretionary form of behavior refers primarily to a person’s efforts to improve his/her skill, knowledge and abilities, which may include non-mandatory training or keeping up to date on useful skills.

Of the seven common themes, Individual Initiative most closely describes the prosecutors that I encountered, as suggested by the stories I heard from various respondents, such as the prosecutor who drove a victim's mother around the neighborhood where the crime occurred to get a "feel" for the crime. One prosecutor showed me a flyer from a public forum that he, the local police department, and victim rights groups conducted. The presentation, which could be called "Anatomy of a Hate Crime," featured the hate crime victim, who spoke about his experience throughout the process. The purpose of this forum was to acquaint the community with the problem of hate crimes, the work of the police department, how victim rights groups can help, and finally, how the prosecution is conducted. The prosecutor was proud of the event, because several hundred people attended and he felt that the message was conveyed about the problem of hate crimes. He also wanted to showcase the hard work done by the police investigators, whose work led to the eventual arrest of the suspects and according to the prosecutor, provided him what he needed for a successful conviction. This presentation was conducted outside the normal business hours and in addition to the prosecutor's other duties, but he felt it was a part of his commitment to hate crime victims.

Finally, I found that personal prosecutors were more likely than procedural prosecutors to talk about the cases they lost as well as those that they won. They were more likely to express regret and a feeling of *personal responsibility* for the failure. Procedural prosecutors, while certainly not immune to expressing feelings of failure, seemed to focus more on how the system failed rather than how they personally may have failed the victims.

Weber's Types of Social Action

Sociologist Max Weber described four types of social actions that may shed some light on the behavior of procedural and personal prosecutors (Coser 1971). The four types are as follows:

1. Purposeful or goal-oriented rational action; Both the goal and the means are rationally chosen. Action is undertaken by virtue of a logical connection with a desired goal.
2. Value-oriented rational action; Striving for a substantive goal which may not be rational but is nonetheless pursued. The action is undertaken on the basis of a value or moral judgment.
3. Emotional or affective motivation action; Anchored in the emotional state of the actor rather than in the rational weighing of the means and ends
4. Traditional action; Guided by the habits of thought, by reliance on the past.

Based on Weber's typology, procedural prosecutors fall into the category of purposeful or goal-oriented rational action, as the decisions that they make are almost solely based on the possibility of winning the case at trial. Personal prosecutors, however, may pursue goals that, while perhaps not always rational (at least in the view of procedural prosecutors), are based on their own personal beliefs and value judgments that they make about the cases.

Data Analysis Using AQUAD

I ran linkages in AQUAD (Huber 2001) to identify the initial demographic information about the prosecutors, i.e., sex, age, religiosity, schools attended, political affiliation, etc. I hand coded and then recoded for keywords, such as “likes media” or “dislikes media.” I also hand coded and made notes in the margins of narratives that I had entered into the software and printed for review.

It was about halfway through my interviews when I noticed that a theme was beginning to emerge, one that separated a small portion of the prosecutors from the others. I found that when I asked prosecutors to describe a typical hate crime case, some of them discussed the suspects, the law, the charging, etc., while a small group focused on the victims. In my narratives it was clear that the term “victim” was used more than 3 times as often by certain prosecutors. I was more likely to find words they used, such as “fun,” “exciting,” “challenging,” and “personal responsibility.” Those same prosecutors were more likely to have a good working relationship with the media, visit crime scenes, exhibit enthusiasm toward their work, use creative sentencing methods and not shy away from complicated or risky cases. The mean age was slightly younger (41 for personal prosecutors vs. 45 for procedural prosecutors), but there was no difference in political affiliation or religiosity. Personal prosecutors were more likely to have given their reason for working hate crimes as Needed Change or Personal Reasons.

At the conclusion of all 18 interviews, the theme that I had previously recognized and tentatively identified as that of a *personal prosecutor* was apparent in 5 (28%) of the interviews. Those five prosecutors exhibited the behaviors described in Organization Citizenship Behavior, in particular Organ’s (2006) Individual Initiative. Clearly, their

approach to the work, their enthusiasm and attitude toward their jobs and especially their dedication to the victims they represented set them apart from the others I interviewed. Using characteristics that I developed during the interviews, I prepared Table 8 which lists the characteristics that the different types of prosecutors discussed, indicated or exhibited during my interviews:

Table 8 - Observed Prosecutor Characteristics

Prosecutor	Talked about victims	Showed photos	Knew victims' families	Mentioned personal responsibility	Often visits crime scene	Likes media	Likes risky cases	Uses innovative sentencing	Often Negotiates Pleas	Discussed Procedures	Discussed Case merits	Discussed suspects	Complained about media	Prefers predictable outcomes
1	x	x	x	x	x		x	x	x					
2	x	x	x	x	x	x	x	x	x					
3	x	x	x		x	x	x	x	x		x			
4	x		x	x	x	x	x	x	x					
5	x	x	x	x		x		x	x					
6								x	x	x	x	x		x
7									x	x	x	x	x	x
8						x			x	x	x	x		x
9				x				x	x		x	x	x	x
10									x	x	x	x	x	x
11								x	x	x	x	x		x
12								x	x	x	x	x	x	x
13					x	x			x	x	x	x	x	x
14									x	x	x		x	x
15									x	x	x	x		x
16									x	x	x			x
17								x	x	x	x		x	x
18								x	x	x	x	x		

In the above table, prosecutors 1-5 exhibit the characteristics of the prosecutor type that I have named personal prosecutor, while numbers 6-18 exhibit the characteristics of the procedural prosecutor. Both types indicated that they often negotiate plea agreements during the course of the adjudication of cases.

Hate Crime Scenarios - Results

All prosecutors were asked to complete the following hate crime scenarios. I received a total of 17 surveys returned to me, 11 in person and 6 by mail. One prosecutor did not return the survey.

I asked prosecutors to review five hate crime scenarios (Appendices 1-5) and to rate them according to how likely they would be to file the case as a hate crime, with no initial information other than what was provided. I found a wide variation in prosecutors' responses to the survey. Some wrote comments, while many did not. Once I determined which prosecutors fell into the procedural category and which prosecutors were in the personal category, I was able to separate the scenario responses into the two separate groups. Those tables immediately follow the overall responses.

Scenario Number One

My first scenario contained the victim, a male Hispanic, who is gay. The suspect, also a male Hispanic, was angry at the victim for some perceived slights that the victim allegedly made in the presence of the suspect's girlfriend, who was also a witness to the assault. Prosecutors' responses to this scenario ranged from somewhat likely to somewhat unlikely and included unsure. No prosecutor considered this scenario as very likely or very unlikely for prosecution, and the responses were pretty evenly divided among the three remaining categories; somewhat likely, unsure, and somewhat unlikely. There was no consensus as to how the case should be handled. One prosecutor wrote, "Independent basis for the crime unrelated to victim's sexuality. Slurs are incidental," while another wrote, "Clearly an assault, but words don't constitute a hate crime."

Tables 9-A and 9-B show the distribution of responses as given by participants to the question, “How likely would you be to prosecute this case given the evidence presented here?”

Table 9- A

Hate Crime Scenario #1 –Prosecutor Responses

Response Options	Number of Responses	% Total
Very Likely	0	0%
Somewhat Likely	5	29%
Unsure	7	41%
Somewhat Unlikely	5	29%
Very Unlikely	0	0%
Total	17	**

**May not equal 100% due to rounding

Table 9- B

Hate Crime Scenario #1 – Procedural/Personal Prosecutor Responses

Response Options	Number of Responses	
	Procedural	Personal
Very Likely	0	0
Somewhat Likely	3	2
Unsure	6	1
Somewhat Unlikely	3	2
Very Unlikely	0	0
Total	12	5

Scenario Number Two

The second scenario involved the victim, a male Hispanic who was sitting at a bus stop waiting for a bus, when the suspect, a male Black, ran up behind him and hit him over the head with a stick, knocking him to the ground. The suspect, while trying to remove the victim's wallet, was subdued by witnesses until police arrived. Upon arrest, the suspect spontaneously told police that he had beaten the "white guy" and tried to take his watch "because he was white." Later, after the suspect was advised of his Miranda rights, he claimed that he had hit the victim only to take the watch and not because of the victim's race. There was greater consensus among prosecutors for this scenario, with most indicating that they were somewhat likely or very likely to prosecute this case. As one commented, "D's [defendant's] spontaneous initial statement provides all I need to prove a hate crime based on perception. His subsequent backpedaling is irrelevant."

Tables 10-A and 10-B show the distribution of responses as given by participants to the question, "How likely would you be to prosecute this case given the evidence presented here?"

Table 10- A

Hate Crime Scenario #2 – Prosecutor Responses

Response Options	Number of Responses	% Total
Very Likely	6	35%
Somewhat Likely	8	47%
Unsure	3	18%
Somewhat Unlikely	0	0%
Very Unlikely	0	0%
Total	17	100%

Table 10-B

Hate Crime Scenario #2 – Procedural/Personal Prosecutor Responses

Response Options	Number of Responses	
	Procedural	Personal
Very Likely	4	2
Somewhat Likely	6	2
Unsure	2	1
Somewhat Unlikely	0	0
Very Unlikely	0	0
Total	12	5

Scenario Number Three

The third scenario contained two black victims, one a young female bus passenger and the other the bus driver. The suspect, a white male, had referred to the victim as a “nigger bitch” while she waited with her friends for the city bus. Upon the arrival of the bus, the female victim boarded the bus, but as the suspect got on the bus, he stated, “I don’t want to get on this nigger bus anyway.” After being ordered off the bus by the driver, the suspect hit the bus driver and said, “I’ll shoot the whole nigger bus.” He then reached into his backpack as if he had a gun inside and left the bus. He was apprehended a few minutes later by police, and invoked his right to remain silent. The suspect had a shaved head and tattoos of lightening bolts on his scalp that read “100% White.”

This scenario was considered by more prosecutors as very likely for prosecution, largely because it contained victim statements, clear motivation and for many, the tattoos were a convincing element. As one prosecutor stated, “Given D’s [defendant’s] tattoos and irrefutable racist motivation (from the very start) this is a clear case.” Another

prosecutor commented, “This one would be an easy one, and a lot of fun to prosecute, too.”

Tables 11-A and 11-B show the distribution of responses as given by participants to the question, “How likely would you be to prosecute this case given the evidence presented here?”

Table 11-A

Hate Crime Scenario #3 – Prosecutor Responses

Response Options	Number of Responses	% Total
Very Likely	10	59%
Somewhat Likely	5	29%
Unsure	2	12%
Somewhat Unlikely	0	0%
Very Unlikely	0	0%
Total	17	100%

Table 11-B

Hate Crime Scenario #3 – Procedural/Personal Prosecutor Responses

Response Options	Number of Responses	
	Procedural	Personal
Very Likely	6	4
Somewhat Likely	4	1
Unsure	2	0
Somewhat Unlikely	0	0
Very Unlikely	0	0
Total	12	5

Scenario Number Four

The fourth scenarios involved a male Jordanian and an assault that occurred in October 2001, one month after the attacks on the Pentagon and World Trade Towers. The suspect, a male white with a shaved head, threw rocks at the victim's vehicle and yelled words such as "camel jockey" and "raghead" at the victim. The rocks thrown by the suspect hit the vehicle but no damage was sustained. Respondents' answers to this scenario ranged from unsure to somewhat unlikely, but none indicated that he would be very or somewhat likely to prosecute, nor did any indicate he would be very unlikely. Some of the comments included, "No apparent crime in California," "Vandalism requires damage," and "This is one I would like to charge, but I don't see the evidence here." As California law clearly states,

“... no person shall be convicted of violating subdivision (a) based upon speech alone, except upon a showing that the speech itself threatened violence against a specific person or group of persons and that the defendant had the apparent ability to carry out the threat. (CPC 426.6(c)).”

Tables 12-A and 12-B show the distribution of responses as given by participants to the question, “How likely would you be to prosecute this case given the evidence presented here?”

Table 12-A

Hate Crime Scenario #4 – Prosecutor Responses

Response Options	Number of Responses	% Total
Very Likely	0	0%
Somewhat Likely	0	0%
Unsure	8	47%
Somewhat Unlikely	8	47%
Very Unlikely	1	6%
Total	17	100%

Table 12-B

Hate Crime Scenario #4 – Procedural/Personal Prosecutor Responses

Response Options	Number of Responses	
	Procedural	Personal
Very Likely	0	0
Somewhat Likely	0	0
Unsure	5	3
Somewhat Unlikely	7	1
Very Unlikely	0	1
Total	12	5

Scenario Number Five

The last scenario, number five, involved a female black victim and a male white suspect. After a dispute over the tile work that the suspect performed for the victim, the suspect placed a 3-foot by 5-foot wooden cross on the victim’s lawn on which he had written the words, “Every day should be a burn day.” (In California, “burn days” indicate days on which farmers can burn crops, etc.) The suspect then placed a sign on his home that stated. “White people beware. The nigger next door ripped me off taking food from

my hungry kids.” The suspect admitted that he had placed both signs, but denied involvement in any racist or white supremacy groups. He also had no previous record.

Responses to this scenario were as varied as the available options. While several prosecutors indicated that they would be very likely to prosecute, others were equally as unsure or very unlikely to prosecute. Some of the comments were, “No crime,” “Free speech,” “Language is not sufficiently threatening and there is insufficient evidence of a pattern of terrorizing victim.” Others said things like, “This is one that I might file just in hopes of getting the suspect into some sensitivity training. The victim has to live next door to the suspect. It could easily escalate over time,” or “This one deserves prosecution, but it’s just not there.”

Tables 13-A and 13-B show the distribution of responses as given by participants to the question, “How likely would you be to prosecute this case given the evidence presented here?”

Table 13-A

Hate Crime Scenario #5 – Prosecutor Responses

Response Options	Number of Responses	% Total
Very Likely	3	18%
Somewhat Likely	2	12%
Unsure	8	47%
Somewhat Unlikely	3	18%
Very Unlikely	1	6%
Total	17	**

**May not equal 100% due to rounding

Table 13-B

Hate Crime Scenario #5 – Procedural/Personal Prosecutor Responses

Response Options	Number of Responses	
	Procedural	Personal
Very Likely	1	2
Somewhat Likely	0	2
Unsure	7	1
Somewhat Unlikely	3	0
Very Unlikely	0	0
Total	12	5

At first glance it seems random in terms of the prosecutors' responses to the hate crime scenarios. Further evaluation revealed that while hate speech alone did not indicate a hate crime, a *pattern* of hate speech seemed to have an impact. The uses of racial epithets did not in and of themselves constitute a hate crime, nor did the use of hate speech toward homosexuals, or persons perceived to be of a particular ethnic background. Tattoos that indicated some type of bias or involvement in a supremacy group were clearly factors that increased the chances that a crime would be prosecuted. There seemed to be a reluctance to choose the category Very Unlikely about the prosecutability of any scenario, and in fact, on only two occasions did any prosecutor choose that category, one for the fourth scenario and once for the scenario number five. The prosecutor who checked Very Unlikely for scenario number 5 cited the case of *RAV v. St. Paul*²⁰ in the comments section.

²⁰ *R.A.V. v. City of St. Paul* 112 Sup Ct. 138 (1992). The Supreme Court struck down St. Paul, Minnesota's bias crime ordinance after a white teenager was charged with burning a cross on the lawn of an African American family. The Court ruled that cross burning in this case was free speech guaranteed by the First Amendment and did not constitute a hate crime.

All in all, the responses to the hate crime scenarios seemed to be as individual as the prosecutors themselves. There were some patterns that seemed to develop, however, such as the agreement among many prosecutors regarding Scenario #2, involving the Hispanic victim and the black suspect, and Scenario #3, where a white male attacked two black victims. The key to the prosecutors' willingness to file those two cases appeared to be statements made by the suspects and obvious motivation. Since motive is the key to proving hate crimes and what distinguishes them from other offenses, only those cases where a clear motive could be proven were readily accepted for prosecution.

When I reviewed the scenarios for prosecutability in relationship to procedural and personal prosecutors, I did not find any patterns that indicated more or less willingness to charge particular cases by one group or the other. It did appear, however, that personal prosecutors were *slightly* less likely to indicate that they were unsure about whether or not to file a case, perhaps an indication that they make decisions based on immediate feelings about a case.

Summary

In this chapter I differentiated between the two types of prosecutors whom I encountered during my interviews. Using AQUAD and manual coding and review of my notes, I determined that there were two distinct types of approach to the prosecution of hate crimes. The procedural prosecutor is a person who appears to be more concerned with win-loss records, the convictability of a suspect and the how the system works. He is less likely to take a case that might present problems in court, and most importantly,

when asked about hate crime cases, discusses the case and its suspects, rather than the victims. This type of prosecutor represents the majority (72%).

The personal prosecutor exhibits what I determined, through the theory that emerged, Organizational Citizenship Behavior, because he clearly uses creativity and innovation in his practice and exuded enthusiasm for the work during our interviews. In sharp contrast to the procedural prosecutor, the personal prosecutor, when asked about hate crimes, immediately discussed the victims and how he felt about them, how he felt a personal responsibility to protect them and why hate crime laws were important in his efforts.

The hate crime scenarios produced some grouping of responses for several of the examples, while others resulted in answers that covered most or all of the possible responses. The outcome is an example of the individual nature of case filing itself – some prosecutors see the possibility of charging a particular case, while others would not attempt to file it. Once I had identified a number of characteristics that were shared by many prosecutors, I used those characteristics to determine which prosecutors fit into the procedural category and which fit into the personal group. I was then also able to review their scenario choices and as mentioned previously, the personal prosecutors were slightly less likely to select Unsure as a category choice when reviewing the hate crime scenarios. Perhaps this is an indication that personal prosecutors are more likely to take risks when deciding whether to file a case; at least in my study they were a little more certain of how they would proceed.

Procedural and personal prosecutors have different approaches to dealing with hate crime cases. Since hate crime is such an emotionally charged crime for suspects,

victims and the public, its prosecution may attract a certain type of individual who is emotionally engaged in the work, at least for a portion of them. This may account for the fact that two of the five personal prosecutors are women. For the majority of the participants, however, hate crime is a difficult case they can win by following good procedure and sound law practice.

CHAPTER VI

CONCLUSION

Introduction

It cannot be overstated just how much autonomy public prosecutors have in this country, and certainly that includes California district and city attorneys. Due to the specialized and sometimes complicated nature of hate or bias crimes, there exists little or no oversight for the men and women who prosecute the often highly publicized cases that are charged each year. It is also important to emphasize that hate crimes, compared to other felony and misdemeanor cases in California, pale in number.

My initial review of this topic led me to conclude that all prosecutors file cases (of any type) that they believe they can win. Certainly there is an advantage to prosecuting only cases with a high probability of success: Such a record can also influence a prosecutor's chances of promotion within his own department, and certainly can affect future assignments. Previous researchers made this point clear in their studies of prosecutors across the country, and win-loss record is often cited when prosecutor runs for public office, such as district attorney or judge. Researchers have found that media, victims' right groups, and other outside influences can also impact a prosecutor's decision making, as do the location of the crime, the perceived "worth" of the victim, the relationship between victim and suspect, and a variety of other factors. Filing cases with a high probability of conviction also reduces the possibility of diluting the law, since frequent acquittals can only jeopardize the impact of a statute, both in the courts and in

the public eye. Careful consideration of each case and its convictability is how most prosecutor offices operate throughout this country and is largely responsible for the high conviction rate that most prosecutors possess. A high conviction rate bolsters public confidence for its civil servants, convincing them that their tax dollars are well spent. Filing cases that are not “winnable” can lead to mistakes in court, leading to overturned decisions, tainted reputations and bad press.

Hate crime prosecutors are not immune to outside influences and pressures felt by any prosecutor involved in high-profile jurisprudence. Highly publicized cases, such as the murders of James Byrd in Texas and Matthew Shepard in Wyoming²¹ brought the problem of hate crime to the nation’s attention. The majority of hate crimes, however, as evidenced by the statistical data gathered in California, and the FBI as well, are cases of assault and vandalism, which make up the majority of the bias offenses reported to police. These crimes are the ones that prosecutors face on a regular basis and about which they must make decisions. They are important because, as one prosecutor pointed out, a hate crime is a “message crime.” One person or building may be the initial victim of the attack, but the message and its harm affect entire groups of people and may reach far beyond the victims themselves in the emotional and personal impact.

When I began looking at hate crime prosecution in 2004, much of what I found replicated the work of previous researchers. Prosecutors just want to win whichever cases they are assigned. However, at one point I encountered a federal prosecutor who said that prosecuting hate crimes is “sexy.” This same prosecutor tried a case against two suspects who repeatedly stabbed an African-American man as the man was putting

²¹ As mentioned previously, the men convicted of both James Byrd’s and Matthew Shepard’s murders were not charged with hate crimes because neither Texas nor Wyoming had hate crime laws at the time.

gasoline into his car at a local gas station. The prosecutor, outraged by the behavior, found that he could invoke federal jurisdiction because pumping gas into a vehicle is a federally protected activity as a result of the Civil Rights Act of 1964, which also protects interstate commerce and transportation. He used the considerable resources of the federal government to convict the suspects of a hate crime and both now reside in federal prison.

Previous research indicates that this prosecutor was an exception. As I conducted my interviews I found that most of the participants were concerned with winning, and making a good case was the primary responsibility of the police and the prosecutor's office. The law, procedure, preparing witnesses, convincing juries, putting people in jail; those were viewed as the important aspects of the prosecutor's job. Victims appear to be judged for their characteristics and how that will play to juries, rather than protected for their immutable states. Media are an annoyance that must be handled or ignored. If it's safer to charge a parallel offense rather than a hate crime, it's better in the long run. It is important to note that oftentimes the parallel offense nets a harsher sentence than the hate crime code, so to charge a hate crime simply because the statute exists would be foolish.²² The system works when the defendant pleads or is pronounced guilty, and although the two types of prosecutors use perhaps different paths, they both get to the same place – conviction. I had not found a theory that described the differences between the two types, however.

I felt some pressure to identify a theory before I tackled the topic of prosecutors and how they make their decisions, particularly in the relatively new arena of hate crime literature. Labeling theory suggests that “crime is not an objective property of certain

²² Some states have separate hate crime offenses, while others have sentence enhancements. Some crimes yield harsher sentences than the hate crimes to which they might be associated.

behavior, but a definition constructed through social interaction” (LaFree, 1989; p. 234). LaFree looks at the social construction of sexual assault using conflict and labeling theory to understand how and why certain incidents of rape are prosecuted and how certain people are labeled as rapists in his study of Indianapolis criminal justice. Conflict theory addresses the power that prosecutors wield, and certainly the well educated, mostly white males in this profession are powerful, but hate crime laws are written to protect the very weak and powerless who are the victims of bias crime. Prosecutors make decisions based on their own personal beliefs of the convictability of cases, and previous literature indicates that they do so by reviewing a number of factors, including the believability and worth of the victim, which indicates labeling. The theory does not account, however, for the prosecutors who deviate from the convictability concerns of a case, and spend more effort and time on the victims of hate crimes themselves. There is no indication that either type of prosecutor has a better win record than the other, but the *approach* is clearly different, which I found most enlightening.

A review of my data drove me to Weber’s four major types of social action, specifically purposeful or goal-oriented rational action and value-oriented rational action. I found that the prosecutors’ approaches to the charging of hate crime cases were divided between those two of the four types that Weber describes, with the norm being purposeful or goal-oriented rational action. This approach most likely reflects most prosecutors in all areas of criminal charging, while the other type, value-oriented rational action, most appropriately pertains to the smaller group or the personal prosecutors.

Another way to explain the slightly more than one-fourth of the prosecutors who deviate from what might be called the *convictability norm* is Organizational Citizenship

Behavior (OCB). I found that in most organizations, there are those who approach their work with a certain attitude, enthusiasm and creativity. There is some indication in previous research that it could be a matter of personality, but that does not account for the extra effort and acts that are well above and beyond the job requirements. Of the seven common themes identified in OCB, I found that Individual Initiative most closely relates to the behavior exhibited by a portion of the prosecutors that I interviewed. It was as result of my review of OCB that I developed the two terms that I believe best describe the two types of prosecutors: *procedural* and *personal*. Since I was curious about those who deviated from the norm, I focused primarily on what made those prosecutors different.

I was most excited about the small percentage (28%) of the prosecutors I interviewed who did not fall into the category of the convictability norm. They seemed to approach the job with an attitude that included a concern for the victims that was not exhibited by the procedural prosecutors. This is not to say that the procedural prosecutors felt no empathy for victims, but their primary concern was with the case. With personal prosecutors, the primary concern appeared to be with the victim. Pursuing justice for the victim, rather than justice for the system seemed to be of greater importance, and personal prosecutors were more likely to embrace the help of the media and the public in order to get the message out about hate crimes. Personal prosecutors, when they discussed cases with me, seemed to know a great deal about their victims, who they were, how they suffered, and how they deserved protection. They were more likely to show photos of the victims, to discuss the victims' families and to have personal knowledge about the victims' lives.

Television and movie dramas give the impression that prosecutors respond to crime scenes, making it appear that a prosecutor knows everything about a crime. This is seldom true, as prosecutors receive summaries of cases and reports from the police officers who have responded to the scene. Because of heavy caseloads, prosecutors rarely have time to leave the courthouse to see where crimes occurred and must rely on crime scene photos, diagrams, etc. I found during my interviews that personal prosecutors were more likely to physically visit crime scenes in order to get a “feel” for the location and an understanding of what occurred. The example in an earlier chapter of the personal prosecutor who drove a victim’s mother around a neighborhood in order to understand what the victim suffered was behavior that separated the prosecutor from many others in his field. There is no theory in criminology that adequately addresses how a prosecutor such as this fits into a system that previous research has identified as not responsive to the plight of victims, but OCB describes the certain type of individual who exhibits behavior that is not “directly or explicitly recognized by the formal reward system” (Organ et al., 1994, p. 8). There may be, however, some social and political benefits that accrue for the personal prosecutor in terms of public and media approval, especially if he is seen as the protector of the weak and the champion of the powerless.

Personal prosecutors were no more or less likely to be religious than their counterparts, they were only slightly younger, the reasons they gave for working hate crime were more likely to be the need for a change or personal reasons, and their political affiliation did not lean in any particular direction. It is difficult to quantify the way that they talked about hate crime, the enthusiasm they exhibited for the job and the innovative

ways that they dealt with cases. It was an attitude that was almost contagious and I found myself caught up in the plights of the victims as well.

Even though these three men and two women who comprised the personal prosecutors' group ultimately had similar success as the 13 men and women I had come to call procedural prosecutors, their methods indicated to me that they were the risk-takers and that they felt a connection to the victims that the majority did not. I was also concerned, then, with how the two different types of prosecutors would view the hate crime scenarios that I presented to them.

Using the hate crime scenarios to ascertain how prosecutors would approach the prosecution of various types of crimes gave me an opportunity to determine if there was agreement among them in terms of how they view cases. For three of the five cases, there was not. Their responses were as varied as the options. In two of the cases, where statements and behavior of the suspects made motive more apparent, there was more agreement among the participants. There were prosecutors who were unsure, while at the same time, several appeared enthusiastic about the prospect of charging such a case. This is indicative of the autonomous nature of the job and the various ways that different prosecutors may view the same incident. There are few written guidelines and no rules outlining which cases are filed and which are not. There was little difference between the scenarios rated by the procedural and the personal prosecutors, although personal prosecutors were slightly less likely to check Unsure when evaluating a scenario. This response may be an example of their emotional engagement in the work and perhaps indicates confidence in their abilities to read into a case.

Further Study

It is unlikely that personal prosecutors only exist in the realm of hate crime prosecution. Certainly others operate in similar fashion as the bias crime experts I encountered in my study; prosecutors who feel freer to take chances than their counterparts. It would be interesting to conduct further interviews of prosecutors in specialized areas with vertical prosecution, such as major crimes, gangs, narcotics, etc, where a prosecutor may have more time to devote to each case, and compare them with prosecutors who do the daily cases involving lower profile crimes. I would be curious to know if prosecutors who carry heavy caseloads of burglaries, assaults, robberies, and other felonies can be separated into the two categories I discovered in my study or if the sheer volume of work precludes them from operating in the manner of a personal prosecutor.

During my study I encounter some issues that warrant further study. When I reviewed 2003 hate crime prosecution statistics for the city and county of San Francisco, I found that only a small percentage of hate crime cases (with known suspects) reported to police were submitted to the prosecutor's office and fewer than half of those were filed as hate crimes. A prosecutor from another jurisdiction told me that San Francisco was notorious for not prosecuting its hate crimes under the then-current administration and with the newly elected District Attorney in place, things were bound to change. Upon reviewing later statistics, however, I find that, in 2006 only about 25% of the reported hate crimes (with suspects) were submitted for prosecution and that only about one-third of those were filed as hate crimes. It could be important to further study San Francisco to

determine where the disconnect exists between police and the prosecutor's office, or if the discrepancy lies within the office itself.

I found similar areas worthy of consideration in other parts of the state. In some jurisdictions, prosecutors have established a pattern of filing a high percentage of the hate crime cases submitted to them, while in others the rate is quite low. Some police jurisdictions present a high percentage of their hate crime reports for filing, while in others very few are submitted. Clearly there is either a problem in how hate crimes are categorized or there exists a breakdown between law enforcement and the prosecutors.

The notion of hate crime as a priority is another topic worth studying. When hate crime first became a priority for the California Attorney General's office in the late 20th and early 21st century, counties such as San Diego used federal and state funding to organize hate crime units, complete with investigators, police officers, prosecutors and support staff. A few years later, with priorities shifted elsewhere, the specialized groups are mostly gone and the prosecutors are left without the additional help. Although the numbers of cases they prosecuted have not decreased, the resources with which to fully investigate and try those cases have.

Another consideration for study is the changing priorities of prosecutors' offices. In the early 1990s the priority shifted from narcotics to child predators and then focused more heavily on hate crimes. Now that hate crime is generally understood by most of law enforcement and computer crimes are reported daily in the media, more prosecutors are spending their days trying to understand the complexities of identity theft and computer fraud. It's this constantly changing stream of priorities that I think warrant further research.

Finally, there may be some distinction between procedural and personal prosecutors and the number of cases that each type is presented. It warrants further research to determine if, perhaps, personal prosecutors have the luxury of handling fewer cases and as a result, have the time and resources to conduct more extensive investigation of cases before filing. Since some jurisdictions handle significantly more cases than others, it might be helpful to narrow the focus of study to one county agency, such as the Los Angeles District Attorney's Office, to determine the distribution of procedural versus personal prosecutors and their respective caseloads.

Summary

I began this process with the understanding that prosecutors only file cases that they believe that they can win and I found something different than I expected, as well as different than I experienced during my twenty years in California law enforcement. While indeed it appears that most of the prosecutors file cases with a high certainty of conviction, I also found a few prosecutors who do not hesitate to take on cases that they believe are intriguing or crimes that are so outrageous that they feel the victim deserves to have the case go forward. Serving justice means serving the victims. Personal prosecutors tackle the job with an enthusiasm that may be considered abnormal for an overworked public servant and is more likely akin to the actions of highly paid actors from some unrealistic television drama. There are no policy implications inherent in the data that I uncovered, except to recognize that both types of prosecutors exist. There is no evidence that personal prosecutors have any better conviction rate than procedural

prosecutors, so some may wonder why their approach makes a difference. To the system, it may not matter – to the victims it may feel like everything.

APPENDIX A

Hate Crime Scenario #1

Victim: Male, Hispanic, 23 yrs (Gay)

Suspect: Male, Hispanic, 24 yrs (Straight)

Weapon: Handgun (not recovered)

Witness: One witness, girlfriend of suspect.

Evidence: Photos of injuries, statements of victim, witness.

Synopsis:

Victim and witness work together at a specialty store in a local mall. Victim is gay and all co-workers are aware of his sexual orientation. Suspect frequently calls the store to speak with his girlfriend, the witness, and victim has begun referring to the suspect as “Bugaboo,” because he constantly calls and “bugs” them. On this occasion, the suspect overheard the victim tell the witness, “Bugaboo is on the phone for you.”

After work that night, the witness and victim left the store so that witness could give the victim a ride home from work, a common occurrence. Suspect approached the victim, who was seated in the passenger seat of witness’s car, opened the passenger door and pointed a gun at the victim’s head, saying, “You fucking fag, do you think you’re funny? You faggot, get out of the car.” The suspect then proceeded to hit the victim in the head with the weapon while the witness screamed for him to stop. Suspect stopped hitting the victim and the witness drove the victim home, while the suspect followed behind in his own vehicle. According to the victim, during the ride the witness admitted that the gun used by her boyfriend was actually hers. When they arrived at his apartment victim went inside and the suspect and witness left in separate vehicles.

Victim did not report the attack until two days later, because he was afraid of suspect’s friends, according to his statement. Photographs of victim’s injuries were taken by local police. Witness said that the suspect did hit the victim with something but that she did not know what it was. When interviewed, suspect said the combat was mutual, there was no gun involved and that the victim started it. He denied using the word “faggot” but said he did tell the victim to “Get the fuck out of the car.” When questioned regarding his attitude toward homosexuals, the suspect said that he knows several and “sometimes I even talk to them.”

Scenario #1

How likely would you be to file this case as a hate crime, given the available evidence?

Very Likely Somewhat Likely Unsure Somewhat Unlikely Very Unlikely

Comments _____

APPENDIX B

Hate Crime Scenario #2

Victim: Male, Hispanic, 67 yrs

Suspect: Male, Black, 23 yrs

Weapon: Wooden stick, 18" long, 1" diameter (recovered)

Witness: Four witnesses, all passersby. All give essentially same account.

Evidence: 18" wooden stick, statements of victim, witnesses, suspect.

Synopsis:

Victim is a light skinned Hispanic male with white hair. He was sitting a bus stop waiting for the bus, when the suspect (Black male) ran up behind him and began hitting him over the head with a stick, knocking him to the ground. The suspect then began trying to remove the victim's watch. Witnesses, who had all been passing by in various vehicles, intervened and then subdued the suspect until police arrived.

After the suspect was in custody, he spontaneously told police that he had beat the "white guy" over the head with a stick and tried to take his watch "because he was white." Once at the police station and after having been advised of his Miranda rights, the suspect stated that he had, in fact, hit the old man and tried to take his watch, but it was because he wanted to sell the watch for the money. Suspect said he was homeless and would have beaten anyone for the watch, regardless of race.

Scenario #2

How likely would you be to file this case as a hate crime, given the available evidence?

Very Likely Somewhat Likely Unsure Somewhat Unlikely Very Unlikely

Comments _____

APPENDIX C

Hate Crime Scenario #3

Victim: 1) Female, Black, 14 yrs.
2) Male, Black, 40 yrs

Suspect: Male, White, 21 yrs, shaved head, tattoos of lightening bolts, "100% White"

Weapon: Hands, voice

Witness: Numerous witnesses, all bus passengers of Victim #1

Evidence: Statements of witnesses, victims only.

Synopsis:

Victim #1 was standing at a bus stop with four of her friends, also Black female juveniles, when she was approached by the suspect. He said to Victim #1, "You guys don't talk to me and I won't call you a nigger bitch," and began getting closer and closer to her, forcing her to step back. Victim #1 told the suspect not to call her "nigger" or "bitch" and the suspect responded, "I'll shoot all 5 of you bitches. I have a 9mm with 3 clips." About that time a city bus, driven by Victim #2 arrived. Victim #2 heard the suspect and Victim #1's heated words and told them not to bring their altercation onto the bus. Victim #1 apologized and she and her friends paid their fares and then boarded the bus, moving to the rear to sit down.

The suspect also boarded the bus and when he got to the fare box he stated to the bus driver, "I don't want to get on this nigger bus anyway." Victim #2 ordered the suspect off the bus. The suspect then poked his finger in Victim #2's eye, knocking off Victim's glasses and said, "I'll shoot the whole nigger bus." The suspect then reached into his backpack as if you get something. Victim #2 then turned and hit an emergency button located near the console. It was apparently at that time that the suspect spat on Victim #2, according to witnesses. The suspect continued to say he was going to "shoot up the bus" and "shoot up the niggers," as he left the bus and walked away, still reaching inside his backpack as if he had a gun there. He was apprehended by police a few minutes later.

The suspect refused to waive his Miranda rights and did not answer any questions.

Scenario #3

How likely would you be to file this case as a hate crime, given the available evidence?

Very Likely Somewhat Likely Unsure Somewhat Unlikely Very Unlikely

Comments _____

APPENDIX D

Hate Crime Scenario #4

Victim: Male, Caucasian (Jordanian), 17 yrs.

Suspect: Male, White, 25 yrs, shaved head

Weapon: Voice, hands, rock

Witness: Several witnesses, neighbors, who gave same account as victim

Evidence: Statements of witnesses, victims only.

Synopsis:

Victim, a Jordanian born Muslim, was wearing his traditional Arab clothing and had just come home from a religious meeting. He parked in front of his own residence and as he got out of his vehicle and started toward his house, he saw the suspect standing on the sidewalk and looking at the victim in a “threatening manner.” The victim was frightened for his safety and went into his house.

The suspect then began shouting “camel jockey” and “raghead” at the victim’s house and then spit in the air, as if in disgust. The suspect picked up a rock and threw it at the victim’s car, hitting it, but not causing any visible damage.

Police arrived on the scene and approached the suspect, who was wearing only a pair of pants and combat boots. The suspect appeared to be very physically fit. He claimed to be part of the military but refused to tell police which branch. The suspect got into a physical altercation with police after he was told to sit down and he refused. He continued to swear and was verbally abusive toward officers after his arrest.

Note: This incident took place in October 2001, about one month after the attacks on the World Trade Towers and Pentagon.

Scenario #4

How likely would you be to file this case as a hate crime, given the available evidence?

Very Likely Somewhat Likely Unsure Somewhat Unlikely Very Unlikely

Comments _____

APPENDIX E

Hate Crime Scenario #5

Victim: Female, Black, 63 years

Suspect: Male, White, 39 years

Weapon: Wooden cross in front yard, sign in yard

Witness: Neighbors, police officers (to existence of cross)

Evidence: Wooden cross 3 ft wide by 5 ft tall, staked in victim's front yard; statements of victim, suspect.

Synopsis:

The suspect (white male) and victim (black female) are next door neighbors. Under verbal agreement, suspect had performed tile work for victim for which he had been partially paid, but victim refused to pay additional funds until the work was completed satisfactorily. Suspect claimed he had offered to finish the job if the victim made an additional payment, but the victim refused.

The suspect placed a 3x5 foot wooden cross on victim's front lawn (he admitted this to investigating officers), on which he wrote "Every day should be a burn day." The suspect then placed a 4x6 ft. sign on the second story of his own home, facing the street, which read, "White people beware. The nigger next door ripped me off taking food from my hungry kids." Police were called by neighbors not involved in the dispute.

The suspect admitted that he had placed both signs, but denied any involvement with any racist or white supremacy groups. He had no previous record.

Note: The incident occurred in an area of California that has designated "burn days" for residential, commercial and agricultural properties.

Scenario #5

How likely would you be to file this case as a hate crime, given the available evidence?

Very Likely Somewhat Likely Unsure Somewhat Unlikely Very Unlikely

Comments _____

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