NOTE

NEXT STEPS FOR CONGRESS ON HATE CRIME REPORTING

Kai Wiggins*

Named after two victims whose murders were prosecuted as hate crimes but not reported in hate crime statistics, the Khalid Jabara and Heather Heyer No Hate Act attempts to improve hate crime reporting in the United States by encouraging state and local jurisdictions to adopt best practices for hate crime data collection. Covered jurisdictions must report on their progress to the Department of Justice, which must then compile the information and publish a report for Congress examining the relationship between hate crime rates within those jurisdictions and their adoption of the Act’s best practices. Although the Act’s substantive features are promising, its incentive structure, which creates an optional grant program instead of imposing conditions on existing funds, inhibits their effect by limiting coverage to a small, self-selecting subset of large jurisdictions. This Essay argues that Congress must strengthen the Jabara-Heyer Act if it wants to see better hate crime statistics. But even that might not be enough.

INTRODUCTION

Reading hate crime statistics has become less about what’s in the data and more about what’s left out. In 2017, for example, U.S. law enforcement agencies

* J.D. Candidate, Stanford Law School, 2023. The Author assisted in the development of the Jabara-Heyer Act and efforts to pass the legislation through Congress.
reported 7,175 hate crimes to the Federal Bureau of Investigation, but the white supremacist car attack that killed Heather Heyer and wounded at least thirty-five other people in Charlottesville, Virginia, was not one of them.1 Nor was the 2016 murder of Khalid Jabara, an Arab American shot dead on his doorstep in Tulsa, Oklahoma, recorded in that year’s federal hate crime statistics.2

The list goes on. In jurisdictions across the United States, hate crimes are misclassified, overlooked, and underreported.3 Most never come to the attention of law enforcement.4 And many that do nevertheless go unrecorded in official data, even when prosecuted under state or federal hate crime statutes.5 Indeed, some estimates suggest that federal statistics capture just one percent of all hate crimes.6 And even though Congress passed legislation in 1990 requiring the Department of Justice to collect annual hate crime statistics,7 as a former DOJ official said in 2019, “we do not have the slightest idea how many hate crimes there are in America. And we have never known.”8

---


2. Simon & Sidner, supra note 1; see also Susan Bro & Haifa Jabara, Opinion, Hate Crimes Are Slipping Through the Cracks, N.Y. TIMES (Aug. 12, 2019), https://perma.cc/MX3W-NRPT.


5. Though not reported in hate crime statistics, the murders of both Khalid Jabara and Heather Heyer were prosecuted under hate crime statutes. See Rachel Treisman, FBI Reports Dip in Hate Crimes, But Rise in Violence, NPR (Nov. 12, 2019), https://perma.cc/4R3N-SSE8.

6. See Tyler Bishop et al., Stan., L. Sch. L. & Pol’y Lab, Exploring Alternative Approaches to Hate Crimes 8 (June 2021), https://perma.cc/Q5NU-NTSR (suggesting that, when adjusting for distinctions between datasets, hate crime statistics from the Uniform Crime Reports (UCR) account for just over one percent (6,739/0.40/250,000) of annual hate crime victimizations estimated in the National Crime Victimization Survey (NCVS)).


Some would argue that is about to change. In May 2021, amid a reported surge of hate crimes targeting Asian Americans and Pacific Islanders during the coronavirus pandemic, President Biden signed into law the Covid-19 Hate Crimes Act.\(^9\) That legislation includes the Khalid Jabara and Heather Heyer No Hate Act, which, among other things, aims to improve hate crime reporting by incentivizing law enforcement agencies to adopt a set of enumerated data collection procedures and related policies, such as establishing bias units and community liaisons.\(^{10}\) According to the president, the Act will “make sure that hate crimes are more accurately counted and reported.”\(^{11}\)

But will it? At best, the Jabara-Heyer Act will have a modest impact on hate crime reporting. And that is assuming the Act’s substantive provisions are conducive to better data collection. The problem lies in the Act’s incentive structure. Rather than imposing new conditions on existing funds, Congress authorized new funding with conditions attached. In other words, the Jabara-Heyer Act is more carrot than stick, as jurisdictions that do not opt into the funding mechanism are exempt from the Act’s substantive provisions. This not only limits the Act’s reach, but also has the effect of providing more federal funding to law enforcement agencies, which is the exact opposite of what some progressives and community activists want from legislation to address bias-motivated violence.\(^{12}\)

In three parts, this essay argues that Congress can strengthen the Jabara-Heyer Act, and assuage its progressive critics, by changing the Act’s incentive structure to require, rather than encourage, the adoption of its substantive provisions. Part I outlines the challenges of hate crime reporting. Part II examines the Jabara-Heyer Act and explains how imposing tailored conditions on federal assistance for law enforcement will expand the Act’s scope without overburdening state and local jurisdictions. Finally, Part III considers the future of hate crime statistics. A strengthened Jabara-Heyer Act will enable Congress to assess the performance of the hate crime reporting system. What it finds could prompt additional reform or spur efforts to abandon the reporting system altogether. If nothing else, the Act will challenge us to think about what hate crime statistics are for.

---


I. CHALLENGES OF HATE CRIME REPORTING

Where do hate crime statistics come from? And why are they so unreliable? For three decades, the FBI has published annual hate crime statistics based on data collected from U.S. law enforcement agencies—representing state, local, and tribal jurisdictions—through a national program known as the Uniform Crime Reports (UCR). The FBI collects this information under the Hate Crime Statistics Act (HCSA), which, as amended, requires the attorney general to “acquire data . . . about crimes that manifest evidence of prejudice based on race, gender and gender identity, religion, disability, sexual orientation, or ethnicity.”

Since 2018, the FBI has also published hate crime statistics based on data from federal law enforcement agencies. But while these agencies are required to submit HCSA data, others are not. For state, local, and tribal jurisdictions, hate crime reporting is voluntary, at least under federal law. And each year, thousands, indeed most, of the nation’s law enforcement agencies report zero hate crimes to the FBI.

Encouraging agencies to report is a major challenge of hate crime data collection. But it is not the only one. Several cracks in the reporting system are to blame for bad data, some of which are considered in the following sections. The first step, however, is understanding how we got here.

A. Data Collection Under the Hate Crime Statistics Act

The HCSA neither established nor designated a specific reporting program, but the UCR is what Congress had in mind. In fact, when the HCSA was first introduced in 1985, it specifically required the attorney general to collect information about hate crime through the UCR. This made sense. The modern UCR had been around since 1930, when Congress first authorized the attorney general to “acquire, collect [. . . ] and preserve” crime records from the nation’s law enforcement agencies. By 1985, nearly sixteen thousand agencies were voluntar-
ily submitting crime data through the UCR each year, enabling the FBI to pro-
duce comprehensive statistics on the nature and extent of crime in the United
States.20

If Congress wanted information about hate crimes, i.e., criminal offenses
like assault, homicide, or vandalism that “manifest evidence of prejudice,”21
then amending the UCR to capture information about the offender’s bias motivation
was the logical solution. Why reinvent the wheel when you can just add another
spoke?

The problem, as any good bike mechanic knows,22 is that it could throw the
entire wheel out of true. And that is exactly what UCR administrators feared in
the HCBA. Testifying before Congress in 1985, a senior FBI official advised
against collecting data about an offender’s motivation through the UCR, ex-
plaining that the resulting statistics would likely be “incomplete, relying too much on
the judgment of the reporting officer.”23 And if the statistics were “questionable,”
the official warned, it “could diminish the reputation and credibility of the UCR
as a whole.”24

Steven Schlesinger of the Bureau of Justice Statistics, which con-
ducts national surveys on crime victimization, shared similar concerns:

Given the difficulties and complexities of accurately ascertaining criminal
motivation even in one specific case, one cannot underestimate the com-
plications of setting out and enforcing uniform rules or standards for inter-
viewers or police officers to apply throughout the Nation in the thousands
of violent or property crimes in which . . . prejudice might possibly be a
motive.25

Speaking at another congressional hearing in 1988, Schlesinger warned that,
as drafted, the HCBA would not produce “the kind of reliable statistics that Con-
gress and the American public have a right to expect.”26

Undeterred, Congress passed the HCBA two years later with strong biparti-
san support.27 Although the enacted version did not specifically require collection
through the UCR, the offenses listed in the bill corresponded to preexisting

---

1986), https://perma.cc/4X8W-KF7N.
22. See Sheldon Brown, Wheel Truing for Beginners, Bike World, Jan. 1979, at 34.
https://perma.cc/7GU4-PWV3.
Baker, Assistant Director, Office of Congressional and Public Affairs, Federal Bureau of In-
vestigation).
24. Id.
25. Id. at 51 (statement of Steven R. Schlesinger, Director, Bureau of Justice Statistics,
U.S. Department of Justice).
Subcomm. on the Const., S. Comm. on the Judiciary, 100th Cong. 121 (1988) (statement of
Steven R. Schlesinger, Director, Bureau of Justice Statistics, U.S. Department of Justice).
27. See Robin Toner, Senate, 92 to 4, Wants U.S. Data on Crimes that Spring from Hate,
N.Y. Times (Feb. 9, 1990), https://perma.cc/U5G9-STCI; see also Hate Crime Timeline, HUM.
UCR reporting categories, which would “expedite implementation of the bill” even if the UCR was not “the vehicle to report hate crimes.”

But the vehicle it was. After the HCSA became law, the attorney general delegated the responsibilities of developing a national hate crime reporting system to the FBI, which in turn assigned them to the UCR Program. According to the FBI, “the developers agreed hate crime data could be derived by capturing the additional element of bias in those offenses already being reported to the UCR Program,” thereby satisfying the directives of the HCSA “without placing an undue additional reporting burden on law enforcement.”

“In time,” wrote the FBI, “a substantial body of data would develop about the nature and frequency of bias crimes throughout the nation.” After three decades, however, that arguably has not happened yet.

B. Cracks in the Reporting System

The HCSA has not fulfilled its promise because of multiple systemic problems that continue to frustrate the data collection process. Apart from some technological developments, the system remains unchanged: a crime happens; police arrive; and while collecting evidence, the responding officer looks for a potential bias motivation. If the evidence suggests the crime was bias motivated, the officer files that information into an incident report. Back at the station, investigators review the evidence and determine whether the incident should be reported as a hate crime, and if so, the associated bias type, e.g., Anti-Black or African American, Anti-Transgender. Based on that determination, records personnel designate the incident as a hate crime in the agency’s records management system and submit the data to the relevant state UCR program, which then forwards the data to the FBI for publication in hate crime statistics.

35. See UNIF. CRIME REPORTING PROGRAM, supra note 34, at 5 (listing reportable bias types).
Simple enough in theory. But complications abound in practice. First, most hate crimes never come to the attention of law enforcement. According to the Bureau of Justice Statistics National Crime Victimization Survey (NCVS), about fifty-six percent of hate crime victimizations between 2010 and 2019 were not reported to police. Reasons for nonreporting may include handling the victimization outside of the criminal justice system, distrust of police, downplaying the crime’s significance, fear of retaliation, or inconvenience. And because the NCVS does not include data on intimidation, vandalism, and property damage or destruction, which often account for most UCR-reported hate crimes, victim nonreporting might be even more prevalent than available statistics suggest. To be sure, NCVS data indicates that nonreporting is nearly as widespread among crimes that are not bias motivated. The fact remains, however, that the HCSA requires federal data collection on bias-motivated crimes, and the government has chosen to fulfill that mandate with an approach that guarantees data on most bias-motivated crimes will never be collected.

Second, no amount of federal guidance or supervision can overcome the tangle of state and local laws, policies, and practices that influence hate crime reporting and data collection from one jurisdiction to the next. For one, the UCR relies on standardized offense definitions, such as aggravated assault or arson, to compile statistics across the six categories defined in the HCSA (race or ethnicity, religion, sexual orientation, gender, gender identity, disability), which are

---

37. Kena & Thompson, supra note 4, at 2.
39. Kena & Thompson, supra note 4, at 4 (listing crime types).
41. This proposition is even more plausible because victims are less likely to report non-violent or property-based hate crimes to police. See Kena & Thompson, supra note 4, at 4.
further divided into thirty-four bias motivation types. But most states’ definitions of hate crime are less inclusive, and some states restrict their definition of hate crime to certain offenses. Additionally, some states neither require law enforcement to report hate crimes nor authorize training on identifying or responding to hate crime. Finally, reporting rates also depend on law enforcement agencies’ policies, procedures, and institutional priorities, which run the gamut.

To date, little to no empirical scholarship has tested the effect of one or all the factors discussed above on hate crime reporting. But a limited review of data from several large jurisdictions provides some insight. Among cities with more than 100,000 residents, those with robust state laws and local policies related to hate crime tend to have higher rates of bias-motivated crime. In 2020, the city of Eugene, Oregon, reported about twenty-five hate crimes per 100,000 residents, which is almost ten times the average rate among large jurisdictions. In addition to being in a state with an inclusive hate crime statute, mandatory hate crime reporting and data collection laws, and statutorily required police training on identifying, reporting, and responding to hate crimes, Eugene has prioritized hate crime reporting and efforts to support hate crime victims. And it is not an outlier within the state. Of the ten large jurisdictions with the most hate crimes reported per capita in 2020, three were in Oregon.

44. See Unif. Crime Reporting Program, supra note 34, at 5.
48. This Essay defines “large jurisdictions” as those with at least 100,000 residents. According to the FBI, the United States has about three hundred local law enforcement agencies representing large jurisdictions. See About Crime in the United States, 2019, Fed. Bureau of Investigation 2 (2020), https://perma.cc/6FAE-GA2V.
On the other end of the spectrum are jurisdictions in states with underinclusive or nonexistent hate crime laws and local governments that have not prioritized bias-motivated crime. Among large jurisdictions that reported no hate crimes from 2013 to 2020 are Montgomery, Alabama, and Jackson, Mississippi, two cities in states that, despite legacies of discrimination and racial violence, lack comprehensive hate crime laws. The same goes for Little Rock, Arkansas, which has reported just one hate crime in the last ten years for which data are available. These appear to be statewide trends. In 2020, Arkansas, Mississippi, and Alabama had among the lowest reported rates of hate crime in the United States.

That hate crimes are least reported in three former Confederate states with dark, well-documented histories of racial violence suggests that reading hate crime data as intended, i.e., to ascertain the nature and extent of hate crime in different parts of the United States, is to read the data wrong. If we accept the data at face value, then hate crimes are more than six times as prevalent in Massachusetts, Vermont, and the Pacific Northwest than in the Deep South. But can that be right? Instead, perhaps hate crime statistics are better read as proxies for state and local efforts to collect hate crime data, if not respond to hate crime generally.


54. See BRENNAN CTR. FOR JUST., supra note 46.

55. See id.


58. See id.; 2020 Population and Housing State Data, U.S. CENSUS BUREAU (Aug. 12, 2021), https://perma.cc/P4VU-P9K7 (find hate crime rate per 100,000 based on “[t]otal number of incidents reported” and state populations reported in 2020 Census data; the “[p]opulation covered” column in Table 12 does not represent total state population). Filtered data on file with author.
The final crack in the reporting system is error. This includes human error, such as when responding officers fail to recognize or misidentify bias motivations despite applicable laws and policies, and systemic error, for example, when flawed data collection procedures or software cause irregularities in official statistics. Both sources of error are preventable to some extent, whether through procedural reform, oversight, or training, and are less consequential than other cracks in the reporting system discussed above. But then again, when working with a small dataset like national hate crime statistics, even minor errors can have significant effects. And glaring, though isolated, data collection errors, several of which have occurred in recent years, can nevertheless undermine public confidence in the system.

These and more issues within the reporting system have frustrated efforts to gather meaningful hate crime statistics, let alone devise responsive policies. At this point, however, attempts at reform have fallen short.

II. STRENGTHENING THE JABARA-HEYER ACT

The crux of the Jabara-Heyer Act resides in two subsections. In addition to providing grants for reporting-program updates, authorizing state-run hate crime hotlines, and creating an alternative sentencing provision for the principal federal hate crime statute, the Act establishes a conditional grant mechanism for state and local law enforcement agencies. Subsection (f) outlines the grant mechanism and its substantive conditions, while subsection (g) creates associated requirements for the federal government. But even if we assume the Act’s substantive features are conducive to better data collection, the grant mechanism limits their potential reach while increasing federal funding for law enforcement. And though calls to “defund the police” have subsided since their peak in 2020, the question remains whether an optional grant program will make a difference where it counts.

First, an overview. The grants focus on hate crime reporting and prioritize state law enforcement agencies and two categories of local agencies:


60. See Maya Berry & Kai Wiggins, FBI Stats on Hate Crimes Are Scary. So Is What’s Missing, CNN (Nov. 14, 2018), https://perma.cc/GE2Q-MHAH. Data collection errors are not limited to underreporting. See Hannah Allam & Talal Ansari, Here’s Why the FBI Report Didn’t Consider the Charlottesville Violence a Hate Crime, BUZZFEED NEWS (Nov. 14, 2018), https://perma.cc/L7LK-RFZS (describing error in Kentucky’s reporting program that led to significant overreporting of specific bias motivation type).


representing 100,000 residents or more; and (b) those representing 50,000 to less than 100,000 residents that have reported no hate crimes over the last three years of available data. Specifically, the grants are meant to “assist covered agencies . . . in conducting law enforcement activities or crime reduction programs to prevent, address, or otherwise respond to hate crime,” with an emphasis on reporting.

The Act enumerates five recommended practices that are ostensibly conducive to better data collection: adopting hate crime reporting and investigative policies; developing standardized reporting methods; establishing special hate crime units; engaging in community relations functions, such as appointing a community liaison or holding public forums; and providing hate crime trainings for law enforcement personnel.63

As grant recipients, covered agencies must collect information about their hate crime prevention and reporting practices and submit semiannual reports to the federal government. The reports must disclose whether the agency follows the Act’s recommended procedures and the number of training hours it provided to personnel during the reporting period. In turn, the Attorney General must compile information received from covered agencies and submit annual reports to Congress that include (1) qualitative analysis on the relationship between hate crime reporting rates and the adoption of the Act’s recommended procedures and (2) quantitative analysis on covered agencies’ adoption of those procedures.

Concerns about the conditional grant mechanism aside, the substantive features of the Act’s information collection and reporting scheme are promising. This Essay suggests that hate crime statistics are more indicative of state and local efforts to collect hate crime data within a particular jurisdiction than the occurrence of hate crime within that jurisdiction.64 Assuming that is correct, and that the Act’s recommended procedures are conducive to better data collection, then as covered agencies adopt the procedures, we should expect to see their hate crime rates increase. That proposition is what the attorney general’s annual reports to Congress are meant to evaluate.

In this respect, the substantive provisions of the Jabara-Heyer Act serve two objectives: encouraging law enforcement agencies to adopt a set of congressionally approved practices, which could lead to more accurate hate crime statistics, and helping the federal government assess the performance of the national reporting system Congress authorized three decades ago when it passed the HCSA. Because of the Act’s incentive structure, however, those objectives remain out of reach.


64. See supra p. 10.
A. Consequences of the Act’s Incentive Structure

Law enforcement agencies that do not opt into the conditional grant mechanism are exempt from the Jabara-Heyer Act’s substantive provisions. As a result, absent other incentives for participation, the Act’s information collection and reporting scheme could reproduce existing problems within the hate crime reporting system and constrain the Act’s potential effects on hate crime statistics.

The grants are limited to a small subset of law enforcement agencies. According to the federal government, there are about 18,000 state, local, and tribal agencies in the United States.65 But the universe of eligible grant recipients is a fraction of that: fifty primary state law enforcement agencies; about 300 local law enforcement agencies representing 100,000 residents or more; and fewer than 200 local agencies representing 50,000 residents or more that have reported no hate crimes for the last three years.66 And there is no guarantee that all eligible agencies will opt into the grant mechanism. We might even expect an overrepresentation of agencies that already prioritize bias-motivated crime and do not need the extra incentive to report hate crimes to the federal government. After all, which state is more likely to participate: Vermont or Mississippi?

The Act’s limited potential reach has consequences. For one, it stymies the Act’s principal objective: to encourage better hate crime reporting and improve data collected under the HCSA. Jurisdictions that would benefit most from participation are the same jurisdictions that could most influence hate crime statistics. What we know about the reporting system suggests that no jurisdiction reports one hundred percent of its hate crimes,67 but some do far better than others. Instead of closing the gap, however, the Act might open it further.

And then there is the Act’s second objective: to help the federal government assess the reporting system’s performance. Congress will derive little value from a report analyzing data from a handful of self-selecting law enforcement agencies on the relationship between hate crime rates and the adoption of six recommended procedures, especially when those agencies already follow similar procedures. The Act therefore ends where it begins. Some agencies will opt into the

65. BUREAU OF JUST. STAT., U.S. DEP’T OF JUST., NATIONAL SOURCES OF LAW ENFORCEMENT EMPLOYMENT DATA 5-6 (Oct. 4, 2016), https://perma.cc/N7KP-BPP8. The Act does not explicitly state whether tribal jurisdictions are eligible for the grants, but the term “unit of local government,” as defined in the Act, includes Indian tribes. See Covid-19 Hate Crimes Act, Pub. L. No. 117-13, § 5(c)(5), 135 Stat. 265, 268 (2021) (citing 34 U.S.C. § 10251(a)(3)). Unless tribes are defined as “states” for the purposes of the Act, their grant eligibility will turn on their resident populations and past reporting practices. Id. at § 5(c)(2).


67. See supra Part I.B.
conditional grant mechanism, and their compliance might translate into more accurate statistics within their respective jurisdictions. But when it comes to fulfilling the HCSA’s thirty-year-old promise of obtaining reliable, comprehensive statistics on the nature and extent of hate crime in the United States, at best, the Jabara-Heyer Act amounts to a single step in the right direction.

Of course, some might argue that it is a step in the wrong direction. Dozens of civil rights and community organizations opposed the Covid-19 Hate Crimes Act, which included the Jabara-Heyer Act, in part because “relying on law enforcement and crime statistics does not prevent violence.”

According to critics, instead of protecting communities, “[h]ate crime laws increase resources for law enforcement agencies,” thereby extracting “resources and dollars from communities that need investment instead of prisons.” The Act is therefore more of the same, providing more funding for law enforcement, centering a carceral approach to preventing hate violence, and exhausting the scarce political will available for devising alternative solutions. As long as the Jabara-Heyer Act aims to improve the reporting system in its current form, these criticisms are inevitable. A minor fix, however, could make a significant difference.

B. The Path Forward in Congress

The Jabara-Heyer Act authorized new federal funding for law enforcement with conditions attached. Even assuming the Act’s substantive provisions are conducive to better data collection, the Act’s restrictive eligibility requirements and opt-in structure will limit the Act’s potential reach in quantitative and qualitative terms. As a result, this Essay argues that the Act’s effect on hate crime statistics will be modest at best.

An obvious solution is transforming the Act from carrot to stick. If lawmakers are serious about improving hate crime statistics, then Congress should eliminate the Jabara-Heyer Act’s grant mechanism and impose new conditions on existing streams of federal financial support for state and local law enforcement.

Congress has done this before. And potential barriers to enactment are less constitutional than political. The principal source of federal criminal justice funding for state, tribal, territorial, and local governments is the Edward Byrne Memorial Justice Assistance Grant (JAG) Program. In 2020, Byrne JAG recipients received more than $200 million for various program areas, including law

---

68. See Yam, supra note 12.
enforcement and crime prevention. Since the Byrne JAG program’s inception, both Congress and the Executive have imposed supplemental conditions on grant recipients to advance federal criminal justice and law enforcement priorities.

For example, jurisdictions that have not substantially implemented the Sex Offender Registration and Notification Act (SORNA) are subject to a ten percent reduction in Byrne JAG funding. And if a state is not in full compliance with the Prison Rape Elimination Act (PREA), it faces a five percent reduction in certain prison-related Byrne JAG funding unless the state assures that it will use the five percent to achieve full compliance or asks the Attorney General to hold the funds in abeyance. Absent congressional mandate, the DOJ has also required direct grant recipients with antiquated crime reporting programs to dedicate three percent of their awards toward a program upgrade.

A third example of congressionally imposed Byrne JAG conditions is the Death in Custody Reporting Act (DCRA), which requires grant recipients to submit data to the federal government on the deaths of people detained, arrested, incarcerated, or otherwise placed in law enforcement custody. At the Attorney General’s discretion, noncompliant grant recipients may lose ten percent of their annual Byrne JAG funding. In turn, the Attorney General must analyze the grant recipients’ data and publish a report for Congress that examines the relationship between death-in-custody rates and the management of jails, prisons, and other specified facilities in which deaths occurred.

DCRA is not dissimilar from the Jabara-Heyer Act in this respect, except that its reach is more expansive and the reports to Congress will be more substantive as a result. But despite the precedent for Congress imposing conditions on Byrne JAG grants to advance federal criminal justice priorities, when it comes to the Jabara-Heyer Act and hate crime statistics, other barriers seem to exist. Those barriers are not constitutional. Congress has power under the Spending Clause to condition the receipt of federal funds if the conditions serve the

---

73. See id.; 34 U.S.C. § 20927(a).
74. See BUREAU OF JUST. ASSISTANCE, supra note 72; 34 U.S.C. § 30307(e)(2).
77. Death in Custody Reporting Act § 2(c)(2).
78. Id. at § 2(f).
general welfare, are unambiguous and related to the federal interest in the program at issue, and do not violate the Constitution; additionally, penalties for non-compliance, such as a reduction of funding, cannot be so great as to be coercive. In drawing the line between encouragement and coercion, the Court has also considered whether the conditions transform the underlying program or impose unforeseeable, retroactive conditions. These limitations reflect a general principle: Congress may use the spending power to create incentives for jurisdictions “to act in accordance with federal policies,” but it cannot force them to implement a federal program, whether by direct commands or indirect inducements.

Applying that principle, the Court in South Dakota v. Dole upheld a five percent reduction of federal highway funds to states that did not adopt the federal minimum drinking age. There, the funds in question represented a fraction of one percent of South Dakota’s budget. But in National Federation of Independent Business v. Sebelius, the Court held that Congress exceeded its spending power in threatening to withhold states’ entire Medicaid grants, i.e., more than 10% of most states’ total revenue, unless states expanded their Medicaid coverage and bore a portion of the associated costs on their own. The Court also found that the expansion “was a shift in kind, not merely degree,” because it transformed, rather than altered or amended, the Medicaid program, which states could not have anticipated when first entering the program.

Congress must negotiate these limitations on its spending power if it decides to revamp the Jabara-Heyer Act. But the real impediments are political. Police unions wield considerable influence in Congress, where posturing against defunding the police has become a bipartisan cause. Furthermore, despite earlier indications that Congress would enact policing reform after the 2020 George Floyd protests, gridlock and dissolution have once again prevailed, suggesting that more ambitious efforts to influence the conduct of state and local law enforcement could face resistance.

81. Id. at 577-78.
82. Dole, 483 U.S. at 211.
83. NFIB, 567 U.S. at 581.
84. Id. at 542, 581-82.
85. Id. at 583-84.
But that does not mean such efforts are doomed. Congress can strengthen the Jabara-Heyer Act without imposing significant burdens on law enforcement. And the Act’s current provisions chart a partial course.

First, the coverage requirement. The current grant program is limited to a small subset, about three percent, of the nation’s law enforcement agencies. And as discussed in the previous section, this limits the Act’s reach and could reproduce existing problems in the reporting system. Additionally, smaller law enforcement agencies, which might have fewer resources than the large jurisdictions eligible for the grants, are excluded from the program. This does not make sense. To be sure, other federal grant programs consider population for eligibility determinations. For example, certain small jurisdictions are ineligible for direct awards of Byrne JAG funds. But those jurisdictions may still receive subawards from state awardees.

The coverage requirement makes far more sense if applied to a stick-instead of carrot-based approach. If Congress attaches the Jabara-Heyer Act’s conditions to an existing federal grant program rather than a new program, the coverage formula becomes a means to ensure that small jurisdictions are exempt from the burdens of compliance, not excluded from a new source of federal assistance. And if more hate crimes occur in denser, more populated jurisdictions, then incorporating resident population into the coverage formula will not seriously constrain the Act’s potential reach. Large jurisdictions, i.e., those with 100,000 residents or more, account for less than two percent of U.S. law enforcement agencies but almost one third of the national population and in 2020, reported nearly forty percent of the nation’s hate crimes. And though jurisdictions representing less than 100,000 but at least 50,000 residents account for a greater percentage of the nation’s law enforcement agencies, the three-year nonreporting clause will limit the Act’s conditions to jurisdictions that are less likely to prioritize hate crime and would therefore benefit more from adopting the Act’s recommended procedures.

Second, the compliance mechanism. The grants are designed to assist recipients “in conducting law enforcement activities or crime reduction programs to

90. See text accompanying notes 65-66 (550/18,000).
91. See supra Part II.A.
92. See BUREAU OF JUST. ASSISTANCE, supra note 75, at 3.
93. Id.
94. See FED. BUREAU OF INVESTIGATION, supra note 48, at 2.
95. See FED. BUREAU OF INVESTIGATION, supra note 51 (download 2020 “Hate Crime Statistics Annual Reports,” open Table 13, filter for population, add number of incidents per quarter, and find total number of hate crimes reported in large jurisdictions); Fed. BUREAU OF INVESTIGATION, supra note 59 (showing 8,263 hate crimes reported in 2020). Filtered tables on file with author.
96. See FED. BUREAU OF INVESTIGATION, supra note 48, at 2.
prevent, address, or otherwise respond to hate crime,” with an emphasis on reporting and data collection.\footnote{98. Id. at § 5(f)(2).} Although the Act enumerates a set of recommended procedures and encourages recipients to adopt them, it does not require them to do so. Instead, the Act requires covered jurisdictions to document their hate crime policies and practices, including whether and to what extent their law enforcement agencies have adopted the recommended procedures.\footnote{99. Id. at § 5(f)(3).} Recipients could therefore maintain compliance without adopting the recommended procedures or even prioritizing hate crime whatsoever; they would just have to let the federal government know.

As with the coverage requirement, the compliance mechanism makes less sense when the Act is a carrot and not a stick. In its current form, the Jabara-Heyer Act awards jurisdictions for doing nothing so long as they admit to doing nothing. If the conditions attach to a federal grant program that excludes most jurisdictions, the compliance mechanism appears to be over-permissive, if not a waste of the congressional spending power. But if the conditions attach to an existing program, then what was over-permissive becomes narrowly tailored, as most jurisdictions are not affected, while compliance for those that are entails a minimal burden.

And despite not asking much, the compliance mechanism would serve a critical purpose. The Act’s information collection and reporting scheme is designed to help Congress assess the performance of the hate crime reporting system. And part of the attorney general’s mandate is to evaluate the relationship between hate crime rates within a particular jurisdiction and the jurisdiction’s prioritization of bias-motivated crime. If a covered jurisdiction does not prioritize hate crime, e.g., it has no existing hate crime policies and has not adopted the Act’s recommended procedures, the mere fact of knowing that is the case may help contextualize the jurisdiction’s reported hate crime rate. If Congress intends to improve hate crime statistics, then that information is relevant, and requiring it from a tailored set of larger, well-resourced jurisdictions amounts to a minor imposition at worst.

Third, enforcement. Despite containing a paragraph on “[c]ompliance and redirection of funds,”\footnote{100 Id. at § 5(f)(4).} the Act does not authorize funding reductions for non-compliant jurisdictions. Instead, it asks recipients to participate in the Act’s information collection and reporting scheme, with opportunities for extension (participation must generally begin within a year of enactment) or waiver, but does not provide penalties for noncompliance.\footnote{101 Id.} This creates an enforcement problem because the Act gives no explicit incentives to maintain compliance nor provides notice of potential consequences should recipients fall short.
If Congress decides to transform the Act from carrot to stick, then penalties for noncompliance present another means to reduce barriers on covered jurisdictions while preserving the Act’s potential effect. State and local governments spent $200 billion on police and corrections in 2018, representing seven percent of their direct general expenditures. In contrast, the 2020 total allocation under Byrne JAG was less than $250 million. These numbers suggest the program’s effects on state and local finances are closer to that of Dole’s federal highway funds than NFIB’s Medicaid grants. This is not a perfect comparison, however, because Byrne JAG includes direct grants to local jurisdictions and laws that attach conditions to Byrne JAG only target state allocations. That said, the federal government has imposed limitations on local Byrne JAG spending in recent years, and both the coverage requirement and compliance mechanism should mitigate concerns about potential burdens on covered jurisdictions.

As for potential funding reductions, the Court’s spending clause jurisprudence and legislation like DCRA, SORNA, and PREA, which threaten between five and ten percent reductions, offer guideposts. Congress might also draw from PREA, which imposes a five percent reduction of Byrne JAG funds on noncompliant states unless they commit the same amount toward achieving compliance or ask for an abeyance. These provisions, in addition to opportunities for extensions or waiver, would further reduce burdens on covered jurisdictions without undermining the Act’s objectives.

In short, lawmakers have a path forward to strengthen the Jabara-Heyer Act. And despite constitutional limits on the spending power and political challenges in Congress, neither obstacle is insurmountable. It is a straightforward fix. Instead of creating a new grant program that excludes most jurisdictions, the Act could attach new conditions on existing grants for a small but consequential subset of larger, well-resourced jurisdictions. To ensure a narrow but effective use of the spending power, Congress can fashion the Act’s coverage formula, compliance mechanism, and enforcement provisions to minimize potential burdens on state and local law enforcement, not to mention political opposition.

But there are risks to this approach, not in strengthening the Jabara-Heyer Act per se, but in committing to the broader, unfinished project of obtaining reliable, comprehensive statistics on hate crime in the United States. If, after three decades of data collection under the HCSA, members of Congress decide it is finally time to first scrutinize and then improve the reporting system, they might find that its problems require more than a minor legislative fix.

103. See supra text accompanying notes 82-85.
104. See BUREAU OF JUST. ASSISTANCE, supra note 72.
105. See id.
106. See BUREAU OF JUST. ASSISTANCE, supra note 75, at 4.
107. See BUREAU OF JUST. ASSISTANCE, supra note 72.
III. THE FUTURE OF HATE CRIME STATISTICS

The HCSA is an unfulfilled promise. After three decades of reporting and data collection under the HCSA, neither Congress nor the public has learned much about the nature and extent of hate crime in the United States. To be sure, the federal government has refined the data collection process over the years,\(^{109}\) and statistics, despite their shortcomings, have brought attention to the hate crime problem.

In Congress, however, we have seen few serious efforts to address issues within the reporting system.\(^{110}\) And while hate crime statistics have driven politics,\(^{111}\) data-driven policies on hate crime seem few and far between. Despite its limited reach, the Jabara-Heyer Act is a significant development in this respect, and strengthening the Act could further prove that Congress is serious about hate crime statistics. But to what end?

It is a question this Note has so far avoided: what is the point of hate crime statistics? But then again, this Note is not alone in that regard. After all, the United States has been collecting hate crime data for thirty years and Congress has only recently decided, despite abundant, longstanding indications that the reporting system is flawed, to act within its power to make it better.

But it is a question we cannot ignore forever, especially if Congress strengthens the Jabara-Heyer Act. And that is because the answer should dictate how Congress evaluates the reporting system and the steps it takes thereafter.

Two purposes come to mind. The first is immediate: to provide an accurate representation of hate crime in the United States. The second is eventual: to serve hate crime victims, if not prevent additional hate crimes from happening in the future. No doubt, these objectives are interrelated. Why collect hate crime data if not to assist those affected?

But there is a risk of fixating on the first purpose at the second’s expense, of focusing too much on improving the reporting system without thinking enough about what it is for. This is a problem of nearsightedness, path dependence, and political expedience. One, it is a problem of nearsightedness, because the reporting system is immediate and its shortcomings articulable, while aspirations to prevent hate crime or solve the problem of bias-motivated violence seem indis-
distinct and out of reach. Two, it is a problem of path dependence, because the system the federal government developed to implement the HCSA, despite the apprehension of government experts, defines and therefore limits the perceived set of available options for more effectively fulfilling its mandate. Three, it is a problem of political expedience, because it neither challenges the traditional approach to solving criminological problems nor compels lawmakers to consider the more ambitious, transformative social change that preventing the underlying conditions that give rise to hate crimes might require.

To some extent, these concerns animated progressive critiques of the Covid-19 Hate Crimes Act. And these concerns are not new. As one commentator wrote more than two decades ago, “because hate crime laws and other anti-hate-crime measures fit easily into an anti-crime, pro-victim agenda, supporting them became an effective way for political actors to communicate a message of ‘caring’ about disenfranchised communities without alienating conservative constituents.” In this light, hate crime laws look like a form of avoidance. And among them, efforts to improve hate crime statistics might be the worst offenders. If laws that advance a criminal justice response to a particular social problem are unambitious, if not counterproductive, then laws that merely require the criminal justice system to measure its response are even less courageous, if not more conservative.

Of course, we cannot ignore political realities. And prospects for transformative legislation are bleak. Returning to our central focus, not even the most assiduous coverage requirement, compliance mechanism, and enforcement provisions might be enough to pass a strengthened Jabara-Heyer Act though Congress. But should they suffice, this conversation about the purpose of hate crime statistics is not just relevant, but critical.

As discussed in the preceding parts, a strengthened Jabara-Heyer Act will enable Congress to assess the performance of the hate crime reporting system. And as discussed in the preceding paragraphs, the assessment must not prioritize the immediate purpose of hate crime statistics, to generate accurate national data, over the broader objective of serving hate crime victims and preventing future crimes. Therefore, Congress should be willing to abandon, retreat from, or supplement UCR reporting if it finds the system incapable of producing sufficient data. And it should be willing to further regulate state and local law enforcement, subject to constitutional constraints, if it finds that covered jurisdictions are not prioritizing hate crime or serving hate crime victims. As for solutions beyond law enforcement and the criminal justice system, if Congress finds that traditional responses to hate crime are insufficient or counterproductive, then it should consider alternatives.

112. See supra text accompanying notes 23-26.
113. See supra text accompanying notes 68-70.
114. Maroney, supra note 38, at 583-85 (citations omitted).
CONCLUSION

More than three decades ago, Congress passed the Hate Crime Statistics Act to generate national data on the nature and extent of bias-motivated crime. As of 2022, that project remains unfinished. But recent efforts in Congress suggest lawmakers are open to reform. In 2021, Congress passed the Khalid Jabara & Heather Heyer No Hate Act, which authorizes a grant program designed to both encourage select law enforcement agencies to adopt best practices for hate crime reporting and help the federal government assess the reporting system’s performance. The Act might be a step in the right direction, but it is not enough. And some might argue we are better off without it.

Fortunately, the next step is simple. Congress can strengthen the Jabara-Heyer Act, and assuage its critics, by turning the Act from carrot to stick. Instead of giving state and local law enforcement agencies more funding to act in accordance with the Act’s substantive conditions, Congress can threaten to withhold existing funds for noncompliance. With the right coverage requirement, compliance mechanism, and enforcement provisions, the resulting burdens on covered jurisdictions will be minimal. But the effects on the hate crime reporting system could be significant.

As for subsequent steps, much will depend on what Congress learns. Despite initial hesitation, those who implemented the HCSA decided to fulfill its mandate through law enforcement data collection. In the end, Congress might decide that generating accurate, reliable hate crime statistics will require increased regulation of state and local law enforcement, or it might decide to abandon the current reporting system altogether. Both options pose difficult questions, but those are further down the road. For now, Congress need not confront them.